costs and risks.

As mentioned earlier, CREST is a computer-based securities transfer settlement system which enables securities to be transferred electronically without a written instrument, and title to be evidenced without a certificate. CREST came into operation in July 1996. It is operated by a company called CRESTCo Ltd, authorised for the purpose by the Financial Conduct Authority under powers delegated by the Treasury. Securities held on CREST are recorded in electronic form and are transferred by means of electronic instructions received from participating members (primarily brokers), subject to elaborate provisions for security. Participation in the CREST scheme is optional, in the sense that a company may choose to have some or all of its securities held in uncertificated form, and there is also an option for any individual holder of the securities to hold his or her securities in one form or the other.

Until 2001, CREST did not itself maintain any register of holders, but merely provided a settlement system, and an instruction to the company to amend its share register accordingly. An entry in the company's register remained evidence of title in the same way as if the entry related to certificated securities. Since 2001, CRESTCo has maintained an Operator register (separate from the company's own register), and registers the transfers immediately they occur. The Operator register is prima facie evidence of the title to uncertificated shares (just as the company's register is for certificated shares).

Restrictions on transfer: directors' approval and pre-emption rights

Listed companies are not permitted to impose restrictions on transfer. Private companies typically do, however. The two provisions most commonly found are: (i) an article giving the directors a discretion to refuse to register any transfer (see Model Articles art 26(5)[20]), and (ii) some form of pre-emptive right for existing members. A transfer of certificated shares is not complete until the transfer is registered in the company's register of members. After paying for the shares and before registration, the transferee only has an equitable interest in the shares.

If the directors are given absolute discretion to refuse to transfer the shares, they must, as directors, exercise this power bona fide and for proper purposes: see 'Duty to act within powers: CA 2006 s 171', pp 331ff, and *Re Smith and Fawcett Ltd* **[11.10]**. CA 2006 s 771(1) requires the directors to consider the matter and either register the transfer or give the transferee notice of and reasons for refusal as soon as practicable and, in any event, within two months. The reasons for refusal must be such as may reasonably be requested, but need not extend to the minutes of board meetings at which the matter was considered.

If transfers are subject to pre-emption rights (requiring the shares to be offered first to the existing shareholders), then directors must refuse to register transfers to outsiders until this is done. Absent this, the existing shareholders' equitable interest in the shares takes priority over the transferee's equitable interest under the sale: *Tett v Phoenix Property and Investments Co Ltd* [1984] BCLC 599.

(p. 576) ***Where the articles confer on the directors a discretion to refuse to register a transfer of shares, they must exercise their power bona fide and for proper purposes; but, subject to this qualification, they may be given an absolute discretion.***

[11.10] Re Smith and Fawcett Ltd [1942] Ch 304 (Court of Appeal)

Article 10 of the company's articles provided that the directors might in their absolute and uncontrolled discretion refuse to register any transfer of shares. There were only two directors and shareholders, Smith and Fawcett, who held 4,001 shares each. After Fawcett's death, Smith and a co-opted director refused to register a transfer of his shares into the names of his executors, or one of them; but Smith offered instead to register 2,001 shares and to buy the remaining 2,000 shares at a price fixed by himself. The court refused to intervene in the exercise of this discretion without evidence of *mala fides*.

> LORD GREENE MR: The principles to be applied in cases where the articles of a company confer a discretion on directors with regard to the acceptance of transfer of shares are, for the present purposes, free from doubt. They must exercise their discretion bona fide in what they consider—not what a court may consider—is in the interests of the company, and not for any collateral purpose. They must have regard to those considerations, and those considerations only, which the articles on their true construction permit

them to take into consideration, and in construing the relevant provisions in the articles it is to be borne in mind that one of the normal rights of a shareholder is the right to deal freely with his property and to transfer it to whomsoever he pleases. When it is said, as it has been said more than once, that regard must be had to this last consideration, it means, I apprehend, nothing more than that the shareholder has such a prima facie right, and that right is not to be cut down by uncertain language or doubtful implications. The right, if it is to be cut down, must be cut down with satisfactory clarity. It certainly does not mean that articles, if appropriately framed, cannot be allowed to cut down the right of transfer to any extent which the articles on their true construction permit. Another consideration which must be borne in mind is that this type of article is one which is for the most part confined to private companies. Private companies are in law separate entities just as much as are public companies, but from the business and personal point of view they are much more analogous to partnerships than to public corporations. Accordingly, it is to be expected that in the articles of such a company the control of the directors over the membership may be very strict indeed. There are, or may be, very good business reasons why those who bring such companies into existence should give them a constitution which confers on the directors powers of the widest description.

