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

was open to Parliament to go beyond what the Directive required and to enact that a director of a company should be able to rely as against third parties on his own mistake made in good faith as to his powers.

120 There is frequently tension in the law—one sees it in administrative law as well as agency and company law—between two desiderata. The first is the desire to ensure that A acting on behalf of B only does that which B has properly authorised: this desire is caused by the wish to protect B from the consequences of that which he has not authorised. The second is the desire to ensure that C who in good faith relies on the acts of A as binding B is then not frustrated in his expectations because it turns out that B has never given A the authority to do those acts. One can easily find policy arguments for giving weight to either desideratum.

121 Manifestly both the directive and section 35A are concerned with giving greater emphasis to the second desideratum than the first. They seek to resolve the tension between B and C in favour of C.

(p. 103) 122 Section 322A is not primarily concerned with this tension or the tension between B and C. It is concerned with the tension between B and A and gives B the opportunity of resolving any tension in its favour.

123 What the present case is in substance concerned with is the tension between A and C. I have not heard of any possible policy reason for enabling a director in A's position to rely on his own mistake vis-à-vis C. I can see none for myself. I thus approach the case with a predisposition to find in favour of the solicitors rather than in favour of the director.

124 Mr Mabb has put forward a careful argument to the effect that in the circumstances it is really the director who is to be regarded as C, rather than the solicitors who relied upon him having the authority of the company. I find that result counter-intuitive.

125 I accept that the word 'person' is on its face wide enough to include such a director and that there is nothing in the section itself which points against the word being given such a wide meaning. That however is not to say that it must be given such a wide meaning.

126 The fact that we are here dealing with a one-man board meeting I agree is irrelevant. My reasoning and conclusions would be the same if the articles required a quorum of three and there had been merely two who attended the board meeting which resolved to part with the company's assets to them.

127 Moreover I accept that, whatever one's intuitive feelings as to the right end result, one must consider whether the statute compels a contrary conclusion.

128 Like Carnwath LJ and the judge, I do not think that it does. I do not accept that section 322A is inconsistent with a construction of section 35A which inhibits a director who is the author of his own misfortune from profiting vis-à-vis third parties from his own mistake. Section 322A seems to me to be concerned with a different problem, namely, with what a company can do vis-à-vis its own director who has overstepped the mark.

129 I note the point made by Mr Mabb about the desirability for certainty and the possible difficulties of drawing the line once one says that the phrase 'person dealing with the company' is not to be construed as comprising all persons. As it seems to me there is no difficulty in excluding from such persons the very directors who overstepped the limitations in the company's constitution.

130 So far as the other issues are concerned I gratefully adopt what Robert Walker LJ has said.

131 Since Carnwath LJ agrees that this appeal should be dismissed it will be.

1. In *Smith v Henniker-Major and Co* **[3.05]**, the majority interprets the CA 1985 s 35A reference to 'a person' dealing with the company as excluding directors, or at least as then importing a different test of what constitutes 'a dealing with a company' when the dealing is with directors. Does CA 2006 s 41, and the approach of Robert Walker LJ, provide an effective answer to that?

2. Whatever the answer to the previous question, a court must still be clear whether there is an 'irreducible minimum' that has to be established before a person can rely on CA 1985 s 35A (CA 2006 s 40). For example, can the provision be relied upon where the person dealing on behalf of the company is not a director at all? No conclusion emerges from the judgments (see Robert Walker LJ at [41] (dissenting) and contrast with Carnwath LJ at [103]–[108]). Given the policy of the Directive that is being implemented, is a restrictive or expansive approach preferable? What are the risks of either extreme in these approaches?

