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BEYOND CORPORATE INCAPACITY,

OR:

HOW I LEARNED TO STOP WORRYING AND LOVE THE ULTRA VIRES DOCTRINE.

Ph.D. Thesis

Trinity College, University of Dublin

October 2008

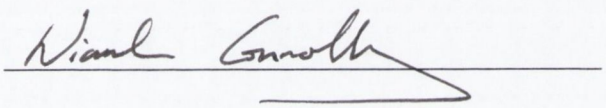
Niamh Áine Connolly

Volume 1 of 2

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Declaration

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Niamh Áine Connolly

Date: 31 October 2008

Summary

I. Summary of methods

The research contained in this thesis was conducted by employing the conventional techniques of academic legal research, drawing on a variety of primary and secondary legal materials. The law governing the principal topics addressed is primarily judicial in origin. The author therefore identified and studied relevant legal authorities, of which most were cases from the Republic of Ireland and the United Kingdom as well as authorities from a number of common law jurisdictions. She also researched the relatively small number of relevant statutory provisions in all the common law jurisdictions considered. In parallel, the author conducted a comprehensive search for relevant secondary materials. These materials included textbooks, edited collections, and journal articles from many jurisdictions. A number of theses held at other universities were located and considered. Official government reports on corporate capacity proved to be an important source. The research process was aided by the use of electronic databases, which facilitated access to domestic and international case law, statute and journals, as well as the materials available in the Berkeley Library of Trinity College Dublin.

II. Summary of findings

Limited capacity is neither a necessary nor an immutable feature of the corporate form. The determination in *Ashbury v. Riche* that registered companies should be subject to the ultra vires doctrine was not inevitable and reflects a mistrust of the corporate form due to historical circumstances. Since then, the application of the doctrine, as it evolved, provoked widespread criticism. Confusion arose from the conflation of the principles governing corporate capacity with other questions. The ultra vires doctrine relates solely to incapacity and must be clearly distinguished from other rules, in particular the law on directors' duties. The corporate benefit test, which was long used to control the intra vires exercise of corporate powers, is more appropriate for judging the valid exercise of directors' powers than for incapacity. The modern *Rolled Steel* approach is commendable for returning the appropriate emphasis to the contents of companies' objects clauses and simplifying the law on corporate capacity. It addresses many of the common criticisms of the doctrine. Unfortunately, *Rolled Steel* has not yet been fully and unambiguously applied in Irish law. Further important developments, especially in the field of remedies, have the effect that traditional concerns about the effect of the ultra vires doctrine on innocent outsiders are no longer warranted either. The statutory protection of the outsider to ultra vires transactions in

Irish law is unsatisfactory because it leaves many exceptions. However, a comprehensive system of remedies now ensures that incapacity does not cause injustice. The existence of a void contract no longer excludes a non-contractual restitutionary remedy. The modern Irish law of restitution is founded on the principle against unjust enrichment and is part of a wider evolution of the law in this area which is still taking place throughout the common law world. Cases arising out of transactions which are void for incapacity have made significant contributions to this development of the law of unjust enrichment. Restitution law will offer a remedy where property is transferred under a void contract even if both sides have fully performed under the non-existent contract. Failure of consideration is one relevant unjust factor. Failure of consideration need not be total, in particular when calculations can be made of net payments made. It is possible that it is absence of consideration rather than failure of consideration which operates in ultra vires cases. Furthermore, incapacity could legitimately constitute an unjust factor in restitution law but has not yet been recognised. Mistake is an alternative cause of action available. The mistake of law bar has no place in modern unjust enrichment law, though it has yet to be definitively removed in Ireland. In addition, the Irish courts are very willing to exercise their equitable jurisdiction to grant proprietary remedies. The remedial constructive trust is more appropriate as a remedial mechanism than the resulting trust. The *Belmont* institutional constructive trust offers a remedy in many ultra vires cases, as it applies wherever corporate property is misapplied in breach of fiduciary duty. Irish authorities demonstrate a willingness to impose remedial constructive trusts, without necessarily insisting on an unconscionability requirement. It would be preferable were they to exercise greater caution in awarding a proprietary remedy instead of a personal remedy. Due to the developments outlined in both substantive company law and the field of remedies, the principal arguments against limited capacity are no longer valid. Yet the pressure to abolish the doctrine remains strong. The ultra vires doctrine is viewed as inconsistent with modern perspectives on the corporation. Ultimately, the decision to give companies limited or full capacity is a policy choice open to the legislature. The recommendations of the Company Law Review Group that private companies should generally possess the full capacity of a natural person whereas public companies and other corporations will retain limited capacity are not necessarily desirable. They are not sufficiently straightforward and do not reform or clarify the doctrine for all the cases in which it will continue to apply. The abolition of objects eliminates a potentially worthwhile statement of business purposes. The modern conception of the company, influenced by stakeholder theory, would suggest that the ultra vires doctrine ought not prevent companies from acting altruistically. In conclusion, corporate objects ought to be retained as an internal discipline within companies.

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My ever-patient, kind and supportive *friends*, with special mention for *Dr Eimear Brown*;

And, in a special category of his own, **I express my eternal love and gratitude to my husband, *Mr Ciarán Toland.*** Marriage vows don't begin to cover this.

Dedication

I dedicate this thesis to the memory of my mother,

***Mrs Nóirín Creedon Connolly**, M. Ed.,*

whose tremendous love, love of learning and capacity for hard work are a towering inspiration.

I recall my mother quoting from Quintilian, so I reproduce the following paragraphs in her honour.

"... the perfection of eloquence is assuredly something, nor does the nature of the human mind forbid us to reach it, but if to reach it be not granted us, yet those who shall strive to gain the summit will make higher advances than those who, prematurely conceiving a despair of attaining the point at which they aim, shall at once sink down at the foot of the ascent."

- Quintilian's *Institutes of Oratory*, preface

"We must write, therefore, as carefully and as much as we can, for as the ground, by being dug to a great depth, becomes more fitted for fructifying and nourishing seeds, so improvement of the mind, acquired from more than mere superficial cultivation, pours forth the fruits of study in richer abundance and retains them with greater fidelity."

- Quintilian's *Institutes of Oratory*, X.3.2

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1. INTRODUCTION

1.1. INTRODUCING THE DOCTRINE OF ULTRA VIRES

> "A company, being an artificial person, has no capacity to do anything outside the objects specified in its memorandum of association. If the transaction is outside the objects, in law it is wholly void."[1]

The doctrine of ultra vires is founded on the premise that a corporation, at the moment when the state grants it legal personality, only receives limited legal capacity. Unlike natural legal persons, the contractual capacity of most corporations is fundamentally restricted. As a rule, adults who are of sound mind have full capacity to engage in any legal transactions which they wish.[2] By contrast, however, the corporation, as an artificial legal creation, has only such capacity to engage in legal transactions as is specifically granted to it. It is generally accepted under the doctrine of ultra vires that corporations are granted the capacity only to do certain acts in furtherance of their stated objects. When a corporation purports to exceed this capacity, it acts ultra vires, that is to say, beyond its powers, and all such acts are void.[3] The principle of limited capacity is both central to an understanding of the nature of the company and of real practical effect.

Company law's essential theoretical question asks: *what is a company?*[4] Another question, deeply intertwined with this, is also of real importance: *what can a*

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[1] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1986] Ch. 246, 303; [1985] 3 AER 52, 91 (per Browne-Wilkinson LJ).

[2] Ussher recalls that historically, natural legal persons have not always had uniformly full capacity - P. Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986), p. 16.

[3] See below at Chapter 4: Defining Ultra Vires".

[4] See H.L.A. Hart, "Definition and Theory in Jurisprudence" (1954) 70 LQR 37, 40; P. Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986), p. 16: "This commonplace of corporation law runs as a vital thread through all the branches of the subject."

company do?[5] The ultra vires doctrine answers the latter question by saying that the company has the legal capacity to pursue the objects set out in its founding act. In the case of statutory corporations, this is an Act of Parliament, and in the case of registered companies, their memoranda of association. The objects clause of a company's memorandum is drafted by its subscribers, and may be amended by the company, but the company is constrained to act within the limits it sets. The statement of objects serves as a warning to the world of the scope of the company's capacity.[6]

Furmston writes that limited capacity "once seemed a logical and indeed inevitable deduction from the nature of a company".[7] Yet it is not self-evident that the capacity of corporations should be limited to what is set out in their memoranda. This is illustrated by the divergent approaches taken to the different species of corporation.[8] Chartered corporations have the full capacity of a natural legal person, but statutory corporations are restricted to the powers set out in their creating acts. Furthermore, current proposals for the reform of company law in Ireland propose to grant full legal capacity to private limited companies in place of the limited capacity which has hitherto been dictated by the ultra vires rules.[9] This shows that restricted capacity is far from an inevitable attribute of the limited company. It was the courts which decided that the doctrine of ultra vires would apply to the registered

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[5] S. Brice, "A Treatise on the Doctrine of Ultra Vires", Preface to 3rd ed, p xvi: "the law of Corporations may be considered for most practical purposes as in reality only the application and development of the doctrine of ultra vires", quoted by C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), pp. 64-65; T. Hadden, "Company Law and Capitalism" 2nd ed. (Weidenfeld and Nicolson, London, 1977), p. 112.

[6] Cotman v. Brougham [1918] AC 515, 522 (per Lord Wrenbury): "it must delimit and identify the objects in such plain and unambiguous manner as that the reader can identify the field of industry within which the corporate activities are to be confined."

[7] M.P. Furmston, "Common Law Corporations and Ultra Vires" (1961) 24 MLR 518, 518.

[8] See below at Chapter 2: "The Corporation: History and Theory".

[9] Company Law Review Group, First Report (Dublin, 2001), Chapter 10.

company.[10] The House of Lords took this step in the seminal case of *Ashbury v. Riche*.[11] Even though it had not been expressly decided by parliament, the rule of limited capacity became firmly embedded through a century of legal decisions.

Questions as to the nature of the corporation and its capacity are not merely philosophical.[12] Trading companies are continuously interacting and conducting business with other legal persons. Those companies need to be certain that their commercial transactions are legally valid, and this certainty should not come at the price of costly legal advice. Their trading partners also need to be sure that the bargain they intended to strike, and believe they have struck, with the company is a valid and enforceable one.

1.2. THE CURRENT CONTEXT FOR THIS ANALYSIS

The current examination of the doctrine of ultra vires arises against a backdrop of the heavy criticism which the doctrine has suffered and the widespread trend in recent decades towards its reform and abolition.[13] A number of factors fostered hostility towards the ultra vires doctrine.

1.2.1. Societal Change

The societal context and, especially, attitudes towards the registered company have undergone a significant shift since the original decision in *Ashbury*.[14] The rule originates in and reflects a stance towards these corporations which is somewhat

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[10] See below at Chapter 3: "The Initial Application of the Doctrine of Ultra Vires to the Registered Company".

[11] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[12] "In the development of our association law in general we have been rather apt to pride ourselves on doing without general theories, while all the while engaged in applying and developing them" - W.J. Brown, "The Personality of the Corporation and the State" (1905) 84 LQR 365, 365.

[13] See eg G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989).

[14] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

antiquated. At the beginning of the twenty-first century, the registered company, in both its public and private forms, is the dominant form of corporation. While the vast majority of registered companies are private, the biggest economic actors are public, so both varieties are highly important in modern society. The period since the nineteenth century has seen the company thrive as a crucial actor in the modern capitalist economy and society. This timeframe has also seen a corresponding evolution in attitudes, both judicial and societal. The structure of company law has developed to ensure the regulation of corporations and prevent the dishonesty which originally fostered their ill-repute. If the initial response to the joint stock company, conditioned by memories of the South Sea Bubble, was one of mistrust, today's citizens and judges are comfortable with the company and aware of its importance.

1.2.2. The Move Towards Reform

These evolving attitudes coupled with specific legal criticisms of the merits and operation of the ultra vires doctrine have created an appetite for significant reform. The doctrine has evoked strong criticism. It is viewed as obscure and capricious.[15] It has led to notoriously unjust outcomes.[16] It undermines the security of commercial transactions. In order to assess the merit of any legal rule, it is important to consider why it was introduced, what interests it serves to protect, whether these interests are adequately served by other legal mechanisms, and whether the current solution prejudices other interests. The orthodox view is that ultra vires has been weighed in the balance and found wanting.

The initial legal foundation for the introduction of the principle of limited capacity was that it was a logical and necessary corollary of the statutory requirement that companies' memoranda state their objects. From this, it was deduced that the statement of objects must bind the company in its actions. The potency of this

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[15] L.H. Leigh, "Objects, Power and Ultra Vires" (1970) 33 MLR 81, 81: "It is a reproach to Parliament that it still exists in its present form. It is a reproach to the courts that it is even now obscure in its details and capricious in its incidence."

[16] In Re Jon Beauforte (London) Ltd (1953) 1 Ch. 131; [1953] 1 AER 634.

argument has been undermined by the subsequent statutory authorisation of the amendment of objects clauses.

The essential lasting rationale for the doctrine is that it preserves corporate assets in the interest of protecting shareholders and creditors. Shareholders are entitled to be informed of the ventures in which their investment is to be applied before they subscribe to the company. The company's assets, in which they have a residual interest, should not be endangered by speculations or transactions of a kind of which the investor was not forewarned. Similarly, the protection of the company's assets is seen to protect the interests of the company's creditors. They too are entitled to know, when they choose to do business with a company, the nature of its business and the uses to which its assets, from which they eventually expect to be paid, may be put. The basis of the doctrine of ultra vires is therefore reasonable, and the interests it protects worthwhile.

However, if the doctrine's motivation is laudable, it is not necessarily an appropriate and proportionate means to attain it. One of the defects of the rule is that it constitutes an illogical blanket prohibition on entire classes of activity which may in fact be highly profitable for the company and therefore beneficial to its shareholders and creditors. In many of the cases which have come before the courts, the company's officers chose to pursue a business opportunity in good faith believing it to be in the interests of the company, and yet ultra vires rules operated to block it. If its purpose is to prevent improvident transactions, it is a blunt instrument.

1.2.3. The Cost of Ultra Vires

The negative effects of ultra vires are evident from the cases. In the first place, commercial practices evolved so that objects clauses were drafted as broadly as possible.[17] Given the dramatic consequences of a finding of ultra vires, this is understandable. The result, however, was to undermine the statutory requirement that objects be stated. If all companies were empowered to engage in virtually all sorts of business, then the objects clause provided no real information to anyone

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[17] See below at Chapter 5: "The Interpretation and Drafting of Objects Clauses".

reading it, including potential shareholders and creditors. Furthermore, objects clauses became impenetrable.[18] Their complexity means that where a company is found to have acted ultra vires, it is generally because it has fallen into a technical trap.

The terms of objects clauses themselves were not the only factor which made it practically impossible to discover the true extent of any company's capacity. The courts interpreted objects clauses restrictively, refusing to acquiesce to the large capacity which companies attempted to award themselves. In particular, judges imposed external conditions on the valid exercise of the powers enumerated in companies' memoranda.[19] Thus, the meaning attributed to objects clauses diverged from that which appeared on the face of the document.[20]

The rules became complex, and compliance onerous and therefore costly. If one cost of the ultra vires doctrine was the compliance burden shared by all those transacting with companies, the other significant cost was borne by those parties which were unfortunate enough to fall foul of the rules. The application of the ultra vires doctrine led to alarming and harsh results. The plight of the innocent outsider to a void corporate contract elicited grave concern.[21] The law on corporate incapacity was seen to penalise the very creditors in whose interests the restrictions had allegedly been created. In some cases, an outsider which had performed its side of its bargain with the company was left deprived of recompense because the agreement was outside the company's capacity.[22] The outsider was deemed by virtue of the doctrine of constructive notice to have been aware of the lack of capacity because he ought to have studied and understood the company's objects

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[18] Cotman v. Brougham [1918] AC 515, 523 (per Lord Wrenbury); L.S. Sealy, "The Bell Tolls for Ultra Vires", (1986) 7 Company Lawyer 90, 90.

[19] In Re Lee, Behrens & Co Ltd [1932] 2 Ch. 46.

[20] See below at Chapter 6: "Powers, Corporate Benefit and Corporate Gifts".

[21] See below at Chapter 8: "The Effect of the Ultra Vires Doctrine on the Innocent Outsider".

[22] In Re Jon Beauforte (London) Ltd (1953) 1 Ch. 131; [1953] 1 AER 634.

clause. Looking at the negative effects of ultra vires in the cases, it is easy to understand the clamour for reform.

1.2.4. Alternative Protections

The perception that the ultra vires doctrine does more harm than good is bolstered by an acknowledgement that modern company law has developed other means of protecting the interests of shareholders and creditors.[23] If these new mechanisms offer sufficient protection, then limited capacity may lose its strongest justification.[24]

In particular, the law on directors' duties effectively requires those managing the company to act in the interests of the company and its shareholders. This duty more effectively targets unduly risky or speculative ventures than limiting them by domain. Other rules also challenge the continuing need for the ultra vires doctrine. A significant body of law now protects minority shareholders from abuses by the majority.[25] The exercise of directors' functions, particularly in insolvent companies, is now regulated by statute to ensure that the interests of creditors are not endangered.[26] Directors of insolvent companies have a fiduciary duty to creditors.[27] The existence of these other rules somewhat undermines the usefulness of ultra vires. Directors' duties and minority oppression rules are, broadly-speaking, sufficient to protect members and statutory regulation can ensure that the assets of companies which are at risk of insolvency are not fraudulently or recklessly dissipated.

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[23] D. Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27, 30.

[24] See below at 15.3: "Alternative Modes of Protecting Shareholders and Creditors".

[25] See Section 205, Companies Act, 1963 (minority oppression).

[26] See Section 286 of the Companies Act 1963, as amended by Section 135, Companies Act 1990 (fraudulent preference); Sections 297 and 297A, Companies Act 1963, as amended by Section 137, Companies Act 1990 (fraudulent and reckless trading); Section 298, Companies Act, 1963, amended by Section 142, Companies Act, 1990 (contribution towards assets for misfeasance).

[27] In Re Frederick Inns Ltd [1990] ILRM 582.

1.2.5. Legislative Reform

Due to the substantial criticisms levelled against it, the ultra vires doctrine has been reformed and effectively abolished in a number of common law jurisdictions in recent decades.[28] Initial reforms sought to mitigate the harsh effects of the rule on third parties who innocently dealt with a company in good faith, creating a statutory exception whereby certain innocent outsiders could rely on a contract which should in principle be completely void *ab initio*.[29] The doctrine was subsequently abolished in the United Kingdom. Now the Irish Oireachtas is to consider its severe restriction and the grant of full legal capacity to the majority of private companies in the proposed Companies Bill.[30] This is a critical moment for the doctrine in this jurisdiction.

However, the current draft Irish Companies Bill does not propose its complete abolition. No matter what happens with the current proposals, it will remain important to understand the precise scope and effect of the rule under modern law.[31] The example of the swaps litigation in the United Kingdom throughout the 1990s demonstrates that the ultra vires doctrine continues to operate and to evolve even after it is removed from the law of private companies.[32] In Ireland, ultra vires will continue to affect a wide range of corporations, including public companies, building societies, statutory corporations and even those private companies which choose to retain an objects clause.

1.3. Can Limited Capacity be Defended?

It might be assumed in this context that the case against the ultra vires doctrine is an open and shut one. In fact, significant developments in two distinct areas militate

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[28] See below at 16.1.2: "Legislative Reform in the Common Law World".

[29] See below at 8.3: "Legislative Reform to Protect the Outsider".

[30] See below at 16.3: "The Current Irish Proposals".

[31] See below at Chapter 7: "The Decline and Fall of the Corporate Benefit Test".

[32] Hazell v. Hammersmith and Fulham London Borough Council [1992] 2 AC 1.

against the need for reform. The full effect of these developments has not yet been appreciated. The two areas in which dramatic advances have been made are, first, within the substantive law on corporate capacity itself, and, second, in the field of remedies law.

1.3.1. The Principle of Ultra Vires in its Modern Form

Rolled Steel[33] must be the second most important landmark decision on corporate capacity. This decision and its extensive implications merit particular attention.[34] It returns the proper focus to the contents of each company's memorandum of association. It grants full effect to the terms of the objects clause in conferring on each company its stated capacity. It highlights the distinction between the law on incapacity and the proper exercise of corporate powers. It rejects an external test of corporate benefit for the exercise of enumerated powers to come within a company's capacity. The ultra vires doctrine in this modern incarnation is far more straightforward and justifiable than the old rules which led to confusion and injustice and brought the doctrine such a bad name.[35] If limited corporate capacity is itself a valid policy choice, then the modern analysis is a principled and fair manner of giving effect to that choice.

1.3.2. The Holistic Approach to Rules and Remedies

The second modern development is important in the context of corporate incapacity, but also of far wider significance. It comprises the dramatic progress which has been made in the area of private law remedies over the past two decades. By looking at the doctrine of ultra vires, not in isolation, as many company lawyers have tended to do, but as part of a bigger picture, many of the orthodox assumptions about the need for reform can be challenged. It is imperative to adopt a holistic view and follow the law through the incapacity and resultant voidness, on towards the

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[33] Rolled Steel Products Ltd v. British Steel Corporation [1984] BCLC 466; [1986] Ch. 246.

[34] See below at 7.2: "Rolled Steel: the Nail in the Coffin for Corporate Benefit".

[35] The "ultra vires chapter of the text-books should as a result become much shorter and a good deal more logical" - L.S. Sealy, "Ultra Vires and Agency Untwined" [1985] CLJ 39, 39.

grant of a remedy to reverse any unjust consequences for the parties. Only then can an accurate judgment be made as to whether the law on capacity is, or is not, an agent of injustice.

Traditional analysis of ultra vires has focused on the conditions in which the doctrine operates. Its effect, that a purported transaction was void and non-existent, seemed to leave little scope for debate. Certainly, as a matter of company law, the consequence of ultra vires is voidness. However, other, non-contractual remedies and consequences can now arise. If the first stage of legal analysis is to determine whether a doctrine applies and to apply it to the circumstances, the second essential step is to decide what happens next. In an ultra vires case, to say there is no contractual obligation is not the end of the matter.

For a long time, the assumption in the cases seems to have been that, if there was no contract, the loss lay where it fell.[36] In fact the prevailing implied contract conception of the law of restitution, as enunciated in *Sinclair v. Brougham*,[37] automatically precluded a legal remedy in most cases of ultra vires.[38] The objection was that the parties' attempt to conclude an express contract must logically exclude an interpretation of their conduct as based on an implied contract.

Given the underdeveloped state of the law of remedies in the past, perhaps it was justifiable to focus solely on application of the rule and the void contract as its final outcome. Modern developments in the law relating to remedies facilitate a new approach to the ultra vires doctrine. These changes resonate far beyond the question of void contracts.

1.4. The Law of Remedies in the Twenty-First Century

In the same period as the doctrine of ultra vires has been on the decline, the law of remedies has undergone a dramatic period of growth. This expansion can be seen

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[36] See In Re Cummins, Barton v. Bank of Ireland [1939] IR 60.

[37] Sinclair v. Brougham [1914] AC 398.

[38] See below at 9.2: "Traditional Approaches to Remedies and the Ultra Vires Doctrine".

both at law and in equity, especially in the law of restitution. Restitution as a branch of the common law is a source of non-contractual personal rights and obligations on the basis of the principle against unjust enrichment.[39] It offers a personal remedy which arises by operation of law, where the lacuna which exists due to the absence of a contract causes the unjust enrichment of one party. Moreover, equity, here as elsewhere, steps in at the discretion of the court to ensure that the strict application of the common law does not create injustice or favour a party who has acted wrongfully. The devices it may deploy include the resulting, and, more recently, the constructive trusts.[40] Tracing is available at both common law and equity. Consequently, the common law and equity may both offer a remedy where one party has transferred a benefit to another in the absence of a legal contract or other justification.

In the context of ultra vires, they permit the person who has executed his obligations under a void agreement to recover or be compensated for his loss. They may even allow both parties to recover the payments they have made to each other, thus unwinding a completed invalid transaction, though this raises complications which are not yet entirely resolved.[41] This contrasts with the severe restriction of the availability of remedies throughout most of the lifespan of the ultra vires doctrine. This absence fed the perception of ultra vires as a mythical source of injustice. The dramatic and expansive recent evolution in the law on remedies has significantly changed the environment in which ultra vires operates and must be assessed.

The pace of change in the law of restitution over the past fifteen years has been remarkable, building on advances in other common law jurisdictions. English law recognised the general and overarching principle of recovery for unjust enrichment

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[39] See below at Chapter 10: "Restitution and Unjust Enrichment Law".

[40] See below at Chapter 13: "Proprietary Remedies".

[41] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938; [1996] AC 669, [1996] 2 AER 961; Guinness Mahon & Co. Ltd. v. Kensington and Chelsea Royal London Borough Council [1999] QB 215; see below at Chapter 11: "Failure of Consideration".

in the landmark case of *Lipkin Gorman v. Karpnale*.[42] Ireland showed itself willing to take this path even earlier.[43] Since then vigorous academic debate and analysis has been to the forefront in developing a coherent theory of restitution and the judiciary has engaged with the new analysis. The refounding of restitution on unjust enrichment instead of implied contract has opened the door to restitutionary remedies in ultra vires cases. The courts have successfully grappled with their suspicion that the grant of a remedy indirectly gives effect to the void contract. *Sinclair v. Brougham*[44] is no longer a bar to a just remedy. The plaintiff can avail of a number of causes of action.[45] Furthermore, internal changes within restitution law have been expansive. In relation to the unjust factor of failure of consideration, the effects of the requirement that failure of consideration be total have been softened.[46] For claims to restitution on the ground of mistake, the old rule preventing recovery where the mistake was a mistake of law, as the legal capacity of a corporation would be, has been removed.[47]

Equitable remedies have also seen dramatic growth in recent years, particularly in this jurisdiction.[48] The resulting trust was traditionally a potential response to transfers under void agreements.[49] It was implied by the courts on the premise that a person who transferred a benefit without compensation intended the property to be held on trust for him. Today the resulting trust has been superseded as a likely

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[42] Lipkin Gorman v. Karpnale [1991] 2 AC 548.

[43] See In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] 1 IR 332; [1992] ILRM 349, 353, where Murphy J. cites East Cork Foods Ltd v. O'Dwyer Steel Co Ltd [1978] IR 103.

[44] Sinclair v. Brougham [1914] AC 398.

[45] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938; [1996] AC 669, [1996] 2 AER 961 (failure of consideration); Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558 (mistake).

[46] See below at Chapter 11: "Failure of Consideration".

[47] See below at Chapter 12: "Mistake".

[48] See below at Chapter 13: "Proprietary Remedies".

[49] Sinclair v. Brougham [1914] AC 398.

remedy in cases of this sort[50] by the development of the new model remedial constructive trust. In principle, the constructive trust is created by the courts in cases where the recipient of the property has not acted in good conscience, so that his conscience is affected. However, the Irish courts have overseen a remarkably expansive application of the doctrine, and an appraisal of the case law appears to suggest that the constructive trust may be implied in the absence of any wrongdoing on the part of the recipient.[51]

A mere brief outline of recent developments demonstrates that both common law and equity offer remedies today in circumstances where fifty years ago the loss would have lain where it fell. Furthermore, some authorities hint at a readiness to grant the more extensive proprietary remedy in circumstances where the personal remedy might seem sufficient and appropriate. This is good for plaintiffs, if not for competing creditors or legal principle.[52]

1.5. Assessing the Ultra Vires Doctrine in the New Context

Strong voices have called for the abolition of the doctrine of ultra vires for over half a century, and now it seems the Irish legislator is finally heeding these calls.[53] The primary and most potent argument against ultra vires has been that it produces injustices which outweigh any benefits it might bring in the protection of shareholders' and creditors' interests. But neither the law nor the environment in which it operates has remained static since these calls were first voiced. If the necessity of abolishing the doctrine may be characterised as the current orthodoxy, has this desire for a new approach become outmoded and obsolete before being realised?

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[50] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669.

[51] See below at 13.2.3.2: "The "new model" or remedial constructive trust".

[52] See below at 13.3: "A Personal or a Proprietary Remedy?"

[53] Notwithstanding the "minimal vote-winning capacity of reforming the ultra vires doctrine" - R.M. Temple, "Ultra Vires: The Dual Approach" (1987) 137 NLJ 1069, 1069.

Two phenomena coalesce to call into question the momentum for abolition. The first is the recent evolution of the rules governing ultra vires in a direction which favours a more expansive conception of companies' capacity.[54] The second, more radical, and probably more fundamental change, affecting this area along with many others, is the more extensive availability of legal remedies. In this new legal context, is it still the case that ultra vires is a source of injustice, or, on the contrary, has the moment for the abolition of ultra vires passed?

When the doctrine of ultra vires was at its peak, its faults were most apparent. The rules were liable to strike down innocent-seeming transactions, and even the most careful legal examination of companies' constitutions failed to ensure the security of transactions.[55] The doctrine generated confusion and uncertainty. It usurped the law on directors' duties in condemning matters which more properly should be regarded as ratifiable breaches of directors' duties. With equal indifference, it operated to the prejudice of the company, or those dealing with it, or anyone else unfortunate enough to have relied on the invalid transaction. At this time, it was hard to defend the law against the charges levelled at it. The tempering of the ultra vires doctrine in *Rolled Steel*[56] was not in itself enough to counter hostility to the doctrine. The ubiquitous move towards reform and abolition continues. To say that a rule is not quite as illogical, not quite as harmful as it once was is a weak defence.

Given the several significant developments of the past twenty years, coupled with the topicality of the proposals for reform, now is an opportune moment to re-examine the point where the doctrine of ultra vires and modern remedies intersect. The ultra vires doctrine is remarkable because it is so drastic in its effect.[57] It results in the non-existence of a purported transaction which is outside the capacity of the

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[54] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1986] Ch. 246, 303; [1985] 3 AER 52.

[55] See below at Chapter 6: "Powers, Corporate Benefit and Corporate Gifts".

[56] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1986] Ch. 246, 303; [1985] 3 AER 52.

[57] See below at Chapter 4: "Defining Ultra Vires".

company. The void act cannot be ratified even by the most authoritative exercise of the company's powers. In the absence of a non-contractual remedy, there is no recourse for the party which has lost out.

Acknowledging that the ultra vires doctrine once led to unjust outcomes, this complaint could in principle be addressed either by the reform of the rule itself or by mitigating its unsatisfactory consequences. Much attention has been paid to the first possible cure, but less to the alternative. Yet the necessary changes may already have taken place. The problem may already be solved. In fact, perhaps the clear-cut injustices which a finding of ultra vires occasionally produced have enabled it to play its part in acting as a valuable spur to the development of the law relating to remedies. These unjust outcomes may have been no more than a necessary phase in the law's evolution, as the practical consequences of the substantive principle and the availability of other remedies were worked out. Legal thought and judicial responses have answered the challenge which the ultra vires doctrine posed. It is the grain of sand in the oyster.

There was for a long time an undeniable divergence between the just objectives which inspired the doctrine and its unjust effects. It is now time to ask whether this gap has been closed. The ultimate purpose of these inquiries will be to consider whether the ultra vires doctrine is compatible with the requirements of justice.[58] If the doctrine of ultra vires will no longer produce the unjust results which led to its criticism, then the case against it is undermined, perhaps fatally.

Yet, even if a reappraisal signals that ultra vires no longer does the harm it once did, this is not yet a sufficient argument that it makes a positive contribution such as to justify its retention. The ultra vires doctrine goes some way to protecting valid interests, at a price, and with some overlap with other rules. These arguments are not determinative: there is neither a conclusive case for retention nor abolition.[59]

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[58] P.S. Atiyah, "Contract and Fair Exchange" (1985) 35 U. Toronto L.J. 1, 24: "once the law takes an interest, as it always has, and must, in the procedures themselves, it is of necessity compelled to take an interest in the substantive justice of contracts."

[59] See below at Chapter 15: "Judging the Ultra Vires Doctrine".

Whether companies should be empowered to engage in any conceivable form of transaction and do as they wish with their assets, even so far as to make gratuitous dispositions from them, turns on the law's conception of the company and whether it is in the interests of other members of society that its capacity be restricted.[60] Ultimately, whether companies should have limited or unlimited capacity is a policy choice. The law's response to this question will reflect a particular conception of the nature of the registered corporation. It is essential in considering the detail of the rules of company law to take into account the underlying philosophical positions.

Modern attitudes display an easy familiarity with the registered company and so favour the grant of full capacity to many companies.[61] The extension of the ultra vires doctrine from statutory corporations to the registered company reflected an attitude of mistrust towards this alien and potentially dangerous creature. Since then, societal and legal attitudes have evolved to become comfortable with the private limited company. This is the age of simplicity and efficiency in company law. The legislator aims to facilitate the ease of commercial transactions. Limits on the capacity of corporations are easily dismissed as a hindrance on the conduct of business. Legal fictions, such as the assumption that all persons have constructive notice of the constitution of companies, are unfashionable and become displaced because they do not accord with our understanding of commerce in the real world. If, however, it is possible to look back from today's vantage point and question the attitudes of mistrust underlying the decision of the House of Lords in *Ashbury*,[62] might not today's underlying prejudices and assumptions be equally doubtful? In particular, might this pragmatic focus on the real world at the expense of theoretical analysis be dangerous for the development of the law?

The law should conform both to today's values and priorities and to a more lasting framework of coherent legal principle. Commercial convenience, though a modern priority, is not the sole object of company law. Coherent legal theory should not be

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[60] See below at Chapter 17: "The Future of Corporate Capacity".

[61] See below at 15.1.1: "The Nature of the Registered Company".

[62] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

sacrificed on the altar of pragmatism and the ease of commercial transactions. The old questions remain: what is this corporation, that we choose to allow to act as a legal person?[63] Do its separate legal personality and the limited liability of its members put those who deal with it at risk? If so, is the ultra vires doctrine an appropriate and effective tool to achieve their protection?

1.6. THE CONTENTS OF THIS THESIS

In order to answer these questions, and to understand the doctrine of limited capacity as it was, and as it is, the author will begin with an outline of the history and theory which reveals the nature of the company. The initial judicial determination that the ultra vires doctrine applies to registered companies will be analysed in detail. The next chapter will elaborate on the nature of the ultra vires doctrine as a form of incapacity, including the consequences which from this fundamental characterisation. The significant themes which emerge from the operation of the doctrine in the courts will then be discussed. These main themes together provide a portrait of the ultra vires doctrine which has provoked such criticism. First, there is the conflict between those who drafted objects clauses in the hope of acquiring wide capacity and the courts, which resisted, imposing their own restrictive interpretations. Then there are the related questions of whether powers may only be exercised for a proper corporate purpose and whether companies may make altruistic gifts. The extrinsic corporate benefit test long dominated the authorities before its later decline and rejection in *Rolled Steel*. Thirdly, it is important to look directly at the issue which has been the lightning rod in commentary on the ultra vires doctrine: the position of the outsider who is prejudiced by the company's incapacity. The exploration of each of these themes shows both the reasons for opposition to the doctrine, and the improvements which have countered its worst excesses.

