Re National Motor Mail Coach Co Ltd, Clinton's Claim [1908] 2 Ch 515

A company, called the Motor Mail Coach Syndicate Ltd, promoted another company, called the National Motor Mail Coach Co Ltd, to acquire the business of a motor mail contractor named Harris. The promoters paid out £416 2s 0d in promotion fees. The two companies were subsequently wound up and Clinton, who was the liquidator of the syndicate, proved in the liquidation of the National Motor Mail Coach Co Ltd for the promotion fees.

Held – Clinton's claim on behalf of the syndicate could not be allowed because the company was not in existence when the payments were made, and could not have requested that they be made. The syndicate was not acting as the company's agent or at its request, and the fact that the company had obtained a benefit because the syndicate had performed its promotion duties was not enough.

However, since the promoters or their nominees are likely to be the first directors, the payment will usually be made by the director under their general management powers.

Pre-incorporation contracts: generally

Another consequence of the company having no legal existence and therefore no capacity to make contracts is that if a promoter, or some other person purporting to act as its agent, makes a contract for the company before its incorporation then:

(a) the company when formed is not bound by it even if it has taken some benefit under it (see ***Re National Motor Mail Coach***, etc., above);
(b) the company is unable to sue the third party on the agreement unless the promoter and the third party have given the company rights of action under the Contracts (Rights of Third Parties) Act 1999 (see below);
(c) the company cannot ratify the agreement even after its incorporation (***Kelner* v *Baxter*** (1866) LR 2 CP 174);
(d) unless the agreement has been made specifically to the contrary, it will take effect as one made personally by the promoter or other purported agent and the third party (s 51 CA 2006). This is illustrated by the following case.

Phonogram Ltd* v *Lane [1981] 3 All ER 182

In 1973, a group of pop artists decided that they would perform under the name of 'Cheap Mean and Nasty'. A company, Fragile Management Ltd (Fragile), was to be formed to run the group.

Before the company was formed, there were negotiations regarding the financing of the group. Phonogram Ltd, a subsidiary of the Hemdale Group, agreed to provide £12,000, and the first instalment of £6,000, being the initial payment for the group's first album, was paid. Fragile was never formed; the group never performed under it; but the £6,000 was not repaid.

The Court of Appeal was asked who was liable to repay it. It appeared that a Brian Lane had negotiated on behalf of Fragile and a Roland Rennie on behalf of Phonogram Ltd.

A letter of 4 July 1973 from Mr Rennie to Mr Lane was crucial. It read:

> In regard to the contract now being completed between Phonogram Ltd and Fragile Management Ltd concerning recordings of a group [. . .] with a provisional title of 'Cheap Mean and Nasty', and further to our conversation of this morning, I send you herewith our cheque for £6,000 in anticipation of a contract signing, this being the initial payment for initial LP called for in the contract. In the unlikely

> event that we fail to complete within, say, one month you will undertake to pay us £6,000 [. . .] For good order's sake, Brian, I should be appreciative if you could sign the attached copy of this letter and return it to me so that I can keep our accounts people informed of what is happening.

Mr Lane signed the copy 'for and on behalf of Fragile Management Ltd'. The money was paid over, and went into the account of Jelly Music Ltd, a subsidiary of the Hemdale Group, of which Mr Lane was a director.

The court had first to consider whether or not Mr Lane was personally liable on the contract. Clearly, Fragile could not be sued, since it never came into existence. Lord Denning took the view that Mr Lane was, as a matter of construction, liable on the contract without recourse to what is now s 51, because the letter, which was in effect the contract, said: 'I send you herewith our cheque for £6,000', and 'in the unlikely event that we fail to complete within, say, one month, you will undertake to repay us the £6,000'.

However, Mr Justice Phillips at first instance had decided on the basis of a lot of evidence which he had heard that Mr Lane was not, as a matter of construction, liable personally, and Lord Denning and the rest of the Court of Appeal proceeded on the assumption that Mr Lane was not liable on the basis of intention and construction.

Lord Denning then turned to what is now s 51. This states:

> A contract that purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as an agent for it, and he is personally liable on the contract accordingly.

This seemed to Lord Denning to cover the case before him and render Mr Lane liable. Mr Lane made the contract on behalf of Fragile at a time when the company had not been formed, and he purported to make it on behalf of the company so that he was personally liable on it.

Mr Lane's counsel drew the attention of the court to the Directive (68/151) on which s 51 is based. This states that its provisions are limited to companies en formation (in course of formation), whereas Fragile never commenced the incorporation process.

Lord Denning rejected this submission saying an English court must under Art 189 of the Treaty of Rome abide by the statute implementing the Directive, and that contained no restriction relating to the need for the company to be en formation.

Article 189 states:

> A Directive shall be binding, as to the result to be achieved, upon each member State to which it is addressed, but shall leave to the national authorities the choice of form and method.

Counsel for Mr Lane also suggested that the word 'purports' must mean that there has been a representation that the company already exists. Lord Denning did not agree with this, saying that a contract can purport to be made on behalf of a company, or by a company, even though both parties knew that the company was not formed and was only about to be formed.

The court also decided that the form in which a person made the contract – e.g. 'for and on behalf of the company' as an agent, or merely by signing the company's name and subscribing his own, e.g. 'Boxo Ltd, J Snooks, managing director', where the form is not that of agency – did not matter and that in both cases the person concerned would be liable on the contract.

As regards the words 'subject to any agreement to the contrary', the court dealt with academic opinion which had suggested that where a person signs 'for and on behalf of the company' – i.e. as agent – he is saying, in effect, that he does not intend to be liable and would not be on the basis of the words 'subject to any agreement to the contrary'.

On this, Lord Denning said:

> If there was an express agreement that the man who was signing was not to be liable, the section would not apply. But, unless there is a clear exclusion of personal liability, [the section] should be

given its full effect. It means that in all cases such as the present, where a person purports to contract on behalf of a company not yet formed, then however he expresses his signature he himself is personally liable on the contract.

