La Société Anonyme des Anciens Etablissements Panhard et Lavassor v *Panhard Levassor Motor Co Ltd* [1901] 2 Ch 513

In this case, which we can call the ***Panhard*** case, the claimant was a French company and its cars were sold in England. The French company wished to set up an English company to act as an agent in England to improve the sales of its cars there. To try to stop this the defendant English company was registered, its promoters hoping that the French company would not be able to register its name for its English corporate agent, there being a company of 'too like' name on the register already, and that this would prevent increased competition in the car market. It was held that the members of the English company must change the name of their company or wind it up or the company would be taken off the register.

To constitute the tort of passing off the business carried on by the offending concern must be the same as that of the claimant, or it must be likely that custom will come to the offending concern because the public will be deceived and associate it with the claimant. An interesting contrast is provided by the following cases.

Ewing v *Buttercup Margarine Company Ltd* [1917] 2 Ch 1

The claimant had since 1904 been carrying on a business dealing in margarine and tea, and had upwards of 150 shops of his own selling 50 tons of margarine a week in all. The claimant's concern was called 'The Buttercup Dairy Co'. The claimant's shops were situated in Scotland and in the North of England, but he was planning to expand his business into the South of England. The defendant company was registered in November 1916, and as soon as the claimant heard about it, he complained to the management of the concern, and later brought this action for an injunction to prevent the defendant company from trading in that name. It appeared that although the defendant was in the business of selling margarine, it was a wholesaler, whereas the claimant was a retailer, and the defendant put this forward as a defence suggesting that there would be no confusion. Another defence was that the company would operate only around London and there would be no confusion with a Northern concern.

Held – by the Court of Appeal – that an injunction would be granted to the claimant restraining the defendant company from trading in that name. Although the defendant was at the moment a wholesaler, the objects clause of the memorandum did give power to retail which it might exercise in future. Further, the claimant intended to open up branches in the South of England where there would be confusion.

Aerators Ltd v *Tollitt* [1902] 2 Ch 319

The claimant company was formed to work a patent for the instantaneous aeration of liquids. The defendants were the subscribers of the memorandum and articles of a proposed new company to be called Automatic Aerator Patents Ltd. The claimant sought an injunction to restrain the defendants from registering that name because it would deceive the public, the word 'Aerator' being associated with the claimant company. The claimant's patent was a portable aerator for use in siphons, whereas the defendants' company was concerned with large installations in public houses where a large amount of aeration of beer was required.

Held – there was no evidence of the probability of deception, and an injunction would not be granted. The action was an attempt to monopolise a word in ordinary use and must be dismissed.

As a general rule, an injunction will not be granted where the offending concern is trading in the name of its proprietor though where a company is trading in a name which is merely that of one only of its members then an injunction will be granted if confusion with an existing concern is likely to result (***MP Guimaraens and Son* v *Fonseca and Vosconcellos Ltd*** (1921) 38 RPC 388). Neither will an injunction be granted where a company uses a name which consists of that of the person from whom the company bought its business, even though confusion results.

Waring and Gillow Ltd* v *Gillow and Gillow Ltd (1916) 32 TLR 389

W and G Ltd, well-known furniture, carpet and rug dealers and auctioneers, sought an injunction restraining G and G Ltd from carrying on a business as auctioneers of carpets (formerly the business belonged to L C Gillow, an auctioneer, who continued to be actively concerned with the business).

The court held that on the facts the two businesses were not likely to be taken one for the other and the injunction sought was not granted. In addition, since L C Gillow was actively concerned with the business, the company was allowed to incorporate his name. Furthermore, since the defendant company had purchased the business from L C Gillow, it was allowed to use his name in order to take advantage of the goodwill purchased.

Comment

There is no similar protection for a first name or nickname. In ***Biba Group Ltd* v *Biba Boutique*** [1980] RPC 413 the defendant whose surname was Gill had been known since infancy by the nickname 'Biba' and she ran a boutique in that name. The claimants, who were in a similar line of business, obtained an injunction against her. Whitford J said that whatever the right of a person to use his own surname, it did not extend to the use of a first name or nickname.

It should be noted that only the members can change a company's name. The Court of Appeal has considered whether the court has jurisdiction to order and empower the Registrar of Companies to change the name of the company as it appears on the register in a situation where no special resolution of its members to that effect has been passed. The Court of Appeal ruled that there is no such jurisdiction.

Halifax plc* v *Halifax Repossessions Ltd [2004] 2 BCLC 455, CA

The claimants had brought proceedings against the defendants for infringement of trade mark and passing off and the court granted relief in terms preventing the defendant group companies from using the word 'Halifax' in their names. However, there was no change of name. The claimants then sought a court order under the Civil Procedure Rules to order the Registrar to change the names to any name not including 'Halifax'. Two such orders were made but not acted upon by the Registrar. In the Court of Appeal it was decided that the relevant rule did not give the court jurisdiction to make such a change in the absence of a special resolution of the members. The Companies Act scheme for change must be followed. There were serious consequences to a change of company name. Signing company cheques where the company's name was not properly stated could result in personal liability in the signer. There were penalties for failing to display the proper name on places of business and on stationery and so on. The Registrar could not effectively be required to go beyond her statutory functions. She could not become involved in private litigation.

Finally, according to s 77 of the Companies Act 2006, a company may change its name by special resolution (see s 78) or by other means provided for by the company's articles (see s 79). On a change of name, the company must notify the Registrar who will enter the new name on the register in place of the old one and issue an amended certificate of incorporation (s 80). Notification must be accompanied by either a copy of the resolution (s 78(1)) or a statement that the change of name has been made by means provided for by the company's articles (s 79(1)).

A change of name has effect from the date on which the new certificate of incorporation is issued (s 81(1)), though one should also bear in mind some of the more practical implications of such a change; the cost of changing letterheads and signs and, more generally, the way in which customers, suppliers and bankers are to be informed. Equally, it should be stressed that a change of name does not impact on the company's rights or obligations. In other words, the company which has an altered name and altered certificate of incorporation is still the same company as when it was first registered under its previous name; it is not reformed at the point of the change of name taking effect (***Oshkosh B'Gosh Inc*** v ***Dan Marbel Inc Ltd*** [1989] BCLC 507).

The objects clause

The objects clause lists the things which the company can do (i.e. the capacity of the company). If it enters into a transaction which is not included in the clause, that transaction will, at least at common law, be *ultra vires* (that is, beyond its powers) and void (that is, of no effect).

