Business & Corporations Law

Contents

Answer to Question No. 1

ISSUES

The following substantial issues arise from the given question;

- Whether the Swimming Pool Company is liable under law for the actions on the part of Martin?
- If yes, on what legal basis may the liability be imposed upon the company?

RULES

The issues raised in the question may be resolved by considering the following legal rules and principles;

The doctrine of vicarious liability is applicable to the given case. The said doctrine has been derived from the law of agency. By application of this doctrine, liability may be imposed on principal for wrongful or negligent conduct of agent. However, the said doctrine is applicable in a myriad of contexts. For instance, parents may be held vicariously liable for the actions of their children. Similarly, an employer may be held vicariously liable for the actions of employees. There are two essentials for imposing vicarious liability; firstly, liability is imposed for the wrongful actions or negligence of one person upon another; secondly, the said liability is strict in the sense that liability arises even without proof of fault. When liability is imposed on an employer for the actions of employees, the liability of the employee remains primary and the employer's liability is additional. In case of employer employee relationship, employer is the principal and employee is the agent (Giliker, 2010).

In the case of Sestili v. Triton Underwriting Insurance Agency Pty. Ltd. *(Sestili v. Triton Underwriting Insurance Agency Pty. Ltd., [2007])* the court has laid down various principles which must be kept in mind while imposing liability upon employers for the actions of employees (Macken *et al*., 2004). These principles include the following;

- The employer is not entitled to claim the defense that the employee has committed the impugned dishonest or fraudulent action at his own accord and not with the consent of the employer;

- The employee has committed the dishonest or fraudulent action contrary to the instructions of the employer (Clarke, 2003).

Again, in the case of Lloyd v. Grace, Smith & Co. (*Lloyd v. Grace, Smith & Co., [1912]*), the court upheld the principle of vicarious liability that when employees commit dishonest and fraudulent actions within the course of their employment, liability of the same is borne by the employers(Cameron, Tucker & Hammer, 2011).

APPLICATION

Now, I would apply the rules and principles discussed in the aforesaid section to the facts of the given case.

In this case, Martin was employed by Swimming Pool Company as the Sales Manager and was entrusted with a myriad of duties. He was supposed to take care that the swimming pools are being constructed in a proper manner. He was also supposed to keep the funds of the company safe. However, he failed to undertake both the duties in an efficient manner. The swimming pools were constructed negligently which led to complaints from the clients and he also misappropriated the funds of the company which were entrusted to him. All the above actions were committed by Martin within the course of his employment with Swimming Pool Company Pty. Ltd.

CONCLUSION

The above discussion leads us to the conclusion that Martin has acted negligently as well as dishonestly within the course of his employment t with Swimming Pool Company. Yes, the company is liable to be held responsible for the impugned actions of Martin. The doctrine of vicarious liability would impose liability upon the Swimming Pool Company for the actions of Martin.

Answer to Question No. 2

ISSUE

The substantial issue which arises from the given question is whether the fact that Martin has not acted as per instructions of the company would absolve liability of the company for the actions of Martin.

RULES

The issue raised in the question may be resolved by considering the following legal rules and principles;

Upon imposition of liability on an employer for wrongful or negligent conduct of employees would entitle an employer to the some defenses. However, the fact as to whether an employer would be able to take the shield of the defenses would depend upon the facts of each case (McIntyre *et al*, 2006). These include the following;

- The most common defense available to an employer is the fact that the employee has performed his/ her job negligently; or
- The employer may as well claim that the employee was acting beyond the scope, sphere and course of his/ her employment with the employer concerned.

In the case of Sestili v. Triton Underwriting Insurance Agency Pty. Ltd. it was observed by the court that in a case of vicarious liability an employer cannot take the defense that the employee has acted dishonestly or fraudulently intentionally without being authorized by the employer to act as such (McBride, 2003).

