objects clause which I have read. It was said that, if this was so, not only need the bank inquire no further but also that it was unaffected by the knowledge which it had that the activity on which the money was to be spent was one beyond the company's powers.

The judge rejected this view, and I agree with him. He based his judgment, I think, on the view that a power or an object conferred on a company to borrow cannot mean something in the air: borrowing is not an end in itself and must be for some purpose of the company; and since this borrowing was for an ultra vires purpose, that is an end of the matter.

Mr Walton, I think, agreed that if sub-clause (N) must in truth be construed as a power, such a power must be for a purpose within the company's memorandum. He says that it is 'elevated into an object' (to use his own phrase) by the concluding words of the objects clause in the memorandum, and this object, being an independent object of the company, will protect the lender and that that is its purpose. I answer that by saying that you cannot convert a power into an object merely by saying so …

I agree with the judge that it is a necessarily implied addition to a power to borrow, whether express or implied, that you should add 'for the purposes of the company'. This borrowing was not for a legitimate purpose of the company: the bank knew it, and, therefore, cannot rely on its debentures. I would dismiss the appeal.

➢ Notes

1. The approach of *Re Introductions Ltd* to the construction of objects clauses, including the 'demotion' in appropriate cases of 'objects' to 'incidental powers', has been endorsed in later cases. However, in *Rolled Steel Products* it is suggested that the decision in *Introductions* should be seen as resting not on *ultra vires* but on the basis that the directors had abused their powers or exceeded their authority. See the discussion at 'Failure to act for proper purposes', p 331. What difference does this make to the relevant legal analysis and to the practical outcome for the various parties potentially affected?

2. One type of corporate 'object' which sometimes calls for particular attention in this connection is that of making gifts and paying pensions and gratuities. *Re Horsley & Weight Ltd* **[4.30]** illustrates that such provisions can be legitimate substantive objects of a company, although it is now possible that such transactions might be open to attack under IA 1986 s 238, as being 'at an undervalue'.

3. By contrast, in the Court of Appeal in *Brady v Brady* **[10.08]**, Nourse LJ expressed views which suggest that the *ratio decidendi* of *Re Horsley & Weight Ltd* may have a restricted application. He said:

> In its broadest terms the principle is that a company cannot give away its assets. So stated, it is subject to the qualification that in the realm of theory a memorandum of association may authorise a company to give away all its assets to whomsoever it pleases, including its shareholders. But in the real world of trading companies, charitable or political donations, pensions to widows of ex-employees and the like apart, it is obvious that such a power would never be taken. The principle is only a facet of the wider rule, the corollary of limited liability, that the integrity of a company's assets, except to the extent allowed by its constitution, must be preserved for the benefit of all those who are interested in them, most pertinently its creditors.

The House of Lords reversed the decision of the Court of Appeal in this case without commenting on these remarks.

(p. 92) ***An act which comes within the scope of a power conferred expressly or impliedly by the company's constitution is not beyond the company's capacity by reason of the fact that the directors entered into it for some improper purpose.***

[3.03] Charterbridge Corpn Ltd v Lloyds Bank Ltd [1970] Ch 62 (Chancery Division)

The plaintiff company asked the court to declare that a legal charge, given by a company referred to as 'Castleford' to the defendant bank as security for the due performance of its obligations under a guarantee, was void, being *ultra vires* Castleford. The guarantee was itself security for the indebtedness to the bank of another company ('Pomeroy') and other companies in the same group as Castleford, all of which were controlled and run by Mr Pomeroy. It was alleged that the guarantee and charge were *ultra vires* because at the time when they were given, Mr Pomeroy had not bona fide intended to further the interests of Castleford (although nor had he intended to prejudice Castleford's interests; he had simply not given the matter separate consideration, ie consideration separate from the interests of the corporate group). The court held that this was irrelevant to the question of *ultra vires*.

> PENNYCUICK J: It will be borne in mind that the present action is based exclusively upon the contention that it was ultra vires Castleford, ie outside its corporate powers, to give the guarantee and legal charge. On this footing [so it is alleged] the guarantee and legal charge were a nullity.
>
> Apart from authority, I should feel little doubt that where a company is carrying out the purposes expressed in its memorandum, and does an act within the scope of a power expressed in its memorandum, that act is an act within the powers of the company. The memorandum of a company sets out its objectives and proclaims them to persons dealing with the company and it would be contrary to the whole function of a memorandum that objects unequivocally set out in it should be subject to some implied limitation by reference to the state of mind of the parties concerned.
>
> [By contrast …] Where directors misapply the assets of their company, that may give rise to a claim based on breach of duty. Again, a claim may arise against the other party to the transaction, if he has notice that the transaction was effected in breach of duty. Further, in a proper case, the company concerned may be entitled to have the transaction set aside. But all that results from the ordinary law of agency and has not of itself anything to do with the corporate powers of the company.