After engaging with the substantive law on corporate capacity, the focus shifts to the law on remedies. Successive chapters will present the current state of restitution

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[63] J. Dewey, "The Historic Background of Corporate Legal Personality" (1926) 35 Yale L.J. 655

law in Ireland, and consider each of the two unjust factors which will ground a remedy in unjust enrichment: failure of consideration and mistake. Proprietary remedies, including tracing and resulting and constructive trusts, add to the arsenal of disappointed contracting parties. Finally, an outline of the possibility of fault-based personal liability completes the picture of the generous supply of non-contractual remedies which can avail in ultra vires cases.

These two parallel studies, of the substantive law on corporate capacity and the modern law of remedies in Ireland, set the stage for a comprehensive re-evaluation of the ultra vires doctrine. Taking into account the various possibilities which exist for reform, the final chapter will present the author's conclusions and recommendations for the future of the ultra vires doctrine.

2. THE CORPORATION: HISTORY AND THEORY

2.1. INTRODUCTION TO THE CORPORATION

The ultra vires doctrine postulates that there are limits to the legal capacity of corporations or artificial legal persons. Judging the aptness of linking legal personality and limited capacity raises questions about the nature of the corporation. Two complementary approaches, reviewing the history of the corporation and the theory underpinning its legal existence, offer vital background information for the evaluation of limited capacity.

First, a survey of the range of corporate entities which have been recognised by the common law offers a number of insights.[1] It suggests answers as to whether limited capacity is a necessary attribute of legal personality, whether there are certain forms of corporation for which it is more or less appropriate, and whether or not the application of the ultra vires doctrine to the registered company was inevitable. It further places the registered company in its historical context. The rules on corporate capacity are not the result of any immutable law, but can be explained by historical circumstance and judicial choice. This survey also serves as a reminder that, while the focus of debate usually centres on the registered company, the ultra vires doctrine applies, and will continue to apply, to a variety of other corporations.[2]

Secondly, asking questions about the capacity of a corporation requires an engagement with the nature of the company at a theoretical level. Certain characteristics of the company, such as separate legal personality and limited

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[1] This encompasses a vast range, from the Crown to the corporation sole - see H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936).

[2] The Company Law Review Group proposes full legal capacity for private companies only - Company Law Review Group, First Report (Dublin, 2001), para. 10.9.2.

liability, are fundamental. Limited capacity might also be one of these essential characteristics.[3]

2.2. THE CORPORATION AS AN ARTIFICIAL LEGAL PERSON

The corporation is an artificial legal entity, which the law chooses to recognise as a legal person,[4] despite its composition as a body to which a number of legal persons belong.[5] The law treats it as a "right-and-duty-bearing unit", much like a man.[6] Yet, the corporation is a strange beast, "invisible, immortal and rests only in intendment and consideration of the law".[7] It benefits from a legal personality independent of any of those flesh and blood individuals who direct its actions. It enjoys the

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[3] Brice, Preface to 3rd ed, p xvi: "the law of Corporations may be considered for most practical purposes as in reality only the application and development of the doctrine of ultra vires", quoted by C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), pp. 64-65.

[4] Cf O. Von Gierke, "Political Theories of the Middle Ages" (Maitland trans., 1927): "No fiction, no symbol, no piece of the State's machinery, no collective name for individuals, but a living organism and a real person, with body and members and a will of its own", quoted in M.J. Phillips, "Reappraising the Real Entity Theory of the Corporation" (1993) 21 Fla. State. Univ. L. Rev. 1061, 1069; cf also M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31 MLR 481, 508: "it is inaccurate to describe companies as "fictitious" or "artificial" creations, for both their rights and powers upon incorporation and their existence as associations are as real and substantial as those of any natural person".

[5] See C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 1; W.J. Brown, "The Personality of the Corporation and the State" (1905) 21 LQR 365; F.W. Maitland, "The Corporation Sole", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 73, at 73: However, Maitland points to the particularity of the corporation sole in English law.

[6] See F.W. Maitland, "Moral Personality and Legal Personality", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 223, 225; cf unincorporated "quasi-corporations": K.W. Wedderburn, "Corporate Personality and Social Policy: The Problem of the Quasi-Corporation" (1965) 28 MLR 62.

[7] Case of Sutton's Hospital (1612) 10 Coke 23a, 30b-32b, (1612) 77 ER 960, 970-973.

potential immortality granted by perpetual succession.[8] The corporation's fundamental peculiarity raises difficult questions as to its legal nature.[9] Hart describes this as a "baffling analytical question".[10] Basic tenets of company law such as separate legal personality and limited liability offer the skeleton of a response to this question:[11] the company is considered wholly independent of its promoters, members, managers and any other natural persons with whom it might be identified. Once the law recognises the existence of an artificial legal person, the question of the extent of its legal capacity naturally follows.[12] Can a corporation do everything that a natural legal person can do,[13] or is its capacity restricted to certain acts or purposes?

While company law is increasingly codified, many of the basic principles of corporate theory were established in the courts.[14] They therefore represent judicial

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[8] C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 1, citing Blackstone, Commentaries, I 475; "The mortality of the members does not affect the immortality of the body", ibid, pp. 12.

[9] See H.L.A. Hart, "Definition and Theory in Jurisprudence" (1954) 70 LQR 37; J. Dewey, "The Historic Background of Corporate Legal Personality" (1926) 35 Yale L.J. 655.

[10] H.L.A. Hart, "Definition and Theory in Jurisprudence" (1954) 70 LQR 37, 40.

[11] Ibid, at 40: legal applications rarely have to decide between concepts of the corporation.

[12] Carr describes contractual liability as "the touchstone of associations" - C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 6.

[13] Except for acts such as marriage which are necessarily logically excluded – see F.W. Maitland, "Moral Personality and Legal Personality", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 223, at 225; "it is hampered by incapacities which arise partly from its natural and "internal" limitations, and partly from external restrictions imposed by the policy of the law" - C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905, p. 1; "it cannot stand upon its head or cut its throat, or do a multitude of things which are possible to the ordinary individual" ibid, p. 64; M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31 MLR 481, 486 et seq.

[14] L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. LR 1369, 1370: "All the statutes presuppose basic principles which for the most part have never been embodied in statutory form."

responses to this central question of the corporation's nature. Yet, while the journals contain many philosophical attempts to understand the nature of the corporation, these debates are not fully explored in the case law.[15] While overall theory is important in company law, so too is practicality, as companies are primarily commercial trading associations.[16] It has been suggested that one can understand the law in this area as based solidly and exclusively on the rules set out in statute and precedent.[17] However, such an approach would ignore any insights which might be garnered from the theory of the corporation in the task of identifying desirable future developments. Furthermore, while the theories may not be expressly adopted in the decisions, those decisions inevitably reflect judges' views of the corporation.[18]

2.2.1. The Variety of Corporations

The corporate landscape features registered companies, both public and private, statutory corporations and chartered corporations, and other bodies, such as trade unions[19] or co-operatives, which can be set up under general statutes other than the Companies Acts,[20] including friendly societies, industrial and provident societies

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[15] M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31 MLR 481, 508.

[16] "It is a creation of law convenient for the purposes of management, of the holding of property, of the association of individuals in business transactions" – Daimler Company Ltd v. Continental Tyre and Rubber Company (G.B.) Ltd [1916] 2 AC 307, 329 (per Shaw LJ), cited in M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31 MLR 481, 484.

[17] Ibid.

[18] See below at 3.3.4: "Theories of Corporate Personality and the Ultra Vires Doctrine".

[19] Trade Union Acts, 1871-1876; Amalgamated Society of Railway Servants v. Osborne [1910] AC 87, 104-105; K.W. Wedderburn, "Corporate Personality and Social Policy: The Problem of the Quasi-Corporation" (1965) 28 MLR 62, 65 et seq; cf F.W. Maitland, "Moral Personality and Legal Personality", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 223, 224.

[20] L.C.B. Gower & P.L. Davies, "Principles of Modern Company Law", 8th ed. (Sweet & Maxwell, London, 2008), p. 24.

and building societies.[21] In addition, there are other forms of corporation, such as local authorities, set up for public non-commercial purposes.[22] Gower excludes "municipal corporations" from the scope of the company law, as they share with companies only those characteristics which are necessary consequences of incorporation.[23] However, such corporations are of interest in the context of corporate capacity. Despite their apparent dissimilarity from commercial bodies, local authorities posses limited capacity, analogous to that of statutory corporations, and are thus subject to the same doctrine of ultra vires.[24] Despite existing and proposed reforms to the corporate capacity of registered companies,[25] incorporated public bodies of this kind will retain limited capacity in the future.[26]

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[21] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), paras. 8, 10; L.C.B. Gower & P.L. Davies, "Principles of Modern Company Law", 8th ed. (Sweet & Maxwell, London, 2008), p. 24; see also C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), preface, quoting Maitland's Introduction to his translation of Gierke's "Political Theories of the Middle Age", at p. xxvii.; P. Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986), pp. 7-13.

[22] See Hazell v. Hammersmith and Fulham London Borough Council [1992] 2 AC 1; Financial Transactions of Certain Companies and Other Bodies Act, 1992 and Borrowing Powers of Certain Bodies Act, 1996 were enacted in this jurisdiction in response.

[23] L.C.B. Gower, "The Principles of Modern Company Law", 3rd ed. (Stevens & Sons, London, 1969), p. 8; cp L.C.B. Gower & P.L. Davies, "Principles of Modern Company Law", 8th ed. (Sweet & Maxwell, London, 2008), p. 22.

[24] Hazell v. Hammersmith and Fulham London Borough Council [1990] 2 WLR 17, 50 (per Woolf LJ): "the law in relation to ultra vires both in respect of public bodies and companies has a common source in the decision of the House of Lords in *Ashbury* [...] We also however appreciate [...] that there are difficulties in applying the Rolled Steel principle to public bodies which have a very different constitution to that of a company."

[25] See below at 8.3: "Legislative Reform to Protect the Outsider " and 16.3: "The Current Irish Proposals"; Company Law Review Group, First Report (Dublin, 2001), Chapter 10.

[26] It is for this reason, and not because, as Babb argues, ultra vires is a species of illegality, that reforms will not "remove the last vestiges of ultra vires" – see C.A. Babb, "Rethinking the Concept of Ultra Vires in Company Law" (Ph.D. thesis, University of Cambridge, 2004): Abstract; see below at 4.4.1: "Illegality".

The principle of limited capacity applies to various distinct forms of corporation. Before the registered company was created, the doctrine of ultra vires applied to determine the capacity of statutory corporations. In future, after the registered company is removed from the doctrine's shadow, many corporate forms will retain the old limits on their capacity.[27] Analysis of the doctrine should therefore focus primarily, but not exclusively, on the registered company.

An initial review of the other corporate forms which have also been recognised by the law places the modern company in its true context, highlights the fundamental characteristics of the limited company which have informed the law's view of it, and shows that the decision that the registered company should have limited capacity represents a choice of one available model among several.

2.2.1.1. The Archetypal Registered Company

Despite the multiplicity of corporate forms, the dominant form of corporation today is inarguably the limited liability registered company.[28] This relatively new form of corporation[29] has enjoyed phenomenal growth since its creation in the nineteenth century.[30] The registered company is described as "the main instrument of capitalism".[31] It is the lifeblood of Ireland's economy.[32] By facilitating the

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[27] See eg Hazell v. Hammersmith and Fulham London Borough Council [1992] 2 AC 1; Attorney General at the relation of O.F. Fishing Ltd v. Port of Waterford Company [2007] 2 IR 156.

[28] Of which the most common form is the limited company with a share capital.

[29] Joint Stock Companies Act, 1844, 7 & 8 Vict. c.110; Joint Stock Companies Act, 1856 19 & 20 Vict. c.47; Joint Stock Companies Act, 1862, 25 & 26 Vict. c.89.

[30] As of October 2008, there were 2.8 million registered companies in Great Britain, of which 11,852 were public companies - http://www.companieshouse.gov.uk/about/busRegArchive/statsOct08.pdf; at the end of 2007, Ireland had 180,000 registered companies, of which 157,000 were private limited companies and 1,633 public limited companies – Companies Registration Office, Annual Report 2007, available at http://www.cro.ie/ena/downloads-corporate.aspx.

[31] J. Treillard, "The Close Corporation in French and Continental Law" (1953) 18 Law & Contemp. Probs. 546, 549; C. Stanley, "Corporate Personality and Capitalist Relations: a Critical Analysis of the Artifice of Company Law" (1988) 19 Cambrian LR 97, 103 et seq.; T. Hadden, "Company Law

combination of investment by those who have funds available with management by "those who are fitted for the task",[33] it has enabled the development of the modern industrial and commercial economy.[34]

The essential characteristics of registered companies are that they have separate legal personality from their members and that they enjoy the privilege of limited liability. Companies which elect to be unlimited[35] expose their members to unlimited liability for the debts of the company,[36] but are consequently permitted to avoid some of the rigours of company law.[37]

Limited legal capacity is another characteristic of the registered company. This rule is not a necessary corollary of the first two qualities, though it has been linked to them as a logical consequence.[38] According to the doctrine of ultra vires, purported

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and Capitalism" 2nd ed. (Weidenfeld and Nicolson, London, 1977); UK statistics show that in 2008 56.6% of enterprises were corporate businesses: www.statistics.gov.uk/cci/nugget.asp?id=1238.

[32] S. Griffin, "Limited Liability: A Necessary Revolution" (2004) 25(4) Comp. Law. 99, 99: "the limited liability company is a flagship of the capitalist economy"; E.T. Penrose, "The Theory of the Growth of the Firm" (Basil Blackwell Ltd, 1959), p. 9, quoted in H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 17: "In a private enterprise industrial economy the business firm is the basic unit for the organization of production. The greater part of economic activity is channelled through firms."

[33] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 44.

[34] L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. LR 1369, 1375: "it enables skilled entrepreneurs to enlist large masses of capital which they employ to the advantage of the absentee owners"; H.G. Manne, "Our Two Corporation Systems: Law and Economics" (1967) 53 Virginia Law Review 259, 260.

[35] See Section 5(2)(c), Companies Act, 1963 (Ireland).

[36] Section 207(1), Companies Act, 1963 (Ireland).

[37] See T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 63; as we will see, however, unlimited companies have limited capacity: Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221.

[38] See Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

transactions by a company which are not authorised by its constitutional documents are void.[39] They are beyond the powers of the company, and therefore there is no possibility of ratifying them or otherwise curing the lack of capacity.

2.2.1.1.1. Public and private companies

Both public and private registered companies[40] are regulated by the rules of company law.[41] Together, they may be viewed as the archetypal modern corporation.[42] Which of the two varieties should be regarded as preeminent is a matter for debate: modern reforms, reflecting evolving corporate practice,[43] aim to shift the focus towards the private company[44] which has hitherto been "a legislative afterthought".[45]

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[39] Ibid.

[40] See L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. LR 1369, 1375-1376

[41] As expounded in the Companies Acts, 1963-2006 and relevant case law; the Companies Act 1963 "follows fairly closely the United Kingdom legislation of 1948" - L.S. Sealy, Book Review: "Company Law in Ireland" [1985] CLJ 504, 504; "Truly, whatever else we wanted independence for, it was not for Company Law Reform!" - A. FitzGerald, "A Consideration of the Companies Act, 1948, Companies Act (Northern Ireland), 1960, and Companies Act, 1963)" (1966) 1 Ir Jur (N.S.) 16, 17.

[42] According to Sealy, the Joint Stock Companies Acts envisages "the middle-sized public company of today" - L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 165; see T. Hadden, "Company Law and Capitalism" 2nd ed. (Weidenfeld and Nicolson, London, 1977), p. 103 et seq; "it would be reasonable enough to take the company as the paradigm for the purpose of illustrating some point or rule of corporate law." - L.S. Sealy, "Perception and Policy in Company Law Reform", in D. Feldman & F. Meisel (eds), "Corporate and Commercial Law: Modern Developments" (LLP, London, 1996), p. 15.

[43] See L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 164.

[44] See eg Company Law Review Group, First Report (Dublin, 2001).

[45] T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 45; see also R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 557; P. Ireland, "Company Law and the Myth of Shareholder Ownership" (1999) 62 MLR 32, 44;

Most registered companies are private companies.[46] Many are small and closely held.[47] They can be created with ease according to the formalities set out in the Companies Acts.[48] Once registered, they acquire a separate legal existence from their members and are free to trade. Though it only became possible to establish private companies in 1908,[49] fifty years later, the private company outnumbered the public company by twenty to one.[50]

Public companies, which may have more than ninety-nine members,[51] are fewer in number,[52] but highly significant as they tend to have extensive operations.[53] The

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H.G. Manne, "Our Two Corporation Systems: Law and Economics" (1967) 53 Virginia Law Review 259, 276-277.

[46] There were approximately 157,000 private limited companies on the Irish Register in 2007 – Companies Registration Office, "Annual Report 2007", p. 9, available online at http://www.cro.ie/ena/downloads-corporate.aspx; private companies are defined by Section 33(1); R. Keane, "Company Law", 4th ed. (Tottel, Dublin, 2007), p. 41.

[47] Company Law Review Group, First Report (Dublin, 2001) para. 10.9.2; see also H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 16: the private company "is usually characterised by the unity of ownership and control"; H.G. Manne, "Our Two Corporation Systems: Law and Economics" (1967) 53 Virginia Law Review 259, 278: "the close corporation is not peculiarly a capital-raising device".

[48] Section 5(1), Companies Act 1963.

[49] Companies (Consolidation) Act 1908; see F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 38.

[50] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 38; "Economically it is less important than the public corporation; yet it is anything but insignificant." - L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. LR 1369, 1376.

[51] See Section 33, Companies Act, 1963, as amended by Section 7, Investment Funds, Companies and Miscellaneous Provisions Act, 2006 for the conditions which a private company must fulfil, including the limitation of membership.

[52] There were approximately 1,600 plcs on the Irish Register in 2007 – Companies Registration Office, "Annual Report 2007", p. 9, available at http://www.cro.ie/ena/downloads-corporate.aspx.

[53] See H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 15: "The large public company is characterised by specialised

public company is the ideal vehicle through which money can be raised from the public to finance substantial commercial endeavours. Dealing in shares on the stock exchange enables investors to recoup their stakes without withdrawing them from the company itself.[54] The separation of ownership and control, which is assumed as a general characteristic by company law, reflects the reality of public companies but rarely of private companies.[55] Public companies are also reasonably straightforward to establish, though subject to certain additional requirements.[56] Unlike the chartered corporations or statutory corporations of the past, it is not necessary to petition the State for the creation of even the largest public company. Compliance with the statutory procedures suffices.

The distinction drawn by company law between public and private companies is an imperfect response to the practical difference between, at one end of the spectrum, large corporations which obtain capital from investment by a large number of shareholders, who play no part in management,[57] and, at the other end of the spectrum, small closely-held concerns where both capital and management are supplied by a small number of individuals, often a family. Public companies require safeguards to protect the public investor, which would be needless in small family

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management, participation in the market for investment capital and by separation of ownership and control."; T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 56.

[54] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 37; L.C.B. Gower & P.L. Davies, "Principles of Modern Company Law", 8th ed. (Sweet & Maxwell, London, 2008), p. 16.

[55] T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 43; H.G. Manne, "Our Two Corporation Systems: Law and Economics" (1967) 53 Virginia Law Review 259, 260-261.

[56] See T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), pp. 44, 1593.

[57] "It is the conventional wisdom that in a company of any size a split emerges between ownership and control, the numerous and scattered shareholders becoming no match for the well organised, tightly knit management." - G.R. Sullivan, "The Relationship between the Board of Directors and the General Meeting in Limited Companies" (1977) 93 LQR 569, 579.

companies.[58] Private companies on the other hand often find regulatory compliance relatively more onerous.[59]

Legislators encounter real difficulty in defining the species of small or private company which might be treated more leniently.[60] The "private company" was introduced as a distinct creature, carved out of the general class of companies, in 1908,[61] but this does not respond precisely to the contours of the factual distinction between closely-held and large corporations. Subsequent attempts to define small or family-run private companies met the obstacle that they would still cover subsidiaries of public companies[62] or "puppets".[63] Between 1948 and 1967, the United Kingdom subdivided private companies into "exempt" and "non-exempt" companies, but this difficult differentiation "produced unfair and capricious results" which were criticised by the Jenkins Committee.[64]

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[58] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 12; cf L.C.B. Gower & P.L. Davies, "Principles of Modern Company Law", 8th ed. (Sweet & Maxwell, London, 2008), p. 14; cp Trevor v. Whitworth (1887) 12 AC 409, 434 (per Lord Macnaghten): "a family company does not limit its trading to the family circle. If it takes the benefit of the Act, it is bound by the Act as much as any other company. It can have no special privilege or immunity."

[59] L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. LR 1369, 1376

[60] See L.C.B. Gower & P.L. Davies, "Principles of Modern Company Law", 8th ed. (Sweet & Maxwell, London, 2008), p. 13 et seq.

[61] Companies (Consolidation) Act, 1908; L.C.B. Gower & P.L. Davies, "Principles of Modern Company Law", 8th ed. (Sweet & Maxwell, London, 2008), p. 15.

[62] L.C.B. Gower, "The Principles of Modern Company Law", 3rd ed. (Stevens & Sons, London, 1969), p. 13.

[63] T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 44.

[64] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 12; the Jenkins Committee proposed the abolition of the distinction between public and private companies, but this proposal was not acted upon: "Jenkins Report", Board of Trade Company Law Committee Report (1962) Cmnd. 1749/62, para. 67.

As a result, today's company law does not generally differentiate between public and private companies.[65] Although there is a great practical difference between them, they are generally subjected to the same legal regime.[66] Public companies may have certain additional compliance obligations, such as the Listing Rules of the Stock Exchange,[67] should they choose to list their shares on the public market.[68] Nonetheless, most of the rules in the Companies Acts and those developed by the courts apply without distinction to all registered companies.

The doctrine of ultra vires, among many other rules, applies equally to all registered companies. This is so even though it can be argued that the interests which the rule is designed to protect are more relevant to large public companies, in which there is a clear distinction between members and management, than to closely held private companies.[69] This perspective is favoured by the Company Law Review Group, which recommends the abolition of objects clauses, and consequently of limited capacity, for private but not public companies.[70]

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[65] T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 44; but certain exceptions are made in favour of private companies eg the short form profit and loss account permitted by section 11(1) Companies (Amendment) Act, 1986.

[66] L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. LR 1369, 1376; although the Companies Act, 1986, as amended by the European Community (Accounts) Regulation, 1993, SI 396/1993, does impose different requirements concerning the disclosure of financial information on "small" and "medium" companies; and the Companies (No. 2) Act, 1999, provides some exemption from auditing requirements for private companies.

[67] The individual stock exchanges had long-established conditions for listing; the UK Federation of Stock Exchanges first issued the Yellow Book of regulations in 1966.

[68] T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 1591.

[69] H.G. Manne, "Our Two Corporation Systems: Law and Economics" (1967) 53 Virginia LR 259, 277: "But just as the economic principles of the existing corporate system were not understood, their inapplicability to small corporations was overlooked. With hindsight, we can see that the problems that began to develop for small corporations were logically predictable."

[70] Company Law Review Group, First Report (Dublin, 2001), para. 10.9.8.

2.3. THE GENEALOGY OF THE REGISTERED COMPANY

Understanding the history of the corporation provides one route to defining its nature and the extent of the capacity it should possess.[71] Historically, the registered company has its origins in a range of older corporate forms. Irish companies share the well-documented origins of the corporation in English law.[72]

Blackstone credited the Romans with inventing the corporation.[73] Hahlo traces the development of the company from its earliest origins, identifying the *universitas personarum* as the Ancient Roman precursor of the modern company.[74] Roman law recognised "the concept of the juristic person as an entity apart from its members".[75] Its creation "required the permission of the Emperor".[76] Unlike continental Europe,

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[71] "The real character of corporate personality is suggested by certain facts in the early history of corporations in England." - W.J. Brown, "The Personality of the Corporation and the State" (1905) 21 LQR 365, 370.

[72] See e.g. W.S. Holdsworth, "A History of English Law" (Methuen, London, 1923-1966); Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992) (the eighth edition of Gower no longer includes the excellent account of the history of the corporation found in earlier editions); P. Ireland, "Company Law and the Myth of Shareholder Ownership" (1999) 62 MLR 32; All companies legislation which predated 1922 applied automatically in Ireland.

[73] F.W. Maitland, "The Corporation Sole", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 73, 75, citing Blackstone, I Commentaries 469.

[74] A term retained for the universities at Oxford and Cambridge - C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 5.

[75] H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 1, see also Corpus Juris Justiniani, D.3.4.7.I, excerpted in Hahlo, ibid, p. 9: "If something is being owed to a *universitas*, it is not being owed to its individual members; and what a *universitas* owes, its members do not owe."; See also F.W. Maitland, "Moral Personality and Legal Personality", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 223, 228: "there could, without undue pressure, be obtained from the Corpus Juris a doctrine of corporations, which, so far as some main outlines are concerned, is the doctrine which has ruled the modern world."

[76] H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (London, Sweet & Maxwell, 1987), p. 1; see also Corpus Juris Justiniani, D.3.4.1.pr.,I, excerpted in Hahlo, ibid, p. 9.

however, the development of commercial organisations in England was not predominantly influenced by Roman law. The incremental evolution of the commercial corporation in English law may be traced more directly to the mediaeval guilds. Over the centuries, several modes of creating a corporation developed. These were "by the authority of parliament, by the common law, by prescription or by a charter from the king."[77]

There has not been a clear linear evolution from the earliest forms of corporation to the modern registered company and McGuigan cautions against seeking one.[78] The pattern is unclear because the company was less an official, legal invention than an instrument which arose spontaneously in a variety of forms to meet the need of businessmen to collaborate.[79] Thus, the unincorporated partnership flourished at a time when it was difficult to obtain state-endowed incorporation.[80] Consequently, corporate forms are shaped by circumstance rather than modelled on some universal theory of corporations. Furthermore, the current conception of the corporation does not constitute the perfect and necessary understanding of the association. McGuigan's view is that the corporation in all its forms is marked, not by a common origin, but by a common purpose. This purpose implies certain characteristics, such as the delegation of day-to-day management to a small group

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[77] W.E. Minchinton, "Chartered Companies and Limited Liability" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 137, 138.

[78] G.F. McGuigan, "The Emergence of the Unincorporated Company in Canada" (1964-1966) 2 U. Brit. Colum. L. Rev. 31, 33: "[t]he historical spoor of the corporation indeed leads into the past but unfortunately goes nowhere in particular but rather everywhere in general."

[79] "The chief attributes of the corporation [...] were long recognized before the conception of the corporation was thought of. Their attainment marked stages which correspond to the developments of social life rather than of juristic thought." - W.J. Brown, "The Personality of the Corporation and the State" (1905) 21 LQR 365, 370; see also McGuigan, op cit, at 33.

[80] See below at 2.3.4.1: "Barriers to incorporation".

and the transferability of interests in the company.[81] The relative importance of these characteristics varies among corporate forms.

With these caveats in mind, identifying the historical antecedents of the registered corporation provides some insights into its nature and essential characteristics. Furthermore, it is worthwhile to examine the capacity of the earlier forms of corporation, because the development of company law has drawn heavily on precedent and continuity. The past millennium has seen the mediaeval guild, the chartered corporation, the statutory corporation and the partnership, before the registered joint stock company appeared less than two centuries ago. These forms divide into two main groups. Chartered and statutory corporations were officially incorporated, endowed with separate legal existence by the state, whereas partnerships remained unincorporated associations.

Originally, the main associations to be recognised in the commercial sphere in England were the mediaeval guilds. These bear little resemblance to modern companies; Perrott characterises them as "social clubs tending towards professional societies".[82] Often it was partnerships which enabled a number of individuals to engage in business together. With the passage of time, many guilds obtained charters from the Crown.[83]

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[81] G.F. McGuigan, "The Emergence of the Unincorporated Company in Canada" (1964-1966) 2 U. Brit. Colum. L. Rev. 31, 34; see also F.W. Maitland, "Moral Personality and Legal Personality", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 223, 232-233 "Group personality is no purely legal phenomenon. The law-giver may say that it does not exist, where, as a matter of moral sentiment, it does exist."

[82] D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 81, at 89.

[83] "By imperceptible steps, the guild merchant, from the fourteenth to the sixteenth century, developed into the regulated company (that is a company regulated by its charter)."- D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 81, at 89; L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 20.

2.3.1. The Chartered Corporation

A royal charter was the means whereby the Crown, as the state,[84] could expressly confer legal personality on a specific group or association. Originally, charters were granted to ecclesiastical[85] and public bodies.[86] Later they were obtained by commercial organisations, as many guilds followed the example of towns in petitioning for a royal charter. The benefits sought by early traders were local monopolies and an increase in power rather than the advantages which would come to the fore in later forms of the corporation, such as the facility to pool a common trading stock or limit members' personal liability for the group's debts.[87]

Charters were most commonly desired by groups of merchants wishing to trade overseas. These associations or "companies" obtained charters from an early date,[88] and gradually became more common. Early companies of this type were known as "regulated companies" and operated in much the same manner overseas as the

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[84] Under Royal Prerogative or statutory powers - L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 6.

[85] H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 1, reports that, "During the Middle Ages, the conception of the *universitas* was kept alive by the Church."

[86] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 19.

[87] D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 81, at 89.

[88] H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 3, cites two examples of England's earliest regulated companies: "Established in the 13th century, the company of the "Mayor, Constables and Fellows of the Merchants of the Staple of England" was an association of English and foreign merchants engaged in selling "staple goods" - English raw materials, and, especially, raw wool - to foreign merchants" (see: 27 Edw. 3, St. 2); the "Fellowship of the Merchant Adventurers of England" was granted its charter in 1407 and traded in manufactured goods.

guilds did in England. Their members traded with their own stock, subject to the company's rules, and were liable for their own debts.[89]

Given the difficulty inherent in making a case for the grant of a charter, charters most suited large-scale businesses with large capital requirements, a degree of risk, and the need for continuity.[90] For such corporations, the benefits made the effort worthwhile. In the domestic context, chartered corporations were set up for heavy industry such as mining[91] or financial concerns such as banking[92] and insurance.[93] During the sixteenth and seventeenth centuries, chartered corporations dominated "large-scale" commerce.[94]

A charter conferred a number of advantages on a prospective corporation. It regulated the internal government of the company, permitted the continuity of management and granted the corporation a common seal to identify its acts.[95] The charter made it possible to sue third parties and members. In these characteristics, it resembles the constitution of a modern company and the legal personality which it creates. A further advantage was that it advertised to the public that this was a reputable corporation, as it had the imprimatur of state approval. Granted by the

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[89] F. Evans, "Joint Stock" (1913) 29 LQR 195, 198.

[90] They were also in a "precarious" position, required to lend money to the government on demand: Ibid, at 198.

[91] The Mines Royal was chartered in 1568.

[92] Eg The Bank of England, chartered in 1694; The Bank of Scotland, chartered in 1695 (see H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 4).

[93] Eg The Amicable Society for Perpetual Insurance, chartered in 1706.

[94] H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 12.

[95] "A corporation being an invisible body cannot manifest its intention by any personal act or oral discourse; it therefore acts and speaks only by its common seal. For though the particular members may express their consent to any act, by words or signing their names, yet this does not bind the corporation..." – Blackstone, Commentaries I, 476, quoted in CT Carr, "The General Principles of the Law of Corporations" (CUP, 1905), pp. 54-55.

state, the charter could award the corporation a monopoly in a particular area of trade or quasi-governmental powers overseas.[96] Many domestic companies were granted the monopoly to work a particular patent or invention. However, by the middle of the seventeenth century, the grant of monopolies to chartered corporations came to be regarded as an inappropriate transfer of the prerogative of the state itself to regulate trade. Many such companies perished, although some adapted by reverting to regulated companies[97] or relinquishing their monopolies.[98] While the corporations set up to trade overseas found their powers circumscribed, the company was flourishing domestically.[99]

In the nineteenth century, as it was viewed as inappropriate for ordinary enterprises to be granted a full charter, the Trading Companies Act, 1834 and the Chartered Companies Act, 1837 were enacted to allow for the grant of legal incorporation similar to chartered status by means of letters patent.[100] Constitutional changes diminished the "legislative prerogative of the sovereign" so that the Crown could no longer grant a charter to a commercial organisation which would infringe the rights

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[96] Such collaboration between Crown and chartered corporation in colonising foreign territories was mutually beneficial, and Hahlo reports that in "Portugal and Spain, France, Holland and England the sixteenth and seventeenth centuries were the Golden Age of the colonial company" - H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 3; they were (instruments of government as much as vehicles for trade." - L.S. Sealy, "Perception and Policy in Company Law Reform", in D. Feldman & F. Meisel (eds), "Corporate and Commercial Law: Modern Developments" (LLP, London, 1996), p. 15.

[97] Eg "The Muscovy Company, which was incorporated in 1555, and traded mainly with Russia, was the first English joint stock company, but was transformed early in the seventeenth century into a regulated company", cited in Hahlo, ibid, p. 3.

[98] Eg the Royal Africa Company.

[99] H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 3.

[100] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 167, p. 6; see also Bonanza Creek Gold Mining Company Ltd v. The King [1916] AC 566.

of individuals.[101] Finally, although this benefit was not initially considered important, it came to be accepted over time that charters could provide for the limited liability of the corporation's members.[102] The Chartered Companies Act, 1837 enabled chartered corporations to make members liable in the amount of their shares.[103]

Many chartered corporations still survive but most are not ordinary trading companies.[104] Since the introduction of the Companies Acts, it is possible for a chartered corporation to be registered under the Acts, in which case it becomes subject to the statutory rules of company law.[105] Given the prestige conferred by the possession of a charter, many of today's chartered corporations are charitable or educational associations.[106]

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[101] B. Thompson, "Are Joint Stock Companies Common Law Corporations?" (1922) 42 Canadian Law Times 143, 149.

[102] W.E. Minchinton, p. 138; see also Edmunds v. Brown and Tillard (1668) 1 Lev. 237; 83 ER 385, excerpted in H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 10.

[103] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 11.

[104] L.C.B. Gower & P.L. Davies, "Principles of Modern Company Law", 8th ed. (Sweet & Maxwell, London, 2008), p. 22; see also L.C.B. Gower, "The Principles of Modern Company Law", 3rd ed. (Stevens & Sons, London, 1969), p. 7: the 1968 London Stock Exchange Year Book listed just fourteen chartered companies.

[105] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 11.

[106] Eg Trinity College Dublin, Royal College of Surgeons, Law Society of Ireland; L.C.B. Gower & P.L. Davies, "Principles of Modern Company Law", 8th ed. (Sweet & Maxwell, London, 2008), p. 22; M. Forde & H. Kennedy, "Company Law", 4th ed., (Round Hall Sweet & Maxwell, 2007), p. 6.

2.3.1.1. The full capacity of chartered corporations

Chartered corporations enjoy both separate legal personality, such that, viewed from outside, individual members are "non-existent",[107] and the full capacity of a natural person.[108] Where a contract is concluded outside the scope of the corporation's charter, the act is valid, but the charter may be revoked in sanction.[109] In addition, members may seek to restrain attempts to change the character of the corporation or to act in a manner which might endanger its charter,[110] or a declaration that an act is ultra vires,[111] but they cannot prevent an application to the Crown for a change of charter.[112]

That chartered corporations should have full capacity appears logical, given their mode of creation. Since the creation of the new legal person was viewed as a concession by the state, it was within the power of the state to grant that person full

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[107] B. Thompson, "Are Joint Stock Companies Common Law Corporations?" (1922) 42 Canadian Law Times 245, 246.