R.F Brown & Co. Ltd. v. Harrison *(R.F Brown and Co. Ltd v. Harrison, [1927])* is a case in which dock workers had stolen cargo from a ship and the owner of the ship was held liable by the court to the passengers for the loss of cargo. The basis of imposition of liability in the instant case was that the said dishonest actions were committed by the dock workers while working for the employer within the scope of their employment.

APPLICATION

Now, I would apply the rules and principles discussed in the aforesaid section to the facts of the given case.

In the instant case, Martin was employed as Sales Manager of Swimming Pool Company Pty. Ltd. He committed negligent and dishonest actions while working for the company. All his actions fell very much within the course of his employment with Swimming Pool Company Pty. Ltd. Moreover, none of his actions were authorized by the company. On the other hand, the principle of promissory estoppels requires employers to bear liability for the actions of employees, even if the actions of employees were fraudulent and dishonest and were committed without the permission or authorization of employees.

CONCLUSION

The above discussion leads us to the conclusion that the Swimming Pool Company is not entitled to claim the defense that Martin was acting without their instructions while committing dishonest and fraudulent actions. The said defense would not be applicable in the instant case.

Answer to Question No. 3

ISSUE

The substantial issues which arises from the given question is whether the Swimming Pool Company is entitled to impose liability on Martin for his actions and if yes the said liability may be imposed under which legal principles.

RULES

The issue raised in the question may be resolved by considering the following legal rules and principles;

Liability may be imposed on employers when employees commit wrongful or negligent or fraudulent actions within the course of their employment. Third parties in such cases may sue the employer to recover their loss. In case it is established before court of law that the employee has committed the wrongful, negligent or dishonest action within the scope of his employment with

the employer, the court would impose liability upon employers. However, once such an employer has made good the loss or damage suffered by the third parties, the employer steps into the shoes of the third parties and is entitled to be reimbursed by the employee the amount of compensation it had to pay to the third parties. Also the loss which the company has suffered as a consequence of the actions of the employee concerned may as well be claimed by the employer (Morgan, 2012).

When an employee is entrusted with responsibilities by an employer, he owes fiduciary duty towards the employees. Liability of employee arises to reimburse as well as make good the loss suffered by the employee as a consequence of the existence of fiduciary duty. By fiduciary duty we mean duty of good faith and trust. When employees are entrusted with duties, employers also entrust on them good faith and trust. When employees act fraudulently they commit breach of the said faith and trust (Price, 2002).

APPLICATION

Now, I would apply the rules and principles discussed in the aforesaid section to the facts of the given case.

In the given case, Martin had committed fraudulent and wrongful actions within the course of his employment with Swimming Pool Company Pty. Ltd. The company would be made liable for the loss suffered by the clients as a consequence of the faulty construction of the swimming pools as well as the deposits made by the clients which were misappropriated by Martin. However, having borne the responsibility the company would acquire the right to sue Martin for the breach of fiduciary duty and recover the loss which the company had to incur because of his negligent and dishonest actions. In fact, Martin had set up a competing business while being employed with the company. If the contract of employment prohibited him from engaging in a competing business, then Martin would be deemed to have committed breach of contract and the company would have a right of action against Martin for such breach of contract.

CONCLUSION

The above discussion leads us to the conclusion that the Swimming Pool Company is entitled to impose liability on Martin for his actions. Liability would be incurred under the law of contract

for setting up competing business if the same was prohibited. Liability would be incurred under the law of equity for breach of fiduciary duty.

Answer to Question No. 4

ISSUE

The substantial issue which arises from the given question is whether Martin has committed breach of legal provisions by way of setting up his own business.

RULES

The issue raised in the question may be resolved by considering the following legal rules and principles;

In the present times, restraint of trade clauses are commonly incorporated in contracts of employment. The purpose of these clauses is safeguarding the interest of the employers from the fraudulent and wrongful actions of employees. Many a times employees acquire confidential information of a company or goodwill of the previous company which is associated with the employee concerned and utilize the same for setting up another company or in some other company which is engaged in similar business. Such clauses intend to restrict such actions on the part of employees (Tan, 2008).