[3.04] Rolled Steel Products (Holdings) Ltd v British Steel Corpn [1986] Ch 246 (Court of Appeal)

Clause 3(K) of the memorandum of RSP empowered it to give guarantees. It guaranteed the obligation of SSS, an associated company, to BSC and gave security over its property in transactions which were in no way for its own advantage but did benefit one of its own directors, Shenkman. All the shareholders of RSP were aware of the irregularity of these transactions, and so also was BSC. Vinelott J at first instance ([1982] Ch 478) held that the knowledge of BSC that the transactions did not further the objects of RSP made them *ultra vires* and void, and incapable of validation by the members' consent. The Court of Appeal, though ruling that the transactions were unenforceable on other grounds **[3.17]**, held that they were not *ultra vires*, and declared that the line of cases on which the judge had relied (including *Re Introductions Ltd***[3.02]**), should not be understood as establishing that an improper purpose could affect the question of a company's capacity.

> BROWNE-WILKINSON LJ: In my judgment, much of the confusion that has crept into the law flows from the use of the phrase 'ultra vires' in different senses in different contexts. The reconciliation of the authorities can only be achieved if one first defines the sense in which one is using the words 'ultra vires'. Because the literal translation of the words is 'beyond the powers', there are many **(p. 93)** cases in which the words have been applied to transactions, which, although within the capacity of the company, are carried out otherwise than through the correct exercise of the powers of the company by its officers: indeed, that is the sense in which the judge seems to have used the words in this case. For reasons which will appear, in my judgment, the use of the phrase 'ultra vires' should be restricted to those cases where the transaction is beyond the capacity of the company and therefore wholly void.
>
> A company, being an artificial person, has no capacity to do anything outside the objects specified in its memorandum of association. If the transaction is outside the objects, in law it is wholly void. [Although note

the changes CA 2006 now makes to this assertion: see 'Statutory provisions protecting third parties (outsiders) from the consequences of constitutional limitations on corporate capacity', p 85 and 'CA 2006 s 40: statutory deeming provisions to avoid constitutional limitations on directors' authority', p 97. But the objects of a company and the powers conferred on a company to carry out those objects are two different things: see ' History of the development of objects clauses', p 87.] If the concept that a company cannot do anything which is not authorised by law had been pursued with ruthless logic, the result might have been reached that a company could not (ie, had no capacity) to do anything otherwise than in due exercise of its powers. But such ruthless logic has not been pursued and it is clear that a transaction falling within the objects of the company is capable of conferring rights on third parties even though the transaction was an abuse of the powers of the company: see, for example, *Re David Payne & Co Ltd*.[13] It is therefore established that a company has capacity to carry out a transaction which falls within its objects even though carried out by the wrongful exercise of its powers.

In my judgment, for this purpose the position of a company is analogous to that of a human being who has fiduciary powers. If two trustees convey trust property in breach of trust, the conveyance is not void. As human beings they have the capacity to transfer the legal estate: their capacity to transfer flows from their status as human beings, not from the powers conferred on them as trustees. Even if their powers under the trust instrument did not authorise the conveyance, the legal estate will vest in the transferee. Beneficiaries under the trust would be entitled, if they learnt in time, to restrain the execution of such conveyance in excess of the powers of the trustees. If the beneficiaries only discovered the position after the conveyance, the transferee, if he took with notice, would be personally liable as a constructive trustee and the property conveyed could be recovered: but the conveyance would not be a nullity. So in the case of a limited company, if a transaction falls within the objects of the company (and is therefore within its capacity) it is effective to vest rights in a third party even if the transaction was carried out in excess or abuse of the powers of the company. If the members of the company learn of what is proposed in time, they will be able to restrain such transaction: if they only discover the facts later, their remedy lies against those who have wrongly caused the company to act in excess or abuse of the company's powers. If a third party has received the company's property with notice of the excess or abuse of powers, such third party will be personally liable as a constructive trustee and the company will be able to recover the property: see *Belmont Finance Corpn Ltd v Williams Furniture Ltd (No 2)* **[10.10]**.

