Michigan Law Review

Volume 55 | Issue 4

1957

Business Associations - Uniform Limited Partnership Act - Corporation as a Limited Partner

Richard Singer
University of Michigan Law School

BUSINESS ASSOCIATIONS—UNIFORM LIMITED PARTNERSHIP ACT—CORPORATION AS A LIMITED PARTNER—The Port Arthur Trust Co., a Texas corporation, sought to enter into a limited partnership agreement as a limited partner. Its capital contribution was to be three trusts established by the prospective general partner wherein the trust company had been named trustee. The secretary of state refused to file the instrument creating the limited partnership on the grounds "that it was necessary for a corporation to have express charter powers" before it can enter into a limited partnership, and that "a corporation is not a 'person' "[1] within the meaning of the Texas Uniform Limited Partnership Act.[2] The corporation then applied to the Texas Supreme Court for a writ of mandamus to compel the secretary of state to file the certificate of limited partnership.[3] *Held,* a writ of mandamus will be granted. A corporation qualified to act as a trustee is authorized to become a limited partner under the Texas Uniform Limited Partnership Act. *Port Arthur Trust Co. v. A.M. Muldrow,* (Texas 1956) 291 S.W. (2d) 312.

In the large majority of states a corporation has no authority to enter into partnerships.[4] Exceptions to this rule are generally recognized (1) where the corporation is expressly authorized by statute or its corporate charter to become a partner, (2) where the sole management of the business is reserved to the corporation, and (3) where the relationship can be classified as a joint adventure.[5] Judicial discrimination with respect to corporate partners is based primarily on the public policy against allowing the management of a corporation to be removed from the hands of the directors.[6] This policy has continued to be controlling under the Uniform Partnership Act even though that act expressly states that a "corporation" is included within the definition of persons capable of forming partnerships.[7] When considering the question of whether a corporation can be a partner, the approach of the courts has been either to ignore the act[8] or to find that it is not indicative of a general legislative intent to allow corporations to

1 Principal case at 313-314.

2 Tex. Civ. Stat. (Vernon, 1949; Supp. 1956) art. 6132(a), §2, "a limited partnership is a partnership formed by two (2) or more persons . . . ."

3 Id., §3(a), "two (2) or more persons desiring to form a limited partnership shall: (1) Sign and swear to a certificate, . . . (2) File for record the certificate in the office of the Secretary of State . . . ."

4 BALLANTINE, CORPORATIONS, rev. ed., §87 (1946); 6 FLETCHER, CYC. CORP. rev. ed., §2520 (1950).

5 BALLANTINE, CORPORATIONS, rev. ed., §87 (1946).

6 Op. Atty. Gen. (N.Y. 1935) 230 at 231: "The whole policy of the law creating and regulating corporations looks to the exclusive management of the affairs of each corporation by the officers provided for or authorized by its charter." See also Mallory v. Hanaur Oil Works, 86 Tenn. 598, 8 S.W. 396 (1888).

7 See, e.g., 1 Ore. Rev. Stat. (1953) §68.020. The same provision is in force in all states which have adopted the Uniform Partnership Act except Massachusetts.

8 The UPA became effective in Oregon on March 31, 1939. Ostlind v. Ostlind Valve, 178 Ore. 161 at 190, 165 P. (2d) 779 (1946), was the first case in which the corporate partner question was considered subsequent to the passing of the act. By way of dictum the court said that it was *"ultra vires"* for a corporation to be a member of a partnership, and did not mention the UPA.

become "members" of a partnership.[9] Although legal writers have pointed out the fallacy in reasoning which prohibits delegation of management authority to a partner but allows a corporation to appoint agents which may bind it by contract,[10] thus far their views have not prevailed. The arguments in favor of corporate partners are strengthened by the willingness of the courts to recognize corporate membership in joint adventures, which are for most purposes not distinguishable from partnerships.[11] It has been urged that the real reason why modern courts refuse to permit corporations to become partners in the overwhelming weight of authority to the contrary, although in practical effect corporations have been allowed to enter partnerships under the guise of joint adventures, i.e., the courts have utilized a subterfuge to circumvent the prohibition against corporate partners.[12] Where the nature of the relationship is not so obvious that the court is forced to call it a partnership, case authority seems to support this analysis.[13] There is surprisingly little authority under the Uniform Limited Partnership Act on the question of corporate participation as a limited partner. The decision in the principal case appears to be the only one to date directly in point. Although the act fails to define expressly "person" as including corporations, the rule of construction followed in most jurisdictions is that "person" includes artificial persons unless exclusion is required from the context of the statute.[14] The ULPA partially eliminates elements of the partner relationship which courts have declared inconsistent with corporate status. Under the act the corporation is liable only to the extent of the assets placed in the limited partnership, and management and control are delegated only with respect to those assets. In effect, a type of limited agency is created. A somewhat analogous relationship often arises in joint adventures, where limitations in the scope and lifetime of the enterprise are common.[15] This suggests that it might be

