

# **A Business Start-up Report**

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# Introduction

This report is designed to outline the ways in which you can start trading as JAC Catering and offer my advice on what I believe to be the best way forward.

With the capital you are investing you can trade as either a:

Or      Private Limited Company  
        Partnership

## Chapter 1

# Private Limited Company

### 1.1 What is a Private Limited Company?

A company has to be created by registering with Companies House in accordance to The Companies Act 1985. When all the formalities of document creation and company acceptance are done, Companies House issues a Certificate of Incorporation, which is effectively the *birth certificate* of a company.

As a human is considered a separate legal entity when issued with a birth certificate, so does a company.

The House of Lords with the SALOMON v SALOMON & CO Ltd case established this principle of a separate legal entity in 1897:

*"In the eyes of the law a company is a person capable of perpetual succession\*\* and quite distinct from the natural persons who are its members at any given time."*

\*\* perpetual succession = A company created by a process of law can only be destroyed by a process of law. It will exist even if all its human members are dead because is a separate legal person.

As a separate legal entity a company can:

- ◆ Own and deal in property
- ◆ Sue and be sued in its own name

### 1.2 Limited liability

As a Private Limited Company is a separate legal entity, it can own property, borrow, sue and be sued. For this reason members of a Private Limited Company have *limited liability*. Limited liability ensures that an investor will only lose what he has invested should the company cease to exist. Although it may seem a little severe for someone to lose their invested life savings, it prevents creditors demanding debts be paid by the shareholders who haven't put up any guarantees.

### 1.3 Members

There must be at least two *members* of a Private Limited Company; a director and a company secretary (these cannot be the same person). You can only be a company director or company secretary if you are not a discharged bankrupt, or have been disqualified by a court from holding such a position.

### 1.4 Address

Each company has to have a registered *address* (in your case the restaurant), where all the statutory documents (register of members, memorandums) for the company are kept.

### 1.5 Contractual capacity

Please be aware that all the contracts you have entered into already are "pre-incorporation contracts". This means that because your company is not yet a separate legal entity, contracts cannot be made on its behalf. Be warned, whoever made the contracts will be held personally responsible until the company is created, so we need to get proceedings under way post haste.

### 1.6 Criminal liability

A company can be convicted of a crime, even though the directors themselves do not have to be convicted, although there are some limitations:

A company cannot be convicted of a crime which requires the physical driving of a vehicle (RICHMOND & THAMES BOROUGH COUNCIL v PINN & WHEELER).

A company cannot be convicted of a crime for which the only available sentence is imprisonment.

As all three of you will be deemed *ultra vires* (the controlling mind) of the company, you will be held personally responsible as well.

### 1.7 Shares

Limited companies are either limited by shares (what your company should be), or limited by guarantee (these are usually charities and non-profit companies).

Companies limited by shares are owned by a minimum of two shareholders (in your case three) and is run by a board of directors (again you three).

To have an equal share in the business you will all be required to have an equal number of shares.

### 1.8 Dissolution of a Private Limited Company

Although it may seem premature and pessimistic, I feel you need to know what processes are involved in winding up a company:

### 1.8.1 Voluntary winding up

If the shareholders decide to wind a company up because they no longer wish for the company trade, a special resolution is passed. Where the company cannot meet its obligations then an extraordinary resolution is passed. These rules are laid down in the Companies Act 1985

If a company declares its solvency then the company will be in control, where a company does not declare its solvency then it will appoint a liquidator. It will be the liquidators job to pursue any outstanding debts owed to the company, sell off the company assets that are needed to settle any outstanding creditor debts.

Although the directors will lose their ability to run the company, the liquidators may keep them on in order for the company to be wound up successfully. Under the process of insolvency, employees will be dismissed but they too may be re-employed by the liquidators to help in the winding up.

### 1.8.2 Compulsory winding up

Under Section 123 of the Insolvency Act 1986, Companies may be forced into insolvency when:

- ◆ It hasn't paid a creditor debt of £750 or more within three weeks of that creditor having served a demand for outstanding monies.
- ◆ A warrant has been issued by the courts to allow bailiffs to take goods belonging to the debtor - which have been returned unpaid.
- ◆ It can be proved that the company is unable to settle outstanding debts.
- ◆ The combined assets of the company can be proved to be less than its liabilities.

