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Section 1. - Corporations

(a) - Kinds of Corporations

Kinds of corporations

10-001

Corporations, which are legal personae just as much as are individuals, [1] are either sole or aggregate. They may also be classified as ecclesiastical and lay, or as statutory and non-statutory. Lay corporations may be either trading or non-trading. [2]

Corporations sole and aggregate

10-002

A corporation sole consists of a single person and his successors in office, such as the Crown, an archbishop, bishop or parson, the Treasury Solicitor, [3] or the Public Trustee. [4] It would seem that the benefit [5] and burden [6] of contracts made with a corporation sole pass, on the death of the holder of the office, to his successor in office; and contracts purportedly made with the corporation during a vacancy in the office take effect on the vacancy being filled, subject to a right of disclaimer by the successor in office. [7] A corporation aggregate is a legal person composed of individual members, but with a continuous identity distinct from that of the members composing it. [8] It follows that it can hold property in its own right, that its rights and liabilities are unaffected by changes in its membership and that, generally speaking, its property but not that of its members is available to satisfy its liabilities.

Companies Act 2006

10-003

The Companies Act 1985 has been replaced by the Companies Act 2006 the provisions of which were brought into effect in stages. Five commencement orders were made, [9] the final implementation being October 1, 2009. [10] Section 1297 of the 2006 Act is a continuity of law provision. This section provides that where the 2006 Act re-enacts a provision repealed (with or without modification) by the Act, the repeal and re-enactment does not affect the continuity of the law. Also, and very importantly, where there are references in articles of association, resolutions and contracts referring to a provision in the 1985 Act which is replicated in the 2006 Act, the provisions of the 2006 Act will be applicable (even if there have been verbal changes) unless it is intended that a change should be affected by the 2006 Act.

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1. *Re Sheffield, etc. Building Society (1889) 22 Q.B.D. 470, 476*.

2. There is also the European Economic Interest Grouping (EEIG) which is an entity distinct from its members: see the European Economic Interest Grouping Regulations 1989 (SI 1989/638) [1985] O.J. L199/1.

3. Treasury Solicitor Act 1876 s.1.

4. Public Trustee Act 1906 s.1.

5. Law of Property Act 1925 ss.180(1) and 205(1)(xx), reversing the common law rule in *Howley v Knight (1849) 14 Q.B. 240, 255*.

6. See Co.Litt. 144b, n.2.

7. Law of Property Act 1925 s.180(3).

8. As to the juristic nature of corporations, see Wolff (1938) 54 L.Q.R. 494; Hart (1954) 70 L.Q.R. 37; Gower & Davies, *Principles of Modern Company Law*, 9th edn (2012), Chs 1 and 2; *Rayner (Mincing Lane) Ltd v DTI [1990] 2 A.C. 418*; *Adams v Cape Industries Plc [1990] Ch. 433*.

9. Companies Act 2006 (Commencement No.1, Transitional Provisions and Savings) Order 2006 (SI 2006/3428 (c.132)); Companies Act 2006 (Commencement No.2, Consequential Amendments, Transitional Provisions and Savings) Order 2007 (SI 2007/1093 (c.49)); Companies Act 2006 (Commencement No.3, Consequential Amendments, Transitional Provisions and Savings) Order 2007 (SI 2007/2194 (c.84)); Companies Act 2006 (Commencement No.4 and Commencement No.3 (Amendment)) Order 2007 (SI 2007/2607 (c.101)); Companies Act 2006 (Commencement No.5, Transitional Provisions and Savings) Order 2007 (SI 2007/3495 (c.150)).

10. For the implementation programme see The Companies Act 2006: Updating you; updating your clients (BERR, 2008).

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(b) - Corporations in General

Corporation created by charter

10-004

A corporation created by charter can, unless prevented by some statute regulating its proceedings, [11] contract and deal with its property in the same way as an individual. [12] Contracts made by it outside the terms of its charter are valid, but by making them the corporation renders itself liable to the revocation of its charter. [13] But a member may obtain an injunction to restrain a chartered company from acting on regulations which would materially change the character of the company and which could not have been contemplated at the date of its incorporation. [14] But he cannot restrain the corporation, acting on the wishes of a majority of its members, from applying to the Crown for an alteration of the charter. [15]

Corporation created by statute

10-005

The powers of a corporation, whether sole or aggregate, created by statute are confined to those given expressly or by reasonable inference by the statute concerned. [16] If the subject-matter of a contract made by such a corporation is outside the scope of its constitution as defined by the statute, the contract is ultra vires and void. [17] This principle applies to all statutory corporations and not only to companies incorporated under the Companies Act. [18] However, the ultra vires rule as far as it affects a company registered under the 2006 Act has been abrogated by s.39 of the Act, [19] the overall purpose of this provision being to guarantee security of transactions between companies and persons with whom they deal. Ultra vires will still have relevance as regards director's authority to bind the company. [20]

Corporations regulated by legislation

10-006

Certain corporations, although not created by statute, are regulated by legislation. Thus, the powers of ecclesiastical corporations, sole and aggregate, are limited by particular statutory provisions [21]; and most charitable corporations [22] are subject to the control of the Charity Commissioners under the Charities Act 1993.

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11. See *Att-Gen v Manchester Corp [1906] 1 Ch. 643*.

12. *Sutton's Hospital Case (1612) 10 Co. Rep. 23a*; *Baroness Wenlock v River Dee Co (1887) 36 Ch. D. 674, 685n*; *R. v Bonanza Creek Gold Mining Co Ltd [1916] 1 A.C. 566, 583-584*; *Institution of Mechanical Engineers v Cane [1961] A.C. 696, 724-725*; *Pharmaceutical Society of Great Britain v Dickson [1970] A.C. 403*. See the Companies Act 2006 s.1043 Pt 33, Chs 1 and 2.

13. See the Companies Act 2006 s.1043 Pt 33, Chs 1 and 2 and see *British South Africa Co v De Beers Consolidated Mines Ltd [1910] 1 Ch. 354, 374-376*; reversed on other grounds *[1912] A.C. 52*. cf. *Att-Gen, New Brunswick v St John [1948] 3 D.L.R. 693*.

14. *Jenkin v Pharmaceutical Society of Great Britain [1921] 1 Ch. 392*. A similar action lies if the alteration is in restraint of trade.

15. *Gray v Trinity College, Dublin [1910] 1 Ir. R. 370*.

16. For local authorities see *Hazell v Hammersmith and Fulham London BC [1992] A.C. 1*.

17. *Ashbury Ry Carriage and Iron Co v Riche (1875) L.R. 7 H.L. 653*.

18. *Baroness Wenlock v River Dee Co (1885) 10 App. Cas. 354*. The doctrine of ultra vires is discussed further at below, paras 10-020 et seq. As to the application of this principle to overseas companies, see Dicey and Morris on the Conflict of Laws, 13th edn (2000), pp.1109-1116; *Janred Properties Ltd v Ente National Per Il Turismo (No.2) [1986] 1 F.T.L.R. 246*.

19. Below, paras 10-027 et seq.

20. See paras 10-031—10-033.

21. Ecclesiastical Leasing Acts 1842 and 1858; Ecclesiastical Leases Acts 1861, 1862 and 1865.

22. On the nature of charitable companies see *Liverpool and District Hospital for Diseases of the Heart v Att-Gen [1981] Ch. D. 193*.

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(c) - Attribution of Acts to a Company

10-007

It is a trite observation that a company can only act through the instrumentability of individuals to, for example, enter into contracts. The question arises as to which individuals will bind the company so that it is liable under a contract. The answer to this question is provided by the rules of attribution whereby the acts of certain individuals are attributed to the company. The principles of attribution were analysed by Lord Hoffmann in *Meridian Global Funds Management Ltd v Securities Commission* . [23] First, there are the company's primary rules of attribution which are to be found normally in the company's constitution (the articles and memorandum of association) and which will determine who or which organ of the company can enter into transactions on behalf of the company. [24] The primary rules of attribution may also be provided by the rules of company law, for example, the principle that the unanimous decision of all the shareholders of a solvent company, even though given informally, constitutes a decision of the company. [25] Coupled with the company's primary rules of attribution are general rules of attribution, namely, the principles of agency and vicarious liability. [26] There will be situations, however, where the primary and secondary rules of attribution do not provide an answer and in these situations the court will have to determine who, if anyone, for the particular matter under consideration is intended to count as the person whose acts are attributed to the company.

Company's name

10-008

The Business Names Act 1985 was repealed by the Companies Act 2006 [27] and replaced by Pt 41 [28] of that Act. Part 41 applies to a "person" carrying on business in the United Kingdom. [29] Chapter 1 of Pt 41 contains prohibitions on the use of sensitive names, broadly names that suggest a connection with a government department or which are subject to statutory regulations. Individuals and partnerships are required to set out details as to their names where they are trading under a "business name". [30] Such disclosure is also required in "business documents". [31] Failure to make such disclosure can have criminal consequences [32] and can affect the company's right to enforce any contract. [33] There are no longer display rules of names by corporate bodies. The Secretary of State may make regulations requiring every company to display its name in a specified way, to include its name in specified documents, and to provide its name in the course of business. [34] Section 83 deals with the civil consequences of failure to comply with the name disclosure regulations. Failure to comply affects the right of the company to bring proceedings arising out of any contract with respect to which the company was in breach of the name regulations, there is, however, no personal liability imposed on the directors in this situation. [35]

Abolition of old rule requiring seal: other formalities

10-009

The contracts of a corporation sole were never required to be made under seal. [36] But the old common law rule was that a corporation aggregate could contract only under seal. [37] The scope of this rule had been greatly restricted by numerous statutory, common law and equitable exceptions; it did not apply to companies incorporated under the Companies Act [38] and it was finally abolished altogether by the Corporate Bodies Contracts Act 1960.

Deeds

10-010

Section 1(2) of the Law of Property (Miscellaneous Provisions) Act 1989, which defines what constitutes a deed, applies to companies. How a deed is to be executed by a company is set out in ss.44–47 of the 2006 Act. [39] Section 44(1)(a) provides that a contract can be executed by a company by affixing the company's common seal or, as provided for in s.44(1)(b), by a "signature in accordance with the following provisions" in the section. These provisions permit a document to be executed by "two authorised signatories" [40] and for this purpose every director of the company and, where the company has one, the secretary are authorised persons. [41] To be binding on the company the document must be "executed by the company" [42] which requires that it be apparent from the face of the document that it is being "executed by the company" and not merely by someone acting as agent for the company. [43] Accordingly where there is a requirement that something must be done "personally", this can be done by a company by complying with s.44. [44]

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23. *[1995] A.C. 500 PC*. See also *Bank of India v Morris [2005] EWCA Civ 693, [2005] 2 B.C.L.C. 328*; *Moore Stephens (a firm) v Stone & Rolls Ltd (In Liquidation) [2009] UKHL 39, [2009] 1 A.C. 1391* (Lords Scott and Mance dissenting). The principles of attribution are developed more fully in paras 16-175 et seq.

24. See, e.g. art.70 of Table A Companies (Tables A–F) Regulations 1985 (SI 1984/805), Companies (Model Articles) Regulations 2008 (SI 2008/3229) art.3.

25. *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd [1983] Ch. 258*.

26. See *New Zealand Guardian Trust Co Ltd v Brooks [1995] 1 W.L.R. 96*.

27. Sch.16.

28. This is excluded from those parts of the Act deemed to constitute "the Companies Act" as it applies to business names in general: see Companies Act 2006 s.2.

29. s.1192(1).

30. s.1200.

31. s.1202.

32. s.1205.

33. s.1206.

34. s.82.

35. Companies Act 1985 s.349(4) has not been replicated.

36. Bl. Comm. Vol.I, at 475.

37. *Yarborough v Bank of England (1812) 16 East 6*; *Ludlow Corp v Charlton (1840) 6 M. & W. 815*; *A.R. Wright & Son Ltd v Romford BC [1957] 1 Q.B. 431*.

38. See now s.43 of the 2006 Act.

39. See *Lovett v Carson Country Homes Ltd [2009] EWHC 1143 (Ch), [2009] 2 B.C.L.C. 196*.

40. s.44(2)(a).

41. All public companies must have a secretary; a private company does not need to have one but may do so: s.270 and s.271. A document can also be validly executed by a director in the presence of a witness who attests the signature: s.44(3)(b).

42. s.44(4).

43. *Williams v Redcard Ltd [2011] EWCA Civ 466, [2011] 2 B.C.L.C. 350* at [18] (appellants' submissions).

44. *City & County Properties Ltd v Plowden Investments Ltd [2007] L. & T.R. 15*. See also *Hilmi Associates Ltd v 20 Pembridge Villas Freehold Ltd [2010] EWCA Civ 314, [2010] 3 All E.R. 391*.

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(d) - Registered Companies [45]

Registered companies

10-011

This section is principally concerned with companies registered under the Companies Acts, but many of the principles herein discussed also apply to corporations created by particular private or public Acts.

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45. This is not a summary of company law, but only of the law applicable to the contracts of companies.

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(d) - Registered Companies [45]

(i) - Contracts between Companies and Third Parties

Pre-incorporation contracts

10-012

Contracts entered into before a company is registered can, prima facie, bind or confer rights only on the actual makers of the contract and not the company, [46] the reason for this being that a company could not be bound by a contract entered into when it was non-existent. [47] At common law such contracts could even be completely null and void if the persons purporting to sign on behalf of the company were not the real principals. [48] However, the courts are strongly disposed to give effect to pre-incorporation contracts and, acting on the maxim ut res magis valeat quam pereat, the agent more likely than not will be personally bound on the contract particularly where both parties were aware at the time of contracting of the non-existence of the company. [49] It must be emphasised, however, that at common law there was no general rule that a person acting for a non-existent principal would be automatically bound by the contract; in the final analysis the agent's liability turns on the intention of the parties. [50] The common law was significantly modified by the need to implement art.7 of the First Directive on Company Law which deals with pre-incorporation contracts. [51] Article 7 was first implemented by s.9(2) of the European Communities Act 1972, was consolidated into s.36(4) of the Companies Act 1985 and became s.36C of the 1985 Act [52] and is now restated in s.51 of the 2006 Act. What is stated in the text with respect to ss.36(4) and 35C is equally applicable to s.51. Commenting on s.36(4), Oliver L.J. in *Phonogram Ltd v Lane* [53] stated that it swept away the "subtle distinctions" of the common law so that:

> "[W]here a person purports to contract on behalf of a company not yet formed, then however he expresses his signature he himself is personally liable on the contract." [54]

Phonogram Ltd v Lane was the first case [55] to interpret s.36(4), and the Court of Appeal rejected attempts to construe narrowly the effect of the section. In particular, it rejected the argument that the phrase "subject to any agreement to the contrary" should be interpreted to relieve a person of liability where he signs the contract as agent, in that this could be taken as evincing an agreement that the person acting for the company was not to be personally liable. [56] A person acting for an unformed company could only avoid liability under s.36C where there was an "express agreement" [57] that he was not to be liable. In *Royal Mail Estates Ltd v Maple Teesdale* [58] it was argued that such an "agreement to the contrary" could arise in one of two ways. The first was that a contrary agreement exists where there is a "contractual provision which … is inconsistent with a consequence which flows (or consequences which flow) from the section 36C effect". The second is that there is "only a contrary agreement … if there is found to be an agreement between the parties by which they intended to exclude the section 36C effect". [59] In *Royal Mail Estates Ltd v Maple Teesdale* the defendants had signed a contract on behalf of an unincorporated company. The reason why the s.36C issue arose was that the contract contained a term that the benefit of the contract "is personal to the Buyer and is not capable of being assigned by the Buyer other than being novated …". It was

argued that this constituted an “agreement to the contrary” and accordingly fell within the terms of s.36C, in other words the first method for showing a contrary agreement was applicable. This was rejected by the court which adopted the second approach set out above, namely that there had to be an explicit agreement in order to exclude the operation of s.36C. Section 36C creates a deemed contract which confers mutual obligations and rights, that is, it not only confers obligations on the agent who acted for the non-existent company but also confers a right of enforcement against the other party to the contract provided it is a situation where the ordinary principles of the common law of agency would entitle the agent to enforce the contract against the third party. [60] In determining who is the “agent” for the purpose of the section it is the person who purported to make the contract for the company and there is no need to establish from the totality of the negotiations that the purported agent was the moving mind and will of the whole transaction. [61] Where a person contracts on behalf of a company which has been struck off the register, and later forms a new company, the section does not apply as the new company was not in contemplation when the contract was entered into. [62]

10-013

Section 36C does not affect the company itself, and it remains the law that a company is not entitled to the benefits of, or bound by the liabilities in, a contract entered into before it was incorporated. But in some circumstances a company may acquire rights or incur liabilities at law or equity in respect of a transaction originally entered into before the incorporation of the company. Broadly speaking, for a company to be so liable it must enter into a new contract after it has been incorporated, but it is arguable (as will be seen later) that a company can be liable in other circumstances.

At law

10-014

A company cannot ratify or adopt a contract made ostensibly on its behalf before its incorporation, since a person cannot by a subsequent ratification make himself liable as a principal where he was not in existence at the time of the original contract. [63] Before a company is bound it must enter into a new contract. If promoters purport to enter into a contract on behalf of a company before its incorporation, the facts may show that a new contract is made with the company after its incorporation on the terms of the old. But the circumstances relied on for this purpose must be necessarily referable to, or must necessarily imply, a new contract between the company and the other contracting party. [64] This is a question of fact. [65] Where the company’s conduct is attributable to its mistaken belief that it was bound by the original contract [66] or is attributable to the performance by the company of a contract between it and, for example the promoters, [67] it will be difficult, if not impossible, to show that the company’s conduct is necessarily referable to a new contract with the other contracting party. In *Rover International Ltd v Cannon Film Sales Ltd* [68] Harman J. rejected the argument that the doctrine of estoppel by convention could operate to preclude the company from claiming that it was not bound by a pre-incorporation contract if both parties to the contract had, after the company’s incorporation, acted as though it were bound. [69] He reasoned that where estoppel by convention operates it must relate to an “assumption of agreed facts … (existing) before the contract or dealing is made or agreed” and as the company did not exist at the time the contract was entered into there was accordingly no basis on which the estoppel could operate. Admittedly, in *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [70] the facts on which the estoppel was based existed at the time the purported contract was entered into, but it is submitted that it is an unnecessarily narrow reading of the estoppel doctrine to confine it to facts that existed at the time the contract was entered into. There is, however, no reason in principle why the estoppel should not date from the time the company is incorporated. The estoppel point was not pursued on appeal in the *Rover International* case, [71] but the court allowed a quantum meruit claim with respect to services rendered by the company after it had been incorporated. Where the company, after its incorporation, has taken possession of property belonging to the other contracting party in pursuance to the agreement, [72] or has agreed to modify the terms of the original contract, [73] it will be easier to infer the making of a new contract.