The language of the article in the present case does not point out any particular matter as being the only matter to which the directors are to pay attention in deciding whether or not they will allow the transfer to be registered. The article does not, for instance, say, as is to be found in some articles, that they may refuse to register any transfer of shares to a person not already a member of the company or to a transferee of whom they do not approve. Where articles are framed with some such limitation on the discretionary power of refusal as I have mentioned in those two examples, it follows on plain principle that if the directors go outside the matters which the articles say are to be the matters and the only matters to which they are to have regard, the directors will have exceeded their powers.

Mr Spens [counsel], in his argument for the plaintiff, maintained that whatever language was used in the articles, the power of the directors to refuse to register a transfer must always be limited to matters personal to the transferee and that there can be no personal objection to the plaintiff becoming a member of the company because the directors are prepared to accept him as the holder of [2,001] of the shares which have come to him as legal personal representative of his father. Mr Spens relies for his proposition on the observations in several authorities, but on examination of those cases it becomes clear that the form of article then before the court by its express language confined the directors to the consideration of the desirability of admitting the proposed transferee to membership on grounds personal to him …

There is nothing, in my opinion, in principle or in authority to make it impossible to draft such a wide and comprehensive power to directors to refuse to transfer as to enable them to take into **(p. 577)** account any matter which they conceive to be in the interests of the company, and thereby to admit or not to admit a particular person and to allow or not to allow a particular transfer for reasons not personal to the transferee but bearing on the general interests of the company as a whole—such matters, for instance, as whether by their passing a particular transfer the transferee would obtain too great a weight in the councils of the company or might even perhaps obtain control. The question, therefore, simply is whether on the true construction of the particular article the directors are limited by anything except their bona fide view as to the interests of the company. In the present case the article is drafted in the widest possible terms, and I decline to write into that clear language any limitation other than a limitation, which is implicit by law, that a fiduciary power of this kind must be exercised bona fide in the interests of the company. Subject to that qualification, an article in this form appears to me to give the directors what it says, namely, an absolute and uncontrolled discretion …

LUXMOORE LJ and ASQUITH J concurred.

➢ Notes

1. *Re Smith and Fawcett Ltd* is also a leading case on the general subject of directors' powers and duties: see 'General issues', pp 309ff.

2. In *Re Swaledale Cleaners Ltd* [1968] 1 WLR 1710 it was held that the discretionary power of directors to refuse registration of a transfer must be affirmatively exercised. The directors must consider the matter and make a decision not to register within a reasonable time after the transfer has been submitted, failing which the transferee is entitled to registration. In the light of CA 2006 s 771(1), a reasonable time for this purpose is prima facie two months. However, in *Popely v Planarrive Ltd*[1997] 1 BCLC 8 it was held that, so long as the directors had reached a decision not to register a transfer within two months, it was not fatal to the effectiveness of their decision that the applicant had not been informed of it within that period. In *Re New Cedos Engineering Co Ltd* [1994] 1 BCLC 797 the company had no directors during the whole of the two months following the receipt by it of an application to have a transfer of shares registered. It was held, following *Swaledale Cleaners*, that the transferee was entitled to registration.

3. In *Curtis v Pulbrook* [2011] EWHC 167 (Ch), [2011] 1 BCLC 638, a director purported to give shares to his wife and daughter in an attempt to evade his creditors. In respect of some of these shares, the director had ensured that new share certificates were issued and entries made on the company's register. However, the director had no authority to register a purported share transfer, so no legal title had passed despite the documentation. Other gifts were allegedly by deed of gift, but as nothing more had been done, neither legal or equitable title passed (*Re Rose* [1952] Ch 499, see 'Equitable interests in shares', p 585). In any event, in these circumstances even if the gifts had been effective, they would have been unwound under IA 1986 s 423(3) (transactions at an undervalue).

Forged and fraudulent transfers

A share certificate is prima facie evidence of a person's title. The company is estopped from denying, as against a bona fide purchaser of the shares, that the person named in the certificate is entitled to the shares described there.

[11.11] Re Bahia and San Francisco Rly Co (1868) LR 3 QB 584 (Court of Queen's Bench)

Five shares in the company were owned by Miss Amelia Trittin. Without her knowledge Stocken and Goldner procured a forged transfer of the shares to themselves, and lodged the **(p. 578)** transfer and Miss Trittin's share certificate with the company for registration. The secretary in due course entered their names on the share register in place of Miss Trittin's, and issued a new share certificate in their names. Relying on this certificate, Burton and Mrs Goodburn, acting in good faith, bought the five shares on the Stock Exchange. After they had been registered as holders of the shares and issued with share certificates, the company was obliged to restore Miss Trittin's name to the share register. This action was brought by Burton and Mrs Goodburn, who claimed to be entitled to equivalent shares in the company, or damages. The court awarded them damages, holding the company estopped by the share certificate from denying the title of Stocken and Goldner.