It should be noted that what we are looking at in this chapter is the company's capacity as revealed by the objects clause of its memorandum. It will be discovered that even where the company has capacity a transaction made on its behalf may still not be enforceable against it because the agent who made it had no authority to do so. The problems presented by lack of authority in the agent are looked at in Chapter 6 but the reader should, even at this early stage, bear in mind the distinction between the two areas of company capacity and agent authority.

See p. 129

The leading case on the operation of the *ultra vires* rule at common law appears below.

Ashbury Railway Carriage and Iron Co v ***Riche*** (1875) LR 7 HL 653

The company bought a concession for the construction of a railway system in Belgium, and entered into an agreement to finance Messrs Riche to construct a railway line. Messrs Riche commenced the work, and the company paid over certain sums of money in connection with the contract. The company later ran into difficulties, and the shareholders wished the directors to take over the contract in a personal capacity, and indemnify the shareholders. The directors thereupon repudiated the contract on behalf of the company, and Messrs Riche sued for breach of contract. The case turned on whether the company was engaged in an *ultra vires* activity in financing the building of a complete railway system because, if so, the contract it had made with Messrs Riche would be *ultra vires* and void, and the claim against the company would fail. The objects clause of the company's memorandum stated that it was established: 'to make or sell or lend on hire railway carriages, wagons and all kinds of railway plant, fittings, machinery and rolling stock; to carry on the business of mechanical engineers and general contractors, to purchase and sell as merchants timber, coal, metal and other materials, and to buy and sell such materials on commission or as agents'.

Held – by the House of Lords – that the financing of the concession to build a complete railway system from Antwerp to Tournai was *ultra vires* and void because it was not within the objects of the company. The words empowering the company to carry on the business of general contracting must be construed *ejusdem generis* with the preceding words, and must therefore be restricted to contracting in the field of plant, fittings and machinery only. In other words, the company could use its funds to make things for railways, but not make railways as such. The contract with Messrs Riche was therefore void, and the directors were entitled to repudiate it.

The company should not carry out acts or enter into transactions which are beyond the company's objects clause and a shareholder, upon discovering the intention of the company's directors to enter into such an agreement, may obtain an injunction so as to prevent it from going ahead (though not if it has already been ratified by way of special resolution of the general meeting).

However, it should be noted that if the transaction has already been carried out, the shareholder may only seek to gain damages from the wrong-doer directors for the company. (It is also worth pointing out at this stage that if a director has exceeded his/her powers then this may be taken as a breach of the terms of his/her contract of employment as well as a breach of his/her directors' duties; s 171 imposes a duty on directors to abide by the company's constitution. This will be discussed later within the context of directors' duties.)

It is also worth noting that the reader should be aware of the distinction to be made between a transaction undertaken by the directors which beyond the capacity of the company (i.e. *ultra vires* the company's objects clause) but which is rather an abuse of power by the directors: ***Rolled Steel Products (Holdings) Ltd*** v ***British Steel Corporation***.

Rolled Steel Products (Holdings) Ltd* v *British Steel Corporation
[1985] 2 WLR 908

A Mr Shenkman was a 51 per cent shareholder and director in Rolled Steel and held all the issued share capital in another company called Scottish Steel of which he was also a director. Scottish Steel owed a lot of money to Colville Ltd (a company controlled by the defendant company, British Steel Corporation) and Mr Shenkman had given his personal guarantee of that debt. Later BSC wanted more security and Mr S caused Rolled Steel to enter into a guarantee of the Scottish Steel debt. There was no benefit to Rolled Steel in this and BSC knew there was not. Rolled Steel went into liquidation as did Scottish Steel, and the court was asked to decide whether BSC could prove in the liquidation of Rolled Steel on the guarantee.

Eventually the Court of Appeal decided that it could not. Slade LJ stated:

> The relevant transactions were not beyond the corporate capacity of the plaintiff and thus were not *ultra vires* in the proper sense of that phrase. However, the entering into the guarantee and, to the extent of the sum guaranteed, the debenture was beyond the authority of the directors, because they were entered into in furtherance of purposes not authorised by the plaintiff's memorandum. Despite this lack of authority, they might have been capable of conferring rights on Colvilles if Colvilles had not known of this lack of authority. Colvilles, however, did have such knowledge and so acquired no rights under these transactions.

Comment

The transaction was not *ultra vires* Rolled Steel because its objects clause contained a paragraph giving an express power to enter into guarantees. Rolled Steel also had an independent objects paragraph on the lines of that in the ***Cotman*** case, so the giving of guarantees was, in effect, an object of the company which it could exercise whether there was a benefit or not.

Understanding the modern objects clause

By way of explanation of the above decision, it should be said that the *ultra vires* rule of the common law was brought in by the courts to protect shareholders. It was thought that if a shareholder bought shares in a company which had as its main object publishing and allied activities, he would not want the directors of that company to start up a different kind of business because he wanted to put money in publishing.

In more recent times it has been realised that shareholders are not so fussy about the business the directors take the company into so long as it is ethical and makes profits from which to pay dividends and the price of the company's shares rises on the Stock Exchange as a result of its success.

The people most affected by the *ultra vires* rule of the common law in more recent times were creditors who had supplied goods or services to a company for a purpose not contained in its objects clause. If the company was solvent, no doubt such creditors would be paid, but if it went into insolvent liquidation, they would not even be able to put in a claim. The liquidator would reject it as being based on a void transaction. Other creditors might get paid some part of their debts if the company had some funds but the *ultra vires* creditors would get nothing.

For this reason it became, and has remained until the Companies Act 2006, usual to put in the objects clause a large number of objects and powers so that the company could do a wide variety of things apart from its main business, if at any time it wished to do so. It also became common to insert a paragraph in the objects clause which stated that each clause contains a separate and independent main object which can be carried on separately from the others. The House of Lords decided in ***Cotman*** v ***Brougham*** [1918] AC 514 that this type of clause was legal so that, for example, a company whose main object was publishing could use a clause giving investment powers for any kind of investment and not just investment in publishing.

Also, the decision of the Court of Appeal in ***Bell Houses Ltd*** v ***City Wall Properties Ltd*** [1966] 2 All ER 674 is to the effect that a subjective objects clause can be drafted in such a way as to allow the company to carry on any additional business, not provided for in the objects clause, which the directors think can be conveniently pursued by the company. If this is thought to put too much power in the hands of the directors, the objects clause may make the decision depend upon an ordinary resolution of the members.