In equity

10-015

Equity also will not assist (in the sense of enforcing a contract) a person who has entered into a contract for the benefit of a corporation which, at the time of the making of the contract, did not exist, and it will not, it would seem, enforce such contracts unless they are enforceable at law. [74] It is true that there are certain late nineteenth-century decisions in which courts of equity did enforce such contracts on the ground that the company had "adopted" the promoters' contract [75]; but the distinction between ratification and adoption was never clear [76] and they can no longer be relied upon. [77] Another attempt to enforce pre-incorporation contracts against companies sought to utilise the device of the trust; thus where a promoter had contracted with third parties that a company not yet in existence should pay the third parties £2,000 in consideration for certain services by the third parties, and the promoter was in a position to sue the company for that remuneration, the promoter was held to be a trustee for the third parties of his right of action, and the third parties, being cestuis que trustent, could sue the company. [78] But the courts are increasingly reluctant to imply a trust in such circumstances, [79] and, in any event, as later decisions show, the promoter will not have any right of action to hold in trust for the benefit of a third party unless the company, *after its incorporation*, makes a contract with him. [80]

Pre-incorporation benefits

10-016

A company is under no liability, either at law or in equity, to pay for benefits rendered to it prior to its incorporation. [81] So, for instance, a company is not bound to reimburse a promoter in respect of the expense of incorporation [82] unless after it has been formed it enters into a binding contract to do so. Similarly, a company is not bound by any agreement made by its promoters that it will, when formed, pay something to a third party who has agreed not to oppose the formation of the company in consideration of such a payment. [83] There are some nineteenth-century cases concerning the incorporation of railway companies by private Acts of Parliament which suggest that the court will not allow such a company to exercise its statutory powers without performing undertakings contained in a contract made by the promoters with a third party, in consideration of which that party agreed not to oppose the formation of the company. [84] But equity will not interfere even to this extent unless the original contract would have been intra vires of the company if originally made by the company. [85]

Post-incorporation benefits

10-017

It may be that a company will benefit in a tangible way from acts arising under a pre-incorporation contract which does not give rise to any contractual claim by the other party to the contract. With the recognition of unjust enrichment as a ground for granting restitutionary remedies, [86] there are now a range of doctrines that can be invoked by the party providing the tangible benefit to obtain restitution for the benefit conferred. Where property or money has been transferred to a company pursuant to a preincorporation contract, the property or money may be recovered on the basis that the transfer or payment was made under a mistake of fact. [87] Alternatively, recovery may be available on the grounds of failure of consideration in the sense that the plaintiff has not received any part of the consideration bargained for under the purported contract. [88] In *Westdeutsche Landesbank Girozentrale v LBC of Islington* [89] it was held that there was a general principle that moneys, paid under an ultra vires contract that was void ab initio, were recoverable on the grounds of total failure of consideration, or on equitable principles entitling a transferor to recover property that in equity belonged to him. Since a preincorporation contract is, like an ultra vires contract, void, these principles could also be applied to moneys paid to a company pursuant to a pre-incorporation contract. [90] Where benefits are conferred on a company on the basis of a pre-incorporation contract, the party providing the benefit will be entitled to a quantum meruit. [91]

10-018

It is submitted that money in the hands of a company can be "traced" no less when it has come into the company's hands as the result of a pre-incorporation contract than when it has done so as the result of an ultra vires contract, [92] and that the ordinary rules of equity also apply where a company has stood by and allowed another to expend money on its property in the mistaken belief, based on a pre-incorporation contract and known to the company, that he has some interest in that property. [93]

Public companies: trading certificate

10-019

A company which is registered as a public company shall not do business or exercise its borrowing powers unless it obtains a certificate from the registrar of companies. [94] Broadly speaking, the registrar is obliged to issue such a certificate once he has been satisfied that the company possesses the necessary allotted minimum share capital. [95] Failure to obtain a certificate can give rise to criminal and civil consequences. In particular, if a public company trades without a certificate and fails to obtain one within 21 days from being called upon to do so, the directors of the company shall be jointly and severally liable to indemnify the other party to the transaction in respect of any loss or damage suffered by him by reason of the failure of the company to comply with those obligations. [96]

Ultra vires contracts [97]

10-020

A company which owes its corporate existence to statute has not the inherent common law powers of chartered corporations. [98] Indeed, it has only capacity to enter into contracts authorised by the objects clause in its memorandum of association, or, in the case of companies not registered under the Companies Act 2006, by the terms of its special Act. Thus, it was held in *Ashbury Ry Carriage & Iron Co v Riche* [99] that any contract outside the scope of the objects clause is ultra vires of the company and void, even if the whole body of shareholders in the company assent to it. [100] A member of a company [101] is entitled to an injunction to restrain the company and its directors [102] from entering into an ultra vires contract or otherwise acting outside the powers of the company, e.g. criminally. [103] Although ss.35–35C of the Companies Act 1985 (originally s.9(1) of the European Communities Act 1972) greatly reduced the importance of the ultra vires doctrine, the provisions did not completely abrogate the effect of the doctrine, and there were some situations (although these were rare) where the common law doctrine had relevance. More importantly, as stated earlier, some knowledge of the common law is needed in order to understand fully the statutory modifications of the ultra vires doctrine. Accordingly, the common law position is discussed in the next six paragraphs, and the Companies Act 2006 is then considered. [104] At this point it must be emphasised that the development of the ultra vires doctrine since the Riche decision also witnessed judicial attempts, on the whole successful, to attenuate the doctrine so that a person dealing with a company will not be prejudiced by the latter's lack of capacity except in exceptional circumstances.

Scope of the rule

10-021

The phrase ultra vires "should be restricted to those cases where the transaction is beyond the capacity of the company and therefore wholly void". [105] The question whether the making of a particular contract is or is not ultra vires of the company depends upon the terms of the company's memorandum of association, which at the time had to state the company's objects. [106] Explaining the rule Lord Wrenbury [107] said:

> "The purpose, I apprehend, is twofold. The first is that the intending corporator who contemplates the investment of his capital shall know within what field it is to be put at risk. The second is that anyone who shall deal with the company shall know without

> reasonable doubt whether the contractual relationship into which he contemplates entering with the company is one relating to a matter within its corporate objects."

As was stated by Browne-Wilkinson L.J. in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [108]:

> "The question whether a transaction is outside the capacity of the company depends solely upon whether, on the true construction of its memorandum of association, the transaction is capable of falling within the objects of the company."

At common law the doctrine is not dependent on the person dealing with the company having notice of the company's lack of capacity; it operates regardless of the third party's state of knowledge as regards the contents of the company's objects clause. [109] In a number of cases it was held that where a company exercised a power which it undoubtedly possessed but for a *purpose* which was ultra vires, and this purpose was known to the party dealing with the company, the contract would be ultra vires in the sense of being outside the capacity of the company and hence void. [110] However, in the *Rolled Steel* decision the Court of Appeal considered that these cases should be treated as cases dealing with an abuse of the company's powers, not with corporate capacity, with the result that the transactions in these cases would be enforceable against the company unless the party dealing with it had notice (actual or constructive) that the transaction was in excess of or an abuse of the company's powers. [111] Normally a transaction falling within a company's objects clause will be within the vires of a company. However, in certain situations a provision in the objects clause may not be capable as existing as an object and may be merely an ancillary power; for example, the power to borrow. [112] Formerly parties dealing with companies were deemed to have notice of companies' memoranda of association [113] but this rule has now been abrogated. [114]

What contracts are ultra vires

10-022

It has been repeatedly asserted that the ultra vires doctrine must be reasonably applied, and that any contract made by a company which may fairly be regarded as incidental to or consequential upon those things which are authorised by the memorandum is not, unless expressly prohibited, to be held ultra vires. [115] This depends on the circumstances of each case. Thus a trading corporation has implied power to borrow money either upon security or otherwise, [116] to sell its property, [117] to purchase the subject matter of its business, [118] or to compromise claims made by or against it. [119] Wide powers given by general words in the memorandum of association may be construed as only ancillary to the company's main objects [120]; but this rule of construction may be excluded by the wording of the memorandum. [121] Not all the activities stated in a company's objects clause are necessarily objects in the strict sense, and "some of them may only be capable of existing as, or on their true construction are, ancillary powers". [122] Thus, for example, (as was stated earlier) a provision in a company's objects clause relating to borrowing will normally be treated as a power and not an independent object. [123] The courts have strained to interpret objects clauses liberally so as to validate transactions. In *Re New Finance & Mortgage Co Ltd* [124] the operation of a petrol station was held to fall within the terms of an objects clause authorising the company to carry on the business of "merchants generally". Goulding J., in the course of his judgment opined that the company's entire "objects clause is too loosely drawn to be of any real value to subscribers or persons dealing with the company". [125]

Opinion of the directors

10-023

Whether a contract is ultra vires or not depends in principle on whether the memorandum does in fact authorise the transaction in question, and not on whether the directors think that it does. [126] But where

a memorandum states that the company can carry on any business which, in the opinion of the board of directors, can be advantageously carried on in connection with, or as ancillary to, its authorised business, the position is different. In such circumstances the bona fide opinion of the directors that a business can be advantageously carried on in connection with, or as ancillary to, the company's principal business will suffice to render the former business intra vires. [127] The memorandum of a company may contain a statement that the powers of the company, or a particular power, must be exercised for "purposes of the company". Normally the court will construe this as being a limitation on the powers of the directors and *not* as a "condition limiting the company's corporate capacity". [128]

No ratification or estoppel

10-024

An ultra vires contract was not capable of ratification by a company [129]; nor can the company be estopped by deed [130] or otherwise [131] from showing that they had no power to do that which they profess to have done. [132]

Effect of ultra vires borrowing

10-025

A loan contracted by persons on behalf of a company which has no power to borrow does not create an indebtedness on the part of the company either at law or in equity. [133] Securities deposited by the company to secure such a loan can be recovered by it from the lender. [134] The money borrowed cannot be recovered from the company upon an implied promise to repay, as money had and received by the company to the use of the lender. [135] But if any part of the money which has been borrowed has been applied in discharging the company's debts, the lender is entitled to have that part of the loan treated as valid. [136] However, the lender is not subrogated to any securities or priorities enjoyed by the creditors who are paid by means of his money, the reason for this being that the ultra vires unsecured creditors should not be put in a better position than the company's unsecured creditors. [137] Money which is in the company's hands as the result of an ultra vires loan is treated as money belonging to the purported lender. So long therefore as that money is identifiable or traceable the lender is entitled to recover it or to a charge on the fund of which it forms part. [138]

Recovery of property of money under ultra vires transaction [139]

10-026

Where money or property is transferred under an ultra vires contract it can be recovered on the ground that since the contract was wholly void there was an inadequacy of consideration. [140] However, this right or recovery would not be available if the defendant could invoke the defence of change of position, that is, the recipient of the money had so changed his position that it would be inequitable to compel him to make restitution or to make restitution in full. [141]

Sections 39–42

10-027

Article 9 of the First Directive on Company Law [142] requires member states to introduce legislation abrogating the doctrine of ultra vires so as to ensure security of transactions between companies and those with whom they contract. This aspect of the Directive was first implemented by s.9(1) of the European Communities Act 1972 [143] which became s.35 of the 1985 Act. Section 35 was amended by s.108 of the Companies Act 1989 which inserted ss.35–35B into the 1985 Act. [144] The relevant provisions of the Companies Act 2006 are ss.39–42. These provisions also deal with the interrelationship of ultra vires and director's authority. [145]

Objects

10-028

Fundamental changes were introduced to the doctrine of ultra vires and the role of objects clauses in a company's constitution by the Companies Act 2006. Section 8 of the 2006 Act provides that a company's memorandum must merely state that the subscribers [146] to it wish to form a company under the Act, agree to become members, and in the case of a company with a share capital, to take at least one share each. [147] Thus the memorandum no longer contains an objects clause. A company's objects (if any) will be contained in a company's articles of association. Section 31(1) of the 2006 Act provides that "[u]nless a company's articles specifically restrict the objects of the company, its objects are unrestricted". Provisions in the memorandum of pre-2006 Act companies (which would include objects) are now treated as provisions in the company's articles other than provisions required to be in the memorandum by s.8 of the 2006 Act. [148] Where a company amends it articles to add, remove or alter its objects, notice must be given to the registrar and the amendment is not effective until it is registered by the registrar. [149] The company's constitution binds the company and its members "to the same extent as if there were covenants on the part of the company and of each member to observe" its provisions. [150] Section 171 of the 2006 Act imposes on the directors a statutory duty to act in accordance with the company's constitution [151] (which would cover any objects) and the shareholders have standing to enforce such a duty. [152]

Corporate capacity

10-029

In reforming the doctrine of ultra vires so as to ensure security of transactions between companies and those with whom they deal, it is necessary to ensure that the validity of the transaction cannot be called into question on the grounds of the company's want of capacity. This is clearly done by s.39 of the 2006 Act which provides that the "validity of an act done by a company" shall not be called into question by reason of anything in the company's constitution. Any contract can be enforced by or against the company even though it is not authorised by the company's constitution. Since a company's objects clause both confers capacity and restricts it, this means that the restriction, implicit by stating objects in the articles, does not affect the validity of any act entered into by the company. It is important to note that the section refers to an "act" of the company, a word that is of the widest import. The common law rule that a company could not ratify an ultra vires transaction has been jettisoned as ratification of such a transaction is now a matter of internal management given that the objects (if any) are now contained in the articles. Where a contract can be avoided because of a conflict of interest of a director who is a party to the contract, the European Court of Justice has held that this does not constitute a breach of art.9(1) of the First Directive. [153] This deals with "abuse" of authority rather than "want" of authority. [154]

Ultra vires and director's duties

10-030

It is a breach of duty for directors to enter into an ultra vires transaction since as fiduciaries they must keep within the limit of their powers arising from the limit on their principal's capacity. [155] The reform of ultra vires so as to ensure security of transactions, does not require that a director's duty to the company to act within its objects should in any way be modified. Section 171(a) provides that a director must act in accordance with the company's constitution.

10-031

An agent only has authority to act for the benefit of his principal unless the parties otherwise agree. [156] The same rule applies to directors. As was stated by Lord Nicholls in *Criterion Properties Plc v Stratford UK Properties Ltd* [157]:

> "If a company (A) enters into an agreement with B under which B acquires benefits from A, A's ability to recover these benefits from B depends essentially on whether the agreement is binding on A. If the directors of A were acting for an improper purpose when they entered into the agreement, A's ability to have the agreement set aside depends upon the application of familiar principles of agency and company law. If, applying these principles, the agreement is found to be valid and is therefore not set aside, questions of 'knowing receipt' by B do not arise. So far as B is concerned there can be no question of A's assets having been misapplied. B acquired the assets from A, the legal and beneficial owner of the assets, under a valid agreement made between him and A. If, however, the agreement is set aside, B will be accountable for any benefits he may have received from A under the agreement. A will have a proprietary claim, if B still has the assets. Additionally, and irrespective of whether B still has the same assets in question, A will have the personal claim against B for unjust enrichment, subject always to the defence of change of position. B's personal accountability will not be dependent upon proof of fault or 'unconscionable' conduct on his part. B's accountability, in this regard, will be 'strict'."

Ultra vires and director's authority

10-032

The authority of directors entering into contracts binding on a company is also constrained by the ultra vires doctrine since directors either individually or collectively could not possess any greater authority than their principal. If the doctrine of ultra vires is to be successfully abrogated it is also necessary to deal with this aspect of the problem. Section 40(1) provides that in "favour of a person dealing with a company in good faith" the power of the board shall be deemed to be free of any limitation flowing from the company's constitution; the same applies to the power of the directors to authorise others to act on behalf of the company. [158] Section 40 restates ss.35A and 35B of the 1985 Act and decisions dealing with these sections are equally applicable to s.40. Critical to the operation of this provision are the concepts of "dealing with" and "good faith". Both are defined in s.40(2). Section 40(2)(a) provides that a person deals with a company if he is a party to any act or transaction to which the company is a party. This would cover not only commercial transactions but also transactions which are gratuitous. [159] In *Smith v Henniker-Major & Co* [160] a director, at an inquorate board meeting, purported to assign to himself an asset of the company (a cause of action against the company's solicitors). This raised two issues: (a) was the failure to hold a quorate meeting a "limitation under the company's constitution" within s.35A(1) (s.40(1)); and (b) was a director a "person" protected by s.35A (s.40). As regards issue (a), Robert Walker L.J. considered that the question was what was the "irreducible minimum, if s.35A (s.40) is to be engaged". [161] In determining whether or not s.35A(1) (s.40(1)) applied it was necessary to distinguish "between a nullity (or non-event) and a procedural regularity" [162] the section only applying to the latter situation. On the facts Robert Walker L.J. held that the defect in the case, namely the inquorate board meeting, was a procedural irregularity and therefore fell within s.35A (s.40) as being a limitation under the company's constitution. Carnwarth L.J. considered the distinction between nullity and procedural irregularity to be unhelpful. He considered that the proper approach would be to determine if the act in question was carried out by someone appearing to be acting on behalf of the company, [163] and in the case he held that this test had been satisfied. As regards issue (b), the majority (Schiemann and Carnwarth L.JJ.) held that, at least on the facts of the case where the director was acting for the company, a director could not benefit from s.35A (now s.40 of the 2006 Act). In *EIC Services Ltd v Phipps* [164] the Court of Appeal held that in the case of a bonus issue of shares, which is an internal corporate arrangement with no alteration in the assets of liabilities of the company, a shareholder could not be held as dealing with the company within the terms of s.35A (s.40).

10-033

The definition of "good faith" is more tortuous and indirect. Section 40(2)(b)(iii) provides that a person shall not be treated as acting in bad faith by reason of his knowing that the act or transaction is "beyond the powers of the directors under the company's constitution". This is not a definition of

"good faith" but rather the singling out of a particular act as not constituting "bad faith". The reason for this is to found in art.9(2) of the First Directive. This provides that the:

> "… limits on the powers of the organs of the company, arising under the statutes or from a decision of the competent organs, may never be relied on as against third parties, even if they have been disclosed."

This Article only deals with restrictions on the scope of an agent's or organ's [165] authority and not with the abuse of authority. Although the provision does not contain any "good faith" limitation it is clear from the debates on the implementation of the Directive that it was not designed to protect persons who were acting in bad faith, [166] for example, entering into a transaction which they knew the directors were entering into not in the interests of the company but in their own interests. [167] This position has been implicitly adopted by the Court of Justice of the EU. [168] Thus (s.40(2)(b)(iii)) attempts to steer between actions which are in excess of authority as opposed to acts which constitute an abuse of authority—the dividing line between these situations will often be wafer thin in that a failure by directors to observe the limitations of a company's objects clause may often be indicative of a failure to act in the interests of the company. Good faith should not be interpreted as "reasonableness" [169] and failure to understand a company's objects should not be taken as evidence of bad faith, [170] but the more implausible the interpretation the easier it will be for the company to show an absence of good faith. [171] There is a presumption that a person has dealt with the company in good faith and the onus is on the company to prove the contrary. [172]

Limitations on director's authority and shareholder rights

10-034

As we have already seen when discussing corporate capacity, [173] a member of a company has the right to compel the company to observe the company's articles and memorandum of association. If this right were not curtailed then, similarly with the abrogation of the ultra vires doctrine, it would be possible for shareholders by asserting this right to enforce indirectly limitations on the powers of directors against third parties. To prevent this from happening, s.40(4) provides that no proceedings by a member shall lie to enjoin a company from entering into a transaction in fulfilment of a legal obligation arising out of a previous act of the company and this would cover legal obligations arising because of s.40 [174]; a member still retains the right to bring proceedings to restrain an action which is beyond the powers of the directors. [175]

Constructive notice

10-035

As previously stated, [176] it was a principle of company law that a person dealing with a company was deemed to have constructive notice of the company's public documents and, while there was some uncertainty as to what exactly fell within the category of public document for this purpose, it undoubtedly covered the company's memorandum and articles of association. [177] It is obviously a necessary corollary to the abrogation of the doctrine of ultra vires that this doctrine be also substantially repealed. This has been achieved by s.40(2) which provides that a person dealing with a company is not bound to enquire as to any limitation on the powers of the directors to bind the company or authorise others to do so.

