director would not be entitled to the salary applicable to the post (***Kerr* v *Marine Products Ltd*** (1928) 44 TLR 292). *Table A* provides for the payment of directors' expenses of office.

Where there is a provision for remuneration, it is *payable whether profits are earned or not* (***Re Lundy Granite Co*** (1872) 26 LT 673), and in a winding-up the directors rank for their remuneration with ordinary creditors and are not deferred, though they are not preferential creditors, except in respect of a salary which may be payable to them as where they occupy a non-board managerial position, e.g. a company secretary, in addition to membership of the board.

Whether a director who vacates office before completing a year in office is entitled to a proportionate part of his yearly remuneration will depend upon the wording of the articles. Where *Table A* applies (replaced by the new Model Articles in newly incorporated companies), there is no problem since under *Table A* directors' remuneration accrues from day to day so that they are entitled to a proportionate part of yearly remuneration.

If the director works for the company without a contract, he can recover a sum of money for his service under a *quantum meruit* but this remedy is not available where the director has a contract which has used inappropriate words.

Craven-Ellis* v *Canons Ltd [1936] 2 KB 403

The claimant was employed as managing director by the company under a deed which provided for remuneration. The articles provided that directors must have qualification shares, and must obtain these within two months of appointment. The claimant and other directors never obtained the required number of shares so that the deed was invalid. However, the claimant had rendered services, and he now sued on a *quantum meruit* for a reasonable sum by way of remuneration.

Held – by the Court of Appeal – he succeeded on a *quantum meruit*, there being no valid contract.

Re Richmond Gate Property Co Ltd [1964] 3 All ER 936

The company was incorporated on 19 January 1962, and a resolution for a voluntary winding-up was passed on 20 September 1962, a declaration of insolvency being filed. Walker, one of the two joint managing directors, lodged proof of a salary claim which the liquidator rejected. Walker was appointed on terms that he should receive 'such remuneration as the directors may determine', and in fact no remuneration was fixed. He claimed £400 either in contract or on *quantum meruit.*

Held – by Plowman J – the liquidator was right in rejecting the proof. There was no claim under the contract which was only for 'such remuneration as the directors may determine' and none had been so determined. Moreover, the existence of an express contract in regard to remuneration automatically excluded a claim on a *quantum meruit*.

Comment

Although the decision seems harsh and represents the law, in this case there had been an understanding that until the company got on its feet, which it never did, no remuneration should be paid.

Contract of service

Remuneration by way of contract of service is governed by different rules. *Table A* provides that service contracts may be made by the board with individual directors thus ousting the general fiduciary rule that a director may not contract with his company. *Table A* allows the director concerned to be counted in the quorum at the meeting at which the company through its board decides to contract with him, though he cannot vote on his own appointment. Directors have, therefore, even under *Table A*, a largely unsupervised freedom to fix their own salaries and other terms of employment by using the contract of service approach.

The Model Articles for Private Companies Limited by Shares, the Model Articles for Private Companies Limited by Guarantee and the Model Articles for Public Companies set forth the regulations concerning conflict of interest and directors' contracts in Articles 14 (for the first two) and Article 19 (for the last). All three Model Articles specifically exempt a director's contract from being considered a conflict of interest. A director who is interested in an actual or proposed transaction or arrangement with the company is to be counted as participating in the decision-making process for quorum and voting purposes when the director's conflict of interest arises from a permitted cause such as arrangements pursuant to which benefits are made available to employees and directors or former employees and directors of the company or any of its subsidiaries which do not provide special benefits for directors or former directors.

In addition, the UK Corporate Governance Code (Financial Reporting Council, June 2010) which applies to all companies with a Premium Listing of equity shares regardless of whether they are incorporated in the UK or elsewhere also contain provisions concerning the level and make-up of directors' remuneration and the procedure for determining an individual director's remuneration. LR 9.8.8R of the Listing Rules also has information that a report to shareholders by the board must contain on directors' remuneration.