> COCKBURN CJ: I am of opinion that our judgment must be for the claimants. If the facts are rightly understood, the case falls within the principle of *Pickard v Sears*[21] and *Freeman v Cooke*[22] The company are [sic] bound to keep a register of shareholders, and have power to issue certificates certifying that each individual shareholder named therein is a registered shareholder of the particular shares specified. This power of granting certificates is to give the shareholders the opportunity of more easily dealing with their shares in the market, and to afford facilities to them of selling their shares by at once showing a marketable title, and the effect of this facility is to make the shares of greater value. The power of giving certificates is, therefore, for the benefit of the company in general; and it is a declaration by the company to all the world that the person in whose name the certificate is made out, and to whom it is given, is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfer of shares. It is stated in this case that the claimants acted bona fide, and did all that is required of purchasers of shares; they paid the value of the shares in money on having a transfer of the shares executed to them, and on the production of the certificates which were handed to them. It turned out that the transferors had in fact no shares, and that the company ought not to have registered them as shareholders or given them certificates, the transfer to them being a forgery.

That brings the case within the principle of the decision in *Pickard v Sears*, as explained by the case of *Freeman v Cooke*, that, if you make a representation with the intention that it shall be acted upon by another, and he does so, you are estopped from denying the truth of what you represent to be the fact.

The only remaining question is, what is the redress to which the claimants are entitled. In whatever form of action they might shape their claim, and there can be no doubt that an action is maintainable, the measure of damages would be the same. They are entitled to be placed in the same position as if the shares, which they purchased owing to the company's representation, had in fact been good shares, and had been transferred to them, and the company had refused to put them on the register, and the measure of damages would be the market price of the shares at that time; if no market price at that time, then a jury would have to say what was a reasonable compensation for the loss of the shares.

BLACKBURN, MELLOR and LUSH JJ delivered concurring judgments.

➢ Notes

1. A similar estoppel operates as regards the amount stated in the certificate to be paid up on the shares: see *Burkinshaw v Nicolls* (1878) 3 App Cas 1004.

2. At the time this case was decided it was particularly important to establish liability on the basis of an estoppel, since there is no privity as between the company and the transferee which would give a remedy in contract, and the notion of a duty of care which would allow a claim to be based in negligence was then a century away. But now that liability in negligence **(p. 579)** for misrepresentations is well established (*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, and, perhaps most pertinently, *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223), a transferee might well have a remedy on this ground, although of course it would be necessary to prove negligence.

3. Although in *Re Bahia and San Francisco Rly Co* **[11.11]** the final purchaser could recover damages from the company, the company would have been able to recover damages from the vendor who had presented the company with the forged transfer initially. This would be true even if the presenter of those documents had been unaware of the fraud or forgery (see later, and *Royal Bank of Scotland plc v Sandstone Properties Ltd* [1998] 2 BCLC 429).

➢ Questions

1. Is the protection given by CA 2006 s 588 to transferees of shares that are not fully paid more, or less, extensive than that which they would get under *Burkinshaw v Nicolls* (see Note 2)?

2. Note the ambit of CA 2006 ss 768 and 775. Would this have affected the outcome in this case?

In an appropriate case, the certificate holder may rely on an estoppel.

[11.12] Balkis Consolidated Co v Tomkinson [1893] AC 396 (House of Lords)

Tomkinson, who held a share certificate stating that he was the owner of 1,000 shares in the company, sold the shares on the market to various purchasers. The company refused to register the transfers, on the ground that Powter, who had transferred the shares to Tomkinson, had had no title at the time, and that Powter had procured the issue of Tomkinson's certificate by fraud. Tomkinson bought shares on the market to honour the contracts with his transferees, and sued the company in damages to recoup this expenditure. The House of Lords, affirming the courts below, upheld Tomkinson's claim.

LORD HERSCHELL LC: After carefully considering the able arguments at the Bar, I have no hesitation in expressing my concurrence in the law laid down by the Court of Queen's Bench in *Re Bahia and San Francisco Rly Co* **[11.11]**… The appellants argued, however, and correctly, that the present case is distinguishable from that in the Queen's Bench, inasmuch as it is not the purchasers who are seeking to render the company liable by way of estoppel, but the vendor of the shares, who himself received the certificate from the company. Does that, in the circumstances which your Lordships have to consider, make any difference? If the company must have known, as was said in the *Bahia and San Francisco Rly* case, that persons wanting to purchase shares might act upon the statement of fact contained in the certificate, it must equally have been within the contemplation of the company that a person receiving the certificate from them might on the faith of it enter into a contract to sell the shares. The plaintiff did enter into such a contract, and thereby altered his position by rendering himself liable to the persons with whom he contracted to sell the shares. All the elements necessary to create an estoppel would appear, therefore, to be present …

LORDS MACNAGHTEN and FIELD delivered concurring opinions.