Comment

(i) The court did not consider, because it did not arise, whether an individual such as Mr Lane could have sued upon the contract. Section 51 talks about the person or agent being 'personally liable' on the contract. Perhaps it should say 'can sue or be sued'. However, lawyers have generally assumed that the court would give an individual like Mr Lane a right to sue if it arose, since it is, to say the least, unusual for a person to be liable on a contract and yet not be able to sue upon it.

(ii) In fact, the matter was raised in ***Braymist Ltd*** **v** ***Wise Finance Company Ltd*** (2001) *The Times*, 27 March. In that case a solicitor signed a pre-incorporation contract for the sale of land to be owned by Braymist before that company was incorporated. Later the other party, Wise Finance, refused to go on with the contract and Braymist after incorporation sued for damages. The solicitor was also a party to the action as a claimant. The High Court ruled that the claim succeeded. The solicitor was not merely liable on the contract but could also sue for its breach. Such a ruling, said the court, was workable and fair. Furthermore, the contract did not infringe s 2(1) and (3) of the Law of Property (Miscellaneous Provisions) Act 1989, which requires a contract concerning land to be in writing and signed by the parties to it. It was signed by the solicitor who was, under the provisions of what is now s 51 of the Companies Act 2006, a party to it.

(iii) As we have seen, s 51 can apply to make the promoter or other purported agent liable even though the company has not actually begun the process of formation. However, it was held in ***Cotronic (UK) Ltd*** **v** ***Dezonie*** [1991] BCC 200 that there must at least be a clear intention to form the company as there was in Phonogram. In the ***Cotronic*** case a contract was made by Mr Dezonie on behalf of a company which had been struck off the register for five years at a time when nobody concerned with its business had even thought about re-registering it. The Court of Appeal held that the contract was a nullity and Mr Dezonie was not personally liable on it under what is now s 51.

The above difficulties do not worry, for example, a garage proprietor in a small way of business who is promoting a limited company to take over the garage business. Such a person will obviously be a director of the new company and will usually hold most of the shares in it. Being in control, he can ensure that the company enters into the necessary contracts after incorporation. However, where the promoter is not in control of the company after its incorporation, the difficulties outlined above are very real.

Pre-incorporation contracts: the Contracts (Rights of Third Parties) Act 1999

Under the above Act, the promoter and the third party are able to give the company when it is incorporated the right to sue and be sued upon a pre-incorporation contract. The Act makes clear that a party given such rights in a contract (in this case the particular pre-incorporation contract(s)) does not have to be in existence when the contract is made. Third-party rights may be applied by the court even in the absence of an express provision in the contract between the promoter and the third party if a term of the contract confers a benefit on the company which, of course, it will do. Nevertheless, an express term should be used to avoid doubt.

Pre-incorporation contracts: solutions to promoter's liability

A promoter may overcome the difficulties facing him in the matter of pre-incorporation contracts in the following ways:

(a) He may incorporate the company before he makes contracts, in which case the problems relating to pre-incorporation contracts do not apply. There is no reason why a promoter should not take this course since the expenses of incorporation are not prohibitive. There is, of course, no problem in the case of a ready-made or shelf company. The company exists and contracts can be made which will be binding on it from the beginning.

(b) He can settle a draft agreement with the other party so that when the company is formed it enters into a contract on the terms of the draft; but the parties are not bound other than morally by the draft. However, in order to ensure that the company does enter into the contract after incorporation the articles of the new company can be drafted to include a provision binding the directors to adopt it. The promoter is never liable here because there is never any contract with him.

(c) The promoter may make the contract himself and assign the benefit of it to the company after it is incorporated. Since English law does not allow a person to assign the burden of his contract, the disadvantage of this method is that the promoter remains personally liable for the performance of his promises in the contract after the assignment to the company. Thus, it is desirable for the other party to the contract to agree that the promoters shall be released from their obligations if the company enters into a new, but as regards terms identical, contract with the other party after incorporation. Since the promoters will usually control the company at this stage, they should be able to ensure that the company does make such a contract with the other party and so procure their own release.

(d) Where the promoter is buying property for the company, he may take an option on it for, say, three months. If the company, when it is formed, wishes to take over the property, the promoter can assign the benefit of the option to the company or enforce the option personally for the company's benefit. If the company does not wish to take the property, the promoter is not personally liable to take and pay for it, though he may lose the money he agreed to pay for the option.

(e) It should also be noted that s 51 states that the promoter is personally liable 'subject to any agreement to the contrary'. Thus the promoter could agree when making the contract that he should not be personally liable on it. (See the remarks of Lord Denning in ***Phonogram Ltd* v *Lane***, 1981.) This may not satisfy a third party who wants a form of initial binding agreement but it is sanctioned by the 1985 Act.

Nevertheless, the general legal position is unsatisfactory and the Jenkins Committee on Company Law Reform which reported in June 1962 (Cmnd 1749) recommended legislation under which a company when formed could validly adopt a pre-incorporation contract by unilateral act, and Clause 6 of the Companies Bill 1973, which never became law, permitted a company after incorporation to ratify contracts which purported to have been made in its name or on its behalf before incorporation without the consent of the other party involved. At the present time such an act or ratification operates only as an offer to be bound which the other party must accept if there is to be an enforceable contract.

Perhaps surprisingly there is no provision under the Companies Act 2006 for ratification of a pre-incorporation contract by the company after its formation.

Natal Land and Colonization Co* v *Pauline Colliery and Development Syndicate
[1904] AC 120

Prior to incorporation, the P Company contracted to take an option to lease land belonging to Mrs de Carrey if it was coal bearing. After incorporation, the company entered on the land and made trial borings. The land was found to be coal bearing and the P company asked for a lease. Mrs de Carrey had by then transferred her interest in the property to the N company and it would not grant a lease. The P company sued at first instance for specific performance of the contract.