CA 2006, s 227 has introduced a definition of a director's service agreement for the purposes of Part 10 of the CA 2006 which includes contracts of service, contracts for services and letters of appointment to the office of director. While s 227(1)(a) covers contract between the director and the company to perform services for the company and s 227(1)(b) covers those services the director might make available through a third party entity such as his or her personal services company, in either case, the contract must require the director personally to perform the service or services in question. Moreover, s 227(2) ensures that the definition includes arrangements under which the director performs duties within the scope of the ordinary duties of the director, and contracts to perform duties outside the scope of the ordinary duties of a director.

CA 2006, ss 228 to 230 replaced CA 1985, s 318 which provided that directors' service agreements must be open to inspection by the shareholders, unless at the relevant time the unexpired portion of the term was less than 12 months or the company could terminate the contract within 12 months without payment of compensation. A company must keep available for inspection copies of all directors' service agreements (or, where the contracts are not in writing, memoranda of their terms) entered into by the company or one of its subsidiaries for a period of at least one year from the date of termination or from the date they expire. The copies must be retained at the company's registered office (or a place specified in regulations made under CA 2006, s 1136). This includes directors' services agreements regardless of the length of any service agreement, e.g. whether or not it is terminable within 12 months as well as those in respect of directors working overseas. On payment of a fee, shareholders have the right to inspect a director's service agreement pursuant to CA 2006, s 229 and those of shadow directors as well under CA 2006, s 230.

CA 2006, s 188 requires shareholder approval for directors' service agreements that are fixed for at least two years replacing CA 1985, s 319. However, such approval is not required by the members of a company which is either a non-UK company or a wholly owned subsidiary. CA 2006, s 189 provides that if the company agrees to a provision in contravention of s 188, the provision is void to the extent of the contravention, and the contract is deemed to contain a term entitling the company to terminate it at any time on reasonable notice.

Taxation of director's fees

As an 'office holder' for tax purposes, a non-executive director's fees must be paid after deduction of tax and national insurance contributions at source under the HMRC's PAYE scheme. CA 2006, s 1177 provides that it is now possible for a company to agree to pay fees gross to a director, or to guarantee a fixed net value, although the obligation under PAYE remains.

Waiver of remuneration

If in, say, difficult times the directors wish to waive all or any of their remuneration, then in order to protect the company from possible claims, e.g. by personal representatives following the death of a director who had waived, the waiver should be absolute and by irrevocable deed since the company will not normally be able to show that it gave consideration for the waiver. A mere minute of the waiver following a resolution at a board meeting is not enough.

Reporting on directors' pay – listed companies

CA 2006, s 412 mandates disclosure of information about directors' benefits with special reference to remuneration. CA 2006, s 413 mandates disclosure of information about directors' benefits such as advances, credit and guarantees. Together they replace CA 1985, s 232. CA 1985, s 232 with Schedules 6 and 7A mandated disclosure of specified information on directors' remuneration in notes to a company's annual report.

CA 2006, s 412 provides that the Secretary of State may make provision by regulations requiring information to be given in notes to a company's annual accounts about directors' remuneration including: (a) gains made by directors on the exercise of share options; (b) benefits received or receivable by directors under long-term incentive schemes; (c) payments for loss of office (as defined in CA 2006, s 215); (d) benefits receivable, and contributions for the purpose of providing benefits, in respect of past services of a person as director or in any other capacity while director; and (e) consideration paid to or receivable by third parties for making available the services of a person as director or in any other capacity while director.

Chapter 6 of Part 15, CA 2006 deals with quoted companies directors' regulations. Section 420 of the CA 2006 requires the directors of a quoted company to prepare a director's remuneration report for each financial year of the company. Section 421 of the CA 2006 states that the Secretary of State may promulgate regulation as to what may be included in the report. CA 2006, s 421(3) requires that the directors and any person who was a director in the previous five years must provide information to the company to be included in the directors' remuneration report. CA 2006, s 421(4) provides that failure to do so is an offence punishable by a fine. Section 422 of the CA 2006 sets forth the requirements for approval and signing of a directors' remuneration report.

Schedule 8 of *The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008 (2008/410)* replaced *The Directors' Remuneration Report Regulations 2002 (SI 2002/1986)* (the 2002 Regulations) which were introduced to improve disclosure on quoted companies' pay policies for directors and to give shareholders a say on those policies at the AGM by introducing a compulsory annual shareholders' vote on directors' remuneration packages as set out in the directors' remuneration report.