➢ Notes

1. There is one exception to the principle illustrated by these cases. Where a certificate is issued which is based on the registration of a forged transfer, no estoppel against the company arises in favour of the person who submitted the transfer for registration. The law takes the view that since this person has at least equally good means as the company of knowing **(p. 580)** whether the transfer is genuine, it should not be deemed to have made any representation to him: *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188, CA.

2. Later cases show that the company's position in such a case is even stronger. A person who presents a transfer to a company for registration, whether it is in favour of himself or someone else (eg a broker presenting a transfer on behalf of his or her client) impliedly warrants that it is genuine and, if it is not, may be liable to indemnify the company if it suffers loss by acting on it: *Sheffield Corpn v Barclay* [1905] AC 392, HL; *Yeung Kai Yung v Hong Kong and Shanghai Banking Corpn*[1981] AC 787, PC; *Royal Bank of Scotland plc v Sandstone Properties Ltd* [1998] 2 BCLC 429.

3. These exceptions require qualification in the case of reliance upon an erroneous statement in a share certificate issued by the company. Ordinarily, a person who presents a share transfer for registration is required to indemnify the company against any liability it incurs to other persons as a result of registering the transfer. However, where the person presenting a share certificate for registration relied upon an erroneous statement of ownership on a share certificate, the estoppel raised against the company overrides the company's right to an indemnity (see earlier, and also *Cadbury Schweppes plc v Halifax Share Dealing Ltd* [2006] EWHC 1184 (Ch)).

In some circumstances a forged share certificate is a nullity and does not bind the company.[23]

[11.13] Ruben v Great Fingall Consolidated [1906] AC 439 (House of Lords)

The plaintiffs Ruben and Ladenburg, who were stockbrokers, had procured a loan for one Rowe (the secretary of the defendant company) on the security of a share certificate for 5,000 shares in the defendant company, to which Rowe had affixed his own signature and the company's seal and had forged the signatures of two directors. The plaintiffs, having reimbursed the mortgagees, claimed damages from the company for failure to register them as owners of the shares. It was held that the company was not estopped by the certificate.

LORD MACNAGHTEN: My Lords, this case was argued at some length and with much ingenuity by the

learned counsel for the appellants. In my opinion there is nothing in it.

Ruben and Ladenburg are the victims of a wicked fraud. No fault has been found with their conduct. But their claim against the respondent company is, I think, simply absurd.

The thing put forward as the foundation of their claim is a piece of paper which purports to be a certificate of shares in the company. This paper is false and fraudulent from beginning to end. The representation of the company's seal which appears upon it, though made by the impression of the real seal of the company, is counterfeit, and no better than a forgery. The signatures of the two directors which purport to authenticate the sealing are forgeries pure and simple. Every statement in the document is a lie. The only thing real about it is the signature of the secretary of the company, who was the sole author and perpetrator of the fraud. No one would suggest that this fraudulent certificate could of itself give rise to any right or bind or affect the company in any way. It is not the company's deed, and there is nothing to prevent the company from saying so.

Then how can the company be bound or affected by it? The directors have never said or done anything to represent or lead to the belief that this thing was the company's deed. Without such a representation there can be no estoppel.

The fact that this fraudulent certificate was concocted in the company's office and was uttered and sent forth by its author from the place of its origin cannot give it an efficacy which it does not **(p. 581)** intrinsically possess. The secretary of the company, who is a mere servant, may be the proper hand to deliver out certificates which the company issues in due course, but he can have no authority to guarantee the genuineness or validity of a document which is not the deed of the company.

I could have understood a claim on the part of the appellants if it were incumbent on the company to lock up their seal and guard it as a dangerous beast and if it were culpable carelessness on the part of the directors to commit the care of the seal to their secretary or any other official. That is a view which once commended itself to a jury, but it his been disposed of for good and all by the case of *Bank of Ireland v Evans' Charities Trustees*[24] in this House …

LORD LOREBURN LC and LORDS DAVEY and JAMES OF HEREFORD delivered concurring opinions.

LORDS ROBERTSON and ATKINSON concurred.