However, the analogy between companies and trustees is not complete. As an artificial person, a company can only act by duly authorised agents. Apart from questions of ostensible authority, directors like any other agents can only bind the company by acts done in accordance with the formal requirements of their agency, eg by resolution of the board at a properly constituted meeting. Acts done otherwise than in accordance with these formal requirements will not be the acts of the company. However, the principles of ostensible authority apply to the acts of directors acting as agents of the company and the rule in *Turquand's case* **[3.16]**establishes that a third party dealing in good faith with directors is entitled to assume that the internal steps requisite for the formal validity of the directors' acts have been duly carried through. If, however, the third party has actual or constructive notice that such steps had not been taken, he will not be able to rely on any ostensible **(p. 94)** authority of the directors and their acts, being in excess of their actual authority, will not be the acts of the company.

The critical distinction is, therefore, between acts done in excess of the capacity of the company on the one hand and acts done in excess or abuse of the powers of the company on the other. If the transaction is beyond the capacity of the company it is in any event a nullity and wholly void: whether or not the third party had notice of the invalidity, property transferred or money paid under such a transaction will be recoverable from the third party. If, on the other hand, the transaction (although in excess or abuse of powers) is within the capacity of the company, the position of the third party depends upon whether or not he had notice that the transaction was in excess or abuse of the powers of the company. As between the shareholders and the directors, for most purposes it makes no practical difference whether the transaction is beyond the capacity of the company or merely in excess or abuse of its power: in either event the shareholders will be able to restrain the carrying out of the transaction or hold liable those who have carried it out. Only if the question of ratification by all the shareholders arises will it be material to consider whether the transaction is beyond the capacity of the company since it is established that, although all the

shareholders can ratify a transaction within the company's capacity, they cannot ratify a transaction falling outside its objects.

In this judgment I therefore use the words 'ultra vires' as covering only those transactions which the company has no capacity to carry out: ie those things the company cannot do at all as opposed to those things it cannot do properly.

The two badges of a transaction which is ultra vires in that sense are (1) that the transaction is wholly void and (consequentially) (2) that it is irrelevant whether or not the third party had notice. It is therefore in this sense that the transactions in *Re David Payne & Co Ltd* and *Charterbridge Corpn Ltd v Lloyds Bank Ltd* **[3.03]** were held not to be ultra vires. The distinction between the capacity of the company and the abuse of powers was also drawn by Oliver J in *Re Halt Garage (1964) Ltd***[5.03]** …

For these reasons, in considering a claim based on ultra vires, the first step must be to determine what are the objects (as opposed to the powers) of a company. Not all activities mentioned in the objects clause are necessarily objects in the strict sense: some of them may only be capable of existing as, or on their true construction are, ancillary powers: *Cotman v Brougham* and *Re Introductions Ltd*. And this may be the position even if the memorandum of association contains the usual 'separate objects' clause: such a clause is not capable of elevating into an object of the company that which is in essence a power: see *Re Introductions Ltd***[3.02]**.

If, on construction of the objects clause, the transactions fall within the objects (as opposed to the powers), it will not be ultra vires since the company has the capacity to enter into the transaction. If the objects clause contains provisions (whether objects or powers) which show that a transaction of the kind in question is within the capacity of the company, that transaction will not be ultra vires …

The main difficulty in reconciling the authorities is *Re Introductions Ltd*. In my judgment, however, the decision in that case accords with the views I have expressed. The bank seeking to enforce the debenture had actual knowledge that the company was going to use the borrowed moneys for a purpose (pig breeding) which was wholly outside its main objects. The provision relating to borrowing in the memorandum of association was construed as being an ancillary power to borrow for the purposes of the company's business. Accordingly, the lender had actual notice of all the facts necessary to appreciate that the borrowing was in excess of the powers, ie, an abuse of powers. It is to be noted that in the Court of Appeal judgments the transaction is nowhere categorised as ultra vires and void. Indeed, … the Court of Appeal held that the liability of the bank depended on the fact that it had notice. Buckley J at first instance described the borrowing as being ultra vires: but, in my judgment, this was merely an unguarded use of language since he also regarded the bank's knowledge of the facts as being a crucial element rendering the debenture unenforceable … In my judgment, the *Introductions* case is not a decision relating to ultra vires in the strict sense: it is an **(p. 95)** example of a case in which a third party has entered into a transaction with a company with actual notice that the transaction was an abuse of power and accordingly could not enforce the transaction against the company …

Applying those principles to the present case, in my judgment, no question of ultra vires arises.

