

COMPANY LAW I 2008 - 2009

SEMESTER ONE - LECTURE OUTLINE I

AN OVERVIEW OF OUR COMPANY LAW COURSE

Semester One:

- Choice of Business Organisation & Company Registration
- Separate Corporate Legal Personality
- Corporate Governance: Distribution of power between board of directors and shareholders' general meeting and executives and non executive directors
- Directors' Duties
- Minority Shareholder Protection

Semester Two

- Agency and Company Capacity: Who can bind the Company to a Contract, or make it liable in Tort or Criminal Law?
- Capital – shares, loans, and markets in shares.
- Take-overs and Mergers of PLC's
- Insolvency and Dissolution of Companies: especially liability of directors.

Choice of Business Structure

Aim:

- To set the context and help you to understand the key features of the main structures and issues in choosing between business structures.

Reading:

- Davies and Gower, Chapters 1 & 2
- Hicks and Goo 6th edition pp 33-77 gives an idea of the development of a business – especially the story on pages 33-40. Pages 41-77 provide the relevant documents for the company in the story. Pages 91-94 outline some of the choices for those setting up a small business.

See

- G. Morse, Partnership Law (Blackstone) 6th Edition (2006) chapters 1 and 9 for a little more detail on partnerships.
- Blackett Ord Partnership, Butterworths, 2002 Chapter 1 pp 1-5; Chap 2 pp 10-34 & Chapter 10, 11, 16, 20 & 21 is good for reference or if you are particularly interested in going more deeply into partnership law.

NOTE: Companies Act 2006 changes the documentation of company constitutions. It makes the Memorandum of Association a document with few details in it which is lodged when the company is registered. The ONLY ongoing constitutional document of companies is now the articles of association. Companies registered under the 2006 Act will use this new system. Existing companies will keep their present documents and need not re-register. However, all provisions of their Memorandum of Association which would not be in the "new style" memorandum of association will be deemed to be provisions of their articles from the time at which the new system comes into effect. See: Companies Act 2006 sections 8 and 28.

1. Available Business Vehicles: The Models

- ***Sole Trader***

Individual person carrying on business without having registered a single member company. The individual's dealings will be governed by the general law of tort, contract, trust etc. No more to say.

- ***Partnership:***

Two or more people carrying on business together and not registering a company to use for their business. Three Types of Partnership:

- Partnership Act 1890
- Limited Partnership Act 1907
- Limited Liability Partnerships Act 2000

(i) Partnership Act 1890

- The oldest and most basic model. Strongly based on contract and equity in respect of relations among the owners ("partners"). Section 1(1) PA 1890: Partnership is the relation which subsists between persons carrying on business in common with a view to profit.
- "Persons" - includes companies - *Newstead v Frost* [1980] 1 All ER 363 but same accounting rules apply to such partnerships as apply to companies - Partnerships and Unlimited Companies (Accounts) Regulations 1993 SI 1993/1820
- "Business" - Not non-profit organisation which is unincorporated association - *Wise v Perpetual Trustee Co.* [1903] AC 139
- "In Common" - participation in the business - *Saywell v Pope* (1979) 53 TC 40
- "With a View to Profit" - if this is present other additional motives do not prevent a partnership - *Newstead v Frost* [1980] 1 All ER 363. Participation in net profits is prima facie evidence of partnership status but, without more, is not enough - section 2(3) Partnership Act 1890 and *Saywell v Pope* (1979) 53 TC 40.
- Unlimited Liability but note (below) Limited Partnerships Act 1907 and Limited Liability Partnerships Act 2000 to gain some limited liability while using a partnership model
- Mutual Agency - Partnership Act 1890 section 5: "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership."
- Joint liability for partnership debts – section 9
- Duty of Utmost Good Faith Between Partners

- Maximum of 20 Partners up to 21st December 2002 - except solicitors, accountants, stock exchange members and other professionals – under sections 716-717 Companies Act 1985. *Those sections have now been repealed by the The Regulatory Reform (Removal of 20 Member Limit in Partnerships etc.) Order 2002 SI 2002/3203.*
- More generally, this structure is governed by Common Law and Equity and was developed by the courts using rules that were codified in the 1890 Act. It is flexible and, in terms of relations between partners, the Act frequently “fills gaps” by providing rules that apply in the absence of agreement to the contrary e.g.
- Equal share of capital and profits and losses – section 24(1)
- Every partner can take part in management – section 24(5) – compare company structure.
- One partner one vote on most issues – section 24 (8) but admitting a new partner or changing the partnership’s area of business needs unanimity – section 24 (7) & (8)

(ii) Limited Partnerships Act 1907

This legislation is little used. Its main characteristics are:

- There must be at least one partner with unlimited liability - section 4(2).
- Those with limited liability must take no part in management – section 6(1).
- The Partnership is registered with the Registrar of Companies – section 5.
- Otherwise it shares all the features of the 1890 Act partnership – no separate corporate personality, agency of each partner for all etc.

(iii) Limited Liability Partnerships: a hybrid partnership/company form (from Texas!) Available since April 2001

Limited Liability Partnerships Act 2000. See also Limited Liability Partnerships Regulations 2001 SI 2001/1090 especially regulation 8 which contains default provisions on voting etc. These regulations apply an adapted version of Companies Act 1985, Insolvency Act 1986 and Company directors’ Disqualification Act 1986 to LLP’s.

- Origins:
 - DTI, Limited Liability Partnerships: A New Form of Business Association for Professions (URN 97/597). DTI, Limited Liability Partnerships. Draft Bill (URN 98/874)

- Articles:
 - Freedman and Finch, “Limited Liability Partnerships: have the accountants sewn up the deep pockets debate?” (1997) Journal of Business Law 387
 - J. Payne “A new legal entity poised to enter onto the commercial stage (2000) 21 Company Lawyer 133 - 134
 - J Henning, “Limited Liability Partnerships, limited partnerships and limited liability limited partnerships” (2000) 21 Company Lawyer pp165 & 196

- Main Features:
 - Body corporate with legal personality formed by registration with Registrar of Companies under Act - sections 1(2), 2 & 3. & Sched 1.
 - Unlimited Capacity - section 1(3)
 - Limited liability - section 1(4). There is unlimited liability for the member actually negligent under Tort Law while the liability of the “innocent” members exists if the tortfeasor acted in the course of the business but is limited to their stake in the firm as agreed on establishing the LLP (section 6(4) and in SI 2001/1090– reg 5 and Schedule 3 substituting new section 74 in Insolvency Act 1986).
 - Partnership Law applies only when this Act applies it - section 1(5) but regulation 7 of SI 2001/1090 does apply many of the same default provisions on right to participate in management, share of profits and duties of partners to each other.
 - Members are those listed on incorporation or joining later with agreement of existing members and leave by agreement, death, dissolution or reasonable notice - section 4(1) - (3) - NOT limited to professionals - any two or more persons carrying on a lawful business - section 2(1) (a)
 - Rights and Duties to each other as agreed or failing that as regulations state - section 5. The courts will build fiduciary duties of members to the partnership and each other on this basis – see regulation 7.
 - Duties may be imposed on LLP by agreement between members before incorporation - - section 5(2) NOT true of companies
 - Section 6 agency of each partner for all unless no authority in fact and other person knew none or did not know/believe s/he was a partner - section 6(1) & (2) - as with other partnerships.
 - Taxed as a partnership - sections 10 to 13. - The main reason that businesses will want to use this new structure rather than a company structure.
 - Dissolution/Insolvency - section 14. Regulations fill in the detail by adapting the Insolvency Act 1986 (applicable to companies) to apply to the LLP. This deals with the limited liability of the partners by limiting their obligation to contribute on insolvency to the amount they agreed to contribute – LLP Regs

2001/1090 Schedule 3 new section 74 of Insolvency Act 1986. Section 6(4) of the LLP Act 2000 keeps individual Tort liability of the tortfeasor partner and also imposes it on the LLP but with limited liability for the other partners under the substituted section 74 of Insolvency Act 1986.

- ***Law Reform of General Partnership Law - At an Early Stage***

English and Scottish Law Commissions, Partnership Law: A Joint Consultation paper Consultation Paper No 159 Discussion Paper No 111 September 2000 and see The Reform of Partnership Law: A Consultation Document April 2004 <http://www.dti.gov.uk/cld/reformofpartnershiplaw.pdf>

Raises possible reform proposals to deal with these main issues:

- Introduction of Separate Legal Personality for English partnerships (Scots ones already have it) - directly on all without registration (Scots model) or only if register (the Company Law “deal”) with disclosure as the price for the privilege? Legal personality would allow them to hold property, and to sue and be sued as an entity.
- No dissolution of partnership every time somebody leaves and joins. Most partnership agreements achieve this but the Partnership Act 1890 provides for dissolution in this event if there is no agreement to the contrary between the partners. Should the “fall back” rule allow withdrawal without dissolution? Right to withdraw would replace right to dissolve partnership.
- Solvent dissolution in broadly the same way as companies with a liquidator to handle this - now complex and problematic if partners can’t agree to co-operate as no official with power to do all that is necessary.