[108] AG v. Manchester Corporation [1906] 1 Ch. 643; Sutton's Hospital (1612) 10 Co Rep 23a; Riche v. Ashbury Railway Carriage Co (1874) LR 9 Ex 224; Wenlock v. River Dee Company (1885) 36 Ch. D. 374, 385; Institution of Mechanical Engineers v. Cane [1960] 3 AER 715; see also: M.P. Furmston, "Common Law Corporations and Ultra Vires" (1961) 24 MLR 518; B. Thompson, "Are Joint Stock Companies Common Law Corporations?" (1922) 42 Canadian Law Times 143, 150; (1922) 42 Canadian Law Times 245, 245; G.H. Treitel, "The Law of Contract" 11th ed., (Sweet & Maxwell, London, 2003), p. 560; cf C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 4, suggesting it likely that ultra vires would in future operate to limit the liability of even chartered corporations; see also G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), pp. 21-25.

[109] British South Africa Co v. De Beers [1910] 1 Ch. 354, 374-376; see also R. v. Eastern Archipelago Company (1853) 3 E&B 857, cited in H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), p. 18.

[110] Jenkin v. Pharmaceutical Society of Great Britain [1921] 1 Ch. 392; G.H. Treitel, "The Law of Contract" 11th ed., (Sweet & Maxwell, London, 2003), p. 560; see F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 11.

[111] Pharmaceutical Society of Great Britain v. Dickson [1970] AC 403.

[112] Gray v. TCD [1910] 1 IR 370.

legal capacity equal to that of a natural person.[113] Since the state considered each request individually, it could limit the purpose of the corporation or otherwise tailor any of the rules governing it if it thought it appropriate to restrict the corporation's actions. Jones goes further and suggests that the full capacity which chartered corporations enjoy cannot be restricted, even by the charter itself.[114] Since the number of charters was relatively few compared to the modern company, the state might reasonably be expected to watch out for cases where the corporation was abusing the capacity granted to it and respond on the facts of the case to sanction any abuse.

2.3.2. The Statutory Corporation

Like the Crown, Parliament also possessed the power to create corporations. Statutory corporations were those set up by a particular Act of Parliament. Changes in perception as to the powers of the branches of government altered the proportions of corporations which were formed by charter and by statute. Gower identifies a particular shift in the balance with the "Glorious Revolution" of 1688: thereafter it was assumed that the power of the Crown was limited to the grant of a charter, but that any monopoly or special powers could only be conferred by statute.[115]

The question of capacity provides a contrast between chartered and statutory corporations. Though the corporation was assumed at common law to have full capacity, Parliament had the power to confer limited capacity on statutory

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[113] J. Dewey, "The Historic Background of Corporate Legal Personality" (1926) 35 Yale L.J. 655, 667: "In some respects, the concession theory is the more favorable to expanded power of corporations; a charter of broad powers might be granted and the courts might construe its terms liberally."; cf Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653; see below at 3.3.4: "Theories of Corporate Personality and the Ultra Vires Doctrine".

[114] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 11.

[115] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 23.

corporations.[116] Many statutory corporations were established to provide public utilities and as railway companies. Because they were granted substantial powers in order to achieve a stated end, or "special purpose", it followed logically that those powers should only be employed to further their intended objectives.[117] Consequently, from the 1840s, the capacity of statutory corporations was determined to be limited. The doctrine of ultra vires was applied to them to invalidate acts purported to be carried out in excess of that capacity.[118] Unlike chartered corporations, which could effect valid transactions outside the scope of their charter at risk of the charter's revocation, statutory corporations lacked the capacity to act beyond their creating statutes and any such act would automatically be void.[119] The extent of their capacity turned on interpretation of the statute, a process with which the courts were comfortable.[120]

The statutory corporation's heyday was in the nineteenth century,[121] but they may still be created to this day.[122] State-sponsored corporations may take the form of

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[116] H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 16.

[117] See Eastern Counties Railway v. Hawkes (1985) 5 HLC 331, 348 (per Lord Cranworth LC); Keane v. An Bord Pleanála and Commissioners of Irish Lights [1997] 1 IR 184, 212 (per Hamilton CJ).

[118] Colman v. Eastern Counties Railway Company (1846) 16 L.J. (Ch.) 73; East Anglian Railway Company v. Eastern Counties Railway Company (1851) 21 L.J. (C.P.) 23; G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 25 et seq.; Griffin, "The Rise and Fall of the Ultra Vires Rule in Corporate Law" 2 (1998) MJLS (www.solent.ac.uk/law/mjls/papers/griffen.pdf), pp. 5-6; H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 17-18.

[119] "Although in many ways the statutory company took over from and performed a similar task to that of the charter company, the courts showed an early reluctance to treat the one, simply as the successor of the other" - H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 14.

[120] H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 16.

[121] Ibid, at 14.

either registered companies whose creation is authorised through Acts of the Oireachtas or of statutory corporations established by a specific Act.[123] Modern statutory corporations include the Electricity Supply Board,[124] Bord na Móna,[125] Raidio Teilifís Éireann[126] and Údarás na Gaeltachta.[127] The ultra vires doctrine continues to govern statutory corporations in its "pristine" common law form[128] despite the statutory modification of the doctrine in relation to registered companies.[129]

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[122] Eg the Health Service Executive, set up under the Health Act, 2004 and TG4 set up under the Broadcasting Act, 2001; see M. Forde & H. Kennedy, "Company Law", 4th ed., (Round Hall Sweet & Maxwell, 2007), p. 6; W. Friedmann, "The New Public Corporations and the Law" 10 (1947) MLR 233: public corporations were notably used by the UK Labour government in the 1940s to effect a nationalisation policy, see eg Coal Industry Nationalisation Act, 1946. These statutory corporations were deliberately conferred with "wide and elastic formulas giving the corporations almost unlimited scope and discretion" - ibid, at 244; L.C.B. Gower & P.L. Davies, "Principles of Modern Company Law", 8th ed. (Sweet & Maxwell, London, 2008), p. 21.

[123] Ibid; see also H. Linnane, "The Powers of Statutory Corporations" (1990) 8 ILT 144.

[124] Electricity (Supply) Act, 1927.

[125] Turf Development Act, 1946.

[126] Broadcasting Authority Act, 1960.

[127] Údarás na Gaeltachta Act, 1979; modern statutory corporations tend to have "public and communal activities" - H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 14.

[128] See H. Linnane, "The Powers of Statutory Corporations" (1990) 8 ILT 144, 145, quoting from Hogan and Morgan, "Administrative Law" at p.85; leading authorities such as Attorney-General v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473 are cited in relation to public bodies - G. Hogan & D. Gwynn Morgan, "Administrative Law in Ireland" 3rd ed., (Round Hall Sweet & Maxwell, Dublin, 1998), pp. 201, 402; consequently enabling legislation was cautiously drafted to confer exhaustive powers – ibid, p. 200; see also Hazell v. Hammersmith and Fulham London Borough Council [1992] 2 AC 1.

[129] See H. Linnane, "The Powers of Statutory Corporations" (1990) 8 ILT 144, 144-145; Section 8, Companies Act, 1963 and Regulation 6(1), European Communities (Companies) Regulations, 1973 do not apply; see below at 8.3: "Legislative Reform to Protect the Outsider ".

Yet Linnane questions the appropriateness of the ultra vires doctrine being applied to semi-state and state-sponsored bodies of this type.[130] He reasons that in these bodies, the shareholders, whom the doctrine is designed to protect, are replaced by the relevant Minister, and creditors can expect to see the company's debts underwritten by the taxpayer. Furthermore, the innocent outsider is even less likely to be familiar with the contents of the statutory corporation's establishing Act than he might be with the constitution of a registered company. Linnane's response is to favour a broad interpretation of the powers conferred in each Act.[131] The Local Government Act, 1991 relaxed the ultra vires rule for local authorities by conferring broad powers on them.[132]

2.3.2.1.1. Distinguishing statutory from registered companies

Companies registered under the Companies Acts are occasionally referred to as "statutory corporations". This description creates unnecessary ambiguity.[133] Statutory corporations are directly and individually created by Act of Parliament and their constitution is found in that Act, subject to other Acts, such as the Companies Clauses Acts, 1845-1889.[134] By contrast, registered companies are created by their promoters,[135] who draw up their constitutional documents, and

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[130] Ibid, at 146.

[131] Ibid, at 147: Linnane cites Den Norske Creditbank v. The Sarawak Economic Development Corporation [1989] 2 Lloyd's Rep 36 as an example of the way forward.

[132] G. Hogan & D. Gwynn Morgan, "Administrative Law in Ireland" 3rd ed., (Round Hall Sweet & Maxwell, Dublin, 1998), p. 200; Section 6(1), Local Government Act, 1991 authorises local authorities to take any measures desirable in the interests of the local community; Section 8(1) confers on them extensive powers to do anything which can advantageously be done in conjunction with their functions.

[133] See eg J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 38 Ir. Jur. 263; see below at 3.3.3: "The Assimilation of Registered Companies to Statutory Corporations".

[134] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 6.

[135] The term "promoter" is addressed in Twycross v. Grant (1876-77) L.R. 2 C.P.D. 469, 527 (per Cockburn CJ): "They were in reality the creators of the company, and were engaged in forming and

merely recognised by the State exercising its statutory authority to do so. While the specific Act creating any statutory corporation is the fundamental source of its legal regulation, such corporations are also subject to the general principles of company law, in so far as these principles are relevant to bodies which often lack shareholders and share capital.[136]

2.3.3. The Unincorporated Partnership

In addition to the two main forms of corporation, equitable principles also enabled unincorporated associations to act in a manner closely resembling legal persons. Maitland argues that the trust enabled English law to accommodate unincorporated bodies, "without troubling king or parliament though perhaps we said that we were doing nothing of the kind".[137] Like the chartered and statutory corporations, the partnership is an important forerunner of the modern company.[138] Since its creation does not require the intervention of the institutions of state, it provided a practical means for individuals to carry on business together in the past and remains useful

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constituting it at the time"; ibid at 541: "there is now no statutory limitation to the functions of a promoter. The question as to when one who in the outset was a promoter of a company continues or ceases to be so, becomes, therefore, as it seems to me, one of fact. A promoter, I apprehend, is one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose"; see E. Manson, "The Reform of Company Law" (1889) 5 LQR 61, 71.

[136] H. Linnane, "The Powers of Statutory Corporations" (1990) 8 ILT 144, 146, citing L.C.B. Gower, "Modern Company Law" (4th edition), pp. 287-288.

[137] H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936): F.W. Maitland, "The Unincorporate Body", p. 128, 139: "Probably as far back as we can trace in England any distinct theory of the corporation's personality or any assertion that this personality must needs have its origin in some act of sovereign power we might trace also the existence of an unincorporated group to whose use land is held by feoffees."

[138] The modern company is "a partnership which has been invested with the character of incorporation, and the rules which are applicable are partly referable to both characters" – Australian Coal & Shale Employers Federation v. Smith (1938) 38 S.R. (N.S.W.) 48, 53; quoted by A.J. Boyle, "The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History" (1965) 28 MLR 317, 325.

today.[139] Hahlo describes partnership as "the prototype of all commercial associations."[140]

In the Middle Ages, while guilds functioned as professional bodies, partnership was the preferred means of collaborative business enterprise. There were two types of partnership. The first, the *commenda*, involved one partner who supplied the capital and the other who actively ran the business, both sharing in the profits realised. Keane sees a strong resemblance between the commenda and the modern company, structured as it was as an investment vehicle.[141] Holdsworth agrees that the commenda bequeathed to commercial law "the idea of a society in which the capitalist could invest and limit his liability".[142] The second type of partnership, the *societas*, resembled the modern partnership, although the legal consequences of the relationship between the partners were not fully developed until the eighteenth and nineteenth centuries.[143] The business world turned to the partnership and successfully adapted it in order to surmount the legal and practical obstacles facing the establishment of large commercial organisations in the nineteenth century.[144] The early partnership developed into the deed of settlement company, which in turn inspired the joint stock company.

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[139] See M. Twomey, "The Legal Requirements for the Establishment of a Partnership Under Irish Law" (1996) 3(7) CLP 178; Partnership Act, 1890, confirmed as Irish law in Murphy v. Power [1923] 1 IR 68.

[140] H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 2.

[141] R. Keane, "Company Law", 4th ed. (Tottel, Dublin, 2007), p. 17, citing W.S. Holdsworth, "A History of English Law" (Methuen, London, 1923-1966), Vol. 10, pp. 193-7.

[142] W.S. Holdsworth, "A History of English Law" (Methuen, London, 1923-1966) Vol. 8, p. 197.

[143] A. Carver, "Corporate Governance – Capitalism's Fellow Traveller", in F.M. Patfield (ed.), "Perspectives on Company Law: 2" (Kluwer, 1997), p. 82-83; L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 20.

[144] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), pp. 4, 30; see below at 2.3.4.1: "Barriers to incorporation".

2.3.3.1. The nature of the partnership

The principal distinction between partnerships and corporations is that the partnership is not a legal entity independent of its members.[145] Through the law of agency, each partner is empowered to act on behalf of the others.[146] The partnership does not enjoy perpetual succession, instead usually dissolving if one partner withdraws.[147] All partners must agree to any transfer of membership, which is not usually the case in other corporations.[148] In some other ways, partnerships are freer than corporations. The partnership agreement may be altered by the partners' mutual consent, without the need to meet legal formalities.[149] Partnerships are not subject to the capital maintenance rules which constrain companies.[150]

In contrast to the corporate paradigm of separate ownership and control, it is more usual that partners take an active role in managing the organisation than is the case in other corporations.[151] Jones views the union of ownership and control as a critical obstacle to the partnership becoming an effective vehicle for enterprise.[152] The active involvement of partners in governing the affairs of partnerships is often "the cause of disaster" because the individual willing to invest the capital in an enterprise

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[145] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 18; cf the modern innovation of the limited liability partnership, which has separate legal personality but unlimited capacity: Section 1, Limited Liability Partnerships Act, 2000 (UK); see also W.J. Brown, "The Personality of the Corporation and the State" (1905) 21 LQR 365, 367.

[146] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 3.

[147] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 42.

[148] Ibid, para. 20.

[149] Ibid, para. 22.

[150] Ibid, para. 25.

[151] Ibid, para. 21.

[152] Ibid, para. 44.

is not necessarily the best qualified to manage it.[153] The partnership is "not intrinsically suited to large joint-stock enterprise".[154] Yet, although the archetypal partnership model involves a limited number of active members, the form could be adapted to associate a large and shifting membership.[155]

2.3.3.2. Deed of settlement companies

The link between the partnership and the modern registered company is the deed of settlement company. This variety of partnership is widely acknowledged as the primary model[156] for the eventual introduction of registered companies under the Companies Acts.[157]

Until legislative intervention in the nineteenth century, "incorporation was a privilege, depending upon administrative discretion."[158] Both forms of incorporation which were historically attainable required those seeking incorporation to persuade the authorities to endorse their particular endeavour. It was simply not practical for every group wishing to engage in commerce to seek official sanction. Many businessmen found a way to mimic incorporation by adopting the partnership model. Stoljar reminds us that the partnership was not well-designed for many business undertakings. It was best suited to those undertakings which could be financed and run by a small number of partners, but more difficult to adapt as a

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[153] Ibid, para. 44.

[154] L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. LR 1369, 1372.

[155] See Smith v. Anderson (1880) 15 Ch. D. 247; 50 LJ Ch. 39; Carlen v. Drury (1812) V. &. B. 154.

[156] H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 5; L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. LR 1369, 1371-2; L.S. Sealy, "Perception and Policy in Company Law Reform", in D. Feldman & F. Meisel (eds), "Corporate and Commercial Law: Modern Developments" (LLP, London, 1996), p. 23.

[157] From the Joint Stock Companies Acts, 1844, 1856 and 1862 to the Companies Act, 1963.

[158] H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 5.

vehicle for investments requiring greater capital and therefore more investors or members.[159] Yet despite their inconvenience for large undertakings, partnerships flourished in the sixteenth and seventeenth centuries, allowing the pooling of joint stock comprising the investments of a large number of partners who did not actively participate in management.[160]

This adaptation was achieved by drafting a complex document, known as the deed of settlement. This deed was "a covenant" between the trustees who governed a partnership and the subscribers who invested, requiring the trustees to comply with the deed and the members to pay their calls.[161] These complex deeds could be drafted so as to confer on deed of settlement companies many of the characteristics of corporations. Unlike members of the archetypal partnership, members of deed of settlement companies were often simply investors, who could transfer their shares to others if desired.[162] Although the deed of settlement companies were in many respects more like corporations than true partnerships, they were treated as partnerships and regulated by the "embryonic" law of partnership[163] and the terms of their deeds.

This arrangement, while complex, was satisfactory in many ways as a means to circumvent the need for incorporation.[164] The company could act as if it had legal

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[159] S.J. Stoljar, "Groups and Entities: an Inquiry into Corporate Theory" (Canberra, 1973) p.88, extracted in H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 10, at 10.

[160] D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 81, at 91.

[161] S.J. Stoljar, "Groups and Entities: an Inquiry into Corporate Theory" (Canberra, 1973) p. 88, extracted in H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 10, at 11.

[162] Ibid, at 11.

[163] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 24.

[164] See F.W. Maitland, "Trust and Corporation", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 141, 191-192.

personality. It enabled investors to participate financially in a business without participating in management and even to transfer their stakes.[165] By the end of the seventeenth century, the advantages of the deed of settlement company as a vehicle for combining the contributions of capitalists and entrepreneurs were widely appreciated. These companies outnumbered chartered corporations and constituted the majority of trading associations in the early part of the eighteenth century.[166]

Yet, despite their popularity, deed of settlement companies were not the ideal commercial structure. As they became larger, their administration became more complex. The absence of corporate personality coupled with the transferability of shares and the resulting difficulty in knowing the exact membership at any time created an "insuperable" obstacle to legal action.[167] Only slow and expensive actions in the courts of equity were open to them.[168] In addition, unlike corporations, members remained fully liable for the debts of the partnership.[169] When deed of settlement companies predominated, most trading bodies consequently had unlimited liability. Later, when it became possible to set up

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[165] Ibid, at 208.

[166] D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 81, at 91.

[167] R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 558; H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 13: "the nightmarish difficulties suffered by innocent creditors wishing to recover payment for goods supplied to an entity which could not be sued in its own name"; T. Hadden, "Company Law and Capitalism" 2nd ed. (Weidenfeld and Nicolson, London, 1977) pp. 18-19.

[168] D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 81, 96; Anonymous, "Article VI – Joint Stock Companies Regulation Acts" (1845) 1 L. Rev. & Q. J. Brit. & Foreign Jurisprudence 95, 98, 112-117.

[169] H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 5: "The only advantage of incorporation which despite the best efforts of their lawyers tended to elude them was limited liability"; cf Maitland, who argues that unincorporated bodies with limited liability would have been inevitable in the absence of the Joint Stock Corporations - F.W. Maitland, "Trust and Corporation", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 141, 210.

registered companies under the Companies Acts, this was a more advantageous, convenient business form and most of the old unincorporated bodies were wound up or incorporated.[170]

2.3.4. Joint Stock Companies and the Road to Incorporation

The various threads of corporate evolution were ultimately drawn together in the joint stock company, the precursor to the modern registered company. This was the model which would attain the right of incorporation and make it readily available to all who wished to conduct business through an artificial legal person. Technically, a "joint stock company" was simply one in which members subscribed to the company's stock, as opposed to trading on their own account through the association.[171] The term does not necessarily define a distinctive form of association; a company is not necessarily a corporation.[172] Thus, joint stock companies could originally be either chartered corporations or deed of settlement companies.

The example of the East India Company typifies the mutation of many chartered corporations into joint stock companies.[173] At first, members could choose between trading on their own account and subscribing to a joint stock for a particular voyage. Then, between 1614 and 1653, members would subscribe to the joint stock for a set

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[170] Eg: Sun Insurance Society, incorporated in 1926, General Life Assurance Company, incorporated in 1927 - L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 4; however not all unincorporated bodies experienced a pressing desire to incorporate - F.W. Maitland, "Trust and Corporation", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 141, 191-192.

[171] See T. Hadden, "Company Law and Capitalism" 2nd ed. (Weidenfeld and Nicolson, London, 1977), p. 9 et seq.

[172] F. Evans, "What is a Company?" (1910) 26 LQR 259, 260; P. Ireland, "Company Law and the Myth of Shareholder Ownership" (1999) 62 MLR 32, 39; L.S. Sealy, "Perception and Policy in Company Law Reform", in D. Feldman & F. Meisel (eds), "Corporate and Commercial Law: Modern Developments" (LLP, London, 1996), p. 121.

[173] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 21.

period of years. In 1653, a permanent joint stock was established, but members could still choose to trade on their own account. Finally, in 1692, the possibility of individual trading ended, and thereafter members could only contribute to the joint stock of the company. Once members were no longer able to trade separately, the company became a "joint stock company". However, not all joint stock companies evolved from chartered corporations. Many were deed of settlement[174] companies.[175] Unincorporated joint stock companies emerged in the middle of the sixteenth century.[176]

The term "joint stock company" acquired a different significance when it was used in the middle of the nineteenth century by the Joint Stock Company Acts. These innovative laws radically changed the corporate landscape by permitting the creation of a new form of corporation.[177]. They made it easy for individuals to form companies, with full legal personality, without the burden of seeking either the grant of a charter or the enactment of a statute.

This advance occurred against a historical backdrop which explains the cautious attitudes of legislators and judges to such a democratically-available form of corporation. These attitudes continued to inform judicial views on the joint stock company at a time when the basic principles of company law were laid down. Crucially, these attitudes may have influenced the decision that the registered company's capacity is limited.[178]

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[174] See above at 2.3.3.2: "Deed of settlement companies".

[175] "I understand by a company - an unincorporated company - some association of members, the shares of which are transferable. As distinguished from a partnership, I know of nothing else except for transferability of shares" - R v. Registrar of Joint Stock Companies [1891] 2 QB 598, 610 (per Lindley LJ); see also Lindley, "Lindley on Companies" 6th ed., p. 1.

[176] F. Evans, "Joint Stock" (1913) 29 LQR 195, 198.

[177] Joint Stock Companies Act, 1844, 7 & 8 Vict. c.110; Joint Stock Companies Act, 1856 19 & 20 Vict. c.47; Joint Stock Companies Act, 1862, 25 & 26 Vict. c.89.

[178] See below at 3.3.5: "The Policy Rationale for the Ultra Vires Doctrine".

2.3.4.1. Barriers to incorporation

The law countenanced the widespread use of partnerships to form joint stock companies until the early eighteenth century, but events prompted a highly restrictive approach from then until the mid-nineteenth century.[179] Bitter experience, encompassing fraud, abuses, manic speculation and financial collapse, provoked official caution, if not open hostility, towards the corporate form during this period.

The first years of the eighteenth century witnessed an "almost frenetic boom"[180] in the number of companies to which members of the public were invited to subscribe.[181] Public faith in investment as a route to riches was "a widespread superstition".[182] Many fraudulent ventures targeted the gullible. There was little regulation of invitations for public subscriptions, and rogues took full advantage of this.

In addition to outright fraud, many chartered corporations were being used for purposes far removed from their original goals. This was understandable because chartered corporations could enjoy the benefits of limited liability, corporate personality and the transferability of shares, but only by enduring the delays and difficulty of obtaining a charter.[183] Deterred by the cost, many prospective promoters chose instead to adopt the charters of defunct corporations by acquiring their shares and then using the corporation for their own ends, regardless of the charter's nature.[184] Typically, a company which was being set up to engage in banking business in Ireland acquired the charter of the Sword Blade Company,

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[179] See F. Evans, "Joint Stock" (1913) 29 LQR 195.

[180] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 25.

[181] P. Ireland, "Company Law and the Myth of Shareholder Ownership" (1999) 62 MLR 32, 41.

[182] D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 81, at 95.

[183] Ibid, at 95.

[184] Ibid, at 95.

which had been granted for the purpose of the manufacture of hollow sword blades.[185] This form of abuse likely attuned the minds of the public, the legislature and the judiciary to the mischief of companies conducting business which was completely divorced from the activities for which they were set up. This factor may subsequently have informed the strict application of the ultra vires rule to registered companies.

In 1720, the uncontrolled speculation and abuses came to a head with the notoriously disastrous collapse of the South Sea Company.[186] It cost many investors dearly.[187] The company, formed by statute and charter in 1711, conceived a scheme to acquire most of the national debt from the State's creditors, which collapsed, causing significant losses to its many investors.[188] This scandal was a catalyst for radical change in the regulation of companies. There was a demand for the legislature to intervene to create some order in the chaos of speculative undertakings. According to Perrott, most of the problems related to the use of corporate form in England in the eighteenth century "would have arisen even with perfectly honestly and competently run companies operating in a calm economic climate."[189] Incompetence and dishonesty both caused problems.[190] The levels of

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[185] W.S. Holdsworth, "A History of English Law" (Methuen, London, 1923-1966), Vol. 8, p. 216; see also L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 25; W.E. Minchinton, "Chartered Companies and Limited Liability" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 137, 142.

[186] Incorporated by Act of Parliament (9 Ann. c. 37) in 1711.

[187] See H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 5; T. Hadden, "Company Law and Capitalism" 2nd ed. (Weidenfeld and Nicolson, London, 1977), pp. 15-16.

[188] Gower describes the South Sea Company's rationale as "not necessarily unsound." - L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 25.

[189] D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 81, at 96.

[190] Anonymous, "Article VI – Joint Stock Companies Regulation Acts" (1845) 1 L. Rev. & Q. J. Brit. & Foreign Jurisprudence 95, 97.

"fraud, stupidity and gullibility" prevalent in the years before 1720 exacerbated the need for legislation to regulate corporations.[191]

Parliament resolved to enact legislation to curb the frenzy of speculation. However, its response to this genuine need was inept.[192] The Bubble Act[193] was to have an enormous detrimental effect on the development of the corporation in English law. Essentially, the Act prohibited unincorporated bodies from claiming corporate personality and outlawed the use of charters for unapproved purposes. Although the act's motivation may have been only to prohibit such activities by "dangerous and mischievous undertakings",[194] it operated as a general restriction, if not absolute obliteration.[195] After the Act was introduced, proceedings were brought against a number of companies which had acquired obsolete charters to compel them to forfeit the charters. The relative scarcity of prosecutions[196] does not negate the Act's chilling effect.

The effects of the Bubble Act can be discerned on a number of levels. It hindered the development of the corporate form in the United Kingdom.[197] Incorporation

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[191] In Twycross v. Grant (1876-77) L.R. 2 C.P.D. 469, 484, Coleridge CJ enumerates well-known fraudulent activities by promoters.

[192] L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. LR 1369, 1370-1371

[193] 6 Geo. I, c.18; see especially Sections 18 to 25.

[194] Anonymous, "Article VI – Joint Stock Companies Regulation Acts" (1845) 1 L. Rev. & Q. J. Brit. & Foreign Jurisprudence 95, 106.

[195] F.W. Maitland, "Trust and Corporation", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 141, 208.

[196] F. Evans, "Joint Stock" (1913) 29 LQR 195, 196-197; Anonymous, "Article VI – Joint Stock Companies Regulation Acts" (1845) 1 L. Rev. & Q. J. Brit. & Foreign Jurisprudence 95, 106; F.W. Maitland, "Trust and Corporation", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 141, 208-209.

[197] T. Hadden, "Company Law and Capitalism" 2nd ed. (Weidenfeld and Nicolson, London, 1977), p. 16.

remained confined to large, wealthy bodies.[198] As a consequence, the development of company law here was retarded by comparison with the United States.[199] The Bubble Act also indirectly fuelled public hostility towards the joint stock company, especially directed against wide passive investment.[200] Unfortunately, the Act was not the appropriate response to the mischief which inspired it. Enacted by a "panic stricken parliament",[201] it failed to distinguish between solid business proposals and speculative frauds.

The law's hostility could not prevent the daily reality of commercial activity in associative form. The beginning of the industrial revolution coupled with the availability of capital[202] made corporate action commercially necessary.[203] The

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[198] H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 13.

[199] New York Act of March 22, 1811, Chap. 67 was the first state statute of general incorporation; the American relative openness to corporations also emerges from the principle that a group of individuals could make themselves a corporation by agreement, and though the State could challenge a usurpation of corporate form, the courts would accept the putative corporation was genuine - S.D. Thompson, "The Doctrine of Ultra Vires in Relation to Private Corporations" (1894) 28 American Law Review 376, 397; L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. LR 1369, 1372.

[200] D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 81, 98: "The investing public and the law officers alike came to regard the principal tests of illegality under the Act as being public subscription and the free transferability of shares in unincorporated partnerships, and not, be it noted, claims to corporate personality or limited liability per se."

[201] F.W. Maitland, "Trust and Corporation", in Fisher ed. "The Collected Papers of Frederick William Maitland, III" (Cambridge, Cambridge University Press, 1911), p. 390, cited by Minchinton, p. 142.

[202] Anonymous, "Article VI – Joint Stock Companies Regulation Acts" (1845) 1 L. Rev. & Q. J. Brit. & Foreign Jurisprudence 95, 96.

[203] G.F. McGuigan, "The Emergence of the Unincorporated Company in Canada" (1964-1966) 2 U. Brit. Colum. L. Rev. 31, 37.

number and importance of companies grew.[204] Large-scale endeavours such as the construction of factories require significant capital from a plurality of investors, so that the company is a "by-product of the machine age".[205] Businessmen motivated by the commercial imperative for collective action had to fall back on unincorporated deed of settlement companies,[206] or resort to attempts to obtain charters or statutory incorporation. The increased volume of applications rendered these procedures "slower, more expensive and more unpredictable."[207] In addition, developing public hostility towards monopolies militated against the grant of charters.[208] While deed of settlement companies and chartered corporations enabled many to engage in business during the eighteenth century, there remained a need for an easier means of incorporation.

2.3.4.2. The Joint Stock Companies Acts

Early in the nineteenth century, public interest in a number of railway schemes led to widespread frustration with the effect of the Bubble Act.[209] The Bubble Act Repeal Act, 1825[210] restored the position which had obtained at common law before 1721.[211] This allowed the development of the company to resume after a century of

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[204] F. Evans, "Joint Stock" (1913) 29 LQR 195, 196; T. Hadden, "Company Law and Capitalism" 2nd ed. (Weidenfeld and Nicolson, London, 1977) p. 17.

[205] J. Treillard, "The Close Corporation in French and Continental Law" (1953) 18 Law & Contemp Probs. 546, 548.

[206] See G.F. McGuigan, "The Emergence of the Unincorporated Company in Canada" (1964-1966) 2 U. Brit. Colum. L. Rev. 31.

[207] D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 81, at 97.

[208] G.F. McGuigan, "The Emergence of the Unincorporated Company in Canada" (1964-1966) 2 U. Brit. Colum. L. Rev. 31, 36.

[209] D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 81, at 98.

[210] 6 Geo. 4, c.91.

[211] Anonymous, "Article VI – Joint Stock Companies Regulation Acts" (1845) 1 L. Rev. & Q. J. Brit. & Foreign Jurisprudence 95, 111; see also F.W. Maitland, "Trust and Corporation", in H.D.

stagnation and set the stage for the enactment of legislation to regulate new companies.[212]

Beginning with the Joint Stock Companies Act, 1844,[213] a series of Acts enabled the promoters of a company to draw up its constitution and have it recognised by the State.[214] Under the new dispensation, any promoter, by complying with the requirements set out in the Act, could apply to have his company incorporated without obtaining individual governmental authorisation. This was a major innovation, introducing the main element of the modern registered company. The fundamental change was that "formation and incorporation of a joint stock companies ceased to be a matter of privilege and became a matter of right."[215]

The 1844 Act was praised for its "equity and utility".[216] It did not, however, invent the modern form of company overnight. The joint stock company was still termed a partnership[217] and retained a partnership's unlimited liability.[218] Partnership

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Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 141, 211: "the State capitulated gracefully in 1862".

[212] See Anonymous, "Article VI – Joint Stock Companies Regulation Acts" (1845) 1 L. Rev. & Q. J. Brit. & Foreign Jurisprudence 95, 96; L.S. Sealy, "Perception and Policy in Company Law Reform", in D. Feldman & F. Meisel (eds), "Corporate and Commercial Law: Modern Developments" (LLP, London, 1996), p. 22.

[213] Joint Stock Companies Act, 1844, 7 & 8 Vict. c.110.

[214] Joint Stock Companies Act, 1844, 7 & 8 Vict. c.110; Joint Stock Companies Act, 1856 19 & 20 Vict. c.47; Joint Stock Companies Act, 1862, 25 & 26 Vict. c.89.

[215] W. Horrwitz, "Historical Development of Company Law" (1946) 62 LQR 375, 377; see also H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), pp. 5-6.

[216] Anonymous, "Article VI – Joint Stock Companies Regulation Acts" (1845) 1 L. Rev. & Q. J. Brit. & Foreign Jurisprudence 95, 95.

[217] Section 25, Joint Stock Companies Act, 1844; see also R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 559; Anonymous, "Article VI – Joint Stock Companies Regulation Acts" (1845) 1 L. Rev. & Q. J. Brit. & Foreign Jurisprudence 95, 98; the deed of settlement company was assumed as the model - L.S. Sealy, "Perception and Policy in Company

remained the "prevailing paradigm".[219] The liability of members was slightly modified in that the creditor of a joint stock company incorporated under the 1844 Act could only levy execution against a shareholder after diligently endeavouring to obtain satisfaction of the debt from the company.[220]

The Joint Stock Companies Act, 1856[221] removed the concept of provisional registration and replaced the deed of settlement with the modern memorandum and articles of association. It provided for the liability of members for the company's debts where the number of members fell below seven for six months, but excluded the company's creditors from levying execution against shareholders in other circumstances. Henceforth, if a company was being wound up and unable to meet its debts, shareholders would be liable to pay to it the amounts outstanding on their shares. Shareholders' direct liability to creditors was replaced by liability to the company itself. Horrwitz characterises the significance of this development as the dominance of the corporate dimension over the partnership aspect.[222]

Nineteenth century companies legislation was strongly influenced by the prevailing philosophies of the era. Horrwitz emphasises that the twin foundations of company law were liberty for shareholders, coupled with public information.[223] Between 1844 and 1856, the state changed direction by recognising that it could not prevent

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Law Reform", in D. Feldman & F. Meisel (eds), "Corporate and Commercial Law: Modern Developments" (LLP, London, 1996), p. 23.

[218] W. Horrwitz, "Historical Development of Company Law" (1946) 62 LQR 375, 378.

[219] R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 559.

[220] Section 66, Joint Stock Companies Act, 1844.

[221] Joint Stock Companies Act, 1856 19 & 20 Vict. c.47.

[222] W. Horrwitz, "Historical Development of Company Law" (1946) 62 LQR 375, 384: "the corporate character of the limited company won the upper hand over the partnership element in it."

[223] Ibid, 386: "in 1856 [...] liberalism was at its peak. The guiding principle then fixed was fullest freedom for shareholders in the formation and management of companies on the condition that fullest information was given to the public."; see also Palmer's *Company Law*, 23rd ed., 1982, para. 2-07.

fraudulent companies. Instead, under liberal principles, companies would be permitted and individuals must be vigilant.[224] The predominant laissez-faire attitude resulted in the 1855 Act's removal of most of the restrictions which accompanied the grant of limited liability.[225] Limited liability was accompanied by an augmentation of the requirements for the provision of public information, which would enable those dealing with joint stock companies to protect their interests.