In this way the limitations which are placed by the common law on a company's business activities by the *ultra vires* rule were much reduced. In fact, with a large number of clauses in the objects clause, with an independent objects subclause and/or a type of *Bell Houses* clause, the modern company's contractual capacity approached that of a natural person prior to the new Act, with the *ultra vires* rule as a method of controlling the activities of the board of directors being largely abandoned for quite a long time.

The Companies Act 2006

In an attempt to simplify further this area, the Company Law Review Steering Groups proposed the repeal of s 3A of the Companies Act 1985, together with the removal of the objects clause from a company's memorandum and insertion into the articles of association. Indeed, the Companies Act 2006 goes further than this and states that unless a company's articles specifically restrict its objects, then according to s 31(1) its objects are unrestricted. Consequently, for companies formed under the new Act, they are not required to have

an objects clause and the doctrine of *ultra vires* (as outlined above) should be irrelevant to their operation.

However, for a company that decides to adopt an objects clause so as to limit the capacity of the company, then the doctrine of *ultra vires* will still remain relevant internally (i.e. with respect to deciding whether its directors have exceeded their powers and entered into a transaction that is *ultra vires* the company's objects clause).

It is also worth noting at this point that s 28(1) of the Companies Act 2006 provides that provisions within the memorandum of existing companies (i.e. formed before the new Act came into force) which fall outside those envisaged by the new Act, will be treated as provisions of the articles. In other words, provisions such as their objects clauses will still form part of the company's constitution as defined by s 17 and as such will be subject to the limitations outlined in the preceding paragraph.

The capacity of the company remains much the same as it did under s 35 of the Companies Act 1985 (as inserted by the Companies Act 1989), and is contained in s 39 of the Companies Act 2006. The intention of this provision was to eliminate the effect of the *ultra vires* rule on the claims of creditors, though it has less of an impact today than it would have had in the past since, as we have seen, fewer transactions are likely to be *ultra vires* at common law. However, on the assumption that the narrow scope of a particular company's objects clause may still allow for this, a review of certain of the statutory provisions appears below.

We shall deal at this stage only with the effect of legislation upon the rules relating to the company's capacity. It should also be borne in mind that legislation only reforms the *ultra vires* rule – it has not been abolished, though so far as trade creditors of a company are concerned little should now be heard of it. There is a continuing relevance of the rule in other areas as we shall see.

(a) The company's capacity

Section 39 provides that the validity of an act of a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution. Section 40(1) goes on to state that 'in favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorize others to do so, is deemed to be free of any limitation under the company's constitution'.

Thus, in the ***Ashbury*** case the contents of the objects clause only allowed the company to make things for railways and not railways as such. The contract with Messrs Riche should now have been enforceable against the company, since so far as outsiders are concerned, the contents of (what is in) the constitution do not affect the validity of the transaction in terms of the company's capacity to enter into it.

(b) The rights of members

As noted above, under the common law any member may ask the court for an injunction to prevent the directors from making (or continuing with) an *ultra vires* transaction, subject to the provisions of the Companies Act 2006. Indeed, s 40(4) states that this provision 'does not affect any right of a member of the company to bring proceedings to restrain the doing of an action that is beyond the powers of the directors'. Section 40(5) goes on to state that it does not affect any liability incurred by the directors by reason of them exceeding their powers.

However, given the fact that no objects clause is now required for private companies, this process should, in the future, become of less importance; though existing companies will still need to be wary of this possibility.

(c) Special regime for charities

Obviously charities need to be dealt with separately because people give not to the charity as such but rather to the objects of that particular charity. Consequently, under s 42 of the Companies Act 2006, ss 39 and 40 do not apply to the acts of a company that is a charity unless a person:

(a) does not know at the time the act is done that the company is a charity; or
(b) gives full consideration in money or money's worth in relation to the act in question and does not know that (i) the act is beyond the company's constitution, or (ii) the act is beyond the powers of the directors.

Altering the objects clause

The movement of the objects clause to a company's articles of association means that this provision may be changed in the same way as any other provision within the articles which have not been the subject of entrenchment (see s 22), and can be freely changed, or amended, under s 21 by way of a special resolution.

Capital

On an application for registration, s 9(4) requires a statement of capital and initial shareholdings if the company is to be limited by shares. Section 10(2) goes on to provide that the statement of capital and initial shareholdings must state:

(a) the total number of shares of the company to be taken on formation by the subscribers to the memorandum of association;
(b) the aggregate nominal value of those shares;
(c) for each class of shares: (i) prescribed particulars of the rights attached to the shares; (ii) the total number of shares of that class; and (iii) the aggregate nominal value of shares of that class; and
(d) the amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the share or by way of premium).

On registration this information will usually be very simple. In the case of a shelf company, this information will generally consist of two people taking one £1 share each, upon which nothing is paid. However, once a company is in the process of issuing larger, more significant numbers of shares, this information must be provided to the Registrar of Companies via a 'return of allotments'. In this regard, s 555(2) provides that within one month of making an allotment of shares, the company must deliver a return of allotment to the Registrar for registration. This return must be accompanied by a statement of capital (s 555(3)(b)) which must according to s 555(4) contain an updated version of the information required under s 10(2) discussed above.

One significant development under the Companies Act 2006 is that it has removed the notion of 'authorised capital' which had increasingly become regarded as a somewhat outdated and irrelevant concept in practice. Indeed, as will be noted in subsequent chapters, this concept could pose problems for the directors of a company in that, once shares had been issued up to the amount of the company's authorised share capital, they were obliged to go

back to the shareholders so as to gain approval to increase the authorised amount (see s 121 of the Companies Act 1985). In one sense, this provided shareholders with a certain amount of protection from having their holdings diluted. However, since the Companies Act 2006 has introduced shareholder control of share-related matters into other sections of its provisions and, with a number of the provisions formerly located in the memorandum now being included into the company's articles, this opens up possibilities for shareholders to place stronger controls in the company's constitution to the alteration of capital rather than via concepts such as 'authorised capital' as in the past.