Ultra vires contracts involving directors

10-036

It is not felt proper that a director should benefit from s.40 in the case of contracts in which the director was personally involved. Where a director of the company or of its holding company or any

person connected with such a director is a party to a transaction which exceeds any limitation on the powers of the directors, such transaction is voidable. [178] Also, irrespective of whether it is avoided, the director will be obliged to account to the company for any profit or to indemnify it for any loss. [179] Where a person (not a person connected with a director) who is a party to a contract along with a director to whom this provision applies, such person may petition the court to have the contract affirmed, severed or set aside on such terms as the court thinks fit. [180]

Charitable companies

10-037

Sections 39 and 40 [181] do not apply to the acts of a company which is a charity except in favour of a person: (i) who gives full consideration in money or money's worth; (ii) does not know that the act is not permitted by the company or that it is beyond the powers of the directors; or (iii) does not know that at the time the relevant act was done that the company was a charity. [182] In any proceedings the burden of proving that the person knew that the company was a charity or knew that the act was not permitted by the company's constitution or was beyond the powers of the directors lies on the person asserting that fact. [183] There is added protection for persons who acquire an interest in or over property acquired from a charitable company. [184]

Other applications of ultra vires principle

10-038

The ultra vires doctrine has sometimes been invoked to explain the invalidity of certain types of contracts entered into by companies, though in truth these appear to have little to do with the contractual capacity of companies. For example, prior to the Companies Act 1981, a contract by a company to purchase its own shares was void, [185] and a contract by a company to provide financial assistance in connection with the purchase of its own shares was illegal and unenforceable. [186] Again, a contract entered into by a company will not be binding on it if its directors have not been acting bona fide in the interests of the company in making the contract and this is known to the other party to the contract. [187] But cases of this kind do not appear to involve questions of capacity and are explicable on other grounds [188] (e.g. illegality or agency) which do not properly fall within the scope of this chapter.

Ratification of unauthorised act of officer

10-039

If a contract is beyond the powers of the officer of the company by whom it was effected, it may be ratified by the company so as to become binding upon it. [189] This also applies to a contract which is outside a company's objects as the objects are now in the articles and the shareholders would be ratifying a breach of the articles, something which is a matter of internal management. [190] In addition, there may by acquiescence in the act of the directors (if any) so that the company is estopped from objecting to its validity. [191] The test of acquiescence in such cases is whether the shareholders had notice of the way in which the affairs of the company were being conducted and were content not to oppose those acts which they knew were being done. [192] So, where everything that is done by the directors is known to and acquiesced in by a sole beneficial shareholder, [193] or by all shareholders with a right to attend and vote at a general meeting, [194] the company will be bound by the directors' acts whatever the company's constitution may say unless those acts are illegal. Where a corporation actually takes the benefit of a contract made in an irregular manner, the adoption will amount to ratification. [195]

Royal British Bank v Turquand

10-040

Where a director enters into a contract on behalf of a company, the company may be bound either by the ordinary rules of agency or by virtue of the rule in *Royal British Bank v Turquand*. [196] The latter has been variously described as part of the law of agency, [197] and as distinct from it, [198] but more recently authority has strongly favoured the first line of reasoning. [199] But it is generally agreed that this branch of the law presents exceptional difficulties although many of these have been reduced by s.40 of the 2006 Act. The general rule is that a stranger is entitled to assume that matters of internal management have been regularly carried out and that the formalities (if any) necessary to enable the company's officers to exercise their powers have been duly performed. But one who has notice that an agent of a company is contracting in excess of his authority cannot enforce that contract against the company. [200] Formerly notice of the memorandum and articles of association was imputed to every person having dealings with the company, [201] but this rule is effectively abrogated by s.40(2) of the 2006 Act. [202] The result of this seems to be that, whatever its original significance, the rule in *Turquand's* case now falls to be treated in most cases as part of the ordinary law of agency. The section has thus made no longer applicable cases holding (for example) that where directors have, by the articles, a power to borrow only up to a certain amount, any loan beyond that amount will be beyond the authority of the directors and therefore not binding on the company. [203]

10-041

The rule in *Turquand's* case, [204] however, does not apply where the circumstances are such as to put the third party on inquiry, as for example, where a bank negligently paid the cheques of a company signed by only one director, [205] or where the company's cheques were paid into a director's private account [206]; these decisions appear to be unaffected by s.40 of the 2006 Act because they do not depend on any limitations on the powers of the directors to bind the company arising from the company's constitution. [207] Another restriction on the operation of the rule at common law was that it could not apply to protect a third party who contracted with the company if, in some different capacity, e.g. as a director, he also acted on behalf of the company in making the contract. [208] These cases would now need to be interpreted in the light of s.41 of the 2006 Act which applies to a contract where the parties include a "director" irrespective of the capacity in which he enters into it. [209]

The rule cannot itself confer apparent authority

10-042

The rule in *Turquand's* case was often treated as an application of estoppel and it followed that an outsider who had not in fact examined the company's public documents could not assert the existence of an apparent authority merely because of some provision in those documents. This aspect of the rule is unaffected by ss.39–40 of the 2006 Act. On the other hand, this in no way prevents an outsider from setting up an apparent authority on ordinary principles of agency where the company holds a person out as having authority otherwise than by provisions in its articles. Thus if a company's constitution provides that the powers, or certain of the powers, of the board of directors may be delegated to a managing director, and one director acts as a managing director to the knowledge of the board, then even though he has never been formally appointed as such, an outsider is entitled to assume that the director has in fact the authority which a managing director would normally have. [210] Where, however, the director enters into some transaction which would not normally be within the powers of a managing director and there is no holding out so as to make s.40 of the 2006 Act applicable, it may be that an outsider cannot rely on any apparent authority unless he has examined the articles, and the articles themselves show that a properly appointed managing director would have such authority. [211]

10-043

In *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd*, [212] where the authorities on this difficult question were reviewed by the Court of Appeal, Diplock L.J. stated the following four conditions which must be satisfied to entitle a contractor to enforce a contract entered into on behalf of a company by an agent without actual authority.

> "It must be shown: (1) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor; (2) that such representation was made by a person or persons who had 'actual' authority [213] to manage the business of the company either generally or in respect of those matters to which the contract relates; (3) that he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied on it; and (4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent." [214]

It is important to note how these principles have been affected by ss.39–40 of the 2006 Act. Principle (4) has been abrogated. More importantly, principle (2) has also been virtually abrogated by s.40 since where that section applies the company will be bound by a transaction outside the authority of the directors even though no holding out was made by a person with actual authority to make one.

Section 161 of the Companies Act [215]

10-044

In some circumstances s.161 of the 2006 Act may also apply. That section provides that the "acts of a person acting as a director are valid notwithstanding that it is afterwards discovered": (a) "that there was a defect in his appointment"; (b) "that he was disqualified from holding office"; (c) "that he had ceased to hold office"; and (d) "that he was not entitled to vote on the matter". [216] Thus this section would appear, for example, to cover under age directors. [217] As stated in Buckley [218]:

> "Endangering accuracy for the sake of brevity, it may be said that the effect of this section is that, as between the company and persons having no notice to the contrary, directors, etc., de facto are as good as directors, etc., de iure."

In some ways the section is wider than the rule in *Turquand's* case [219] in that it may be relied upon not only by outsiders, but also by directors of the company and by the company itself; on the other hand, unlike the rule in *Turquand's* case, s.161 will not apply unless there has been an "appointment", albeit a defective appointment, but does not apply where there is no appointment. [220] Neither the rule nor the section can be called in aid by a third party who knew or should have known of the defect. [221]

Forgeries

10-045

It has been said that the rule in *Turquand's* case [222] does not apply where the document upon which it is sought to make the company responsible is a forgery. [223] But the three cases in which this question has arisen can all be explained on the ground either that the forged document was not put forward as genuine by an official acting within his actual or apparent authority, or that the outsider was put on inquiry. [224] This was the view taken by the High Court of Australia in *Northside Developments Pty Ltd v Registrar-General* [225] where the court stated that a company would be bound by a "forgery" where it was "estopped from denying the authority of the persons affixing the genuine seal and writing the genuine signature to it". [226] In *Lovett v Carson Country Homes Ltd* [227] a guarantee and a debenture were signed by a director who was also the company's secretary and this director also added the signature of another director without having any authority to do so. The court held that the company was bound, as the director who had actually signed the guarantee and debenture had ostensible authority to warrant that all the formalities relating to the approval and execution of the guarantee and debenture had been duly complied with. [228] In the course of his judgment the judge stated [229]:

> "No doubt a forged corporate document is a nullity in the sense that no one has actual authority on the part of a company to issue a forged document. But as the exception of estoppel shows, that does not mean that the forged document can in no circumstances have any effect whatsoever: just because circumstances can arise whereby the company may be estopped from disputing its validity. But once one accepts that, then, in my opinion, that immediately opens up the prospect that such a document cannot be sidelined as a nullity for all purposes in the case of apparent authority."

It is submitted therefore that where a document is made by an officer of a company who has apparent authority to do so, the rule can be applied and the company may be bound by the document even though the officer forged it for some purpose of his own.

Registration of charges [230]

10-046

A contract entered into by a company which involves a charge on its assets may require registration with the registrar of companies under Pt 25 of the Companies Act 2006. The most important types of charge covered by this section are charges to secure an issue of debentures; charges created by an instrument which, if executed by an individual, would require registration as a bill of sale; charges on land or any interest therein; charges on book debts; and floating charges on the undertaking or property of the company. [231] Prescribed particulars of a charge covered by s.860 must be delivered to the Registrar within 21 days after its creation. [232] Failure to deliver particulars of a charge [233] renders the charge void against a liquidator, an administrator and any creditor of the company, and also renders any debt secured by the charge immediately repayable. [234] The court has power under s.873 of the 2006 Act to extend the time for registration in various circumstances.

Effect of winding up on company's contracts

10-047

A compulsory winding up automatically brings the powers of a director to an end [235] and publication of the winding-up order discharges all persons employed by the company, giving them a right to damages for wrongful dismissal. [236] The liquidator may waive the dismissal brought about by publication of the winding-up order, and where he does so the old contract of employment continues. [237] Where the winding up is voluntary the powers of the directors likewise cease, except that the company in general meeting or the liquidator may sanction their continuance [238]; the passing of a resolution for voluntary winding up may, but does not necessarily, terminate general contracts of employment with the company so as to give the company's employees a right to damages for wrongful dismissal. [239] It may do so where the circumstances are such that the employee knows that the company cannot continue to fulfil its obligations, [240] or where, on the facts, the company has ceased to carry on business and there is no implied term in the contract of employment that the contract is subject to the continuance of business by the company. [241] Where an order is made by the court under s.900 of the Companies Act 2006 for the amalgamation of two companies, a contract of employment between a worker and the transferor company does not automatically become a contract of employment between the worker and the transferee company. [242]

Winding up not a repudiation

10-048

On the other hand, the winding up of a company is not by itself a repudiation of the contractual obligations of the company unless the personality of the company goes to the root of the contract, [243] though there are statutory provisions for the disclaimer of leases or other onerous or unprofitable contracts. [244] The liquidator has certain statutory powers to deal with the company's property some of which can only be exercised with the sanction of the court, the liquidation committee, or, in the case

of a members' voluntary winding up, the members. [245] Where a liquidator, appointed by the court, performs a contract of the company without disclaimer or where he purports to make a new contract on its behalf, he acts as agent for the company [246] and there is no presumption that he does so in a personal capacity. [247]

Dispositions of property in winding up

10-049

In a winding up by the court any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of members of the company, made after the commencement of the winding up, is, unless the court otherwise orders, void. [248] The court has a wide discretion in this respect which will be exercised having regard to what is fair and just in all the circumstances, particular attention being paid to the question of good faith and the principle that a company's free assets should be distributed pro rata among the company's unsecured creditors. [249] The court will readily validate transactions entered into bona fide in the course of trade and completed before the date of the winding-up order [250]; but the court will not validate the payment of a debt by the company to a debtor who has notice of the presentation of a winding-up petition [251] unless it is a "necessary part of a transaction which as a whole is beneficial to the general body of unsecured creditors". [252] The court will also normally validate the sale of an asset at its full market value as this does not dissipate the company's assets. [253] Further, the court can only validate a disposition of property; a contract for the sale of goods by a company is not a disposition of property which can be validated by the court unless the property in the goods has passed to the purchaser. [254]

Appointment of a receiver or manager [255]

10-050

An administrative receiver is a receiver appointed under a floating charge where the charge holder has a charge or charges over all or substantially all of a company's assets. [256] Under the Enterprise Act 2002 s.250 the holder of a floating charge created after a date appointed by the Secretary of State will no longer be able to appoint an administrative receiver. [257] Holders of a floating charge created before this date will be able to appoint an administration receiver provided of course they satisfy the terms of s.29(2). [258] The appointment of a receiver and manager by the court operates to discharge the company's employees. [259] But the appointment of a receiver and manager out of court by debenture holders, so that he becomes an agent of the company, does not normally operate to discharge the company's employees. [260] At common law such an appointment will, however, operate to discharge the company's employees if the appointment is accompanied by a sale of the company's business, [261] or if the appointment is accompanied by or followed by a new agreement with the company's employees, [262] and probably only if the new contract is inconsistent with the old, [263] or if the company's employees occupy positions which would be inconsistent with the position of the receiver. [264] Section 44(1)(a) of the Insolvency Act 1986 makes an administrative receiver of the assets of a company the company's agent unless and until the company goes into liquidation, a device that is primarily designed to avoid the security holder who appointed him from being treated as a mortgagee in possession. An administrative receiver is also made personally liable on any contract entered into by him. [265] Such liability can be excluded and almost invariably is. The 1986 Act also makes an administrative receiver personally liable "on any contract of employment adopted by him in carrying out" his functions, but that he is not to be "taken to have adopted a contract of employment by anything done or omitted to be done within 14 days after his appointment". [266] Initially, there was considerable uncertainty as to what this section means and, in particular, whether mere acquiescence in the continuation of contracts of employment can constitute an adoption. [267] However, in *Powdrill v Watson* [268] the House of Lords held that a receiver will be taken to have adopted a contract of employment where he treats the continued contract as giving rise to a separate liability in the receivership. The House also decided that the receiver could not reject some of the terms of the contract but accept others, but that his liability could be limited to liabilities arising during the period when he was in office. [269]

10-051

The appointment of a receiver does not amount to a repudiation of the trading contracts of the company, except in special circumstances. [270] It is often claimed that the receiver is in a better position than the company in that he need not observe existing contracts and, in addition, such contracts cannot be specifically enforced against him. [271] To permit contracts to be enforced against the company, or to require the receiver to comply with them would reverse the order of priorities in that it would oblige the receiver to prefer the interests of unsecured creditors over the interests of the security holder that appointed him. It is for this reason that the receiver is in a better position than the company as regards the obligation to observe existing contracts. [272] Where a receiver and manager, appointed by the court, orders goods for the purpose of the business of the company, the inference is that he pledges his personal credit for the goods, looking for indemnity to the assets of the company; he is therefore not necessarily the agent of the company [273] though he may be in particular circumstances. [274] The same is true of receivers appointed out of court where although an agent of the company he is personally liable in contracts he enters into unless the contract states otherwise. [275] The authority of a receiver is terminated by the winding up of the company whether it is voluntary [276] or by the court. [277] Although the authority of a receiver to act on behalf of the company is prima facie terminated by a winding-up order, this does not mean that a receiver appointed by debenture holders can no longer sell or convey property charged to the debenture holders, in respect of which a power of sale exists. [278] He can still exercise the in rem rights that his appointor has against the company's property.

Receivers and the tort of inducing a breach of contract

10-052

The question has arisen in a number of cases as to whether a receiver who does not observe a contract which the company has entered into before his appointment can be liable for the tort of inducing a breach of contract. [279] It has been held (not without misgivings) that a receiver cannot be held so liable in that the receiver as agent of the company is the alter ego of the company, the other party to the contract, and accordingly no possible action could lie against a person for procuring himself to induce a breach of contract. [280]

Administrators

10-053

The Enterprise Act 2002 [281] replaces the administration procedure set out in Pt II of the Insolvency Act 1986. This procedure like its predecessor imposes significant constraints on the right of a person to enforce a transaction against a company in administration. [282] Specialist texts should be consulted with respect to these provisions.

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45. This is not a summary of company law, but only of the law applicable to the contracts of companies.

46. *Kelner v Baxter (1866) L.R. 2 C.P. 174*; *Scott v Lord Ebury (1867) L.R. 2 C.P. 255*; *Wilson & Co v Baker, Lees & Co (1901) 17 T.L.R. 473*; *King v David Allen & Sons Billposting Ltd [1916] 2 A.C. 54*; Gross (1971) 87 L.Q.R. 367.

47. See Law Commission, Privity of Contract: Contracts for the Benefit of Third Parties (Report No.242), paras 8.9–8.16.

48. *Newborne v Sensolid (Great Britain) Ltd [1954] 1 Q.B. 45*; *Black v Smallwood (1965–66) 117 C.L.R. 52*. See also Vol.II, para.31-029.

49. *Kelner v Baxter (1866) L.R. 2 C.P. 174*.

50. *Hawkes Bay Milk Corp v Watson [1974] 2 N.Z.L.R. 236*. Note also the possible liability of the putative agent for breach of warranty of authority: see Bowstead on Agency, 20th edn (2014), Art.105.

51. First Directive 68/151 art.7 provides that: "If, before a company being formed has acquired legal personality, action has been carried out in its name and the company does not assume the obligations arising from such action, the persons who acted shall, without limit, be jointly and severally liable therefore, unless otherwise agreed."

52. This was inserted by s.130(4) of the 1989 Act.

53. *[1982] 1 Q.B. 938, 946* (Oliver L.J.).

54. *[1982] 1 Q.B. 938, 944*, per Lord Denning M.R.

55. For other cases dealing with s.36(4) of the 1985 Act see: *Rover International Ltd v Cannon Film Sales Ltd [1987] B.C.L.C. 540* (the subsection, as would be the case with s.51, does not affect foreign companies); *Oshkosh B'Gosh Inc v Dan Marbel Ltd [1989] B.C.L.C. 507*; *Cotronic (UK) Ltd v Dezonie [1991] B.C.L.C. 721*; *Badgerhill Properties Ltd v Cottrell [1991] B.C.L.C. 805*.