Held – the P company could not enforce the option because:

(a) its own conduct in merely boring did not unequivocally evidence an intention to take a lease; and
(b) even if it had, it was merely an offer, and there was no evidence of acceptance either by Mrs de Carrey or the N company.

Comment

Courts in the United States are more generous. They take the view that a contract made before incorporation is an offer open for acceptance by the company. So any act done by the company after incorporation which is unequivocally referable to the offer operates as an acceptance and not an offer as in English company law.

Promoter's liability and the Contracts (Rights of Third Parties) Act 1999

It should be noted that the provisions of the above Act are no help to the promoter in avoiding liability on the pre-incorporation contract because, where third-party rights are given, in this case to the company when formed, the original parties, of whom the promoter is one, remain liable on the contract.

Incorporation

Application for registration is made by filing certain documents with the Registrar of Companies. The main Registry is in Cardiff (Crown Way, Cardiff, CF14 3UZ) and further information about Companies House, together with details of the procedure for registering new companies, is available at: www.companieshouse.gov.uk. The documents to be filed are as follows:

1 The memorandum of association must be delivered to the Registrar together with an application for registration and a statement of compliance.

The memorandum is a significantly abridged document when compared with the former requirements of the Companies Act 1985 and previous company legislation (see Chapter 3). Its function under the Companies Act 2006 is to evidence the intention of the person or persons who subscribe to it that he/she/they have the intention to form a company and to take at least one share each in the company. A company, even a public company, can be registered with one member and, since the memorandum is reduced to a formation document, it is no longer part of the company's constitution (see s 17) and is no

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longer subject to alteration, amendment or update. The memorandum must be in the prescribed form and authenticated by each subscriber.

Note that there is no requirement for subscribers to a company to be domiciled in the part of the UK in which the company is to be registered (***Princess of Reuss* v *Bos*** (1871) LR 5 HL 176). However, a business which is already completely constituted as a partnership or a corporation under another legal system cannot be registered as a company under the Companies Act 2006 (***Bulkeley* v *Schutz*** (1871) LR 3 PC 764).

2 The application for registration. According to s 9(2) this must state:
   (a) the proposed name of the company;
   (b) whether the registered office is to be situated in England and Wales (or in Wales) or in Scotland or Northern Ireland;
   (c) whether the liability of the members of the company is to be limited and, if so, whether by shares or guarantee; and
   (d) whether the company is to be public or private.

Where the company is being formed by an agent of the subscribers to the memorandum, the application must contain his or her address (s 9(3)).

The required contents of the application for registration are outlined in s 9(4) and are as follows:

(a) where the company is to have a share capital, a statement of capital and initial shareholdings;
(b) where the company is to be limited by guarantee, a statement of the guarantee;
(c) a statement of the proposed officers of the company;
(d) a statement of the intended address of the registered office;
(e) a copy of any company specific articles of association.

Where no articles are filed, or insofar as the company specific articles do not modify or exclude them, the Companies Act 2006 Model Articles will apply as default articles. (See Appendix 1 of this book for a copy of these provisions.)

The application, together with a statement of compliance, must be delivered to the Registrar of Companies for England and Wales (if the registered office can be situated in England or Wales, or solely in Wales). The Registrars in Scotland and Northern Ireland deal with registrations of companies in those jurisdictions.

A fee of £20 is payable for the registration of a company non-electronically and the process normally takes 5 working days. For a fee of £50, the process may be undertaken on the same day so long as the documents are presented before 3pm. A reduced fee of £15 is payable for the electronic registration of a company.

Statement of capital and initial shareholdings

According to s 10 of the Companies Act 2006, this must state:

(a) The total number of shares in the company that are to be taken by those who are subscribers to the memorandum and the total nominal value of those shares taken together.
(b) For each class of shares, such particulars of the rights attached to them as the Secretary of State may require and prescribe; the total number of shares of the class and the total nominal value of those shares taken together and 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.

(c) The statement must contain such information as the Secretary of State may require and prescribe to identify the subscribers to the memorandum. This need not be a home address; a contact address will be sufficient (e.g. the office of the subscriber's solicitors or accountants).
(d) In regard to each subscriber, the number, nominal value of each share, and the class of share to be taken by the subscriber on formation, assuming there are different classes of shares and the amount to be paid, or left unpaid, on the shares either on account of the nominal value or premium for each class, where there are different classes of shares.

Statement of guarantee

Section 11 states that this must contain:

(a) A provision that each member undertakes that if the company is wound up whilst he or she is a member, or within one year after ceasing to be a member, he or she will contribute to its assets such amount as may be required for the payment of the debts and liabilities of the company contracted before he or she ceased to be a member, and the costs, charges and expenses of winding up, as well as the adjustment of the rights of members as between themselves not exceeding a specified amount.
(b) Information, as required by the Secretary of State, sufficient to identify the subscribers; a contact address will be sufficient.

Statement of proposed officers

Under s 12 of the Companies Act 2006, this must contain details of the company's proposed officers/directors and secretary. This information must appear in the register of directors and the register of secretaries which a company keeps. For example, for directors this is as follows:

(a) name and any former names;
(b) a service address (e.g. the company's registered office);
(c) the country or state or part of the UK in which the director is usually resident;
(d) nationality;
(e) business occupation (if any);
(f) date of birth.

In addition, the usual residential address must be supplied for inclusion on the company's register of residential addresses and the Registrar's register of residential addresses, but these are not open to inspection by the public, but only to certain groups (i.e. a police authority).

The above procedure in regard to residential addresses is to protect directors against such things as violent demonstrations against them and their companies due to their line of business. The provisions apply to all directors now and also to company secretaries. This matter is further considered in Chapter 17 See p. 334.