In July 2006 the Government announced that it does not propose to take these reforms to general partnership law forward “at this time” but that it will use secondary legislation to bring forward reforms to the Limited Partnerships Act 1907

European Structures:

- European Economic Interest Grouping

See Council Regulation (EEC) No. 2137/85 of 25th July 1985 on the European Economic Interest Grouping OJ L 199 31.7.1985 p1 and the UK European Economic Interest Grouping Regulations 1989 SI 1989/638. Davies and Gower pp 26-28

- European Company Statute

See Council Regulation (EEC) No. 2157/2001 of 8th October 2001 on the Statute for a European Company OJ L 294 10.11.2001 p1 and Council directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees OJ L 294 10.11.2001 p22. Davies and Gower pp 28-31

- ***Unincorporated Associations***
- ***Special Corporate Forms:***
 - Building Societies Act 1986 - registration as a building society.
 - Industrial and Provident Societies Acts 1965 to 2003 - registration of co-operatives and community benefit organisations. See http://www.hm-treasury.gov.uk/consultations_and_legislation/creditunions/consult_creditunions_index.cfm for consultation on reforms to this legislation
 - Friendly Societies Acts 1974 and 1992 - registration as a friendly society for mutual insurance of the members.
 - The Companies (Audit, Investigations and Community Enterprise) Bill 2004 – the Community Interest Company (CIC) a special type of company – Davies and Gower p p 7-11

- **Limited Company Registered under Companies Act 2006**

- Registered/statutory/chartered
- Limited/unlimited companies
- Companies limited by guarantee/companies limited by shares
- Private/public companies
- Listed/unlisted companies
- Parent/subsidiary companies

A Spectrum:

- Quasi Partnership to Large Listed PLC - a practical distinction throughout the course.
- Separation of ownership and control - management self interest - corporate governance - board and general meeting - shareholder democracy - cost of participation - non-executive directors - Stock Market - institutional investors - Monitoring - audit and remuneration committees - two tier board?

- **Key Features of Companies and Issues in Choosing Structure:**

- Members' liability limited to amount payable but not yet paid on shares,
- or in case of company limited by guarantee, amount member promised to pay in event of insolvency of company – Companies Act 2006 section 3(1)-3(3)
- Corporate personality of registered Company – (next topic) – company and not individual members owns assets and sues and is sued – Companies Act 2006 section 16(2)-16(3)
- Share capital available as a means of raising capital – if limited by shares but

not if limited by guarantee – Companies Act 2006 section 5.

- Must formally register the Company before it exists - Companies Act 2006 section 1(1).
- Taxed by Corporation Tax rather than just income tax on profits distributed to owners
- Governance usually by general meeting of shareholders (limited powers and not agents of company) and separate board of directors (greater powers and may be/appoint agents of company) and not by owners (shareholders) collectively - Companies Act 2006 Parts 3, 10, 13, and 15 and Table A in the Companies (Tables A-F) Regs 1985 SI 1985/805..

Compare 1890 Act Partnership and sole trader –

- no corporate personality,
- no limited liability,
- no easily transferable shares,
- no need to register to set them up,
- profits taxed as income of individual partner owners,
- governance model that all partners equal (can vary this) and that partners have agency rights to contract for firm.
- LLP Act 2000 and LPA 1907 Act partnerships - hybrids.

Practice Essay

- "Argue for *or* against the proposition that, in the context of wealthy and powerful transnational corporations, it is inappropriate to assume that each company in a group is a separate legal person."

Note: You should write an answer of up to 1500 words.

REFERENCES AND BIBLIOGRAPHY

Sources of company law

1. European Union Company Law Directives – Davies and Gower
8th Edition pp 129-138 and go to:
http://ec.europa.eu/internal_market/company/index_en.htm
to keep up to date.

2. Companies Act 2006 - Statute Book, and HMSO Legislation Site
3. Insolvency Acts 1986 and 2000 and Enterprise Act 2002 Statute Book, HMSO Legislation Site and Handout Materials
4. City Code on Takeovers and Mergers – Blackboard External Link to <http://www.thetakeoverpanel.org.uk/> for full text.
5. Judge Made Law - Common Law and Equity - usual electronic and hard copy case law sources and Hicks and Goo.

Electronic Sources

1. <http://www.berr.gov.uk/index.html> gets you the relevant UK Government Department for company law matters (under the Brown Administration renamed as the Department for Business Enterprise and Regulatory Reform but formerly known as the Department of Trade and Industry) and <http://www.berr.gov.uk/bbf/co-act-2006/index.html> will get you to the BERR Company Law Pages from which you can get to information about the Companies Act 2006, and the Company Law Review and White Paper on which it was based. The Companies Act 2006 rewrote the law in the whole area and became law in November 2006. The latest (March 2005) White Paper can be found on <http://www.berr.gov.uk/bbf/co-act-2006/white-paper/page22800.html> In lectures, tutorials and the exam, we base the course on the law as it will stand after the Companies Act 2006 is fully in force. In fact different parts of the Act come into force at different times right up to Autumn 2009 – see the [Companies Act 2006 table of commencement dates](http://www.berr.gov.uk/bbf/co-act-2006/index.html) link from <http://www.berr.gov.uk/bbf/co-act-2006/index.html> for details of the plans for this and <http://www.berr.gov.uk/whatwedo/businesslaw/co-act-2006/made-or-before-parliament/page35232.html> for the current state of play with commencement orders.
2. <http://www.fsa.gov.uk/> is the UK Financial Services Authority (FSA) Site – dealing with all financial services regulation, stock exchange listing rules (known for this purpose as the UK Listing Authority (UKLA)), banking and insurance regulation. The Listing Rules to be found on their site at <http://www.fsa.gov.uk/pages/Library/Communication/Forms/handbook/listing.shtml> are particularly relevant later in the course. The FSA operates as the United Kingdom Listing Authority (UKLA) under the relevant EU Directives for that purpose.
3. <http://jurist.law.pitt.edu/paperchase/> is an excellent academic law site for USA and international materials and Universities including journals, court and legislative materials. Starting with these sites you should spend many happy hours on the internet researching relevant material and being swamped with information!

Prescribed Materials

1. Davies, P. L., (2008). *Gower and Davies' Principles of Modern Company Law*, 8th Edition. London: Sweet and Maxwell.

2. Hicks, A. and Goo, H.S., (2008). *Cases and Materials on Company Law*, 6th Edition. Oxford : OUP

Select Bibliography of General Reference Books

1. Hannigan, B. (2003). *Company Law* (1st ed)
 - This is a full and thorough academic text. A good source of alternative reading to Davies and Gower but not updated for the 2006 Act.
2. Mayson, French & Ryan (2008). *Company Law* (25th ed.)
 - dense, full, factual and boring
3. Dignam, A., & Lowry, J., (2009). *Company Law* 5th ed.
 - Core Texts series OUP – a good introduction
4. Sealy, L., & Worthington, S., (2008). *Cases and Materials on Company Law* 8th ed. OUP
5. Schmithoff & Thompson (Eds) (1992). *Palmer's Company Law* (25th ed.,)
 - major reference book.
6. Boyle & Sykes (Eds), (1999). *Gore-Brown on Companies* (44th ed.,)
 - loose-leaf and regularly updated.
7. Gould, S., *Principles of Company Law* Cavendish
 - good basic outline
8. Pennington, R.R. (2001). *Pennington's Company Law* Butterworths.
9. Sealy (1984). *Company Law and Commercial Reality*.
 - essays on key issues.

Select Bibliography on Particular Topics or with a Particular Angle

1. Talbot, L.E. (2008). *Critical Company Law*, Routledge-Cavendish.
 - an excellent critical analysis of the whole area with particular reference to Corporate Governance issues
2. de Lacy, J. (ed.) (2002). *The Reform of Modern UK Company Law*, Cavendish.
3. Dean, J., (2001). *Directing Public Companies: Company Law and the Stakeholder Society*, Cavendish.
4. Dignam, A.J. (2000). *Company Law and the Human Rights Act 1998*, Butterworths.
5. Hopt, K.J. (2003). *Capital Markets and Company Law*, OUP.
6. Edwards, V. (1999). *EC Company Law*.
7. Ferran, E. (1999). *Company Law and Corporate Finance*.
8. Hadden (1983). *Control of Corporate Groups*.
9. Johnson, *The City Takeover Code* (1980)
10. McGee, C. Williams and Scanlan, G. (2005). *The Law of Business Organisations*, Law Matters.
 - This is an “applied” analysis, with a running example, of what happens to a business in its life and death.
11. Macmillan Patfield, F. (ed) (1995). *Perspectives on Company Law*, Kluwer.