The Joint Stock Companies Act, 1862[226] was mainly a consolidating Act.[227] However, one of its main innovations would be pivotal in the context of ultra vires. Section 12 prohibited the alteration of the objects clause of a registered company. Subsequent judicial interpretation reasoned that this implied that such companies must always abide by their stated objects and therefore had limited capacity.[228]

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[224] Introducing the Bill in the House of Commons, the Vice-President of the Board of Trade rejected "the principle upon which the present Joint Stock Companies Act is founded - that it is in the power of the Government to prevent the institution of fraudulent companies. We do not believe that it is in the power of the Government to supersede the vigilance of individuals who actuated by the strongest personal interests to detect these frauds." - W. Horrwitz, "Historical Development of Company Law" (1946) 62 LQR 375, 381; see also Mr. Bouverie's speech reported at (1855) 139 Hansard 310 et seq, quoted in H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 12: "He did not think it was his duty as legislator to prevent imprudence in commercial undertakings. The real preventive against imprudence was the loss which it entailed on the imprudent man; no security against it was so great as the punishment which the imprudent man brought on himself by committing it."

[225] Limited Liability Act, 1855, 18 & 19 Vict. c.133.

[226] Joint Stock Companies Act, 1862, 25 & 26 Vict. c.89.

[227] Though Maitland celebrates it for making legal personality accessible to any seven persons: "we have cause to rejoice over the width of these words, for we in England are too much accustomed to half-measures, and this was no half-measure." - F.W. Maitland, "Trust and Corporation", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 141, 172, 208; it "made it easy and advantageous for enormous numbers of recruits to join the ranks of corporations" - C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905, p. 3.

[228] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653; see below at Chapter 3: "The Initial Application of the Doctrine of Ultra Vires to the Registered Company".

2.4. THE SIGNIFICANT CHARACTERISTICS OF REGISTERED COMPANIES

The modern registered company is unlike the partnership because it is incorporated, and so possesses its own legal personality distinct from that of the individuals who form it. It differs from chartered or statutory corporations in that the State does not enact the terms of the instrument which grants incorporation. Instead, the State has established a mechanism whereby individuals may form an association, writing its constitution themselves, and obtain recognition and consequently legal personality from the State. This process is "simple, straightforward, cheap and generally available".[229] The essential characteristics of the registered company, which might bear on the scope of its capacity, were established from an early date. These are that it is viewed by the legal system as a separate legal entity, independent of its members, and that a distinction is therefore drawn between the liabilities of the company and those of its members.[230] Those members are not liable to contribute to the debts of the company if its assets are insufficient.

2.4.1. The Separation of Ownership and Control

Certain characteristics are assumed by company law, such as the separation of a corporation's ownership and control.[231] This originates in the commercial practice of deed of settlement companies but is now a central principle of the law.[232] In practical terms, a company must necessarily act through natural persons. Much of company law is designed to govern the interactions between those who own the

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[229] H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 13.

[230] E. Ferran, "Company Law and Corporate Finance" (Oxford, 1999), p. 13.

[231] See A. Berle & G. Means, "The Modern Corporation and Private Property" rev. ed, (Harcourt, Brace & World Inc., New York, 1967); also: "Thus the shareholders are seen to have no executive authority whatsoever: the "separation of ownership and control" is transformed from an economist's cliché into a legal reality." - G.R. Sullivan, "The Relationship between the Board of Directors and the General Meeting in Limited Companies" (1977) 93 LQR 569, 573-574.

[232] Automatic Self-Cleansing Filter Syndicate Company Ltd v. Cuninghame [1906] 2 Ch. 34; R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 564.

company and those who run it on a daily basis. On an economic view of the company, this separation reflects a sensible division between the roles of those who contribute capital and those who are well-qualified to run a business.[233]

In reality, this separation is often more apparent than real. In many cases, and particularly where the company in question is a small family company, there is a de facto correlation between ownership and management.[234] Shareholders may take an active role in management and not necessarily distinguish between their roles as owners and managers.[235] Company law, however, generally assumes the contrary and strives to ensure that those entrusted with the management of a company conduct their functions in the interests of the company and its owners.[236]

Gower equates the division of functions between the members of a company and its management to the separation of the legislative and executive powers in a state.[237] The members are the higher authority and are empowered to do all that is within the capacity of the company itself, but it would be impracticable for "such a cumbersome piece of machinery" to engage in the routine pursuit of the company's business.[238] The power held by the directors or officers to enable them to carry out

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[233] B. Cheffins, "Using Theory to Study Law: A Company Law Perpective" (1999) 58 CLJ 197, 210.

[234] 70% of UK companies are close or "shareholder-managed" - L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 169.

[235] In Re W & M Roith Ltd [1967] AER 427, "it was necessary to lift the veil of incorporation and to pay regard to "the economic realities behind the legal façade" of a small family company and yet, at the same time, to ignore those economic realities and to acknowledge instead the legal realities of the company's corporate existence." - H. Silberberg, "Gratuitous Payments for the Benefit of a Company" [1968] JBL 213, 213-214.

[236] See below at Chapter 14: "Remedies against an Individual for Wrongful Conduct".

[237] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 15; cp L.C.B. Gower & P.L. Davies, "Principles of Modern Company Law", 8th ed. (Sweet & Maxwell, London, 2008), pp. 46-47.

[238] Ibid, at p. 18; the shareholders may delegate and circumscribe the powers of management as they wish through the articles of association: "the shareholders may make such regulations for their own

their functions is delegated to them by the shareholders. The shareholders, as the owners of the company, are the real decision-making power.[239] The general meeting of the company collectively exercises the will of the company. Although they are the ultimate arbiters within the company, even the shareholders in general meeting are constrained by the company's constitution.[240]

The separation between those who own the company and those who run it grounds the relative status of shareholders and directors,[241] and grants to shareholders as the ultimate authority in a company the power to ratify a breach of fiduciary duties by directors, which constitutes a wrong against the company.[242] Dodd[243] and Berle[244] emphasise the central importance of private property to the conception of the company as "an association of stockholders formed for their private gain and to be managed by its board of directors solely with that end in view."[245] The assets of the

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government as they see fit" - Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 671 (per Lord Cairns LC).

[239] G.R. Sullivan, "The Relationship between the Board of Directors and the General Meeting in Limited Companies" (1977) 93 LQR 569.

[240] T. Hadden, "Company Law and Capitalism" 2nd ed. (Weidenfeld and Nicolson, London, 1977), p. 106.

[241] See G.R. Sullivan, "The Relationship between the Board of Directors and the General Meeting in Limited Companies" (1977) 93 LQR 569.

[242] R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 554-555; G.D. Goldberg, "Article 80 of Table A of the Companies Act 1948" (1970) 33 MLR 177; Bamford v. Bamford [1970] Ch. 212.

[243] E.M. Dodd, "For Whom are Corporate Managers Trustees?" (1932) 45 Harv. L. Rev. 1145, 1145-1147.

[244] A.A. Berle, "For Whom Corporate Managers are Trustees: a Note" (1932) 45 Harv. L. Rev. 1365, 1368.

[245] E.M. Dodd, "For Whom are Corporate Managers Trustees?" (1932) 45 Harv. L. Rev. 1145, 1145-1147, 1147.

company are ultimately the property of shareholders, and the directors act like trustees on behalf of the shareholders.[246]

However, Grantham challenges the view that shareholders, as owners, have delegated certain powers to management. Instead, he argues that since shareholders are precluded from encroaching on territory reserved by the company's constitution to management,[247] they are no longer the "ultimate source of authority" but merely subjects of the constitution.[248] Nonetheless, in the context of ratification, the view of shareholders as higher authority remains useful. The academic consensus has been that the conception of the separation of ownership and control grounds the law's ongoing concern that a company be run in the sole interests of shareholders.[249]

2.4.2. The Corporate Constitution

The memorandum and articles of association are the founding documents of a registered company. Descendants of the deeds of settlement, they constitute a binding contract between the shareholders[250] and between the company and its members.[251] The articles of association specify the internal regulations of the

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[246] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 165; See also Maitland, "The Collected Papers of Frederic William Maitland" (Cambridge University Press, 1911), Vol. 3: "The trust has given us a liberal supplement for a necessarily meagre law of corporations", cited in A. O'Neill, "The Constitutional Rights of Companies" (Thompson Round Hall, Dublin, 2007), p. 14.

[247] See: Bamford v. Bamford [1970] Ch. 212; Automatic Self-Cleansing Filter Syndicate Company Ltd v. Cuninghame [1906] 2 Ch. 34; Gramophone & Typewriter Ltd v. Stanley [1908] 2 KB 89.

[248] R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 566, citing John Shaw & Sons Ltd v. Shaw [1935] 2 KB 113; cf G.D. Goldberg, "Article 80 of Table A of the Companies Act 1948" (1970) 33 MLR 177.

[249] R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 567.

[250] Ibid, at 564, citing Automatic Self-Cleansing Filter Syndicate Co Ltd v. Cuninghame [1906] 2 Ch. 42 and Salmon v. Quin & Axtens Ltd [1909] 1 Ch. 311.

[251] "They are in effect a contract between the company and its members. When they are registered they bind the company and its members as if they had been sealed and signed by each member and

company, and transgressions may therefore be approved or ratified by shareholders. The memorandum is superior.[252] It is regarded as the company's contract with the state and the rest of the world. It contains the terms on which registration and legal personality are granted. Neither the company itself nor any power within the company may disregard the memorandum. If it purports to do so, such acts are ultra vires and void.

2.4.3. Separate Legal Personality

The corporation is a legal person, independent of the natural persons who come together to form it, and a valid legal actor in its own right.[253] Prominent among the difficult philosophical questions which arise as to the nature of such legal personality[254] is the extent of the legal capacity which the corporation might

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contained covenants on the part of each member to observe all the provisions of the articles." – Roper v. Ward [1981] ILRM 408, 412 (per Carroll J.); See also: Clark v. Workman [1920] 1 IR 107 (Ross J.); Pender v. Lushington (1877) 6 Ch. D. 70; Wood v. Odessa Waterworks Company (1889) 42 Ch. D. 636; Hickman v. Kent or Romney Marsh Sheep Breeders' Association [1915] 1 Ch. 881; Lee & Company (Dublin) Ltd and Conroy v. Egan (Wholesale) Ltd and Roe (High Court, Unreported, 27 April, 1978, Kenny J.); Attorney General and Ireland v. Jameson [1904] 2 IR 644; Section 25, Companies Act, 1963; G. Carey & S. Leonowicz, "Company Constitutional Documents as Contracts" (2003) 21(3) ILT 39; R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 565; Section 33(1), Companies Act 2006 (UK).

[252] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 671 (per Lord Cairns LC); The "former immutability" of the memorandum inspired both the ultra vires doctrine and the superiority of the memorandum over the articles - P. Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986), p. 60.

[253] L.C.B. Gower & P.L. Davies, "Principles of Modern Company Law", 8th ed. (Sweet & Maxwell, London, 2008), p. 4; M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31 MLR 481; see also: M. Gallagher, "A Company's Separate Legal Personality – Lifting the Corporate Veil" (2005) 23(11) ILT 167; O. Kahn-Freund, "Corporate Entity", (1940) 3 MLR 226; Belton v. Carlow County Council [1997] 2 ILRM 405; In Re Frederick Inns Ltd [1991] ILRM 582, 587.

[254] And the concept is "of pervasive effect, for a great part of company law is derived from, or related to, it" - M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31 MLR 481, 484; L.S. Sealy, "Perception and Policy in Company Law Reform", in D. Feldman & F. Meisel (eds), "Corporate and Commercial Law: Modern Developments" (LLP, London, 1996), p. 16 et seq.

enjoy.[255] Gower asserts that the theoretical basis of legal personality should not concern lawyers except insofar as the alternative theories have influenced judicial decision-making.[256]

Various attributes and rules flow from separate legal personality.[257] The registered company enjoys perpetual succession, surviving, whatever fate might befall individual members, until such time as it comes to be wound up. The company can hold property in its own name, unlike the partnership,[258] and conclude contracts through its agents.[259] Pre-incorporation contracts, concluded by the company's promoters on its behalf before the company is registered, do not bind the company unless the company assumes the obligations after it comes into existence.[260]

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[255] See M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31 MLR 481, which approaches capacity in this way.

[256] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 4; Sealy warns against taking the theories literally: L.S. Sealy, "Perception and Policy in Company Law Reform", in D. Feldman & F. Meisel (eds), "Corporate and Commercial Law: Modern Developments" (LLP, London, 1996), p. 16.

[257] See Prudential Assurance Company Ltd v. Newman Industries Ltd (No. 2) [1982] Ch. 204, 224; E. Ferran, "Company Law and Corporate Finance" (Oxford, 1999), p. 14.

[258] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 44.

[259] Ibid, at para. 89; See C.T. Carr, "The General Principles of the Law of Corporations" (CUP, 1905), pp. 54-56: the exceptions to the requirement of a seal include commercial trade and necessities; cf Corporate Bodies' Contracts Act, 1960 (UK).

[260] In Re English & Colonial Produce Company Ltd [1906] 2 Ch. 435; In Re National Motor Mail Coach Company Ltd [1908] 2 Ch. 515, cited in F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 56.

The landmark decision of *Salomon v. Salomon & Co Ltd*[261] did not invent separate legal personality,[262] but it tested the limits of the legal status of companies established under the Joint Stock Companies Act 1862.[263] In *Salomon*, the House of Lords upheld the separate legal personality of a close company formed under the 1862 Act.[264] The company was formed by a bootmaker, who was managing director and held the vast majority of shares. On winding up, the company owed debentures to the controlling shareholder, leaving insufficient funds to pay its ordinary creditors. The liquidator sought to have those debentures cancelled, claiming that the price paid to the managing director for the acquisition of the company's business had been excessive, and that the company was no more than the appellant acting under another name, so that it was a "sham" or "fraud" designed to allow him "to carry on his business without risk to himself and at his creditors' expense."[265]

The House of Lords rejected this argument. It ruled that the company was a "distinct legal persona",[266] and "at law a different person altogether from the subscribers".[267] Lord Halsbury described a registered company as an "artificial creation of the Legislature"[268] and asserted that, once registered, the company must

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[261] Salomon v. Salomon & Co Ltd [1897] AC 22.

[262] See John Foster & Sons Ltd v. Commissioners of Inland Revenue [1894] 1 QB 516; L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 165.

[263] Joint Stock Companies Act, 1862, 25 & 26 Vict. c.89; the decision also ended a period of uncertainty in relation to separate personality, though "even in such extreme cases the existence of a corporate entity distinct from the mere sum of the corporators was not doubted until the year 1894" - C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), pp. 6, 7.

[264] It thus "ensured that these privileges were not restricted to large ventures dependant on many investors" - H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 14.

[265] Salomon v. Salomon & Co Ltd [1897] AC 22: see Farwell QC, at 28.

[266] Ibid, at 42 (per Lord Herschell).

[267] Ibid, at 51 (per Lord Macnaghten).

[268] Ibid, at 29 (per Lord Halsbury LC).

be regarded as a fully independent legal person.[269] This company was validly created as a distinct legal person from its main shareholder.[270] Lord Herschell conceded that perhaps the company was not of the kind on which the legislature had intended to confer limited liability,[271] but emphasised the free choice of those transacting with registered companies: outsiders could decide whether or not they were sufficiently satisfied with the company's capital and assets to deal with the company.[272] Consequently, if the registered company and limited liability present a danger to the public, the appropriate response is not official restriction but individual caution.[273] This fits in with liberal and individualist thinking. It also represents a "fundamental paradigm shift" in company law.[274]

According to Grantham, given that joint stock companies were still commonly viewed as a species of partnership, the affirmation of the company's independent legal personality in *Salomon* was "neither obvious nor particularly significant".[275] Since then, however, separate legal personality has become a founding principle of company law. Recognition of a group's legal personality has at times been viewed as a threat to the freedom of individuals or the power of states.[276] It has also posed difficult questions regarding tortious and criminal responsibility.[277]

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[269] Ibid, at 30 (per Lord Halsbury LC).

[270] Salomon v. Salomon & Co Ltd [1897] AC 22, 29 (per Lord Halsbury LC): "I have no right to add to the requirements of the statute, nor to take away from them."

[271] Ibid, at 46 (per Lord Herschell).

[272] Ibid, at 46 (per Lord Herschell).

[273] E. Manson, "The Reform of Company Law" (1889) 5 LQR 61, 64.

[274] R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 561.

[275] Ibid, at 560; P. Ireland, "Company Law and the Myth of Shareholder Ownership" (1999) 62 MLR 32, 39.

[276] F.W. Maitland, "Moral Personality and Legal Personality", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 223, 229-230: cites the French Revolution; A. O'Neill, "The Constitutional Rights of Companies" (Thompson Round Hall, Dublin,

All corporations enjoy separate personality, regardless of their size. Sometimes the managers of close family-run enterprises fail to appreciate the distinction between corporate and personal assets, and use the company to engage in transactions which benefit others rather than serving the company's interest.[278] The principle of separate legal personality implies that this is improper: corporate assets should be protected because they belong to the company, not its owners, and creditors have a claim to them.

2.4.4. Limited Liability

One of the primary advantages enjoyed by the limited company as a vehicle for business is limited liability.[279] Shareholders will not generally be required to contribute to the debts of the company, should its assets be insufficient to discharge them. While this essential characteristic has facilitated investment and economic growth through the medium of the limited company, it is also sometimes a source of disquiet.[280] The problem is that limited liability poses a potential threat to the interests of those who deal with the company. This concern strongly influenced the judicial application of the ultra vires doctrine to the limited company.

2007), p. 12, citing Freund, "Standards of American Legislation" (University of Chicago Press, 1917), p. 39.

[277] See M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31 MLR 481, 502-504; Lennard's Carrying Company Ltd v. Asiatic Petroleum Company Ltd [1915] AC 705; The Lady Gwendolen [1965] 3 WLR 91; Tesco Supermarkets Ltd v. Natrass [1972] AC 152.

[278] "The Company was a small affair, easily controllable by a single group of co-owners and the consequent disregard of its distinct corporate character goes some way towards explaining, though it does not excuse, the imbecility of the part which the Company was made to play in relation to the deal." - In Re S.M. Barker Ltd [1950] IR 123, 127 (per Gavan Duffy P.).

[279] H.G. Manne, "Our Two Corporation Systems: Law and Economics" (1967) 53 Virginia Law Review 259, 262: "limited liability also flows logically from the concept of the corporation as a capital-raising mechanism."; L.C.B. Gower & P.L. Davies, "Principles of Modern Company Law", 8th ed. (Sweet & Maxwell, London, 2008), p. 193 et seq.

[280] E. Manson, "The Reform of Company Law" (1889) 5 LQR 61, 61.

While limited liability is a logical consequence of separate personality, it is not a necessary consequence.[281] Historically, few associative forms enjoyed limited liability. The first companies to possess limited liability were chartered corporations.[282] For them limited liability was an unimportant incident of their separate legal personality.[283] Unincorporated deed of settlement companies, which were a more common form of enterprise, had neither separate legal personality nor limited liability.

The existence of unlimited private companies under modern law proves that it is logically possible to have separate legal personality without limited liability. There is no logical inconsistency in proposing that a corporation is a distinct legal entity, but should it default on its debts, its members will be required to contribute from their personal assets. Such an approach alters the balance struck between the competing interests of creditors and shareholders. It directly favours the creditor, but indirectly, the absence of limited liability would likely discourage trade which could expose shareholders to the risk of large debts and thus restrain commercial activity generally.[284] It might also penalise shareholders for actions over which they have no real day to day control. Modern company law prefers to respect the limited liability of shareholders but target for liability any company directors guilty of fraudulent or reckless trading.[285]

The statutory regime which saw the revival of the corporation opted to complement separate legal personality with limited liability. The Bubble Act Repeal Act, 1825[286] set the stage for the rise of limited liability. It facilitated the grant of limited liability

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[281] E. Ferran, "Company Law and Corporate Finance" (Oxford, 1999), p. 17.

[282] Limited liability was not a given; it depended on the terms of the charter - T. Hadden, "Company Law and Capitalism" 2nd ed. (Weidenfeld and Nicolson, London, 1977), p. 20.

[283] W. Horrwitz, "Historical Development of Company Law" (1946) 62 LQR 375

[284] See S. Griffin, "Limited Liability: A Necessary Revolution" (2004) 25(4) Comp. Law. 99.

[285] Section 286, Companies Act, 1963 (fraudulent preference); Section 297, Companies Act, 1963 (fraudulent trading); Section 297A, Companies Act, 1963 (reckless trading) - (Ireland).

[286] Bubble Act Repeal Act, 1825, 6 Geo. 4, c.91.

to chartered corporations by allowing the Crown to set their members' liability at any level it chose.[287] However, the public, concerned at the risks posed to creditors by a profusion of chartered corporations with limited liability, began to oppose the extension of limited liability.[288] This public hostility led the Joint Stock Companies Act of 1844[289] to withhold the privilege from registered companies. The introduction of limited liability was suggested on a number of occasions in the 1830s and 1840s but encountered strong opposition.[290]

However, by 1855, with a multitude of companies competing for the available capital, the absence of limited liability had come to be regarded as a flaw in the 1844 Act, deterring potential investors.[291] In 1854, the House of Commons resolved that limited liability be introduced. The Limited Liability Act, 1855 allowed registered companies to benefit from limited liability, while containing certain restrictions designed to protect creditors.[292] Limited liability was confirmed in 1856[293] and 1862.[294] After limited liability became generally available to registered

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[287] Section 2, Bubble Act Repeal Act, 1825, 6 Geo. 4, c.91.

[288] D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation"(Croom Helm, 1982), p. 81, at 99.

[289] Joint Stock Companies Act, 1844, 7 & 8 Vict. c.110.

[290] W. Horrwitz, "Historical Development of Company Law" (1946) 62 LQR 375, 378-379; S. Griffin, "Limited Liability: A Necessary Revolution" (2004) 25(4) Comp. Law. 99, 99: cites fears that "under-capitalised concerns might exploit the corporate form to the detriment of creditors and the investing public".

[291] D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation"(Croom Helm, 1982), p. 81, at 100.

[292] Limited Liability Act, 1855, 18 & 19 Vict. c.133; see W. Horrwitz, "Historical Development of Company Law" (1946) 62 LQR 375, 379.

[293] Joint Stock Companies Act, 1856, 19 & 20 Vict. c.47.

[294] Joint Stock Companies Act, 1862, 25 & 26 Vict. c.89.

companies in 1862, "new chartered companies ceased to be launched for most purposes."[295] The new registered limited liability company came to predominate.[296]

Limited liability, which is now regarded as the greatest advantage of setting up a trading company, was not prized by investors in centuries past. Although it was recognised by the courts in the late seventeenth century,[297] it was then viewed primarily as a means to protect the assets of the company from the debts of members, which is the converse of the modern perspective. Prior to the introduction of the first Joint Stock Companies Act,[298] there was no great clamour for limited liability.[299] Perhaps the strongest motivation was the practical inconvenience caused by the difficulty faced by executors in ascertaining the liabilities of deceased shareholders.[300]

Equally, creditors of those statutory or chartered corporations which already possessed limited liability were not unduly perturbed.[301] Gower explains that the historical insouciance about limited liability arose because even where members were not directly liable for a corporation's debts, many charters conferred a power to demand "leviations" or contributions from members, so that any protection

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[295] W.E. Minchinton, "Chartered Companies and Limited Liability" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 137, at 146.

[296] However, limited liability did not immediately win universal acclaim: "When we styled the Limited Liability Act, 'the Rogues Charter', we certainly did not anticipate that it would so speedily approve its claim to the title. It is little more than two years old, and already what a mass of villainy it has engendered!", The Law Times, London, 25th March, 1858, quoted in H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 13.

[297] Salmon v. The Hamborough Company (1671) 1 Chan. Cas. 204; 22 Eng. Rep. 763.

[298] Joint Stock Companies Act, 1844, 7 & 8 Vict. c.110.

[299] Anonymous, "Article VI – Joint Stock Companies Regulation Acts" (1845) 1 L. Rev. & Q. J. Brit. & Foreign Jurisprudence 95, 118.

[300] Ibid, at 119.

[301] Ibid, at 118.

derived from the principle of limited liability was in fact "illusory".[302] The company's creditors could proceed directly against members if the company refused to make the leviation, using a "process resembling subrogation".[303]

Even now, the protection which limited liability offers the members of a company is not absolute. Jones describes it as "frequently more academic than real"[304] because members of private companies are often required in practice to give personal guarantees for company debts. Griffin points to the "credit boom" of the twentieth century as undermining the need for share capital and thus limited liability.[305]

In the mid-nineteenth century, it was the need for capital to fund the proliferation of new joint stock companies which induced a change in attitude.[306] If limited liability does not flow automatically from incorporation, Manne asserts that, from the economic viewpoint, it is a consequence of "the concept of the corporation as a capital-raising mechanism."[307] Its policy motivation has traditionally been to encourage investment in "desirable but risky enterprises".[308] It offers comfort to

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[302] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 23.

[303] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 23.

[304] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 46.

[305] S. Griffin, "Limited Liability: A Necessary Revolution" (2004) 25(4) Comp. Law. 99, 99; S. Conneely, "The Company Law Review Group Report: What Will We Do With the Small Firm?" (1997) 11(15) ILT 210, 210.

[306] D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 81, at 100; S. Griffin, "Limited Liability: A Necessary Revolution" (2004) 25(4) Comp. Law. 99, 99.

[307] H.G. Manne, "Our Two Corporation Systems: Law and Economics" (1967) 53 Virginia Law Review 259, 262; E. Ferran, "Company Law and Corporate Finance" (Oxford, 1999), p. 18.

[308] D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 81, at 84; see also L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural"

prospective investors who, either subjectively or objectively, have a lot to lose.[309] The mechanism for this facilitation of investment is a displacement of risk from investor to creditor.[310] This is justified on the basis that the lender might be "the superior risk bearer".[311] Furthermore, in the case of voluntary creditors, Posner argues that lenders compensate for the burden of dealing with limited liability companies by charging higher interest rates.[312] Thus, from a law and economics perspective, the economic logic underlying limited liability is the distribution of risk in an agreed fashion.[313]

The argument for the introduction of limited liability in the mid-nineteenth century may have been bolstered by mistrust of the management of joint stock companies. Moving the second reading of the Limited Liability Bill, 1855, Bouverie connected the desire for limited liability in joint stock companies to the absence of that element of mutual trust on which partnerships were based, pointing out that a shareholder could see the board in whom he had confidence replaced at any time by a new board undeserving of that trust.[314]

(1987) 13 Monash U. L. Rev. 164, 181: "without it, the world's railways would not have been built and we would have had no Industrial Revolution, no modern technology."

[309] D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 81, at 84: "the very rich, whose whole capital would otherwise be at risk, and from the relatively poor, who feel that their own individual stake is manageable."

[310] R.A. Posner, "Economic Analysis of Law" 3rd ed., (Little, Brown & Company, 1986), pp. 368-372, excerpted in H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 18, 20; S. Griffin, "Limited Liability: A Necessary Revolution" (2004) 25(4) Comp. Law. 99, 99; It "may work hardship to the creditors" - C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 7.

[311] R.A. Posner, op cit, p. 20; S. Griffin, "Limited Liability: A Necessary Revolution" (2004) 25(4) Comp. Law. 99, 99 refers to its "risk advantage".

[312] R.A. Posner, op cit, p. 20.

[313] B. Cheffins, "Using Theory to Study Law: A Company Law Perpective" (1999) 58 CLJ 197, 209.

[314] (1855) 139 Hansard 310 et seq, quoted in H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 12.

By contrast to its economic justifications, the argument against limited liability is a moral one, that those who permit a company to make decisions that result in it trading at a loss should not escape personal losses when those unfortunate creditors who have no control or responsibility over the company suffer those losses.[315] Less powerful and involuntary creditors such as trade creditors, consumers and tort victims are exposed.[316] There are also parallel economic concerns that this permits complacency and inefficiency.[317] This view however presumes a fault on the part of members of an insolvent company that may more properly, given the common division of ownership and control, be ascribed to its managers. The current statutory liability of directors of insolvent companies who contribute through their fault to the company's inability to pay its debts recognises this responsibility.[318] Shareholders' control is indirect and does not permit them to prevent all irresponsible transactions. However, the moral arguments are reflected in the law's enduring concern to ensure that corporate assets are preserved and not abused or dissipated. The introduction of limited liability was tied to the requirement of full financial disclosure by companies, offering creditors the opportunity to check on the debtor company's finances and prospects.[319]

In conclusion, limited liability was a policy-motivated choice by the nineteenth century legislator. Having been adopted, it permitted the development of the current company-based economy. Manne characterises it as "probably an essential aspect of

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[315] D.L. Perrott, "Changes in Attitude to Limited Liability – the European Experience" in Tony Orhnial (ed.), "Limited Liability and the Corporation" (Croom Helm, 1982), p. 81, at 84.

[316] S. Griffin, "Limited Liability: A Necessary Revolution" (2004) 25(4) Comp. Law. 99, 99.

[317] S. Griffin, "Limited Liability: A Necessary Revolution" (2004) 25(4) Comp. Law. 99, 99, citing Berle and Means.

[318] Section 297, Companies Act, 1963 (fraudulent trading); Section 297A, Companies Act, 1963 (reckless trading) - (Ireland).

[319] L.C.B. Gower, "The Principles of Modern Company Law", 3rd ed. (Stevens & Sons, London, 1969), p. 57; see also L.C.B. Gower & P.L. Davies, "Principles of Modern Company Law", 8th ed. (Sweet & Maxwell, London, 2008), p. 198; Anonymous, "Article VI – Joint Stock Companies Regulation Acts" (1845) 1 L. Rev. & Q. J. Brit. & Foreign Jurisprudence 95, 119; E. Manson, "The Reform of Company Law" (1889) 5 LQR 61, 65-66.

a large corporate system with widespread public participation."[320] Certainly, almost 150 years after its introduction, it would be difficult to imagine the modern commercial landscape without limited liability.[321] Limited liability is a given;[322] the question which remains is "the old question"[323] of what other rules of company law should be employed to minimise the dangers it can pose. What conditions ought to be imposed in return for the grant of limited liability?[324]

2.4.5. Conclusion

The limited liability registered company was a new creature made possible by the Joint Stock Companies Acts.[325] It is widely viewed as an incarnation of the deed of

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[320] H.G. Manne, "Our Two Corporation Systems: Law and Economics" (1967) 53 Virginia LR 259, 277, extracted in H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 22.

[321] In 1889, Manson wrote, "there will be no going back so far as the principle of limited liability is concerned" - E. Manson, "The Reform of Company Law" (1889) 5 LQR 61, 61; cf S. Griffin, "Limited Liability: A Necessary Revolution" (2004) 25(4) Comp. Law. 99, 100, who proposes restrictions, abolishing it for subsidiaries and undercapitalised companies; S. Conneely, "The Company Law Review Group Report: What Will We Do With the Small Firm?" (1997) 11(15) ILT 210, 212: suggestion of a corporate form without limited liability for small businesses; I. Lynch, "Reform in Haste, Repent at Leisure" (1994) 12(8) ILT 189, 191: small businesses are heavily reliant on loan capital.

[322] And is being extended to partnerships: Limited Liability Partnership Act, 2000 (UK), though not yet in Ireland; see L.C.B. Gower & P.L. Davies, "Principles of Modern Company Law", 8th ed. (Sweet & Maxwell, London, 2008), p. 6.

[323] L.C.B. Gower, "The Principles of Modern Company Law", 3rd ed. (Stevens & Sons, London, 1969), p. 57.

[324] Eg the keeping of proper company accounts may be seen as a corollary to the benefit of limited liability, imposed in the public interest: see In Re Rolus Properties Ltd (1988) 4 BCC 446 (Harman J.), cited by D. Milman, "Personal Liability and Disqualification of Company Directors: Something Old, Something New" (1992) 43(1) NILQ 1, 13; cf S. Griffin, "Limited Liability: A Necessary Revolution" (2004) 25(4) Comp. Law. 99, 100: "statutory and common law attempts to curb the exploitation of the limited liability form have proved ineffective".

[325] Joint Stock Companies Act, 1844, 7 & 8 Vict. c.110; Joint Stock Companies Act, 1856 19 & 20 Vict. c.47; Joint Stock Companies Act, 1862, 25 & 26 Vict. c.89.

settlement partnership,[326] but its essential features of incorporation and separate legal personality constitute a profound difference. Limited liability was also an important innovation, which poses a challenge to the regulation of companies. The question of capacity must be addressed in this context, which is simultaneously historical and theoretical. The Joint Stock Companies Acts did not explicitly define the scope of the registered company's capacity. Its antecedents possessed a variety of legal capacity regimes; it was not self-evident that the doctrine of ultra vires would be applied to the registered company. In this context, the importance of the decision of the House of Lords in *Ashbury Railway Carriage and Iron Company v. Riche*[327] should not be underestimated.[328] It was this landmark decision which determined that the capacity of registered companies would, like that of statutory corporations, be limited by the doctrine of ultra vires.

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[326] L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. LR 1369, 1371-2; L.S. Sealy, "Perception and Policy in Company Law Reform", in D. Feldman & F. Meisel (eds), "Corporate and Commercial Law: Modern Developments" (LLP, London, 1996), p. 23.

[327] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[328] See below at 3.2: "The House of Lords " for analysis of this decision.

3. THE INITIAL APPLICATION OF THE DOCTRINE OF ULTRA VIRES TO THE REGISTERED COMPANY

3.1. THE CHOICE OF LIMITED CAPACITY FOR REGISTERED COMPANIES

Separate legal personality and limited liability may be statutory in origin,[1] but the limited capacity of registered companies is not.[2] The doctrine of ultra vires is a judicial invention,[3] albeit grounded on the Companies Acts' requirement that companies list the objects for which they were established in their memorandum of association. *Ashbury Railway Carriage and Iron Company v. Riche*[4] is the leading authority for the application of the doctrine of ultra vires to registered companies.[5] This decision was not inevitable. The reasons behind it merit scrutiny, not only to

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[1] Though Salomon v. Salomon & Co Ltd [1897] AC 22 is important for establishing the full significance of separate legal personality; see L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 165.

[2] "Section 8 of the Companies Act, 1963 modifies the ultra vires rule, yet that rule is nowhere defined in the Act, nor is there any indication given of its significance" - A. FitzGerald, "A Consideration of the Companies Act, 1948, Companies Act (Northern Ireland), 1960, and Companies Act, 1963" (1966) 1 Ir Jur (N.S.) 16, 16.

[3] It is "purely of judicial origin" – G.C. Gale, "The Doctrine of Ultra Vires, as Affecting the Rights and Obligations of a Corporation..." (1899) 48 Central Law Journal 231, 231; Ussher refers to "wholly judge-made rules relating to a company's capacity" - P. Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986), p. 1.