In the case of Workpac Pty. Ltd. v. Steel Cap Recruitment Pty. Ltd.*(Workpac Pty. Ltd. v. Steel Cap Recruitment Pty. Ltd, [2008])* the court laid down that the very fact that a noncompeting or restraint of trade clause is incorporated in a contract of employment does not imply that the said clauses are valid and enforceable. The validity and enforceability of the clauses would depend upon the circumstances and also the reasonableness of the clauses.

The case of GlaxoSimthKline Australia Pty. Ltd. v. Ritchie *(GlaxoSmithKline Australia Pty. Ltd. v. Ritchie, [2008])* the court observed that when a former employee sets a competing business with the former employer by way of using his own skill and diligence which he had acquired while rendering service for the employer would not lead to breach of non competing clause of contract of employment (Sappideen & Macken, 2011).

.

Moreover, in order to enforce a noncompeting clause the same must have been expressly incorporated in a contract. In the absence of such a clause it is difficult to hold an employee liable for setting up competing business. However, if an employee has set up a competing business at the cost of the employer then the company may restrain such an employee even in the absence of such clause in contract of employment.

APPLICATION

Now, I would apply the rules and principles discussed in the aforesaid section to the facts of the given case.

The case does not make a mention about either employment contract or non competing clause. In such a circumstance we would decide this case by making assumptions. If the contract of employment between Swimming Pool Company Pty. Ltd. and Martin contained a non competing clause and carrying on a competing business during the tenure of employment is prohibited under the terms of the contract, Martin would be liable for breach of contract. However, if any such clause is absent and Martin has utilized the confidential information of the company for setting up the business then he would be held liable to the company for such action.

CONCLUSION

The above discussion leads us to the conclusion that Martin may be deemed to have committed breach of law for having set up his own business similar to that of the company during his tenure of employment with the company on the basis of the above stated factors.

Reference List

Cameron, M., Tucker, L. & Hammer, C. (2011). *Employment and the law*. Sydney: Legal Information Access Centre.

Clarke, L. (2003). Employment Law. *Industrial Law Journal*, 32(4), pp.332-334.

Giliker, P. (2010). *Vicarious liability in tort*. Cambridge, UK: Cambridge University Press.

GlaxoSmithKline Australia Pty. Ltd. v. Ritchie [2008]VSC p.154.

Lloyd v. Grace, Smith & Co. [1912]UKHL p.1.

Macken, J., McCarry, G., Sappideen, C. and Macken, J. (2004). *The law of employment*. North Ryde, N.S.W.: Law Book Co.

McBride, N. (2003). VICARIOUS LIABILITY IN ENGLAND AND AUSTRALIA. *Cam. Law. J.*, 62(2), pp.255-260.

McIntyre, M., Martin, S. and Dickinson, G. (2006). Re-Establishment and Employment Law in Australia. *The Australian Quarterly*, 18(4), p.116.

Morgan, P. (2012). RECASTING VICARIOUS LIABILITY. *C.L.J.*, 71(03), pp.615-650.

Price, R. (2002). *Employment law in principle*. Sydney: Lawbook Co.

R.F Brown and Co. Ltd v. Harrison [1927]TLR 43, p.633.

Sappideen, C. & Macken, J. (2011). *Macken's law of employment*. Rozelle, N.S.W.: Thomson Reuters (Professional) Australia.

Sestili v. Triton Underwriting Insurance Agency Pty. Ltd. [2007]SASC p.241.

TAN, S. (2008). Vicarious Liability. *Internal Medicine News*, 41(24), pp.36-37.

Taylor, E. (1991). *The manager's guide to employment law and practice in Australia*. Melbourne, Vic.: Business Library.

Workpac Pty. Ltd. v. Steel Cap Recruitment Pty. Ltd [2008]WASC p.238.