Select Bibliography of Books on the Law of Partnership

1. Blackett, M.O., (2002). *Partnership: the modern law of partnership, limited partnership and limited liability partnership*, Butterworths, 2002.
2. Morse (2006). *Partnership Law* (6th ed.,)
3. Scammell (ed.), *Lindley and Banks on Partnership*

Excellent introduction to the theoretical framework of company law

1. M Stokes: "Company Law and Legal Theory" in W Twining (ed), *Legal Theory and Common Law* (1986), 155 – 183
2. P.I. Blomberg *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality*, OUP 1993
3. Cheffins, *Company Law: Theory Structure and Operation* (1997) - thorough Economic Analysis of Law approach and critique for those who want to take the subject a little further
4. Grigg Spall & Ireland, *The Critical Lawyer's Handbook* (1992) - a radical anti-corporate view
5. Joel Bakan, *The Corporation: the Pathological Pursuit of Profit and Power*.
6. Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (1st Edtn 1993, 2000 Reprint). - a liberal critique for those who want to take the subject a little further
7. Wheeler, ed., *Company Law* (1993) - good collection of socio-legal articles.
8. Wheeler, ed., *The Law of the Business Enterprise* (1994) - very useful introductory chapter and collection of socio-legal articles.

Periodicals

1. The Company Lawyer
2. Journal of Business Law
3. Financial Times (<http://www.ft.com>) or Business pages of a Broadsheet daily and/or Sunday newspaper - this will give you the business context which is so important to really getting to grips with the subject.
4. The Times <http://www.the-times.co.uk/>, The Daily Telegraph <http://www.telegraph.co.uk/> and The Guardian/Observer <http://www.guardian.co.uk/> are on the internet each day.

COMPANY LAW 2008 - 2009 - LECTURE OUTLINE II

TOPIC 1 : THE BIRTH OF THE COMPANY

Reading:

- Gower and Davies, 8th Edition 2008, Chapter 4
- Hicks & Goo 6th Edition pp 78-83 are also helpful on the registration issues, and pp41-77 contain examples of the documents we are concerned with here. Just browse them to see what they cover.
- The Companies Act 2006 makes the articles the only effective constitutional document for new companies.

Introduction

This technical detail about registration and constitutional documents is not something we focus on in the course but you need to be aware of it as background to the emergence of the company as a separate person in law and to some of the issues arising later in the module.

Pre-2006 Act System for Registering a Company

1. The two basic constitutional documents:
 - Memorandum of Association: See specimens in Companies (Tables A-F) Regs 1985 SI 1985/805 Tables B & F and see CA 1985 ss 2,3.
 - Articles of association: See Companies (Tables A-f) Regs 1985 Tables A, C, D, and E and see CA 1985 ss7,8.
 - But White Paper “Modernising Company Law, July 2002, Cm 5553 paras 6.2. & 6.3. propose a single document.

2. Memo and Arts to be subscribed in the presence of a witness by each subscriber (initial shareholder): CA 1985, ss 2(6) and 7

3. Memo must state (CA 1985 s2):
 - a. **name of company**, plus "Limited/Ltd" if limited by shares or guarantee unless dispensation granted or "plc" if public limited company (or Welsh equivalent);
 - b. whether company's **registered office** is **situated** in England and Wales or Scotland - domicile;
 - c. **objects of company** - a company may register its object as being a general commercial company (see CA 1985 s 3A, inserted by s. 110 of Companies Act, 1989);
 - d. whether company is **limited by shares or guarantee**. If limited by guarantee memo. must state maximum amount members guaranteed to contribute. If limited by shares. memo. must state amount of company's share capital, the division of the share capital into shares of a fixed amount and the number of shares subscribed by each subscriber. Note, also, that the capital of a plc must not be less than the authorised minimum (CA 1985 s11), currently fifty thousand pounds.

4. Memo and arts delivered to the Registrar of Companies with prescribed fee plus:

- a **statement on** formation of limited company:
 - b **declaration of compliance;**
 - c **particulars of directors and secretary** signed by subscribers:
 - d **address of registered office** signed by the subscribers
 - e payment of prescribed **fee**
5. Duty of Registrar and effect of registration (CA 1985 ss 12 - 13):
- a. **Registrar must be satisfied that the statutory requirements are met** and that the objects of the company are lawful (see *R v Registrar of Companies; ex parte Bowen* [1914] 3 KB 1161; *R v Registrar of Companies; ex parte More* [1931] 2 KB 197 (CA))
 - b. Subject to c. *infra*, **certificate of incorporation** issued by the Registrar on satisfactory completion of requirements is **conclusive evidence** to the world **that the company has satisfied the statutory requirements** (see *Bowman v Secular Society* [1917] AC 406 (HL)).
 - c. **Only the Crown can challenge lawfulness of incorporation:** *R v Registrar of Companies, ex p HM's Attorney General* [1991] BCLC 476 [Lindi St Clair (Personal Services) Ltd aka "Miss Whiplash"].
6. **On issue of certificate of incorporation** (and on satisfying minimum capital requirement in the case of plcs), the company can start trading.
7. The following documents known as the "**statutory books**" **must be kept at the company's registered office and be available for inspection.**
- a register of members ;
 - b register of charges;
 - c copies of instruments creating charges;
 - d minute book of General Meetings;
 - e register of debenture holders;
 - f register of directors and secretary;
 - g register of directors' share and debenture holdings in the company;
 - h copies of directors' service contracts.
8. **The company's name must appear outside every office etc. where its business is carried on and all correspondence, invoices etc. must bear the company's name.** Where these requirements are not complied with there is a possibility of criminal sanctions or of the officers of the company becoming personally liable.

Post 2006 Act System for Registering a Company

One or more persons subscribe their name to the (new style) memorandum of association and comply with registration requirements of *sections 9 to 13 – section 7(1) CA 2006*.

Company must not be formed for an unlawful purpose – *section 7(2)*.

Memorandum of Association (in prescribed form and authenticated by each subscriber) states that the subscribers wish to form a company, agree to become members and agree to take at least 1 share each if the company is to have share capital - *section 8*.

The document then has no other function - it is no more than a form filed on the registration of the company and contains only the information mentioned above.

All ongoing constitutional information and rules will be in the articles of association – the one constitutional document for new companies created under the 2006 Act.

For registration the following documents are filed with the Registrar of Companies in England and Wales, or Scotland or Northern Ireland (as the case may be):

- The memorandum of association
- An application for registration – *sections 9 to 12*
- A statement of compliance with Companies Act’s requirements – *section 13*
- A copy of the company’s proposed articles of association to the extent that one of the statutory models is not to be used.

- *section 9(1)*

The application for registration

States:

- co. name; jurisdiction where reg’d office situated; whether liability of members limited and, if so, whether by guarantee of shares; whether Co, PLC or private company and name and address of any agent filing it – *section 9(2) & (3)*

Contains:

- statement of capital and initial shareholdings for Co ltd by shares as per *section 10*; statement of guarantee for a co ltd by guarantee as per *section 11*; statement of proposed officers (director(s), secretary (if any); authorised signatories (if any)) and their consents to act as per *section 12*; address of co’s registered office and copy of articles except to extent model is used – *section 9(4) & (5)*.

Registration and Its Effect

- *Section 14* requires registrar to register if he is satisfied that Act’s requirements complied with (as now).
- Then under *section 15* a *certificate of incorporation* is issued with much the same information as before and, “is conclusive evidence that the requirements of the Act as to registration have been complied with and that the company is duly registered” – *clause 15(4)*.
- This appears to continue position as in *Bowman v Secular Society* [1917] AC 406 (HL) (above). *Section 7(2)* continues *R v Registrar of Companies*;

ex parte Bowen [1914] 3 KB 1161: *R v Registrar of Companies; ex parte More* [1931] 2 KB 197 (CA) and the Crown, but not others, would still have the right to challenge the registration of a company with an unlawful purpose after the event - *R v Registrar of Companies, ex p HM's Attorney General* [1991] BCLC 476 ["Miss Whiplash"].

- Registration, from the date of incorporation, creates a body corporate capable of exercising all the functions of a registered company, with the named people holding shares and office as director, secretary etc – *section 16*.