3. The answer to the previous question may depend in part on a further drafting matter. CA 1985 s 35A refers to 'the power of the board of directors to bind the company, or authorise others to do so', whereas CA 2006 s 40 refers to 'the power of the directors to bind the company, or authorise others to do so'. Hansard offers no explanation for the change, nor whether it was intentional. Some commentators therefore continue to interpret the section as if it referred to the board; others see the change as material. With the former approach, **(p. 104)** determining whether 'the board' has acted at all (as in *Smith* **[3.05]**) is clearly important. By contrast, a test focused on determining whether 'the directors' (or even *a* director) has acted may be more lenient. Which approach is correct? Which construction best meets the intentions of the early Directive?

[3.06] EIC Services Ltd v Phipps [2004] EWCA Civ 1069 (Court of Appeal)

The Court of Appeal held that shareholder receiving a bonus share was not 'a person dealing with a company' within the meaning of CA 1985 s 35A(1), and so the share issue was void as it had not been effectively authorised by E's members, overruling Neuberger J in the court as follows.

> PETER GIBSON LJ:
>
> 34 For section 35A(1) to validate the bonus issue it was necessary to find that the shareholders receiving the shares were persons dealing with the company in good faith and that the reasons why the bonus issue would otherwise have been invalid were limitations under the company's constitution on the power of the board of directors to bind the company. The judge [Neuberger J] held that a shareholder of a company receiving shares (whether or not bonus shares) from the company is 'a person dealing with the company' within the scope of section 35A(1). He considered that, as a matter of ordinary language, such a shareholder would be within the ambit of those words, and he said that, in the absence of a powerful reason to the contrary, it is inappropriate to treat naturally wide words in a statute as subject to an implied limitation. The judge also referred to the decision of this court in *Smith v Henniker-Major & Co* **[3.05]** and found that the reasoning of each member of this court appeared, if anything, to support his conclusion. He also found that section 322A of the 1985 Act indirectly supported his conclusions. That section sets out circumstances in which section 35A cannot be relied on. Those circumstances are limited to transactions between a company and a director of it or of its holding company or a person connected with the directors or a company with whom such a director is associated. Finally the judge expressed the view that the present case plainly fell within the policy behind section 35A as expressed by Carnwath LJ in *Smith*, at para 108:
>
> > '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.'
>
> 35 I have to say that my immediate reaction to the question whether a shareholder receiving bonus shares

is ‘a person dealing with the company’ is not the same as that of the judge. Having regard to the nature of a bonus issue (see paras 17 and 18 above) and the fact that it is an internal arrangement with no diminution or increase in the assets or liabilities of the company, with no change in the proportionate shareholdings and with no action required from any shareholders (see*Whittome v Whittome (No 1)* 1994 SLT 114, 124, per Lord Osborne), I do not think that the shareholder is a person dealing with the company as a matter of ordinary language. The section contemplates a bilateral transaction between the company and the person dealing with the company, or an act to which both are parties, such as will bind the company only if the section applies and it will not apply if the person deals with the company other than in good faith. It would be very surprising if a bonus issue made by a single resolution applicable to all shareholders were to be rendered by the section binding in part but void in part, depending on the circumstances of the individual shareholders. Nor do I agree with the judge that it matters not whether the shareholder receives a bonus issue or pays for his new shares. If a shareholder receives shares otherwise than by way of a bonus issue (for example, by a rights issue requiring payment of new consideration), then he would have to deal with the company, and the question would be whether a shareholder is within the intended reach of the section.

(p. 105) 36 I turn to that question. Section 35A, as Robert Walker LJ pointed out in *Smith* [2003] Ch 182, para 19, represents Parliament’s second attempt to give effect to article 9 of the First Council Directive on Company Law (68/151/EEC). The section was introduced by section 108 of the Companies Act 1989. The First Directive was, of course, adopted before the United Kingdom joined the European Community and so there was no United Kingdom input into the language of the Directive. Article 9(2) provides that limits on the powers of the organs of the company may never be relied on ‘as against third parties’.