The registered office

Section 9(2)(b) requires that on application to be registered, a company must state in which of the three United Kingdom jurisdictions its registered office will be located. If it is to be in England and Wales or Wales, then registration is effected by the Registrar of Companies in London, and if in Scotland, by the Scottish Registrar of Companies in Edinburgh. The situation of the registered office in England and Wales or Wales or Scotland fixes the company's nationality as British and its domicile as English or Scottish, as the case may be (but see ***Daimler Co Ltd*** v ***Continental Tyre & Rubber Co Ltd***, 1916), though not its residence. Therefore, the legal system under which a company is incorporated is its domicile (***Gasque*** v ***Commissioners of Inland Revenue*** [1940] 2 KB 8) but the company is not free to abandon one domicile in favour of another one, as per a human being under the principles of Private International Law (Conflict of Laws) (***Carl Zeiss Stiftung*** v ***Rayner and Keeler Ltd*** (No 3) [1970] Ch 506). The only way in which a company may move from one jurisdiction to another is if the members of that company promote a private Act of Parliament for that sole purpose (e.g. the Henry Johnson, Sons & Co Limited Act 1996).

Residence is fixed by ascertaining where the company's centre of control and management is. Thus, a company may be resident in a number of countries where it has several centres of control in different countries. The residence of a company is important in connection with its liability to pay UK taxation.

Swedish Central Railway Co Ltd v ***Thompson*** [1925] AC 495

The company was incorporated in 1870 to construct a railway in Sweden, the registered office of the company being in London. Later the management of the company was moved to Sweden but the registered office remained in London, dealing only with formal administrative matters such as share transfers. All dividends were declared in Sweden, and no part of the profits was ever sent to England, except payment of dividend to English shareholders. The Commissioners of Income Tax assessed the company for tax on income received in Sweden.

Held – a company could have more than one residence, though only one nationality and domicile. This company was resident in Sweden and London, and since residence was relevant for income tax purposes, the assessment of the Commissioners was affirmed.

A company must in all its business letters and order forms state whether it is registered in England or Scotland, the registration number assigned to it (as shown in the certificate of incorporation), and the address of its registered office. There are penalties in case of default.

A company's registered office may be, and often is with private companies, the office of its accountants, and this is where formal communications will be sent. A Post Office box address cannot be used because people (members and in some cases the public) have a right to visit the registered office to inspect documents.

Purpose of registered office

The registered office is the company's official address. It provides a place where legal documents, notices and other communications can be served. A document can be served on a company by leaving it at, or sending it by registered or ordinary post to, the registered office. (***T O Supplies Ltd*** v ***Jerry Creighton Ltd*** [1951] 1 KB 42.) If the company has no registered office, claim forms and summonses may be served on the directors or the secretary at an office which is not registered. Thus, in ***Re Fortune Copper Mining Co*** (1870) LR 10 Eq 390 the registered office of the company had been pulled down and a claim form was served on the secretary and the directors at an unregistered office. The court held that this was good service.

In an interesting development a change in the County Court Rules allows service of claim forms, and other legal process, on a company not only at the company's registered office but also at any place of business, such as a branch, which has some real connection with the cause or matter at issue. So if business has been conducted through a branch office which has resulted in the supply of defective goods or services, legal process could be served on the branch office. This assists the consumer, in particular, who will probably be more familiar with the branch through which he has dealings than the situation of the registered office.

When the Registrar of Companies receives a communication returned as undeliverable at the registered office, he will eventually set in motion the procedures for striking the company off the Register as a defunct company (see further Chapter 27).

See p. 593

The registered office and insolvency proceedings

In order to implement EU regulations on insolvency proceedings, UK regulations, entitled the Insolvency Act 1986 (Amendment) (No 2) Regulations 2002, were put into law. Before these regulations came into force it was possible for a UK court to deal with insolvency proceedings in regard to foreign companies provided that the company concerned had assets here. Under the 2002 regulations that are numbered SI 2002/1240, the territory in which the corporate debtor has its centre of main interests will have jurisdiction to open insolvency proceedings against it. These are referred to as the main proceedings and the registered office is presumed but not conclusively to be the centre of main interests. The courts of other countries can institute insolvency proceedings but only in regard to assets of the corporate debtor that are within the jurisdiction of the court. These are called territorial proceedings which would not result in, for example, the winding-up of the company. This would be a matter for the main proceedings. These matters receive further consideration in the chapters on corporate insolvency and company rescue. However, the importance here is the role of the registered office in deciding which country is entitled to conduct the main proceedings. The main thrust of the regulations is to deal with companies within the EU but as will be seen in the insolvency chapters a UK court has regarded itself as entitled to deal with insolvency matters where the corporate debtor was an American company ruling that its centre of main interests was the UK even though its registered office was in the United States (see ***Re Brac Rent-A-Car International Inc.*** [2003] All ER (D) 98 (Feb)).

Essay questions

1 'There are occasions when the courts will look behind the formality of legal personality and will appear to disregard it, but it is impossible to find any consistent principle upon which they will do so.'

Discuss. (*Kingston University*)

2 In 2005 Archie, Bert, Colin and David, as shareholders and directors, set up a company to acquire a disused mill to renovate into single-person flats. David had bought the mill in 2004 and sold it to the company once it was formed. Bert has now become concerned that this deal has caused the company to suffer a loss. Advise Bert on what the common law position is regarding the company, the transaction and the protection of his interests.

(*University of the West of Scotland*)

3 Eric and Stanley have been carrying on business in partnership as building contractors in a small town for some years. They carry out most of the work themselves and only occasionally employ labour. They have no plans to enlarge the area of their operations. It has been suggested to them that they ought to trade as a private registered company limited by shares. They ask your advice on the following matters.

(a) What are the alleged advantages of trading as a private registered company limited by shares? Are there any disadvantages in so trading?

(b) At present they trade as 'Ericstay'. They would like to retain the name because of the business connection attached to it.

Advise them on their suggested choice of name.

(c) They have been informed that as a registered company they will need a certificate to commence business.

Explain to them what a certificate to commence business is and advise them whether they will need such a certificate. (*The Association of Chartered Certified Accountants*)

4 The objects clause as traditionally contained in the memorandum of association of a company has been the subject of considerable debate and disagreement, even with the introduction of s 3A of the Companies Act 1985. The only way in which this area could be clarified once and for all was to pursue the approach taken by the Companies Act 2006. Discuss.

(*Authors' question*)

5 Jane is a promoter dealing with the formation of a private limited company. You are required to advise Jane on the following matters.

(a) The restrictions which exist upon the choice of corporate name.

(b) The documentation which must be sent to the Registrar of Companies in order to obtain incorporated status.

(c) The liability for Jane personally if she enters into any contracts on the company's behalf before the issue of the certificate of incorporation.