If the courts do decide to wind a company up, all employees are dismissed, legal actions against the company are suspended, and transfer of shares or property becomes void. If the liquidators deem the company is to be dissolved then the registrar is sent to Companies House and notification is advertised in the London Gazette and two local newspapers.

## **1.9 To summarise a Private Limited Company...**

### *Advantages*

- ◆ Directors not personally responsible for company debts (providing they haven't put up any personal assets for loan guarantees).
- ◆ Greater access to funding as there can be up to fifty shareholders.
- ◆ The perceived stability of a Private Limited Company over a partnership, will be a more attractive proposition when hiring more senior positions.
- ◆ Income is taxed at definitive rates of corporation tax, which is lower than the top rate of personal tax.

- ◆ There is more regulation of a Private Limited Company than a partnership

*Disadvantages*

- ◆ Complex process to dissolve a Private Limited Company.
- ◆ Profit divided amongst shareholders.
- ◆ Public viewing of company accounts.
- ◆ Has to pay NI contributions on wages.
- ◆ Professional auditing is a statutory requirement over a certain amount.
- ◆ Fines imposed for late filing of records to Companies House.
- ◆ Complicated and expensive to create compared to a partnership.



## Chapter 2

# Partnerships

### 2.1 What is a partnership?

*"The relation which subsists between persons carrying on a business in common with a view of profit"*

Unlike a Private Limited Company, which when created becomes a separate legal entity, a partnership is an agreement between persons.

Due to the possible volatility that can arise through partnerships, the regulation of them is very stringent.

You can be a partner in one of two ways:

- ◆ A sleeping partner who has no managerial capacity and is simply there to give financial help and take profits.
- ◆ General partners who are responsible for the running of the company. The Partnership Act 1890 states all partners are entitled to equal sharing of the company, from investment and profit to debts.

Be prepared, only a single transaction between two people can form a partnership. (MANN v D'ARCY 1968).

Although no written contract is required, it is advisable to create a written agreement, known as a Deed of Partnership.

Any provisions that the Deed does not incorporate are clarified in the Partnership Act 1890.

### 2.2 The Partnership Act 1890

Partners are able to decide who does what, who takes what and who contributes what. But if they don't decide what then the Act implies various defaults; equal sharing of profits & losses, equal contributions to capital, equal responsibilities to work.

If two or more persons trade on the premise to share profits, they will be treated as though they are partners, and the legal consequences that goes with it.

Express agreements between parties can force a change to:

- ◆ The right of each partner to an equal voice in management
- ◆ Equal sharing of capital profits and losses
- ◆ Equal sharing of revenue profits and losses
- ◆ Equal liability to contribute to the partnership's capital needs
- ◆ Whether either party may buy the partnership assets on dissolution

Some of the legal consequences however cannot be changed:

- ◆ Either partner can commit the partnership in a legal obligation or liability to a third party.
- ◆ Partners are jointly and severally liable to third parties for all partnership debts and liabilities.
- ◆ The partnership does not have a legal persona separate to that of the participants.
- ◆ Partners cannot make a 'secret profit' out of their dealings with the partnership, but have to account to the partnership for any profits they make. The partnership will be dissolved if either partner goes into liquidation or becomes insolvent.
- ◆ Tax assessments are made on the partnership for profits. If the partnership fails to pay the revenue can look to any partner for payment of the whole amount of tax.

### 2.3 Agency

Each partner is an agent of the company and of each other, as previously stated, in a partnership you are all responsible for each others actions, financially and legally.

### 2.4 Liability in contracts

*“Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner”.*

Every contract made by one of you is legally binding on the other two, are all three of you prepared for this responsibility? Are all three of you prepared to risk your personal assets to honour a disastrous contract only one of you knowingly entered into?