Statement of compliance

Section 13 deals with this. It is a statement that the requirements of the Act as regards registration have been complied with. The Registrar may accept this as sufficient evidence of compliance.

Registration

If the Registrar is satisfied that the requirements of the Act have been complied with, he will register the documents and issue a certificate of incorporation (ss 14, 15), together with a registered number (s 1066).

The Registrar has no discretion in the matter. He must grant a certificate of incorporation and, since the Registrar is here acting in a quasi-judicial capacity, the subscribers may enforce registration through the courts by asking the court to order the Registrar to make the registration (***R* v *Registrar of Companies, ex parte Bowen*** [1914] 3 KB 1161).

R* v *Registrar of Companies, ex parte Bowen [1914] 3 KB 1161

An application was submitted to register the following proposed company name: 'The United Dental Service Ltd'. The Registrar refused to register the company unless the memorandum was amended so as to indicate that work should be undertaken only by registered dentists, or the name of the company was amended so as to omit the word 'dentist'. The applicants (seven unregistered dental practitioners) sought a writ of mandamus to compel the Registrar to register the company. Lord Reading CJ noted:

> In my opinion the question turns in the main . . . upon whether the use of these words, 'The United Dental Service', would amount to an offence under the Dentists Act 1878 . . . I think these words, 'United Dental Service', imply a description of the acts to be performed, and do not imply that the persons who will perform them are persons specifically qualified under the statute of 1878. The Registrar of Companies would be entitled, if the use of the proposed name would be an offence under the statute, to refuse to register the company with that name; but, having arrived at the conclusion that that would not be the effect of the use of the words, 'United Dental Service', I hold that the registrar was wrong in refusing registration upon that ground.

Held – The Registrar's refusal was unjustified.

However, the Registrar may refuse to register a company whose objects are unlawful. In ***R* v *Registrar of Joint Stock Companies, ex parte More*** [1931] 2 KB 197, Scrutton LJ noted:

> This is a short point involving the construction of s 41 of the Lotteries Act, 1823. Two gentlemen proposed to sell tickets in England in connection with an Irish lottery. For some reason they did not propose to do this themselves; they proposed to form a private company to do it. It is merely conjecture on my part that this may be due to the fact that the provisions in the Act of 1823 making offenders liable to be punished as rogues and vagabonds do not apply to a company, and so the two gentlemen intending to form this company wished in this way to avoid the risk of being prosecuted under the Act. They accordingly lodged the memorandum and articles of association of the proposed company with the Registrar of Companies, who, when he saw that the object of the company was to sell tickets in a lottery known as the Irish Free State Hospitals Sweepstake, refused to register the company. Thereupon an application was made to the Court for a writ of mandamus directing the Registrar to register the company. To succeed in that application the applicant must show that it is legal to sell in England tickets for the Irish Free State Hospital Sweepstake authorised by an Act of the Irish Free State. The only Act which can be supposed to authorise the selling in England is an Irish Act, but the Irish Parliament has no jurisdiction in England, and that being so, the Irish Parliament cannot authorise lottery tickets to be sold in England. The authority to sell in any place must be given by the Parliament having jurisdiction in that place, and the Imperial Parliament has given no authority to sell lottery tickets in England . . . The appeal must be dismissed.

As to the effect of registration, the subscribers to the memorandum become members of the company, which has a legal personality, and the persons named in the statement of proposed officers (i.e. directors and secretary) are deemed appointed. The certificate is also conclusive evidence that the registration requirements have been complied with so that the valid and legal existence of the company cannot be challenged in court, even if in the event they have not been (ss 15, 16).

Note, however, that the Registrar's decision to incorporate a company is subject to judicial review, as per the case of ***R* v *Registrar of Companies, ex parte AG*** [1991] BCLC 476 which dealt with the attempted registration of a company to carry on the business of prostitution.

Electronic incorporation

Companies House has introduced a service whereby presenters who incorporate companies regularly can conduct the process electronically. A citizens' incorporation service is not yet available. There is a system of electronic authentication where documents are delivered electronically. This procedure for electronic incorporation is permitted under Schedules 4 and 5 to the Companies Act 2006.

Effect of incorporation

The issue of a certificate of incorporation incorporates the members of the company into a persona at law (legal person), and limits their liability if the application for registration requires this. This takes effect from the first moment of the date of incorporation stated on the certificate (***Jubilee Cotton Mills Ltd* v *Lewis*** [1924] AC 958). As we have seen, the certificate of incorporation is conclusive evidence that all the requirements of the Companies Act as to registration have been complied with, and if any irregularity had occurred in the registration procedure, it would not be possible to attack the validity of the company's incorporation. The evidence which was available to prove the irregularity would not be admissible (***Cotman* v *Brougham***, 1918, see Chapter 3). This means that all English companies registered under the Act are companies *de jure* (as a matter of law). In the jurisdictions where this rule does not apply, actions have been brought in the courts attacking the validity of a company's formation many years after incorporation. This cannot happen in England and Wales.

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However, the certificate of incorporation is not conclusive evidence that all the company's business is legal; and if a company is registered with illegal or immoral business, the House of Lords decided in ***Bowman* v *Secular Society*** [1917] AC 406 that the Crown could apply, through the Attorney-General, for a quashing order to cancel the registration made by the Registrar. In ***Attorney-General* v *Lindi St Claire (Personal Services) Ltd*** [1981] 2 Co Law 69 the High Court quashed a decision by the Registrar of Companies to register the business of a prostitute as Lindi St Claire (Personal Services) Ltd. The name was registered in 1979 after the Registrar had rejected Miss St Claire's alternative titles, i.e. Prostitutes Ltd, Hookers Ltd and Lindi St Claire French Lessons Ltd. Miss St Claire's accountants advised her to register a company after receiving a letter from the Revenue's policy division stating that it considered prostitution to be a trade. The Attorney-General contended that the company

should not have been registered because it was formed for sexually immoral purposes and was consequently against public policy and illegal. The High Court agreed and the registration was quashed.