56. e.g. as in *Newborne v Sensolid (Great Britain) Ltd [1954] 1 Q.B. 45*. See generally Prentice (1973) 89 L.Q.R. 518, 530-533.

57. *Phonogram Ltd v Lane [1982] 1 Q.B. 938, 940*.

58. *[2015] EWHC 1890 (Ch)*.

59. *[2015] EWHC 1890 (Ch)* at [51].

60. *Braymist Ltd v Wise Finance Co Ltd [2002] EWCA Civ 127, [2002] Ch. 273*.

61. *[2002] EWCA Civ 127*.

62. *Cotronic (UK) Ltd v Dezonie [1991] B.C.L.C. 721*.

63. *Kelner v Baxter (1866) L.R. 2 C.P. 174*; *Melhado v Porto Alegre Ry (1874) L.R. 9 C.P. 503*; *North Sydney Investment & Tramway Co v Higgins [1899] A.C. 263*; *Scott v Lord Ebury (1867) L.R. 2 C.P. 255, 267*.

64. *Natal Land, etc., Co v Pauline Colliery Syndicate [1904] A.C. 120*.

65. *Howard v Patent Ivory Manufacturing Co (1888) 38 Ch. D. 156*.

66. *Re Northumberland Avenue Hotel Co (1886) 33 Ch. D. 16*; *Bagot Pneumatic Tyre Co v Clipper Pneumatic Tyre Co [1901] 1 Ch. 196, 203*.

67. *Howard v Patent Ivory Manufacturing Co (1888) 38 Ch. D. 156, 164-168*.

68. *[1987] B.C.L.C. 54; [1989] 1 W.L.R. 912 CA*. For other proceedings involving the parties see *Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 W.L.R. 670* where Hoffmann J. stated that it "would be a blot on English jurisprudence if this contract, acted on by both sides, had now to be held null and void" (at 679).

69. This argument was advanced in the 25th edition of this text, p.334.

70. *[1982] Q.B. 84*.

71. *[1989] 1 W.L.R. 912*; noted (1989) 105 L.Q.R. 179 (Beatson). For other aspects of this case see below, para.10-017.

72. See n.62.

73. *Howard v Patent Ivory Manufacturing Co (1888) 38 Ch. D. 156, 166*.

74. In some nineteenth-century cases there are dicta that persons who perform services for an unformed company will have a claim in equity for payment on the grounds that it is "inequitable for a man not to pay for services of which he has taken the benefit", per James L.J., *Re Empress Engineering Co (1880) 16 Ch. D. 125, 130*. See also *Hereford South Wales Waggon & Engineering Co (1876) 2 Ch. D. 621*. These dicta are of doubtful authority: no case actually turns on their application; they are often cited in the context of a company having purportedly "adopted" the contract, a phrase used with no great clarity; they are scarcely compatible with subsequent authority and were rejected in *Re English and Colonial Produce Co Ltd [1906] 2 Ch. 435, 442*.

75. *Spiller v Paris Skating Rink Co (1878) 7 Ch. D. 368*. The question of "adoption" was often bound up with the problem of part performance in connection with the Statute of Frauds (see above, paras 5-041—5-049) and it was sometimes suggested that part performance was itself a ground of liability in equity even in the absence of a binding contract (see *Wilson v West Hartlepool Ry (1865) 2 De G.J. & S. 475*) but it is clear today that this is not so: *Hunt v Wimbledon Local Board (1878) 4 C.P.D. 48, 61*.

76. *Falcke v Scottish Imperial Insurance Co (1886) 34 Ch. D. 234, 249-250*.

77. *Re Empress Engineering Co (1880) 16 Ch. D. 125, 130*; *Natal Land, etc., Co v Pauline Colliery Syndicate [1904] A.C. 120*.

78. *Touche v Metropolitan Ry Warehousing Co (1871) L.R. 6 Ch. App. 671* (it is important to note that the court found that there was a trust of the company's promise to the promoter, although how the trust was actually constituted is not clear from the facts).

79. *Re Empress Engineering Co (1880) 16 Ch. D. 125*; and see below, paras 19-066—19-067.

80. *Re National Motor Mail Coach Co, Clinton's Claim [1908] 2 Ch. 515*.

81. *Re English & Colonial Produce Co Ltd [1906] 2 Ch. 435*, disapproving dicta in *Re Hereford & South Wales Waggon, etc., Co (1876) 2 Ch. D. 621*; see also n.72.

82. *Re Hereford & South Wales Waggon, etc., Co (1876) 2 Ch. D. 621*.

83. *Earl of Lindsey v Great Northern Ry (1853) 10 Hare 664*; *Earl of Shrewsbury v North Staffordshire Ry (1865) L.R. 1 Eq. 593*.

84. *Earl of Shrewsbury v North Staffordshire Ry (1865) L.R. 1 Eq. 593*. These cases, decided before the consequences of the entity doctrine were fully appreciated, were considered to have been seriously "shaken" by the development of this doctrine: see Hodges, *A Law of Railways*, 7th edn (1888), pp.141-152. There is much substance to this view which is not significantly undermined by a more relaxed doctrine of privity, as to hold the company bound would for all intents and purposes sweep away the learning on pre-incorporation contracts, something which is scarcely likely to happen. The promoters who gave the assurance may, of course, be liable if there is deceit or, perhaps, for negligent misrepresentation or breach of warranty of authority.

85. *Earl of Shrewsbury v North Staffordshire Ry (1865) L.R. 1 Eq. 593*. See *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669*. The effect (if any) of s.51 of the Companies Act 2006 on this type of case is uncertain. For the categories of company covered by s.51, see s.1 and Pt 33 of the 2006 Act.

86. See Ch.29.

87. *Rover International Ltd v Cannon Film Sales Ltd [1989] 1 W.L.R. 912*. See Burrows, *The Law of Restitution*, 3rd edn (2011), p.202; Goff and Jones, *The Law of Unjust Enrichment*, 8th edn

(2011), para.2-30.

88. *Rover International Ltd v Cannon Sales Ltd [1989] 1 W.L.R. 912*; Burrows, at pp.393-396.

89. See above, n.83; see also *Kleinwort Benson Ltd v The South Tyneside MBC [1994] 4 All E.R. 972*.

90. Moneys paid on behalf of a company before it is has been formed could not be recoverable by the company, the company has lost nothing. See *Rover International Ltd v Cannon Film Sales Ltd [1989] 1 W.L.R. 912*.

91. *Rover International Ltd v Cannon Film Sales Ltd [1989] 1 W.L.R. 912*; *Cotronic (UK) Ltd v Dezonie [1991] B.C.L.C. 721*. In the latter case, the court held that s.34 of the 1985 Act did not preclude recovery.

92. See below, para.10-026.

93. See *Hunt v Wimbledon Local Board (1878) 4 C.P.D. 48, 61*. The same rules will apply where it is the company has expended the money on another's property.

94. Companies Act 2006 s.761.

95. s.761(2).

96. s.767.

97. The provisions dealt with in this paragraph, ss.35–36C of the 1985 Act, have been replaced by ss.39–40 of the 2006 Act. This is particularly relevant to paras 10-027—10-034. Also of relevance is, inter alia, s.31 of the 2006 Act which provides that a company's objects are unrestricted unless the company's articles specifically restrict the objects. Under the 2006 Act, a company's memorandum cannot contain a statement of its objects (s.8). If a company has objects they will have to be in its articles (s.31). See para.10-028 for a more extended treatment. However, a knowledge of the 1985 Act is necessary for an understanding of the current position.

98. See above, para.10-004.

99. *(1875) L.R. 7 H.L. 653*; and see *Att-Gen v Great Eastern Ry (1880) 5 App. Cas. 473*; *Wenlock (Baroness) v River Dee Co (1885) 10 App. Cas. 354*; *L.C.C. v Att-Gen [1902] A.C. 165*; *Att-Gen v Mersey Ry [1907] 1 Ch. 81; [1907] A.C. 415*; *Re Jon Beauforte (London) Ltd [1953] Ch. 131*; *Parke v Daily News Ltd [1962] Ch. 927*.

100. "An ultra vires agreement cannot become intra vires by means of estoppel, lapse of time, ratification, acquiescence, or delay": *York Corp v Henry Leetham & Sons Ltd [1924] 1 Ch. 557, 573*; see also para.10-024.

101. But not, in general, a creditor: *Mills v Northern Ry of Buenos Aires Co (1870) L.R. 5 Ch. App. 621*; *Cross v Imperial Continental Gas Association [1923] 2 Ch. 553*; *Lawrence v W. Somerset Mineral Ry Co [1918] 2 Ch. 250*; contrast *Maunsell v Midland G.W. (Ireland) Ry (1863) 1 Hem. & M. 130*. See also *Charles Roberts & Co Ltd v British Railways Board [1965] 1 W.L.R. 396* (action for declaration by business competitor of a nationalised industry); and as to relator actions, see *Att-Gen v Crayford U.D.C. [1962] Ch. 575*.

102. *Hoole v G.W. Ry (1867) L.R. 3 Ch. App. 262*. The right to restrain prospective ultra vires acts is based on the contract constituted by s.33 of the Companies Act 2006. A shareholder's standing to complain of past ultra vires acts gives rise to more complex problems: see *Smith v Croft (No.2) [1988] Ch. 114*.

103. See Buckley, *The Companies Acts*, 15th edn (2000), para.35-190.

104. Proposals for the reform of the ultra vires doctrine were put forward in a DTI consultative document: Reform of the Ultra Vires Rule: A Consultative Report (1986). These were partly implemented by ss.108-109 of the Companies Act 1989.

105. *Rolled Steel Products (Holdings) Ltd v British Steel Corp [1986] 1 Ch. 246, 303*, per Browne-Wilkinson L.J. (see also Slade L.J. 297). The phrase should not therefore be used to refer to situations where directors abuse or exceed their authority or where the transaction is illegal.

106. Companies Act 1985 s.2(1)(c). It has been said that a wider construction ought to be given to the memorandum of association of a commercial company than to the statute creating a company with special powers: *Att-Gen v Mersey Ry [1907] 1 Ch. 81, 106* (reversed *[1907] A.C. 415*), but see *Charles Roberts & Co Ltd v British Railways Board [1965] 1 W.L.R. 396*, at 400. See para.10-028 on the current position with respect to objects clauses.

107. *Cotman v Brougham [1918] A.C. 514, 522*; *Hazell v Hammersmith and Fulham LBC [1992] 2 A.C. 1, 36–37*; *Westdeutsche [1996] A.C. 669*.

108. *[1986] Ch. 246, 306*.

109. *[1986] Ch. 246, 304*. See also *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 Q.B. 480, 504*.

110. See, e.g. *Re Lee, Behrens & Co [1932] 2 Ch. 46*; *Re Jon Beauforte (London) Ltd [1953] Ch. 131*. cf. Insolvency Act 1986 s.238(5); *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669*.

111. Where the third party has knowledge the contract would appear to be void (*[1986] 1 Ch. 246, 306-307*); *Jyske Bank (Gibraltar) Ltd v Spgeldmaes Unreported July 29, 1999 CA*. Quaere if the contract is enforceable by the company and therefore only voidable.

112. *Rolled Steel Products (Holdings) Ltd v British Steel Corp [1986] Ch. 246, 305*.

113. *[1986] Ch. 246*; *Ernest v Nicholls (1857) 6 H.L. Cas. 401*. Copies of all a company's public documents are available for inspection: Companies Act 2006 s.1085.

114. See below, para.10-035.

115. *Att-Gen v Great Eastern Ry (1880) 5 App. Cas. 473, 478*; *Peel v L. & N.W. Ry [1907] 1 Ch. 5*; *S. Pearson & Sons Ltd v Dublin & S.E. Ry [1909] A.C. 217, 220*; *Dundee Harbour Trustees v Nicol [1915] A.C. 550*; *Municipal Mutual Insurance Ltd v Pontefract Corp (1917) 116 L.T. 671*; *Evans v Brunner, Mond & Co [1921] 1 Ch. 359*; *Deuchar v Gas Light & Coke Co [1925] A.C. 691*; *Wimbledon & Putney Commons Conservators v Tuely [1931] 1 Ch. 190*; *City of Winnipeg v C.P.R. Co [1953] A.C. 618*.

116. *General Auction Estate & Monetary Co v Smith [1891] 3 Ch. 432*.

117. *Re Kingsbury Collieries Ltd and Moore's Contract [1907] 2 Ch. 259*; *Re Thomas (William) & Co Ltd [1915] 1 Ch. 325*.

118. *Leifchild's Case (1865) L.R. 1 Eq. 231*.

119. *Dixon v Evans (1872) L.R. 5 H.L. 606*; *Bath's Case (1878) 8 Ch. D. 334*.

120. *Re German Date Coffee Co (1882) 20 Ch. D. 169, 188*. This case dealt with a petition to wind up a company on the grounds that its substratum had disappeared, a doctrine which although having a strong resemblance to that of ultra vires is not the same: *Cotman v Brougham [1918] A.C. 514*; *Re Tivoli Freeholds [1972] V.R. 445*.

121. *Cotman v Brougham [1918] A.C. 514*; *Anglo-Overseas Agencies Ltd v Green [1961] 1 Q.B. 1*.

122. *Rolled Steel Products (Holdings) Ltd v British Steel Corp [1986] Ch. 246, 305*.

123. *[1986] Ch. 246*. Normally it will not be possible to elevate this power into an object by a provision in a company's objects clause requiring all the objects to be interpreted independently of each other, although in other situations the courts have given full effect to such a clause: see *Cotman v Brougham [1918] A.C. 514*.

124. *[1975] 1 Ch. 420*. See also *Newstead v Frost [1980] 1 W.L.R. 135*.

125. *Newstead v Frost [1980] 1 W.L.R. 135* at 425.

126. *Tinkler v Wandsworth D.B.W. (1858) 2 De G. & J. 261, 274* (directors cannot confer power on a statutory company by asserting that something falls within the spirit of the Act).

127. *Bell Houses Ltd v City Wall Properties Ltd [1966] 2 Q.B. 656*. Although the statement to this effect in *Bell* was technically obiter, the Court of Appeal found the contract to be intra vires, it is generally considered to be correct: see *American Home Assurance Co v Tjmond Properties Ltd [1986] B.C.L.C. 181 NZCA*.

128. *Rolled Steel Products (Holdings) Ltd v British Steel Corp [1986] Ch. 246, 295*.

129. *Ashbury Railway Carriage & Iron Co v Riche (1875) L.R. 7 H.L. 653*; see below, para.10-029.

130. *Ex p. Watson (1888) 21 Q.B.D. 301*.

131. *Great N.-W. Central Ry v Charlebois [1899] A.C. 114*; *York Corp v Henry Leetham & Sons Ltd [1924] 1 Ch. 557*; see also n.206, below; cf. *Islington Vestry v Hornsey U.D.C. [1900] 1 Ch. 695*.

132. For the present statutory provision see below, paras 10-027 et seq.

133. *Baroness Wenlock v River Dee Co (1885) 10 App. Cas. 354*; see generally Vann (1978) 52 A.L.J. 490.

134. *Cunliffe Brooks & Co v Blackburn Benefit Building Society (1882) 22 Ch. D. 61; (1884) 9 App. Cas. 857*.

135. *Sinclair v Brougham [1914] A.C. 398*. See below, para.10-026. For criticisms of *Sinclair v Brougham* see *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669, 709-714*.

136. *Re Cork and Youghal Ry (1869) L.R. 4 Ch. App. 748*; *Cunliffe Brooks & Co v Blackburn Benefit Building Society (1882) 22 Ch. D. 61*; *B. Liggett (Liverpool) Ltd v Barclays Bank Ltd [1928] 1 K.B. 48*; *Re Airedale Co-operative Worsted Manufacturing Society Ltd [1933] Ch. 639*. The onus is on the person claiming the money to establish the necessary factual connection: see *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 689*.

137. *Re Wrexham Mold and Connah's Quay Ry [1899] 1 Ch. 440*; Goff and Jones, *The Law of Restitution*, 6th edn (2002), pp.127, 162-163 (not in the more recent edition). On the limits of subrogation where the contract is illegal see *Orakpo v Manson Investments Ltd [1978] A.C. 95*.

138. *Sinclair v Brougham [1914] A.C. 398*, where the principle of *Re Hallett's Estate (1880) 13 Ch. D. 696* as to the tracing and identification of blended money was explained and the method adopted in *Re Guardian Permanent Benefit Building Society (Crace Calvert's Case) (1882) 23 Ch. D. 440* was criticised. See also *Re Diplock [1948] Ch. 465, 518-519* (affirmed sub nom. *Ministry of Health v Simpson [1951] A.C. 251*). For other consequences of an ultra vires transaction see Goff & Jones, *The Law of Unjust Enrichment*, 8th edn (2011), pp.648-649, 772-774.

139. See below, paras 29-044 et seq.

140. Title to money or property can be transferred under an ultra vires contract: see *Ayres v South Australian Banking Corp (1871) L.R. 3 P.C. 548*; *Westdeutsche Landesbank Girozentrale v Islington LBC [1996] A.C. 669, 689-690*.

141. *Lipkin Gorman v Karpnale [1991] 2 A.C. 548*; see also below, paras 29-186 et seq.

142. First Directive 68/151 on Company Law [1968] O.J. L65/7.

143. See Prentice (1973) 89 L.Q.R. 518; Collier and Sealy (1973) C.L.J. 1.

144. These provisions were brought into effect on February 4, 1991. These reforms were based in part on a consultative report, Reform of the Ultra Vires Rule (DTI, 1986); see also "Modern Company Law—The Strategic Framework", Company Law Review Steering Committee (February 1999), Ch.5.3.

145. See s.40.

146. These are persons who subscribe their name to the memorandum: s.7.

147. s.8(1).

148. s.28.

149. s.31(2)(c). Charitable companies will still have to restrict their objects under charities legislation: s.31(4).

150. s.33(1) which replaces s.14 of the 1985 Act. There is, of course, no reference in s.33 to articles or memorandum but rather to the company's constitution which is defined in s.17 of the 2006 Act.

151. This was also the position at common law: see below, para.10-030.

152. Pt 11 (Derivative claims).

153. *Co-operative Rabobank Vecht en Plassgebied BA v Minderland (C-104/96) [1998] 2 B.C.L.C. 507*.

154. See below, para.10-032.

155. *Re Faure Electric Accumulator Co (1889) 40 Ch. D. 141*; *Ferguson v Wilson (1866) L.R. 2 Ch. 77*; *Northern Counties Securities Ltd v Jackson & Steeple Ltd [1974] 1 W.L.R. 1133*; Bowstead and Reynolds on Agency, 18th edn (2006), paras 8–033, 8–036, 8–038.

156. Bowstead and Reynolds on Agency, 20th edn (2010), at para.8-031, art.23 cited with approval in *Hopkins v T L Dallas Group Ltd [2004] EWHC 1379 (Ch), [2005] 1 B.C.L.C. 543*.