(*The Chartered Institute of Management Accountants*)

6 Explain the term 'business name' and describe the relevance of the Business Names Act 1985.

(*The Institute of Company Accountants*)

7 For several years Jay Ltd has been carrying on the business of managing night clubs. The directors are now proposing that the company should operate a chain of pizza restaurants but, because some of the shareholders are objecting to the proposal, they wish to know if it would be permissible.

Advise the directors. (*The Institute of Chartered Accountants in England and Wales*)

Test your knowledge

Four alternative answers are given. Select ONE only. Circle the answer which you consider to be correct. Check your answers by referring back to the information given in the chapter and against the answers at the back of the book.

1 A transaction with a trade creditor which falls outside a company's express objects set out in the articles is:

A Valid under s 39 of the CA 2006.
B Void as being *ultra vires* the company.
C Void as being *ultra vires* the directors.
D Void at the instance of the members.

2 On 1 February Mersey Ltd passed a special resolution changing its name to Trent Ltd. On the same day the managing director made a contract with Thames Ltd to sell it some goods. On 1 March the company received its new certificate of incorporation and on 1 April Trent Ltd failed to deliver the goods in breach of contract. What is the effect on the contract of the change of name?

A It is enforceable against the managing director as a pre-incorporation contract.
B It cannot be enforced because Mersey Ltd no longer exists.
C The contract is enforceable against the company and proceedings can be commenced against it in its new name.
D The contract cannot be enforced unless ratified by the company in the new name.

3 Ribble Ltd has a share capital of 1,000,000 ordinary shares. The holders of 800,000 shares vote on a resolution to change the company's name. The minimum number of votes which must be cast in favour of the resolution for it to be effective is:

A 400,001 B 500,000 C 600,000 D 750,000

4 Promoters wish to form a company to be called 'Barchester City Council Tuition Services Ltd'. What is the legal position as to the permissibility of that name in company law?

A The name cannot be registered because it is unlawful.
B It can be registered if the Secretary of State gives permission.
C Permission must be obtained from the Department for Education and Employment.
D The name may be registered with the permission of the Barchester City Council.

The answers to test your knowledge questions appear on p. 616.

Suggested further reading

Lewis, 'Corporate Redomicile', (1995) 16 Co Law 295

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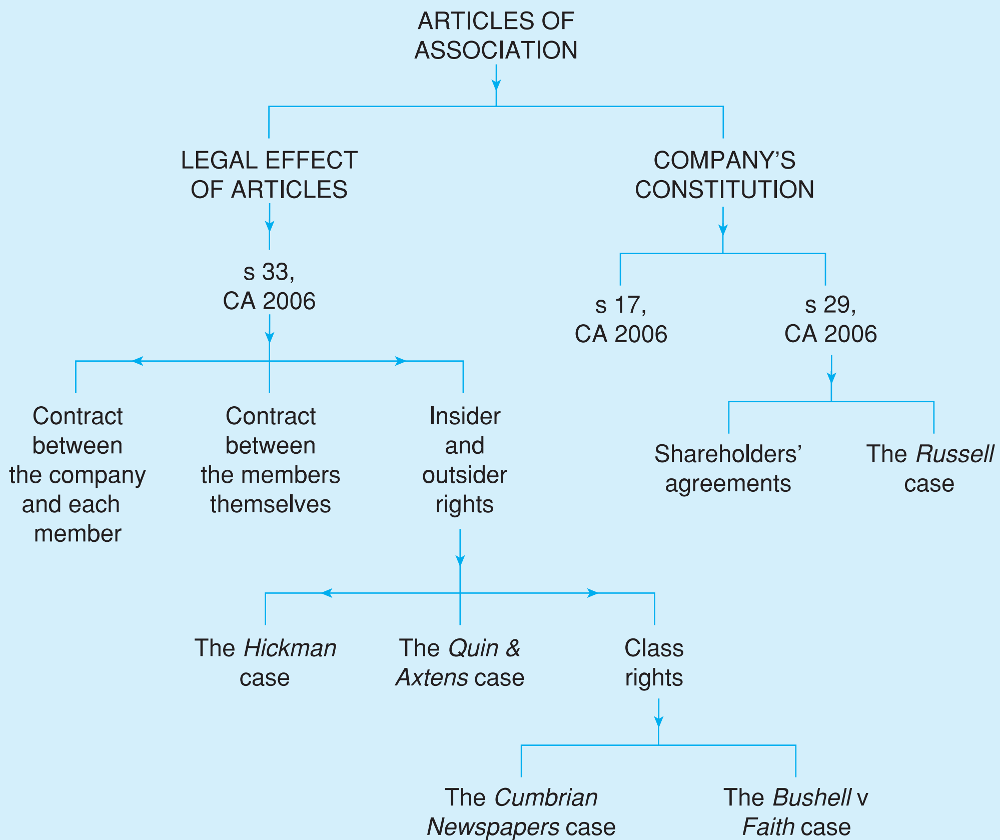
4 The constitution of the company – the articles of association



Section 17 of the Companies Act 2006 defines a company's constitution as including the articles of association and 'any resolutions and agreements to which Chapter 3 applies (see s 29)'. The most important aspects of the latter point being any special resolutions of the shareholders (s 29(1)(a)); any unanimous resolution or agreement adopted by the members of a company, that it would not otherwise be binding on them unless passed by a special resolution (s 29(1)(b)); and any resolution or agreement of a class of members binding all members of the class (s 29(1)(c)). Two points should be made at this point. First of all, given the reduced role of the memorandum of association under the Companies Act 2006, it does not form part of the company's constitution (see s 8); a contrast to the position under the Companies Act 1985. Secondly, as will be discussed later, there is the suggestion that s 29 now takes account of shareholder agreements as part of the company's constitution.

The articles of association regulate the internal affairs of a company subject to those matters which are otherwise specifically regulated by way of other sources of law. This in turn offers an incredible amount of freedom and flexibility to a company to regulate its internal affairs. Unfortunately, as will be noted later in this chapter, such freedom has led to academic debate, not so much as to what may be inserted into the articles of association, but rather as to which portions of the articles will be subsequently recognised and enforced by the courts.

Section 18 states that a company 'must have articles of association prescribing regulations for the company' unless it is a company to which model articles apply by virtue of s 20. It goes on to note that the articles should be contained in 'a single document' and 'divided into paragraphs numbered consecutively' (s 18(3)). In many respects, this latter point is common sense and follows accepted good practice when drafting any legal document; so as to avoid confusion of interpretation or application a contractual document should aim to utilise short, concise and self-contained paragraphs.