SLADE and LAWTON LJJ delivered concurring judgments.

➢ Notes

1. Whether they acknowledged it or not, the members of the Court of Appeal in this case were making a break with the past and laying down a new rule. Their reasoning is undoubtedly more logical, but their treatment of earlier—indeed, binding—Court of Appeal decisions such as *Re Introductions Ltd* **[3.02]** was controversial.

2. The events in *Rolled Steel* occurred before the European Communities Act 1972 came into force—that is, before there was any provision in the law corresponding to CA 1985 ss 35–35A and, now, CA 2006 s 39. But

this would not have saved BSC, since the court held that it had not been 'acting in good faith'.

3. The judgments in *Rolled Steel* refer throughout to 'corporate power' and the *company's* abuse of its *corporate* power. Read in today's context, might this be more accurately regarded as a reference to the *directors'* abuse of their powers (ie directors' misuse of their actual authority)? See 'Actual and ostensible authority of corporate agents', p 108.

4. The judgments in *Rolled Steel* also refer throughout to ratification by the *unanimous* consent of all the shareholders where the transaction is an abuse of corporate power (but not where it is *ultra vires*, since even a unanimous vote of the shareholders could not then legitimately effect the transaction). It is not clear whether the members of the court had in mind precedents such as *Multinational Gas* **[7.39]** and *Re Horsley & Weight Ltd* **[4.30]**, where the consent had to be unanimous because it was given informally (see 'Informal decision-making—the "*Duomatic*" principle', p 206), or whether they were intending to lay down a new rule. On previous authority, a resolution validly passed by majority vote at a general meeting would have been effective to ratify: *see North-West Transportation Co Ltd v Beatty* **[4.33]** and *Bamford v Bamford* **[4.32]**. On this point, see further 'Members' decisions concerning directors' breaches', pp 235ff, and note the changes made to these approval and ratification rules by CA 2006 ss 180 and 239.

5. The distinction made in cases such as *Re Introductions Ltd* **[3.02]** between a substantive object and a 'mere' power loses a lot of point in the light of the decision in*Rolled Steel*, but it may remain of some relevance to the question of whether the directors have exceeded or abused their corporate powers (see 'Failure to act for proper purposes', p 331).

Agency and authority in corporate contracting

Re-read 'Contractual liability: general issues', pp 82–85, which summarises the issues that need to be considered in deciding whether an agent acting for the company has successfully bound the company in contract to the third party.

Summary of agency principles

These are three-party problems. The goal is to bind the *principal* (the company) in contract to the *third party* using the efforts of the *agent* (who is probably a company director or company employee).

(p. 96) The *actual authority* of the agent is determined by looking solely at the principal–agent relationship: what authority has the *principal* actually given the *agent* ? The third party is irrelevant to this determination. If the board of directors, or someone authorised by the board, effects the transaction for the company, there are few problems. The articles typically give the board (not an individual director) the authority to manage the business of the company (see Model Articles, extracted at 'Rules of attribution: how does a company act?', p 82), subject of course to any limitations imposed by the company's objects clause (although on that see 'Interpreting objects clauses', p 90), and subject to any special limitations specified in the company's own articles. This authority given to the board typically includes the authority to enter into contracts on behalf of the company, *and* to delegate that authority to others. If the agent obtains his or her authority in this way, then the agent will have actual authority *from the company* to transact on behalf of the company (but must observe any limitations in the grant of authority, eg authority only for specific tasks, or only within specific financial limits).

Problems arise if it is not so clear who purported to act *for the company* in granting actual authority to the agent. The agent cannot obtain actual authority if the person delegating it did not have actual authority to so delegate (see the way this delegation from the board of directors was found in *Hely-Hutchinson* **[3.09]**).

Delegation of actual authority by the company to the agent can be implied. The agent will then have *implied actual authority*. Delegation of authority may be implied by appointing a person to a particular role in the company; then the assumption is that the individual has implied actual authority to do all the things necessary to fulfil that role. The cases sometimes say that the agent has '*usual*' authority to do what the job requires (but see later for the potential confusion).

Ostensible authority, on the other hand, arises from the relationship between the *principal* and the *third party*. The agent is irrelevant to the analysis. The agent's ostensible authority is the authority he is represented by the principal to the third party as having. This may be more or less extensive than the agent's actual authority. Again, some care is needed, because the representation to the third party must be by the *company* (the principal), since the goal is to bind the principal in contract to the third party. The person acting for the company in making the representation must have the necessary (actual) authority to make it (it is not possible to 'build ostensible authority on ostensible authority').