In addition, a company incorporated for unlawful purposes may be ordered by the court to be wound up on the petition of a creditor or member, the ground for the petition being that it is just and equitable that the company should be wound up (Insolvency Act 1986, s 122(1)(g)), or on the petition of the Department for Business, Innovation and Skills (BIS) where it has appointed an inspector to investigate the company's affairs and he has reported adversely on the legality of the business for which it was formed.

From the date impressed upon the certificate the company becomes a body corporate with perpetual succession, and with the right to exercise the powers given in its memorandum. The company's life dates from the first moment of the day of incorporation (***Jubilee Cotton Mills* v *Lewis***, 1924, see below).

There is no statutory requirement that the certificate should be displayed at the registered office or kept at any particular place.

Jubilee Cotton Mills* v *Lewis [1924] AC 958

Lewis was a promoter of a company formed to purchase a cotton mill and to carry on the business of cotton spinning. The memorandum and articles of the company were accepted by the Registrar of Companies on 6 January 1920, and the certificate of incorporation was dated on that day. However, the certificate, it appeared, was not signed by the Registrar until 8 January 1920. On 6 January a large number of fully paid shares were allotted to the vendors of the mill, and they were later transferred to Lewis. The question of the validity of the allotment arose in this case, and it was held that the certificate was conclusive as to the date on which the company was incorporated. A company is deemed to be incorporated from the day of the date on its certificate of incorporation, and from the first moment of that day. Therefore, the allotment was not void on the ground that it was made before the company came into existence.

Ready-made companies

It will be appreciated that where a ready-made company is used the registration procedures will have been gone through. Indeed, it has been estimated that approximately 60 per cent of company registrations are undertaken via the 'shelf company' route (see: Company Law Review Steering Group, *Modern Company Law for a Competitive Economy: Developing the Framework*, URN 00/656, London: DTI, 2000). Such companies are also relatively economic to purchase, usually being around £50 in price and simple to acquire.

Once purchased, the promoters may wish to change the ready-made company's name and will have to appoint directors and a secretary and notify these appointments to the Registrar. The ready-made company will have had directors and a secretary on formation but these persons will have resigned on the purchase of the ready-made company.

The notification of the new directors and secretary is under s 167 as changes in the directorate and secretariat since they are replacements and not original appointments.

Publicity in connection with incorporation

The Registrar is required to publish in the *London Gazette*:

(a) the issue of any certificate of incorporation (but there is in fact no statutory requirement to display the certificate at the registered office, though it is often so displayed);
(b) any report as to the value of a non-cash asset under s 597 where a non-cash asset has been acquired from a subscriber.

Post-incorporation procedures for re-registration

Conversion of companies from private to public (ss 90–96)

A private company may be re-registered as a public company if not previously re-registered as an unlimited company if:

(a) the members pass a special or written special resolution which alters the company's articles so that they fit the statutory requirements of a public company. The name must be changed on conversion to reflect the fact that the company will be a public company. Companies House will only permit a change to the suffix plc under the re-registration procedure. If any other change in the name is required, the members must pass a special resolution (which may be in written form) and file the resolution with the re-registration documents with the relevant name change fee. The re-registration certificate will carry the new name;
(b) the requirements as regards share capital are met. This means that the nominal value of the allotted share capital is not less than £50,000 and in respect of all the shares, or as many as are needed to make up the authorised minimum, the following conditions are satisfied:
    (i) no less than one-quarter of the nominal value of each share and the whole of any premium on it is paid up;
    (ii) none of the shares has been fully or partly paid up by means of an undertaking to do work or perform services where this has not already been performed or otherwise discharged; and
    (iii) where any share has been allotted as fully or partly paid up for a non-cash consideration which consists solely or partly of an undertaking to do something other than to perform services, i.e. usually an undertaking to transfer a non-cash asset, either the undertaking has been performed or otherwise discharged or there is a contract between the company and the person involved under which the undertaking must be performed within five years.

    Shares allotted under an employees' share scheme which are not one-quarter paid up can be disregarded for the purpose of deciding whether the above requirements have been met;
(c) an application for the change is made to the Registrar accompanied by a statement of compliance;

(d) the application is accompanied by the following documents:
  (i) a printed copy of the articles as altered and added to by the special or written resolution and a copy of the resolution unless already forwarded to the Registrar;
  (ii) a copy of a balance sheet prepared as at a date not more than seven months before the date of the application, but not necessarily in respect of an accounting reference period. The balance sheet must be accompanied by a copy of an unqualified report of the company's auditor in relation to the balance sheet. If there is a qualification, the auditor must state in writing that it is not material in determining whether at the date of the balance sheet the company's net assets were at least equal to the sum of its called-up capital and non-distributable reserves, such as its share premium account and capital redemption reserve;
  (iii) a copy of a written statement by the company's auditors that in their opinion the balance sheet referred to in (ii) above shows that the amount of the company's net assets at the date of the balance sheet was not less than the aggregate of its called-up share capital and non-distributable reserves;
  (iv) the statement of compliance that: (a) the requirements in regard to the making of necessary changes in the company's constitution have been complied with; and that (b) between the balance sheet date and the application for re-registration there has been no change in the financial position of the company which has caused the net assets to become less than the aggregate of called-up share capital plus non-distributable reserves.

It should be noted that audit exemption regulations do not dispense with the requirement of an audit report on the balance sheet. This means that small companies can exempt themselves from the requirement to appoint an auditor unless and until it becomes necessary to do so for certain purposes other than the audit of financial statements. Re-registration is one of those purposes. Other areas where an auditor is required will be picked up as they occur.

