CHAPTER 2

INCORPORATION & ITS CONSEQUENCES
PROCEDURES OF INCORPORATION

CHOOSE THE COMPANY’S NAME
FORM 13A

FORM 6
STATUTORY DECLARATION OF COMPLIANCE

MEMORANDUM OF ASSOCIATION (MOA)

FORM 48A
STATUTORY DECLARATION APPOINTMENT OF DIRECTOR

ARTICLE OF ASSOCIATION (AOA)
PROMOTER

DEFINITION

TWYCROSS V GRANT (1877) 2 CPD

i) Someone who undertakes to form a company

ii) To set it going

iii) Who takes the necessary steps to accomplish this purpose
PROMOTERS’ DUTIES

1) Fiduciary duties towards the company that he promotes.
2) Prohibition against secret profit.
3) A promoter must disclose any profit or benefit that he received in the promotion of the company.

REMEDIES FOR BREACH OF PROMOTERS’ DUTIES

1) Rescission of the contract
2) Recovery of the promoter’s secret profit
3) Damages for breach of duty or for deceit/fraud
ERLANGER v NEW SOMBRERO PHOSPHATE CO.  
(1878) 3 App Cas 1218

FACT OF THE CASE:

- E and his friends formed a syndicate to acquire the lease of an island that full of phosphates for £55,000.
- Later on, they incorporated a company called New Sombrero Phosphate (NSP) and sold the island to NSP for £110,000.
- The promoters did not disclosed the actual price of the island to the NSP’s board of directors.
- The NSP’s directors brought the matter to the court and to rescind the contract of sale.

COURT DECISION (HOL):

The contract can be rescind since the promoters did not disclosed their interest in the transaction.
PRE-INCORPORATION CONTRACT

DEFINITION
A contract or transaction made before the incorporation of a company.

EFFECT

COMMON LAW
MALAYSIAN LAW
According to common law, any contract or transaction made before the incorporation of a company is INVALID.

It is because the company does not exist to enter into a contract by itself.
NEWBORNE v SENSOLID (GREAT BRITAIN) LTD [1954] 1 QB 45

FACT OF THE CASE:

- The plaintiff entered a contract to sell 200 of tinned ham to the defendant.
- The contract was entered on behalf of Leopold Newborne Ltd, a company which was not yet incorporated.
- Later on, the market for tinned ham fell and the defendant refused to continue the contract.
- The plaintiff sued the defendant for breach of contract.

HELD:

The contract was not valid since the company did not exist.
SECTION 35 (1) CA 1965:

Any contract or other transaction entered into by a company prior to its formation or by any person on behalf of a company may be ratified by the company after its formation and the company shall become bound by and entitled to the benefit as if it had been in existence at the date of the contract had been to.

PRE-INCORPORATION CONTRACT IN MALAYSIA IS A VALID CONTRACT
PRE-INCORPORATION CONTRACT IS VALID PROVIDED THAT:

1) The contract must be entered by the company or any person on behalf of the company and
2) The contract must be ratified/renewed after the formation of the company.
FACT OF THE CASE:

- Mr. Khoo was appointed as a managing director of the company prior its formation.
- The condition of the appointment that he shall be the managing director for life unless he resigns, dies or commits an offence under the Companies Act.
- Later on, the company was incorporated and the appointment of Mr. Khoo was ratified under the same condition.
- A dispute arose between the company and Mr. Khoo where the company terminated his service. Mr. Khoo brought an action to the court.

HELD:

The appointment was pre-incorporation contract and the condition in S.35 was fulfilled. Therefore the termination was not valid.
EFFECTS OF INCORPORATION

The identity of the company is separated from its members once it was incorporated. The company is considered as an artificial person or legal person who has rights, protections, privileges, responsibilities and liabilities under the law.
ISSUES:

1) WHETHER THE CREDITORS HAVE THE RIGHT TO ASK MR. SALOMON TO PAY THE DEBTS ON BEHALF OF THE COMPANY?

2) WHETHER MR. SALOMON HAVE THE RIGHT TO CLAIM THE DEBT FROM THE COMPANY?
FACT OF THE CASE:

- Mr. Lee formed a company named Lee’s Air Farming. He was the director and also employed by the company as a pilot.
- He was killed while flying for the company.
- His wife claimed for compensation as he died while he was working.

HELD:

1) The court rejected the claim stating that “Lee cannot employed himself”.

APPEAL AT PRIVY COUNCIL:

2) Allowed the claim as the company has separate legal personality even though Lee was the one who formed the company.
SECTION 16(5) CA 1965

On and from the date of incorporation specified in the certificate of incorporation but subject to this Act the subscribers to the memorandum together with such other persons as may from time to time become members of the company shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the functions of an incorporated company and of suing and being sued and having perpetual succession and a common seal with power to hold land but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is provided by this Act.
SECTION 16(5) CA 1965

1) Ability to own property

2) Ability to sue and be sued

3) Perpetual succession

4) Company is a body corporate with power

5) Liability of members with regard to company’s debts
EXCEPTION: LIFTING THE VEIL OF INCORPORATION

The identity of the members and the company shall not be separated.

1) STATUTORY EXCEPTION
2) JUDICIAL EXCEPTION