Turning to s 20, the Act states that if articles are not registered on the formation of a limited company, or if the registered articles 'do not exclude or modify the relevant model articles' (i.e. by way of the inclusion of a special provision expressly excluding their application), then such model articles will form part of the company's articles as if they had been duly registered at the time of formation. This is an important point and one which anyone involved in the formation of a company should be aware.

Therefore, a company may under s 18 have its own articles or adopt the relevant Model Articles (see Appendix 1 of this book) 'prescribed for a company of that description as in force at the date on which the company is registered' (s 20(2)). It should be noted though that for many existing companies, the relevant model articles that will be encountered will still remain *Table A* (see Appendix 2 of this book). A not uncommon use of special provisions in the articles of private companies is where they are subsidiaries and the holding company wants to add extra provisions, not found in the model articles (or *Table A*), to the articles of the subsidiary as a means of control over that subsidiary. The most usual clauses inserted into the articles of the subsidiary are to the effect that certain transactions of the subsidiary, e.g. borrowing over a set limit, require the approval of the shareholders of the subsidiary (the holding company being, of course, the controlling shareholder) by ordinary resolution (a 'general meeting' provision) or the consent of a nominated director who is a representative of the holding company (the 'special director' provision).

When amending or modifying the articles of association, a company must ensure that any new provisions are not inconsistent with the legislation governing companies (***Re Peveril Gold***

Mines Ltd [1898] 1 Ch 122) and in line with the general law (***Welton*** v ***Saffery*** [1897] AC 299) otherwise they will be void. Aside from these restrictions, members may seek to include any provisions which they feel to be appropriate to the company (***Gaiman*** v ***National Association for Mental Health*** [1971] Ch 317), though the issue of insider/outsider rights should also be borne in mind when considering such provisions (see discussion later in this chapter).

The articles deal with such matters as the appointment and powers of directors, general meetings of the company, the voting rights of members, the transfer of shares, and dividends. The rights of the different classes of shareholders may also be found in the articles if included by way of special provisions. This has led many to refer to the articles as being equivalent to the 'instruction book' of a company. The contents of both *Table A* and the new Model Articles are outlined below.

Table A is a comprehensive document which deals with virtually every aspect of the internal workings of a company and applies to a company incorporated under the Companies Act 1985 unless it was specifically excluded or modified. The main areas of operation are presented.

Table A (Companies Act 1985)

Articles	Corporate issues
1	Interpretation
2–35	Shares
36–63	Members and General Meetings
64–98	Directors and Board Meetings
99–101	Administration
102–110	Profits
111–116	Notices

As noted earlier, the emphasis of the Companies Act 2006 has been to '*think small first*' and this approach is reflected in the fact that the new Model Articles have 53 provisions compared with 118 under the 1985 Act's *Table A*. The new Model Articles apply to all companies incorporated after 1 October 2009 and, importantly, provide the same freedom to companies to amend them (s 21 CA 2006).

Model Articles for Private Companies limited by Shares (CA 2006)

Articles	Corporate issues
1–2	Definition and Members' liability limitation
3–6	Directors' powers and responsibilities
7–16	Directors' decision making
17–20	Appointment of directors
21–29	Shares
30–35	Dividends and other distributions
36	Capitalisation of profits
37–47	General meetings
48–51	General provisions re communication, seal, etc.
52–53	Directors' indemnity/insurance

The traditional division of powers under the articles

See p. 115

A company's articles of association determine the manner in which power within a company is divided between the shareholders in General Meeting and the Board of Directors. The relevant articles from both *Table A* and the new Model Articles are set out below and illustrate the 'default' setting for the division of powers though, as noted above, this may be amended by the company by altering its articles of association (see Chapter 5).

Table A (CA 1985) – Article 70

70. Subject to the provisions of the Act, the memorandum and the articles and to any directions given by special resolution, the business of the company shall be managed by the directors who may exercise all the powers of the company. No alteration of the memorandum or articles and no such direction shall invalidate any prior act of the directors which would have been valid if that alteration had not been made or that direction had not been given. The powers given by this regulation shall not be limited by any special power given to the directors by the articles and a meeting of directors at which a quorum is present may exercise all powers exercisable by the directors.

Model Articles for private companies limited by shares (CA 2006) – Articles 3 and 4

3. Subject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company.

4. (1) The shareholders may, by special resolution, direct the directors to take, or refrain from taking, specified action.

(2) No such special resolution invalidates anything which the directors have done before the passing of the resolution.

It is worth bearing in mind at this stage that any division of powers that takes place via the articles of association has significant implications for the running of a company. If shareholders subsequently wish to retract certain powers/responsibilities that have been granted to directors, the only way forward is to amend the company's articles of association by way of a special resolution in General Meeting.

Imperial Hydropathic Hotel Co, Blackpool v Hampson (1882) 23 Ch D 1

The articles of association provided that the directors could hold office for a period of three years and then retire by rotation. At a general meeting which had been called for this purpose along with other matters, resolutions were passed to remove two directors who were not due to retire under the terms of the articles. Furthermore, they were to be replaced by two other individuals. The company claimed that the directors had been validly removed from office. Cotton LJ stated:

> There is nothing in the Act or in the articles which directly enables a general meeting to remove directors; but the way it is put is this – that there is power in these articles, as there is power in the Act, by a meeting duly called to pass a resolution altering the articles; and it is said that here there was a resolution which would have been effectual to alter the articles that these directors whom the articles did not authorise to be removed should be removed. Now in my opinion it is an entire fallacy to say that because there is power to alter the regulations, you can by a resolution which might alter the

> regulations, do that which is contrary to the regulations as they stand in a particular and individual case. It is in no way altering the regulations. The alteration of the regulations would be by introducing a provision, not that some particular director be discharged from being a director, but that directors be capable of being removed by the vote of a general meeting. It is a very different thing to pass a general rule applicable to everyone who comes within it, and to pass a resolution against a particular individual, which would be a *privilegium* and not a law. Now here there was no attempt to pass any resolution at this meeting which would affect any director, except those who are aimed at by the resolution, no alteration of the regulations was to bind the company to those regulations as altered; and assuming, as I do for the present purpose, as the second meeting seems to have been regular according to the notice, that everything was regularly done, what was done cannot be treated in my opinion as an alteration first of the regulations, and then under that altered regulation as a removal of the directors. . . .
>
> [In the present case] there is not a general alteration of the regulations of the company, but simply an attempt, without altering the rules for the purpose, to remove a director, his removal being, unless there is a general alteration, an illegal act on the part of those who attempt to remove him – by illegal I mean an act *ultra vires* and not supported by any regulation of the company. Therefore, I think that the appeal ought to be dismissed with costs.