[4] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

5 American judges also developed the rule in the nineteenth century; see A.B. Frey, "Ultra Vires and Estoppel" (1909) 43 American Law Review 81, 82; see also: York & Maryland Railroad v. Winans (1854) 58 US 39; 17 Howard 30; Pearce v. Madison & Indianapolis Railroad (1858) 62 US 441; Thomas v. West Jersey Railroad Company (1879) 101 US 71; Green Bay & Minnesota Railroad v. Union Steamboat Company (1883) 107 US 98; 2 S. Ct. 221; Central Transportation Company v. Pullman's Palace Car Company (1891) 139 US 24; 11 S. Ct. 478.

assess whether it was the right decision to make at the time, but also to judge whether or not those reasons justify its retention today.[6]

Despite the contrary views of some commentators,[7] *Ashbury v. Riche*[8] truly was a landmark decision.[9] Anderson argues that the ultra vires doctrine was well-established on both sides of the Atlantic throughout the nineteenth century.[10] He makes the sweeping assertion that ultra vires "was of central importance in early English and American company law".[11] However, he does not distinguish between statutory and registered corporations, and the early authorities he cites relate to statutory corporations, especially railway companies.[12] Cooke decries the fact that, when private companies emerged, "the superficial resemblance in name between them and public corporations, led to the assumption of an identity in nature."[13] There is support for the view that registered companies are a species of statutory

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[6] See below at 15.1: "Revisiting Ashbury: A Nineteenth Century Doctrine in the Twenty First Century".

[7] See J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 263.

[8] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[9] See M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31 MLR 481, 485; L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 167; Ashbury was "the fons et origo of the voidness principle" – M. Forde & H. Kennedy, "Company Law", 4th ed., (Round Hall Sweet & Maxwell, 2007), p. 32.

[10] See J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 263.

[11] Ibid, at 264.

[12] Nor does he adequately distinguish chartered corporations: J. Anderson, op. cit., at 263-264; furthermore, the vires of statutory corporations only reached the House of Lords twice between Colman v. Eastern Counties Railway Company (1846) 16 L.J. (Ch.) 73 and Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, and in both cases, the acts were within express powers: Taylor v. Chichester and Midhurst Railway Company (1867) LR 2 Ex 356, Eastern Counties Railway v. Hawkes, 5 HL 348.

[13] F.H. Cooke, "Should the Ultra Vires Doctrine be Applied to Business Corporations?" (1894) 28 American Law Review 222, 222.

corporation,[14] but this view undoubtedly builds on the fact of their assimilation by the courts and the consequent determination that both have limited capacity.[15] It is not clear that this assumption of identity was appropriate when first the courts were faced with registered companies.

It is imperative to insist on the specificity and novelty of the "new-fangled"[16] corporations formed under the Joint Stock Companies Acts.[17] Carr emphasises the importance of this question given the enthusiastic adoption of the registered company form.[18] While in some areas a rule developed for one form of association might appropriately be applied to another,[19] the differences are vitally important for capacity. Examination of the history, theory and law relating to the various corporate forms in existence in the nineteenth century clearly shows that they

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[14] G.H. Treitel, "The Law of Contract" 11th ed., (Sweet & Maxwell, London, 2003), p. 560: "Statutory corporations can be created in two ways: first, by complying with the formalities required by statute..."; see also M. Forde, "Company Law", 3rd ed. (Round Hall Sweet & Maxwell, 1999), p. 94.

[15] See Baroness Wenlock v. River Dee Company (No. 1) (1884-85) L.R. 10 App. Cas. 354, 360.

[16] C. Baxter, "The Role of the Judge in Enforcing Shareholder Rights" (1983) 42 CLJ 96, 99.

[17] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 34; "these wholly radical changes stole upon the commercial scene almost unnoticed" - L.S. Sealy, "Perception and Policy in Company Law Reform", in D. Feldman & F. Meisel (eds), "Corporate and Commercial Law: Modern Developments" (LLP, London, 1996), p. 23.

[18] "It is consequently important to ask how far the new class of corporations thus created can enjoy the powers of corporations at common law" – C.T. Carr, "The General Principles of the Law of Corporations" (CUP, 1905), p. 3.

[19] Such as the rule in Foss v. Harbottle (1843) 2 Hare 461; the case concerned a statutory corporation but the rule developed was applied to all corporations - A.J. Boyle, "The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History" (1965) 28 MLR 317, 319.

cannot be regarded as identical for the purpose of discussing contractual capacity.[20] Reliance on American authorities may also be misleading, given the prominence in America of the view of statutory incorporation as "a grant by the state for a quasi-public purpose"[21] and restrictions frequently imposed on the corporate form there.[22] Conflating distinctive corporate forms obscures the importance of *Ashbury*,[23] in which the House of Lords determined that the capacity of registered companies should be aligned with that of statutory, as opposed to chartered, corporations.

Rather than *Ashbury*[24] being a mere application of the pre-existing doctrine of ultra vires, the alternative view is that, before then, companies did not necessarily have limited capacity.[25] On this view, it was assumed that "the objects clause merely limited the actual authority of a company's board" and that ratification was therefore possible.[26] Horrwitz argues that the Joint Stock Companies Act, 1844 allowed companies to alter their deeds and ratify unauthorised acts.[27] Rajak indicates widespread support between the 1840s and 1870s for the proposition that a

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[20] "During the development of the law affecting corporations, there has existed no more fruitful cause of confusion, than the failure to observe the radical distinction in origin, history and tendency, between public corporations and private corporations." – F.H. Cooke, "Should the Ultra Vires Doctrine be Applied to Business Corporations?" (1894) 28 American Law Review 222, 222; see above at 2.3: "The Genealogy of the Registered Company".

[21] G.A. Mark, "The Personification of the Business Corporation in American Law" (1987) 54 U. Chi. L. Rev. 1441, 1453.

[22] Eg restrictions on duration of corporate life or on capital or borrowings - J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 265; See also A.J. Boyle, "The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History" (1965) 28 MLR 317, 317: "The law of business corporations is one area where English and American law differ to a very marked degree."

[23] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[24] Ibid.

[25] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 167

[26] A. Griffiths, "Contracting with Companies" (Hart, 2005), p. 166.

[27] W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 67.

corporation "should be able to develop to its full potential, constrained only by prohibitions in its constitution".[28] This formulation does not equate silence in respect of a particular activity with effective prohibition.

Given the conflicting views of the prior law, there was, at the least, a real decision to be made by the court in *Ashbury*[29] as to whether the capacity of companies formed under the Joint Stock Companies Acts was limited or unlimited.

3.1.1. The Background to the Limitation of Registered Companies' Capacity

Ashbury,[30] though seminal, was not an aberration. The application of the ultra vires doctrine to registered companies was foreshadowed in 1860 by *Simpson v. Westminster Palace Hotel Company*[31] which discussed obiter the doctrine's application to a joint stock company.[32]

The company's business was to run a hotel, of which it leased a section to the government for a short period. A shareholder challenged this arrangement as ultra vires the company. The House of Lords' decision indicates that it considered the doctrine of ultra vires to apply to joint stock companies, but that on the facts the arrangement was within the powers of the company because it complemented the company's main business. Lord Campbell expresses, obiter, the view that

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[28] H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 19-20; he cites: Taylor v. Chichester and Midhurst Railway Company (1867) LR 2 Ex 356, 384 (Blackburn & Willes JJ); Riche v. Ashbury Railway Carriage Co (1874) LR 9 Ex 224 (Blackburn J.); Eastern Counties Railway v. Hawkes, 5 HL 348 (St Leonard LJ).

[29] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[30] Ibid.

[31] Simpson v. Westminster Palace Hotel Company (1860) 8 HLC 712.

[32] The company was established under the Joint Stock Companies Act, 1856, 19 & 20 Vict. c.47; the prior application of the ultra vires doctrine to statutory corporations is part of the background, but not decisive – see below at 3.3.3: "The Assimilation of Registered Companies to Statutory Corporations".

shareholders can object to the use of corporate assets for unintended purposes.[33] This statement of the law reflects the doctrine of ultra vires as applied to statutory corporations. However, applying it unhesitatingly to joint stock companies, with the underlying assumption that their capacity is modelled on that of statutory corporations, neglects the distinctions between corporate forms. The term, "joint stock company" originally designated, not a particular corporate form,[34] but any trading association, be it a chartered corporation or a deed of settlement company, which operated with a collective stock.[35] The doctrine of ultra vires as formulated here never applied to chartered corporations, or to unincorporated companies. The inherent weakness of an obiter statement is therefore accentuated because it fails to consider and distinguish between the different forms of corporation. Lord Campbell cites examples, such as railway companies, which are statutory corporations, but fails to acknowledge that another corporate form enjoyed full capacity. This statement of the law does not address the specificity of the registered company or justify why it should be treated in the same way as the statutory rather than the chartered corporation. The courts were confronted with a choice, whether they acknowledged it or not, between deeming the registered company to be endowed with full legal capacity, like the chartered corporation, or limited capacity, like the statutory corporation.

If *Simpson v. Westminster Palace Hotel Company*[36] indicates that joint stock companies were assumed to have limited capacity like statutory corporations even

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[33] Simpson v. Westminster Palace Hotel Company (1860) 8 HLC 712, 717 (per Campbell LC): "The funds of a joint stock company established for one undertaking cannot be applied to another. If an attempt to do so is made, this act is *ultra vires*, and although sanctioned by all the directors and by a large majority of the shareholders, any single shareholder has a right to resist it, and a court of equity will interpose on his behalf by injunction."

[34] Though it was adopted in the Joint Stock Companies Acts to denote the new registered limited liability corporation.

[35] See above at 2.3.4: "Joint Stock Companies and the Road to Incorporation".

[36] Simpson v. Westminster Palace Hotel Company (1860) 8 HLC 712.

before *Ashbury*,[37] it also interprets the company's capacity generously. Similarly, in 1865, *Featherstonhaugh v. Lee Moor Porcelain Clay Company*[38] considered a deed of settlement company registered under the 1844 Act.[39] Vice-Chancellor Page Wood adopted a permissive approach, saying that the deed authorised the company to deal with its assets as it thought best in the case of a crisis. He accepts as natural that the large power conferred on the board, "although very large, would be controlled by the scope, object and purport of the deed".[40]

3.2. THE LANDMARK CASE: TWO ALTERNATIVE APPROACHES

In the landmark case of *Ashbury Railway Carriage and Iron Company v. Riche*,[41] the House of Lords explicitly determined that the ultra vires doctrine applied to companies incorporated under the 1862 Act.[42] The House unequivocally decided that, since the 1862 Act precluded the alteration of a company's objects, it followed that these should not be exceeded either. This justification was bolstered by other motivating factors.[43] The decision further pointed towards a restrictive approach to discerning capacity, expressing the rule in "its clearest and most uncompromising form".[44] Evaluating the momentous decision of the House of Lords necessitates identifying and examining the various factors which contributed to the result. This analysis aids a better understanding of the courts' approach throughout the

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[37] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[38] Featherstonhaugh v. Lee Moor Porcelain Clay Company (1865-66) L.R. 1 Eq. 318.

[39] Joint Stock Companies Act, 1844, 7 & 8 Vict. c. 110.

[40] Featherstonhaugh v. Lee Moor Porcelain Clay Company (1865-66) L.R. 1 Eq. 318, 328.

[41] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[42] Joint Stock Companies Act, 1862, 25 & 26 Vict. c.89.

[43] Cf G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), pp. 15-16.

[44] H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 9.

subsequent history of the rule,[45] and may illuminate today's debate as to the future of the ultra vires doctrine.[46]

Despite the House of Lords' unanimity and certainty, the contrasting approach taken in the Court of Exchequer Chamber shows that the question of the capacity of registered companies was not clear-cut. It was accepted that a company could not do something expressly prohibited in statute, but could it do acts about which the statute or the corporate constitution was silent?[47] As Carr writes, "two views are possible".[48] All agreed that the contract was not within the objects clause of the company's memorandum of association.[49] The pivotal question, directly posed, was whether the company had the capacity to do acts not set out in its objects clause. Blackburn J. in the Court of Exchequer Chamber concluded that registered companies have full legal capacity. However, the House of Lords took the opposing view, unanimously reversing this decision, holding that the contract, which was outside the objects of the company, was ultra vires and could not be ratified.

The Ashbury Company had been established, according to its objects clause, to make and sell railway carriages and equipment, and to "carry on the business of mechanical engineers and general contractors". Planning to construct a railway line in Belgium, the company entered into contracts to acquire the concession to build the railway, and to subcontract the construction to Messrs. Riche. The project went smoothly until difficulties arose because Ashbury's members were less favourably

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[45] See below at 5: "The Interpretation and Drafting of Objects Clauses" and 6: "Powers, Corporate Benefit and Corporate Gifts".

[46] See below at 15: "Judging the Ultra Vires Doctrine".

[47] H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 16; See Blackburn J, Riche v. Ashbury Railway Carriage Co (1874) LR 9 Ex 224, 262.

[48] C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 3.

[49] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 693 (per Lord Selborne).

disposed towards it than its directors. The company repudiated the contract, claiming it was ultra vires, and Messrs. Riche sued for damages for breach.

The plaintiffs succeeded at first instance. On appeal to the Exchequer Chamber, the judges were evenly split, so the judgment was affirmed.[50] Blackburn J.'s decision[51] is important because it acts as a dissenting voice, a counterpoint to the reasoning subsequently favoured by a unanimous House of Lords.[52] Blackburn J. preferred the "affirmative view",[53] that registered companies had full legal capacity, on the basis that the Acts had not expressly departed from the common law rule which granted chartered corporations full legal capacity.

3.2.1. Blackburn J. Favours Full Capacity at Common Law

Like the House of Lords, Blackburn J. accepted that, if registered companies were to be deemed to have restricted capacity, then acts in excess of that capacity would be completely void and not susceptible to ratification.[54] However, he chose as his departure point the position of chartered corporations.[55] This provided the premise that at common law, a corporation has the same full power to contract as natural persons.[56] This "general power of contracting" could only be curtailed by the

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[50] Riche v. Ashbury Railway Carriage Co (1874) LR 9 Ex 224.

[51] Brett and Groves JJ. concurring; Riche v. Ashbury Railway Carriage Co (1874) LR 9 Ex 224.

[52] "Blackburn J. played a major role in resisting the development of a doctrine likely to inhibit the growth of these new companies and sought as far as possible to assimilate them to their chartered forbears"- H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 16; see also Taylor v. Chichester and Midhurst Railway Company (1867) LR 2 Ex 356, 384.

[53] C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 3.

[54] Riche v. Ashbury Railway Carriage Co (1874) LR 9 Ex 224, 262 (per Blackburn J.)

[55] Ibid.

[56] Ibid, at 263 (per Blackburn J.): the corporation has "as an incident given by law, the same power to contract, and subject to the same restrictions, that a natural person has."

express intent of the legislature.[57] Any alleged legislative restriction of this full capacity required "express provision, or necessary implication".[58] Blackburn J. did not discern the requisite explicit restriction in the 1862 Act, although he conceded a suspicion that it may have been the view of the framer that capacity would be limited.[59] Accepting that Section 12 of the 1862 Act prevented the change of a company's objects,[60] the logical consequences Blackburn J. drew from this were that dissentient shareholders could restrain the company from acting beyond its objects and that the board must be given actual rather than ostensible authority to contract outside the company's objects.[61] He did not accept that contracts concluded outside the scope of a company's objects were void.

3.3. THE HOUSE OF LORDS PREFERS LIMITED CAPACITY

The House of Lords overturned this decision, taking the "negative view".[62] This ruling definitively established that registered companies are subject to the doctrine of ultra vires, and outlined the basic principles which would henceforth define the doctrine. Furthermore, the House of Lords endorsed an illiberal approach to the interpretation of objects clauses.[63] Lord Cairns interpreted the power to act as general contractors restrictively in light of the preceding purpose of acting as mechanical engineers, which indicated that the contracts were outside the company's objects. It then fell to be decided whether they were nonetheless valid, a question which the House answered in the negative.

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[57] Ibid; relying on the "canon of construction that affirmative words do not take away the common law right".

[58] Ibid.

[59] Joint Stock Companies Act, 1844, 7 & 8 Vict. c.110.

[60] Riche v. Ashbury Railway Carriage Co (1874) LR 9 Ex 224.

[61] Ibid.

[62] C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 3.

[63] See below at 5.3.1: "Restrictive Interpretation of the Objects Clause".

3.3.1. The Reasons for the House of Lords' Decision

It is possible to discern a number of principal rationales, both express and implicit, for the House of Lords' extension of the ultra vires doctrine to registered companies. First, the speeches in the House of Lords expressly rely on the terms of the statute,[64] especially the Section 12 prohibition on altering objects clauses.[65] Secondly, the registered company is viewed as a creature of statute, consistent with the concession theory of corporate personality. A further crucial motivation is the policy imperative to protect interested parties, specifically shareholders and creditors, from the risk of dissipation of the company's assets in unauthorised activity. The decision to view registered companies as a species of statutory corporation is implicit, yet crucial, in the decision. Underpinning and informing the various justifications is a mistrustful judicial attitude towards the corporation. Each of these factors merits consideration, as their persuasiveness varies.

3.3.2. The Statutory Foundation

The statutory justification relies on the requirement that companies enact a memorandum of association stating their objects as a condition of registration. The Joint Stock Companies Acts[66] did not explicitly address the ensuing question of whether companies could validly act in pursuit of objects other than those enumerated. The law's approach to the amendment of the objects clause evolved between the 1856 and 1862 Acts. In 1856, the omission of any reference to the amendment of the objects clause was ambiguous. Section 12 of the Companies Act, 1862 attempted to resolve this difficulty, effectively providing that the memorandum could not be altered.[67]

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[64] Joint Stock Companies Act, 1862, 25 & 26 Vict. c.89.

[65] Section 12, Joint Stock Companies Act, 1862, 25 & 26 Vict. c.89.

[66] Joint Stock Companies Act, 1856, 19 & 20 Vict. c.47; Joint Stock Companies Act, 1862, 25 & 26 Vict. c.89.

[67] Section 12, Joint Stock Companies Act, 1862, 25 & 26 Vict. c.89.

In *Ashbury*,[68] Lord Cairns L.C. asserted that the provisions of the Joint Stock Companies Act, 1862 had been misinterpreted below. He identified four sections of the Act, Sections 6, 8, 11 and 12, as relevant to whether the capacity of registered companies is limited to the objects enunciated. First, he asserted that Section 6, which provides for the formation of the company by the subscription of its promoters to a memorandum of association, does not purport to create a common law corporation, but instead "speaks of the company being incorporated with reference to a memorandum of association".[69] This distinguishes companies registered under the Act from chartered corporations.[70] Turning next to Section 8, which required that the memorandum of association state the objects for which the company was to be established, he asserted that this meant that the coming into existence of the company was "for those objects alone."[71] Furthermore, Lord Cairns viewed Section 11, which stated that the memorandum shall bind the company and its members as if it were a covenant, as instituting a covenant by every member of the company that he will observe the conditions of the memorandum, including the objects set out in it, subject to the Act's provisions. Of itself, this would not necessarily imply that an act undertaken in breach of this covenant must be void.

Finally, and most significantly, the Lord Chancellor considered the effect of Section 12, which permitted the alteration of the memorandum only in order to make certain changes to its capital or a change of name. He inferred that the company's objects could not be modified, and further deduced from this that companies could not engage in activities that were outside the scope of their objects, as it would circumvent the restriction on altering objects clauses if acts could validly be

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[68] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[69] Ibid, at 668 (per Lord Cairns LC).

[70] Sutton's Hospital (1612) 10 Co Rep 23a; see also AG v. Manchester Corporation [1906] 1 Ch. 643.

[71] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 669 (per Lord Cairns LC).

undertaken in utter disregard of the specified objects.[72] Arriving at a similar conclusion, Lord Chelmsford asserted emphatically that the statute did forbid companies from entering contracts outside their objects, and that it could not have made this any more explicit.[73] On the contrary, the legislature could indeed have used stronger words, by stating expressly that a company's capacity was limited to acts done in pursuit of its stated objects.[74] For this reason, the speech of Lord Cairns L.C., which explains the deduction involved, is to be preferred.

Horrwitz views Section 12 as the true foundation of ultra vires.[75] As a matter of logic, the Section 12 reasoning is persuasive if not conclusive. Interestingly, *Ashbury*[76] can be contrasted with the approach subsequently adopted in *Salomon*,[77] where the House of Lords refused to read into the statute restrictions which were not expressed.[78] Furthermore, a requirement to respect the stated objects could in principle be accompanied by sanctions other than voidness, such as voidability, ratifiable invalidity, or internal sanctions. Moreover, if the combined requirement to state objects and the subsequent impossibility of altering them provides some support for the initial determination that registered companies have limited capacity,

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[72] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 670 (per Lord Cairns LC): "if there is a covenant that no change shall be made in those objects for which the company is established, I apprehend that that includes within it the engagement that no object shall be pursued by the company, or attempted to be attained by the company in practice, except an object which is mentioned in the memorandum of association."

[73] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 678 (per Lord Chelmsford): "I do not know how stronger words than these could be used to prohibit a company formed under the statute from entering into any contract for any object beyond those mentioned in the memorandum of association."

[74] Cf Riche v. Ashbury Railway Carriage Co (1874) LR 9 Ex 224, 263 (per Blackburn J.); G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 15.

[75] W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 68.

[76] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[77] Salomon v. Salomon & Co Ltd [1897] AC 22.

[78] Ibid, at 30 (per Lord Halsbury LC).

the later statutory amendment of those requirements undermines the strength of this justification today.[79]

Lord Cairns L.C. underlined his reasoning based on Section 12 by emphasising the distinction between the company's memorandum and articles of association. He equated the company's memorandum with its "charter", which "defines the limitation of the powers of a company to be established under the Act."[80] There was therefore an important distinction between acts which might be outside the company's memorandum of association, and so ultra vires the company, and acts which might be merely outside the company's articles, and so, "extra vires the directors, but intra vires the company."[81] He contrasted the status of the memorandum and the articles, particularly as regards amendment. The articles prescribe internal regulations, within the parameters set by the memorandum.[82] Articles could be amended under Section 50 and the members were consequently their "absolute masters."[83] By contrast, the memorandum binds the entire company, defining "the area beyond which the action of the company cannot go".[84] Consequently, Lord Cairns L.C. summarily dismissed a clause in the company's articles of association, which purported to permit the amendment of the company's objects by special resolution.[85] This was an attempt by the company to claim a

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[79] See below at 5.4.1: "The Alteration of Objects Clauses" and 15.1.2.2: "The diminished usefulness of the objects clause".

[80] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 668 (per Lord Cairns LC).

[81] Ibid, at 668.

[82] Ibid, at 671 (per Lord Cairns LC): "inside that area the shareholders may make such regulations for their own government as they see fit."

[83] Ibid, at 671.

[84] Ibid, at 671.

[85] Ibid, at 671.

power, by internal regulation, to do that which was prohibited by the Act, that is, "to go beyond the objects or purposes expressed or implied in the memorandum."[86]

3.3.3. The Assimilation of Registered Companies to Statutory Corporations

If Section 12 was the explicit statutory basis for the ultra vires doctrine, the underlying, unexamined assimilation of registered and statutory corporations was also fundamental. Given the existence of conflicting models in the chartered and statutory corporation, the point of departure, in deciding to which form the new registered company is analogous, predicts the answer which will be given. This is evident from the contrast between the views of Blackburn J. and the House of Lords.[87]

Lord Selborne explicitly stated that he identified registered companies with statutory corporations.[88] Similarly, the Lord Chancellor's statement of the effect of an act being deemed ultra vires adopts the terminology of statutory corporations.[89] This approach can be criticised for failing to acknowledge that the registered company was a new and distinct entity, and that the same rules should not automatically apply to it as obtained in the case of the established statutory corporation.[90] While the Lords present an accurate statement of the position regarding statutory corporations, this can only be applied to registered companies by regarding the Joint Stock Companies Act, 1862 as the statute creating them, rather than a statute setting out a procedure whereby a person might set up a company that

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[86] Ibid, at 671.

[87] Ashbury Railway Carriage and Iron Company v. Riche (1874) LR 9 Ex 224 (Court of Exchequer Chamber); (1875) LR 7 HL 653 (House of Lords).

[88] "The present and all other companies incorporated by virtue of the Companies Act of 1862 appear to me to be statutory corporations within this principle" - Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 693 (per Lord Selborne).

[89] Ibid, at 673 (per Lord Cairns LC).

[90] Sealy regards the partnership as the true model for the registered company - L.S. Sealy, "Perception and Policy in Company Law Reform", in D. Feldman & F. Meisel (eds), "Corporate and Commercial Law: Modern Developments" (LLP, London, 1996), pp. 23-24.

would be recognised by the state. The argument for treating them alike is not articulated.

At most, the relationship between the company and the statute is indirect. Rajak asserts that, "the memorandum with which the company was registered was given statutory force by the provisions of the Companies Acts".[91] This is a means of rationalising the assimilation of the statutory and registered companies, but the registered company is better regarded as *sui generis*.[92] Lord Hatherley implicitly acknowledges the novelty of the new form, referring to the carrying on of business on principles which were previously entirely unknown.[93] Later, in *Bell Houses Ltd v. City Wall Properties Ltd*,[94] Danckwerts L.J. acknowledged the distinction, distinguishing old authorities on the basis that they dealt with statutory corporations, not registered companies.[95] If the registered company was an entirely new innovation, why were the rules developed in the context of statutory corporations automatically applied to it?

Lord Selborne's approach is consistent with a strong strand of contemporary attitudes. Brice regards the joint stock company as similar to the statutory

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[91] H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 11.

[92] Especially given that it was modelled on the deed of settlement company rather than any existing corporation - L.S. Sealy, "Perception and Policy in Company Law Reform", in D. Feldman & F. Meisel (eds), "Corporate and Commercial Law: Modern Developments" (LLP, London, 1996), p. 23.

[93] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 684 (per Lord Hatherley): "this Act of Parliament was passed with the view of enabling persons to carry on business on principles which were, up to that time, wholly unknown in the general conduct of mercantile affairs in this country".

[94] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656.

[95] "These two cases of statutory powers seem to me to be not directly relevant to a company formed under the Companies Act, 1948, the powers of which are established by the memorandum of association of the company with extensive detailed powers therein contained which has to be construed." - Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656, 678 (per Danckwerts LJ).

corporation, in that the "invariable mode in which corporations are now called into being, is by the direct intervention of the supreme legislature."[96] In the case of the registered company, the legislature passed the enabling statute on which individuals rely. Lord Lindley's logic in *Elve v. Boyton*[97] is that the corporation in that case, granted a charter which was authorised by statute, was a statutory corporation because it could not have been created without the initial Act of Parliament.[98] Thompson dismisses the alternative approach of characterising registered companies as a form of common law corporation as "the quintessence of absurdity".[99] On the other hand, Grantham points out that the joint stock company was frequently assimilated to the partnership,[100] and that the effect of *Salomon v. Salomon & Co Ltd*[101] was to change the perception of the joint stock company from a form of partnership to something akin to a chartered corporation.[102]

These competing views represent a real and understandable confusion as to the nature of the joint stock company. They show that it was not self-evident that the registered company should be treated like the statutory corporation. At the least, they leave open the question of how it should be characterised for the purpose of

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[96] S. Brice, "A Treatise on the Doctrine of Ultra Vires" 2nd ed. (Stevens & Haynes, London, 1877), pp. 21-22; he continues: "Either a special Act of Parliament is passed incorporating the persons applying for the same, or individuals in a manner incorporate themselves by taking advantage of the general statutes which have been enacted for that purpose."

[97] Elve v. Boyton (1891) 1 Ch. (C.A.) 508.

[98] B. Thompson, "Are Joint Stock Companies Common Law Corporations?" (1922) 42 Canadian Law Times 143, 159.

[99] Ibid.

[100] R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 559; see also B. Thompson, "Are Joint Stock Companies Common Law Corporations?" (1922) 42 Canadian Law Times 245, 246; "These bodies resemble partnerships" - C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 70.

[101] Salomon v. Salomon & Co Ltd [1897] AC 22.

[102] R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 561.

determining its capacity. While it is true that the registered company could not be established in the absence of the Act, by analogy with the principles of causation in tort law, this "but for" criterion is not sufficient to make the registered company a statutory corporation.

This reasoning is not compelling because the characters and form of the two corporations argue that they are far from identical. The characteristics which differentiate the registered company from the statutory corporation imply that the doctrine of ultra vires should not have automatically been extended to the new registered company. Firstly, Street describes statutory corporations as "mostly semi-public in character".[103] He elaborates that their purposes frequently involve public works, rather than purely private commerce.[104] These activities necessitated "large-scale expropriation of private property", pursuant to extensive powers which operated to the detriment of private individuals.[105] The quasi-public powers of statutory corporations lead some to suggest that the administrative law doctrine of ultra vires springs from the same well of ultra vires cases concerning railway companies.[106]

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[103] H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), pp. 22-23; they were the means by which "private capital was deployed to wide public use" - H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 14.

[104] H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), pp. 22-23: "Gain is not their sole object, though they are commercial, embracing railways, canals, waterworks and the like."; M.A. Schaeftler, "Ultra Vires – Ultra Useless: The Myth of State Interest in Ultra Vires Acts of Business Corporations" (1983-1984) 9 J. Corp. L. 81, 85.

[105] Beman v. Rufford (1851) 1 Sim. (NS) 550; 15 Jurist 914; Shrewsbury Railway Company v. London and North Western Railway Company, 22 L.J. (Ch) 682; H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 15; E. Manson, "The Reform of Company Law" (1889) 5 LQR 61, 65: "The Legislature invests a railway with very arbitrary, not to say tyrannical, powers".

[106] See S. Sedley, "Public Power and Private Power" in C. Forsyth (ed), "Judicial Review and the Constitution" (Hart, Oxford, 2000) 297; Woolf & Jowell, "De Smith, Woolf & Jowell Judicial Review of Administrative Action" 5th ed, (Sweet & Maxwell, London, 1995), 229-230; both cited in C.A. Babb, "Rethinking the Concept of Ultra Vires in Company Law" (Ph.D. thesis, University of

The registered company, by contrast, is purely a private enterprise, and does not possess any powers of the type generally conferred on statutory corporations.[107] In support of allowing commercial companies some latitude in the application of the ultra vires doctrine, Street[108] cites a dictum of Vaughan Williams LJ,[109] which was approved in the context of the *Ashbury*[110] rule in *Re Kingsbury Collieries and Moore's Contract.*[111] This contrasts "a purely commercial company having no compulsory powers and no monopoly" with "a statute creating a monopoly, like a railway company, having compulsory powers of land purchase and a practical monopoly."[112] There is a functional difference and imbalance in power between the registered company and the typical statutory corporation, exercising monopoly-type powers, which should logically be subject to a more restrictive capacity regime than ordinary registered companies.[113]

Cambridge, 2004), p. 10; cf Pennington, "Company Law" 6th ed (1990), p. 91: the Company Law doctrine was probably derived from public law.

[107] See S. Brice, "A Treatise on the Doctrine of Ultra Vires" 2nd ed. (Stevens & Haynes, London, 1877), p. 23: "These statutes give to the bodies coming within their purview, no arbitrary or compulsory power of dealing with the rights, pecuniary or proprietary, of others than their own members. A corporation is as powerless as an individual, and it is as illegal in the one case as the other to infringe or encroach upon existing rights. Wherever for any reason whatever, public or private, it is necessary to do so, special authorisation must be obtained from the supreme legislature. For this purpose special acts of Parliament are passed".

[108] H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), p. 58.

[109] Attorney-General v. Mersey Railway Company [1907] 1 Ch. 81, 106.

[110] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

111 In Re Kingsbury Collieries and Moore's Contract [1907] 2 Ch. 259, 266.

[112] Attorney-General v. Mersey Railway Company [1907] 1 Ch. 81, 106 (per Vaughan Williams LJ), cited in H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), pp.58-59.

[113] E. Manson, "The Reform of Company Law" (1889) 5 LQR 61, 65: "Legislation for railway and canal companies, or even insurance companies, is no precedent for interference with trading companies."

In *Attorney-General v. Great Northern Railway Company*,[114] Kindersley V.C. identifies the rationale of the limited capacity of statutory corporations as based on the exceptional power of large, wealthy corporations which gave them an unfair advantage over other traders.[115] Specifically, he fears that if a railway company is permitted to trade in coal, it can create a monopoly, refusing competing coal suppliers access to the market. Therefore, it is in the public interest that the company be restrained. However, this reasoning is clearly inappropriate to the registered company. The ordinary registered company is the everyday vehicle of business in the modern world. It resembles more closely the ordinary traders which this logic seeks to protect than those immensely powerful beasts which must be subjected to restrictions.[116] If, as Rajak suggests, the courts were disposed to protect business rivals from economic damage by controlling powerful statutory corporations,[117] it does not follow that ordinary commercial companies required the same control.[118]

Furthermore, unlike the statutory corporation, the registered company is in reality the creation of its promoters.[119] The registered company's key novelty was that it was formed by individuals and recognised by the state, which granted legal personality on terms conceived by the company's promoters. The promoters draft its constitution, with no substantive input from the state. Street encapsulates this distinction: provided registered companies comply with the statutory conditions of

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[114] Attorney-General v. Great Northern Railway Company (1860) 62 Eng. Rep. 337.

[115] Ibid, at 339; 1 Dr & Sm 154, 159-160 (per Kindersley VC): "these companies, being armed with the power of raising large sums of money [...] might acquire such a preponderating influence and command over some particular branch of trade or commerce as would enable them to drive the ordinary private traders out of the field, and create in their own favour a practical monopoly".

[116] And the mischief feared could be better addressed directly by Competition Law if it did arise.

[117] H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 15.

[118] From a modern perspective, competition law answers this concern.

[119] Cf S.A. Smith, "Atiyah's Introduction to the Law of Contract" 6th ed (Clarendon, Oxford, 2006), 66: "it is impossible to form a registered company by purely private actions".

establishment, "all other powers and arrangements and the internal organisation of the corporation" are chosen by the members themselves.[120] Gower also emphasises that the initiative now belongs to the promoters, who enjoy "almost complete freedom".[121] If a constitution is accepted by the Registrar of Companies, it will reflect exactly what was conceived and sought by those in charge of drafting it. The state no longer defined the scope of the activities for which legal personality was conferred. This sets the registered company apart from both the chartered and the statutory corporation. The importance of this feature can be seen from the subsequent strategies of company promoters to draft objects clauses designed to avoid the doctrine of ultra vires.[122] This distinction, between corporations formed by the state and those created by individuals and merely recognised by the state, should have been taken into account in deciding whether the capacity which accompanied the grant of legal personality would be full or limited. The reasoning adopted in *Ashbury*[123] leads to a fundamental contradiction at the heart of the law on corporate capacity: the investors who come together to form the company are completely free in drafting its objects, but once these are approved, they have no power whatsoever to deviate from their original choice.[124]

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[120] H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), p. 23; cf A.J. Boyle & R. Sykes (eds), "Gore-Browne on Companies" 44th ed. (Jordans, loose-leaf, 1986), para. 3.002 implicitly approves the assimilation of registered companies to statutory corporations: "the same principles apply also to companies registered under the Companies Acts, for such companies are in fact created by the statute for the purposes which are set out in the memorandum of association, and have no existence except for those purposes."

[121] L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 14.

[122] See below at 5.1: "The Application and Evolution of the Ultra Vires Doctrine".

[123] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[124] H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 11; This contradiction led to the continuing conflict between corporate promoters and the courts detailed below at 5.1; companies obtained some freedom when it became possible to alter objects: see below at 5.4.1.