Again, a representation can be implied. Appointment of a person to a particular role can constitute a representation to outsiders that the person has all the authority that usually goes with that role. A managing director can usually do certain things, as can a marketing director or the company's secretary. So 'usual' authority rears its head again. But notice this time that the appointment serves as a representation *to the third party*. The ostensible authority it will support is only the authority carried by the representation, which must be made by the company to the third party. Care must therefore be taken with the idea of 'usual authority'—it can be employed in two quite different situations.

The third party's bona fides are not relevant when the agent has actual authority to transact for the company.[14] But they are relevant when the third party wishes to rely on ostensible authority: then the third party must be able to assert that there was reliance, and that it was reasonable.

Two further points need to be made for completeness. First, no authority of any sort is generated by mere assertion by the *agent* to the third party that the agent is authorised, no matter how credible the assertion. Secondly, the deeming provisions permitted by CA 2006 s 40 (relating to corporate capacity constraints) and the indoor management rule (relating **(p. 97)** to internal procedural matters) can be relied upon to expand the assertion by the third party of the agent's actual or ostensible authority. These are both examined in the following section.

CA 2006 s 40: statutory deeming provisions to avoid constitutional limitations on directors' authority

The relevant provision is contained in the following extract. It must be read carefully. It allows third parties 'dealing with' the company (defined in s 40(2)) in 'good faith' (with provisions on this in s 40(2)(b)) to deem the power of the 'directors'[15] (not other agents) to bind the company to be free of any 'limitation under the company's constitution' (defined more widely than limitations in the articles (see s 40(3)).

Note CA 2006 s 41. It is an important qualification to these general rules. It excludes the presumptions permitted by CA 2006 s 40 where the dealing is with the directors of the company or its holding company, or any persons connected with these directors. Effectively, these 'insiders' are irrebuttably presumed to know the true state of affairs. The remedies available to the company in these 'insider' circumstances are wider than those available at common law, and are set out in s 41 which follows.

Companies Act 2006 ss 40 and 41

40 Power of directors to bind the company

(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 to be free of any limitation under the company's constitution.

(2) For this purpose—

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

(b) a person dealing with a 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 or of any class of shareholders, 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 action that is beyond the powers of the directors.

But no such proceedings 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.

(p. 98) **(6)** This section has effect subject to—

section 41 (transactions with directors or their associates), and

section 42 (companies that are charities).

41 Constitutional limitations: transactions involving directors or their associates

(1) This section applies to a transaction if or to the extent that its validity depends on section 40 (power of directors deemed to be free of limitations under company's constitution in favour of person dealing with company in good faith).

Nothing in this section shall be read as excluding the operation of any other enactment or rule of law by virtue of which the transaction may be called in question or any liability to the company may arise.

(2) Where—

(a) a company enters into such a transaction, and

(b) the parties to the transaction include—

(i) a director of the company or of its holding company, or

(ii) a person connected with any such director,

the transaction is voidable at the instance of the company.

(3) Whether or not it is avoided, any such party to the transaction as is mentioned in subsection (2)(b)(i) or (ii), and any director of the company who authorised the transaction, is liable—

(a) to account to the company for any gain he has made directly or indirectly by the transaction, and

(b) to indemnify the company for any loss or damage resulting from the transaction.

(4) The transaction ceases to be voidable if—

(a) restitution of any money or other asset which was the subject matter of the transaction is no longer possible, or

(b) the company is indemnified for any loss or damage resulting from the transaction, or

(c) rights acquired bona fide for value and without actual notice of the directors' exceeding their powers by a person who is not party to the transaction would be affected by the avoidance, or

(d) the transaction is affirmed by the company.

(5) A person other than a director of the company is not liable under subsection (3) if he shows that at the time the transaction was entered into he did not know that the directors were exceeding their powers.

(6) Nothing in the preceding provisions of this section affects the rights of any party to the transaction not within subsection (2)(b)(i) or (ii).

But the court may, on the application of the company or any such party, make an order affirming, severing or setting aside the transaction on such terms as appear to the court to be just.

(7) In this section—

(a) 'transaction' includes any act; and

(b) the reference to a person connected with a director has the same meaning as in Part 10

(company directors).