This personal liability may seem daunting, but I must stress that it only applies in a business course of dealings. If it could be proved that debts were incurred from a personal level, then your personal assets would be safe.

Personal liability can be limited if:

- ◆ The partner has no authority (stated in the Deed of Partnership ) to enter into the contract.

And

- ◆ The other person in the contract knew the partner had no authority.

### **2.5 Liability in torts**

Again, as each of you will be responsible for each others contracts and financial transactions if you decide to form a partnership, any criminal offence that is committed by any one of you, then the other two will also be liable.

Obviously the liability from a criminal act is when done in a course of business. (HAMLYN v HOUSTON Co. 1903)

### **2.6 Liability by holding out**

When dealing as a partnership it is possible that someone could pretend to be a partner of the firm and enter into contracts on your behalf. (A H BUNNY LTD v ATKINS 1961)

### **2.7 Unlimited liability**

Whatever advantages forming a partnership may seem to have over a Private Limited Company, the very fact that you are not covered by limited liability, is the strongest reason I can give for suggesting you do NOT form a partnership.

All three of your personal assets are at risk should you run into financial difficulties.

### **2.8 Limited partnerships**

Under The Limited Partnerships Act 1907, it is possible that two of you could have limited liability, but you would relinquish your managerial and decision making capacities.

If any of you were to become limited partners, you are not able to have any additional financial dealings with the company, either to invest or withdraw money. If you have to partake in financial dealings you will lose your limited liability.

Due to their complexities and limitations, limited partnerships are not very popular, and I would definitely advise against creating one.

## 2.9 Limited liability partnerships

Limited liability partnerships are an alternative business vehicle, in that they can benefit from having limited liability but allow the flexibility of internal management like a traditional partnership.

Limited liability partnerships are a separate legal entity like a Private Limited Company, but members could be personally sued for financial loss if it could be proved they were negligent, although this would be a civil action.

Although this may seem a viable option, as the implications and problems with limited liability partnerships are not yet fully understood, I would also advise in not setting up as one.

## 2.10 Dissolution of a partnership

Under sections 32-44 of the Partnerships Act 1890 a partnership can be dissolved when:

- ◆ Expiry of a fixed term.
- ◆ Agreed expiry of a single transaction.
- ◆ A single partner informs the others that they wish to dissolve the partnership.

## 2.11 To summarise a partnership...

### *Advantages*

- ◆ Greater availability of capital.
- ◆ Possibility of better decision making as personal assets are at stake.
- ◆ Clients may see partnerships as having tighter controls

### *Disadvantages*

- ◆ Authority is divided.
- ◆ Full trust and cooperation between partners is required.
- ◆ Each partner has unlimited liability.
- ◆ Decision making can be delayed as all partners have to be consulted.

## Chapter 3

### Documents required

As I have all the necessary details, and you have informed me that Christine will be company secretary, and due to JAC Catering being unavailable, AJC Catering will be the company name.

If you decide on forming a Private Limited Company then I will fill in the following forms for you:

#### 3.1 Memorandum of Association

The Memorandum of Association is one of the two documents that are legally required to form a company. It specifies the following:

- ◆ The company name.
- ◆ Where the registered office is (England, Scotland, Wales).
- ◆ A statement of limited liability on the shareholders.
- ◆ A statement of the companies authorised share capital.
- ◆ The signature of one or more persons who will be the companies first shareholders.
- ◆ The objects of the company (what it will do). The Memorandum of Association defines the objects as "carrying on business as a general commercial company". A format can be used by formation agents and means the company can carry out business as it wants without being too specific.

#### 3.2 Articles of Association

This is the second legal document needed to form a company and details how the officers and shareholders will run the company. Usual practise is to adopt the statements from a legal table known as "Table A". Table A is a set of numbered paragraphs and defines items such as how much power the directors have and how resolutions will be passed.

Articles of Association must include the following:

- ◆ Company name.
- ◆ The number of shares allocated to each member.

- ◆ Signature of a witness.

### **3.3 Form 10**

Basically used to appoint 1<sup>st</sup> director and company secretary.