37 The judge said that he did not find the reference to ‘third parties’ in the Directive to be of much assistance to Mr Lee Barber’s [counsel’s] case for two reasons. The first was that it was not entirely clear what is meant by ‘third parties’ in article 9(2). With respect, although ‘third parties’ is not defined, to my mind it is tolerably clear from the Directive itself that third parties do not include members of the company: see, for example, the sixth preamble. In the context of a company, the term ‘third parties’ naturally refers to persons other than the company and its members. The judge’s second reason was that article 9(2), if not requiring legislation to protect members dealing with the company, did not prevent section 35A going further, as Schiemann LJ pointed out in *Smith*, at para 119. That is true, but in construing section 35A, given that its purpose was to implement the Directive, it must be relevant to have regard to the extent of the requirement of article 9(2), in the absence of any other known mischief which the section was designed to counteract. In my judgment the Directive supports the view that a member receiving a bonus issue is not ‘a person dealing with a company’.

38 As for the other reasons given by the judge as to why section 35A applied, I am not able to derive assistance for the present case from the court’s judgment in*Smith*. The issues in that case were entirely different, relating as they did to the actions of a director. The explanation of the policy of the section given by Carnwath LJ does not purport to explain who is a person dealing with the company for the purposes of the section. Nor, in my view, does section 322A assist. It does not follow from the fact that the legislature has dealt specifically with transactions between a director and a company that an inference can be drawn about the applicability of section 35A to shareholders who in that capacity deal with the company.

➢ Question

Is this reasoning persuasive? In particular, if Parliament did not intend shareholders to be protected by CA 1985 s 35A/CA 2006 s 40, why did it not expressly qualify the protection applying to them, as it did for directors in CA 1985 s 322A/CA 2006 s 41?

Meaning of ‘good faith’ in CA 2006 s 40.

[3.07] TCB Ltd v Gray [1986] Ch 621 (Chancery Division); affd on other grounds [1987] Ch 458 (Court of

Appeal)

Gray was sued on a guarantee which he had given to the plaintiff TCB to secure the indebtedness of a company called Link, of which Gray was a director. The debenture evidencing Link's debt had been signed by one Rowan purporting to act as Gray's attorney, but Link's articles required a director to sign personally. The court ruled that TCB, which had acted on the debenture in good faith, was protected by s 9(1) of the European Communities Act 1972 [see 'Calls for reform', p 89, and now see CA 2006 s 40, 'CA 2006 s 40: statutory deeming provisions to avoid constitutional limitations on directors' authority', p 97].

BROWNE-WILKINSON V-C: The debenture was not signed by any director of Link, but by an attorney for a director. There is no power in the articles of Link for a director to act by an attorney. Therefore, says Mr Brodie, on the principle delegatus non potest delegare the seal was not affixed in accordance with the requirements of the articles; accordingly the debenture is not the act of Link.

(p. 106) Apart from s 9(1) of the European Communities Act 1972, there would be much force in these submissions. But in my judgment that section provides a complete answer. Under the old law, a person dealing with a corporation was required to look at the company's memorandum and articles to satisfy himself that the transaction was within the corporate capacity of the company and was to be carried through in accordance with the requirements of its articles. The rigour of those requirements was only tempered to the extent that the rule in *Royal British Bank v Turquand* **[3.16]** allowed third parties to assume that acts of internal management had been properly carried out. It has been generally assumed that the old law has to a large extent been swept away by s 9(1) of the Act of 1972 … Section 9(1) was passed to bring the law of England into line with article 9 of Council Directive 68/151/EEC. In approaching the construction of the section, it is in my judgment relevant to note that the manifest purpose of both the directive and the section is to enable people to deal with a company in good faith without being adversely affected by any limits on the company's capacity or its rules for internal management. Given good faith, a third party is able to deal with a company through its 'organs' (as the directive describes them) or directors. Section 9(1) achieves this in two ways: first it 'deems' all transactions to be authorised; second, it deems that the directors can bind the company without limitations. The second part of the subsection reinforces this by expressly abolishing the old doctrine of constructive notice of the contents of a company's memorandum and articles. It being the obvious purpose of the subsection to obviate the commercial inconvenience and frequent injustice caused by the old law, I approach the construction of the subsection with a great reluctance to construe it in such a way as to reintroduce, through the back door, any requirement that a third party acting in good faith must still investigate the regulating documents of a company.