➢ Notes

1. *Ruben*'s case is defensible upon only the narrowest possible *ratio decidendi*, as set out at the head of this extract. As has already been observed (*Balkis Consolidated Co v Tomkinson* **[11.12]**), the company ought to be bound in such circumstances if a person who may be assumed to have authority to do so has put forward the share certificate as genuine. Now that it is recognised that the secretary of a company is not a 'mere servant', but a responsible officer having an important role in administrative matters (see the *Panorama* case **[3.15]**), it could not be seriously argued that he or she does not have usual authority to guarantee the genuineness of a document such as a share certificate.

2. Even less supportable nowadays is the decision in *South Greyhound Racecourses Ltd v Wake* [1931] 1 Ch 496, where the share certificate which was issued to Wake bore genuine signatures and a true impression of the company's seal, and the only irregularity was that the latter had been affixed without authority. Clauson J considered himself bound by the decision in *Ruben*'s case to hold that the certificate was a 'forgery', upon which Wake could not base any claim.

3. A similar issue has arisen in a number of cases concerning the 'certification' of share transfers. Where part only of the shares to which a share certificate relates are transferred, it is customary for the transferor to lodge the certificate either with the company itself or with the Stock Exchange, instead of handing it to the

purchaser. A 'certification' is then endorsed on the transfer form by the secretary of the company (or by an official of the Stock Exchange), confirming that the share certificate has been lodged. When the transfer is later presented to the company for registration, separate share certificates are issued which 'split' the original holding between those now entitled as separate owners. On the ordinary principles of vicarious liability, as recognised ever since *Lloyd v Grace Smith & Co* [1912] AC 716, the secretary's certification ought to be binding on the company (and that of the official binding on the Stock Exchange), even if the secretary has acted fraudulently. These cases were followed in *Lovett v Carson Country Homes* **[11.14]**, which indicates that a company can be estopped from disputing the validity of a forged document.

However, in two decisions of the House of Lords, *George Whitechurch Ltd v Cavanagh* [1902] AC 117 and *Kleinwort, Sons & Co v Associated Automatic Machine Corpn Ltd* (1934) 50 TLR 244, it was ruled that a secretary had no apparent authority to act for a company in the matter of the certification of transfers, so that where no certificate had in fact been lodged, the certification of a dishonest secretary was not binding on the company in favour of an innocent purchaser of the shares.

(p. 582) These cases are seen by most commentators as an anomalous exception to the principle of *Lloyd v Grace Smith & Co*, and in the light of the new status accorded to the company secretary by the *Panorama* case **[3.15]**, there is really no ground upon which they can be supported.

It is, of course, now open to the Supreme Court to disown its earlier rulings, in view of the relaxation of the strict doctrine of precedent. It is also possible that CA 2006 s 775 modifies the effect of these cases, but the repeated use of the word 'authorised' in s 775(4) leaves room for doubt, since a court might well hold that this means 'having *actual* authority' as opposed to having *either* actual or ostensible authority.

4. If the transfer takes place within CREST, then different rules apply. The Uncertificated Securities Regulations 2001 (SI 2001/3755) provide that the court may make an order against the CREST operator, although several limitations apply to such orders. The most significant is that if the perpetrator of the forgery is identified, then no compensation order can be made against CREST even where the loss cannot be recovered from the perpetrator. See reg 36.

But a forgery is not inevitably a nullity. The normal rules of agency apply to determine whether the company is bound by a forged document.[25]

[11.14] Lovett v Carson Country Homes [2009] EWHC 1143, [2009] 2 BCLC 196 (Chancery Division)

Administrators were appointed to Carson Country Homes (CCH) by Barclays Bank pursuant to powers conferred under a debenture between CCH and the bank. Carter, a director and shareholder of CCH, asserted that his signature on the debenture was forged by Jewson, also a director and shareholder of CCH. Jewson's own signature was genuine. Carter claimed that the debenture was a nullity, and the administrators were therefore not validly appointed. The judge found that Carter's signature was indeed a forgery, and that Jewson had no actual authority to apply Carter's signature in this way. (Apparently there was a practice of this, sometimes authorised or at least ratified by Carter after the event.) He further decided that Carter and Jewson were 'authorised signatories' for the purposes of CA 2006 s 44, and that the bank was a 'purchaser'. He then had to decide whether the document 'purported' to be signed properly (CA 2006 s 44(2) and (5)).

DAVIS J:

79… [T]he word 'purports' is on its face a wide word which is not defined in the section. In my view, such a word operates to refer to the impression a document conveys. Indeed, it is self-evidently focusing on what appears to be the case rather than on what actually is the case. As it seems to me, if one were to pose as a matter of impression the question here 'Does the debenture purport to be signed on behalf of CCH by two authorised signatories?' the answer would be in the affirmative.