Directors' remuneration reports must contain the following information:

- The names of the persons on the company's remuneration committee who have considered matters relating to directors' remuneration and the name of any person who provided material advice or services to the committee.
- The company's policy on directors' remuneration for future financial years, including details and explanations of performance criteria for share options and long-term incentive schemes.
- A statement of how pay and employment conditions of employees of the company and of other undertakings within the same group as the company were taken into account when determining the directors' remuneration for the relevant financial year.
- A performance graph providing historic information on the company's performance against the relevant criteria showing the company's total shareholder return compared with that of a broad equity market index over a period of the five most recent financial years (or, if fewer, the number of years since the company obtained its listing).
- Details of the directors' service contracts (such as date, unexpired term, notice periods, compensation provisions, provisions on company's liability for early termination, significant awards made to former directors).
- The amount of each director's emoluments and compensation.
- Details of the directors' share options.
- Details of long-term incentive schemes.
- Details of pensions.
- The amounts of excess retirement benefits of directors and past directors.
- Details of significant compensation for former directors.
- Details of sums paid to third parties in respect of a directors' services.

Part of the directors' remuneration report is subject to audit and this is the information that is required by Part 3 of *Schedule 8 to the Large and Medium-sized Companies Regulations*, e.g. the amount of each director's emoluments and compensation in the relevant financial year; details on share options, long-term incentive schemes and pensions. CA 2006, s 498(1)(c) requires the company's auditor to investigate and confirm that the auditable part of the directors' remuneration report is in line with the company's accounting records and returns and to include any information that has been omitted and which was required to be included. CA 2006, s 422(1) requires that the board must approve the directors' remuneration report and it must be signed on behalf of the board by a director or the company secretary.

CA 2006, s 427 requires quoted companies to lay copies of its annual accounts and reports before the company in general meeting. Additionally, CA 2006, s 439 provides that a quoted company must, prior to its accounts meeting, give its members notice of an ordinary resolution approving the directors' remuneration report, although entitlement of a person to remuneration is not conditional on the resolution being passed.

CA 2006, s 439(4) requires all persons who were directors of the company immediately before the general meeting to ensure that the resolution is put to the vote of the meeting. As with other fine provisions in the CA 2006, failure to comply with s 439 makes every officer in default liable to a fine. Moreover, as with other fault schemes in the CA 2006, s 440(2) provides that if the resolution is not put to the vote of the accounts meeting, an offence has been committed by each existing director subject to a 'reasonable steps' defence provided for under CA 2006, s 440(3).

CA 2006, s 463 provides that directors will be liable to the company in relation to the whole of the directors' remuneration report (or summary financial statement derived from it) but will not have liability to anyone else relying on these reports in the absence of civil penalties or criminal liability.

CA 2006, s 430 mandates that quoted companies now must also make their annual accounts and reports available to the public on their website, until their accounts and reports for the next financial year are so made available.

Comment

Paragraph 686 of the *Explanatory Notes to CA 2006* provides that s 440 restates the requirement under s 241A of CA 1985 that a quoted company circulate a resolution approving the directors' remuneration report for the preceding financial year to its shareholders prior to its annual general meeting. However, the comment emphasises that the vote is advisory: 'as such, it does not require directors to amend contractual entitlements, nor to amend their remuneration policy, but the result of the vote will send a very strong signal to directors about the level of support among shareholders for the board's remuneration policy. In practice, directors will wish to take notice of the views of the company's members, and to respond appropriately.'

The power to pay directors

As regards the power to pay, a company may remunerate its directors where this is 'reasonably incidental to the carrying on of the company's business', *per* Bowen LJ in ***Hutton*** v ***West Cork Railway*** (1883) 23 Ch D 654.

Directors and the national minimum wage

It may be that while a business is being built up a director pays himself nothing while paying other employees a reasonable wage. The director may have a spouse at work or savings, or may simply get by on very little until the business is established. What is the position in regard to the payment to the director of the minimum wage (NMW)?