157. *[2004] UKHL 28, [2004] 1 W.L.R. 1846* at [4].

158. Note that this covers all limitations flowing from the company's constitution. Limitations on the directors' powers flowing from a resolution of any meeting or a class meeting of shareholders or any agreement of the members are covered: see s.40(3). On this type of constitutional limitation see, e.g. *Cane v Jones [1980] 1 W.L.R. 1451*.

159. As, e.g. in *Parke v Daily News Ltd [1962] Ch. 927*; *Simmonds v Heffer [1983] B.C.L.C. 298*.

160. *[2002] EWCA Civ 762, [2002] 2 B.C.L.C. 655*. For the first instance judgment of Rimer J. see *[2002] B.C.C. 544*.

161. *[2002] EWCA Civ 762* at [41].

162. *[2002] EWCA Civ 762*.

163. *[2002] EWCA Civ 762* at [108].

164. *[2004] EWCA Civ 1069, [2005] 1 All E.R. 325*.

165. The concept of organ does not fit neatly into English company law but would at least include the board and the shareholders in general meeting including, it is submitted, a class meeting of shareholders.

166. See Stein, *Harmonization of European Company Law* (1970), p.294.

167. See, e.g. *Rolled Steel Products (Holdings) Ltd v British Steel Corp [1986] Ch. 246*.

168. *Co-operative Rabobank Vecht en Plassengebied BA v Minderhoud (C-104/96) [1998] 1 W.L.R. 1025*.

169. *Barclays Bank Ltd v TOSG Trustfund [1984] B.C.L.C. 1, 18* ("reasonableness is not a necessary ingredient of good faith", per Nourse J. at first instance); cf. Bills of Exchange Act 1882 s.90; Paget's Law of Banking, 14th edn (2014), para.27–13. See also *International Sales and Agencies Ltd v Marcus [1982] 3 All E.R. 551, 559*.

170. For example, if the person dealing with the company reads but misinterprets the articles: see *Re Introductions Ltd [1970] Ch. 199*.

171. See, e.g. the bank in *Re Introductions Ltd [1970] Ch. 199*; *Wrexham Association Football Club Ltd v Curcialmove Ltd [2006] EWCA (Civ) 237, [2008] 1 B.C.L.C. 508* at [47].

172. s.40(2)(b)(ii).

173. See para.10-020.

174. It remains a breach of duty for directors to enter into a transaction which is not authorised by the company's constitution: see the Companies Act 2006 s.171.

175. s.40(4).

176. See para.10-021.

177. *Irvine v Union Bank of Australia (1877) 2 App. Cas. 399 PC*; *Re London and New York Investment Corp [1895] 2 Ch. 860*.

178. s.41(1), (2). See also s.41(4) (bars to the avoidance of the contract). See also below, para.10-056.

179. s.41(3). Quaere if the liability under this subsection can be waived by the company. Other parties to the transaction can also be liable in the same way as directors but they are provided with a defence in s.41(4).

180. s.41(6). The company may also make an application.

181. The Charities Act 1993 Sch.6 para.20 has been repealed: see Sch.16 to the 2006 Act.

182. s.42.

183. s.42(3). Any affirmation of a transaction with a charity to which s.41 applies requires the written consent of the Charity Commissioners (s.42(4)).

184. s.42(2).

185. This was the old rule in *Trevor v Whitworth (1887) 12 App. Cas. 409*. Companies may now purchase their own shares provided certain statutory pre-conditions are satisfied: see Pt 18, Chs 1 and 4 of the 2006 Act; see also *Precision Dippings Ltd v Precision Dippings Marketing Ltd [1986] Ch. 447* (the transaction in that case would have been more appropriately classified as illegal rather than ultra vires).

186. *Victor Battery Co v Curry's Ltd [1946] Ch. 242*; *South Western Mineral Water Co Ltd v Ashmore [1967] 1 W.L.R. 1110*; *Armour Hick Northern Ltd v Whitehouse [1980] 1 W.L.R. 1520* interpreting the Companies Act 1948 s.54. On financial assistance by a company in the purchase of its own shares see now Pt 18 Ch.2 of the 2006 Act.

187. For a recent example, see *Re R.W. Roith Ltd [1967] 1 W.L.R. 432*. An agent (and this includes a director) only has authority to act for the benefit of his principal unless the parties otherwise agree: see *Criterion Properties Plc v Stratford UK Properties Ltd [2004] 1 W.L.R. 1846*. Where the contract is with a third party who has no notice of the director's want of good faith, the contract will be enforceable: *Rolled Steel Products (Holdings) Ltd v British Steel Corp [1986] Ch. 246* (see also para.10-031).

188. See Gower & Davies, *Principles of Modern Company Law*, 7th edn (2003), pp.132–134 (not in the more recent edition); see also *Charterbridge Corp Ltd v Lloyds Bank [1970] Ch. 62*; *Heald v O'Connor [1971] 1 W.L.R. 497*.

189. *Reuter v Electric Telegraph Co (1856) 6 E. & B. 341, 348*; *Allard v Bourne (1863) 15 C.B.(N.S.) 468*; *Rolled Steel Products (Holdings) Ltd v British Steel Corp [1986] Ch. 246* clearly distinguishes the issues of corporate capacity and director's duties. But an attempt to confer authority on directors with respect to future transactions would be treated as an attempt to alter the articles of association for which a special resolution would be necessary: *Grant v UK Switchbank Ry (1888) 40 Ch. D. 135*.

190. s.39; see above, para.10-028.

191. *Re Magdalena Steam Navigation Co (1860) Johns. 690*.

192. *Evans v Smallcombe (1868) L.R. 3 H.L. 249, 256*; and see *Phosphate of Lime Co Ltd v Green (1871) L.R. 7 C.P. 43*; *London Financial Association v Kelk (1884) 26 Ch. D. 107*; *Re Bailey Hay & Co Ltd [1971] 1 W.L.R. 1357*.

193. *Personal Service Laundry Ltd v National Bank Ltd [1964] I.R. 49*; *Walton v Bank of Nova Scotia (1965) 52 D.L.R. (2d) 506*.

194. *Re Duomatic Ltd [1969] 2 Ch. 365*.

195. *Smith v Hull Glass Co (1852) 11 C.B. 897*; *Re Bonelli's Telegraph Co, Collie's Claim (1871) L.R. 12 Eq. 246, 259*.

196. *(1856) 6 E. & B. 327*. See generally, Campbell (1959–60) 75 L.Q.R. 469, 76 L.Q.R. 115.

197. Gower & Davies, *Principles of Modern Company Law*, 7th edn (2003) at pp.132–134.

198. Pennington, *Company Law*, 8th edn (2001), p.131.

199. *Freeman & Lockyer v Buckhurst Park Properties Mangal Ltd [1964] 2 Q.B. 480*; Nock (1966) Conv.(N.S.) 123, 163. cf. *Northside Developments Pty Ltd v Registrar-General (1990) 64 A.L.J.R. 427*.

200. *Rolled Steel Products (Holdings) Ltd v British Steel Corp [1986] Ch. 246, 283* (per Slade L.J.), 304 (per Browne-Wilkinson L.J.).

201. See *Fountaine v Carmarthen Ry (1868) L.R. 5 Eq. 316*; *Crampton v Varnay Ry (1872) L.R. 7 Ch. App. 562, 568*; *Mahony v East Holyford Mining Co (1875) L.R. 7 H.L. 869, 893*; *County of*

Gloucester Bank v Rudry Merthyr Steam & House Coal Colliery Co [1895] 1 Ch. 629.

202. Replacing s.35B of the 1985 Act.

203. *Irvine v Union Bank of Australia (1877) 2 App. Cas. 366*. A case which arguably was decided on a wrong application of the *Turquand* rule. In that case, Sir Barnes Pollock considered that the resolution authorising the director to borrow above the stipulated limit would have had to be registered under the Companies Act 1862 s.53, so that a person dealing with the company would have had notice of it. This in fact was not so, and the ordinary resolution increasing the directors' borrowing powers did not have to be registered.

204. *(1856) 6 E. & B. 327*.

205. *B. Liggett (Liverpool) Ltd v Barclays Ltd [1928] 1 K.B. 48*; cf. *South London Greyhound Racecourses Ltd v Wake [1931] 1 Ch. 496*; *Houghton & Co v Nothard, Lowe & Wills [1927] 1 K.B. 246, affirmed [1928] A.C. 1*.

206. *A.L. Underwood Ltd v Bank of Liverpool & Martins [1924] 1 K.B. 775*. Such a transaction may also not fall within the usual or apparent authority of a director: see *Acute Property Developments Ltd v Apostolou [2013] EWHC 200 (Ch)*.

207. *International Sales and Agencies Ltd v Marcus [1982] 3 All E.R. 551*.

208. *Morris v Kanssen [1946] A.C. 459*; *Smith v Henniker Mayor & Co [2002] EWCA Civ 762, [2002] 2 B.C.L.C. 655*. cf. *Hely-Hutchinson v Brayhead Ltd [1968] 1 Q.B. 549*, affirmed on different grounds, 573; see also *John v Rees [1970] Ch. 345*.

209. Above, para.10-036.

210. *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 Q.B. 480*. All the earlier authorities must now be read in the light of this case, see, e.g. *Biggerstaff v Rowatt's Wharf Ltd [1896] 2 Ch. 93*; *Dey v Pullinger Engineering Co [1921] 1 K.B. 77*; *Houghton & Co v Nothard, Lowe & Wills Ltd [1927] 1 K.B. 246*; *Kreditbank Cassel GmbH v Schenkers Ltd [1927] 1 K.B. 826*; *British Thomson-Houston Co Ltd v Federated European Bank Ltd [1932] 2 K.B. 176* ; *South London Greyhound Racecourses Ltd v Wake [1931] 1 Ch. 496*; *Rama Corp v Proved Tin & General Investments Ltd [1952] 2 Q.B. 147*; *British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) Ltd [1983] 2 Lloyd's Rep. 9*; *Rhoddian River Shipping Co SA v Halla Maritime Corp [1984] 1 Lloyd's Rep. 373*. See also Vol.II, paras 31-056—31-060.

211. In the *Freeman and Lockyer [1964] 2 Q.B. 480* case this was held to be the correct explanation of the *Houghton [1927] 1 K.B. 246* case, the *Schenkers [1927] 1 K.B. 826* case, and the *Rama [1952] 2 Q.B. 147* case. As a matter of principle it is difficult to see how mere knowledge of the articles could operate to confer an apparent authority on a director: see *Houghton & Co v Nothard Lowe & Wills Ltd [1927] 1 K.B. 246, 266*.

212. *[1964] 2 Q.B. 480*. See also *Hely-Hutchinson v Brayhead Ltd [1968] 1 Q.B. 549*. As to the authority of: (1) a company's secretary, see *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd [1971] 2 Q.B. 711*; (2) the individual director, see Leigh, *The Criminal Liability of Companies in English Law* (1969), pp.94–95. There is controversy as to whether being chairman of the board confers authority on the holder of this position greater than that of the ordinary director. Although there is some authority that it does (*British Thomson-Houston Co Ltd v Federated European Bank [1932] 2 K.B. 176*; *Clay Hill Brick Co Ltd v Rawlings [1938] 4 All E.R. 100*), it is difficult to appreciate why being appointed chairman should confer this additional authority; see generally Gower & Davies, *Principles of Modern Company Law*, 9th edn (2012) at p.183.

213. There was, however, a difference of opinion in the Court of Appeal on this point. Pearson L.J. took the view that a director acting as the alter ego of a company may hold *himself* out qua agent as having the necessary authority: *[1964] 2 Q.B. 480, 499*, citing Greer L.J. in the *British Thomson-Houston case [1932] 2 K.B. 176, 182*, although the judgment of Greer L.J. provides scant support for this proposition. The British Thomson-Houston case was cited with approval

by Browne-Wilkinson L.J. in *Egyptian International Foreign Trading Co v Soplex Wholesale Supplies Ltd and P.S. Refson & Co Ltd [1985] 2 Lloyd's Rep. 36, 43*, but Kerr L.J. in the latter case, "as at present advised", considered that an agent's assurance as to his authority could not vest him with wider authority than he already possessed (at 46). For dicta which on the whole support Kerr L.J. see *Armagas Ltd v Mundogas SA [1985] 1 Lloyd's Rep. 1, 37 and 67–68, [1986] A.C. 717, 733–735, 749*. See also Diplock L.J. in *Freeman*: a "contractor cannot rely on the agent's own representation as to his actual authority" (at 505). These somewhat conflicting dicta were reconciled in *First Energy (UK) Ltd v Hungarian International Bank Ltd [1993] B.C.L.C. 1409* on the grounds that while an agent, without actual authority or apparent authority, cannot enlarge his appearance of authority by his own representation, he may nevertheless have apparent authority to communicate decisions of the company, for example, that the board of directors have approved of a particular transaction.

214. *[1964] 2 Q.B. 480, 504–505*.

215. Section 161 replaces s.285 of the 1985 Act.

216. s.161 overrides s.160 ("appointment of directors of public company to be voted on individually").

217. They would be disqualified (s.157 and s.161(1)(b)) or cease to act (s.159 and s.161(1)(c)).

218. Buckley, *On the Companies Acts*, para.285-4.

219. *(1856) 6 E. & B. 327*.

220. *Morris v Kanssen [1946] A.C. 459, 471*.

221. *Kanssen v Rialto (West End) Ltd [1944] Ch. 346*; affirmed sub nom. *Morris v Kanssen [1946] A.C. 459*.

222. See above, n.217.

223. *Ruben v Great Fingall Consolidated Co [1906] A.C. 439, 443*; *Kreditbank Cassel GmbH v Schenkers Ltd [1927] 1 K.B. 826, 844*; *South London Greyhound Racecourses Ltd v Wake [1931] 1 Ch. 496*. In *Lovett v Carson Country Homes Ltd [2009] 2 B.C.L.C. 196* at [89] the court considered that *South London Greyhound Racecourses v Wake* was a "decision which to my mind is very hard to sustain".

224. See Campbell (1960) 76 L.Q.R. 115, 130 et seq.

225. *(1990) 64 A.L.J.R. 427*.

226. *(1990) 64 A.L.J.R. 427, 443*. See also *Lonsdale Nominee Pty Ltd v Southern Cross Airlines Ltd (1993) 10 A.C.S.R. 739*. Where there is a forgery in the strict sense of the word, i.e. the name of a person is falsely appended to a document, then this would obviously not be binding on the company.

227. *[2009] EWHC 1143 (Ch), [2009] 2 B.C.L.C. 196*.

228. *[2009] EWHC 1143 (Ch)* at [96].

229. *[2009] EWHC 1143 (Ch)* at [90]; see also n.217.

230. For details, see Buckley on the Companies Acts, Division H; Gough, *Company Charges*, 2nd edn (1998). As to the conclusiveness of the Registrar's certificate of registration, see Companies Act 2006 s.869(6)(b); *R. v Registrar of Companies Ex p. Esal Commodities Ltd [1986] Q.B. 1114*. Pt 25 of the 2006 Act restates but does not make any substantive changes to Pt XII of the 1985 Act. Section 894 of the 2006 Act enables the Secretary of State to amend Pt 25 by regulations which are subject to the affirmative resolution procedure. See Company Law Review: Proposals for Reform of Part XII of the Companies Act 1985 (DTI, A Consultative

Document, November 1994); Registration of Security Interest: Company Charges and Property other than Land (Law Commission Consultation Paper No.164, 2002).

231. s.861(7).

232. s.870.

233. It is important to note that it is delivery of the particulars of the charge rather than registration which saves it from invalidity; see *NV Slavenburg's Bank v Intercontinental Natural Resources Ltd [1980] 1 W.L.R. 1076*.

234. s.874.

235. *Re Oriental Inland Steam Co (1874) 9 Ch. App. 557, 560*; *Fowler v Broad's Patent Night Light Co [1893] 1 Ch. 724*; *Gosling v Gaskell [1897] A.C. 575, 587*; *Measures Brothers v Measures [1910] 2 Ch. 248, 256*. In the case of a voluntary winding up, see Insolvency Act 1986 ss.91(2), 103. On the effect of winding up on the powers and office of directors, see Keay and Walton, *Insolvency Law: Corporate and Personal*, 3rd edn (2012), p.290.

236. *Re General Rolling Stock Co, Chapman's Case (1866) L.R. 1 Eq. 346*; *Ex p. Maclure (1870) L.R. 5 Ch. 737*; *Re R.S. Newman Ltd [1916] 2 Ch. 309*; *Re Oriental Bank Corp, MacDowall's Case (1886) 32 Ch. D. 366*. An employee's right to damages is not affected by the fact that he may, as a shareholder, have supported the resolution for voluntary winding up: *Fowler v Commercial Timber Co [1930] 2 K.B. 1*. See Vol.II, paras 40-178—40-179.

237. *Re English Joint Stock Bank Ex p. Harding (1867) 3 Eq. 341*.

238. Insolvency Act 1986 ss.91(2), 103.

239. *Midland Counties District Bank Ltd v Attwood [1905] 1 Ch. 357*; *Fox Bros (Clothes) Ltd v Bryant [1979] I.C.R. 64*; see also Vol.II, para.40-181.

240. *Reigate v Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 K.B. 592*.

241. *[1918] 1 K.B. 592*; *Fowler v Commercial Timber Co [1930] 2 K.B. 1, 6*.

242. *Nokes v Doncaster Amalgamated Collieries Ltd [1940] A.C. 1014* (this was decided under s.427 of the 1985 Act which s.900 restates).

243. *British Waggon Co v Lea (1880) 5 Q.B.D. 149*; cf. *Tolhurst v Associated Portland Cement Manufacturers Ltd [1903] A.C. 414*, commented on in *Nokes v Doncaster Amalgamated Collieries Ltd [1940] A.C. 1014, 1019–1020*; and see paras 19-055—19-057.

244. See Insolvency Act 1986 s.178. This is a change from the old law: see *Re Hans Place Ltd [1993] B.C.L.C. 768*; *Re Morrish (1882) 22 Ch. D. 410*; *Re A.B.C. Coupler and Engineering Co Ltd (No.3) [1970] 1 W.L.R. 702*; *Warnford Investments Ltd v Duckworth [1979] Ch. 127*; *Re A.E. Realisations (1986) Ltd [1987] B.C.L.C. 486*. Such disclaimer does not release a guarantor of the rents from his guarantee: *Hindcastle Ltd v Barbara Attenborough Associates Ltd [1997] A.C. 70*. See also *Re Park Air Services Plc [2000] 2 A.C. 172*.

245. Insolvency Act 1986 ss.165–167; see *Bateman v Ball (1887) 56 L.J.Q.B. 291*; *Hire Purchase Furnishing Co v Richens (1887) 20 Q.B.D. 387*.

246. *Re Anglo-Moravian Co (1875) 1 Ch. D. 130*.

247. *Stead Hazel & Co v Cooper [1933] 1 K.B. 840*. Representative language was not used in this case although it is always prudent for a liquidator to contract clearly in a representative capacity.