Mr Brodie, whilst accepting that TCB had no actual or imputed knowledge of any irregularity in the execution of the debenture, at first submitted that TCB did not act 'in good faith' within the meaning of the section since TCB was put on inquiry by the unusual manner in which the debenture had been executed. He said that TCB should have looked at the articles and would then have discovered the irregularity. Accordingly, he submitted, they were not acting 'in good faith'. On further consideration Mr Brodie abandoned this argument, to my mind rightly. The last words of the second part of s 9(1) expressly provide that good faith is to be presumed: the second part further provides the person dealing with the company is not bound to inquire as to limitations on the powers of directors. In my judgment, it is impossible to establish lack of 'good faith' within the meaning of the subsection solely by alleging that inquiries ought to have been made which the second part of the subsection says need not be made.

Mr Brodie's next submission was that, in order for s 9(1) to apply at all, the first requirement is that there must be a transaction by the company. Since Link never sealed the debenture in the only way authorised by the articles, there was here no transaction by Link at all; the debenture was not the act of Link. If this argument is right, it drives a coach and horses through the section. In every dealing with the company the third party would have to look at its articles to ensure that the company was binding itself in an authorised manner. In my judgment the section does not have the effect. The section is dealing with purported actions by a company which, having regard to its internal documents, may be a nullity, eg acts outside its corporate capacity. In such a case under the old law the purported act of the company would not be the act of the company at all. Yet the first part of s 9(1) deems it so to be. Similarly a document under seal by the

company executed otherwise than in accordance with its articles was not, under the old law, the act of the company: but s 9(1) deems it so to be since the powers of the directors are deemed to be free from limitations, ie as to the manner of affixing the company's seal. In my judgment, s 9(1) of the Act applies to transactions which a company purports to enter into and deems them to be validly entered into …

Accordingly the necessary basis for s 9(1) of the Act of 1972 to apply, as between Link and TCB, exists. It follows that the debenture was valid, and Mr Gray's second line of defence also fails.

(p. 107) ➢ Notes

1. In *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] BCLC 1 at 17, Nourse J made the following observations on the meaning of the phrase 'in good faith':

[Counsel for the defendants] said that even if the assignment agreement was ultra vires the trust fund nevertheless, in favour of the agency, it is deemed, by virtue of s 9(1) of the European Communities Act 1972 to have been intra vires, on the ground that at all material times the agency acted in 'good faith', that is to say that it genuinely and honestly believed that it was within the trust fund's corporate powers to enter into the assignment agreement. Counsel for the plaintiffs, on the other hand, says that before s 9(1) can apply the agency must have acted not only genuinely and honestly, but in circumstances where it neither knew nor ought to have known the lack of vires. That means, he says, that the agency must have acted not only genuinely and honestly, but reasonably as well …

My view of that question is this. In the case of a transaction decided on by the directors s 9(1) has abolished the rule that a person who deals with a company is automatically affected with constructive notice of its objects clause. But, by retaining the requirement of good faith, it nevertheless ensures that a defence based on absence of notice shall not be available to someone who had not acted genuinely and honestly in his dealings with the company. Notice and good faith, although two separate beings, are often inseparable. There is a most valuable account of their liaison in the speech of Lord Wilberforce in the recent case of *Midland Bank Trust Co v Green*.[16] What it comes to is that a person who deals with a company in circumstances where he ought anyway to know that the company has no power to enter into the transaction will not necessarily act in good faith. Sometimes, perhaps often, he will not. And a fortiori where he actually knows. Next, a person who acts in good faith will sometimes, perhaps often, act in a manner which can also be described as being reasonable. But I emphatically refute the suggestion, if such it is, that reasonableness is a necessary ingredient of good faith. That would require the introduction of an objective standard into a subjective concept and it would be contrary to everything which the law has always understood of that concept. In my judgment a person acts in good faith if he acts genuinely and honestly in the circumstances of the case. Beyond that it is neither possible nor desirable to attempt an examination of the circumstances in which s 9(1) may or may not apply.