Meaning of 'a person' and 'a dealing with a company' in CA 2006 s 40.

[3.05] Smith v Henniker-Major and Co [2002] EWCA Civ 762, [2003] Ch 182 (Court of Appeal)

The question in this case was whether a director/chairman of a company could rely on CA 1985 s 35A [CA 2006 s 40] to validate a resolution passed at the meeting, attended only by himself, to assign to himself certain causes of action of the company. The chairman **(p. 99)** believed he had power under the company's articles to act alone, but in fact the 'meeting' was inquorate since the articles provided that the quorum for a board meeting was two. The Court of Appeal divided on the issue. Robert Walker LJ thought the chairman could rely on s 35A to validate what had happened whereas Schiemann and Carnwath LJJ thought he could not.

ROBERT WALKER LJ (dissenting on this point):

41 In my judgment the irreducible minimum, if section 35A is to be engaged, is a genuine decision taken by a person or persons who can on substantial grounds claim to be the board of directors acting as such, even if the proceedings of the board are marred by procedural irregularities of a more or less serious character. This is not a precise test and it would have to be worked out on a case by case basis. But the essential distinction is between nullity (or non-event) and procedural irregularity.

42 That was ultimately, as I see it, the ground on which Sir Nicolas Browne-Wilkinson V-C based his decision on the second issue in *TCB Ltd v Gray* **[3.07]**:

> 'The evidence clearly established that no such meeting of the directors of Link ever took place. But in fact all the directors of Link individually had decided to grant the debenture, although not at a meeting at which they were all present.'

So the absence of a properly-convened meeting, or a signed written resolution, was treated as an irregularity. …

43 If an outsider had been negotiating in good faith with the company, believing that the draft contract was to be approved at a board meeting, Mr Smith's [the chairman's] one-man meeting on 12 August 1998 would in my view have passed the test and attracted protection under section 35A. Mr Smith was a duly appointed director of SPDL. He sent a notice of the proposed board meeting to the only other director. He attended the meeting and took decisions, recorded in the minutes which he prepared. His written evidence is that he believed that he was entitled to take that decision on his own, and he signed the assignment of 14 August 1998 in that belief. Had he produced the minutes to a third party acting in good faith, both parties would have been bound by any resulting agreement. …

46 Mr Mabb relied mainly on the following points in arguing that 'person' in section 35A(1), although necessarily excluding the company (which could not deal with itself) did not exclude a director of the company. (i) The contrary reading would be inconsistent with section 322A of the Companies Act 1985 [CA 2006 s 41], a provision introduced as part of the same set of amendments made by the Companies Act 1989, which must have been intended to have a coherent scheme. (ii) The natural meaning of 'person' is wide and the court should be slow to find an unexpressed limitation in what are quite detailed statutory provisions. (iii) That point was reinforced by doubt as to what limitation ought to be read in, if there were to be any interference with the statutory text. (iv) All or most leading textbooks take the view that section 35A(1) is not restricted in this way. …

48 Mr Mabb submitted that these provisions, and those of section 35A(6) (set out in paragraph 21 above) made plain that the two sections were intended to coexist and interact in such a way that a director who

acted in good faith but in a transaction to which he himself (or an associate) was a party, and which was beyond the board's powers, got through the first filter of section 35A but was caught by the second filter of section 322A, with the result that the transaction was voidable, not void. …

50 I have found Mr Mabb's submissions more persuasive, and especially his reliance on section 35A(6). The two sections do cross-refer, and the terms of the cross-reference in section 35A(6) are to my mind striking. …

53 I would add that Carnwath LJ (from whom I differ only with misgivings) has referred to the speech of Lord Simonds in *Morris v Kanssen* [1946] AC 459, 475–476. That was a case in which a director and his accomplice conspired together to concoct false minutes of a board meeting which had never taken place (and at which, as it was fraudulently claimed, the accomplice had been appointed as a director). The most surprising thing about the case is that it reached the House of **(p. 100)** Lords. In the passage which Carnwath LJ has referred to, Lord Simonds was dealing with general principles of agency and with the general presumption of regularity of transactions. I do not find it of much help in construing section 35A of the 1985 Act. Indeed another passage in the speech of Lord Simonds, at p 471—'There is, as it appears to me, a vital distinction between (a) an appointment in which there is a defect or, in other words, a defective appointment, and (b) no appointment at all'—appears to me to give some slight support to the view which I have expressed in paragraph 41 above. I readily acknowledge that it is not a wholly satisfactory test but I can see no alternative short of what I would regard as an unduly restrictive reading of section 35A.