The NMW does not apply to company directors unless they also have contracts that make them workers. Company directors are office holders in common law and can do work and be paid for it in that capacity. This is true no matter what sort of work is done or how it is rewarded. However, company directors who also have employment contracts will need to be paid the NMW for work done under that contract.

Guidance on the NMW and directors and family members working for a family company is given in Issue 50 of the *Inland Revenue Tax Bulletin*. It is in the form of an article written by the Tax Faculty of the Institute of Chartered Accountants in England and Wales. The guidance confirms that directors and company secretaries who are paid less than the minimum wage should ensure that there is *no contract of employment with them*. That being so, the NMW is unlikely to apply. Other family members working in a family company who are not office holders may need to have their wages increased to comply with the NMW. There is, of course, the possibility that the law might *imply a contract* with a working office holder, such as a director. However, the DTI (now BIS) has informed the Revenue (now HMRC) that if there is no written contract of employment or other evidence of an intention to create an employer/employee relationship, it will not contest the relationship on the implied-contract ground.

Where the power to pay remuneration is expressly set out in the company's constitution, as it is in *Table A* or the Model Articles, it would seem that it can be made even though the company is not a going concern. There is no requirement that directors' remuneration should be paid only from distributable profits.

Re Halt Garage (1964) Ltd [1982] 3 All ER 1016

The entire issued share capital of the company was owned by a husband and wife, Mr and Mrs Charlesworth, who were also the only directors. During its early years the company prospered. Both husband and wife worked very hard. Later, the company got into financial problems and went into what eventually became compulsory insolvent liquidation.

The liquidator issued a summons against husband and wife under what is now s 212 of the Insolvency Act 1986. He wanted the court to decide that they were jointly and severally liable to repay to him certain sums paid to them both as directors under an express power now in Reg 82 of *Table A* which provides that: 'The directors shall be entitled to such remuneration as the company may by ordinary resolution determine [. . .]' during the period when the company had been making a loss. In regard to the husband's remuneration, the liquidator wanted repayment of that part of it which it was alleged had exceeded the market value of the work he had done. In regard to the wife, repayment was sought of the whole of her remuneration during the periods when she could not work by reason of illness. Counsel for the liquidator said quite simply that the payments to Mr and Mrs C were presents which the company had no power to make and which could not be ratified by the shareholders. Counsel for Mr and Mrs C said that the company had an express power to determine and pay directors' remuneration and that in the absence of fraud on the creditors or on minority shareholders, the amount of such remuneration was a matter for the company.

Mr Justice Oliver (as he then was) decided that:

(i) The amount of remuneration awarded to a company director was a matter of company management. Provided there has been a genuine exercise of the company's power to award remuneration and in the absence of fraud on the creditors or minority shareholders, it was not for the court to determine it or to decide to what extent it was reasonable.

(ii) Since there was no evidence, having regard to the company's turnover, that Mr C's drawings were obviously excessive or unreasonable or that they were disguised gifts of capital, the court would not enquire whether it would have been more for the benefit of the company if he had taken less. That was a matter for the company. The claim for misfeasance in regard to Mr C's drawings failed.

(iii) As regards Mrs C's drawings, the company's articles (now Reg 82 of *Table A*) gave power to award remuneration to a director on the mere assumption of office. It was not necessary that he should be active in any sense. To this extent the liquidator's claim that he should recover everything paid to Mrs C during periods of absence failed. However, where a director was not active, the court could examine the amount of the drawings. In the circumstances Mrs C was entitled to £10 per week (she had drawn £30) merely for being a director even during the period in which she was not active. Amounts drawn in excess of this were repayable to the liquidator.

Comment

It would appear from this decision, which affirms ***Re Lundy Granite Co Ltd, Lewis's Case*** (1872) 26 LT 673, that there is no need for directors' remuneration to come from profits. Any requirement that it must would bring some companies to a standstill and prevent those which had fallen on hard times from being brought round. The creditors' right to have the capital kept intact is subject to the consideration that directors may be paid remuneration.