Statement of proposed secretary

This is a s 95 requirement which arises as a result of the abolition of the requirement for private companies to have a company secretary. On re-registration as a public company, and on the assumption that the company does not have a secretary, details of the person or persons who will act as secretary or joint secretaries must be given together with consent to act. Where, for example, a firm acts, consent can be given by one partner on behalf of the others.

Additional requirements relating to share capital

If between the date of the balance sheet and the passing of a special (or written) resolution to convert to a public company the company has allotted shares which are wholly or partly paid for by a non-cash consideration, then it shall not make an application for re-registration unless before application is made:

(a) the consideration has been valued in accordance with s 593 (i.e. by a person or persons who are qualified by law to audit a public company's accounts who may themselves appoint other suitable persons to assist them);
(b) a report regarding the value has been made to the company by the persons referred to in (a) above during the six months immediately preceding the allotment of the shares.

If the Registrar is satisfied with the application for re-registration and provided that there is not in existence any court order reducing the company's share capital below the authorised minimum, he will, on payment of a fee, retain the documents which have been sent to him and issue a certificate of incorporation stating that the company is a public company.

The company then becomes a public company and the alterations in its constitution take effect. The certificate of incorporation is conclusive evidence that the re-registration requirements have been complied with and that the company is a public company.

Conversion of companies from public to private: generally (ss 97–101)

This is permitted and the procedure is as follows:

(a) the members must pass a special resolution altering the memorandum so that it no longer states that the company is a public company and also in terms of the name. The provisions regarding change of suffix from 'plc' to 'Ltd' and any further name change are with the necessary changes the same as those set out above for private to public conversion; and
(b) application is then made on the prescribed forms accompanied by a statement of compliance. The application is delivered to the Registrar together with a copy of the articles as altered or added to by the special resolution and the resolution to re-register.

It should be noted that because this type of conversion may well result in the loss of a market (i.e. a listing or quotation on the Stock Exchange) in which to sell the shares there are as regards the special resolution dissentient rights. Within a period of 28 days after the passing of the resolution dissentient holders of at least 5 per cent in nominal value of the company's issued share capital or any class thereof, or not less than 50 members, may apply to the court to have the resolution cancelled and the court may cancel or affirm it. If there is no application to the court or if it is unsuccessful and the court affirms the special resolution, the Registrar will issue a new certificate of incorporation as a private company.

It should also be noted that the court may, in addition, adjourn the proceedings brought by dissentients in order that satisfactory arrangements may be made for the purchase of the shares of those dissentients. The purchase may obviously be by other shareholders but the company's money may also be used for this purpose and if this is the intention the court will make the necessary order to provide for the purchase by the company of its own shares and to reduce its share capital. The order may also make any necessary alterations in or additions to the articles of the company.

Conversion of companies from public to private: reduction of share capital

If the court reduces the share capital of a public company to below £50,000, it must re-register as a private company. To speed up this process the court may authorise re-registration without the company having followed the above procedures and the court order may specify and make the necessary changes in the company's constitution. Thus, a reduction of capital may now have the further consequence of changing the company's status from public to private.

Conversion of private limited company to private unlimited company (ss 102–104)

A company limited by shares or by guarantee may be re-registered as an unlimited company.

However, no public company may apply to be re-registered as an unlimited company because a public company cannot be an unlimited company and therefore such a conversion involves a reduction in status from public to private. A public company which wishes to re-register as unlimited must use the procedure laid down in the 1985 Act for conversion of a public company to a private company.

If, however, the company is private, all the members must consent in writing and if this can be achieved there must be sent to the Registrar of Companies a statement of compliance that all the members of the company have consented together with a copy of the articles as altered. The Registrar will then issue a new certificate of incorporation which is conclusive evidence that the conversion is in all respects valid. In addition, the Registrar must publish the issue of the new certificate in the *London Gazette*. There can be no conversion back to a limited company. In addition, a company is excluded from re-registering as unlimited if it has previously re-registered as limited.

As we have seen, unlimited companies do not in general have to file accounts and re-registration back and forth between limited and unlimited status is not allowed in order to prevent selective filing of accounts, e.g. by re-registration as unlimited in a year in which the directors did not wish to file accounts and then back to limited status subsequently.

Conversion of private unlimited company to private limited company (ss 105–108)

It is also possible to re-register an unlimited company as a limited one but, as we have seen, this does not apply to a company which was previously a limited company but has re-registered as an unlimited one. If the conversion is to a private limited company, the conversion must be authorised by special or written resolution of the members. Following this a copy of the articles as altered and a statement of compliance are sent to the Registrar who will issue a new certificate of incorporation which is conclusive evidence that the conversion is in all respects valid. The Registrar will also advertise the issue of the new certificate in the *London Gazette*.

If an unlimited company wishes to re-register as a public company which is by definition a company limited by shares, the procedure to be followed is that for the re-registration of a private company as a public company except that the special resolution to convert must include two additional matters as follows:

(a) it must state that the liability of the members is to be limited by shares and what the share capital of the company is to be; and
(b) it must make such alterations in the company's constitution as are necessary to bring it in substance and in form into conformity with the requirements of the Companies Act in regard to a public company limited by shares. This involves, for example, changes in the company's name and capital.

The re-registration as a public company is not available to unlimited companies which have re-registered as such having been previously limited companies.

The effect on the liability of members of such a conversion is that those who become members after conversion are liable only to the extent of capital unpaid on their shares. Those who

were members at the date of the conversion, and are still members at the date of winding-up, are fully liable for debts and liabilities incurred before conversion. Those who were members at the date of conversion but have transferred their shares after conversion and before winding-up are liable for debts and liabilities incurred before conversion up to three years after it took place (Insolvency Act 1986, s 77(2)).

Essay questions

1 The directors of Balkan Ltd have decided that it is necessary to convert their company into a public limited company. Advise them on:

(a) the differences between a private and public limited company;

AND

(b) the procedures to be followed during re-registration.