If the company should not have been equated with the statutory corporation, one might ask whether it would instead have been appropriate to treat it like the chartered corporation.[125] From a practical perspective, the approach which applied to the chartered corporation, involving revocation of the individual charter after the fact as a sanction for acting beyond its terms, was not suited to the registered company. If the new law was designed to facilitate the establishment of a large number of companies with minimal intervention by the state, it was not practical to expect the state to monitor the actions of all those companies and impose an individual sanction for every act which strayed outside their objects. If the companies' objects clauses were to be regarded as constraining them in any way, the real choice would therefore have been between the doctrine of ultra vires as we know it and treating acts outside the company's objects as an internal breach, ratifiable by the company, rather than modelling the regime governing the registered company directly on that of the chartered corporation.

The registered company was a new form of corporation, created by individuals with singular, unprecedented ease, and therefore calling for new approaches based on sound legal and commercial principle. Approaching the issue from a policy angle, the state's reduced input and control over the company to which it conceded the substantial privilege of legal personality may argue for a restrictive approach to capacity. If companies are considered dangerous entities to have dealing with other traders, particularly once they possess limited liability, then it is reasonable to curtail their activities.[126] Restricting them to their own terms may not seem unduly restrictive. Alternatively, it may be argued that since the state is no longer concerned with the purposes for which the company is set up, it is not necessary for it to police the company's compliance with those freely-chosen objects.

Innate conservatism in judicial thinking may partially explain the decision of the House of Lords in *Ashbury* to equate the registered company with the established statutory company rather than regarding it as an innovation requiring the elaboration

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[125] See above at 2.3.1.1: "The full capacity of chartered corporations".

[126] See below at 3.3.5: "The Policy Rationale for the Ultra Vires Doctrine".

of a new set of rules.[127] Wheeler and Shaw identify two approaches to the relationship between societal change and the development of contract law. [128] On one hand, legal doctrine may generally be viewed as "the product of social and economic forces, including intellectual trends that reflect those forces."[129] The explanation of *Ashbury* as predicated on mistrust of the corporation relies on this assumption.[130] The alternative explanation, which may simultaneously apply, relies on "an important assumption or observation about the nature of judge-made doctrine: it is somewhat conservative."[131] This latter view holds that radical departures in legal thinking and judicial decision-making depend on camouflage or plausible deniability.[132] Our legal system, which seeks to obscure the role of the judge in law-making, is more comfortable with continuity than change.[133] In the nineteenth century, the judiciary faced a rapid rate of societal and economic transformation, which strained the capacity of existing law to answer new questions.[134] Yet, if judges were seen to be creating new law, this would require greater justification than simply adapting pre-existing rules to a new situation,

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[127] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 37.

[128] P. Hamburger, "The Development of the Nineteenth Century Consensus Theory of Contract", (1989) 7 Law & Hist. Rev. 241, 242-3, cited in S. Wheeler and J. Shaw, "Contract Law: Cases, Materials and Commentary" (Clarendon Press, Oxford, 1994), pp. 57-58.

[129] A "belief that the law directly and promptly reflected societal forces" - Hamburger, cited in Wheeler and Shaw, op cit, pp. 57-58.

[130] See below at 3.3.5: "The Policy Rationale for the Ultra Vires Doctrine".

[131] Hamburger, cited in Wheeler and Shaw, op cit, p. 58.

[132] Ibid, at p. 58: radical departures "can only occur if they are imperceptible or are sufficiently well disguised that they can be plausibly denied."

[133] Ibid, at p.58.

[134] 1801-1870 "witnessed immense changes in the structure of British society as industrial development and population growth transformed well-established economic and social relationships. At the beginning of the century, the legal system was already struggling to keep up with a rate of change which was constantly accelerating. By the 1850s and 60s, it was lagging seriously behind" - J. Davies, "Aspects of Nineteenth Century Legal Literature" (1998) 29 Cambrian Law Rev. 22, 22.

particularly if one does not explicitly acknowledge the novelty of the new scenario. It would have been more difficult in *Ashbury*[135] to justify an apparent innovation, in treating the registered company differently from the statutory corporation, than an extension of the doctrine already in existence.

3.3.4. Theories of Corporate Personality and the Ultra Vires Doctrine

The question of whether a company is directly the creation of its founders or the state relates to philosophical debates as to the nature of the legal personality enjoyed by corporations. This philosophical question directly informed the determination that the registered company has limited capacity.

The landmark decision in *Salomon v. Salomon*[136] underlines the fundamental principle that companies formed under the Companies Acts have separate legal personality from their members.[137] The grant of incorporation and recognition of separate legal personality are not of themselves sufficient answers to the questions of the nature of the registered company or the extent of its legal capacity. Incorporation was a practical response to the difficulties of suing deed of settlement companies,[138] not a declaration of principle regarding the fundamental nature of registered companies. Nonetheless, capacity is tied to a view of personality.

A number of competing theories purport to explain the basis of corporate personality.[139] If academic and philosophical soul-searching as to the true nature of the corporation may sometimes be decried as irrelevant,[140] there is a close

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[135] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[136] Salomon v. Salomon & Co Ltd [1897] AC 22.

[137] See above at 2.4.3: "Separate Legal Personality".

[138] Anonymous, "Article VI – Joint Stock Companies Regulation Acts" (1845) 1 L. Rev. & Q. J. Brit. & Foreign Jurisprudence 95, 112.

[139] See A. O'Neill, "The Constitutional Rights of Companies" (Thompson Round Hall, Dublin, 2007), pp. 13-23.

[140] H.L.A. Hart, "Definition and Theory in Jurisprudence" (1954) 70 LQR 37, 53; see also M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31 MLR 481, 508.

relationship between the nature and source of corporate personality and the scope of corporate capacity. Hart argues that it is unnecessary to engage in philosophical struggles to define "anomalous or fictitious entities", when one can present the law instead as based on "new and extended though analogous use of legal rules".[141] Many laws can be described without recourse to such theories,[142] but the extent of contractual capacity raises underlying questions about the nature of the registered company. Engaging with the nature of the corporation might shed some light. The principles governing corporate capacity necessarily reflect a theoretical conception of the legal person and the decision-makers' underlying attitude to it. Even where it is not explicitly discussed, judicial assumptions about corporate personality influence the law's development. Rajak asserts that the doctrine of ultra vires typifies how assumptions rooted in different theories of corporate personality influence the law.[143]

Patfield identifies three principal theories of corporate personality traditionally invoked.[144] These are the concession or fiction theory,[145] the contractual model and

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[141] Ibid; this approach is more suited to descriptive than prescriptive analysis.

[142] H.L.A. Hart, "Definition and Theory in Jurisprudence" (1954) 70 LQR 37, 50.

[143] H. Rajak, "A Sourcebook of Company Law", 2nd ed. (Jordans, Bristol, 1995), p. 9: Rajak cites the contrasting approaches of Blackburn J in the Court of Exchequer Chamber and the House of Lords in Ashbury; interestingly, the relationship between the concession theory and ultra vires appears to be somewhat circular: see eg H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), p. 55: " the conception of a corporation as a natural person has been considerably modified by the modern doctrine of ultra vires", see also S. Brice, "A Treatise on the Doctrine of Ultra Vires" 2nd ed. (Stevens & Haynes, London, 1877), pp. 31-32, "A corporation is commonly styled a "legal person," but the appellation "person" is applicable to it only by analogy; and the analogy fails when we see it thus clearly stated that this legal person is wanting in much that belongs to an ordinary person – that its course of existence is marked out from its birth, that it has been called into being for certain special purposes; and that all the obligations it affects to assume which do not arise from or out of the pursuit of such purposes are null and void."

[144] F. Patfield, "Challenges for Company Law", in F. Patfield ed., "Perspectives on Company Law" (Kluwer, 1995), p. 7.

[145] The concession and fiction theories "fit together to form a coherent whole" – M.J. Phillips, "Reappraising the Real Entity Theory of the Corporation" (1993) 21 Fla. State. Univ. L. Rev. 1061,

the natural entity or corporate realist theory.[146] According to the concession or fiction theory, the company is "an artificial entity created and supervised by the state."[147] The personality it enjoys is "but a legal fiction".[148] The consequence of the concession theory is that the capacity and powers granted to a corporation by the state must be interpreted restrictively, "for fear that the company is abusing the concessions granted to it by the sovereign."[149] The nexus-of-contracts approach regards the company as being "comprised of contractual relations between the various people involved in the company."[150] This view is propounded by the dominant law and economics school of thought in the United States, and attributes reduced significance to the legal principle of separate legal personality,[151] instead explaining the corporate form and all the relationships within the corporation as contractually based.[152] Grantham rejects this approach, arguing that it has not

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1064; "If the personality of the corporation is a legal fiction, it is the gift of the prince" - F.W. Maitland, "Moral Personality and Legal Personality", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 223, 228; cf J. Dewey, "The Historic Background of Corporate Legal Personality" (1926) 35 Yale L.J. 655, 665-666.

[146] F. Patfield, "Challenges for Company Law", in F. Patfield ed., "Perspectives on Company Law" (Kluwer, 1995), p. 7.

[147] Ibid, pp. 7-8.

[148] C.L. Colson, "Corporate Personality" (1935) 24 Georgetown L.J. 638, 639.

[149] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 18.

[150] F. Patfield, "Challenges for Company Law", in F. Patfield ed., "Perspectives on Company Law" (Kluwer, 1995), p. 8; B. Clarke, "Corporate Responsibility in Light of Separation of Ownership and Control" (1997) 19 DULJ 50, 69.

[151] See B. Cheffins, "Using Theory to Study Law: A Company Law Perspective" (1999) 58 CLJ 197, 209; see also Bratton, "The New Economic Theory of the Firm: Critical Perspectives from History" (1989) Stan. L. Rev. 1471, 420: "the corporate entity [...] almost disappears", quoted in A. O'Neill, "The Constitutional Rights of Companies" (Thompson Round Hall, Dublin, 2007), p. 23.

[152] R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 579.

"proved compelling",[153] particularly because it fails to account for the many imperative rules of company law.[154] The nexus-of-contracts approach is a modern version of aggregate theory,[155] which looks beyond the corporate form at the interests of the individuals who associate through it and so runs counter to the principle of separate legal personality.[156] The aggregate theory is useful in a constitutional rights context, [157] but does not provide a basis for sound theoretical elaboration of company law principles. Finally, the natural entity or corporate realist theory views the company as the creation of those who come together to form it, "being naturally formed and not dependent on state intervention."[158] However, it

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[153] Ibid, at 579.

[154] Ibid, at 580-581; see also A. O'Neill, "The Constitutional Rights of Companies" (Thompson Round Hall, Dublin, 2007), p. 22.

[155] A. O'Neill, "The Constitutional Rights of Companies" (Thompson Round Hall, Dublin, 2007), p. 21.

[156] Ibid, at pp. 18-19.

[157] Iarnrod Eireann v. Ireland [1996] 3 IR 321; [1995] 2 ILRM 161; A. O'Neill, "The Constitutional Rights of Companies" (Thompson Round Hall, Dublin, 2007), p. 18.

[158] F. Patfield, "Challenges for Company Law", in F. Patfield ed., "Perspectives on Company Law" (Kluwer, 1995), p. 8; "In reality, the function of the state in the matter has been permissive and regulative rather than creative." - W.J. Brown, "The Personality of the Corporation and the State" (1905) 84 LQR 365, 370; see also: Dicey, XVII Harv. L. Rev. 511, 513, quoted in F.W. Maitland, "Moral Personality and Legal Personality", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 223, 224-225; Bratton, "The New Economic Theory of the Firm: Critical Perspectives from History" (1989) Stan. L. Rev. 1471, 1486, cited in A. O'Neill, "The Constitutional Rights of Companies" (Thompson Round Hall, Dublin, 2007), p. 17.

has been dismissed as "little more than a metaphor"[159] and Maitland rejects it as English law.[160]

It is possible to discern the effect of the concession theory in the House of Lords decision in *Ashbury*.[161] Lord Chelmsford characterises the creation of a limited liability company as "entirely a creature of the statute."[162] This leaves little room to acknowledge the creative role of the promoters. The concession theory, related to corporate capacity, dictates that companies have no existence or powers independent from those conceded to them by the state when it grants the privilege of incorporation. According to Griffin, the House of Lords' adoption of the restrictive view, that any matter which was not authorised expressly was forbidden,[163] suggests that the court subscribed to the concession theory. Other dicta also embody the concession theory,[164] including that of Lord Cairns L.C., who emphasises that the grant of incorporation comprises both positive existence and negative boundaries to

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[159] A. O'Neill, "The Constitutional Rights of Companies" (Thompson Round Hall, Dublin, 2007), p. 25; see also K.W. Wedderburn, "Corporate Personality and Social Policy: The Problem of the Quasi-Corporation" (1965) 28 MLR 62, 70-71: "That such theories can be given the respectability of the bench ten years after Professor Hart destroyed whatever life they had left is an interesting quirk of legal history."; H.L.A. Hart, "Definition and Theory in Jurisprudence" (1954) 70 LQR 37.

[160] F.W. Maitland, "The Corporation Sole", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 73, 75: "the corporation sole stops [...] the way. It prejudices us in favour of the Fiction Theory"; F.W. Maitland, "Trust and Corporation", ibid., p. 141, 141-142: "no Germanistic theory is beyond dispute until it has been tested upon our English material".

161 G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 17 et seq.

[162] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 678 (per Lord Chelmsford).

[163] S. Griffin, "The Rise and Fall of the Ultra Vires Rule in Corporate Law" (1998) 2 MJLS (www.solent.ac.uk/law/mjls/papers/griffen.pdf), pp.7-8.

[164] See A. Griffiths, "Contracting with Companies" (Hart, 2005) p. 167.

that existence; both a freedom and a constraint on that freedom.[165] He suggests that the existence of such limits is self-evident.[166] In a similar vein, Lord Selborne refers to the "original limitation and circumscription of their powers by the law, and for the purposes of their incorporation."[167] This statement rejects the idea that registered companies could have full capacity, by linking the extent to which capacity is granted to them to the purpose for which that capacity is granted.

Reliance on concession theory to justify the limitation of the capacity of registered companies may be challenged at two stages. Firstly, does concession theory accurately represent the basis of the existence of the registered company? Secondly, if the company does owe its existence to a concession by the state, does this necessarily dictate that its capacity must be limited?

The House of Lords' conception of corporate personality conformed to views then current. Anderson asserts that corporations were at this time widely perceived to be "a creature of the state".[168] Brice espouses the fiction theory.[169] The argument that corporations derive their existence as a concession from the state, and that their capacity must, as a result, be interpreted restrictively, is strongest in the authorities concerning the capacity of statutory corporations. The operation of the ultra vires

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[165] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 670 (Lord Cairns LC): "a mode of incorporation which contains in it both that which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and power which by law are given to the corporation and it states, if it is necessary so to state, negatively, that nothing shall be done beyond that ambit, and that no attempt shall be made to use that corporate life for any other purpose than that which is so specified."

[166] Ibid, at 670: "*if it is necessary so to state*".

[167] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 694, (per Lord Selborne).

[168] J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 263, 266.

[169] S. Brice, "A Treatise on the Doctrine of Ultra Vires" 2nd ed. (Stevens & Haynes, London, 1877), p. 2; pp. 18-19: "Corporations are usually considered to owe their existence to the royal prerogative, which has been manifested impliedly [...] and expressly".

doctrine in this context was confirmed unequivocally in *Eastern Counties Railway v. Hawkes*.[170] The long line of cases in which ultra vires was applied to statutory corporations appears to be informed by the concession theory. The decision of Turner L.J. in *Shrewsbury Railway Company v. London and North Western Railway Company* illustrates this trend, stating,

> "[t]he fact of their being endued with such powers, and incorporated for such purposes, only shows that Parliament did not think fit to entrust them with more extended powers, or to incorporate them for other purposes."[171]

Certainly, the Acts constituting statutory corporations are "easily viewed as a grant of a concession or privilege from the State."[172]

However, while the statutory corporation is the archetypal example of a body deriving its existence as a concession from the state, even statutory corporations were not always deemed necessarily to have limited capacity. The modern perception that ultra vires was a long-established doctrine when it was extended to the registered company is challenged by Brice's 1874 observation that the,

> "doctrine may have been present in a vague form to the minds of the older judges, but it is only within the last half century that it has been laid down in clear and unqualified language".[173]

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[170] Eastern Counties Railway v. Hawkes 5 HL 348 (per Lord Cranworth): "a well-settled doctrine that a company incorporated by Act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorised by the terms of its incorporation, however desirable such an application may appear to be."- cited in S. Brice, "A Treatise on the Doctrine of Ultra Vires" 2nd ed. (Stevens & Haynes, London, 1877), p. 31.

[171] Shrewsbury Railway Company v. London and North Western Railway Company, 22 L.J. (Ch) 682 (per Turner LJ), cited in S. Brice, "A Treatise on the Doctrine of Ultra Vires" 2nd ed. (Stevens & Haynes, London, 1877), p. 30.

[172] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 25.

The nineteenth century judicial restriction of the capacity of such bodies displaced a long-established contrary view. Historically, the view of corporations was that they "were considered to have most of the powers [...] of ordinary citizens."[174] Carr describes the ultra vires doctrine as "of modern growth; it is scarcely yet 60 years old".[175] It can be traced to *Colman v. Eastern Counties Railway Company*[176] in 1846. It does not therefore appear that the courts were strongly motivated by the concession theory to restrict even the capacity of statutory corporations until the nineteenth century. The fact that the capacity of statutory corporations was not always limited weakens the argument that concession theory dictates limited capacity.

The concession theory is furthermore an even weaker explanation for the legal personality of registered companies than statutory corporations, given the predominant role of their individual progenitors in their conception. It is questionable whether the House of Lords was correct in viewing the concession theory as the basis for the separate legal personality of registered companies.[177] Many argue that the registered company evolved from the deed of settlement company, formed by private arrangement, rather than the chartered or statutory

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[173] S. Brice, "A Treatise on the Doctrine of Ultra Vires" 2nd ed. (Stevens & Haynes, London, 1877), p. 28; see also H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 9; Pickering suggests that ultra vires was first developed in response to the South Sea Bubble - M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31(5) MLR 481, 485.

[174] "But of late, from the introduction and development of the doctrine of Ultra Vires, these powers and obligations have been, especially as regards some kinds of corporations, considerably curtailed." - S. Brice, "A Treatise on the Doctrine of Ultra Vires" 2nd ed. (Stevens & Haynes, London, 1877), p. 27.

[175] C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 65; Colman v. Eastern Counties Railway Company (1846) 16 L.J. (Ch.) 73; East Anglian Railway Company v. Eastern Counties Railway Company (1851) 21 L.J. (C.P.) 23.

[176] Colman v. Eastern Counties Railway Company (1846) 16 L.J. (Ch.) 73.

[177] A. O'Neill, "The Constitutional Rights of Companies" (Thompson Round Hall, Dublin, 2007), p. 17: "the modern system of incorporation can scarcely be said to fit with the concession theory".

corporation, whose constitutions were drawn up by the State.[178] The deed of settlement companies were "regulated entirely by the will of their founders."[179] Thompson views the memorandum of association as the basis of the joint stock company; it is an agreement between the parties seeking to create the company, in the form prescribed by statute.[180] The shareholders may be regarded as partners, and the company is restricted by legislation in their interest. This view supports the argument that the company is not the creation of the state or the statute. Gower also expressly endorses this view.[181]

The Joint Stock Companies Acts provided, as was the case in deed of settlement Companies, that the promoters themselves would choose all the pertinent characteristics of their company, including its objects and powers.[182] Their constitution would merely be recognised by the State.[183] The Registrar had no discretion in the matter, and was obliged to admit companies that complied with the

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[178] H.R. Hahlo & J.H. Farrar, "Hahlo's Cases and Materials on Company Law" 3rd ed., (Sweet & Maxwell, London, 1987), p. 5; L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. LR 1369, 1371-1372: "the modern English business corporation has evolved from the unincorporated partnership, based on mutual agreement, rather than from the corporation, based on a grant from the state."

[179] Anonymous, "Article VI – Joint Stock Companies Regulation Acts" (1845) 1 L. Rev. & Q. J. Brit. & Foreign Jurisprudence 95, 111.

[180] B. Thompson, "Are Joint Stock Companies Common Law Corporations?" (1922) 42 Canadian Law Times 302, 311.

[181] L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. L. Rev. 1369, 1371-2: "The modern English business corporation has evolved from the unincorporated partnership, based on mutual agreement, rather than from a corporation, based on a grant from the State ...."

[182] See H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), p. 23: "The legislature has laid down certain requirements as the conditions of incorporation, but leaves all other powers and arrangements and the internal organisation of the corporation to the members themselves."

[183] See A. O'Neill, "The Constitutional Rights of Companies" (Thompson Round Hall, Dublin, 2007), p. 16: "the concept of incorporation as of right [...] undermined the idea that the existence of the company was at the pleasure of the state".

prescribed criteria. Beyond the prevention of "purely delusive and fraudulent companies",[184] the state did not seek to dictate the purpose of a registered company. Certainly, the "right to incorporate remains a privilege granted by the State".[185] Nevertheless, if the terms of this grant are conceived by the founders, this view does not necessarily imply a role for the state in ensuring that the company be confined to whatever boundaries they draw.

A further argument against basing the restricted capacity of registered companies on concession theory emerges from the contrast with chartered corporations. The concession theory is less apt to the registered company, which was modelled on the deed of settlement company, than it would be to the chartered corporation, and therefore the concession theory cannot alone justify the extension of ultra vires to registered companies. Hutchinson highlights the logical inconsistency in deeming the capacity of statutory corporations and joint stock companies to be limited, yet granting full capacity to chartered corporations.[186] The existence of a chartered corporation is far more clearly a concession from the state, than that of a registered company. Yet, the courts were keen to insist that the ultra vires doctrine does not apply to a grant of legal personality from the Crown.[187]

The fact that chartered corporations were consistently accepted as having full capacity, in contrast to statutory corporations, reveals that the capacity of different types of corporation could vary, regardless of whether the state is the grantor of all

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[184] Anonymous, "Article VI – Joint Stock Companies Regulation Acts" (1845) 1 L. Rev. & Q. J. Brit. & Foreign Jurisprudence 95, 112.

[185] N.H.D. Foster, "Company Law Theory in Comparative Perspective: England and France" (2000) 48 Am. J. Comp. L. 573, 585, cited in A. O'Neill, "The Constitutional Rights of Companies" (Thompson Round Hall, Dublin, 2007), p. 17.

[186] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 21.

[187] Bonanza Creek Gold Mining Company v. R., [1916] 1 AC 566, 582 (per Lord Haldane): "the doctrine of *Ashbury Railway Carriage and Iron Co. v. Riche* does not apply where, as here, the company purports to derive its existence from the sovereign and not merely from the words of the regulating statute".

legal personality. Hutchinson infers from the courts' refusal to apply ultra vires to chartered corporations that the concession theory could not in fact have been the rationale for the *Ashbury* extension.[188] Of course, the courts may have distinguished between the power of the Crown and that of Parliament to create corporations, and considered that the Crown somehow had it in its gift to grant a greater degree of personality, and thus capacity, but this is speculation, not evident from the authorities, and nor does it commend itself as an obvious explanation for the contradiction.

Finally, it may be questioned whether the concession theory is really useful as an explanation for the existence of the registered company. Certainly, one may conclude that the company exists because it is recognised by law, but the implicit assumption that its existence should therefore be delimited as narrowly as possible is not necessarily true. Griffiths asserts that the concession theory is now of historical interest only.[189] Wolff discounts the concession theory in favour of a distinct fiction theory, according to which corporations possess the capacity with which they are endowed by law.[190] In his view, the fiction theory need not be equated with the concession theory and the resultant circumscription of a company's personality. He rejects the criticism that the fiction theory is founded on the concession theory,[191] arguing that it "shows a confusion of the conceptions State and Law."[192]

Hutchinson argues that the view of personality as a grant from the state could not, unaccompanied by other reasons, justify ultra vires. He reasons that if the courts were motivated solely "out of a wish to protect the parliamentary prerogative", they

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[188] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), pp. 24-25.

[189] A. Griffiths, "Contracting with Companies" (Hart, 2005) p. 167.

[190] M. Wolff, "On The Nature of Legal Persons" (1938) 54 LQR 494, 496, 505-6; See also E.M. Dodd, "For Whom are Corporate Managers Trustees?" (1932) 45 Harv. L. Rev. 1145, 1146.

[191] M. Wolff, "On The Nature of Legal Persons" (1938) 54 LQR 494, 509.

[192] Ibid, at 509.

would have implemented the doctrine long before the nineteenth century.[193] On this view, even if concession theory fed into the decision in *Ashbury*, it cannot alone explain it. The logical progression from the observation that the company's legal personality owes its existence to recognition by the state and the law does not inexorably lead to the inference that its existence and capacity must therefore be circumscribed as tightly as possible.[194] The state has chosen to acknowledge the creation of the company by its members, on the terms conceived by them.

3.3.5. The Policy Rationale for the Ultra Vires Doctrine

The second step of the concession theory reasoning only makes sense if the company is viewed as a threat.[195] The mistrust and hostility engendered by corporations in the nineteenth century,[196] coupled with the perceived need to protect individuals who came in contact with them, explains the progression from viewing legal personality as a gift of the state to requiring it to be strictly constrained.[197] The Lord Chancellor reflected in his speech in *Ashbury*[198] on the policy behind the regulation of limited liability joint stock companies, identifying the interests of

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[193] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), pp. 24-25.

[194] J. Dewey, "The Historic Background of Corporate Legal Personality" (1926) 35 Yale L.J. 655, 667-668.

[195] "The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the Act of Incorporation." - Beaty v. Lessee of Knowler (1830) 29 US 152.

[196] Such mistrust has deep historical roots: "the Romans were very jealous of such combinations of individuals, and they restrained those that were not specifically authorized; and every corporation was illicit that was not ordained by a decree of the senate or of the emperor." – Kent, 2 Commentaries, lecture 33, 268, cited by F.H. Cooke, "Should the Ultra Vires Doctrine be Applied to Business Corporations?" (1894) 28 American Law Review 222, 223.

[197] "In England it seems well settled that [the doctrine] is founded on public policy" - G.C. Gale, "The Doctrine of Ultra Vires,as Affecting the Rights and Obligations of a Corporation..." (1899) 48 Central Law Journal 231, 231; K. Greenfield, "Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality" (2001) 87 Virginia Law Review 1279, 1303.

[198] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

protecting shareholders, as well as potential shareholders and "the outside public, and more particularly those who might be creditors of companies of this kind."[199] These specific policy concerns reflect a wider hostility towards corporations which must also have informed the decision.[200]

The enactment[201] and subsequent repeal[202] of the Bubble Act were relatively recent memories in the mid-nineteenth century. Society, legislature and judiciary alike were being asked to adopt positions on the regulation of corporations. While the economy and commercial world may have needed incorporation to progress, these actors were not necessarily favourably disposed towards the corporation.[203] It engendered widespread mistrust.[204]

In *Colman v. Eastern Counties Railway Company*,[205] Lord Langdale M.R. bases a need to police corporations on their large funds and the risk of their actions

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[199] Ibid, at 667.

[200] "The wide view of ultra vires was underpinned by concern for the possible social, economic and political damage which corporations might inflict" - H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 18.

[201] Bubble Act 6 Geo. I, c.18.

[202] Bubble Act Repeal Act 6 Geo. 4, c.91.

[203] Lord Eldon "who certainly had a great aversion to companies, seems to have been of opinion that companies with large capitals, arising from numberous small contributions, and with transferable shares, were injurious to the public and were illegal." – Lindley on Partnership, 4th ed., p. 193, cited by F.H. Cooke, "Should the Ultra Vires Doctrine be Applied to Business Corporations?" (1894) 28 American Law Review 222, 224.

[204] J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 263, 266; "As Lord Bramwell recently said of promoters, "If you stop one hole they knock another"." - Anonymous, *Notes* (1889) 18 LQR 221, 223.

[205] Colman v. Eastern Counties Railway Company (1846) 10 Beav 1.

"materially affecting the rights and interests of other persons".[206] This statement offers insight into the fears evoked by large and powerful corporations. However, the problem was not just the size and wealth of some companies. Unincorporated deed of settlement companies could also be large, but did not provoke the same fears, and Lord Langdale specifically calls for greater vigilance in relation to companies than to partnerships, regardless of wealth or size. If it is appropriate to exercise greater vigilance towards registered companies than partnerships, the relevant differentiating factor must be their divergence in relation to limited liability. Lord Langdale hints at this concern when he refers to the company's powers of interference "with the private rights of individuals".[207] Rajak situates the invention of the ultra vires doctrine in the context of the nineteenth century philosophy of individualism, with the corporation seen as a threat to the freedom and interests of individuals.[208] He describes landowners and businessmen as "vulnerable to the growing might of these new legal monsters".[209] The unease which companies generated may have related more broadly to rampant, unregulated capitalism than direct abuses of the corporate form. Brandeis J. characterises these misgivings expansively, suggesting concerns that the individual's liberty is threatened by the powerful instruments of relentless capitalism.[210]

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[206] Ibid, at 13-14; see also Salomons v. Laing (1850) 12 Beav 339, 50 ER 1091; Munt v. Shrewsbury and Chester Railway Company (1850) 20 L.J. Ch. (N.S.) 169, 13 Beav 1, 51 ER 1; East Anglian Railway Company v. Eastern Counties Railway Company (1851) 21 L.J. (C.P.) 23, (1851) 11 CB 775, 138 ER 680.

[207] Colman v. Eastern Counties Railway Company (1846) 10 Beav 1, 13-14; Carr refers to "non-sovereign law-making bodies" - C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 70.

[208] The courts "tried to lean in favour of the individual when the latter appeared put upon by public and quasi-public officials" - H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 15.

[209] Ibid.

[210] Brandeis J., Liggett v. Lee (1933) 288 US 517: "Fear of the encroachment upon the liberties and opportunities of the individual. Fear of the subjection of labour to capital. Fear of monopoly. Fear that the absorption of capital by corporations and their perpetual life might bring evils similar to those which attend mortmain. There was a sense of some insidious menace inherent in large

Anderson presents the ultra vires doctrine as an understandable response to such fears of massive and powerful accumulators of capital in an era when there was little other regulation of companies.[211] The framework of company law rules and regulations which constrains business activity today had not yet been constructed. This sort of generalised fear is better combated by targeted laws and regulations against each of its aspects than a blanket hostility to the corporate form.

3.3.5.1. Protection of shareholders and creditors

The speech of Lord Cairns L.C. shows that he regarded the limitation of the capacity of companies incorporated under the Act as part of a system of controls necessitated to protect investors, both current and prospective, and creditors from abuse of the privilege of limited liability. When interpreting the Act,[212] he referred to the conditions under which limited liability was introduced. These were, in his view, designed to protect the interests of,

> "shareholders for the time being in the company, [...] those who might become shareholders [...], the outside public, and more particularly those who might be creditors of companies of this kind."[213]

These "public policy"[214] considerations unquestionably influenced the decision to restrict the capacity of registered companies, and are often cited as the rationale

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aggregation of capital, particularly when held by corporations.", cited by J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 263, 266.

[211] J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 263, 264: he refers to "its ability to limit, in an effective manner, the power and size of companies, which was considered vital in the era of laissez-faire governmental administration"

[212] Joint Stock Companies Act, 1862, 25 & 26 Vict. c.89.

[213] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 667.

[214] C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 70.

underlying the ultra vires doctrine.[215] In *Cotman v. Brougham*,[216] Lord Parker explains the protection offered by the statement of objects as serving a "double purpose".[217] Investors are protected because they know "the purposes to which their money can be applied."[218] Likewise, prospective contracting parties can also discover the ambit of a company's powers.[219]

Though the ultra vires doctrine aims to serve both, the interests of shareholders and creditors are not precisely equivalent. Shareholders' interest in the preservation of corporate assets is more direct, since they are the ultimate owners of these assets on liquidation.[220] Creditors simply have a claim to be paid out of available assets on winding up. Furthermore, as Lord Parker also highlights, the two interests are not always parallel, as shareholders are better informed by narrow objects but creditors are less exposed to the risk of invalidity where objects are broad.[221]

In the case of shareholders, both the risk argument and the contract perspective explain the restriction of capacity to the business stated in the memorandum. The risk argument is that, if a company engages in activities beyond those for which it was established, this is inherently dangerous. Thompson evokes the fear for the

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[215] See eg F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 130.; G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 31.

[216] Cotman v. Brougham [1918] AC 515.

[217] Ibid, at 520 (per Lord Parker).

[218] Ibid, at 520 (per Lord Parker).

[219] Ibid, at 520 (per Lord Parker).

[220] The "company in reality only exists as the agent of its members, or as a trustee for them, of property and contractual rights and obligations which in a true sense, taking into account "the realities of the situation," belong to those members", but this is not descriptive of a preceise legal relationship - M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31 MLR 481, 490-499; "The interest of the shareholders is to receive a dividen, in the event of the company's profits allowing it to be paid, and to share in any surplus assets of the company on a winding up" – Belton v. Carlow County Council [1997] 2 ILRM 405, 414.

[221] Cotman v. Brougham [1918] AC 515, 520 (per Lord Parker).

shareholder as that, having decided to invest on the basis of one area of activity, he may helplessly watch his investment being ventured in an unrelated area.[222] Carr refers to "sudden and uncertain changes in its objects".[223]

The ultra vires doctrine mandates active judicial intervention to control the business activities of corporations.[224] The paternalistic thinking which underlies it emerges from the decision of Lord Langdale in *Colman v. Eastern Counties Railway Company*.[225] He asserts that "investment should not be considered a wild speculation, exposing those involved in it to all sorts of risks, whether they intended it or not."[226] Firstly, to modern eyes it seems incompatible with the spirit of enterprise that investors could be shielded so completely from risk.[227] Secondly, the assumption that the ultra vires doctrine targets acts which recklessly endanger corporate assets is flawed. Transactions beyond the scope of a company's objects clause are not automatically speculative enterprises which endanger the company's assets. Limiting a corporation's capacity may also preclude it from pursuing activities which would prove beneficial to the company and its shareholders.[228] This argument was raised in *Colman v. Eastern Counties Railway Company*,[229] where the

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[222] B. Thompson, "Are Joint Stock Companies Common Law Corporations?" (1922) 42 Canadian Law Times 143, 143: "the investor at any moment may either be despoiled of his money or see it employed without even the right to protest, for purposes completely different from, or even opposed to, those contemplated and stipulated when he made his investment."

[223] C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 70.

[224] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 79.

[225] Colman v. Eastern Counties Railway Company (1846) 10 Beav 1.

[226] Ibid, at 17-18.

[227] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 176; risk-taking is "the essence of the function of the entrepreneur" - L. MacCann, "Directors' Duties of Care, Skill and Diligence" (1991) 9 ILT 56, 56.

[228] See eg Colman v. Eastern Counties Railway Company (1846) 10 Beav 1 for potentially profitable ultra vires activity.

[229] Colman v. Eastern Counties Railway Company (1846) 10 Beav 1.

railway company sought to establish a profitable steam transport line, but Lord Langdale rejected it.[230] If profitable activities are not permitted, this bolsters the argument that the primary purpose of the law on capacity is not directly to ensure the protection of the company's profitability, but because the company should not be permitted to exceed certain limits. This dichotomy, between a rule designed to ensure business is profitable, yet which bars profitable ventures, might be excused on the basis that, at the general level, the rule tends to provide security for investors who make decisions based on the field of a company's activity. The rule would not provide any certainty or security if the capacity of a company in any particular case turned on an assessment of a venture's profitability.