Compensation for loss of office

CA 2006, ss 215–222 set out the provisions on payments for loss of office. These scenarios might include the retirement of a director from a company or other situation when an individual loses his position as director. It is important to note that the sections cover both loss of employment in connection with the management of company affairs as well as the loss of office as director including both payments made in connection with retirement and non-cash benefits which count towards compensation under CA 2006, s 215(2). Shareholder approval (CA 2006, ss 217(1) and 218(1)) is required where a company wishes to make a payment for loss of office to a director of the company or a payment for loss of office to a director of the company in connection with the transfer of the whole or any part of the undertaking or property of the company. CA 2006, s 219 mandates shareholder approval for payments for loss of office to a director in connection with a share transfer in relation to shares in the company or a subsidiary, resulting from a takeover bid. CA 2006, s 220 exempts payments made in good faith in discharge of an existing legal obligation, e.g. damages for breach of such an obligation by way of settlement or compromise of any claim arising in connection with the termination of a person's office or employment from approval by shareholders. If the company or any of its subsidiaries is making only a small payment to the director which does not exceed £200 then this payment needs no shareholder approval pursuant to CA 2006, s 221. All payments made to directors for loss of office or for anything to which a director is entitled under the service agreement are not included in the substantial property transaction regime to be discussed below whereby shareholders' approval is required.

If a payment is not disclosed and approved by shareholders where required, the director holds the money on trust for the company, and must repay the sum involved to the company (***In Re Duomatic Ltd***, 1969, see Chapter 17). Furthermore, a director is also by reason of CA 2006, s 219 under a duty to disclose payment for loss of office made in connection with a transfer of shares on an offer, for example, to take over the company. In so far as the amount a director is to receive is not disclosed and approved by the shareholders, the director concerned holds the money on trust for persons who have sold their shares as a result of the offer. The director concerned must bear the expense of distributing the compensation to them.

See p. 334

A payment will be treated as compensation for loss of office only if the company is under no legal obligation to make it. Thus payment of damages to a director who is dismissed in breach of his service contract, whether the damages are settled out of court or assessed by the court, does not require the approval of members. It was held in ***Mercer* v *Heart of Midlothian plc*** 2001 SLT 945 that payments by way of compensation are not confined to cash payments but can cover also the transfer of a company asset.

In addition, an amount which a director receives under the terms of his service contract on his resignation or removal from office in terms of severance pay is not treated as compensation for loss of office because the company is obliged by the contract to pay it. Thus, it is payable unconditionally when the resignation or removal takes place and it does not require the approval of the members in general meeting (***Taupo Totara Timber Co Ltd* v *Rowe*** [1977] 3 All ER 123). The decision of the Privy Council in ***Taupo*** was affirmed by the Court of Session in ***Lander* v *Premier Pict Petroleum Ltd*** [1998] BCC 248.

Fair dealing by directors

This section is concerned with the basic rules relating to loans, quasi-loans and credit to directors, along with material interests and substantial property transactions. CA 2006, ss 197–214 (replacing CA 1985, ss 330–342) introduced major changes some of which we will explore herein. Most critically, the CA 2006 abolished the general prohibition on loans to directors and replaced it with a requirement of shareholder approval for all companies. CA 2006 also introduced provisions to ensure that public companies, and any private company associated with a public company, may only make quasi-loans to directors, loans or quasi-loans to connected persons or enter into credit transactions with directors or connected persons, if shareholder approval is obtained. CA 2006 also abolished the criminal penalty for breach of the provisions on loans, raised the maximum amounts for the exceptions for expenditure on company business, small loans, small quasi-loans and small credit transactions, abolished the maximum amounts for the money lending companies exception and allowed for affirmation of loans, quasi-loans and credit transactions entered into by the company in line with the substantial property transaction provisions. Most critical to note is that the CA 2006 made significant changes to the regime that applies to loans made by a company to its directors by replacing the general prohibition on loans to directors with a requirement for member approval.

Loans, etc. to directors

CA 2006 made significant reforms to the regulatory structure that applies to loans made by a company to its directors. It replaced the general prohibition on loans to directors with a requirement for member approval. Restrictions still exist for public companies (and private companies associated with public companies) with respect to quasi-loans and credit transactions. A description of loans, quasi-loans, credit and connected persons may be useful at this point.