[The decision of Nourse J was reversed on another point: [1984] 1 All ER 628, CA; affd [1984] AC 626, HL; but no comment was made about this passage in any of the judgments on appeal.]

2. In *Wrexham Association Football Club Ltd v Crucialmove Ltd* [2006] EWCA Civ 237, CA, the court held that CA 1985 s 35A [CA 2006 s 40] does not protect a person who failed to inquire about matters in circumstances in which he should have done so (eg where the third party does not deal with the entire board of directors, but needs to establish whether the board has authorised the dealing—note that this was in the context of CA 1985 s 35A, which protects dealings with the 'board of directors', not simply the 'directors' as in CA 2006 s 40).

Transactions involving directors or their associates: CA 2006 s 41

As noted earlier, CA 2006 s 40 cannot be relied upon by directors or their associates. CA 2006 s 41 ensures this, and provides a variety of remedies for the company (see 'CA 2006 s 40: statutory deeming provisions to avoid constitutional limitations on directors' authority', p 97, on the proper formulation of these propositions). The terms of CA 2006 s 41 (extracted in the same section, p 98) raise several questions.

(p. 108) ➢ Questions

1. In *Smith v Henniker-Major and Co* **[3.05]**, the court refused to allow a director to rely on CA 1985 s 35A [now CA 2006 s 40]. Does CA 2006 s 41 provide an effective answer to this case? The issue may be important, because, if the director cannot rely on s 40, then the contract is *void*; by contrast, if the director can rely on s 40, but the company then has rights under s 41, the contract is *voidable*. Does this conundrum suggest that directors *can* rely on s 40, rendering the transaction valid *unless* avoided by the company under s 41?

2. If the facts of *Guinness v Saunders* **[5.01]** were to recur, would CA 2006 s 41 be applicable?

3. What is the impact of the saving provision in s 41(1) that preserves the operation of other rules of law that may call into question the validity of the transaction?

Actual and ostensible authority of corporate agents

Very often the authority which an agent must have to ensure a binding contract between company and third party is not derived directly from the company's constitution (which typically deals generally with the powers of the board, and third parties rarely deal directly with the board). Instead, it must be found in express or implied delegations of *actual* authority (including implicit delegations of usual authority), or alternatively the third party must be able to rely on the agent's *ostensible* (or *apparent*) authority (derived from representations of the agent's authority, including implicit representations of usual authority) (see 'Summary of agency principles', p 95), augmented by 'The "indoor management rule"', p 124. All of this is common law, and the following cases illustrate the courts' approach. The judgment of Diplock LJ in *Freeman and Lockyer* **[3.08]** is the *locus classicus*.

Explaining the principles of agency

Actual and ostensible authority contrasted.

[3.08] Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480 (Court of Appeal)

Two men had formed the defendant company to buy and resell a large estate. Kapoor was a property developer; Hoon had contributed half of the capital but played no active part in the company's business. Kapoor, Hoon and a nominee of each were appointed the four directors of the company, and under the articles all four were needed to constitute a quorum. Hoon spent much time abroad, leaving all the day-to-day management of the company's affairs to Kapoor. After an initial plan for the immediate resale of the land had fallen through, Kapoor decided to develop the estate and engaged the plaintiffs, a firm of architects and surveyors, to apply for planning permission. The company later refused to pay the plaintiffs' fees on the ground that Kapoor had had no authority to engage them. The county court judge held that the company was bound. The Court of Appeal affirmed his decision on the basis that the agent had ostensible authority.