### **3.4 Form 12**

Statutory declaration that must be signed in the presence of a solicitor or a Commissioner of Oaths.

### **3.5 Deed of Partnership**

Alternatively if you decide to form a partnership then a Deed of Partnership needs to be drawn up. Terms not covered by your deed of partnership during a possible dispute will be governed by the Partnership Act 1890.

### **3.6 Passing off**

On doing a search for JAC Catering I found that someone has already registered that name, which is why you agreed to AJC Catering. If you had succeeded in maybe trading as JAAC Catering, you could have had a court injunction imposed on you ensuring that you had to cease trading under that name. This is to ensure consumers are not confused as to which company is which, this can be beneficial if you want to trade using a company name that has had problems in the past. (EWING v BUTTERCUP MARGERINE Co LTD 1971).

## Chapter 4

# Legal Rules effecting management of a Private Limited Company

### 4.1 Directors of a Private Limited Company

As per section 282 of the Companies Act 1985, your company must have a board of directors, which will be the three of you.

Although you don't have to appoint a chairperson by law, as you will have to hold an AGM, it makes sense to have somebody chairing this meeting. You could rotate this position annually.

As company directors you will be given "*all powers if the company*" as stated in regulation 70 of the Companies Act 1985 and article 80 of the Companies Act 1948. You will be required to perform special duties:

#### 4.1.1 Fiduciary Duties

A director must be accountable for any personal profit made while dealing through the company, irrespective of how well the company is performing.

You must use your powers of directorship for the benefit of the company, not your own.

#### 4.2.2 Duty of skill and care

As directors you are obliged not to act negligently in managing the companies affairs. In larger companies directors are usually experts in a particular field, but a judge once made a statement that directors:

- ◆ Need not show a greater degree of skill than may be expected of a person with their knowledge and experience.
- ◆ Need not to give continuous attention to the affairs of the company.
- ◆ Are not bound to attend all meetings of the board, although they ought to attend whenever practical.
- ◆ May delegate duties to other officials in the company and trust them to be performed properly so long as there is no reason to doubt or mistrust them.

#### 4.1.3 Duties to outsiders

You are also under a duty to prevent harm to persons outside the company (in the catering industry, food poisoning is often cited).

#### 4.1.4 Statutory duties

As directors you *must*:

- ◆ Notify the company of their interest in its shares or debentures or those of an associated company (Section 324).
- ◆ Disclose any substantial non-cash transactions with the company (Sections 320-322).
- ◆ Disclose any personal interests in any contracts of the company (Section 317).
- ◆ Have regard to the interests of the employees (Section 309).

#### 4.1.5 Duties to employees

It could be assumed that as directors you will be working in the best interests of the company, you will be working for the benefits of your employees as well.

Although to save the company you may have to make staff redundant and your employees have no real say should they disagree with the board's decisions.

#### 4.1.6 Duties to shareholders

As it will just be the three of you with shareholdings in the company I will not go into much detail here, only to say that in the future, should you expand and become a Public Limited Company, shareholders have the ability to remove directors, diminish their powers, or instruct the directors.

#### 4.1.6 Duties to creditors

Creditors take on numerous guises; Suppliers, shareholders, banks the government. Suppliers partake in credit for goods, usually 30 days after the goods have been received. In larger firms where cash flow is not really an issue, they can exploit this norm of trade credit and demand terms of 90 days, or even "forget" to pay some months, knowing full well that they won't be put on stop because the smaller companies need them. This can cause financial hardships for smaller firms who are reliant on a more steady cash flow in order to survive. Steps are being taken to prevent bullying from larger firms.

Every company owes the government money, and the length of payment terms and amount vary with each tax; Corporation Tax - 9 months after accounting period; Income Tax and National Insurance - 14 days after the end of the fiscal period; VAT can be either monthly or quarterly basis.



Companies very often need to invest to expand, and if the financing is not available through shares or sales, then bank loans are the next option. As with a personal loan, companies have to provide guarantees and security that they will be able to pay the loan.