Loans and quasi-loans

Basically a quasi-loan occurs when a director incurs personal expenditure but the company pays the bill. The director pays the company back later. In a loan situation the company would put the director in funds: he would buy, say, personal goods with the money, and then repay the loan. In some cases, for example, quasi-loans arise when the company buys a yearly railway season ticket for a director of the company or its holding company and he then repays the company; or a director uses a company credit card to pay for personal goods, e.g. a video, and the company pays the credit card company and then the director reimburses the company. CA 2006, s 199 defines 'quasi-loan' adapting the CA 1985, s 331(3) definition.

Credit

Examples are: (1) a furniture company sells furniture to a director of the company (or its holding company) on terms that payment be deferred for 12 months; (2) the company services a director's personal car in its workshops and the director is given time to pay; (3) Motor Sales plc sells a BMW to the wife of one of its directors under a hire-purchase agreement. The wife is a 'connected person' and in some cases transactions with such persons are controlled.

Connected persons

In broad terms, a person who is not a director of the company concerned is regarded as connected with a director of the company if the person is the spouse, child or stepchild (under 18 years of age) of that director. Also connected are companies (called associated companies) in which the director and his connected persons have together a one-fifth or more interest in the equity share capital or control one-fifth or more of the voting power.

Trustees of trusts whose beneficiaries include the director or the director's spouse or any child or stepchild (under 18) or any associated company are also connected, as is a partner of the director or a partner of the director's connected persons.

CA 2006, s 197 enables all companies to make loans to directors of the company or holding company, or give guarantees or provide security for loans made by any person to such directors, with shareholder consent. Where the director is a director of the company's holding company, the members of the holding company must also approve the transaction. No approval is required by members of a company which is not a UK-registered company or is a wholly owned subsidiary.

Relevant statutory provisions

CA 2006, s 198 prohibits a public company or a company associated with a public company, from making a quasi-loan to a director of the company or its holding company, or from giving a guarantee or providing security in connection with a quasi-loan to such a director, unless shareholder consent has been given (including consent of the members of the holding company where the director concerned is a director of the holding company). No approval is required by members of a company which is not a UK-registered company or is a wholly owned subsidiary. Under CA 2006, s 256, companies are associated if one is a subsidiary of the other or both are subsidiaries of the same body corporate.

CA 2006, s 200 considers loans or quasi-loans to persons connected with directors. A public company or company associated with a public company may not make a loan or quasi-loan to a person connected with a director of the company or its holding company or give a guarantee or provide security in connection with a loan or quasi-loan made to such a connected person, unless shareholder approval is obtained (including consent of the members of the holding company where the connected person is connected with a director of the holding company). No approval is required by members of a company which is not a UK-registered company or is a wholly owned subsidiary.

CA 2006, s 201 covers credit transactions in that it states that a public company or a company associated with a public company may not enter into credit transactions or give a guarantee or provide security in connection with a credit transaction entered into for the benefit of a director of the company or its holding company or a person connected with such a director, unless shareholder consent is obtained (including consent of the members of the holding company where the director or connected person is a director of the holding company or a person connected with such a director). No approval is required by members of a company which is not a UK-registered company or is a wholly owned subsidiary. A 'credit transaction' is defined in CA 2006, s 202.

CA 2006, s 203 requires shareholder approval in relation to related arrangements. A related arrangement is one in which another person enters into a transaction that would have required shareholder approval under CA 2006, ss 197, 198, 200 or 201 if the company had entered into the transaction and under that arrangement, that person obtains a benefit from the company or a company associated with it. Alternatively, it can be where the company arranges for the assignment to it, or assumption of rights, obligations or liabilities under a transaction that, if it had been entered by the company, would have required shareholder approval.

CA 2006, ss 197, 198, 200 and 201 mandate additional requirements that must be met with respect to related transactions in addition to obtaining shareholder consent. For instance, a written memorandum setting out the nature of the transaction or arrangement, the amount and purpose of the loan, guarantee or credit transaction and the extent of the company's liability connected with it must be made available to shareholders before they give their approval by way of ordinary or written resolution.