> DIPLOCK LJ: The county court judge made the following findings of fact: (1) that the plaintiffs intended to contract with Kapoor as agent for the company, and not on his own account; (2) that the board of the company intended that Kapoor should do what he could to obtain the best possible price for the estate; (3) that Kapoor, although never appointed as managing director, had throughout been acting as such in employing agents and taking other steps to find a purchaser; (4) that Kapoor was so acting was well known to the board …

The county court judge did not hold (although he might have done) that actual authority had been conferred upon Kapoor by the board to employ agents. He proceeded on the basis of apparent authority, that is, that the defendant company had so acted as to be estopped from denying **(p. 109)** Kapoor's authority. This rendered it unnecessary for the judge to inquire whether actual authority to employ agents had been conferred upon Kapoor by the board to whom the management of the company's business was confided by the articles of association.

I accept that such actual authority could have been conferred by the board without a formal resolution recorded in the minutes, although this would have rendered them liable to a default fine under s 145(4) of the Companies Act 1948 [CA 2006 s 183]. But to confer actual authority would have required not merely the silent acquiescence of the individual members of the board, but the communication by words or conduct of their respective consents to one another and to Kapoor. [His Lordship discussed the evidence and continued:] I myself do not feel that there is adequate material to justify the court in reaching the conclusion of fact (which the county court judge refrained from making) that actual authority to employ agents had been conferred by the board on Kapoor.

This makes it necessary to inquire into the state of the law as to the ostensible authority of officers and servants to enter into contracts on behalf of a corporation. It is a topic on which there are confusing and, it may be, conflicting judgments of the Court of Appeal … We are concerned in the present case with the authority of an agent to create contractual rights and liabilities between his principal and a third party whom I will call 'the contractor'. This branch of the law has developed pragmatically rather than logically owing to the early history of the action of assumpsit and the consequent absence of a general jus quaesitum tertii [sic] in English law. But it is possible (and for the determination of this appeal I think it is desirable) to restate it upon a rational basis.

It is necessary at the outset to distinguish between an 'actual' authority of an agent on the one hand, and an 'apparent' or 'ostensible' authority on the other. Actual authority and apparent authority are quite independent of one another. Generally they co-exist and coincide, but either may exist without the other and their respective scopes may be different. As I shall endeavour to show, it is upon the apparent authority of the agent that the contractor normally relies in the ordinary course of business when entering into contracts.

An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. 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 principal and the contractor …

An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon 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 but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the 'actual' authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either upon the representation of the principal, that is, apparent authority, or upon the representation of the agent, that is, warranty of authority.

(p. 110) The representation which creates 'apparent' authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually 'actual' authority to enter into.

In applying the law as I have endeavoured to summarise it to the case where the principal is not a natural person, but a fictitious person, namely, a corporation, two further factors arising from the legal characteristics of a corporation have to be borne in mind. The first is that the capacity of a corporation is limited by its constitution, that is, in the case of a company incorporated under the Companies Act, by its memorandum and articles of association; the second is that a corporation cannot do any act, and that includes making a representation, except through its agent. [Lord Diplock discussed aspects of the *ultra vires* and constructive notice doctrines (now, of course, repealed), and continued:]

The second characteristic of a corporation, namely, that unlike a natural person it can only make a representation through an agent, has the consequence that in order to create an estoppel between the corporation and the contractor, the representation as to the authority of the agent which creates his 'apparent' authority must be made by some person or persons who have 'actual' authority from the corporation to make the representation. Such 'actual' authority may be conferred by the constitution of the corporation itself, as, for example, in the case of a company, upon the board of directors, or it may be conferred by those who under its constitution have powers of management upon some other person to whom the constitution permits them to delegate authority to make representations of this kind. If follows that where the agent upon whose 'apparent' authority the contractor relies has no 'actual' authority from the corporation to enter into a particular kind of contract with the contractor on behalf of the corporation, the contractor cannot rely upon the agent's own representation as to his actual authority. He can rely only upon a representation by a person or persons who have actual authority to manage or conduct that part of the business of the corporation to which the contract relates.