Held – The company's articles of association could not be disregarded in this matter.

Similarly, where the articles provide that the company's directors are responsible for the day-to-day running of the business, the shareholders have no power by way of ordinary resolution to give directions to the board of directors or to overrule its decisions.

Automatic Self-Cleaning Filter Syndicate Co Ltd* v *Cuninghame [1906] 2 Ch 34

A company had power under its memorandum of association to sell its undertaking to another company having similar objects, and by its articles of association the general management and control of the company were vested in the directors, subject to such regulations as might from time to time be made by extraordinary resolution, and, in particular, the directors were empowered to sell or otherwise deal with any property of the company on such terms as they might think fit. At a general meeting of the company a resolution was passed by a simple majority of the shareholders for the sale of the company's assets on certain terms to a new company formed for the purpose of acquiring them, and directing the directors to carry the sale into effect. The directors, being of opinion that a sale on those terms was not for the benefit of the company, declined to carry the sale into effect.

Held – Upon the construction of the articles, that the directors could not be compelled to comply with the resolution. Collins MR stated:

> The point arises in this way. At a meeting of the company a resolution was passed by a majority – I was going to say a bare majority, but it was a majority – in favour of a sale to a purchaser, and the directors, honestly believing, as Warrington J thought, that it was most undesirable in the interests of the company that that agreement should be carried into effect, refused to affix the seal of the company to it, or to assist in carrying out a resolution which they disapproved of; and the question is whether under the memorandum and articles of association here the directors are bound to accept, in substitution of their own view, the views contained in the resolution of the company. Warrington J held that the majority could not impose that obligation upon the directors, and that on the true construction of the articles the directors were the persons authorised by the articles to effect this sale, and that unless the other powers given by the memorandum were invoked by a special resolution, it was impossible for a mere majority at a meeting to override the views of the directors. That depends, as Warrington J put it, upon the construction of the articles. First of all there is no doubt that the

company under its memorandum has the power in clause 3(k) to sell the undertaking of the company or any part thereof. In this case there is some small exception, I believe, to that which is to be sold, but I do not think that that becomes material. We now come to clause 81 of the articles, which I think it is important to refer to in this connection. [His Lordship read the clause.] Then come the two clauses which are most material, 96 and 97, whereby the powers of the directors are defined. [His Lordship read clause 96 and clause 97(1).] Therefore in the matters referred to in article 97(1) the view of the directors as to the fitness of the matter is made the standard; and furthermore, by article 96 they are given in express terms the full powers which the company has, except so far as they 'are not hereby or by statute expressly directed or required to be exercised or done by the company', so that the directors have absolute power to do all things other than those that are expressly required to be done by the company; and then comes the limitation on their general authority – 'subject to such regulations as may from time to time be made by extraordinary resolution'. Therefore, if it is desired to alter the powers of the directors that must be done, not by a resolution carried by a majority at an ordinary meeting of the company, but by an extraordinary resolution. In these circumstances it seems to me that it is not competent for the majority of the shareholders at an ordinary meeting to affect or alter the mandate originally given to the directors, by the articles of association. It has been suggested that this is a mere question of principal and agent, and that it would be an absurd thing if a principal in appointing an agent should in effect appoint a dictator who is to manage him instead of his managing the agent. I think that that analogy does not strictly apply to this case. No doubt for some purposes directors are agents. For whom are they agents? You have, no doubt, in theory and law one entity, the company, which might be a principal, but you have to go behind that when you look to the particular position of directors. It is by the consensus of all the individuals in the company that these directors become agents and hold their rights as agents. It is not fair to say that a majority at a meeting is for the purposes of this case the principal so as to alter the mandate of the agent. The minority also must be taken into account. There are provisions by which the minority may be over-borne, but that can only be done by special machinery in the shape of special resolutions. Short of that the mandate which must be obeyed is not that of the majority – it is that of the whole entity made up of all the shareholders. If the mandate of the directors is to be altered, it can only be under the machinery of the memorandum and articles themselves. I do not think I need say more.

Baron* v *Potter [1914] 1 Ch 895

The company's two directors had reached deadlock whereby they no longer spoke to one another. This in turn impacted on the ability to conduct effective board meetings. The plaintiff had called a general meeting which had sought to appoint additional directors to the company's board. The defendant objected to this course of action, stating that the power to appoint new directors was vested, according to the terms of the articles of association, in the directors.

Held – Due to the deadlocked position of the current directors of the company the power to appoint reverted to the general meeting. Consequently, the appointment of additional directors was valid.

The legal effect of the articles

One aspect of the articles of association which has, until the coming into force of the new Companies Act 2006, traditionally caused confusion for both scholars and students alike has been their legal effect. Section 14 of the Companies Act 1985 has now been replaced by s 33 of the Companies Act 2006 which, significantly, has updated the wording of this traditionally awkward section.

Section 33 of the Companies Act 2006, states that 'the provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions'. Under s 14 of the Companies Act 1985, the memorandum and articles, when registered, bound 'the company and its members to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and articles'.

The first point that needs to be made is that s 33 now includes the phrase '*on the part of the company and each member*' as opposed to simply '*on the part of each member*'. The wording of this section, subject to slight variations, may be traced back to the Companies Act 1844, which adopted the method of forming an unincorporated joint-stock company in existence at that time. In effect, the wording of previous versions of s 33 appeared to suggest that the articles bound only the members, ignoring the fact that the company was a separate legal entity. The updated wording of the Companies Act 2006 appears to have eventually addressed this oversight. However, it has long since been assumed that the articles were binding as between members and the company. Stirling J noted in ***Wood* v *Odessa Waterworks Co*** (1889) 42 Ch D 636, that 'the articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other'. Nevertheless, it is generally acknowledged that the situation was clarified, once and for all, in the case of ***Hickman* v *Kent or Romney Marsh*** discussed below.

Secondly, s 33 makes reference to the company's constitution as opposed to 'the memorandum and articles'. This reflects the careful consideration with which this area has been revised by the Companies Act 2006. While the memorandum has effectively been reduced in its significance, and as such its role within the s 33 statutory contract, there is recognition of the role that other agreements may play within the day-to-day running of a company, particularly private limited companies. It is also worth noting at this point that, according to s 28, provisions which were contained in a company's memorandum immediately before the commencement of Part I of the Companies Act 2006, and are 'not provisions of the kind mentioned in s 8 (provisions of the new-style memorandum), are to be treated after the commencement of this Part as provisions of the company's articles' (s 28(1)).