2 Brian, who had decided to transfer his existing wholesale food business to a private limited company called Brian Foods Ltd, delivered the necessary documents to the Registrar of Companies and received the Certificate of Incorporation (dated 1 April) on 6 April 2005.

On 15 March 2005, Brian agreed to purchase a quantity of coffee from Benco Ltd in a letter which he signed 'For and on behalf of Brian Foods Ltd, B Brian, Director'.

At the first meeting of the board of directors of Brian Foods Ltd the contract with Benco Ltd was approved and the company took delivery of the first consignment. The board later found that the Benco brand of coffee was more difficult to sell than had been anticipated and decided to cancel any subsequent consignments.

(a) Advise Brian Foods Ltd on its liability to Benco Ltd.

AND

(b) How far, if at all, will your answer to (a) differ if on 10 April 2005 the two companies re-negotiated the contract and agreed on a different contract price?

AND

(c) How far, if at all, will your answer to (a) differ if in the letter of 15 March 2005 Brian expressly excluded his personal liability? (*Glasgow Caledonian University*)

3 Bill and Ben trade in partnership as garage mechanics. They are considering changing their form of business association and trading as a private registered company limited by shares.

Explain to them the legal procedures that they must follow in order to form such a company, and advise them on the advantages of trading as a private company as opposed to a partnership. (*The Association of Chartered Certified Accountants*)

4 Philip, who is in the process of forming a company, wishes to avoid personal liability upon any contracts he may enter into on behalf of the proposed company. Advise Philip.
(*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 When a private company wants to re-register as a public company it must file a balance sheet with the Registrar. The balance sheet must be one which is not more than:

A Fifteen months old at the date of re-registration.
B Seven months old at the date of re-registration.
C Fifteen months old at the date of application.
D Seven months old at the date of application.

2 Thames was re-registered from a limited to an unlimited company. It wishes to re-register as a public company.

A It must apply to the Registrar to be registered as a public limited company.
B It must re-register as a private limited company and then re-register as a public company.
C It must pass a special resolution to convert into a public company.
D There is no procedure whereby Thames may become a public limited company.

3 Fred is a member of a private company at the date of its re-registration as a public company. Fred cannot profit by selling non-cash assets to the public company within an initial period of two years from the date of re-registration unless:

A The sale is approved by a resolution of the board and the consideration is not an allotment of shares.
B The property is valued by an independent accountant and the members approve the sale by ordinary resolution.
C The property is independently valued and approved by a resolution of the board.
D The sale is approved by an ordinary resolution of the members and the consideration is not an allotment of shares.

4 Before the incorporation of Ouse Ltd, its promoter Bob entered into a contract on behalf of the company. The contract gave the unformed company third-party rights. Who is liable if the contract is later breached?

A Ouse Ltd.
B Bob and Ouse Ltd.
C The shareholders of Ouse Ltd.
D The directors of Ouse Ltd.

5 Joe and Fred wished to form a company. On 1 March 20XX they filed the appropriate documents with the Registrar. On 10 May 20XX they received a certificate of incorporation dated 1 May 20XX. Later they found out that the company had been registered on 4 May 20XX. On what date was the company incorporated?

A 1 March 20XX **B** 1 May 20XX **C** 10 May 20XX **D** 4 May 20XX

6 Meg used to be employed by Trent Ltd. Her contract contained a clause under which she agreed not to compete with Trent Ltd. The clause was reasonable in terms of its duration and

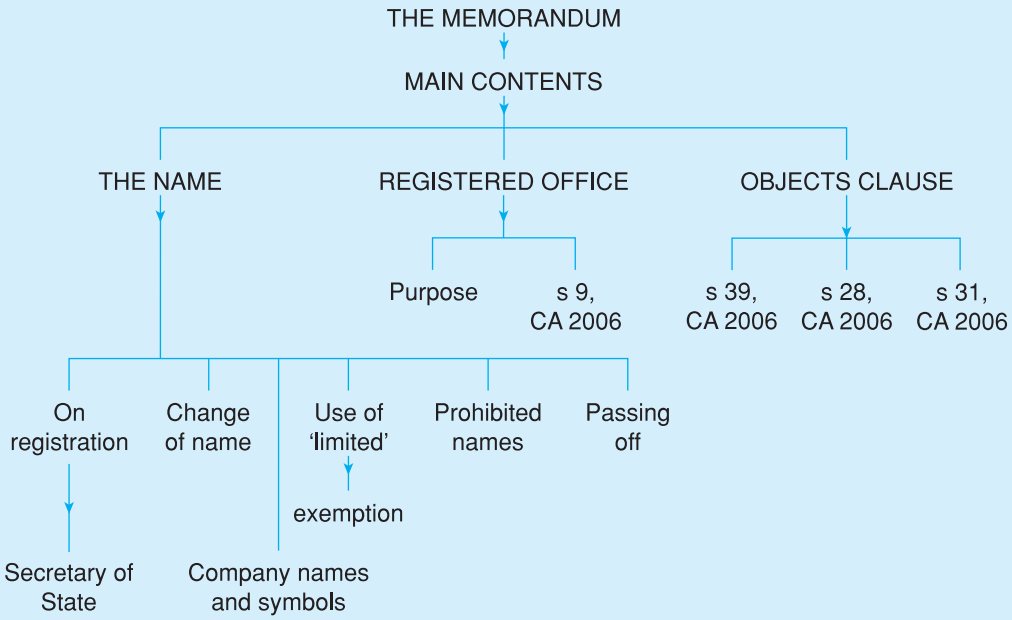
area. Meg has now formed a company called Meg (Corporate Services) Ltd and has started to compete against Trent Ltd through the company. Will Trent Ltd be able to obtain an injunction to prevent Meg (Corporate Services) Ltd from competing against Trent Ltd?