The 2006 Constitutional Rules

The articles – plus any resolutions and agreements affecting the company constitution such as those amending the articles or otherwise binding all members - are the “company’s constitution” – *section 17 CA 2006*. The articles have to be in a single document and divided into numbered paragraphs and must be registered unless model articles are used – *section 18*. The Models will be prescribed by the DTI under power in *section 19* and they apply on default if no articles are registered or the registered articles do not exclude or modify the model articles applicable to that company – *section 20*. This is similar to the Table A system pre-2006 except that more models are to be drafted including one for “owner managed” companies. See

- <http://www.berr.gov.uk/files/file45533.doc>

FAQ’s on it see

- <http://www.berr.gov.uk/whatwedo/businesslaw/co-act-2006/faq%20Act%202006/page38503.html>

For the purpose of the module this year we will refer to the 1985 version of Table A. Amendment of the Articles is by special resolution but, as almost everything that would currently be in the memorandum will be in the articles under the 2006 regime, there is greater clarity and uniformity about this. The exceptions to the simple amendment of articles by 75% majority, is in the case of a charity in which case the permission of the Charities Commission is needed too – *section 21*. This is the same as now.

The 2006 Act allows for “*provision for entrenchment*” so as to specify in the articles – either on registration or later by unanimous decision of all the members – that certain parts of the articles can be amended or repealed only if certain conditions are met but this will never prevent amendment by agreement of all the company’s members – *section 22*.

This might be used to prevent change by less than a very high percentage of members to protect a particular group although another way of achieving this is to have different classes of share and then a special majority of members holding that class of share will be needed for change. If the company is structured as a co-operative or for some other special purpose or function, this power may be useful.

However, a company set up to provide benefit to the community can be registered as a Community Interest Company (CIC) in which case the CIC regulator - <http://www.cicregulator.gov.uk/> - can prevent change. If a company meets the

definition of a charity it can register with the Charity Commission who can then prevent change - <http://www.charity-commission.gov.uk/> . So the use made of the general Companies Act 2006 entrenchment power may be more limited. The entrenchment and any later change in it must be registered with the Registrar of Companies – *sections 23 and 24*.

Under previous company law it was possible to entrench provisions so that they could not even be changed by unanimous agreement of the members using section 17 of the 1985 Act. This will no longer be possible. *Section 28* of the 2006 Act provides that the Memoranda of Association of existing companies (where entrenchment in existing companies is likely to be found) are to be regarded as part of their articles except so far as they contain information also to be found in the “post-2006” memorandum of association. This clause also applies the new entrenchment rules to existing companies.

Two important changes of substance are part of the new arrangements.

- Formerly all companies had to state a maximum limit on the amount of shares they can issue – “authorised” or “nominal” capital – in their Memorandum of Association. The 2006 Act removes that requirement as no such figure is required in the articles of companies. However, PLC’s will still have to meet the minimum capital requirement of having £50,000 of issued share capital with at least 25% paid up.
- Under the 2006 Act companies will not be required to state what their objects are – this is currently required in the memorandum. The new rule is that:
 - “unless a company’s articles specifically restrict the objects of the company, its objects are unrestricted” – *section 31(1)*.

We come back to this “death of ultra vires” in the Company Contracts topic later this term.

Pre-incorporation Contracts

(See: Gower and Davies 8th Edition pp114-118 and Hicks and Goo 6th edition pp83-91)

- The company cannot be bound to a contract before it is formed either when the contract is made or later by adopting it – *Kelner v Baxter* (1866) LR 2 CP 174 but the person who purports to make the contract on behalf of the non-existent company will be personally liable on it “subject to any agreement to the contrary” – *section 51 of the 2006 Act* implementing art 7 of the First EEC Company Law Directive.
- Any “agreement to the contrary” must be clear and explicit. Signing “on behalf of the company” or in a similar way is not enough on its own – *Phonogram Ltd v Lane* [1982] QB 938 CA
- The agent can also sue on the contract - *Braymist Ltd v Wise Finance Company Ltd* [2002] EWCA Civ 127 [2002] Ch 273.

- Read Hicks & Goo 5th Edition pp 70-75 for relevant extracts from the earlier case law and the precise wording of the section and see *Braymist Ltd v Wise Finance Company Ltd* [2002] EWCA Civ 127 [2002] Ch 273

TOPIC 2: CORPORATE PERSONALITY: The Foundation of Company Law

READING:

- Gower and Davies, 8th Edition 2008, Chapters 8 and 9
- Hicks & Goo 6th Edition Chapter 3 and Chapter 20.12.

1. THE DOCTRINE ESTABLISHED:

SALOMON V SALOMON [1897] AC 22

"It seems to me however that when one considers the fact that these shareholders were nominees of Mr Salomon's, that he took the whole of the profits and that his intention was to take the profits without running the risk of debts and expenses, one must also consider the position of the unsecured trade creditors, whose debts amount to some £11,000. As I have said, the company was a mere nominee of Mr Salomon's ... and therefore I wish, if I can, to deal with this case exactly on the basis that I should do if the nominee, instead of being a company, had been some servant or agent of Mr Salomon's to whom he had purported to sell his business." Vaughan William J. at first instance; *Broderip v Salomon* [1895] 2 Ch 323 329

"Either the company was a legal entity or it was not. If it was, the business belonged to it and not to Mr Salomon. If it was not, there was no person and nothing to be an agent at all.": Lord Halsbury [1897] AC 22

"In a popular sense a company may in every case be said to carry on business for and on behalf of its shareholders; but this certainly does not in point of law constitute the relationship of principal and agent between them or render the shareholders liable to indemnify the company against the debts which it incurs.

The company is at law a different person altogether from the subscribers to the Memorandum [shareholders] and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent of the subscribers or a trustee for them. Nor are subscribers as members liable in any shape or form, except to the extent and in the manner provided by the Act": Lord Macnaughton, *ibid* 51

(a) Consequences of the Salomon decision

See Cohn & Simitis (1963) 12 LCLQ 215-225; Kahn-Freund 7 MLR 54-59

(i) Status of one-person companies

- *Lee v Lee's Air Farming Ltd* [1961] AC 12
Companies (Single Member Private Limited Companies) Regs 1992 SI 1992/ 1699 implementing Directive 89/ 667/ EEC OJ No. L395 30.12.89, p40.

- (ii) Possibility of Limiting Liability –even for a small business owned by one person
- (iii) Debentures as a means of minimising risk.

(b) Main Consequences of Companies' Corporate Personality

- (i) Companies can sue and be sued in their own name
- (ii) Companies enjoy perpetual succession
- (iii) Companies can hold property and members have no property interest in company property: *Macaura v. Northern Assurance Co Ltd* [1925] AC 619

"Shareholders are not, in the eyes of the law, part owners of the undertaking. The undertaking is something different from the totality of the shareholding." Evershed LJ in *Short v Treasury Commissioners* [1948] 1 KB 116 122

Tate Access Floors Inc v. Boswell [1991] Ch 512. per Browne-Wilkinson V-C at 531

"If people choose to conduct their affairs through the medium of corporations, they are taking advantage of the fact that in law those corporations are separate legal entities, whose property and actions are in law not the property or actions of their incorporators or controlling shareholders. In my judgement controlling shareholders cannot, for all purposes beneficial to them, insist on the separate identity of such corporations but then be heard to say the contrary when discovery is sought against such corporations."

2. EXCEPTIONS - "LIFTING THE VEIL OF CORPORATE PERSONALITY"

See. e.g. Whincup, "Inequitable Incorporation" (1981) 2 Co Lawyer 158; Ottolenghi, "From Peeping behind the corporate veil, to ignoring it completely" (1990) 53 MLR 338; Charles Mitchell, "Lifting the Corporate Veil in the English Courts: An Empirical Study" (1999) 3 Company, Financial and Insolvency Law Review 3 pp15-28 and A J Boyle, *The Company Law Review and "Group Reform"* (2002) 23 Company lawyer 35-36 – available on Westlaw.

(a) Statutory Exceptions

- (i) **Section 24 CA 1985** - Liability of a member of the debts of the company. This little used provision is **repealed by the Companies Act 2006**
- (ii) **Fraudulent Trading/ Wrongful Trading** - Section 993 CA 2006 (criminal offence of fraudulent trading): ss 213-215, Insolvency Act 1986 (remain after 2006).

s213 IA 1986 "(1) If in the course of the winding up of a company it appears that any business of the company has been carried out with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the following has effect.

(2) The Court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper."

Re Maidstone Building Provisions Ltd [1971] 1 WLR 1085

Re Augustus Barnett & Son Ltd [1986] BCLC 170

Re Patrick Lyon Ltd [1933] Ch 786, Maugham J:

"actual dishonesty involving, according to current notions of fair trading among commercial men, real moral blame".