#### **4.2 Board meetings**

Regulation 88 of the Companies Act 1985 stipulates that the board of directors have to meet to discuss and conduct company business. In a Private Limited Company this can be when ever is practical, in Public Limited Companies they are more frequent and are on predetermined dates.

#### **4.3 Debentures**

A debenture is basically a loan. Who ever holds a debenture (usually a bank if you have borrowed money from them), is considered to be a creditor of the company. When a company has to liquidate its assets, then a debenture will have to be repaid before shareholders are entitled to any remaining monies.

## Chapter 5

# Legal rules of running a Partnership

The Partnership Act has been discussed earlier on in this report. In a partnership agreement you will all have stated that each other has the authority to act on the companies behalf, and have equal rights to share profits, as well as have equal liability to debts incurred.

The following are additional matters that I haven't yet discussed about the Partnership Act 1890:

### 5.1 Remuneration

Just because you are a partner of a firm, this does not entitle you to any salary! Although a usual course of dealings is that you will distribute profits evenly.

### 5.2 Disputes

Disputes are spit into two categories:

- ◆ Whether the nature of business is to be changed

Or

- ◆ The dispute is regarding the usual course of business

If the nature of the business is to be changed then a unanimous decision has to be agreed between partners, for a dispute in regards normal business duties, then only a majority vote is needed.

### 5.3 Financial records

Partnership books are to be kept at the address stated in Form 10, and have to be accessible to all partners who have the authority to inspect and copy from them.

### 5.4 Removal of a partner

It will usually be stated in the partnership agreement that any partner is allowed to expel another partner should they break the partnership

agreement. Just cause has to be given in good faith and cannot be a vehicle for other partners to expel the other.

### **5.5 The duty of good faith**

Sections 28-30 state that:

- ◆ The partners must render true accounts and information (LAW v LAW 1905)
- ◆ They must account for profits (BENTLEY v CRAVEN 1853)
- ◆ They must not compete with the business

## Chapter 6

### Conclusion

I hope that I have put forward a true representation of what is required when forming a business.

I strongly advise that to give greater protection to your personal assets, and give you more freedom to run the company, that you go ahead and form a Private Limited Company.

The following sections in this report are concerned with employment law, and will be binding for whatever course of business you decide to choose.

## Chapter 7

# Employment Law

If you thought the process of starting a business was complicated, the minefield that is employment law is even more so. I will try and inform you as much as possible to arm you with the correct facts, should you have any further questions when the business is up and running do not hesitate to contact me.

Before the advent of unions in the workplace, the company owner could rule with an iron fist and treat his worker as he saw fit, these days it appears that it's the employees who have the upper hand.

I will outline the three stages of employment:

- ◆ Hiring
- ◆ Working
- ◆ Firing

### 7.1 Hiring

So, you've set up your business, now you need to recruit the right people. Will you use an agency or recruit yourself?

Agencies will vet your applicants and job adverts, so you will only have to interview the correct people for the job, unfortunately they usually charge between 15-20% of the wages for a minimum of twelve months.

The cheaper option is to do the recruiting yourselves. This is the first step to complying with employment law. Please ensure that any job placements you advertise for could not be deemed discriminatory. Do not refer to gender, race or age.

If you do have a particular preference, please ensure that you include at least one person in the shortlist so that you can evidence you have not discriminated against any one.

Once you have sifted through the CV and have decided whom you want to employ, you will have to offer each employee a contract of employment.

## 7.2 Working

### 7.3 Contract of Employment

Each worker will have to be given a contract of employment that you will both sign. If no contract is provided then implied terms are used:

#### 7.3.1 Duties of an Employer

- ◆ To pay the employee
- ◆ To provide work
- ◆ To treat the employee with mutual trust and confidence
- ◆ To take reasonable care for the safety of the employee
- ◆ To deal promptly with grievances
- ◆ To reimburse the employee for any expenses properly incurred while at work

#### 7.3.2 Duties of an employee

- ◆ To be ready and willing to work
- ◆ To use reasonable skill at work
- ◆ To follow reasonable and lawful orders
- ◆ To take care of the employer's property
- ◆ To act in good faith