248. Insolvency Act 1986 s.127; *Mond v Hammond Suddards [1996] 2 B.C.L.C. 470*; *Hollicourt*

(Contractors) Ltd v Bank of Ireland [2001] Ch. 555; *Re Tain Construction Ltd [2003] 2 B.C.L.C. 374*; *Wilson v SMC Properties [2015] EWHC 870 (Ch)*.

249. *Re Steane's (Bournemouth) Ltd [1950] 1 All E.R. 21*; *Re T.W. Construction Ltd [1954] 1 W.L.R. 540*; *Re Clifton Place Garage Ltd [1970] Ch. 477*; *Re Operator Control Cabs Ltd [1970] 3 All E.R. 657n*; *Re Argentum Reductions (UK) [1975] 1 W.L.R. 186*; *Re Gray's Inn Construction Co Ltd [1890] 1 W.L.R. 711*; *Re Tramway Building and Construction Co Ltd [1987] B.C.L.C. 632*; *Re Webb Electric Ltd [1988] B.C.L.C. 382*; *Denney v John Hudson & Co Ltd [1992] B.C.L.C. 901*.

250. *Re Wiltshire Iron Co (1868) L.R. 3 Ch. App. 443*; *Re Park Ward & Co [1926] Ch. 828*; *Re French's (Wine Bar) Ltd [1987] B.C.L.C. 437*.

251. *Re Civil Service & General Store Ltd (1887) 57 L.J. Ch. 119*; cf. *Re T.W. Construction Ltd [1954] 1 W.L.R. 540*.

252. *Re Gray's Inn Construction Co Ltd [1980] 1 W.L.R. 711, 719*. See also *Denney v John Hudson & Co Ltd [1992] B.C.L.C. 901*.

253. *[1992] B.C.L.C. 901*. In the case of a solvent company, the court will validate a disposition under the Companies Act 2006 s.127 provided that an intelligent and honest board of directors could reasonably take the view that the arrangements were in the best interests of the company. Only where bad faith or other exceptional circumstances are proved will the court decline to act under s.127; *Re Burton and Deakin Ltd [1977] 1 W.L.R. 390*.

254. *Re Oriental Bank Corp Ex p. Guillemin (1883) 28 Ch. D. 634*; *Re Wiltshire Iron Co (1868) L.R. 3 Ch. App. 443*.

255. For the definition of receiver see Insolvency Act 1986 s.29. In particular note the definition of administrative receiver a term first introduced by the Insolvency Act 1986: see also s.251 of the 1986 Act.

256. Insolvency Act 1986 s.29(2).

257. This introduces ss.72A–72H into the Insolvency Act 1986. The prohibition affects floating charges created after September 15, 2003 (SI 2003/2093).

258. There are also a number of exemptions to the prohibition on appointing an administrative receiver: see Insolvency Act 1986 ss.72C–72H.

259. *Reid v Explosives Co (1887) 19 Q.B.D. 264* (note, however, the reservations of Fry L.J.); *Re Mack Trucks (Britain) Ltd [1967] 1 W.L.R. 780*; *Griffiths v Secretary of State for Social Services [1974] Q.B. 468*. This principle has not been followed in Australia: see *Spidad Holding v Popovic (1995) 19 A.C.S.R. 108*.

260. *Griffiths v Secretary of State for Social Services [1974] Q.B. 468*; *Deaway Trading Ltd v Calverley [1973] I.C.R. 546*; see Vol.II, paras 40-178—40-179.

261. *Re Foster Clark Ltd's Indenture Trusts [1946] 1 W.L.R. 125*. The position has now been substantially modified by the Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1794). See Vol.II, paras 40-179 et seq.

262. *Re Mack Trucks (Britain) Ltd [1967] 1 W.L.R. 780*.

263. *Griffiths v Secretary of State for Social Services [1974] Q.B. 468, 486*.

264. *Griffiths v Secretary of State for Social Services [1974] Q.B. 468*; see Freedland, *The Contract of Employment* (1975), p.339.

265. s.44(1)(b). On the nature of the administrative receiver's liability see *Re Atlantic Computer*

Systems Plc (No.1) [1992] Ch. 505, 526.

266. s.44(1)(b), (2). This was designed to overcome the decision in *Nicoll v Cutts [1985] B.C.L.C. 322*.

267. Stewart, *Administrative Receivers and Administrators*, pp.96–99.

268. *[1995] 2 A.C. 394*.

269. In the lower courts it was held that the receiver who adopted the contract would be liable for all outstanding liabilities: see *[1995] 2 A.C. 394* where the judgment of Lightman J. is reported. Because of the threat of liability this resulted in receivers, and more importantly administrators who are similarly liable under s.19 of the 1986 Act, in terminating contracts of employment, s.44 and s.19 of the Act have been modified by the Insolvency Act 1994 so that receivers and administrators will only be liable for services on a contract of employment rendered during the administration or receivership after the adoption of the contract of employment (referred to as "qualifying liabilities").

270. *Airlines Airspaces Ltd v Handley Page Ltd [1970] Ch. 193*. cf. *Rother Iron Works Ltd v Canterbury Precision Engineers [1974] Q.B. 1*; *George Barker (Transport) Ltd v Eynon [1974] 1 W.L.R. 462*.

271. See, however, *Ash & Newman Ltd v Creative Devices Research Ltd [1991] B.C.L.C. 403* where an injunction was granted to protect a pre-emption right of the plaintiff but the facts were exceptional in that the injunction did not prejudice the interests of the security holder.

272. *Hill (Edwin) & Partners v First National Finance Corp Plc [1989] B.C.L.C. 89*; *Astor Chemicals Ltd v Synthetic Technology Ltd [1990] B.C.L.C. 1, 11*.

273. *Burt, Boulton & Hayward v Bull [1895] 1 Q.B. 276, 279*. On the right of a court appointed receiver to be remunerated see *Mellor v Mellor [1993] B.C.L.C. 30*.

274. *Lawson v Hosemaster Co Ltd [1966] 1 W.L.R. 1300*.

275. Insolvency Act 1986 s.44(1)(b).

276. *Thomas v Todd [1926] 2 K.B. 571*.

277. *Gosling v Gaskell [1897] A.C. 575*; *Re S. Brown & Co Ltd [1940] Ch. 961*; see also *Bacal Contracting Ltd v Modern Engineering (Bristol) Ltd [1980] 2 All E.R. 655, 658*.

278. *Sowman v David Samuel Trust Ltd [1978] 1 W.L.R. 22*.

279. The authorities are collected in *Welsh Development Agency v Export Finance Co Ltd [1992] B.C.L.C. 148*. See also *OBG Ltd v Allan [2007] UKHL 21, [2007] 4 All E.R. 545*.

280. *[2007] UKHL 21* at 171–173.

281. A new Sch.B1 is inserted by s.248 into the 1986 Act; see Sch.16.

282. See, e.g. paras 42–45 of Sch.B1.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 3 - Capacity of Parties

Chapter 10 - Corporations and Unincorporated Associations

Section 1. - Corporations

(d) - Registered Companies [45]

(ii) - Contracts between Companies and Promoters or Directors

Promoters

10-054

Promoters are the persons who procure the formation of a company and its "flotation". [283] The term "promoter" is not a legal term but depends upon the function being carried out with respect to the formation of the company. A promoter stands in a fiduciary relationship to the company both before and after its formation. [284] While, therefore, a promoter may make a profit out of the sale of his property to the company, [285] that profit must be disclosed to an independent board of directors or to the shareholders [286]; he may not take a secret commission from a person selling to the company, [287] and if he does so, the company may rescind the contract [288] or claim to recover the secret profit from the promoter, [289] or (at any rate in some cases) sue him for damages. [290] Where promoters acquired property before they began to promote the company and thereafter sold it to the company without disclosing that they were the vendors, it was held that rescission was the only right open to the company, as the promoters were not at the time of their purchase in a fiduciary position to the company. [291] If disclosure is relied on, it must be a genuine disclosure, that is to say, either a disclosure to a board of directors independent of the promoters, [292] or a communication to all the shareholders, [293] or a plain indication in the prospectus that the board of directors are acting for the promoters. [294]

Directors

10-055

Directors owe fiduciary obligations to the company and may not make any secret profit by virtue of their office. [295] But directors are in a more responsible position than promoters and neither they nor companies in which they are interested [296] can make an enforceable contract with the company, unless so authorised by the articles of association. [297] Such authorisation is in practice almost universally included in the articles of association, but even where it is given the interested director has a statutory obligation to disclose his interest fully. [298] In the absence of the necessary authority in the articles, or in the event of a failure to disclose an interest where there is such authority, the contracts will be voidable by the company. [299] It may be affirmed by the shareholders in general meeting [300] or (probably) by an independent board of directors, [301] or alternatively the company may rescind the contract if restitutio in integrum is still possible. The company cannot, however, claim both to affirm the contract and an account of profits unless actual fraud or breach of trust can be proved, as, for example, where a director has sold to the company property which he already held as trustee (expressly or constructively) for the company. [302] Where the director is guilty merely of non-disclosure, having, for example, acquired his interest in the property which he sold to the company before he became a director, the company may either affirm the sale and pay the price agreed or rescind the transaction altogether, but, unless the transaction falls within s.190 of the Companies Act 2006, [303] it

cannot claim to affirm and yet to recover the profit made by the director. [304]

Companies Acts and directors' contracts

10-056

The Companies Acts contain extensive provisions designed to regulate transactions between directors and their companies, the overall purpose of these provisions being to prevent overreaching by directors and to compel disclosure to the members of the details of the transactions. Some types of transaction must be disclosed and approved in advance (e.g. loans, [305] payments made in connection with the loss of office), [306] while others merely have to be disclosed (e.g. emoluments). [307] These provisions are much too technical and extensive to be dealt with here and specialist texts on Company Law should be referred to. Of greater significance with respect to contracts between directors and their companies is s.177 of the Companies Act 2006, [308] which requires a director who has a direct or indirect interest in a proposed contract or arrangement with his company to make disclosure of his interest in the way set out in the section. Directors are also obliged to disclose interests in an existing transaction or arrangement. [309] There are also special provisions dealing with contracts which include as one of the parties a director of the company and with respect to that contract the board exceeds limitations on its powers under the company's constitution. [310] Such contracts are (subject to limitations) made voidable at the option of the company. [311]

Managing directors

10-057

The appointment of a managing director does not necessarily constitute a contract between the holder of that office and the company and in the absence of a contract he is removable according to the regulations in the company's constitution. [312] Even where a person is appointed as a managing director pursuant to a contract to that effect the company can lawfully terminate the appointment at any time in accordance with the company's constitution if the appointment is not made for a specific term, though reasonable notice may be required in this event. A person appointed managing director cannot, in the absence of an agreement to that effect, claim to be entitled to continue as such so long as he remains a director. [313]

Contract for term of years

10-058

A managing director may, however, be employed in that capacity by a company under a contract for a term of years, [314] and if so his appointment cannot be lawfully revoked by the company before the expiration of that time by removing him from his directorship in accordance with the articles of association or s.168 of the 2006 Act. [315] Although the company's power to remove a director under s.168 cannot be taken away by contract, [316] the exercise of the power may be a breach of contract because a managing director who is removed from his position as a director will necessarily lose his post as managing director, [317] and the company will then be in breach of any contract to employ him as such. Even if remuneration is attached to the office and there is a contract, the contract may exceptionally (particularly where it is an informal parol agreement) be treated as being subject to the provisions of the company's constitution. In this event removal of the managing director in accordance with the company's constitution will not be a breach of contract. [318]

Improper appointment

10-059

If a managing director is improperly appointed, fees received by him as such may be recovered from him by the company. [319]

45. This is not a summary of company law, but only of the law applicable to the contracts of companies.

283. Flotation in this sense does not require that the company's securities be offered to the public; *Gifford v Willoughby's Mashonaland Expedition Co (1899) 16 T.L.R. 24*; *Torva Exploring Syndicate v Kelly [1900] A.C. 612*. On liability with respect to defective prospectuses: see Financial Services And Markets Act 2000 s.90; above, para.7-098.

284. *Erlanger v New Sombrero Phosphate Co (1878) 3 App. Cas. 1218*; *Emma Silver Mining Co v Lewis (1879) 4 C.P.D. 396*; *Lagunas Nitrate Co v Lagunas Syndicate [1899] 2 Ch. 392, 428*; *Gluckstein v Barnes [1900] A.C. 240*.

285. *Omnium Electric Palaces Ltd v Baines [1914] 1 Ch. 332*.

286. *Gluckstein v Barnes [1900] A.C. 240*; *Re Leeds & Hanley Theatres of Varieties Ltd [1902] 2 Ch. 809*; *Jubilee Cotton Mills Ltd v Lewis [1924] A.C. 958*.

287. *Lydney & Wigpool Iron Co v Bird (1886) 33 Ch. D. 85*.

288. See above, n.282.

289. See above, n.282.

290. *Re Leeds & Hanley Theatres of Varieties Ltd [1902] 2 Ch. 809*; *Jacobus Marler Estates v Marler (1913) L.J.P.C. 167n*.

291. *Ladywell Mining Co v Brookes (1887) 35 Ch. D. 400*; cf. *Burland v Earle [1902] A.C. 83*. For statutory liability with respect to a defective prospectus see Financial Services and Markets Act 2000 ss.84, 85 and 150.

292. *Gluckstein v Barnes [1900] A.C. 240*; *Burland v Earle [1902] A.C. 83*, above.

293. *Salomon v Salomon & Co [1897] A.C. 22*; *Att-Gen for Canada v Standard Trust Co of New York [1911] A.C. 498*.

294. *Lagunas Nitrate Co v Lagunas Syndicate [1899] 2 Ch. 392*.

295. *Imperial Mercantile Credit Association v Coleman (1873) L.R. 6 H.L. 189*; *Parker v McKenna (1874) L.R. 10 Ch. App. 96*; *Kaye v Croydon Tramways Co [1898] 1 Ch. 358*; *Tiessen v Henderson [1899] 1 Ch. 861*; *Clarkson v Davies [1923] A.C. 100*; *Regal (Hastings) Ltd v Gulliver [1942] 1 All E.R. 378, [1967] 2 A.C. 134n*; *Industrial Development Consultants Ltd v Cooley [1972] 1 W.L.R. 443*. See now Pt 10 of the 2006 Act which contains a codification of the major directors' duties.

296. *Flanagan v Great Western Ry (1868) L.R. 7 Eq. 116*; *Transvaal Lands Co v New Belgium Land Co [1914] 2 Ch. 488*.

297. *Costa Rica Railroad Co v Forwood [1901] 1 Ch. 746*; *Re Republic of Bolivia Exploration Syndicate Ltd [1914] 1 Ch. 139*; see now s.177 of the 2006 Act.

298. s.182. This section replaces s.317 of the Companies Act 1985. Failure to comply with s.317 did not render the contract void or voidable: *Hely-Hutchinson v Brayhead Ltd [1968] 1 Q.B. 549*; *Guinness Plc v Saunders [1990] 2 A.C. 663*. It would also appear that breach of s.317 did not vest in the company any right of action for damages for breach of statutory duty: *Castlereagh Motels Ltd v Davies-Roe (1966) 67 S.R. (N.S.W.) 279*; see also *Lee Panavision Ltd v Lee Lighting Ltd [1992] B.C.L.C. 575*; *Runciman v Walter Runciman Plc [1992] B.C.L.C. 1084*. The same would apply to s.182.

299. *Transvaal Lands Company v New Belgium (Transvaal) Land and Development Co [1914] 2 Ch. 488*.

300. *North West Transportation Co v Beatty (1887) 12 App. Cas. 589*. However, *Beatty* has been substantially modified by s.239 of the 2006 Act so that a shareholders' vote affirming the transaction must be passed by an independent majority of shareholders thus disregarding the votes of the director or anyone connected with him. For the definition of connected persons see s.252 of the 2006 Act.

301. *Queensland Mines Ltd v Hudson (1978) 52 A.L.J.R. 399 PC*; noted (1979) 42 M.L.R. 711. It is important to note that in this case the shareholders were all aware of the director's conduct: see *Cane v Jones [1980] 1 W.L.R. 1451* and above, para.10-039.

302. *Re Leeds and Hanley Theatres of Varieties Ltd [1902] 2 Ch. 809*.

303. Where the transaction is a substantial property transaction as defined in s.190 of the Companies Act 2006, and that section is not complied with, the director must account for any gain and are liable to indemnify the company for all losses (s.195); see *Joint Receivers and Managers of Niltan Carson Ltd v Hawthorne [1988] B.C.L.C. 298*; *Duckwari Plc v Offerventure Ltd (No.2) [1999] 2 Ch. 253*.

304. *Re Cape Breton Co (1884) 26 Ch. D. 221; 29 Ch. D. 795*; *Burland v Earle [1902] A.C. 83*.

305. s.197. Loans may also be subsequently affirmed within a reasonable period of time: s.214. The long standing prohibition on company loans to directors was abrogated by the 2006 Act.

306. ss.215–219. See Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties (Law Commission, Consultation Paper No.153).

307. s.318.

308. See also n.295.

309. ss.182–186. This is extended to a shadow director: s.187.

310. s.41. The purpose of this provision is to deny to directors the full protection of ss.39 and 40. See above, para.10-034.

311. s.41.

312. An appointment without remuneration will normally mean that there is no contract: *Foster v Foster [1916] 1 Ch. 532*.

313. *Foster v Foster [1916] 1 Ch. 532*.

314. Service contract is defined in s.227 of the 2006 Act and it must be open for inspection by members: ss.228–229. These provisions apply to shadow directors: s.230.

315. *Southern Foundries Ltd v Shirlaw [1940] A.C. 701*; *Shindler v Northern Raincoat Co Ltd [1960] 1 W.L.R. 1038*; *Cumbrian Newspapers Group Ltd v Cumberland and Westmoreland Newspaper and Printing Co Ltd [1987] Ch. 10*.

316. See, however, *Bushell v Faith [1970] A.C. 1099*.

317. *Re Alexander's Timber Co (1901) 70 L.J. Ch. 767*; *Bluett v Stutchbury's Ltd (1908) 24 T.L.R. 469*.

318. *Read v Astoria Garage (Streatham) Ltd [1952] Ch. 637*; contrast *Shindler v Northern Raincoat Co Ltd [1960] 1 W.L.R. 1038*. This gives rise to difficult conceptual problems: see Trebilcock (1967) 31 Conv.(N.S.) 95; *Carrier Australia Ltd v Hunt (1935) 61 C.L.R. 534*.

319. *Brown & Green v Hays (1920) 36 T.L.R. 330*; *Kerr v Marine Products (1928) 44 T.L.R. 292*; cf. *Craven Ellis v Canons Ltd [1936] 2 K.B. 403*.