- The Jenkins Committee, 1963, para 563(b)
 - The Cork Committee, 1981
 - S214 IA 1986, if
 - (a) the company has gone into insolvent liquidation:
 - (b) that before the commencement of the winding up, the director knew or ought to have concluded that there was no reasonable way of avoiding insolvent liquidation; and
 - (c) the person was a director at the time:
- (3) provided that a declaration will not be made if it satisfied that the person took every step to try and minimise the loss to creditors.
- (4) assumed to be a reasonably diligent person having both the general knowledge, skill and experience to be expected of a person carrying out his functions in relation to the company and the general knowledge, skill and experience that he in fact has.
- *Re Produce Marketing Consortium (No.2)* [1989] BCL 520
 - What is the position of shadow directors?

(iii) Personal liability of signatories of company documents before the 2006 Act

- s 348- 351, CA 1985
- *Rafsanyan Pistachio Producers v Reiss* [1990] BCLC 352
- *Jenice Ltd and others v Dan* [1994] BCC 43
- **Sections 82 to 85 of the 2006 Act** empowered BERR to make regulations about the disclosure of the company name on specified documents. See now The Companies (Trading) Disclosures Regulations 2008 SI 2008/495.
- Those rules are enforceable by criminal proceedings against the company or officers in default. The *civil consequences* of breach of the rules *are limited to defending an action brought by a company in breach of the rule on the basis of suffering financial loss or being unable to pursue one's own claim because of the breach. There is no statutory personal liability on the part of a signatory.*

(iv) Duties of groups of Companies to produce group accounts

Sections 398 to 408 of Companies Act 2006.

(b) Judicial Exceptions

The current UK position:

Adams v Cape Industries plc [1990] Ch 433

Represents a strong reaffirmation of the Salomon Principle, on the basis that only the narrow and well established exceptions justify lifting the veil:

(i) Agency

Smith, Stone & Knight v Birmingham Corporation [1939] 4 All ER 116 (Noted Kahn-Freund, (1940) 3 MLR 226)
Gramophone & Typewriter Ltd v Stanley [1908] 2 KB 89
Re F. G. (Films) Limited [1953] 1 WLR 483 - tax case
Southern v Watson [1940] 3 All ER 439
Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd [1921] 2 AC 465

(ii) Fraud/Facade

Gilford Motor Co v Horne [1933] Ch 935
Jones v Lipman [1962] 1 WLR 832
Re H [1996] 2 All ER 391 CA

(iii) Economic Unit/Groups of Companies

Holdsworth & Co v Caddies [1955] 1 WLR 352
DHN Food Distributors Ltd, Tower Hamlets LBC [1976] 3 All ER 464
Woolfson v. Strathclyde Regional Council (1978) ALT 159
Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd, [1983] 3 WLR 492. See Wedderburn, (1984) 47 MLR 87
Kleinwort Benson Ltd v. Malaysia Mining Corporation Bhd [1989] 1 WLR 379, CA
Ord v Bellhaven Pubs Ltd [1998] 2 BCLC 447
Re Polly Peck International plc (in administration) [1996] 2 All ER 433

Direct Liability of a Holding Company as an Alternative

Lubbe & Others v Cape PLC [2000] 1 WLR 1545 HL
Stoczni Gdanska v Latvian Shipping Co [2002] 2 Lloyds Rep 436 CA

A different approach here with no need to lift the veil and the possibility of direct legal liability for the holding company as a tortfeasor. However, note the cautious approach to this on the issue of personal liability for negligent misstatement in: *Williams v Natural Life Health Foods Ltd* [1998] 1 W.L.R. 830 HL

And contrast the willingness to hold a director liable for the tort of deceit where s/he is found to have been fraudulent - even if the company will be liable as well: *Contex Drouzhba Ltd v Wiseman* [2008] B.C.C. 301 CA

Draft 9th Directive

See also Cohn & Simitis, *supra* and Rixon (1986) 102 LQR 415 (extracted in Hicks & Goo)

Contrast UK position with USA:

"...where the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association of persons.": US v *Milwaukee Refrigerator Transit Co.* (1905) 142 Fd 247, 255

- the US concept of inequitable incorporation:

- fraud
- undercapitalisation
- domination by parent of subsidiary

See Whincup, *supra*; Cohn & Simitis, *supra*: and Schmitthoff [1976] JBL 305

COMPANY LAW 2008-2009

LECTURE OUTLINE

AGENCY: Contracting For the Company

Readings

1. Gower and Davies Chapter 7 esp pp.151-178
2. Hicks and Goo Chapter Parts 6.1 and 6.2 and Chapter 8 Part 8.2

(a) Actual authority of an agent:

Approach confirmed in *Criterion Properties PLC v Stratford UK Properties LLC* [2004] UKHL 28 per Lord Scott of Foscote para 30:

“This case turns, in my opinion, on the "authority" issue. If Mr. Glaser and Mr. Palmer either had actual authority.....given by a person or body with power to confer that authority or, if they did not have actual authority, had apparent authority to do so, then I can see no reason why the SSA should not be held enforceable against Criterion. If, on the other hand, Mr Glaser and Mr Palmer had neither actual nor apparent authority to conclude the SSA, then the SSA could not be held enforceable against Criterion.....”

Express actual authority: through Regs 70 & 71 of Table A

Implied Authority

Freeman & Locker v. Buckhurst Park Properties Limited [1964] 1 All ER 630:

"Actual authority is a legal relationship between principal and agent created by consensual agreement to which they alone are parties. Its scope is to be determined by applying ordinary principles of construction of contracts....To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless if the agent does enter into a contract pursuant to the 'actual' authority it does create contractual rights and liabilities between the principle and the contractor" (per Diplock LJ at 644).

Hely-Hutchinson v. Brayhead Ltd [1967] 3 All ER 98.

(b) Apparent or Ostensible authority of an agent:

Freeman & Lockyer, supra:

""Apparent' or 'ostensible' authority...is a legal relationship between the principle and the contractor created by a representative made by the principle to the contractor, that the agent has authority to enter on behalf of the principle liable to perform any obligations imposed on him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation. The representation when acted on by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principle from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter in to the contract" (per Diplock LJ, at 644).

- *Hely-Hutchinson (supra)*
- *Armogas LTD v. Mundogas SA* [1986] Ac 717

- *Egyptian International Foreign Trade Co. v. Soplex Wholesale Supplies Ltd, The Raffaiella* [1985] BCLC 404
- *First Energy Ltd v. Hungarian International Bank Ltd* [1993] BCC 533

Knowledge that contract made in breach of duty or without actual authority may be fatal to attempt to establish apparent authority:

Criterion Properties PLC v Stratford UK Properties LLC per Lord Scott of Foscote para 31:

“If a person dealing with an agent knows that the agent does not have actual authority to conclude the contract or transaction in question, the person cannot rely on apparent authority. Apparent authority can only be relied on by someone who does not know that the agent has no actual authority. And if a person dealing with an agent knows or has reason to believe that the contract or transaction is contrary to the commercial interests of the agent's principal, it is likely to be very difficult for the person to assert with any credibility that he believed the agent did have actual authority. Lack of such a belief would be fatal to a claim that the agent had apparent authority.”

STATUTORY CHANGES TO DIRECTORS' AUTHORITY TO BIND THE COMPANY

Section 40 CA 2006 (Formerly section 35A CA 1985):

(1) In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed free of any limitation under the company's constitution.

(2) For this purpose -

(a) a person "deals with" a company if he is party to any transaction or other act to which the company is a party,

(b) a person dealing with the company –

(i) 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,

(ii) is presumed to have acted in good faith unless the contrary is proved, and

(iii) is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution;

(3) The references above to limitations on the directors' powers under the company's constitution include limitations deriving -

(a) from a resolution of the company in general meeting or a meeting of any class of shareholder, or

(b) from any agreement between the members of the company or of any class of shareholders.

(4) This section does not affect any right of a member of the company to bring proceedings to restrain the doing of an act which is beyond the powers of the directors. But no such proceedings shall lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company.

(5) This section does not affect any liability incurred by the directors, or any other person, by reason of the directors' exceeding their powers.

(6) This section has effect subject to-
 Section 41 (transactions with directors or their associates)
 Section 42 (companies that are charities).

The Structure

- (i) The board of directors or those they authorise bind the company in any dealing with a person who is in good faith. No constitutional limitations affect this.
- (ii) A "dealing" is any transaction or any other acting
- (iii) A person is not acting in bad faith merely by knowing that an act is beyond the directors' constitutional powers. Good faith is presumed.
- (iv) A member has the right to restrain an act beyond the powers of directors.
- (v) Directors may be liable for exceeding their powers.
- (vi) Third parties are not bound to enquire into the capacity of the company or the capacity of the directors. The doctrine of constructive notice is abolished.