80 It was not disputed before me that such a statutory provision would operate to validate (in favour, of

course, only of a purchaser) a document which has, for example, been erroneously signed by someone styled a director when, in fact, that person is not a director. Clearly, for example, it could potentially overcome in favour of a purchaser any defect by reference to the internal management rule. But on the face of the wording there is no such restriction simply as to those kinds of case, and the wording, unless glossed, would at first sight seem to be (in favour of a purchaser) capable of validating also a document where there has been fraud or forgery if the document purports to be signed in accordance with subsection (2). Nor would such a conclusion be without purpose or sense: for notoriously where fraud or forgery is concerned in a company context the innocent **(p. 583)** suffer: the shareholders and creditors on the one hand if the transaction is held binding; the innocent third party purchaser on the other hand if it is not. To favour the latter, provided and crucially he acts in good faith and is not put on inquiry as to wrongdoing, is not unprincipled. Indeed, it means that the company has to take the consequence of employing a dishonest director or servant and it is for the company to look for redress from that individual.

Forgery

81 Mr Hill-Smith [counsel], however, submitted that the subsection does not operate to validate documents which are forgeries. At the heart of Mr Hill-Smith's argument is the proposition that a forgery is a nullity. Indeed, as a general rule, a person whose signature on a document has been forged is entitled to say, 'This is not my document'. Mr Hill-Smith goes on to say that there is, as it were, nothing which can be deemed to be 'duly executed' for the purposes of section 44(5). Mr Hill-Smith submitted that this was established by authority. It is to be noted, however, that all counsel before me were agreed that there was no direct authority for this proposition for the actual purposes of section 44(5) itself or its immediate statutory predecessor …

85 In *Ruben* **[11.13]**, it has to be said, the facts were very strong. …

89 The decision and approach in *Ruben* **[11.13]** has, as it seems to me, to be set in the context of the subsequent well-known decision of the House of Lords in *Lloyd v Grace, Smith & Company* [1912] AC 722 to which, indeed, Lord Loreburn and Lord Macnaghten were themselves party. But whilst aspects of the comments of Lord Davey in his speech in *Ruben* were expressly disapproved in *Lloyd v Grace, Smith*, the decision itself was not … Since that time, it seems to be the case that by and large *Ruben* has, nevertheless, been represented as setting out the general position that a forgery is a nullity which cannot be validated, albeit there may be circumstances in which a party may be estopped from disputing the validity of a forged document … A particularly extreme version of the purported application of the decision in *Ruben* can be found in the case of *South London Greyhound Racecourses Ltd v Wake* [1931] Ch 496. There, even though the signatures of director and secretary on the certificate were valid and they had affixed the seal, and even though they had done so in order to defer proceedings threatened against the company, it was held that the fact that the board had not authorised the affixing of the seal rendered the certificate a forgery and a nullity: a decision which to my mind is very hard to sustain.

90 No doubt a forged corporate document is a nullity in the sense that no one has actual authority on the part of a company to issue a forged document. But as the exception of estoppel shows, that does not mean that the forged document can in no circumstances have any effect whatsoever: just because circumstances can arise whereby the company may be estopped from disputing its validity. But once one accepts that, then, in my opinion, that immediately opens up the prospect that such a document cannot be sidelined as a nullity for all purposes in the case of apparent authority. Indeed, the principles of apparent authority are a broad reflection of the general principles of estoppel. That that may be so is borne out by *Ruben* itself in my view: for, admittedly in somewhat grudging terms, *Shaw* was not formally disapproved as a decision but instead was distinguished as being capable on its facts as connoting that the secretary was held out as having authority to warrant the genuineness of a certificate. …

91 Thus *Ruben* was to be distinguished, not in point of principle, of course, but in point of fact. In *Ruben* there was no ostensible authority vested in the secretary. …

92 The position is also dealt with in *Gore Browne on Companies* in its latest edition in chapter 8, paragraph 28, where amongst other things this is said:

> ‘There is authority from the House of Lords for the proposition that forgery as such is a nullity and cannot bind the company. On the other hand, if an organ or official of the company with the authority to bind the company held out the person who committed the forgery as having authority to execute the document in question, the company may be estopped from denying the validity of the forgery …’

(p. 584) 93 The paragraph then turns to deal with the case of *Ruben* and then this is said:

> ‘Indeed, it is difficult to see why even forgery as in *Ruben’s* case must be treated as being governed by a special rule. So far as actual authority is concerned, a forgery is clearly a nullity. However, whether or not it binds the company should depend on general *Turquand* principles [see **[3.16]**]. It is clear that under general agency law forgeries are not treated differently from other fraudulent acts which may be binding on the principal if the agent acts within his ostensible authority. In particular, the company secretary may have a wide authority to represent that minutes and other documents are valid.’