However, shareholder consent need not be obtained under CA 2006, ss 197, 198, 200 or 201 if the transaction falls into one of the following exceptions:

- CA 2006, s 204 applies where (i) expenditures are made on company business and (ii) the value of the transaction in question and the value of relevant transactions or arrangements, do not exceed a maximum of £50,000. Expenditures here include funds provided to directors of the company's holding company and connected persons.
- CA 2006, s 205 applies where expenditures covered by this exception are restricted to expenditure in defending criminal or civil proceedings in connection with any alleged negligence, default, breach of duty or breach of trust by the director in relation to the company or an associated company.
- CA 2006, s 206 applies where expenditures in connection with regulatory action or investigation are made. Where anything is done by a company to provide a director (or director of its holding company) with funds to meet (or avoid) expenditure incurred or to be incurred by him in defending himself in an investigation by a regulatory authority, or against action proposed to be taken by a regulatory authority, in connection with any alleged negligence, default, breach of duty or breach of trust by him in relation to the company or an associated company, this exception is triggered.
- CA 2006, s 207(1) provides an exception for minor business expenses and transactions, loans of small amounts remains and quasi-loans (not just short-term quasi-loans) in and up to £10,000.
- CA 2006, s 207(2) provides an exception for minor credit transactions up to £15,000.
- CA 2006, s 207(3) provides an exception where the credit transaction is in the ordinary course of the company's business and is not on more favourable terms than would be offered to an unconnected person of the same financial standing.
- CA 2006, s 208 covers intra-group transactions made by associated body corporates which is where one body corporate is a subsidiary of the other or both are subsidiaries of the same body corporate.
- CA 2006, s 211(7) provides that where the value of a transaction or arrangement is unascertainable, it is deemed to exceed £50,000.
- CA 2006, s 214 provides that where the transaction or arrangement is affirmed by the shareholders within a reasonable period, the transaction may no longer be avoided.

Consequences of contravention

There are consequences in civil law as follows.

A loan which contravenes the provisions set out above is voidable at the instance of the company but no one else (CA 2006, s 213). In consequence, the company will be able to recover the funds from those into whose hands they have passed and there would appear to be no limit in time for avoiding the transaction. However, there are exceptions where:

- it is no longer possible to make restitution, as where the loan has been spent on a cruise;
- the company has been indemnified, e.g. by the borrowing director;
- avoidance of the loan would affect rights which were acquired in good faith and for value and without actual notice by a person other than the person for whom the loan was made. This is the usual protection for third parties and would, for example, cover the shipping company which had provided the cruise referred to above so that the loan would not be recovered from such a company.

It appears from case law that the existence of the above-mentioned tracing of funds remedies depends upon whether or not the company has actually avoided the contract of loan.

Ciro Citterio Menswear plc* v *Thakrar [2002] 2 All ER 717

In this case the High Court ruled that an illegal loan to a director which had been used to purchase a house could not be recovered by the company's administrator by an order for a sale of the property to extract the amount of the loan from the proceeds. At the time the property was purchased the company had not rescinded the loan so that the director was still the owner of the loan. Therefore no tracing remedy was available.

Comment

The administrator presumably did not rate highly his chances of getting repayment from the director and went instead for a tracing remedy into the property purchased with the loan. It would seem that the tracing remedy could be used if the loan was used to buy the property *after* the company had provided evidence, e.g. a board resolution that it had rescinded the loan.

In addition, whether or not the transaction has been rescinded, the director who is a party to it is liable to account to the company for any gain made from the loan and to indemnify the company against any loss or damage it has suffered which has not been put right by rescinding the loan. This liability is extended also to any other director who authorised the transaction, though such a person will not be liable if he can show that he did not know the relevant circumstances constituting the contravention at the time the transaction was made.

As an example of the above-mentioned civil remedies, the Court of Appeal has decided that a company is entitled under CA 1985 to demand from a director immediate repayment of an illegal loan made to the director, regardless of any other terms of the contract of loan which may provide differently.

Tait Consibee (Oxford) Ltd* v *Tait [1997] 2 BCLC 349

On 1 February 1994 the claimant company made a loan of £10,000 to the defendant, who was at that time a director of the company. In July 1994 the defendant's employment terminated and in October 1994 he ceased to be a director. By a letter dated 9 January 1995 the company demanded