Furthermore, it seems odd and excessively activist that the courts would actively intervene to prevent mildly foolish commercial ventures, rather than leaving this power in the hands of the company's owners.[231] The ultra vires doctrine removes from shareholders the power which they ought to have as owners of the company to sanction any improper acts that might damage their interests. Instead of allowing the company itself to decide what acts ought to be avoided, the courts step in and apply a sweeping rule to invalidate whole classes of transaction, regardless of the actual harm or benefit which might accrue in a specific case.

The other view underpinning this shareholder protection logic is the perception of the memorandum, as part of the corporate constitution, as the essentially contractual terms on foot of which the shareholder agreed to subscribe to the company.[232] Thompson subscribes to this view, that the memorandum is the basis of an agreement between the company and its investors, by which the parties agree to

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[230] Ibid, at 17.

[231] A.B. Frey, "Ultra Vires and Estoppel" (1909) 43 American Law Review 81, 94: "it must be said that they have chosen the officers and agents of the corporation".

[232] This contractual description is more frequently expressly made of the articles of association, but also applies to the memorandum; see Clark v. Workman [1920] 1 IR 107, 112; it is supported by Section 11, Joint Stock Companies Act, 1862, 25 & 26 Vict. c.89.

associate with "limited rights or powers and limited liability".[233] Anderson points to two underlying assumptions: that prospective investors are swayed by the activities set out in a company's constitution, and that the nature of the activities engaged in is so important to them that transgressions are a deal breaker, or a breach of the company's contractual obligation to investors.[234] By declaring that the act outside the objects is void and unratifiable, the law imposes an irrefutable presumption that the nature of the company's activities are of central importance to shareholders, without reference to profitability.

The focus on defined areas of activity may seem "quaint" in the modern context where shareholders regularly invest in companies which provide the greatest return, regardless of the activities which produce the profits.[235] In fact, as Griffiths points out, the increasing prevalence of expansive objects clauses over the years indicates that, on the contrary, shareholders prize flexibility of corporate purpose.[236] It might be countered that it was promoters, closer to management, and not investors, who drafted these clauses, but the investors elected to subscribe to the companies with broad objects.

Just because the rule does not always effectively protect shareholders – it might in a particular instance bar a profitable line of business or leave a company unpaid on foot of a void contract – does not negate the fact that its inspiration is to protect shareholders generally, and that it might conceivably offer useful security to intending members. On the other hand, the primacy of shareholder protection as the explanation for the rule is undermined by the subsequent application of the doctrine

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[233] B. Thompson, "Are Joint Stock Companies Common Law Corporations?" (1922) 42 Canadian Law Times 143, 158.

[234] J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 263, 267; this covenant view underpins Lord Cairns' analysis of Section 11 of the Joint Stock Companies Act, 1862, 25 & 26 Vict. c.89 in Ashbury.

[235] Ibid, at 267.

[236] A. Griffiths, "Contracting with Companies" (Hart, 2005) p. 167.

to companies limited by guarantee, justified by reference to the interests of creditors.[237]

The logic that limited capacity provides protection is weaker in relation to creditors. The doctrine of constructive notice assumed that creditors were aware of the contents of corporate constitutions, including their objects. The reasoning underlying the ultra vires doctrine seems to be that creditors would examine a company's objects in the course of determining whether to extend credit to it. Yet, this seems removed from commercial reality. The primary factor in determining the credit-worthiness of a prospective trading partner is surely not often the trade in which it operates. The informed choice argument is even less appropriate to involuntary creditors.

If the policy motivation behind the doctrine is reduced to the simple motto that the assets of the company should not be recklessly endangered or dissipated in unforeseen activities, the same logical objection arises as does in relation to shareholder protection: there is no necessary correlation between activities which are outside the stated objects and those which are foolish and speculative.

Furthermore, the subsequent application of the doctrine in the courts shows that, far from protecting creditors, individual creditors often lost out because they provided goods or services to a company under a contract which turned out to be void.[238] In fact, the doctrine is now widely regarded as an unjustifiable danger to creditors, militating against the security of transactions and imposing a futile and inefficient burden of ensuring that partners have sufficient capacity.[239]

The protection argument also raises questions as to the precise nature of the interest which shareholders and, particularly, creditors have in the assets of a company,

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[237] Hennessy v. National Agricultural and Industrial Development Authority [1947] 1 IR 159, 191; the doctrine also applies to companies limited by guarantee and not having a share capital - Simmonds v. Heffer [1983] BCLC 298.

[238] See below at Chapter 8: "The Effect of the Ultra Vires Doctrine on the Innocent Outsider".

[239] See below at 15.2: "The Cost of the Ultra Vires Doctrine".

particularly at a time when the company has not reached the end of its lifespan and is not insolvent. Should creditors have the right to object to a solvent company dissipating certain of its assets, even wastefully, if it does not appear that it will thereby become unable to pay them?

3.3.5.2. Limited liability

The principle of limited liability creates the need to protect creditors from the waste or misapplication of the company's assets,[240] and is therefore inextricably connected to the doctrine of ultra vires.[241] The need to protect a company's assets in the interests of creditors was not entirely a novel idea in the nineteenth century. The "concept of capital as a permanent fund to be kept intact" developed in England around the seventeenth century, before limited liability became common.[242] This view underpins the capital maintenance rules as well as restrictions on capacity.[243] The connection is demonstrated in *Trevor v. Whitworth.*[244] While it reasonable to suppose that the company's assets may be increased or diminished in the course of

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[240] See P. Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986), p. 18 et seq.

[241] T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 342: "received wisdom is that it is thought to be part and parcel of limited liability" that capacity be limited.

[242] I.J. Levy, "Purchase by an English Company of its Own Shares" (1930) 79 1 UPLR&ALR 45, 45; see above at 2.4.4: "Limited Liability".

[243] "The principle is only a facet of the wider rule, the corollary of limited liability, that the integrity of a company's assets, except to the extent allowed by its constitution, must be preserved for the benefit of all those who are interested in them, most pertinently its creditors." - Brady v. Brady [1988] BCLC 20, 38 (per Nourse LJ); W.J.L Knight, "Capital Maintenance" Chapter 4, in F. Patfield (ed.), "Perspectives on Company Law" (Kluwer, 1995), p 49, at 52.

[244] Trevor v. Whitworth (1887) 12 AC 409; Guinness v. Land Corporation of Ireland (1882) 22Ch. D. 349, 375 (per Cotton LJ).

usual and legitimate trade, creditors, it is claimed, are entitled to assume that capital will not be expended on transactions outside the company's domain.[245]

Concern for the preservation of corporate assets was naturally accentuated by the novel introduction of limited liability for joint stock companies after 1855. Griffin links the limitation of corporate capacity to the grant of limited liability.[246] Corporate assets must be safeguarded because debts can only be satisfied out of the company's own assets. Thus, the prohibition on the purchase by a company of its own shares does not apply to unlimited companies.[247] In the absence of limited liability, the need to protect a company's funds for creditors is less pressing. In an unlimited company, even if the assets of the company were to be lost on an unforeseen risky venture, its creditors could claim their losses from the companies' members. Conversely, where the only funds available to pay creditors are the assets of the company itself, the interests of protecting those creditors, and indirectly, encouraging others to do business with limited companies, impose a need for strict regulation of the uses to which corporate funds can be put.

Yet, despite the logical corollary between limited liability and ultra vires, Horrwitz disputes that limited capacity responds to limited liability.[248] Although he agrees that the introduction of limited liability created a need for provisions to protect creditors, he points out that the prohibition of any change in the objects clause

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[245] Trevor v. Whitworth (1887) 12 AC 409, 416 (per Lord Herschell): "have a right to rely, on the capital remaining undiminished by any expenditures outside these limits, or by the return of any part of it to the shareholders."

[246] S. Griffin, "The Rise and Fall of the Ultra Vires Rule in Corporate Law" (1998) 2 MJLS (www.solent.ac.uk/law/mjls/papers/griffen.pdf), p. 6: "the logical consequence of limited liability meant that a company's membership was able to avert their own personal liability for corporate debts. To protect creditors, and also to secure the investment interests of existing and future shareholders, the legislature considered it appropriate to regulate the ambit of corporate capacity."

[247] In Re Borough Commercial and Building Society [1893] 2 Ch. 242; but the ultra vires doctrine does: Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221.

[248] W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 69.

found in Section 12 of the 1862 Act applied to limited and unlimited companies alike.[249] *Northern Bank v. Quinn*[250] illustrates the application of the doctrine to an unlimited company. Thus, even in companies where there is no such imperative to protect the pool of assets for creditors, capacity is still limited. However, there may be the practical concern that even in an unlimited company, there is no guarantee that members' assets will discharge corporate debts. Furthermore, even if the rule extends beyond the usual case of the limited company, this does not negate the explicit statements in *Ashbury* that the policy motivation was to protect corporate assets, and the observation that this was a pressing concern due to the rise in limited liability. The policy considerations expressly cited by the House of Lords in *Ashbury*[251] in support of ultra vires were most likely inspired by a perception that the existence of limited liability required that creditors be protected.

3.3.5.3. Disregarding businesses' need for flexibility

While policy reasons are important in explaining *Ashbury*, there also exist conflicting policy factors which ought to weigh against the imperative to protect shareholders and creditors. These countervailing interests were not taken into account. In particular, the House of Lords paid scant attention to companies' need for flexibility as an alternative policy concern. The ultra vires doctrine as enunciated, coupled with the impossibility of altering objects clauses, hindered commercial expediency.[252]

Lord Hatherley dismissed any inconvenience that might arise for companies. If the members of a company wished to frame a new object of business, he proposed that

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[249] Ibid, at 69.

[250] Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221.

[251] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[252] Ahern describes it as a "straightjacket" - D. Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27, 27.

they "might sign a fresh memorandum and form a new company."[253] In practical terms, this does not sufficiently answer the need for companies to be able to respond flexibly and apply their existing resources to realise new opportunities. The amendment of objects has since become possible through legislative changes.[254] However, in prioritising the protection of the public, the court underestimated the commercial importance of companies having flexibility about their business. Choong regards the possibility to change business and adopt new activities as essential for businesses to survive in "a complex and fast changing environment".[255]

The policy basis of protecting shareholders and creditors is undoubtedly an important concern, providing one of the more attractive rationales for the restriction of corporate capacity, yet there are too many holes in the logic for it to be fully convincing. Such an uncompromising, sweeping doctrine has the potential to do more harm than good, and must surely not be the most effective way which could be conceived to guarantee these vital interests.

3.3.6. Evaluating the Various Arguments for Limited Capacity

Ashbury[256] is truly a landmark decision, where the courts were faced with a real choice about the capacity of the new registered companies formed under the Joint Stock Companies Acts. The contrasting views of Blackburn J. and Lord Cairns on the effect of Section 12 reveal that the application of the ultra vires doctrine was not an inevitable result. Had the outcome been different, registered companies would have enjoyed full capacity from the outset. This area of company law would have escaped complexity and uncertainty, companies would have been less restricted in their activities, and the security of transactions would have been upheld. None of the reasons, express or implied, for the application of the ultra vires doctrine to the

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[253] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 687 (per Lord Hatherley).

[254] See below at 5.4.1: "The Alteration of Objects Clauses".

[255] T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17, 20.

[256] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

new registered company is entirely convincing. The statement of objects does not necessarily imply incapacity outside them. This argument is sufficiently persuasive to provide a statutory hook for the decision, but is not necessarily conclusive.

The registered company differs from the statutory corporation in its characteristic functions and powers. Furthermore, the concession theory is not properly applied to it. The registered company is created by the individuals who come together to form it, like the joint stock company from which it derives. The anomalous legal position in relation to the capacities of chartered, statutory and registered corporations further undermines the concession theory argument. Even if legal personality is a concession by the state, this does not necessarily imply that capacity must be limited.[257]

The policy considerations are powerful factors, particularly in the context of the limited liability of the registered company. Yet, even here, the logic is flawed: transactions which are outside a company's objects do not necessarily endanger the interests of shareholders and creditors. The shareholder protection argument relies on the equation of acts which are not envisaged in the objects with acts which pose an unnecessary risk of loss. However, logically, such acts are not necessarily dangerous and may on the contrary be profitable.[258] The fact that an act is actually prospectively beneficial to shareholders does not save it. Even if there were an equivalence between acts outside the objects, and bad business decisions, should shareholders not be entitled to either approve or disown any such foolish management decisions by directors?

The unspoken general mistrust of companies must be treated as one of the primary reasons for this decision. It informs both the espousal of the concession theory and the policy argument. The limited liability company inspired little confidence. Together with the innate conservatism of judicial law-makers, this might also

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[257] Cf G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 17.

[258] Ibid, p. 94.

explain the willingness of the court to overlook the novelty of the registered company.

An examination of the *Ashbury* decision shows that it was far from inevitable that the ultra vires doctrine should apply to the modern registered company. Limited capacity is not a necessary attribute of the corporation. However deeply the principle might have spread its roots, the arguments which motivated the judicial introduction of the rule are not decisive.[259]

3.3.7. The Doctrine Takes Root

Although none of the rationales for the *Ashbury*[260] decision is individually fully persuasive, they are defensible and, cumulatively, sufficed to convince. The decision also benefited from the highest authority under the doctrine of *stare decisis*. The binding force of the decision was reinforced when *Ashbury*[261] was confirmed by the House of Lords in *Attorney-General v. Great Eastern Railway Company*.[262] This confirmation ensured that the judicially-declared ultra vires doctrine became firmly embedded in company law.[263]

The subsequent affirmation is important, especially as Lord Blackburn's decision in the case[264] shows that the outcome was not ineluctable. Although *AG v. Great*

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[259] See below at 15.1: "Revisiting Ashbury: A Nineteenth Century Doctrine in the Twenty First Century" for reconsideration of these rationales from a modern perspective.

[260] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[261] Ibid.

[262] AG v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473; see below at 5.3.1.1: "Early decisions emphasised reasonableness".

[263] London County Council v. Attorney-General [1902] AC 165, 167 (per Lord Halsbury LC): "these two cases do constitute the law upon this subject [...] they are now part of the law of this country, and we must now acquiesce in them, whether we like them or not."; early Irish applications include: In Re Balgooley Distillery Company (Weekes' Case) (1886) 17 LR Ir 239 and In Re Bansha Woollen Mills Co Ltd (1888) 21 LR Ir 181.

[264] Riche v. The Ashbury Railway Carriage and Iron Company, Ltd (1873-74) L.R. 9 Ex. 224, 261-271 (per Blackburn J.)

Eastern Railway Company[265] itself concerns a statutory corporation rather than a registered company, it expressly affirms all that was decided in *Ashbury*[266] and was understood to confirm the rule for registered companies. That *Great Eastern Railway Company*[267] also sees no distinction between statutory and registered companies implicitly confirms the approach adopted in *Ashbury*[268] and reinforces the view that the doctrine is to apply equally to both. This premise allows the later authorities on capacity to be read without reference to whether the case in question concerns a statutory or registered company. The law developed along similar lines for both forms of corporation, despite any principled objections which might arise.[269]

In *Attorney-General v. Great Eastern Railway Company*,[270] there is a disparity apparent between the perspectives of Lords Selborne and Blackburn on the doctrine of ultra vires. This divergence reflects their respective positions in the *Ashbury* case.[271] Whereas Lord Selborne states his conviction that it is important that the rule be maintained,[272] Lord Blackburn, now elevated, intimates his hesitation by referring expressly to the fact that the decision in *Ashbury* was binding on the House of Lords under the doctrine of *stare decisis*.[273] Despite the reservations which Lord Blackburn, and others outside the court, may still have entertained, the affirmation of limited capacity for registered companies in the later case dispelled any doubts.

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[265] AG v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473.

[266] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[267] AG v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473.

[268] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[269] See above at 3.3.3: "The Assimilation of Registered Companies to Statutory Corporations".

[270] AG v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473.

[271] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[272] AG v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473, 478 (per Lord Selborne LC).

[273] Ibid, at 481 (per Lord Blackburn).

Limited capacity was the law. It remained to be seen how the law would be applied in practice and what effects it would have.

4. DEFINING ULTRA VIRES

> "If confusion is to be avoided, it seems to me highly desirable that, as a matter of terminology, the phrase "ultra vires" in the context of company law should for the future be rigidly confined to describing acts which are beyond the corporate capacity of a company."[1]

4.1. ULTRA VIRES IS INCAPACITY

The doctrine of ultra vires is distinctive in both its theoretical basis and its effects. It governs the limited contractual capacity of a corporate entity.[2] It dictates that corporations cannot be a party to anything which exceeds their individual capacity. The scope of each company's capacity is specific to that company, defined by reference to its stated objects. Acts which are beyond a company's capacity are void *ab initio*, and can have no legal effect.

The fundamental and decisive proposition, from which the contours of the principle logically flow, is that the ultra vires doctrine relates to legal capacity.[3] The weight of authority supports this view. The initial premise is the judicial determination in *Ashbury Railway Carriage v. Riche*[4] that registered companies necessarily possess

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[1] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 87 (per Slade LJ).

[2] See L.S. Sealy, "Ultra Vires and Agency Untwined" [1985] CLJ 39, 39.

[3] This is the orthodox view: see C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28(2) CLJ 280, 280; E. O'Dell, "Incapacity" (Chapter 5), in P. Birks & F. Rose (eds.), "Lessons of the Swaps Litigation" (Mansfield Press, 2000), pp. 113-167, at 117; G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 12; cf C.A. Babb, "Rethinking the Concept of Ultra Vires in Company Law" (Ph.D. thesis, University of Cambridge, 2004): Chapter 1 "Ultra Vires and Illegality: The Views of Scholars". Babb's thesis argues that ultra vires is not incapacity but illegality.

[4] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

only a limited purview, tied to the purposes for which they have been granted legal personality.[5] This assumption necessitated the development of a body of law which would serve to identify the extent of each company's capacity. These rules form the ultra vires doctrine.

Incapacity must be clearly distinguished from other issues such as illegality[6] and breaches of directors' duties.[7] Illegal transactions are prohibited because the nature of the contract is objectively contrary to law or public policy. In contrast, an act may be beyond a company's powers without being objectively illicit. Since the parameters of each company's contractual capacity are defined by its own memorandum of association, its ability to do an act can only be judged in the particular. If its objects clause does not confer the capacity to engage in a particular activity, it is legally impossible for that company to accomplish such acts, although they are not necessarily illicit and may even be virtuous.[8] Babb asserts that ultra vires is equivalent to illegality, arising because "the legislature had prohibited a company from making such a contract"[9] but the preferable view must be either that the legislature did not empower the company to make the contact, or that the promoters did not choose to equip it with the requisite capacity.[10] Even if the

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[5] See above at 3.3: "The House of Lords ".

[6] C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 70; F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 293; G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 4; cf C.A. Babb, "Rethinking the Concept of Ultra Vires in Company Law" (Ph.D. thesis, University of Cambridge, 2004).

[7] See A. Griffiths, "Contracting with Companies" (Hart, 2005) p. 165; N. Wolfman, ""Ultra Vires" Acts of Corporations" (1908-1909) 6 Commw. L. Rev. 218, 219.

[8] See Parke v. Daily News Ltd [1962] Ch. 927, [1962] 2 AER 929, [1962] 3 WLR 566.

[9] C.A. Babb, "Rethinking the Concept of Ultra Vires in Company Law" (Ph.D. thesis, University of Cambridge, 2004), p. 7, citing Lord Cairns' speech in Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653 (see Babb, pp. 24-25).

[10] Depending on whether one views the modern registered company as the creature of statute, by virtue of concession theory, or as the creation of those who draft its constitution – see above at 3.3.4: "Theories of Corporate Personality and the Ultra Vires Doctrine".

company is the creation of the state, its inability to exceed its objects is not a prohibition, but results from a failure to equip it with the requisite measure of capacity.

The singular and distinct scope of the capacity granted to each company explains the central place which the examination of the individual company's objects clause should occupy in every case. Whether a company has the power to engage in a particular transaction ought to be determined by reference not to any quality of the act, but to the company's memorandum of association. This statement of principle has the advantage of simplicity and clarity, and respects the aspiration that a company's capacity should be readily discernable from its registered constitutional documents. However, there have been attempts through the history of the doctrine to restrict companies' capacity even within the boundaries set by their objects clauses, through the application of external legal tests for the valid exercise of express powers.[11] This approach may be criticised as inconsistent with the principled basis of the doctrine and has more recently been rejected.[12]

Where a corporation lacks the capacity to do an act, then its apparent consent is illusory. Contract law is founded on consent and without the capacity to consent, there can be no valid agreement.[13] Incapacity therefore logically explains the inexorable consequences of ultra vires: the apparent contract is void and non-existent. Though it appears that a bargain was struck, it has not been, because one party could not consent to it. Consequently, the defect in the act cannot be cured by any organ of the company because neither the company as an entity nor, it follows, any organ within the company has the capacity to do it. Even "the assent of all its shareholders" cannot authorise the company to exceed the capacity conferred on

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[11] In Re Lee, Behrens & Co., Ltd [1932] AER 889; see below at Chapter 6: "Powers, Corporate Benefit and Corporate Gifts".

[12] Rolled Steel Products Ltd v. British Steel Corporation [1984] BCLC 466; see below at Chapter 7: "The Decline and Fall of the Corporate Benefit Test".

[13] H. Goudy, "Contracts by Lunatics" (1901) 17 LQR 147, 150: "in order to create an agreement there must be consent of parties [...] there are two essential elements in consent; it must be free and it must be intelligent".

it.[14] The hallmark of incapacity is therefore that the purported transaction is absolutely void and cannot be saved.[15] This fundamental element of the ultra vires doctrine is not negated because in some cases a legal remedy may arise, outside of contract, to mitigate a potential injustice arising from attempted performance of a void agreement.[16] Such remedial consequences are not a part of the initial inquiry into capacity, but constitute a second independent stage of decision-making which should follow a ruling of ultra vires.[17]

A further theoretical question arises, relating to potential civil or criminal liability for an ultra vires act.[18] Can the act for which capacity is lacking nonetheless be attributed to the company so as to ground responsibility? Goodhart argued that the ultra vires act performed by an employee could not be attributed to the company,[19] but the modern consensus is that an act beyond the company's contractual capacity can nonetheless ground extracontractual liability.[20] This makes sense by analogy

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[14] East Anglian Railway Company v. Eastern Counties Railway Company (1851) 138 Eng. Rep. 680; 11 C. B. 775; 21 L.J. (C.P.) 23; Sealy queries the emphasis on "unanimous consent", which is not usually inherently superior to majority consent – L.S. Sealy, "Ultra Vires and Agency Untwined" [1985] CLJ 39, 40.

[15] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653; Sinclair v. Brougham [1914] AC 398, 434 (per Lord Dunedin); Rolled Steel Products Ltd v. British Steel Corporation [1984] BCLC 466; Hennessy v. National Agricultural and Industrial Development Authority [1947] 1 IR 159, 203; Johnston J. refers to the "useful harshness" of this absolute rule in Re Cummins, Barton v. Bank of Ireland [1939] IR 60, 71.

[16] See below at 10.1.1: "The Absence of Contractual Obligations".

[17] As is also the case where contracts are void for illegality - M. Furmston ed., "The Law of Contract" 3rd ed., (Lexis Nexis Butterworths, London, 2007), p. 1155.

[18] C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 71.

[19] See F.M. Bradshaw, "The Liability of Statutory Corporations for Ultra Vires Torts" (1935-1938) 1 Res Judicatae 44, citing A.L. Goodhart, Essays in Jurisprudence and the Common Law", pp. 91-109; see also S.D. Thompson, "The Doctrine of Ultra Vires in Relation to Private Corporations" (1894) 28 American Law Review 376, 380-382.

[20] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 85; A.B. Frey, "Ultra Vires and Estoppel" (1909) 43 American Law Review 81, 86; R.S. Welch, "The Criminal Liability of Corporations" (1946) 62 LQR 345; refusal to recognise

with an act done by a minor which leads to tortious liability. Contractual capacity requires the ability to form an intent to enter into legal relations, whereas non-contractual liability can be imposed in respect of an act voluntarily done, without there being an intention to create legal consequences. Thus, the act outside the company's objects can be attributed to it in a civil or criminal context, but cannot equate to contractual consent.

The ultra vires doctrine is not concerned with defects in the internal governance of the company, but with external relations between the company and others. Focusing on the criterion of the invalid act's legal effect shows the distinction between a lack of capacity on the part of the company as a whole and an abuse of its powers by an organ of the company, especially the directors. Ultra vires acts cannot be ratified.[21] If an invalidity can be ratified, this proves that the act is within the powers of the shareholding body, and therefore also within the capacity of the company.[22] In some circumstances the question of capacity may arise in parallel to an alleged breach of directors' fiduciary duties. It is important not to blur the distinction between incapacity and ratifiable breach of duty. A clear differentiation between the various grounds on which a transaction may be impugned is necessary to ensure that the

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corporate liability in tort "was undeniably logical, but so grossly unjust that it could not long remain a part of an enlightened system of jurisprudence" - S.D. Thompson, "The Doctrine of Ultra Vires in Relation to Private Corporations" (1894) 28 American Law Review 376, 382; see also Byrne v. Rudd [1920] 2 IR 12, 31 which treats the misrepresentation by an agent that an act was intra vires as imputable to the company: "even though his representation involved the doing of an act which was illegal, or ultra vires on the part of his principal, he was nevertheless acting within the scope of his authority in making it, in so far at least as to deprive his principal of the right to retain any benefit under it."

[21] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653; In Re Bansha Woollen Mills Company Ltd (1888) 21 LR Ir 181; "If such a thing were possible, it would mean an end for ever of the salutary principle of *ultra vires*." - In Re Cummins; Barton v. Bank of Ireland [1939] 1 I.R. 60, 69-70 (per Johnston J.); R.M. Temple, "Ultra Vires: The Dual Approach" (1987) 137 NLJ 1069, 1070.

[22] In Re S.M. Barker Ltd [1950] IR 123, 135; Peter Buchanan Ltd v. McVey [1954] IR 89, 96.

appropriate legal tests are applied and the correct consequences and remedies proposed.

Finally, reiterating that the doctrine of ultra vires concerns capacity hints at the answer to another question which has arisen in the case law: which party can plead that a contract is ultra vires a corporation? If an act is void and non-existent, because it was not an act which an intending party could do, then this is so no matter which party draws attention to the fact. The company can therefore point to its own incapacity. Furthermore, ultra vires is part of the common law, not an equitable or discretionary doctrine.[23] No equitable doctrine can artificially give life to the void transaction in order to thwart a company which seeks to invoke its own want of capacity, however unmeritorious its reliance on the doctrine might seem.[24]

4.1.1. Corporate Incapacity Distinguished from the Incapacity of Natural Persons

Viewed in isolation, the theory underpinning the ultra vires doctrine is coherent and convincing. An act for which a legal person lacks capacity is void from the start and of no legal effect, since the party cannot have consented, despite appearances.[25] Yet the principles governing corporate capacity diverge from those which apply to incapable natural persons. The contrast with other incapacities shows that the absolute voidness approach adopted by company law is not the only possible response to incapacity.

Minors possess a limited capacity to contract. The incapacity of minors, designed to protect the minor himself, leads to the general principle that "a minor is not bound

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[23] Cf Thompson: "The Equitable principle or doctrine of ultra vires, showing that the corporation entity is in some fiduciary relationship to the constituent members of it." - B. Thompson, "Are Joint Stock Companies Common Law Corporations?" (1922) 42 Canadian Law Times 245, 246.

[24] Cf In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349.

[25] "The doctrine rests upon the strictest basis of logic" - S.D. Thompson, "The Doctrine of Ultra Vires in Relation to Private Corporations" (1894) 28 American Law Review 376, 378.

by his contracts".[26] It is a "personal privilege" which benefits only the incapax, potentially to the detriment of others.[27] By contrast, since the motivation of the ultra vires principle is to protect parties both internal and external to the company, its shareholders and creditors,[28] it would not be fair or appropriate to create an imbalanced protection of this kind which would allow the company to evade its liabilities at will to the detriment of others. Furthermore, the technical rules which enable those dealing with incapable minors to enforce certain contracts would be inappropriate for corporations. There is no category of transaction which is necessary to a corporation. The incapacity of both minors and persons suffering from a mental disorder countenances contracts which are voidable or have other legal effects, such as binding the contracting party.[29] Since, unlike the incapacity of the corporation, that of the minor always comes to an end, the idea of ratification on attaining full consent is useful in relation to minors but does not translate to company law. A further contrast is that where a contract has been executed, the minor cannot seek the return of what he has performed,[30] though it appears a corporation now could.[31]

There are clear differences between the law governing the capacity of natural and legal persons. The complexity of the law on minors' capacity[32] would not enhance

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[26] G.H. Treitel, "The Law of Contract" 11th ed., (Sweet & Maxwell, London, 2003), p. 539; "It seeks to achieve this purpose, generally, by allowing minors to go back on contracts" - M. Furmston ed., "The Law of Contract" 3rd ed., (Lexis Nexis Butterworths, London, 2007), p. 775; J. Beatson, "Anson's Law of Contract" 28th ed., (Oxford, 2002), p. 215 et seq.

[27] M. Furmston ed., "The Law of Contract" 3rd ed., (Lexis Nexis Butterworths, London, 2007), p. 775.

[28] See above at 3.3.5.1: "Protection of shareholders and creditors".

[29] G.H. Treitel, "The Law of Contract" 11th ed., (Sweet & Maxwell, London, 2003), pp. 545, 549.

[30] Ibid, p. 549.

[31] Guinness Mahon & Company Ltd v. Kensington and Chelsea Royal Borough Council [1999] QB 215; see below at 11.2.2: "Unravelling a Fully-performed Void Contract".

[32] M. Furmston ed., "The Law of Contract" 3rd ed., (Lexis Nexis Butterworths, London, 2007), p. 775.

the law of corporations. The law governing corporate incapacity possesses admirable simplicity at the level of theory.[33] The incapacity of natural persons is governed by a complex set of rules, designed to protect a vulnerable human, who might need to engage in certain transactions to survive. By contrast, the company's capacity was deemed to be limited, because the company was viewed, not as vulnerable, but as a threat. A balance must be struck between the various, potentially conflicting, interests at stake in the corporate context: if the company could choose to enforce an ultra vires agreement, this would be unfair to one of the groups which it was intended to protect, and contrary to the motivating spirit. Furthermore, though it might seem inflexible, it is reasonable that the effect of corporate incapacity should be more sweeping than that of natural persons. While natural persons are assumed to be capable, contracting parties are expected to be aware of potential limits to the capacity of artificial legal persons.

4.2. SANCTIONING THE ULTRA VIRES ACT

4.2.1. Preventing a Company's Excess of Capacity

It is established that an ultra vires transaction which has purportedly been accomplished is void. After the event, members are entitled to sue to invalidate and recover an ultra vires disposition.[34] It is also possible for shareholders to intervene before the act is done to prevent an excess of capacity. In fact, the right of shareholders to seek a pre-emptive injunction was settled even before the doctrine of ultra vires was extended to the registered company in 1874.[35] It is now embodied in statute.[36] In *Ashbury*,[37] even Blackburn J. accepted that, since companies could

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[33] Especially on a modern, post-Rolled Steel, view of the law.

[34] Simmonds v. Heffer [1983] BCLC 298.

[35] In 1879, Field already describes it as "universally recognized" - G.W. Field, "Ultra Vires" (1879) 13 American Law Review 632, 659; it was established in relation to statutory corporations before Ashbury Railway Carriage and Iron Company v. Riche (1874) LR 9 Ex 224: Colman v. Eastern Counties Railway Company 10 Beav 1.

[36] Today the common law right of action is supplemented by Section 8(2), Companies Act, 1963, which permits any member or debenture holder to seek to have the company restrained from

not change their objects, it followed that they could be restrained from acting beyond them. Since the stronger view prevailed, that the capacity of registered companies is limited like that of statutory corporations,[38] *a fortiori*, shareholders could seek to injunct against proposed excesses of capacity.[39] Hutchinson explains the right of shareholders to seek an injunction against ultra vires acts by reference to the contractual dimension of the corporate constitution.[40] Provided shareholders are alert to the proposed action, pre-emptive action may be more effective than challenging a transaction later.[41]

The rights of the company and its shareholders to take action concerning an excess of contractual capacity exist in parallel.[42] Baxter states that it is often difficult, viewing the authorities, to tell if the plaintiff shareholders sued for themselves or on the company's behalf.[43] Confusion may arise due to the presence of a "dual analysis" whereby the ultra vires act founds both a personal action and one by the company, and the pleadings do not differentiate.[44] The action may be either a personal one against the company or a derivative one against the directors.[45] Should

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exceeding its capacity; See also Section 35(2), Companies Act, 1985 (UK); see also: Hennessy v. National Agricultural and Industrial Development Authority [1947] 1 IR 159, 203; McGilligan v. O'Grady [1999] 1 ILRM 303.

[37] Riche v. The Ashbury Railway Carriage and Iron Company, Ltd (1873-74) L.R. 9 Ex. 224; Ashbury Railway Carriage and Iron Company v. Riche (1874) LR 9 Ex 224.

[38] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[39] Parke v. The Daily News Ltd [1962] 2 AER 929, [1962] WLR 566.

[40] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 77.

[41] And avoid the obstacles which historically impeded the recovery of benefits transferred under void contracts: see below at 9.2.2: "The Rejection of Restitution".

[42] Practically, action is likely to be taken by a dissenting minority before the event or the company or its liquidator after the event, since a shareholder majority could restrain the act internally.

[43] C. Baxter, "The Role of the Judge in Enforcing Shareholder Rights" (1983) 42 CLJ 96, 100.

[44] Ibid, at 106-107.

[45] R.R. Pennington, "Directors' Personal Liability" (BSP Professional, 1987), pp. 216-217.

a majority of members oppose a planned ultra vires transaction, they can impose their will on the directors by internal means. Recourse to the courts is therefore of greater practical importance for minority shareholders. In addition, the right to seek an injunction is likely to be more useful in small companies, where dissenting shareholders are involved in management and abreast of proposed transactions, than in large companies with passive membership.[46]

Under the rule in *Foss v. Harbottle*,[47] minority shareholders cannot appeal to the courts against conduct which is capable of being cured by ratification. This is based on the principle of majority rule and the idea that, by virtue of separate legal personality, it is the company and not its shareholders which should properly act against a wrong done to it.[48] One of the few recognised exceptions to the rule allows minority shareholders to bring a derivative action to prevent a company from initiating an ultra vires transaction.[49] Logically, since the company can never ratify an act for which it lacks capacity, if a sole dissenting shareholder brings it to the attention of the court, there is no obstacle to court intervention.[50] Thus, as an exception to the general principle, individual shareholders could sue to prevent ultra

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[46] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 99.

[47] Foss v. Harbottle (1843) 2 Hare 461.

[48] A.J. Boyle, "The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History" (1965) 28 MLR 317, 319-320; Edwards v. Halliwell [1950] 2 AER 1064; Prudential Assurance Company Ltd v. Newman Industries Ltd (No. 2) [1982] Ch. 204; O'Neill v. Ryan [1993] ILRM 557.