94 In my view, that approach is the correct approach and gives the answer to the present case on the facts, finding as I do that the Bank was a bona fide purchaser for valuable consideration. The question of the authority, both actual and ostensible, of a company secretary has unquestionably moved on since the days of *Ruben*, as a number of authorities show. Moreover, there may well be cases where an officer or employee of a company can in any event be authorised actually or ostensibly by the company to warrant that procedures have been properly complied with and that documents are genuine. Indeed, the realities of modern commerce can sometimes require as much. An example can be found in the Court of Appeal decision in *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd’s Rep 194.

95 Moreover, in general agreement with the comments in *Gore Browne*, I can see no reason in principle why some special approach should be grafted on in the case of forgery by reciting the mantra that a forgery is a nullity which is not to be grafted on in the case of fraud. After all, while not all frauds involve forgeries, all forgeries in their own way involve a fraud. No officer or servant has actual authority to commit a fraud any more than he has actual authority to commit a forgery. But it is clear ever since the decision in *Lloyd v Grace, Smith* that a principal may in appropriate circumstances be bound by the fraudulent acts of his agent in circumstances where there is ostensible authority. True it is that in contractual terms fraud may make a contract voidable, not void, but the general point still remains that something which is done with authority, actual or apparent, is capable of binding the principal. Indeed, were that not so, I do not see how the House of Lords in *Ruben* could have approached the case of *Shaw* as they did or made the comments that they made on authority. …

96 On the facts here, Mr Jewson was both director and secretary of CCH, as well as a shareholder in CCH both directly and indirectly through SGJ. But more than that, through the years of the company’s incorporation, and by consent of Mr Carter, he and he alone had had on behalf of CCH all dealings with the Bank. This was not merely a self-appointed role on his part; this was the way he and Mr Carter, the other director, had on behalf of CCH agreed that things should be done. As Mr Jewson said and I accept, Mr Carter left all the Bank dealings and documentation to him and was happy for him to look after it all. The Bank itself had no reason to think otherwise. In matters of documentation, therefore, it was to Mr Jewson on behalf of the directors of CCH that Barclays Bank looked in its dealings with CCH, and Mr Carter had throughout been content that that should be so. Further, as I have said, on a significant number of occasions—not just with a separate bank, Denizbank, but also with the Bank itself—Mr Carter had been content to leave it to Mr Jewson to communicate the appropriate signed formal documents to the Bank when Mr Carter must have known that two signatories were required and that he himself had not signed and when he knew that Mr Jewson had been wont to sign bank documents using Mr Carter’s purported signature. In such circumstances, I conclude that Mr Jewson had been clothed by CCH with ostensible authority to warrant to the Bank that all formalities relating to approval and execution of the debenture and

guarantee had been duly complied with and that the signatures could be relied upon as genuine.

97 Having so concluded on the facts, it seems to me that on any view of section 44 the debenture must be taken to be valid vis-à-vis the Bank. Indeed, Mr Hill-Smith himself accepted in the course of argument that section 44 can at least be taken as reflecting the common law principles; and so would extend (in favour of a purchaser) to a document purporting to be signed by the two directors in circumstances of apparent authority on the part of Mr Jewson.

(p. 585) ➤Question

CA 2006 s 44(5) reads as follows:

(5) In favour of a purchaser a document shall be deemed to have been duly executed by a company if it purports to be signed in accordance with subsection (2).

A 'purchaser' means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property.

And subsection (2) reads:

(2) A document is validly executed by a company if it is signed on behalf of the company—

(a) by two authorised signatories, or

(b) by a director of the company in the presence of a witness who attests the signature.

Would *Ruben*'s case **[11.13]** or *South London Greyhound Racecourses Ltd v Wake* (para [89] of the extract) be decided differently today in the light of this provision?

Equitable interests in shares

Legal title does not pass until the transferee's name is entered into the company's register (or onto the CREST register). Before this registration step is completed, it is often important to know whether the dealings between transferor and transferee have been sufficient to constitute the transferee the owner in equity, even if not at law. This can happen in a number of ways.