CARNWATH LJ:

103 I agree with the judgment of Robert Walker LJ on every point, except one, in relation to the application of section 35A of the Companies Act 1985. Unfortunately, in the somewhat unusual circumstances explained in his judgment, this issue has now become potentially determinative of the appeal. I will therefore explain my reasons rather more fully than in the draft judgment which was supplied to the parties.

104 The problem is to identify the 'irreducible minimum' needed to bring section 35A into play. Literal interpretation does not help. On its face, the section is about the 'power of the board of directors' [now CA 2006 s 40 refers simply to 'the power of the directors'] to bind the company, in favour of a person who is party to 'any transaction … to which the company is a party'. This begs two questions to which the section provides no direct answer: how does the 'board of directors' exercise its power; and in what circumstances is a transaction to be treated as one to which the company is a 'party'? Both questions can only be answered, under the ordinary law, by looking at the company's constitution. Yet that is the very inquiry which the section seeks to avoid.

105 I do not, with respect to Robert Walker LJ, think that this problem can be solved by the suggested distinction between 'nullity' and 'procedural irregularity'. Such distinctions have not proved workable in administrative law (see eg de Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 5th ed (1995), para 5-044ff) and I do not think they are workable here. The problem is illustrated by this case. By what criterion is it to be said that Mr Smith's decision to constitute himself as a board of the company is to be treated as a mere procedural irregularity, rather than a nullity? He had no more authority to take a decision in the name of the company than the office-boy. To an outsider, of course, such a document, emanating from the chairman, could reasonably have been assumed to have more validity than a similar document signed by the office-boy. Yet, viewed under the company's constitution, the decision had no validity of any kind; it was a 'nullity'.

106 The same problem, in different words, arises under article 9 of the Directive ('acts done by organs of the company'); or section 9(1) of the 1972 Act ('transaction decided on by the directors'). In *TCB Ltd v Gray* [1986] Ch 621, 636g Sir Nicolas Browne-Wilkinson V-C accepted the submission that it had to be shown that the debenture was a transaction 'decided on by the directors', applying the wording of section 9(1) as it then was. Although there was a purported minute of a board meeting recording a decision on that issue, the evidence showed that no such meeting had ever taken place. The position was that all the directors had decided to grant the debenture, but not at a meeting at which they were all present. Sir Nicolas Browne-Wilkinson V-C commented, at p 637:

> ‘It has to be borne in mind on this aspect of the case that I have to determine whether a valid debenture was granted by Link. In my judgment Link, having put forward the minutes of the meeting of 25 January as one of the completion documents on the basis of which TCB made the loan, could not be heard to challenge the validity of that minute by denying that such a meeting ever took place. Therefore the minute stands as irrefutable evidence against Link that the grant of the debenture was a “transaction decided on by the directors”. Accordingly the necessary basis for section 9(1) of the 1972 Act to apply, as between Link and TCB, exists.’

107 I do not understand him to have treated the lack of a properly convened meeting as a mere ‘irregularity’, which could be disregarded for that reason. The key point seems to have been that **(p. 101)** the purported minute had been put forward by persons with apparent authority on behalf of the company and relied on by the TCB in completing the transaction. In effect, therefore, Sir Nicolas Browne-Wilkinson V-C treated the irreducible minimum as either an actual decision of the directors approving the transaction or something represented as such a decision, by someone having apparent authority so to represent it, and in circumstances in which the other party was entitled to rely on the representation.

108 I would be reluctant, however, to treat that reasoning, which was related to the facts of the case, as laying down a general test. Nor is this the case in which to attempt that task. A purposive approach to the section suggests a low threshold. The general policy seems to be that, if a document is put forward as a decision of the board by someone appearing to act on behalf of the company, in circumstances where there is no reason to doubt its authenticity, a person dealing with the company in good faith should be able to take it at face value: see eg Mr Advocate General Mayras in *Friederich Haaga GmbH* [1974] ECR 1201, 1210, cited in Edwards, EC Company Law, p 43. (There may be some question, as she points out, whether section 35A has fully achieved that policy.) In principle, where the person in question is a third party in the ordinary sense, a wide interpretation is wholly appropriate.