Additional Points

- Who is the Board: *International Sales Ltd v. Marcus* [1982] 3 ALL ER 551.
- The position of a Single Director : *Freeman & Lockyer v. Buckhurst Park Properties Limited* [1964] 1 ALL ER 630.
- "Person" (as in third party) may include director but does not always do so and section probably covers procedural irregularities (e.g. inquorate board meeting) as well as constitutional limitations but not "non-events" – *Smith v Henniker-Major & Co* [2002] 2 BCLC 655
- *Hely-Hutchinson v. Brayhead Limited* [1967] 3 All ER 98
- *Royal British Bank v. Turquand* [1856] 6 E&B 327.
- *Barclays Bank Ltd v. TOSG Trust fund Ltd* [1984] BCLC 1 [1984] AC 626.
- *TCB Ltd v. Gray* [1986] Ch 621

DOES THE COMPANY HAVE CAPACITY TO ACT?

THE REFORM OF THE DOCTRINE OF ULTRA VIRES

1. POWERS OF THE COMPANY

Companies Act 2006 gives companies unrestricted capacity unless a company's articles specifically restrict its objects – section 31(1). They will not need to state any objects in their constitution if registered after that part of the Act is in force. Only if they do state objects, will there be any restriction on their capacity. Charities and Community Interest Companies will still need to do this to satisfy the relevant regulator. A previous but little used attempt to achieve this was:

The General Commercial Company

Section 3A CA 1985

Where the Company's memorandum states that the object of the company is to carry on business as a general commercial company -

- (a) the general object of the company is to carry on any trade or business whatsoever, and
- (b) the company has power to do all such things as are incidental or conducive to the carrying on or of any trade or business by it.

[inserted in CA 1985 by Companies Act 1989, section 110 (1)]

To take advantage of CA 2006's unrestricted capacity provision, existing companies may need to amend their constitutions to get rid of their objects clauses.

Section 35 CA 1985 which provided additional statutory protection where the company has an objects clause or limits the powers of the board of directors is re-enacted in section 39 of the 2006 Act. When read with section 171 of the 2006 Act (duty of directors to act within their powers) it has the same effect as section 35 of CA 1985 except that the right of a member to prevent an ultra vires action in advance is not mentioned in the 2006 Act although it may survive at Common Law – *Smith v Croft (No2)* [1988] Ch 114 and *Edwards v Halliwell* [1950] 2 All ER 1064 (see derivative action handout).

Corporate Capacity

The Ultra Vires Rule

Ashbury Railway and Carriage and Iron Co. v. Riche [1875] LR 7 HL 653.

Section 39 CA 2006:

A company's capacity

(1) The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution.

(2) This section has effect subject to section 42 (companies that are charities).

Section 42 CA 2006

42 Constitutional limitations: companies that are charities

(1) Sections 39 and 40 (company's capacity and power of directors to bind company) do not apply to the acts of a company that is a charity except in favour of a person who-

- (a) does not know at the time the act is done that the company is a charity, or
- (b) gives full consideration in money or money's worth in relation to the act in question and does not know (as the case may be)-

- (i) that the act is not permitted by the company's constitution, or
- (ii) that the act is beyond the powers of the directors.

(2) Where a company that is a charity purports to transfer or grant an interest in property, the fact that (as the case may be)-

- (a) the act was not permitted by the company's constitution, or
- (b) the directors in connection with the act exceeded any limitation on their powers under the company's constitution,

does not affect the title of a person who subsequently acquires the property or any interest in it for full consideration without actual notice of any such circumstances affecting the validity of the company's act.

(3) In any proceedings arising out of subsection (1) or (2) the burden of proving-

- (a) that a person knew that the company was a charity, or
- (b) that a person knew that an act was not permitted by the company's constitution or was beyond the powers of the directors,

lies on the person asserting that fact.

(4) In the case of a company that is a charity the affirmation of a transaction to which section 41 applies (transactions with directors or their associates) is ineffective without the prior written consent of-

(b) This means:

Lack of capacity is not a ground of invalidity (section 39(1)) BUT :

(i) Directors may be liable for a breach of duty if they fail to observe limitations in a company's capacity contained in the memorandum – section 171 CA 2006 now but formerly stated in s 35 CA 1985.

(ii) Section 42 limits the protection given in the case of charitable companies (equivalent to and replacing section 65(1) Charities Act 1993); and

(iii) The pre-2006 rule that if the act would have lacked capacity but for the 35(1) (now s 39(1) CA 2006) then a member could bring proceedings to restrain the act (unless it fulfilled a legal obligation or had been ratified by special resolution) is not mentioned in CA 2006 but see *Smith v Croft (No2)* [1988] Ch 114 and *Edwards v Halliwell* [1950] 2 All ER 1064 (derivative action handout). The equivalent rule in the case of transactions beyond directors' powers survives in the 2006 Act – see section 40(4) CA 2006

LIABILITY OF THE COMPANY FOR THE ACTS OF ITS OFFICERS

The possible ways of Imposing Liability

- (a) Agency - where some person had authority to bind the company - see supra.
- (b) Vicarious Liability - liability for torts committed by employees and some crimes (secondary liability).
- (c) Liability where the wrong involves some knowledge or intent?

Lennards Carrying Co. v Asiatic Petroleum Co LTD [1915] AC 705
Tesco Supermarkets Ltd v. Natrass [1971] 2 ALL ER 127

R. v. Andrews Weatherfoil Ltd [1972] ALL ER 65.

Meridian Global Funds Management Ltd v The Securities Commission [1995] 3 WLR 413
annotated by Grantham (1996) 59 MLR 732

Odyssey Re (London) Ltd (formerly Sphere Drake Insurance Plc) v OIC Run Off Ltd
(formerly Orion Insurance Co Plc) Times, March 17, 2000 (CA) – Westlaw

COMPANY LAW 2008 - 2009

HANDOUT FOR TUTORIAL GROUPS

Introduction

In preparing for tutorials you need to bear in mind that Company Law is a subject which draws on both statutory and case material. The statutory material is complex and you are advised, at least when directly referred there, to read the material itself perhaps after looking at the descriptions in the textbooks. Try to develop a familiarity with the structure and drafting of companies legislation to better understand some of the topics covered in this course. Tutorials will help you with this process as should the statute book you can buy from the Law Office.

Generally, tutorial sheets will, in addition to the relevant case material, identify relevant reading from Paul L. Davies, *Gower and Davies' Principles of Modern Company Law*, 8th Edition, published by Sweet and Maxwell in July 2008 and Hicks and Goo, *Cases and Materials on Company Law* 6th Edition 2008 from OUP, provided that the extracted material is appropriate. If a reference to Hicks and Goo is not given then you should consult a full report of the case. The facts of the cases are frequently complex and you should try to give careful attention to them. Trying to understand the factual situations will assist your general understanding in Company Law. Diagrams of company structures and transaction illustrations can help your understanding of the facts of the cases.

Finally, you should not expect these tutorials to be simply a 'how-to' or descriptive analysis of Company Law. Whilst you will be expected to have a detailed understanding of the primary materials, tutorials will also be concerned with considering issues such as what interests are relevant in the regulation of companies and whether the present structure of Company Law is adequately designed to meet those interests?

Tutorial topics

- CHOICE OF BUSINESS ORGANISATION
- CORPORATE PERSONALITY
- CORPORATE GOVERNANCE

Lectures will follow the same order with the last topics in Semester One being Directors' Duties and Minority Shareholder Protection on which tutorials will be held in Semester 2.

"Your" Company

In recent years, to add an element of "realism" to the course, we have allocated to each tutorial group one listed company (i.e. one whose shares are traded on the London Stock Exchange). We have chosen companies with websites and you will find that information with the name of the company below. However, you can search for other information on "your" company by visiting <http://www.ft.com/markets/uk> and doing a search from there via "markets and funds data" for share price etc or just a general search for articles in the FT. You can also check the business pages of the other newspapers for comment on "your" company. You may wish to use metacrawler (<http://www.metacrawler.com>) or Google to find other web references or information services which will help you keep track of the company. Always bear in mind whether the information is from, or about, the company.

The “spin” may differ substantially depending on this and, as always, it’s for you to assess the reliability of the source – well respected journal, newspaper, official source etc. or some eccentric’s personal web page? You may need to use the “investor relations” link from the main company home page to get the kind of information we will be dealing with.

From time to time the group will be asked to find and report on certain information or issues involving its company. You might be interested in looking at some of the other companies mentioned as well and once you’re out there on the web you will find all sorts of other information and ways of gathering information about businesses.