The commonest form of representation by a principal creating an 'apparent' authority of an agent is by conduct, namely, by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have 'actual' authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do usually enters into in the ordinary course of such business. The making of such a representation is itself an act of management of the company's business. Prima facie it falls within the 'actual' authority of the board of directors, and unless the memorandum or articles of the company either make such a contract ultra vires the company or prohibit the delegation of such authority to the agent,[17] the company is estopped from denying to anyone who has entered into a contract with the agent in reliance upon such 'apparent' authority that the agent had authority to contract on behalf of the company.

If the foregoing analysis of the relevant law is correct, it can be summarised by stating four conditions which must be fulfilled to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so. It must be shown:

(1) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor.
(2) that such representation was made by a person or persons who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
(p. 111) **(3)** that he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and
(4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought or be enforced or to delegate authority to

enter into a contract of that kind to the agent.[18]

The confusion which, I venture to think, has sometimes crept into the cases is in my view due to a failure to distinguish between these four separate conditions, and in particular to keep steadfastly in mind (a) that the only 'actual' authority which is relevant is that of the persons making the representation relied upon, and (b) that the memorandum and articles of association of the company are always relevant (whether they are in fact known to the contractor or not) to the questions (i) whether condition (2) is fulfilled, and (ii) whether condition (4) is fulfilled and (but only if they are in fact known to the contractor) may be relevant (iii) as part of the representation on which the contractor relied.

In each of the relevant cases the representation relied upon as creating the 'apparent' authority of the agent was by conduct in permitting the agent to act in the management and conduct of part of the business of the company. Except in *Mahony v East Holford Mining Co Ltd* (1875) LR 7 HL 869, it was the conduct of the board of directors in so permitting the agent to act that was relied upon. As they had, in each case, by the articles of association of the company full 'actual' authority to manage its business, they had 'actual' authority to make representations in connection with the management of its business, including representations as to who were agents authorised to enter into contracts on the company's behalf. The agent himself had no 'actual' authority to enter into the contract because the formalities prescribed by the articles for conferring it upon him had not been complied with. In *British Thomson-Houston Co v Federated European Bank Ltd* [[1932] 2 KB 176, CA], where a guarantee was executed by a single director, it was contended that a provision in the articles, requiring a guarantee to be executed by two directors, deprived the company of capacity to delegate to a single director authority to execute a guarantee on behalf of the company, that is, that condition (4) above was not fulfilled; but it was held that other provisions in the articles empowered the board to delegate the power of executing guarantees to one of their number, and this defence accordingly failed. In *Mahony's* case no board of directors or secretary had in fact been appointed, and it was the conduct of those who, under the constitution of the company, were entitled to appoint them which was relied upon as a representation that certain persons were directors and secretary. Since they had 'actual' authority to appoint these officers, they had 'actual' authority to make representations as to who the officers were. In both these cases the constitution of the company, whether it had been seen by the contractor or not, was relevant in order to determine whether the persons whose representations by conduct were relied upon as creating the 'apparent' authority of the agent had 'actual' authority to make the representations on behalf of the company. In *Mahony's* case, if the persons in question were not persons who would normally be supposed to have such authority by someone who did not know the constitution of the company, it may well be that he contractor would not succeed in proving condition (3), namely, that he relied upon the representations made by those persons, unless he proved that he did in fact know the constitution of the company …