A No, because Meg (Corporate Services) Ltd is a separate entity.
B Yes, because the company has been formed as a device to avoid the restraint clause.
C No, since the company is not liable for the actions of its shareholders.
D Yes, because Meg (Corporate Services) Ltd is engaged in wrongful trading.

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

Visit **www.mylawchamber.co.uk/keenancompany** to access study support resources including practice exam questions with guidance, weblinks, legal newsfeed, answers to questions in this chapter, legal updates and further reading.

3 The constitution of the company – the memorandum of association



Under the Companies Act 1985, the constitution of a registered company consisted of two documents called the memorandum of association and the articles of association. However, this situation has been changed under s 17 of the Companies Act 2006, which now states that a company's constitution consists of the articles of association and any resolutions and agreements to which Chapter 3 (of the 2006 Act) applies.

The memorandum is still required for registration under s 9 of the Companies Act 2006, but is reduced significantly in its role, complexity and length. According to s 8, the document simply states the intention of the subscribers to form a company and to be members of the company on formation as well as to take at least one share each in the company (if limited by shares). The memorandum must be in the prescribed form and authenticated by each subscriber (s 8(2)).

For existing companies, s 28(1) states that provisions within the memorandum which fall outside those envisaged by the Companies Act 2006, will be treated as provisions of the articles. In other words, these provisions will still form part of the company's constitution as defined by s 17.

In line with this approach, the objects clause (formally one of the fundamental elements of a company's memorandum) has now been relocated to the articles of association. In addition, s 33(1) of the Companies Act 2006 provides that the objects of a company are unrestricted unless the articles specifically restrict them. This is regarded by many as a considerable step forward in the area. In the past, many companies were wary of the doctrine of *ultra vires* (discussed later) and as such their objects clauses were extremely long affairs, despite attempts to simplify the area (i.e. s 3A of the Companies Act 1985 permitted a company 'to carry on business as a general commercial company').

The remainder of this chapter will cover those issues which until the new Companies Act were traditionally contained within the memorandum of a company.

Company names

Section 9(2)(a) requires the application for registration to include the company's proposed name. Furthermore, s 82 states that the Secretary of State has power to require companies to give appropriate publicity to their names thereafter at their places of business as well as on business correspondence and related documentation.

A company's choice of name is subject to a number of limitations. First of all, ss 58 and 59 state that if the company is a limited company, then its name must end with the prescribed warning suffix 'limited'/'Ltd' (if it is a private company) or 'public limited company'/'plc' (if it is a public company). This requirement is subject to limited exemptions outlined in s 60 (i.e. if the private company is a charity). The purpose of this requirement is to act as a warning to anyone dealing with the company that it is an entity which has limited liability (though many feel that this is a little outdated and not very effective in practice).

In addition, under s 53, there are certain prohibited names which limit a company's choice. These include anything that is regarded offensive or which, in the opinion of the Secretary of State, would constitute an offence. This category of restriction will not often be met with in business but the Registrar turned down the names 'Prostitutes Ltd', 'Hookers Ltd' and 'Lindi St Claire French Lessons Ltd' when application was made for the registration of the

business of a prostitute (***Attorney-General* v *Lindi St Claire (Personal Services) Ltd*** [1981] 2 Co Law 69).

Furthermore, s 54(1) states that the approval of the Secretary of State is required for the use of a name that would be likely to give the impression that the company is connected with Her Majesty's Government, a local authority, or any public authority. Equally, the name of a company must not include indications of company type or legal form (i.e. public limited company) except in accordance with the requirements outlined above (s 65).

Finally, and probably most importantly, the proposed name of a company must not be the same as any name that already exists on the Registrar's index of names (s 66). This may appear easily avoidable, but when one considers the fact that there are currently over 2 million names on the Registrar's index, then the process becomes a little more complicated, especially when one considers the possibility for 'passing off'. Once again, a limited exception has been introduced by way of s 66(4) for groups of companies.

Where the approval of the Secretary of State is required, the necessary evidence must be submitted with the incorporation documents or with the relevant resolution on a change of name. Where the approval of a particular body or organisation is required, a statement that an approach to that body or organisation has been made, together with a copy of any response received, must be included. This would be the case where the word 'charity' was to be used and the Charity Commissioners had been approached.

Once a suitable name has been decided upon though, the company may progress the process of registration. However, a final word of caution must be noted. Even if the company successfully registers its chosen name, the Secretary of State may, within 12 months of registration, direct a change because a name has been registered which is the same or too like that of an existing company. This permits an existing company to pursue a more cost effective mode of challenging a newly registered company name that is causing confusion, than that of a 'passing off' action. If the Secretary of State so directs a company to change its name then non-compliance is a criminal offence on the part of the company and every officer in default. Once that time has passed and the existence of a company with a 'too like' name has not been discovered by the first company to have the name, then the first company is left with the only other remedy, i.e. to seek redress at common law in the law of tort.

A company or other business organisation which carries on or proposes to carry on business under a name calculated to deceive the public by confusion with the name of an existing concern commits the civil wrong (or tort) of passing off, and will be restrained by injunction from doing so from the moment of incorporation. Consequently, in the case of ***Tussaud* v *Tussaud*** (1890) 44 ChD 678, the court granted an injunction in favour of the company which owed Madame Tussaud's waxworks so as to prevent a member of the Tussaud family from carrying on a similar waxworks show under the name of 'Louis Tussaud Ltd'. Where the offending business is a proposed company, an injunction can be obtained to prevent registration, if information is available in time. If an injunction is made against an existing company for passing off, it must either change its name or its business or wind up. In addition, it is not necessary to demonstrate that the deception was intentional (***British Diabetic Association* v *Diabetic Society Ltd*** [1995] 4 All ER 812).

It has already been noted that the mere fact of using one's own name in business will not necessarily prevent a successful passing-off claim by an organisation already in business under that name (***Asprey & Garrard Ltd* v *WRA (Guns) Ltd*** (2001).

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.