

- **Legal Position of a Promoter**

The promoter is **neither a trustee nor an agent of the company** because there is no company yet in existence. The correct way to describe his legal position is that he stands in a fiduciary position towards the company about to be formed.

Lord Cairns has correctly stated the position of promoter in Erlanger V. New Semberero Phosphate Co. The promoters of a company stand undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company. They have the power of defining how and when and in what shape and under what supervision, it shall start into existence and begin to act as a trading corporation.

Fiduciary position of promoters:

The two important results follow:

(1) A promoter cannot be allowed to make any secret profits. If it is found that in any particular transaction of the company, he has obtained a secret profit for himself, he will be bound to refund the same to the company.

(2) The promoter is not allowed to derive a profit from the sale of his own property to the company unless all material facts are disclosed. If he contracts to sell his own property to the company without making a full disclosure, the company may either repudiate/rescind the sale or affirm the contract and recover the profit made out of it by the promoter.

A promoter who wishes to sell his own property to the company must make a full disclosure of his interest.

The disclosure may be made:

- To an independent Board of Directors, or
- In the articles of association of the company, or
- In the prospectus, or
- To the existing and intended shareholders directly.

If the promoter fails to discharge the obligation demanded of his fiduciary position the company may rescind the contract or may in the alternative choose to take advantage of the contract and sue the promoter for damages for breach of his duty to the company.

Secret profits on the sale of property can be recovered from a promoter only when the property was bought and sold to the company while he was acting as a promoter.