The cases where the contractor's claim failed, namely *Houghton & Co v Nothard, Lowe & Wills Ltd* [[1927] 1 KB 246, CA], *Kreditbank Cassel GmbH v Schenkers Ltd* [[1927] 1 KB 826] and the *Rama Corpn* case, [19] were all cases where the contract sought to be enforced was not one which a person occupying the position in relation to the company's business which the contractor knew that the agent occupied, would normally be authorised to enter into on behalf of the company. The conduct of the board of directors in permitting the agent to occupy that position, upon the which **(p. 112)** the contractor relied, thus did not of itself amount to a representation that the agent had authority to enter into the contract sought to be enforced, that is, condition (1) was not fulfilled. The contractor, however, in each of these three cases sought to rely upon a provision of the articles giving to the board power to delegate wide authority to the agent as entitling him to treat the conduct of the board as a representation that the agent had had delegated to him wider powers than those usually exercised by persons occupying the position in relation to the company's business which the agent was in fact permitted by the board to occupy. Since this would involve proving that the representation on which he in fact relied as inducing him to enter into the contract comprised the articles of association of the company as well as the conduct of the board, it would be necessary for him to establish first that he knew the contents of the articles (that is, that condition (3) was fulfilled in respect of any representation contained in the articles) and secondly that the conduct of the board in the light of that knowledge would be understood by a reasonable man as a representation that the agent had authority to enter into the contract sought to be enforced, that is that condition (1) was fulfilled.

The need to establish both these things was pointed out by Sargant LJ in*Houghton*'s case in a judgment which was concurred in by Atkin LJ; but his observations, as I read them, are directed only to a case where the contract sought to be enforced is not a contract of a kind which a person occupying the position which the agent was permitted by the board to occupy would normally be authorised to enter into on behalf of the company …

In the present case the findings of fact by the county court judge are sufficient to satisfy the four conditions, and thus to establish that Kapoor had 'apparent' authority to enter into contracts on behalf of the company for their services in connection with the sale of the company's property, including the obtaining of development permission with respect to its use. The judge found that the board knew that Kapoor had throughout been acting as managing director in employing agents and taking other steps to find a purchaser. They permitted him to do so, and by such conduct represented that he had authority to enter into contracts of a kind which a managing director or an executive director responsible for finding a purchaser would in the normal course be authorised to enter into on behalf of the company. Condition (1) was thus fulfilled. The articles of association conferred full powers of management on the board. Condition (2) was thus fulfilled. The plaintiffs, finding Kapoor acting in relation to the company's property as he was authorised by the board to act, were induced to believe that he was authorised by the company to enter into contracts on behalf of the company for their services in connection with the sale of the company's property, including the obtaining of development permission with respect to its use. Condition (3) was thus fulfilled. The articles of association, which contained powers for the board to delegate any of the functions of management to a managing director or to a single director, did not deprive the company of capacity to delegate authority to Kapoor, a director, to enter into contracts of that kind on behalf of the company. Condition (4) was thus fulfilled.

I think the judgment was right, and would dismiss the appeal.

WILLMER and PEARSON LJJ delivered concurring judgments.

➢ Notes

1. This case makes it clear that it is not possible to rely upon the ostensible authority of an agent if the person transacting with the company knew that the act was beyond the actual authority of that agent. Also see *Criterion Properties plc v Stratford UK Properties LLC* **[3.13]**.

2. In *AMB Generali Holding AG v Manches* [2005] EWCA Civ 1237, the court held that although a company that has endowed one of its members with ostensible authority (eg by virtue of an appointment to a given position) may withdraw that authority by sacking the 'agent', third parties may continue to rely upon the initial representation unless and until the withdrawal of authority is communicated to them specifically.

(p. 113) ***Implied actual authority.***

[3.09] Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549 (Chancery Division and Court of Appeal)

Richards was chairman of directors of the defendant company and its chief executive or '*de facto* managing director', who often committed the company to contracts on his own initiative and only disclosed the matter to the board subsequently. The board acquiesced in this practice. The plaintiff (referred to in the judgment as Lord Suirdale) was chairman and managing director of another company, 'Perdio', which it was planned should eventually be merged with the defendant. As part of an agreement to put more money into Perdio, the plaintiff (who had been made a director of the defendant company) was given certain letters (referred to as C 23 and C 26) signed by Richards, by which the defendant agreed to guarantee the repayment of money owed to the plaintiff and to indemnify him against certain losses. When sued on these undertakings, the defendant alleged that Richards had had no authority to make the contract in question. Roskill J held that Richards had *apparent* authority to bind