9 See Op. Atty. Gen. (N.Y. 1935) 230. See also Freida Popkov Corp. v. Stack, 198 Misc. 826, 103 N.Y.S. (2d) 507 (1950). But see Memphis Natural Gas Co. v. Pope, 178 Tenn. 580, 161 S.W. (2d) 211 (1941), affd. Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942), which has been cited for the proposition that corporations may enter partnerships under the UPA. The court failed to indicate whether it based its decision on partnership or joint adventure, but a subsequent decision, Texas Gas Transmission Corp. v. Atkins, 197 Tenn. 123, 270 S.W. (2d) 384 (1954), cert. den. 348 U.S. 883 (1954), explained the Memphis case as an application of the joint adventure concept.

10 See Rowley, "The Corporate Partner," 14 MINN. L. REV. 769 (1930).

11 See 30 AM. JUR., Joint Adventure §5 (1940).

12 See Rowley, "The Corporate Partner," 14 MINN. L. REV. 769 (1930); 46 HARV. L. REV. 519 (1933).

13 E.g., Clement A. Evans & Co. v. Waggoner, 197 Ga. 857, 30 S.E. (2d) 915 (1944); Luling Oil & Gas Co. v. Humble Oil & Refining Co., 144 Tex. 475, 191 S.W. (2d) 716 (1945); Luhrig Collieries Co. v. Interstate Coal & Dock Co., (S.D. N.Y. 1922) 281 F. 265.

14 E.g., United States Tire Co. v. Keystone Tire Sales Co., 153 S.C. 56, 150 S.E. 347 (1929); Fleming v. Texas Loan Agency, 87 Tex. 238, 27 S.W. 126 (1894); Moss v. Standard Drug Co., 159 Ohio St. 464, 112 N.E. (2d) 542 (1953). See also 13 AM. JUR., Corporations §9 (1938).

15 E.g., Kasishke v. Baker, (10th Cir. 1945) 146 F. (2d) 113, cert. den. 325 U.S. 856 (1945); Wiley N. Jackson Co. v. City of Norfolk, 197 Va. 62, 87 S.E. (2d) 781 (1955); Nolan v. J. & M. Doyle Co., 338 Pa. 398, 13 A. (2d) 59 (1940).

possible to justify corporate limited partners through an extension of the joint adventure rationale. It should be noted, however, that the decision in the principal case is the result of unusual circumstances and is based on a different line of reasoning. The details of the trust agreements are not set out in the opinion, but, assuming that the corporation protected itself from liability for delegation of management of the trust funds,[16] its entry into the limited partnership involved no capital risk. Only trust funds, of which the corporation was trustee, were contributed to the limited partnership. These trust funds were not corporate assets, and assets that did belong to the corporation were safeguarded by the ULPA. The decision in the principal case is easily explained as falling within the reservation of management exception to the rule against corporate partners.[17] Thus, it may be doubted that the principal case will serve as a general precedent for recognition of corporate limited partners. The joint adventure analogy could be invoked, but the policy considerations against partnership will probably be controlling where a substantial contribution of corporation assets is involved. Although these considerations are subject to valid criticism and should be re-evaluated in terms of logic and modern business needs, there is no reason to suspect that the courts will not continue to follow them.

Richard Singer

16 2 SCOTT, TRUSTS, 2d ed., §171.1, pp. 1277-1278 (1956): "So, too, even though the trustee continues to be trustee, it is a breach of trust to commit the whole management of the trust estate to another, unless he is permitted to do so by the terms of the trust."

17 See note 5 supra. A corporation is allowed to enter a partnership where the whole management of the enterprise is reserved to the corporation because a relationship of this nature is consistent with the policy against delegation of corporate management and control over its own assets. It follows that an agreement whereby the corporation contributes none of its own assets to the enterprise and cannot be held liable for the debts of the enterprise is also allowable.