Companies for group work:

1. United Utilities: <http://www.unitedutilities.com/Investors.htm>
2. BT: <http://www.btplc.com/Sharesandperformance/index.cfm>
3. Lloyds TSB: <http://www.lloydsbankinggroup.com/investors.asp>
4. GKN: <http://www.gknplc.com/>
5. Tesco: <http://www.tesco.com/corporateinfo/>
6. Cadbury: <http://www.cadbury.com/Pages/Home.aspx>
7. Marks & Spencer: <http://corporate.marksandspencer.com/>
8. Vodafone: http://www.vodafone.com/start/investor_relations.html
9. Prudential: <http://www.prudential.co.uk/plc/>
10. Jarvis: <http://www.jarvisplc.com/>
11. Ladbrokes: <http://www.ladbrokesplc.com/>
12. AstraZeneca: <http://www.astrazeneca.com/node/investor.aspx>
13. Morrisons: <http://www.morrisons.co.uk/Corporate/Investors/>
14. BAE Systems: <http://www.baesystems.com/>
15. Newcastle United: <http://www.nufc.premiumtv.co.uk/page/PLC/0,,10278,00.html>
16. HSBC: <http://www.hsbc.com/> Click “Investor Relations”
17. Rio Tinto: http://www.riotinto.com/index_investors.asp
18. Carnival: <http://phx.corporate-ir.net/phoenix.zhtml?c=140690&p=irol-irhome>

References

3. Davies, P. L., (2008). *Gower and Davies’ Principles of Modern Company Law*, 8th Edition. London: Sweet and Maxwell.
4. Hicks, A. and Goo, H.S., (2008). *Cases and Materials on Company Law*, 6th Edition. Oxford : OUP

TUTORIAL ONE: CHOICE OF BUSINESS ORGANISATION

Questions

1. Consider the different type of business organisation available. Which factors are relevant to the choice of form to be adopted?
2. Do you agree with the Finch and Freedman critique of the limited liability partnership structure? Identify the other recent reform proposals for Partnership Law (see Company Lawyer editorial).
3. Black and White have developed a product which will increase efficiency in the machine tooling industry. They have recently been made redundant and wish to set up in a business together. They have some capital, in the form of their redundancy payments, but will need more to establish the business. They seek your advice about the best form of organisation to adopt for their new business.
 - (a) How would you advise them? What factors would you take into account in forming your opinion?
 - (b) Pink has a large sum of money available which would be of considerable assistance to Black and White. Pink is willing to invest this sum in their business, but is not interested in having any active management role. How might Pink's position be catered for?
 - (c) Assume that the business (having adopted the form of organisation which you recommended) has been very successful, and that Black and White have now developed new products for which there is likely to be great demand. They wish to expand the business to cater for the demand. The expansion will require large sums of capital investment, and an increased workforce. They again seek your advice as to whether there should be any changes to their form of organisation, and how the form they might use might assist them in meeting the demands of the proposed expansion. Advise them.

Reading

1. Companies Act 2006, ss 3-7 & 16 (statute book).
2. Partnership Act, 1890, ss 1-2, 4(1), 5-12 17, 24(1) and (5) Statute Book
3. Statute Law Database <http://www.statutelaw.gov.uk/> click on A-Z then P then the Act then the sections you want to read Limited Liability Partnerships Act 2000 sections 1 to 7 (statute book)
4. Gower and Davies, Chapters 1 and 2 and pages 115 to 118
5. G. Morse, Partnership Law (Blackstone) 6th Edition chapters 1 and 9
6. Hicks and Goo 6th edition pp 33-40 and 91-95.
7. V. Finch and J. Freedman, "The Limited Liability Partnership: Pick and Mix or Mix Up?" (2002) Journal of Business Law 475-512 – hard copy and through Westlaw
8. Michael Lower "What's on Offer? a Consideration of the Legal Forms available for use by small- and medium- sized enterprises in the United Kingdom" (2003) 24 Company lawyer 166-169 - Hard copy or on Westlaw

Optional Extra Reading:

9. Stuart R. Cross. "Limited Liability Partnerships Act 2000: Problems Ahead" (2003) Journal of Business Law 268-283
10. S. Sheikh, "Limited Partnerships Act 1907: Time for Reform" (2002) 23 Company Lawyer 179-184 - hard copy and through Westlaw
11. M. Twomey, "Protection for Partners from Unlimited Liability in Certain Circumstances" (2003) 24 Company Lawyer, 86-87 – hard copy or via Westlaw

TUTORIAL TWO: CORPORATE PERSONALITY

Your Company

Provide a brief summary of the areas of business and geographical areas in which the company allocated to your group operates, stating the source of the information. You may wish to share this task among yourselves from one tutorial to the next – or maybe you would all benefit from the experience of doing it.

Note: in this tutorial your tutor will allocate you to a sub-group to prepare to argue the position of the board or the minority shareholder in Tutorial Three.

Questions

1. In his article Kahn-Freund refers to the "calamitous decision in Salomon v Salomon & Co Ltd".
 - (a) Do you agree that the House of Lord's decision was calamitous?
 - (b) Have the courts been faithful to Salomon? In what circumstances have they been prepared to lift the veil?
 - (c) Are there any statutory exceptions to the rule in Salomon?
2. In the context of wealthy and powerful transnational corporations is it appropriate to assume that each company in a group is a separate legal person? What are the arguments for and against this policy?
3. Do you think Mitchell makes out the case for the importance of "contextual factors" in the decisions of the courts on this issue? Which "contextual factors does he identify?
4. How far does the application of Contract or Tort in the two main cases discussed by Hawke and Hargreaves undermine the Salomon principle?
5. Ken Ltd manufactures vinyl dolls. 35% of the issued voting shares in Ken Ltd are held by Barbie plc. a listed company that heads a group of companies operating a very successful toy manufacturing and distribution business. The remaining shares are owned by the directors of Ken Ltd. By an agreement with the other shareholders, Barbie Plc has the right to appoint a majority of the directors of Ken Ltd.

Midge Limited enters into an agreement with Ken Ltd to supply the company with vinyl sheeting for use in the manufacture of the dolls. Midge Ltd has not dealt with Ken Ltd. before but is aware from Ken Ltd's Letterheads that it is a part of the Barbie Group of Companies. Midge Ltd is keen to develop business relations with Barbie plc and, accordingly, the Board of directors agrees to supply the vinyl to Ken Ltd at an introductory price which represents a loss to Midge Ltd.

Over a period of 6 months 6 deliveries of the vinyl material are made but no payment is received. It then emerges that Ken Ltd ceased trading about 5 months ago, and all the deliveries of vinyl were passed to another company, Shrimp Ltd. Shrimp Ltd was incorporated recently and is a wholly owned subsidiary of Barbie plc. Midge Ltd's inquiries also reveal that Ken Ltd has few assets, and that Barbie plc is a substantial secured creditor of Ken Ltd.

Can Midge Ltd claim payment from any person other than Ken Ltd?

READING

1. Gower and Davies, Chapters 8 and 9
2. Hicks & Goo 6th Edtn Ch 3 pp 95-122 & 147-149.
3. Hicks & Goo at pages 122 to 147 deals with criminal liability in some detail. Read this if it interests you.

The tutorial focuses mainly on civil law issues.

- Salomon v Salomon & Co. (sub nom Broderip v Salomon [1895] 2 Ch. 323 (CA)); [1897] AC 22 (HL) AC 22
- Jones v Lipman [1962] 1 WLR 832
- Smith, Stone & Knight v Birmingham Corporation [1939] 4 All ER 116
- Lee v Lee's Air Farming [1961] AC 12 (PC)
- DHN Food Distributors v Borough of Tower Hamlets [1976] 1 WLR 852 (Read a full report of this case).
- Woolfson v. Strathclyde Regional Council [1978] SLT 159
- Adams v Cape Industries plc [1991] 1 ALL ER 929
- Stocznia Gdanska SA v Latvian Shipping Co (Repudiation) [2002] EWCA Civ 889; [2002] 2 All E.R. (Comm) 768 (CA) – Westlaw
- Odyssey Re (London) Ltd (formerly Sphere Drake Insurance Plc) v OIC Run Off Ltd (formerly Orion Insurance Co Plc) Times, March 17, 2000 (CA) – Westlaw
- Kahn-Freund, "Some Reflections on Company Law Reform" (1944) 7 MLR 54. 54-59 only
- Whincup, "Inequitable Incorporation" (1981) 2 Co Lawyer 158
- Rixon, "Lifting the Veil between Holding and Subsidiary Companies" (1986) 102 LQR 415 Hicks & Goo pp 119-122
- Charles Mitchell, "Lifting the Corporate Veil in the English Courts: An Empirical Study" (1999) 3 Company, Financial and Insolvency Law Review 3 pp15-28.
Neil Hawke & Pamela Hargreaves, "Corporate Liability: Smoke and Mirrors" (2003) 14 International Company and Commercial Law Review 75-82 – hard copy or Westlaw

TUTORIAL THREE: CORPORATE GOVERNANCE

Introduction

In this tutorial we consider the decision-making of the company. You should understand from your reading the functions and powers of the Board of Directors and the Annual General Meeting, and the corporate governance recommendations that deal with the issues that arise when listed plc's have widely dispersed shareholdings.