Any express terms *must* be put in writing and handed to the employee within eight weeks of starting work. Express terms include:

- ◆ Pay
- ◆ Hours
- ◆ Holidays

The contract can stipulate whatever working details you want but should include the following:

- ◆ Names of employer and employee
- ◆ Date employment began
- ◆ Rates and dates of pay
- ◆ Hours (and whether overtime is included)
- ◆ Holiday entitlement and Holiday pay
- ◆ Sick Pay
- ◆ Pension scheme details
- ◆ How much notice employer/ee need to give
- ◆ If job is not permanent, date when expected to end
- ◆ Place of work
- ◆ Disciplinary and grievance procedures

## 7.4 Additional statutory rights

Employees are also entitled to the following:

- ◆ Time off work for public duties (trade union activities, jury service, looking for work due to redundancy and antenatal care).
- ◆ Three weeks annual pay for employees who have worked at least 13 weeks.
- ◆ Statutory sick pay for up to 28 weeks of incapacity for work during a 3-year period.
- ◆ Itemised pay statement showing gross pay and take-home pay with variable deductions between the two.
- ◆ A minimum of fourteen weeks maternity leave.
- ◆ Work no more than a 48 hours per week for a rolling 17 week average (opt-out available).

## 7.5 Discrimination

There are various legislations to ensure that no matter what gender, race, ethnical origin, age, physical characteristics or sexual orientation who will be treated as equal:

### 7.5.1 Sex Discrimination Act 1975

Sex Discrimination Act 1975 ensures that employers know that it is illegal to discriminate in regards gender with:

- ◆ Recruitment
- ◆ Contracts of Employment
- ◆ Career development
- ◆ Benefits
- ◆ Redundancy

Discrimination can be cited as being either:

- ◆ Direct - Where the business has an open policy of discrimination based on gender.
- ◆ Indirect - Where conditions within the job prevent the job to be completed equally by men or women.

Any member of staff that falls pregnant will have to be treated carefully, although you might feel as though you are entitled to terminate her contract as she will not be of any use for a while the leading case of WEBB v EMO CARGO 1994, ensures that pregnant employees cannot be immediately terminated.

If you require that employees look smart when customer facing please ensure that you do not impose a gender specific dress code. In March 2003 a male Job Centre worker successfully won his case in an employment tribunal where he was made to wear a shirt and tie, while female colleagues were allowed to wear t-shirts.

### 7.5.2 Race Relations Act 1976

Race Relations Act 1976 covers discrimination on the grounds of colour, race, nationality or ethnic or national origins. *MANDLA v DOWELL LEE* 1983 classed ethnic origin as being:

*"a long shared history and cultural tradition are essential. The group differentiates itself from others and its cultural traditions: family, customs and manners are maintained"*.

Other conditions can also be considered:

- ◆ Shared origin (geography) or descent - common ancestors
- ◆ Language (though this need not be exclusive)
- ◆ Common literature
- ◆ Religion, may be different from neighbouring groups
- ◆ Being a minority or dominant or oppressed group in a community

From the *MANDLA v DOWELL LEE* case it has been decided that Sikhs, Jews and Gypsies are to be considered as ethnic groups, but Jehovah Witnesses and Rastafarians are not.

Matters relating to race discrimination can be either:

- ◆ Positive discrimination - whereby providing selection criteria is based on merit, an employer can promote job applications from under-represented groups.
- ◆ Positive discrimination - where only a certain ethnic group will be considered for application is unlawful.

### 7.5.3 The Disabled Persons (Employment) Acts 1944 and 1958

The Disabled Persons (Employment) Acts 1944 and 1958 state that any company that employs over 20 people must fulfil a quota that 3% of their workers should be disabled. Very few companies have been prosecuted. Many think that due to societies changing attitudes towards disabilities, as well as technological advances, a 50 year old act is somewhat outdated and should be revised.

### 7.5.4 Remedies

Remedies can be taken for anyone subjected to any form of discrimination. Complaints should be lodged within three months of the act taking place. The usual course of action is to award compensation (no limited is stipulated) and that the discriminatory act be removed from the business.