109 I accept that the section does not distinguish between insiders and outsiders. It applies to any ‘person dealing with the company’. These words are wide enough to include a director of the company. There is nothing in law to prevent a director from being ‘a person dealing’ with his own company. If there were any doubt in section 35A itself, it seems implicit in section 322A that a director may be such a person. On the other hand, it is impossible to read that section as giving any comfort to directors seeking to rely on section 35A. Rather it adds a further level of defence for the company against its own directors and connected persons, by making transactions voidable in the circumstances defined; but this is expressly stated not to exclude any other rule by which the transaction may be avoided, and not to affect the operation of section 35A in relation to any other party: see section 322A(4)(7).

110 I would prefer, however, to express no view about the position of directors in other circumstances. The facts here were quite exceptional. Mr Smith was not simply a director dealing with the company, and having some incidental involvement in the decision. As chairman of the company, it was his duty to ensure that the constitution was properly applied; yet he was personally responsible for the error by which he purported to turn himself into a one-man board. We have to assume good faith, but that means no more than that we have to assume that he made an honest mistake. It does not make it any less a mistake, or one for which he is any less responsible. I do not see how he can rely on his own error to turn his own decision, which had no validity of any kind under the company’s constitution, into a decision of ‘the board’. I see nothing in section 35A, however purposefully interpreted, to give it that magical effect.

111 I am also comforted to find that a robust approach was taken by the House of Lords to a similar contention in *Morris v Kanssen* [1946] AC 459. That concerned the application of the rule in *Turquand’s case (Royal British Bank v Turquand* (1856) 6 E & B 327), which allows outsiders dealing with the company to assume that acts of internal management have been properly carried out. The facts in Morris’s case were, if anything, even more extreme than in the present case. There was a series of concocted meetings, at the end of which Mr Morris claimed to have been validly appointed a director, and as such to have joined in successfully allotting shares to himself. The question was whether he could rely on the rule for his own

benefit. Lord Simonds thought the answer was clearly no, even approaching the matter on the basis that he was acting in good faith [1946] AC 459, 476:

> ‘For here Morris was himself purporting to act on behalf of the company in a transaction in which he had no authority. Can he then say that he was entitled to assume that all was in order? My Lords, the old question comes into my mind, “Quis custodiet ipsos custodes?” It is the duty of directors, and equally of those who purport to act as directors, to look after the affairs of the company, to see that it acts within its powers and that its transactions are regular **(p. 102)** and orderly. To admit in their favour a presumption that that is rightly done which they have themselves wrongly done is to encourage ignorance and condone dereliction from duty.’

112 Of course, he was concerned with a common law principle, rather than statute. But where, as here, the language of a statute, even one based on a Directive, has to be stretched in a purposive way to achieve its object, I see no reason why, in setting the limits, we should not be guided by what the common law would deem appropriate in a similar context.

113 Accordingly, differing with great respect from the judgment just given, I would dismiss the appeal.

SCHIEMANN LJ:

114 I also would dismiss this appeal.

115 So far as the issue under section 35A of the Companies Act 1985 is concerned, I have approached the matter by first considering the First Directive on Company Law, 68/151/EEC. Article 9(2) of the Directive provides:

> ‘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.’

116 This provision was clearly intended to prevent the company from relying as against a third party on limits on the powers of the organs of the company. I do not consider that it was intended to prevent the company from relying on those limits as against the very director (‘the delinquent director’) who breached those limits. The fact that the directive makes no mention of good faith seems to lend support to this view. It is to me inconceivable that it was intended that a company should not be able to sue a director who knowingly acted beyond his powers so as to dispose of the company’s assets. This leads me to the conclusion that such a director falls outwith the concept of a third party as used in the Directive.

117 By contrast, the solicitors’ firm in the present case is a third party. This provision was intended to prevent the company, and perhaps others such as the delinquent director, from relying on those limits as against a third party. It was not in my judgment intended to prevent a third party from relying on those limits.

118 I do not understand either of my lords to take issue with any of the foregoing. The differences between them arise as to the proper interpretation of section 35A. Does that section enable a director, who has made an honest mistake as to the meaning of a provision in the articles of the company of which he is a director, himself to rely on his own mistake in order to give validity to something which would lack validity were it not for that mistake? In the phraseology of judges who lived in a different sartorial era, to pull himself up by his own bootstraps. To that question Robert Walker LJ gives an affirmative and Carnwath LJ and Rimer J a negative answer.

119 Section 35A uses different drafting from the directive and I accept poses more difficult problems. Manifestly, at least in part, it was enacted to give effect to article 9(2). However, I accept of course that it