Your Company:

For this tutorial gather as much information as you can about the general meetings of your company, the composition of its board of directors and its approach to corporate governance. Everybody might enjoy a look at before or after this tutorial.

Problem:

You are a minority shareholder in a public company, Esquire plc, with Table A articles. Esquire plc manufactures skin and beauty products for men. It has been successful since its inception and is presently making substantial profits. You are concerned that the company is using materials in its manufacturing process which have been tested on animals. You want the Board to adopt a policy of only using materials which have not been tested on animals. It is likely that the adoption of such a policy would increase the company's manufacturing costs. The company is due to hold its annual general meeting within the next six months.

(A) How could you try to effect a change in the company's current practice, and how would the Board attempt to retain its control over company policy? In your answer you should examine the legal and practical difficulties facing you and your chances of success.

These are some areas to which you might give consideration:

- the roles of the board and general meeting
 - how the general meeting can affect the board's decisions
 - the ability of shareholders to convene meetings or influence the agenda
 - how voting takes place
- (B) Assume the above facts but with the following variation. You are still a minority shareholder but your shareholding is substantial and you are an institutional shareholder. Would you be likely to be any more successful in influencing the Board?
- (C) Think about *pp240-251 of Hicks and Goo*. Why are the Codes about corporate Governance extracted there believed to be necessary? How are they "enforced"? What is the role of non-executive directors? Why are they given this role? Are other measures necessary to ensure that managers identify with investors' interests? What perspective did the information you accessed from <http://www.hermes.co.uk/> add to the information in Hicks and Goo?
- (D) Do you agree with Dignam's view of the UK system of "negotiated regulation"?

Reading

1. Companies Act 2006, Part 13, (Resolutions and Meetings) ss 281-361, and Reg. 70 of Table A.

Use these materials together with to tackle the division of powers, and mechanical aspects of meetings and resolutions raised in the problem question below.

2. Chapter 15 plus pp 365-378 of Gower and Davies 8th ed. and
3. Chapter 7 plus pp 222-225 of Hicks and Goo 6th edtn.
4. Gower and Davies 8th edtn pp 359-363 plus Chapter 14 and Hicks & Goo, 6th Ed Ch 7 (as advised above) & pp. 235-269 on corporate governance and the role of the board.
5. Alan Dignam. "Exporting Corporate Governance: UK. Regulatory Systems in a Global Economy" (2000) 21 Company Lawyer 70-76
6. Play around with <http://www.hermes.co.uk>
7. and links from it to see how an important UK institutional investor which leads the pack on corporate governance issues sees things.

Further Reading:

Stephen Copp "Corporate Governance: change, consistency and evolution: Part 1". (2003) 14 International Company and Commercial Law Review 65-74 and Part 2 (2003) 14 ICCLR 115-128.

TUTORIAL 6 CONTRACTING FOR THE COMPANY

QUESTIONS

1. How does the law of agency apply to give authority to company employees and officers?
2. How do the provisions of sections 39 CA 2006 (formerly section 35 CA 1985) and section 40 CA 2006 (formerly section 35A CA 1985) and of sections 41 and 42 CA 2006 operate?
3. Ben has recently been appointed to the Board of French Limited, a film production company, as an executive director. The other directors of the company, Stephen and Hugh, who are non-executive directors, inform Ben that they hope to appoint him shortly as managing director. After Ben's appointment, as an executive director Stephen and Hugh pay little attention to the business preferring to concentrate on making commercials, whilst Ben actively sets about negotiating for the making of several new films by the company. To this end he enters into a number of contracts for the purchase of scripts. Feeling confident about his position, Ben usually signs letters and documents in a way that indicates that he is managing director of the company.

Several films are made and earn a substantial income of the company. Inspired by his success, Ben enters into a contract, paying an advance fee of one million pounds, for a script to be written by Lord Itcher.

For some time Stephen and Hugh, whilst pleased with the profits made by the business, have been dissatisfied with Ben's reactionary ideas and have decided not to appoint him as managing director. At a recent board meeting, Stephen and Hugh are horrified to learn of the contract with Lord Itcher, of whom they strongly disapprove. Putting integrity above profit, Stephen and Hugh seek your advice:

- (a) Advise whether French Ltd is bound by the contract with Lord Itcher.
- (b) How, if at all, would your answer to (a) differ if under the articles of association of French Ltd all contracts involving the payment of advances exceeding £500,000 had to have the prior consent of the general meeting?
- (c) How, if at all, would your answer to (a) differ if it transpired that the meeting appointing Ben as director was in some manner invalidly convened?

Your Company

What is the latest share price of your company. What have been its highest and lowest prices in the last year and can you find any newspaper comment on the company and its progress?

READING

1. Sections 39 to 42 Companies Act 2006
2. Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549; [1967] 3 All ER 98
3. Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480; [1964] 1 ALL ER 630
4. First Energy Ltd v Hungarian International Bank Ltd [1993] BCC 533
5. Smith v Henniker-Major & Co [2002] EWCA Civ 762; [2003] Ch. 182; [2002] 3 W.L.R.; 2002 WL 1446112
6. Gower and Davies Chapter 7 esp pp.151-178
7. Hicks and Goo Chapter Parts 6.1 and 6.2 and Chapter 8 Part 8.2

Optional Extra Reading

1. Claire Howell, "Companies Act 1985, s.35A and 322A: Smith v Henniker-Major and

the Proposed Reforms” (2003) 24 Company Lawyer 264-270 – hard copy or Westlaw

2. C. Howell, “Section 35A of the Companies Act and an Inquorate Board: One Won’t Do” (2002) 23 Company Lawyer 96-98 – Hard Copy and Westlaw
3. Derek Obadina, “The Transactional Authority of a Managing Director: Part 1 (1998) 9 International Company and Commercial Law Review 321-327 - Hard Copy and Westlaw
4. R.J. Wickins. C.A. Ong, “Confusion Worse Confounded: the end of the directing mind theory” [1997] Journal of Business Law 524-556 – Hard Copy and Westlaw.

TUTORIAL 8: CORPORATE INSOLVENCY

QUESTIONS

- 1) Bring to the tutorial a recent newspaper story concerning insolvency. (Stories from the Internet are also satisfactory.)
- 2) What impact is the Enterprise Act 2002 having on insolvency proceedings? Are these developments to be welcomed?
- 3) New Vista Ltd was formed in 1998 to operate a window replacement business from a shop in Westcliffe. The only formally appointed directors of the company were Shane and Brian. This was the first experience either director had had of company management, although they consistently obtained business advice and instructions from Roland, a retired accountant. Roland was never formally appointed to the board as he was subject to an order under the Company Director Disqualification Act 1986. In addition to providing advice Roland had given the company a loan of £2000, repayable in 2005. Shane and Brian devoted a lot of energy to securing contracts for New Vista and carrying out work for customers. As a result they were too busy to see that proper accounts were prepared for the company. It was however Roland's impression that the company had done well during its first year of trading as a large number of orders had been received that year and he recommended that the company should expand by opening a second shop. Shane agreed that it would be beneficial for the company to expand and persuaded Brian to go along with this. Brian was initially sceptical because he thought that the company was short of cash. Although the company had completed a lot of orders most windows were provided on credit terms and so, other than an initial deposit, many customers had not yet paid for their goods. Brian further noted that New Vista had a lot of unpaid invoices from its own suppliers. He was however persuaded by Roland's expertise. The second shop was opened in February 2005. Unfortunately the expansion programme proved unwise. The company's cash flow difficulties severely worsened and in order to pay its employees their wages it became necessary to resort to an account containing sums due to the Inland Revenue in respect of PAYE and VAT taxes. Moreover the company did not have enough funds to provide its most recent customers with the goods for which they had provided deposits. In August 2006 Roland insisted that New Vista should transfer ownership of the second shop to him, in satisfaction of the sums owing to him under the loan. Shortly after this was done New Vista Ltd went into insolvent liquidation. Advise the liquidator of New Vista Ltd of any potential liabilities of Brian, Shane and Roland.

READING

1. Gower and Davies, Chapter 10; Chapter 32 and Appendix (especially pp.1196-1234)
2. Hicks and Goo, Chapters 11(11.8 only), 15(15.3 and 15.4 only) and all of Chapter 20
3. Business sections of daily newspapers
4. IA 1986, ss 212-217; 238-240
5. Company Director Disqualification Act 1986