First, there is nothing to prevent the transferor declaring a trust of the shares for the benefit of the transferee. No special formalities are required; the declaration may be oral—although writing is usually advisable if only as a means of proof of the three certainties necessary to establish a valid trust. So, in *Shah v Shah* [2010] EWCA Civ 1408, CA, a letter written by the donor (and accompanied by a signed stock transfer form but without the share certificate) was held sufficient to manifest an intention in the donor to dispose of his shares forthwith, and to do so by way of trust in favour of his brother. His brother, as sole beneficiary, would then have been entitled to terminate the trust and call for the transfer of legal title.[26]

Secondly, if the dealing is a sale which is specifically enforceable[27] and unconditional, then the transferee will become the owner in equity once the price is paid, even before the transfer is registered.[28] The transferor then holds the shares on constructive trust for the transferee, and must account for dividends and vote the shares as the transferee directs.[29] Before then, the transferor remains entitled to protect his or her own interests.[30] This rule applies even if the shares are subject to pre-emption or first refusal rights, although then the transferee's interest can be no greater than the transferor's, that is, subject to the pre-emption rights in question.

Finally, even if the intended transfer is by way of gift, the donee may acquire equitable ownership in advance of the transfer of legal title. In two cases, each coincidentally named **(p. 586)** *Re Rose*, reported in [1949] Ch 78 and [1952] Ch 499, it was held that where the donor of shares has done everything in his power to divest himself in favour of the donee (eg by delivering to the donee, or to the donee's agent, or to the company, an executed transfer and the relevant share certificate), then the gift is complete in equity despite the absence of registration.[31] This rule applies even where the directors have a discretion to refuse registration of the transfer, although then the transferee's rights are subject to that restriction. By way of illustration, contrast the successful arguments in the *Rose* decisions with the unsuccessful attempt to apply the same arguments in *Zeital v Kaye* [2010] EWCA Civ 159, CA, where there was no written transfer document and the share certificate had gone missing without the transferor applying for a duplicate.

The rule in *Re Rose* was extended still further in *Pennington v Waine* [2002] EWCA Civ 227, [2002] 1 WLR 2075, CA, where the court found that equitable title had passed even though the transferor still had functions to perform in transferring legal title. This conclusion is difficult to justify, unless the particular facts entitle the transferee to rely on equitable estoppel, as in *Curtis v Pulbrook* [2011] EWHC 167 (Ch).

Also see *Hawks v McArthur* **[11.18]**, illustrating the problems exemplified in the next section, where there are competing legal and equitable claims to the same parcel of shares.

These problems in determining when equitable interests arise have emerged rather dramatically over the past few decades in the context of dealings in part only a shareholder's holding, as in dispositions by way of trust of '50 of my 950 shares' (*Hunter v Moss* [1994] 1 WLR 452, CA) or by way of sale (*Re Harvard Securities Ltd* [1997] 2 BCLC 369 (Ch, Neuberger J).[32] In that context, see the detailed analysis of Campbell J in *White v Shortall* [2006] NSWSC 1379.

Competing claims to shares

A legal title to shares will prevail over an earlier equitable title; but a transfer of the legal title is not perfected until registration of the transferee as holder of the shares.[33]

[11.15] Shropshire Union Railways and Canal Co v R (1875) LR 7 HL 496 (House of Lords)

Mrs Robson sought a writ of mandamus to compel the directors of the company to register a transfer of stock to her from George Holyoake, in whose name it stood. (Holyoake had given the transfer as security for a loan made by Mrs Robson's late husband.) She failed because Holyoake had only a bare legal title (the beneficial interest being in the defendants themselves) and nothing which had happened had displaced the defendants' earlier equity.

> LORD CAIRNS LC: [Undoubtedly] the position of matters was, that the defendants had the whole beneficial interest in the stock … Theirs was the equitable title. Holyoake was a person who held merely the legal title and the right to transfer the stock. He was able, if not interfered with, to **(p. 587)** transfer the stock to any other person, and to give a valid receipt for the purchase-money to any person who had not notice of the beneficial interest of the defendants. On the other hand, any person with whom Holyoake might deal by virtue of his title upon the register, had, or ought to have had, these considerations present to his mind. He ought to have known that although Holyoake's name appeared upon the register as the owner of these shares, and although Holyoake could present to him the certificates of this ownership, still it was perfectly possible either that these shares were the beneficial property of Holyoake himself, or that they were the property of some other person. If he dealt merely by equitable transfer, or equitable assignment with Holyoake, and if it turned out that the beneficial ownership of Holyoake was co-incident and co-extensive with his legal title, well and good; his right would be accordingly, so far as Holyoake was concerned, complete. But, if, on the other hand, it should turn out that Holyoake's beneficial interest was either nil, or was not coextensive with the whole of his apparent legal title, then I say any person dealing with Holyoake, by way of equitable bargain or contract, should have known that he could only obtain a title which was imperfect, and would not bind the real beneficial owner. And, my Lords, he also might have known, and should have known, this, that if he desired to perfect his title, and make it entirely secure, he had the most