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Chapter 10 - Corporations and Unincorporated Associations

Section 1. - Corporations

(d) - Registered Companies [45]

(iii) - Contracts between Companies and their Members

Purchase and allotment

10-060

The contract between a company and a shareholder may be made in a number of ways. By s.112 of the Companies Act 2006, the subscribers to the memorandum of association are deemed to have agreed to become members of the company. [320] The phrase “agrees to become a member” in s.112 does not require a binding contract and this requirement is satisfied where the name of a person is entered in the register of members with his consent. [321] However, in most cases, [322] the contract between the shareholder and the company will either be preceded by a purchase of shares from a third party or will be made by application to the company followed by allotment. In the former case the contract is probably made by the application of the prospective shareholder to be entered in the register followed by his being so entered. In the latter case the contract is constituted by an application to take shares, accepted by the company by a notification that shares have been allotted. [323] Notice of allotment must be given within a reasonable time or the application lapses. [324] It was held in *Houldsworth v City of Glasgow Bank* [325] that a person who had applied for and been allotted shares in a company could not, while he remained a member of the company, sue the company for damages for breach of his contract of membership, [326] or for damages for fraudulently inducing him to enter into it. [327] The only remedy used to be that of rescission of the contract and rectification of the register of members. The position has now been altered by s.655 of the 2006 Act, [328] which provides that being a member does not preclude an action for damages. Rescission of a contract of subscription will normally be ordered if the claimant succeeds in showing that he has been induced to take the shares by a material misrepresentation of fact on the part of the company. A misrepresentation made by a person acting on behalf of the company within the scope of his authority [329] or contained in a document which is, to the knowledge of the company, the basis of the contract to take shares, [330] is a good ground for rescission. [331] In most cases the representations complained of are contained in a prospectus issued by the company, and inasmuch as the offer to take shares is an offer to take them on the terms of the prospectus, the materiality of the statements contained in the prospectus will in most cases be beyond dispute. [332] If the shareholder does not rescind the contract and take steps to have the register rectified within a reasonable time, [333] and in any event before the commencement of the winding up of the company, [334] he loses his right of rescission; but this rule does not apply to a shareholder whose shares have been forfeited by the company and who has done nothing to affirm the contract, for he has ceased to be a shareholder and has become a debtor to the company. [335]

Effect of articles

10-061

The terms of the contract of membership of a company are contained in the memorandum and articles of association. Where a company prior to the 2006 Act had to possess articles and a

memorandum the articles were subordinate to the memorandum and, in the case of inconsistency between them, the memorandum prevails. Provisions in the memorandum of such companies are now treated as provisions in its articles. [336] No provision is made in the 2006 Act for dealing with the unlikely event that a conflict might arise but the courts would probably follow the old law, so that any provision in the articles derived from the memorandum would prevail. [337] The extent to which the articles of association form an enforceable contract between the company and its individual members is determined by s.33 of the Companies Act 2006 which provides that the:

> "… provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions." [338]

In *Hickman v Kent or Romney Marsh Sheep-Breeders' Association*, [339] Astbury J. made an elaborate examination of the cases, some of which decided that the articles of association created no contract between the company and its members and others that a company was entitled as against its members to enforce and restrain breaches of its regulations; he concluded "[i]t is difficult to reconcile these two classes of decisions and the judicial opinions therein expressed", but he went on to formulate the following rules:

(1)

No article can constitute a contract between the company and a third person. [340]

(2)

No right purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as, for instance, a solicitor, [341] promoter [342] or director, [343] can be enforced against the company.

(3)

Articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively.

The articles also constitute a contract been the members inter se. [344]

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45. This is not a summary of company law, but only of the law applicable to the contracts of companies.

320. Companies Act 2006 s.112 makes it clear that the subscribers to the memorandum become members on registration of the company even if the company fails to enter their names in the register of members.

321. *Re Nuneaton Borough Association Football Club Ltd [1989] B.C.L.C. 454*. This was decided under s.22 of the 1985 Act which s.112 restates.

322. cf. *Mackley's Case (1875) 1 Ch. D. 247*.

323. For the statutory rules relating to allotment and the effects of irregular allotment, see Companies Act 1985 ss.82–86 repealed in part by Financial Services Act 1986 Sch.17, settling

the law left uncertain in *Jubilee Cotton Mills Ltd v Lewis [1924] A.C. 958*; *Re James Burton & Son Ltd [1927] 2 Ch. 132*.

324. *Ramsgate Victoria Hotel Co v Montefiore (1866) L.R. 1 Ex. 109*.

325. *(1880) 5 App. Cas. 317*; *Soden v British and Commonwealth Holdings Plc [1997] 2 B.C.L.C. 501*.

326. *Re Addlestone Linoleum Co (1887) 37 Ch. D. 191*.

327. *Western Bank of Scotland v Addie (1867) L.R. 1 Sc. & Div. 145*; *Houldsworth v City of Glasgow Bank (1880) 5 App. Cas. 317*.

328. This was first introduced as s.111A of the 1985 Act by s.131 of the Companies Act 1989.

329. *Lydney v Anglo-Italian Hemp Spinning Co [1896] 1 Ch. 178*; cf. *Lagunas Nitrate Co v Lagunas Syndicate [1899] 2 Ch. 392*.

330. *Karberg's Case [1892] 3 Ch. 1*; *Collins v Associated Greyhound Racecourses [1930] 1 Ch. 1*.

331. See above, Ch.7.

332. See *Karberg's Case [1892] 3 Ch. 1*; *Mair v Rio Grande Rubber Estates [1913] A.C. 853*; *Re Pacaya Rubber & Produce Co [1914] 1 Ch. 542*.

333. *First National Reinsurance Co v Greenfield [1921] 2 K.B. 260*.

334. *Oakes v Turquand (1867) L.R. 2 H.L. 325*; *Reese River Silver Mining Co v Smith (1869) L.R. 4 H.L. 64*.

335. *Aaron's Reefs v Twiss [1896] A.C. 273*.

336. s.28.

337. *Ashbury v Watson (1885) 30 Ch. D. 376*; *Rayfield v Hands [1960] Ch. 1*.

338. This replicates the effect s.14 of the 1985 Act, there have been inconsequential linguistic amendments.

339. *[1915] 1 Ch. 881, 900*; approved *Beattie v Beattie Ltd [1938] Ch. 708*. See also *Mutual Life Insurance Co of New York v The Rank Organisation Ltd [1985] B.C.L.C. 11* (the contract constituted by the articles does not import the requirement that there be parity of treatment of shareholders of the same class); *Bratton Seymour Service Co Ltd v Oxborough [1992] B.C.L.C. 693*.

340. *Melhado v Porto Alegre Ry (1874) L.R. 9 C.P. 503*; *Re Greene [1949] Ch. 333*.

341. *Eley v Positive Life Assurance Co (1876) 1 Ex. D. 88*; cf. *Cumbrian Newspapers Group Ltd v Cumberland and Westmoreland Herald Newspaper & Printing Co Ltd [1987] Ch. 1, 16*.

342. *Pritchard's Case (1873) L.R. 8 Ch. 956*.

343. *Browne v La Trinidad (1887) 37 Ch. D. 1*; *Beattie v Beattie Ltd [1938] Ch. 708*; contrast *Rayfield v Hands [1960] Ch. 1*, on which see Gower (1958) 21 M.L.R. 401, 465.

344. *Rayfields v Hands [1960] Ch. 1*. See also *Re Royal Institution of Chartered Surveyors' Application [1985] I.C.R. 330, 345–347* (relationship between members of a body corporate incorporated by Royal Charter). It has been argued that a member also has the right to compel a company to observe all of the provisions in the company's articles of association, a proposition which if accurate would provide a means for enforcing indirectly outsider rights.

Although some cases recognise such a right, it has not constituted the basis of any decision and its status remains very uncertain. See generally, Wedderburn [1957] C.L.J. 194; [1958] C.L.J. 93.

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Section 1. - Corporations

(d) - Registered Companies [45]

(iv) - Contracts between Companies and their Auditors

Appointment and removal of auditors

10-062

Public companies must appoint auditors. [345] However, if the directors reasonably resolve that no such appointment is needed on the ground that audited accounts are unlikely to be required then auditors need not be appointed. [346] The appointment of auditors is made by the members. [347] Although the first auditors may be appointed by the directors, [348] auditors are normally elected at the general meeting at which the company's accounts are considered [349] and the terms of the auditor's remuneration will normally be determined by the members of the company. [350] The auditor's term of office must run from the conclusion of that meeting to the conclusion of the next such meeting, [351] and although an auditor may resign he must follow certain stipulated procedures. [352] By virtue of the Companies Act 2006 s.510, a company may by ordinary resolution remove its auditor from office, before the expiration of his term of office, any such removal is without prejudice to any claim for damages for breach of contract. [353]

Rules of industrial societies

10-063

It would appear that the rules of a society registered under the Industrial and Provident Societies Act 1965 (or earlier Acts replaced by that Act) bind the members of such a society to the same extent as the articles of association bind the shareholders. [354]

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45. This is not a summary of company law, but only of the law applicable to the contracts of companies.

345. s.489(1).

346. s.489(1).

347. s.489(1). In certain restricted circumstances, the directors can appoint auditors: see s.489(3).

348. s.489(3).

349. s.489(4).

350. s.492.

351. s.495.

352. ss.516–618.

353. The Act contains other procedural provisions relating to the removal of an auditor: see ss.510–513 of the Act.

354. *Biddulph & District Agricultural Society v Agricultural Wholesale Society [1925] Ch. 769, [1927] A.C. 76*.

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Section 2. - Unincorporated Associations

(a) - Generally

Liability of unincorporated associations

10-064

An unincorporated association is not a legal person and therefore cannot sue or be sued [355] unless such a course is authorised by express or implied statutory provisions as in the case of a trade union [356] and a trustee savings bank. [357] Nor can a contract be made so as to bind all persons who from time to time become members of such an association. [358] But a contract purportedly made by or with an unincorporated association is not necessarily a nullity. [359] If the person or persons who actually made the contract had no authority to contract on behalf of the members they may be held to have contracted personally. [360] On the other hand, if they had the authority, express or implied, of all or some of the members of the association to contract on their behalf, the contract can be enforced by or against those members as co-principals to the contract by the ordinary rules of agency. [361]

Representative action

10-065

By the rules of agency, therefore, a large number of members of an association may find themselves parties to a contract. In practice it would be impossible in such a case to join all the members as plaintiffs or defendants, and therefore recourse must be had to the device of a representative action. Order 15 r.12, of the Rules of the Supreme Court (which is preserved by the Rules of the Supreme Court Sch.1) provides that where there are numerous persons having the same interest in any proceedings, [362] the proceedings may be begun and, unless the court otherwise orders, continued by or against any one or more of them as representing all or as representing all except one or more of them. The attitude of the courts is to interpret the open textured language of Ord.15 r.12, in a liberal manner. Its language, according to Megarry V.C., is wide and permissive and the rule should be used as “a flexible tool of convenience in the administration of justice”. [363]

Requirements for representative action

10-066

In *Prudential Assurance Co Ltd v Newman Industries Ltd* [364] Vinelott J. reviewed the authorities relating to representative actions and formulated the following principles with respect to the bringing of such actions.

Not if it would confer new right of action

10-067

First, a representative action may not be brought if the effect of so doing is:

> "… to confer a right of action on a member of the class represented who would not otherwise have been able to assert such a right in separate proceedings, or to bar a defence which might otherwise be available to the defendant, in such separate proceedings." [365]

From this Vinelott J. reasoned that the plaintiff in a representative action will normally be only entitled to declaratory relief, although he may join with the representative action a claim for personal damages. Although this is the normal rule, in exceptional circumstances the court may grant damages in favour of the plaintiff in an action commenced in representative form. [366] Also, it may be that the contractual arrangements between the parties make it appropriate that there be an action in representative form. [367] An action of libel cannot be instituted under the rule where some of the members of the association might not have authorised the publication of the alleged libel, or might be out of the country. [368] Similarly, it was refused where an order was sought against the members at the date of the proceedings and the members had changed since the cause of action had arisen, [369] and, in an action for breach of a contract for the carriage of goods by sea, where the shippers in a general ship held different bills of lading and different defences might have been raised against them. [370]

Not to enforce a personal liability

10-068

Nor can representative proceedings under this rule be used in an action in which a personal liability, such as a judgment for money due or for damages, is sought to be enforced against the individual members of the association. [371] In *Lord Churchill v Whetnall*, [372] where three subscribers to a fund brought an action for misrepresentation in the circular inviting subscriptions to the fund on behalf of themselves and the other 200 subscribers, it was held that there could be no representative action to establish the right of numerous persons to recover damages, each in his own several right, where the only right claimed was the right to recover such damages: before a subscriber could recover he would have to show that he had been induced by the representation and this could only be done in separate proceedings. [373] But where the association is possessed of funds in the hands of trustees, a plaintiff may sue proper persons as representatives of the association for a declaration of his right against the property belonging to the association, and, by adding the trustees as defendants, may obtain an order charging the funds which are in their hands and of which they are the legal owners. [374]

Common interest

10-069

The *Prudential Assurance* case also required that there must be an "interest" shared by all members: "there must be a common ingredient in the cause of action of each member of the class". [375] This to a large extent is nothing more than a rephrasing of the first requirement.

For benefit of class

10-070

The third, and related requirement, is that it is for the benefit of the class that the representative action be brought. [376] This, among other things, will require that all evidence relating to the claim is adduced to avoid any unfairness to members of the class who will be bound by the outcome of the litigation.

Relation of unincorporated association to its members

10-071

Inasmuch as unincorporated associations are generally not legal persons, but mere collective names for all their members, a contract made by one member with some person or persons on behalf of the association is a contract by a man with himself and others; and as no man can be both covenantor and covenantee upon a contract, it must be construed as a contract between the member and the other members. [377] If that contract is broken the injured member can sue and recover damages from those who have broken it, [378] though he cannot sue the association except where statutory authorisation for such a course can be found. But he may be faced with the difficulty that the wrongful act was committed by an agent of the association on behalf of its members, including himself. In that case it is possible that he may be unable to recover from his fellow members, whose responsibility, in the circumstances, will be no greater than his own. But the other members, in order to rely on such a defence, must show that the agent was really acting on behalf of the injured member; and, at any rate where the injury is a wrongful expulsion in breach of the rules, that will not be so. [379]

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355. *London Association for Protection of Trade v Greenlands Ltd [1916] 2 A.C. 15, 20, 38*; *Steele v Gourley (1886) 3 T.L.R. 118, 119; affirmed (1887) 3 T.L.R. 772*. See, generally, Ford, *Unincorporated Non-Profit Associations* (1959); Keeler (1971) 34 M.L.R. 615.

356. Trade Union and Labour Relations (Consolidation) Act 1992 s.10; *British Association of Advisers and Lecturers in Physical Education v National Union of Teachers [1986] I.R.L.R. 497 CA*; *E.E.T.P.U. v Times Newspapers Ltd [1980] Q.B. 585*.

357. *Knight and Searle v Dove [1964] 2 Q.B. 631*. See Wedderburn (1965) 28 M.L.R. 62.

358. See *Walker v Sur [1914] 2 K.B. 930*; *Jarrott v Ackerley (1915) 85 L.J.Ch. 135*.

359. The Regulatory Reform (Removal of 20 Member Limit in Partnership, etc.) Order 2002 (SI 2002/3203) removed the size limits on partnerships imposed by s.716 of the 1985 Act. No size limitation on partnerships has been imposed by the 2006 Act.

360. *Bradley Egg Farm v Clifford [1943] 2 All E.R. 378*.

361. See Vol.II, Ch.31.

362. *Barker v Allanson [1937] 1 K.B. 463*; *London Association for Protection of Trade v Greenlands Ltd [1916] 2 A.C. 15, 39*; *Janson v Property Insurance Co (1913) 30 T.L.R. 49*.

363. *John v Rees [1970] Ch. 345, 370*.

364. *[1981] Ch. 229*; *CBS/SONY Hong Kong Ltd v Television Broadcasts Ltd [1987] F.S.R. 262*.

365. *[1981] Ch. 229, 254*.

366. *EMI Records Ltd v Riley [1981] 1 W.L.R. 923*.

367. *Irish Shipping Ltd v Commercial Union Assurance Co Plc [1991] 2 Q.B. 206* (action in representative form against the lead underwriter of an insurance contract).

368. *Mercantile Marine Service Association v Toms [1916] 2 K.B. 243*; *E.E.T.P.U. v Times Newspapers Ltd [1980] Q.B. 585*.

369. *Barker v Allanson [1937] 1 K.B. 463*; *Roche v Sherrington [1982] 2 All E.R. 426*; cf. *Campbell v Thompson [1953] 1 Q.B. 445*. There is no reason why a representative action should not be instituted against those persons who were members when the cause of action arose, but in this event no order could be made affecting the assets of the association.

370. *Markt & Co v Knight S.S. Co [1910] 2 K.B. 1021*.

371. *Walker v Sur [1914] 2 K.B. 930*; *Hardie and Lane v Chiltern [1928] 1 K.B. 663*. See, however, *Morrison S.S. Co Ltd v Greystoke Castle (Cargo Owners) [1947] A.C. 265*. It may also be noted that the new Ord.15 r.12 is in wider terms than the old Ord.16 r.9, and it is perhaps arguable that the cases denying the use of this procedure in an action for damages should not now be followed. But see *Prudential Assurance [1981] Ch. 229, 244*; *Roche v Sherrington [1982] 2 All E.R. 426*.

372. *(1918) 87 L.J. Ch. 524*; *Wing v Burn (1928) 44 T.L.R. 258*; *Markt & Co v Knight S.S. Co [1910] 2 K.B. 1021, 1035*.

373. See *Prudential Assurance [1981] Ch. 229, 251*.

374. *Wood v McCarthy [1893] 1 Q.B. 775*; *Taff Vale Ry v Amalgamated Society of Railway Servants [1901] A.C. 426, 443*; *Linaker v Pilcher (1901) 17 T.L.R. 256*; *Ideal Films v Richards [1927] 1 K.B. 374, 381*.

375. *Prudential Assurance Co Ltd v Newman Industries Ltd [1981] Ch. 229, 255*. Vinelott J. cited *Markt & Co v Knight S.S. Co [1910] 2 K.B. 1021* and *Lord Churchill v Whetmall (1918) 87 L.J. Ch. 524* as two cases where this requirement was not satisfied.

376. *Prudential Assurance Co Ltd v Newman Industries Ltd [1981] Ch. 229, 255*.

377. Law of Property Act 1925 s.82. See also *John v Matthews [1970] 2 Q.B. 443*; *Reel v Holder [1981] 1 W.L.R. 1226*.

378. See *Abbott v Sullivan [1952] 1 K.B. 189, 193, 219*; *Lee v Showmen's Guild of Great Britain [1952] 2 Q.B. 329, 341*.

379. *Bonsor v Musicians' Union [1956] A.C. 104, 148–149, 153*.

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(b) - Clubs [380]

Kinds of clubs

10-072

The principal bodies with regard to which these questions arise are clubs and trade unions. Clubs are unincorporated associations and may be formed for any purpose for which associations may be lawfully constituted. There are two principal types of club: members' clubs and proprietary clubs. [381]

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380. See Josling and Alexander, *The Law of Clubs*, 6th edn (1987).