The results of the statutory contract, as evidenced under s 14, were as follows:

(a) The memorandum and articles constituted a contract between the company and each member. Thus, each member, in his capacity as member, was bound to the company by the provisions in the articles. Furthermore, although s 14 did not state that the articles bind the company to the members but only the members to the company, the company was regarded as bound to each member in his capacity as member to observe the provisions in the articles.

(b) The memorandum and articles were also, by reason of case law, a contract between the members themselves. Thus, one member can sue another if that other fails to observe a provision in the memorandum or articles. However, the method by which this may be undertaken is discussed in greater detail below in terms of the decision in ***MacDougall* v *Gardiner*** (1875) 1 Ch D 13.

(c) No right given by the memorandum or articles to a member in a capacity other than that of member (e.g. as solicitor or director) can be enforced against the company. The memorandum and articles are not a contract with outsiders but merely with the members in respect of their rights as members.

To a large extent these points remain relevant for the s 33 statutory contract, though it is suggested that both (a) and (b) have now been clarified by the rewording of this section under the Companies Act 2006. Point (c) remains the subject of debate and will be examined in the next section in the context of 'insider' and 'outsider' rights. Nevertheless, the case law in relation to the statutory contract still remains of considerable use. For example, in ***London Sack and Bag Co Ltd*** **v** ***Dixon and Lugton Ltd*** [1943] 2 All ER 763, when considering the effect of the statutory contract on the legal relationship between a company's members, Scott LJ observed '. . . the statutory result may not be to constitute a contract between them about rights of action created entirely outside the company relationship, such as trading transaction between members' but rather to be restricted to membership matters. In many respects this reinforces the view that the purpose of the articles of association is to outline the way in which the proper functioning of the company is to take place.

This is echoed in ***Welton*** **v** ***Saffery*** [1897] AC 299, when Lord Herschell observed:

> It is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company; but the articles do not any the less, in my opinion, regulate their rights inter se. Such rights can only be enforced by or against a member through the company, or through the liquidator representing the company, but I think that no member has, as between himself and another member, any right beyond that which the contract with the company gives.

However, this also introduces the notion that rights may only be enforced via the company as opposed to directly between members and is based on the internal management principle outlined in ***MacDougall*** **v** ***Gardiner*** (1875) 1 Ch D 13 in which James LJ stated:

> I think it is of the utmost importance in all these companies that the rule which is well known in this court as the rule in . . . ***Foss*** **v** ***Harbottle*** should be always adhered to; that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by someone shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent – unless there is something *ultra vires* on the part of the company qua company, or on the part of the majority of the company, so that they are not fit persons to determine it; but that every litigation must be in the name of the company, if the company really desire it.

Consequently, when considering membership rights, it would appear that not only is there a restriction on the type of actions which may be brought by members against other members, but also upon the mode by which such actions should take place. However, with an eye on the notion of quasi-partnerships, which will be discussed further in this chapter, it is perhaps worth noting the comments of Vaisey J in ***Rayfield*** **v** ***Hands*** [1960] Ch 1 when, having granted an order in favour of Mr Rayfield which required the directors to take his shares in accordance with the terms of the company's articles, he stated: 'The conclusion to which I have come may not be of so general application as to extend to the articles of association of every company, for it is, I think, material to remember that this private company is one of that class of companies which bears a close analogy to a partnership.'

The implications of this discussion will be examined in greater detail within Chapters 15 and 16.

See pp. 289 and 312

Finally, it is important to note that the term 'memorandum and articles', has been updated under the Companies Act 2006 to that of the company's constitution (see s 17). Also note the effect of s 28(1) as outlined above and in the previous chapter.

See p. 79

Wood* v *Odessa Waterworks Co (1889) 42 Ch D 636

The articles of association empowered the directors with the approval of the general meeting to declare 'a dividend to be paid to the members'. The directors recommended that instead of paying a dividend, members should be given debenture-bonds bearing interest repayable at par, by annual drawings, extending over 30 years. The recommendation was approved by the company in general meeting by an ordinary resolution. The plaintiff successfully sought an injunction restraining the company from acting on the resolution on the ground that it breached the articles. Stirling J stated:

> . . . the rights of the shareholders in respect of a division of the profits of the company are governed by the provisions of the articles of association. By s 16 of the Companies Act 1862 (now s 33 of the Companies Act 2006), the articles of association 'bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act.' . . . Those articles provide that the directors may, with the sanction of a general meeting, declare a dividend to be paid to the shareholders. Prima facie, that means to be paid in cash. The debenture-bonds proposed to be issued are not payments in cash; they are merely agreements or promises to pay: and if the contention of the company prevails a shareholder will be compelled to accept in lieu of cash a debt of the company payable at some uncertain future period. In my opinion that contention ought not to prevail.

Hickman* v *Kent or Romney Marsh Sheepbreeders' Association [1915] 1 Ch 881

The defendant company was incorporated under the Companies Acts in 1895. The objects of the company were to encourage and retain as pure the sheep known as Kent or Romney Marsh, and the establishment of a flock book listing recognised sires and ewes to be bred from. The articles provided for disputes between the company and the members to be referred to arbitration. This action was brought in the Chancery Division by the claimant because the Association had refused to register certain of his sheep in the flock book, and he asked for damages for this. It also appeared that the Association was trying to expel him, and he asked for an injunction to prevent this.

Held – by Astbury J – that the Association was entitled to have the action stayed. The articles amounted to a contract between the Association and the claimant to refer disputes to arbitration. However, Astbury J, after accepting that the articles were a contract between a company and its members, went on to say:

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

Comment

(i) It was held, by the Court of Appeal, applying ***Hickman***, in ***Beattie* v *E and F Beattie Ltd*** [1938] Ch 708, that a provision in the articles that disputes between the company and its members must be referred to arbitration did not apply to a person whose dispute was between the company and himself as director even though he was also a member.

(ii) In ***Pender* v *Lushington*** (1877) 6 Ch D 70, the chairman of a meeting of members refused to accept Pender's votes. The articles gave one vote for every 10 shares to the shareholders. This caused a resolution proposed by Pender to be lost. He asked the court to grant an injunction to stop the directors acting contrary to the resolution.

Held – Pender succeeded. The articles were a contract binding the company to the members.