381. The Friendly Societies Act 1974 s.7(2)(d) recognised the "working men's clubs" but this definition is not repeated in the Friendly Societies Act 1992. However, the social and philanthropic purposes that could be carried out by working men's clubs as defined in 1974 Act could be carried out by a body registered as a Friendly Society under the 1992 Act: see Sch.2 Pt D as amplified by s.7(2)(b) and s.10 of the 1992 Act.

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(b) - Clubs [380]

(i) - Members' Clubs

Members' liability

10-073

The question whether contracts purporting to have been made on behalf of an association bind all the members or only some (e.g. the committee) is one which turns on the general law of agency. [382] Thus, no member of a members' club is liable for the debts of the club except to the extent that he has expressly or impliedly authorised some official of the club to pledge his personal credit. [383] Clubs are not partnerships [384] and the:

> "… law, which was at one time uncertain, is now settled, that no member of a club is liable to a creditor except, so far as he has assented to the contract in respect of which such liability has arisen." [385]

Unless the rules expressly so provide, [386] the committee of a club has no authority to pledge the credit of the members by borrowing on debentures, [387] or by ordering work to be done for or goods to be supplied to the club [388]; but a member may make himself liable by ratifying the order. [389] Members of the committee of a club are liable in respect of contracts made by them on behalf of the club, [390] but not in respect of contracts made by officials of the club which they have not themselves authorised. [391] Where one committee man has paid out money under a contract on which another committee man also could have been sued, the former has a right of contribution against the latter in respect of such payment, [392] but he has no right of indemnity against the members of the club. [393]

Relation of club to its members

10-074

The relations between the members of a club are governed by a contract between the members which may be express or implied and which is usually found in the rules of the club [394]; membership of a club may also confer proprietary rights on members which will be of significance where the club is being dissolved. [395] In *Lee v Showmen's Guild of Great Britain* [396] Denning L.J. said:

> "It was once said by Sir George Jessel M.R. that the courts only intervened in these cases to protect rights of property: see *Rigby v Connol* [397]; and other judges have often said the same thing: see, for instance, *Cookson v Harewood*. [398] But Fletcher Moulton L.J. denied that there was any such limitation on the power of the courts: see *Osborne v Amalgamated Society of Railway Servants* [399]; and it has now become clear that he was

> right: see the cornporters' case, *Abbott v Sullivan*. [400] That case shows that the power of this court to intervene is founded on its jurisdiction to protect rights of contract. [401] If a member is expelled by a committee in breach of contract, this court will grant a declaration that their action is *ultra vires*. It will also grant an injunction to prevent his expulsion, if that is necessary to protect a proprietary right of his; or to protect him in his right to earn his livelihood: see *Amalgamated Society of Carpenters, etc. v Braithwaite* [402]; but it will not grant an injunction to give a member the right to enter a social club, unless there are proprietary rights attached to it, because it is too personal to be specifically enforced: see *Baird v Wells*. [403] That is, I think, the only relevance of rights of property in this connection. It goes to the form of remedy, not to the right."

But the absence of property rights may, in certain circumstances, be some evidence that the members did not intend that their club membership should create legal relations between them. [404] As a result of the contractual nature of the rules the court will interfere to prevent them being altered, [405] unless they are altered in accordance with a procedure prescribed therein [406] or with the consent of every member.

Expulsion of members

10-075

The court will not restrain the exercise by a club of a power, contained in its rules, to expel members unless it is shown that what has been done is, in fact, contrary to the rules or has been done in bad faith [407] or, at least where some sort of inquiry is contemplated, where the rules of natural justice have been infringed. [408] It has been said that to give one reason for expelling a member and to act upon another is evidence of bad faith. [409] In a case of expulsion it was held that the issues were whether the rules of the club had been observed, whether the committee had given the member a fair hearing and whether it had acted in good faith. [410] Every member of the committee must be summoned to the meeting or the proceedings may be invalidated. [411] Notice must be given to the member of the charge made against him and he must have a proper opportunity of being heard in his own defence [412]; a rule purporting to deprive him of this right would probably be invalid as contrary to public policy. [413] If a decision of a committee, based on the opinion of the committee, is challenged, the court will only interfere if there was no evidence upon which to base the opinion, in which case it will declare the decision ultra vires. The club cannot oust the jurisdiction of the courts by making the committee the final arbiter on questions of law; and the construction of the rules is always a question of law. [414]

Election

10-076

Generally speaking, a person who is refused membership of an unincorporated association has no ground for legal redress. [415] It has, however, been suggested that if the grounds for such refusal are unlawful as being in restraint of trade, redress may be available. [416] But refusal to admit a person to membership of a *social* club could hardly be in restraint of trade. [417] A refusal to admit a person to membership of a club on the grounds of colour, race or ethnic or national origins may constitute a breach of s.25 of the Race Relations Act 1976. [418]

Re-election

10-077

Where the rules of an unincorporated association provide for re-election at stated intervals by the committee, the committee (somewhat surprisingly in the light of the rules relating to expulsion) is not bound to give a member notice of any objection to his re-election, [419] and provided that they act neither arbitrarily nor capriciously but in the honest exercise of their discretion, which in the absence of evidence to the contrary will be presumed, their decision cannot be questioned. [420]

Resignation

10-078

A member of a club may unilaterally resign his membership even in the absence of any provision in the club's rules, and such resignation may be inferred from long-continued non-payment of dues. [421]

Officers' mess

10-079

For goods supplied to an officers' mess neither an individual member of the mess [422] nor the commanding officer [423] can be made liable without evidence that he authorised his credit to be pledged and that he was the person to whom the seller gave credit.

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380. See Josling and Alexander, *The Law of Clubs*, 6th edn (1987).

382. See Vol.II, Ch.31: *Lascelles v Rathbun (1919) 35 T.L.R. 347*; *Shore v Ministry of Works [1950] 2 All E.R. 228*; *Prole v Allen [1950] 1 All E.R. 476*; cf. *Moshenan v Segar [1917] 2 K.B. 325* dealing with proprietary clubs.

383. *Steele v Gourley (1887) 3 T.L.R. 772*; *Wise v Perpetual Trustee Co [1903] A.C. 139*.

384. *Wise v Perceptual Trustee Co [1903] A.C. 139*.

385. *Re St James' Club (1852) 2 De G.M. & G. 383, 387*.

386. *Cockerell v Aucompte (1857) 2 C.B.(N.S.) 440*.

387. *Re St James' Club (1852) 2 De G.M. & G. 383*.

388. *Flemyng v Hector (1836) 2 M. & W. 172*; *Hawke v Cole (1890) 62 L.T. 658*; *Draper v Earl Manvers (1892) 9 T.L.R. 73*.

389. *Delauney v Strickland (1818) 2 Stark. 416*.

390. *Lee v Bissett (1856) 4 W.R. 233*; *Re London Marine Insurance Association (1869) L.R. 8 Eq. 176*; *Duke of Queensbury v Cullen (1787) 1 Bro. P.C. 396*.

391. *Todd v Emly (1841) 7 M. & W. 427; 8 M. & W. 505*.

392. *Earl of Mountcashell v Barber (1853) 14 C.B. 53*.

393. *Wise v Perpetual Trustee Co [1903] A.C. 139*.

394. *Harington v Sendall [1903] 1 Ch. 921*; *Lee v Showmen's Guild of Great Britain [1952] 2 Q.B. 329*. On the liability of a club or its officers to its members in tort: see *Robertson v Ridley [1988] 2 All E.R. 474*.

395. *Re Sick and Funeral Society of St John's Sunday School, Golcar [1973] Ch. 51*.

396. *[1952] 2 Q.B. 329, 341–342*.

397. *(1880) 14 Ch. D. 482, 487*.

398. *[1932] 2 K.B. 478, 481, 488*.

399. *[1911] 1 Ch. 540, 562*.

400. *[1952] 1 K.B. 189*.

401. See, however, *Nagle v Feilden [1966] 2 Q.B. 633*, which suggests that in the case of associations which control entry to a trade or profession (such as the Jockey Club, the Stock Exchange or the Inns of Court) the court's power to grant redress is not confined to cases of contract. See also *R. v Jockey Club Ex p. RAM Racecourses Ltd [1993] 2 All E.R. 225, 247–248*. cf. *Goring v British Actors Equity Association [1987] I.R.L.R. 122, 127–128*.

402. *[1922] 2 A.C. 440*.

403. *(1890) 44 Ch. D. 661, 675–676*. But a right to vote may be protected by injunction: *Woodford v Smith [1970] 1 W.L.R. 806*.

404. See *Rigby v Connol (1880) 14 Ch. D. 482, 487* (this was based on the discredited theory that court intervention in the affairs of an association was only justified to protect rights of property).

405. *Harington v Sendall [1903] 1 Ch. 921*.

406. *Thellusson v Viscount Valentia [1907] 2 Ch. 1*.

407. *Hopkinson v Marquis of Exeter (1867) L.R. 5 Eq. 63*; *Richardson-Gardner v Fremantle (1870) 24 L.T. 81*; *Dawkins v Antrobus (1879) 17 Ch. D. 615*; *Lambert v Addison (1882) 46 L.T. 20*. See Lloyd (1952) 15 M.L.R. 413.

408. *Russell v Duke of Norfolk [1949] 1 All E.R. 109*; *Lawlor v Union of Post Office Workers [1965] Ch. 712*. cf. *Gaiman v National Association of Mental Health [1971] Ch. 317*.

409. *D'Arcy v Adamson (1913) 29 T.L.R. 367*.

410. *Lamberton v Thorpe (1929) 141 L.T. 638*, following *Maclean v Workers' Union [1929] 1 Ch. 602* .

411. *Young v Ladies' Imperial Club Ltd [1920] 2 K.B. 523*.

412. *Labouchere v Earl Wharncliffe (1879) 13 Ch. D. 346*; *Fisher v Keane (1878) 11 Ch. D. 353*; *Gray v Allison (1909) 25 T.L.R. 531*.

413. *Lee v Showmen's Guild of Great Britain [1952] 2 Q.B. 329, 342*; *Faramus v Film Artistes' Federation [1964] A.C. 925, 941*; *John v Rees [1970] Ch. 345*; *Enderby Town Football Club Ltd v Football Association Ltd [1971] Ch. 591*.

414. *Lee v Showmen's Guild of Great Britain [1952] 2 Q.B. 329*; followed in *Barker v Jones [1954] 1 W.L.R. 1005*.

415. *Faramus v Film Artistes' Association [1964] A.C. 925, 947*.

416. *Nagle v Feilden [1966] 2 Q.B. 633*; *Reg v Disciplinary Committee of The Jockey Club [1993] 1 W.L.R. 909, 933*; *Bunbury v Lautro Ltd [1996] C.L.C. 1273*.

417. *[1996] C.L.C. 1273, 644, 653*.

418. The law on this is complicated and it is necessary to refer to specialist texts: see Feldman, *Civil Liberties & Human Rights*, 2nd edn (2002).

419. *Cassel v Inglis [1916] 2 Ch. 211*.

420. *Weinberger v Inglis [1919] A.C. 606*; cf. *Nagle v Fielden [1966] 2 Q.B. 633*.

421. *Re Sick and Funeral Society of St John's Sunday School, Golcar [1973] Ch. 51*.

422. *Hawke v Cole (1890) 62 L.T. 658*.

423. *Lascelles v Rathbun (1919) 35 T.L.R. 347*.

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(b) - Clubs [380]

(ii) - Proprietary Clubs

Proprietary clubs

10-080

In a proprietary club the property and funds of the club belong to the proprietor who regulates the use of the property by the members in return for their subscriptions. The management is generally in the hands of a committee of members. Although it was formerly thought that the only remedy of a member of a proprietary club which had itself no property was against the proprietor, [424] it is now clear that this is not so. [425] But since members have no right of property in the case of a proprietary club, one who has been expelled by the committee cannot obtain relief by way of injunction, even though the proceedings were irregular, but will be left to obtain it in damages. [426]

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380. See Josling and Alexander, *The Law of Clubs*, 6th edn (1987).

424. *Lyttleton v Blackburne (1875) 45 L.J. Ch. 219*; *Baird v Wells (1890) 44 Ch. D. 661*.

425. *Lee v Showmen's Guild of Great Britain [1952] 2 Q.B. 329*.

426. *Baird v Wells (1890) 44 Ch. D. 661*. cf. *Millennium Productions Ltd v Winter Garden Theatre (London) Ltd [1946] W.N. 151*; reversed sub nom. *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd [1948] A.C. 173*.

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(c) - Trade Unions

Contractual capacity of trade unions

10-081

The law relating to the contractual capacity of trade unions has undergone some remarkable vicissitudes since the beginning of this century. Under the nineteenth-century statutes governing trade unions there was no express provision for incorporation, but the *Taff Vale* case, [427] which held that registered unions could be sued in their own name, resulted in a limited contractual capacity being conferred upon them. [428] Legislation on trade unions in the twentieth century has tended to confer some type of "corporate" status on trade unions. [429] The present position is to be found in s.10 of the Trade Union and Labour Relations (Consolidation) Act 1992 which provides that a trade union is not nor is it to be treated as a "body corporate". [430] However, despite this statutory denial of corporate status a trade union, so far as the capacity to enter into contracts is concerned, is treated as if it were a body corporate since it is expressly provided that a trade union is capable of entering into contracts [431] and that it can sue or be sued in its own name. [432] Any judgment or order made against a trade union is enforceable against any property held in trust [433] for it is as though it were a body corporate. [434] The agreements of a trade union are not void or voidable because they may be in restraint of trade. [435] Thus for most practical purposes in connection with contracts with third parties the position of a trade union has been equated with that of a body corporate.

Contracts between trade unions and their members

10-082

The relationship between a member of a trade union and the union itself is contractual, and the terms of the contract are to be found in the rules of the union. [436] A member of a trade union has in general the right to take proceedings to enforce compliance with the union's own rules in relation to matters such as election of officers and other internal regulations. [437] In general the court has no power to declare provisions of a trade union's rules to be void as unreasonable any more than it has with the provisions of any other contract. [438] However, in *Edwards v SOGAT* [439] the Court of Appeal, prior to the 1974 Act, struck down a union rule permitting capricious and arbitrary expulsion of a member, apparently on the ground that such a rule is contrary to public policy in so far as it permits such expulsion. [440] Section 46 of the Trade Union and Labour Relations (Consolidation) Act 1992 imposes a statutory duty on a trade union to ensure that its officers [441] are elected by secret ballot. [442] Re-elections for such offices must take place at intervals of not more than five years. [443]

Expulsion and exclusion from a trade union

10-083

Prior to the Industrial Relations Act 1971, the courts had protected members of a union against

unlawful expulsion where it could be shown that the union had violated the procedure laid down in its own rules, and was thus in breach of its contract with its member. It was originally thought that the only remedy was by injunction but it was eventually held by the House of Lords that damages could also be awarded against the union. [444] It was also well established that a union, like any other domestic tribunal, must in general observe the rules of natural justice, [445] and it also seemed that the rules of the union could not validly exclude the rules of natural justice. [446] Where the rules of natural justice applied, a trade union, like the committee of a club, [447] was required to give a man notice of the charge against him and a reasonable opportunity of meeting it. [448] A trade union could not in any case oust the jurisdiction of the court and could not be made the final arbiter on questions of law [449]; and if it acted without evidence, the courts would interfere. [450] But the courts did not claim to act as courts of appeal from domestic tribunals and would not disturb a decision which was on a matter of opinion only. [451]

Refusal of membership

10-084

No attempt to protect a worker from arbitrary or unreasonable refusal of membership could (it is thought) have succeeded at common law since no contractual relation could, ex hypothesi, be established between a would-be member and the union. [452]

Statutory protection of member's rights

10-085

Of greater importance than the common law in protecting a trade union member's rights are the statutory protections accorded to trade union members to prevent them from being excluded, expelled or disciplined on grounds that the statute treats as being unjustifiable. [453]

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427. *[1901] A.C. 426*.

428. See the 23rd edition of this work, paras 520-524.

429. See, for example, s.2 of the Trade Union and Labour Relations Act 1974 (now repealed).

430. s.10(1) and (2).

431. s.10(1)(a).

432. s.10(1)(b).

433. s.12(1) provides that all the property of a trade union must be vested in trustees to be held on trust for it.

434. s.12(2).

435. s.11.

436. *Bonsor v Musicians' Union [1956] A.C. 104*.

437. See *Taylor v N.U.M. (Derbyshire Area) [1985] B.C.L.C. 237* (on right of members to sue with respect to ultra vires disbursements of union assets).

438. *Faramus v Film Artistes' Federation [1964] A.C. 925, 943*.

439. *[1971] Ch. 354*.

440. See generally, Rideout, *Principles of Labour Law*, 5th edn (1989), pp.395–432.

441. These are defined in s.4(2).

442. The voting procedures are set out in ss.47–52.

443. s.46(1)(b).

444. *Bonsor v Musicians' Union [1956] A.C. 104*. On the availability of an interlocutory injunction, see *Porter v N.U.J. [1980] 1 I.R.L.R. 404*.

445. *Lee v Showmen's Guild of Great Britain [1952] 2 Q.B. 329*; Kidner, *Trade Union Law*, 2nd edn (1983), Ch.3.

446. *Russell v Duke of Norfolk [1949] 1 All E.R. 109*; *Lawler v Union of Post Office Workers [1965] Ch. 712*; *Taylor v National Union of Seamen [1967] 1 W.L.R. 532*; *Lee v Showmen's Guild of Great Britain [1952] 2 Q.B. 329*:*Faramus v Film Artistes' Federation [1964] A.C. 925*.

447. See above, para.10-075.

448. *Annamunthodo v Oilfield Workers' Trade Union [1961] A.C. 945*; *Breen v Amalgamated Engineering Union [1971] 2 Q.B. 175*.

449. *Luby v Warwickshire Miners' Association [1912] 2 Ch. 371*; *Burn v National Amalgamated Labourers' Union [1920] 2 Ch. 364*; *Leigh v National Union of Railwaymen [1970] Ch. 326*; and see *Australian Workers' Union v Brown (1948) 77 C.L.R. 601*; *White v Kuzych [1951] A.C. 585*.

450. *Lee v Showmen's Guild of Great Britain [1952] 2 Q.B. 329, 340*.

451. *[1952] 2 Q.B. 329*.

452. In *Nagle v Feilden [1966] 2 Q.B. 633*, it was suggested that in some circumstances the court's power to intervene might extend beyond cases of contract, but in so far as this decision was based on the invalidity of an unreasonable restraint of trade it could have no application anyhow to a trade union by reason of s.3 of the Trade Union Act 1871, now replaced by s.11 of the Trade Union and Labour Relations (Consolidation) Act 1992. Indeed the wording of s.11 is more clearly calculated to exclude the argument suggested in *Nagle v Feilden*. See *Greig v Insole [1978] 1 W.L.R. 302, 363*; *Goring v Bristol Actors' Equity Association [1987] I.R.L.R. 122, 127–128*.

453. The major statutory protections are to be found in Ch.V of the Trade Union and Labour Relations (Consolidation) Act 1992 as amended by ss.15 and 16 of the Trade Union Reform and Employment Rights Act 1993; ss.174–177 of the 1992 Act were replaced by s.14 of the 1993 Act.