[49] Simpson v. Westminster Palace Hotel (1868) 8 HLC 712; see also Edwards v. Halliwell [1950] 2 AER 1064; see H.G. Manne, "Our Two Corporation Systems: Law and Economics" (1967) 53 Virginia Law Review 259, 272-273 on derivative actions.

[50] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653; In Re German Date Coffee Company Ltd (1882) 20 Ch.D. 169; J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 263, 268; see also A.J. Boyle, "The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History" (1965) 28 MLR 317, 327; MacDougall v. Gardiner (1875) 1 Ch. D. 13, 25 (Mellish LJ).

vires acts or fraudulent conduct, provided they first sought directly to divert the company from its proposed course.[51]

It may be possible to obtain an interlocutory injunction to prevent an ultra vires act, subject to the principles governing the grant of emergency injunctions, including the balance of convenience. In *McGilligan v. O'Grady*,[52] a minority shareholder opposed a merger which would cause the company to become involved in manufacturing. The Supreme Court overruled the grant of an interlocutory injunction. Keane J. emphasised that the interlocutory injunction did not prejudge the question of whether the company would be found to exceed its capacity.[53] However, he disputed the finding that the balance of convenience favoured granting the interlocutory injunction, because if the act turned out to be within the capacity of the company, "irreparable damage" could be caused by having restrained it.[54] It may be that in many cases, an interlocutory injunction would be turned down because it would cause the company to miss a window of business opportunity.

Unlike shareholders, most creditors do not have the facility to oppose proposed ultra vires transactions by a company.[55] The exception is debenture holders who enjoy a statutory right to intervene.[56] Creditors cannot generally seek to prevent excesses of capacity because of the indirect character of their interest in the company's financial wellbeing. It would be contrary to the general pattern of company law if outside

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[51] A.J. Boyle, "The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History" (1965) 28 MLR 317, 324; in America, derivative actions were available in ultra vires cases without the usual need to show that the directors and shareholders refused to acknowledge the demand of the opposing shareholders – ibid, 323.

[52] McGilligan v. O'Grady [1999] 1 ILRM 303.

[53] Ibid, at 312.

[54] Ibid, at 320.

[55] Mills v. Northern Railway of Buenos Ayres (1870) 5 Ch. App. 621; Lawrence v. West Somerset Railway [1918] 2 Ch. 520; cf Cross v. Imperial Continental Gas Association [1923] 2 Ch. 553 where a debenture holder was allowed sue.

[56] Section 8(2), Companies Act 1963 (Ireland); T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 342-343.

parties which dealt with a company could interfere in its internal decision-making process.[57]

Similarly, the state cannot seek to prevent an excess of its capacity by a registered company.[58] This contrasts with the position relating to statutory corporations, where outsiders can request the Attorney-General to seek an injunction.[59] The rationale is that the constituting Act "may for many purposes be regarded as a contract as between the promoters of the company and the public, as well as a contract among the shareholders".[60] The public interest would be endangered if a statutory company were permitted to engage in commercial activities beyond its objects. This reasoning is based on a particular view of statutory corporations as unfairly powerful competitors in the marketplace, to the potential detriment of other traders.[61] Despite the extension of the ultra vires doctrine to ordinary registered companies, public intervention of this kind would be inappropriate for them.

4.2.2. Winding Up for Failure to Pursue Proper Objects

Where a company is deemed to have abandoned its authorised objects entirely, it may be wound up. This situation does not arise where a company continues to conduct its official trade, but also engages in other activities. This scenario was more frequent before it became possible readily to alter objects clauses.[62] The best-

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[57] Courtney refers to "frivolous or vexatious" claims: T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 343.

[58] A.B. Frey, "Ultra Vires and Estoppel" (1909) 43 American Law Review 81, 85.

[59] Attorney-General v. Great Northern Railway Company (1860) 62 Eng. Rep. 337; 6 Jur. 1006.

[60] Ibid, at 338 (per Kindersley VC).

[61] Ibid, at 339; see above at 3.3.3: "The Assimilation of Registered Companies to Statutory Corporations".

[62] See below at 5.4.1: "The Alteration of Objects Clauses".

known cases date from the end of the nineteenth century and take a hard line against companies switching their businesses.[63]

The concept of failure of substratum is exemplified in 1882's *In Re German Date Coffee Company*.[64] The company was formed to manufacture coffee substitute from dates under a German patent. No German patent was obtained, so the company operated under a Swedish patent. When it became clear that the original intention was partly frustrated, some members were content and others withdrew. The plaintiffs applied to have the company wound up on just and equitable grounds. Kay J. identifies the "substratum" of a company as "a distinct purpose which is the foundation of the company".[65] Any other objects are ancillary. Therefore, if the main purpose fails completely, the substratum of the company disappears, and the company may be wound up.

Similarly, *In Re Crown Bank*[66] confirmed the power to wind up a company which changed its business. The company discontinued its banking operations and began trading as a speculator in land and securities. Although its broadly drafted objects included these activities, North J. interpreted the company's objects in light of its name and original business and found that it did not authorise entirely novel operations.[67] North J. affirmed that if the company engages in both legitimate and illegitimate activities, the appropriate response is to seek an injunction preventing that part of the business which exceeds its capacity. On the other hand, winding up is the appropriate course where the company has "abandoned its legitimate business, and is only doing business that is outside its powers."[68]

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[63] In Re German Date Coffee Company (1882) Ch.D. 169; see L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, 80; In Re Crown Bank (1890) 44 Ch. 634.

[64] In Re German Date Coffee Company (1882) Ch.D. 169; see L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79.

[65] In Re German Date Coffee Company (1882) Ch.D. 169, 177.

[66] In Re Crown Bank (1890) 44 Ch. 634.

[67] Ibid, at 645 (per North J.)

[68] Ibid, at 646-647 (per North J.)

4.2.3. A Concluded Act which is Ultra Vires

Winding up is a radical solution where the business departs completely from that originally intended. More commonly, a company continues its general business, and alongside it concludes a transaction which might exceed its capacity. If shareholders do not prevent the act in advance, the courts will have to address the consequences of a concluded ultra vires contract. Simply put, an act which is beyond the capacity of the corporation which is a party to it is completely void, from the beginning.[69] The corporation's incapacity is not some remediable defect affecting the act; it prevents the act from coming into existence. For Browne-Wilkinson L.J., the "badge" of an ultra vires transaction is that it is wholly void.[70] There is no possibility of ratifying or validating it.[71] The void agreement may either be executory or partially or fully executed.[72] Unlike the United States, where fully executed contracts have traditionally been allowed despite incapacity, and partially executed contracts were treated in divergent ways, Irish and English law does not vary according to whether the contract has been performed.[73]

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[69] Frey however regards voidness as an inaccurate descriptor, given that US law may give some effect to the contract through estoppel: "Is there any necessity to call the contract "void"? [...] simply say – ultra vires contracts when purely executory are unenforceable on the grounds of public policy" - A.B. Frey, "Ultra Vires and Estoppel" (1909) 43 American Law Review 81, 92.

[70] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 92 (per Browne-Wilkinson LJ).

[71] "Being nullities, they are incapable of being made effective or binding ex post facto, by sanction of the Minister, by ratification by the Association, or in any other way, and the defences of estoppel, laches, acquiescence etc are wholly out of place and unsustainable." - Hennessy v. National Agricultural and Industrial Development Authority [1947] 1 IR 159, 191 (per Overend J.).

[72] In Bell Houses Ltd v. City Wall Properties Ltd [1966] 1 QB 207, Mocatta J. held that ultra vires applied to both executory and executed contracts.

[73] G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 119.

4.2.3.1. Ratification not possible

Ashbury Railway Carriage v. Riche[74] established that any act which exceeds the scope of a company's capacity is void and cannot be ratified, even by the unanimous consent of shareholders.[75] The company had sought authorisation to ratify and proceed with the contract, so as "to make the best they could of a difficulty into which they had thus been thrown" by the actions of the directors.[76] Lord Cairns rejected this argument immediately, on policy grounds. He considered that it would be "fatal to the whole scheme of legislation" if directors could do acts which were beyond the power of the company and the shareholders could then sanction such acts. Thus, the requirement that objects be stated necessarily implied not only that an act could not be validly concluded outside them, but also, that the invalidity was absolutely fatal. This has been characterised as "useful harshness".[77] Moreover, the company's incapacity prevents the contract coming into existence. A contract outside the company's capacity does not have any sort of curable half-existence.[78] Lord Chelmsford described it as "in exactly the same condition as if no contract at all had been made."[79]

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[74] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[75] See also: In Re Bansha Woollen Mills Co Ltd (1888) 21 LR Ir 181, 186; Central Transportation Company v. Pullman's Palace Car Company (1891) 139 US 24, 59-60; In Re Greendale Developments Ltd. (No.2) [1998] 1 IR 8; unanimity does not have special status in company law, but its definiteness underlines the point – see L.S. Sealy, "Ultra Vires and Agency Untwined" [1985] CLJ 39, 40.

[76] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 673.

[77] In Re Cummins; Barton v. Bank of Ireland [1939] 1 I.R. 60, 71 (Johnston J.).

[78] This principle has been modified somewhat by Section 8(1) Companies Act, 1963 – see below at 8.3: "Legislative Reform to Protect the Outsider ".

[79] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 679.

Shareholders, though "the supreme organ of the company",[80] cannot exercise capacity greater than the company itself. Since the ultra vires doctrine arises where the act is beyond the power, not of any particular organ of the company, but of the entire company, there is no authority which has the power to approve the act. The Supreme Court has affirmed that the unanimous assent of a company's shareholders can only cure ills which do not amount to ultra vires.[81]

It follows that the act cannot be implicitly cured either by conduct or the lapse of time.[82] Neville J. affirms in *Re Birkbeck Permanent Benefit Building Society*[83] that openly engaging in a business for a long period cannot protect it if it is ultra vires.[84] Furthermore, *In Re Jon Beauforte*[85] establishes that even a court judgment in favour of creditors cannot be used to give effect to ultra vires engagements. Two suppliers had obtained judgment against the company for the debts incurred ultra vires. However, Roxburgh J. ruled that these judgments could be set aside because the company had not raised the issue of ultra vires at the time.[86] In *Re Oceanic Steam*

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[80] G.R. Sullivan, "The Relationship between the Board of Directors and the General Meeting in Limited Companies" (1977) 93 LQR 569, 570.

[81] "[T]heir fundamental illegality cannot be cured by the fact, if it be the fact, that all the shareholders assented to each and every one of the payments" - In Re Greendale Developments Ltd. (No.2) [1998] 1 IR 8, 24 (per Keane J.), citing In Re S.M. Barker Ltd [1950] IR 123, 134.

[82] The "defences of estoppel, laches, acquiescence etc are wholly out of place and unsustainable." – Hennessy v. National Agricultural and Industrial Development Authority [1947] 1 IR 159, 191, 203 (per Overend J.); The issue of estoppel is considered in greater depth below – see below at 9.2.3.4: "Estoppel".

[83] In Re Birkbeck Permanent Benefit Building Society [1912] 2 Ch. 183.

[84] Ibid, at 197: "The fact that this banking business has been long carried on and with the widest notoriety cannot, I think, avail to legalize what in its inception and throughout its career has been an illegal transaction."

[85] In Re Jon Beauforte (London) Ltd (1953) 1 Ch. 131; [1953] 1 AER 634.

[86] Ibid, at 637: "any compromise made on the footing that the contract is intra vires and any judgment suffered in an action in which the defence of ultra vires is not raised can be set aside, because [...] it is ultra vires the company to proceed on the footing that the contract is intra vires".

Navigation Company Ltd,[87] Simonds J. refused court sanction to a scheme which would be ultra vires the company.[88]

The Company Law Review Group identifies a common commercial practice involving the giving of warranties by a party to a contract that it has sufficient capacity, and points out that this practice is probably ineffective and "false comfort".[89] At the level of principle, if the company does not possess the capacity to do the thing, then it cannot by any act of its own acquire the capacity it lacks. In practical terms, such warranties are unlikely to restrain a liquidator from challenging a transaction.

Some older authorities challenge the firm assertion that the ultra vires transaction must be completely void. They suggest that where the outsider is not affected by constructive notice of an incapacity which arises from the use of a power for an improper purpose, the agreement can have legal effect.[90] These cases include *In Re David Payne*[91] and *In Re Marseilles Extension Railway Company.*[92] According to Choong,[93] it was first established in *Re Marseilles Extension Railway Company*[94] and followed in a line of subsequent authorities that where a power was used for an improper purpose, the validity of the act depended on the outsider's awareness of that fact.[95] Modern analysis of the law on capacity suggests that, since ultra vires

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[87] In Re Oceanic Steam Navigation Company Ltd [1939] 1 Ch. 41.

[88] Ibid, at 50.

[89] Company Law Review Group, First Report (Dublin, 2001), para. 10.6.3.

[90] See below at 6.4.1: "The Outsider's Awareness of the Improper Purpose".

[91] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[92] In Re Marseilles Extension Railway Company [1871] LR 7 Ch. 161.

[93] T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17.

[94] In Re Marseilles Extension Railway Company [1871] LR 7 Ch. 161.

[95] T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17, 17-18.

necessarily results in the act being void, cases such as *David Payne*[96] are not true capacity cases. Slade L.J. in *Rolled Steel*[97] reinterprets *David Payne*[98] as a case concerning directors' authority, not capacity.[99] The problem which these cases tried to solve, of a condition unknown to the outside party rendering the agreement void does not exist under the modern, *Rolled Steel*, approach, by which all express powers may be used intra vires for any purpose. It is therefore possible to reaffirm the proposition that ultra vires contracts are void.

Where a contract is declared void, non-existent and incapable of ratification, this may raise practical questions about the consequences for the parties. If the contract is purely executory, it is straightforward to declare that cannot be enforced.[100] If the non-contract has instead been performed by one party, must the loss lie where it falls?[101] Might there be legal remedies outside the realm of contract law?[102] For a long time, the orthodox view was that where a contract is void, that is the end of the matter. There were no coherent general principles granting remedies.[103] Significant changes have recently occurred in the law on remedies, which must have a significant effect on any modern appraisal of the ultra vires doctrine.[104]

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[96] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[97] Rolled Steel Products Ltd v. British Steel Corporation [1984] BCLC 466; [1986] Ch. 246.

[98] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[99] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 82; see below at 7.2.1.2: "David Payne reinterpreted under agency principles".

[100] A.B. Frey, "Ultra Vires and Estoppel" (1909) 43 American Law Review 81, 86.

[101] A question left open by the House of Lords in Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[102] See below at 9.1: "The Need for a Remedy where a Contract is Deemed Void"; see H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), p. 76.

[103] See below at 9.2: "Traditional Approaches to Remedies and the Ultra Vires Doctrine".

[104] See below at 15.2.1.2: "The unjust effects issue".

4.2.3.2. Severing the void element of a transaction and saving the rest

A slightly more complex situation arises where the act is partly within and partly beyond the company's capacity. Should it be possible to sever the transaction and allow that part of it which is within the company's capacity to be effective? If this is possible, does it challenge the premise that the ultra vires act is void?

Gregory considers that an ultra vires contract is not fully void because "an *ultra vires* security is enforceable to the extent of lawful advances to the company."[105] This proposition relies on *In Re Bansha Woollen Mills Co Ltd.*[106] In this case, a restriction on the amount of borrowings expressed in the articles of association was ruled to limit the contractual capacity of the company. However, the court held that only the amount of the mortgage in excess of the permitted amount was void due to the incapacity.[107] Surely on general principles the whole instrument must have been void. Severance was only possible here because of an express monetary limit on the transaction, which in turn, was due to the articles being deemed to restrict capacity. The case is remarkable both for its restriction of capacity by reference to the articles and the partial upholding of an ultra vires agreement, and should best be regarded as an authority to be distinguished rather than relied upon, and certainly not as authority which puts in question the entire conceptual foundation of the ultra vires doctrine.

In fact, there is more persuasive authority to the contrary. *In Re Irish Provident Assurance Co Ltd*[108] indicates that where an act comprises a number of elements, it is not possible to separate it into smaller transactions and so save parts of it. It had

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[105] R. Gregory, "Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation" (1985) 48 MLR 108, 111.

[106] In Re Bansha Woollen Mills Co Ltd (1888) 21 LR Ir 181.

[107] Ibid, at 186-187: "the mortgage is bad to the extent of the money advanced in excess of one-third of nominal capital"

[108] In Re Irish Provident Assurance Co Ltd [1913] 1 IR Ch. 352.

been determined that the company was not entitled to issue life assurance.[109] A former director, who held void life assurance policies, concluded an agreement with the company that encompassed his resignation, the transfer of his shares to the company and his surrender of certain rights in return for a sum of money. Palles CB described this transaction as ultra vires the company, as part of it related to the release of void claims against the company.[110] Furthermore, since an unspecified part of the money was consideration for the purchase of the company's own shares, "the agreement in its entirety was void."[111] The court accepted that it was impossible to attribute a certain proportion of the consideration to the illegal or ultra vires act and the rest to the permissible acts.[112] The agreement must be treated as a whole and either remain binding on the parties or be set aside *in toto*.[113] This applies unless certain stipulations are in fact severable.[114] Furthermore, in *Re Frederick Inns*,[115] one aspect of the liquidator's Supreme Court claim was that the entire sums paid ultra vires, and not merely the excess of each company's payment over its own tax liability, should be returned by the Revenue Commissioners. Blayney J. accepted this argument, which is consistent with the proposition that the transaction is entirely void at common law.

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[109] Flood v. Irish Provident Assurance Company 46 ILTR 214; [1912] 2 Ch. 597.

[110] In Re Irish Provident Assurance Co Ltd [1913] 1 IR Ch. 352, 368.

[111] Ibid, at 369.

[112] Ibid, at 370: "Each part of the consideration pervades every part of the agreement; and the agreement, *in its entirety,* is *ultra vires* and void".

[113] H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), p. 88: "Stipulations in themselves good, but an integral part of agreements having *ultra vires* objects, are not valid."

[114] Ibid, at p. 88.

[115] In Re Frederick Inns Ltd. [1994] 1 ILRM 387.

4.3. WHO CAN PLEAD ULTRA VIRES?

Given the dramatic consequences of a successful plea of ultra vires, doubts may arise as to whether it should be open to all parties to make such a claim. These concerns arise most starkly in the case of partly executed agreements, and when the question of the voidness of the contract is viewed independently of any remedies. There are various circumstances in which, one side having performed its side of a bargain, it might seem unjust that the other party could hide behind the doctrine of ultra vires to justify its own failure to perform.[116]

If the doctrine of ultra vires aims to protect the assets of the company in the interests of its shareholders, it might seem odd that the rule could be turned against the company by a contracting party which had failed to perform its contractual obligations. Equally, if the doctrine is understood to protect creditors, it might cause concern that the company could invoke the doctrine to the detriment of those same creditors, with whom it had seemed to agree a contract and had indeed held itself forth as being able to make the agreement. If the outsider would suffer the consequences of constructive notice, it might be still more objectionable that the company itself, with full knowledge of its own constitution and capacity, could extricate itself from otherwise valid obligations which it had freely taken on. These concerns all pose the same dilemma: are there restrictions on which party can argue that the contract is void for incapacity? Wedderburn suggests that neither possible solution to the problem of who can plead ultra vires is ideal, as parties could abuse the rules to evade their obligations.[117]

Of particular interest is whether the company itself could avail of the doctrine of ultra vires. Often, the liquidator of an insolvent company seeks to have commitments undertaken by the company declared void. In principle, the fact that the ultra vires doctrine equates to incapacity provides a sound answer to questions as to which parties could raise the argument of ultra vires. Policy considerations and

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[116] The existence of non-contractual remedies now addresses this problem: see below at 9.3: "Modern Remedies in Ultra Vires Cases".

[117] K.W. Wedderburn, "What is the Point of Ultra Vires?" (1966) 29 MLR 191, 194.

a sense of justice might balk at the notion that a company could rely on its own want of capacity to extricate itself from freely concluded agreements, but the theoretical foundation of the doctrine, a lack of capacity, implies that its availability does not depend on the circumstances or the merits of the parties. Capacity depends solely on an objective determination of the scope of the powers granted by the company's objects clause. As a common law doctrine, rather than an equitable one, the plaintiff need not have clean hands to invoke it. Judges have no discretion to give effect to a void contract, even if it seems reprehensible that the company should seek to evade the obligations it had seemed to agree.

4.3.1. The Ultra Vires Doctrine as a Defence by the Outsider

The first issue is whether the doctrine of ultra vires, which is designed to protect the company's assets, can be used against the company by an outsider.[118] Can the outsider argue that the company lacked capacity in order to deprive the company of a remedy for breach of contract? Salmon L.J. doubts the appropriateness of the ultra vires doctrine being turned against the company in both *Bell Houses*[119] and *Anglo-Overseas Agencies v. Green.*[120] In the latter case, he considers that the defendants have adopted an unattractive stance in seeking to defraud the company and its shareholders by abusing a rule designed to protect them.[121] However, Salmon J. rules that even if reliance on the rule against the interests of the company appears

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[118] Salmon L.J. considers it "strange that third parties could take advantage of a doctrine, manifestly for the protection of the shareholders, in order to deprive the company of money which in justice should be paid to it by the third parties." - Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656, 694; [1966] 2 AER 674, 690.

[119] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656; [1966] 2 AER 674.

[120] Anglo-Overseas Agencies Ltd v. Green [1961] 1 QB 1.

[121] Ibid, at 8 (per Salmon J.): "The defendants as champions of this rule have cast themselves in a novel and perhaps not overwhelmingly attractive role. They say, in effect, "Even if we have caused the plaintiff company, and accordingly their shareholders, serious damage by conspiracy to defraud them, yet we can escape all liability by reason of this very rule designed for the protection of the shareholders.""

distasteful, if the law requires it to be applied, the defendants' argument will succeed.

Furmston[122] argues that it was not self-evident that a company's incapacity could be used as a defence against it.[123] He points out that contemporary textbooks were either silent or divided[124] and emphasises the absence of previous authority on the point.[125] Hutchinson, following Gower, advocates adopting the model of infants' incapacity in Ireland.[126] Furmston, however, refutes Gower's argument that contract law would generally incline against allowing the company's incapacity to be used against it.[127] The analogy with the incapacity of infancy is not necessarily convincing. Not only is the law on infant incapacity itself imperfect,[128] but there is also an important distinction in that companies are not in the same vulnerable position as infants, and are often instead in a position to cause prejudice to others.[129] Corporate incapacity, which is absolute rather than a personal privilege, can logically be viewed as a fact which may be raised against the company. This is justifiable because the ultra vires doctrine's dual aim is to protect, not only the company and its shareholders, but also its existing creditors. It is not a privilege created to serve the interests of the company alone. In the interests of justice, and

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[122] M.P. Furmston, "Who Can Plead that a Contract is *Ultra Vires*?" (1961) 24 MLR 715.

[123] Ibid, at 715: "it is surprising that the important question of whether the defendant could set up the defence that the contract was *ultra vires* the plaintiff company was allowed to go by default."

[124] Ibid, at 715.

[125] Ibid, at 716-717; though he cites American authorities, in particular Central Transportation Company v. Pullman's Palace Car Company (1891) 139 US 24, 59; 35 L. Ed. 55 at 68 (1890), at 718-720.

[126] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 55.

[127] M.P. Furmston, "Who Can Plead that a Contract is *Ultra Vires*?" (1961) 24 MLR 715, 717.

[128] Ibid, at 717-718: "the rules relating to the contractual capacity of infants are themselves fraught with possibilities for injustice".

[129] Ibid, at 718: "Experience has surely shown that it is persons who contract with companies who need protection".

because an ultra vires contract is void and not merely voidable, Furmston persuasively argues that neither party should be able to enforce an ultra vires contract,[130] and both parties should be able to raise the issue as a defence.[131]

Treitel approaches this question from a different angle, asking whether, on contractual principles, a corporation can validly choose to enforce a contract despite its incapacity.[132] He focuses on whether the policy underlying the restricted capacity would be subverted by allowing the corporation to enforce the contract, and reasons that allowing the corporation to perform an executory ultra vires contract would encourage ultra vires activity.[133] On the other hand, where the corporation has executed its part of the void contract, the company might be allowed to enforce it, since receiving "the agreed price of services" does not contradict the purpose of the ultra vires doctrine, though the purpose of the restricted capacity might also be served by allowing a non-contractual restitutionary or proprietary remedy. Ultimately, Treitel aligns with the orthodox view, adverting to the authorities which say that the ultra vires contract is "wholly void"[134] and "devoid of any legal contractual effects"[135] to lend "further support to the view" that a corporation cannot enforce an ultra vires contract.[136]

However, if the matter appeared settled, one Irish authority may have unsettled it. Murphy J. in *Re PMPA Garage (Longmile) Ltd. (No.2)*[137] effectively gave effect to

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[130] Ibid, at 718.

[131] Ibid, at 719.

[132] G.H. Treitel, "The Law of Contract" 11th ed., (Sweet & Maxwell, London, 2003), p. 566; this discussion is not relevant to companies which are currently affected by the statutory protection of the outsider in Section 8(1), Companies Act 1963.

[133] Ibid, at p. 566.

[134] Morgan Grenfell & Company Ltd v. Welwyn Hatfield DC [1995] 1 AER 1, 4.

[135] Guinness Mahon & Company Ltd v. Kensington and Chelsea Royal Borough Council [1999] QB 215, 284.

[136] G.H. Treitel, "The Law of Contract" 11th ed., (Sweet & Maxwell, London, 2003), p. 567.

[137] In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349.

an ultra vires contract, reasoning that something like an estoppel would prevent the other party relying on the company's incapacity. Murphy J. appears to be motivated by some vague sense of justice which is not satisfied by the availability of personal and proprietary remedies against the recipient of the company's property.[138] He reasons that it would be "unconscionable" for either the borrowers or the guarantors to rely on the lender's incapacity so as to avoid repaying it.[139] As a result, even though the contract was ultra vires and void, the court would act as if it were valid, and declare the lender a creditor of the guarantors "on foot of the guarantee".[140] Murphy J.'s justification is that there is a distinction between a state of facts existing and parties being allowed to plead those facts in court.[141]

Perhaps this decision is explained by broad concerns for the well-being of the members of the public who invested with the lender company, but is it hardly good law. At common law, a contract for which one party has insufficient capacity is void *ab initio*, as if it never came into being.[142] This is not an equitable or discretionary principle. Given that Murphy J. had already found that there would be a variety of direct remedies against the parties which received the company's property, and that his approach was adopted specifically in order to allow the company a claim against the (non-receiving) guarantors under the void contract, it has to be highly suspect. MacCann[143] has criticised the Murphy J.'s decision on the ground that holding that the guarantors were estopped from relying on the incapacity to oppose the loan's enforcement strikes at the root of the doctrine of ultra vires. He argues that an ultra

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[138] Ibid, at 363: "justice could only be achieved by allowing the invalid transaction to be implemented"; Murphy J. cites Australian authority including City of Camberwell v. Cooper [1930] VLR 289.

[139] Ibid.

[140] Ibid, at 363-364.

[141] Ibid, at 363-364: "I see no difficulty in reconciling the proposition that a particular state of facts or law may exist but that a party may in particular circumstances be precluded from relying on them".

[142] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[143] L. MacCann, "The Capacity of a Company: Part II" (1992) ILT 151, 157.

vires contract should not be enforceable by the company, regardless of any unjust enrichment which might occur. He also asserts that the injustice is less than it might appear, since the company should be presumed to be aware of the contents of its own objects clause.

4.3.2. Can the Company Raise its own Incapacity?

The other side of the coin relates to the company's ability to argue its own incapacity against the outsider. Principle suggests that here also, the pertinent point is that the contract is void, and that this point can be indicated by either side. However, there have been doubts about the justice of this proposition. Furmston[144] highlights the undesirable consequences which would result if ultra vires were to be available, solely at the discretion of the company, to invalidate transactions. It would be remarkably unjust that the doctrine should offer a loophole to any company to engage in ultra vires transactions and then abandon them, with the sanction of the law, should they prove unfruitful.[145] Carr earlier remarked the inconsistency which would allow a company to have the benefit of a contract and then invoke its incapacity, when such relief would not be available to an individual raising his incapacity due to lunacy or drunkenness, or repudiating a contract for his own fraud.[146]

Even before doubts on this question were explicitly addressed, companies were using the doctrine to escape contractual obligations freely entered into. In *East Anglian Railway Company v. Eastern Counties Railway Company*,[147] the defendant statutory company relied on its incapacity to avoid paying its debt to the plaintiff,

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[144] M.P. Furmston, "Who Can Plead that a Contract is *Ultra Vires*?" (1961) 24 MLR 715.

[145] Ibid, at 718: "to hold that a company can enter into *ultra vires* transactions knowing that it can disown them if they turn out unfavourable and enforce them if they prosper".

[146] C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 66-67.

[147] East Anglian Railway Company v. Eastern Counties Railway Company (1851) 21 L.J. (C.P.) 23, (1851) 11 CB 775, 138 ER 680.

leaving the plaintiff at a significant monetary loss.[148] In *Ashbury* itself, the company sought to repudiate the contract based on its own incapacity.[149]

Bell Houses v. City Wall Properties Ltd[150] definitively addressed the question of who could invoke the ultra vires doctrine. Mocatta J. rejected Gower's analogy with the incapacity of infants, preferring Furmston's reasoning that either party could rely on a company's lack of capacity.[151] Mocatta J. emphasises that the voidness principle articulated in *Ashbury*[152] demands that either party can invoke the incapacity: a defendant cannot rightly be held "liable under a non-existent contract".[153] This decision eliminates any obstacle to the company, or, more commonly, its liquidator, pleading its own incapacity.

Wedderburn questions whether Mocatta J.'s response was inevitable, and challenges as inconclusive the authorities relied upon.[154] However, the *Bell Houses*[155] view represents the law. In *Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company*,[156] the plaintiff bank contended that the guarantor company was estopped from relying on its lack of capacity, but Keane J. rejected this argument. On principle, and under the weight of authority, either party can raise

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[148] See H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 19.

[149] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[150] Bell Houses Ltd v. City Wall Properties Ltd [1965] 3 AER 427; [1966] 2 AER 674.

[151] M.P. Furmston, "Who Can Plead that a Contract is *Ultra Vires*?" (1961) 24 MLR 715.

[152] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[153] Bell Houses Ltd v. City Wall Properties Ltd [1965] 3 AER 427, 435.

[154] K.W. Wedderburn, "What is the Point of Ultra Vires?" (1966) 29 MLR 191, 193: they "point mainly by their silences."

[155] Bell Houses Ltd v. City Wall Properties Ltd [1966] 1 QB 207, 224-225 (per Mocatta J.).

[156] Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221.

the question of ultra vires, despite some opposition in *Re PMPA Garage (Longmile) Ltd. (No.2)*[157]

4.3.2.1. Circumstances giving rise to ultra vires arguments

Since it is established that either party can invoke a company's incapacity, it is unsurprising that there are several common patterns of cases in which the issue of corporate capacity arises. In order to prevent a company going through with a transaction, a pre-emptive action may be brought by a shareholder[158] or a debenture holder.[159] Similarly, a company may seek court approval in advance for a proposed course of action.[160] Concluded contracts may be called into question, either independently or in the context of other litigation about the contract, by either party. Often this occurs when one side to the contract has already performed its obligations, as where the company borrows money, defaults, and is sued by the bank.[161] In particular, the issue often arises on the winding up of the company. This can occur when the creditor seeks payment, as in *Re W&M Roith*[162] or lodges proof founded on a judgment debt for goods sold and delivered as *In Re New Finance and Mortgage Co Ltd*[163], where a bank seeks repayment of loans as in *Re Introductions*,[164] or where a liquidator seeks repayment of disbursements made by

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[157] In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349.

[158] eg Evans v. Brunner Mond and Co Ltd [1921] 1 Ch. 359.

[159] eg Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

[160] eg In Re Oceanic Steam Navigation Co Ltd [1938] 3 Ch. D. 740.

[161] Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221.

[162] In Re W&M Roith Ltd [1967] AER 427.

[163] In Re New Finance and Mortgage Co Ltd [1975] 1 Ch. 420.

[164] In Re Introductions, Ltd [1968] 2 AER 1221.

the company prior to winding up as in *Re Duomatic Ltd*[165] and *Re Halt Garage Ltd.*[166]

4.3.3. No Discretion Regardless of Parties' Relative Appeal

The justice of the case may seem in various scenarios to favour one or other of the parties, but that should not preclude either class of litigant, company or outsider, from asserting the incapacity. If anything, it is an argument for ensuring that the operation of the doctrine does not work an injustice in any case.

The extent to which the onlooker's sympathies might be elicited by one or other of the parties depends entirely on the circumstances of each case. The fact of exceeding its capacity does not necessarily imply wrongdoing on the part of a company or its controllers. In *Re Birkbeck Permanent Benefit Building Society*,[167] Fletcher Moulton L.J. refers to the "perfect sincerity and openness" of the society's actions, which were not "tainted in any way with fraud or conscious misdoing".[168] It is therefore not safe to assume that the company is a guilty party, deserving of harsh treatment. In other cases, the facts may indeed reveal wrongdoing. *Ridge Securities Ltd v. IRC*[169] provides an example of an unsympathetic plaintiff, which disguised dividends as interest payments as part of a dishonest tax-avoidance scheme.[170] *In Re Halt Garage*[171] is a contrasting example, where the liquidator took an unsympathetic claim against a person who had contributed much to the business.[172]

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[165] In Re Duomatic Ltd [1969] 1 AER 161.

[166] In Re Halt Garage Ltd [1982] 3 AER 1016.

[167] In Re Birkbeck Permanent Benefit Building Society [1912] 2 Ch. 183.

[168] In Re Birkbeck Permanent Benefit Building Society [1912] 2 Ch. 183, 211.

[169] Ridge Securities Ltd v. IRC [1964] 1 WLR 479; [1964] 1 AER 275; see Schmitthoff ed, "Companies" [1964] JBL 244.

[170] See ibid, at 286-287 (per Pennycuick J.).

[171] In Re Halt Garage Ltd [1982] 3 AER 1016.

[172] "Obviously in the case of a lady who is as ill as Mrs Charlesworth is and whose illness, so far as the evidence goes, appears to have been contributed to by the long hours of work and irregularity of

The common law must be applied regardless of the seemingly greater attractiveness of one party. The ultra vires doctrine is not a matter of judicial discretion. Lord Campbell affirmed this in 1855 in *Mayor of Norwich v. Norfolk Railway Company*,[173] stating that the court is not influenced by whether the claim is sympathetic or contemptible.[174]

Although the ultra vires doctrine does not bend according to the justice of individual cases, the merits of the parties which succeed under it may prove useful in assessing the doctrine. The great virtue of the common law is that it provides a laboratory in which the concrete effects of abstract theory can daily be tested. Too great a divergence between the legal outcome and the apparently just response to the circumstances would invite further consideration in the context of judging the law. However, it should also be taken into account that the existence of adequate remedies may cure the apparent injustices which seem at first to flow from the doctrine of limited capacity.[175]

4.4. Distinguishing the Ultra Vires Doctrine from Other Legal Principles

In addition to teasing out the consequences of the nature of ultra vires as incapacity, it is essential to distinguish ultra vires from other principles with which it has been conflated in the past.[176] These include illegality, directors' duties and even breaches

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meals which she underwent whilst working up the business, the claim is not a very attractive one, but a liquidator has no discretion about the performance of his duties and if the claim is good in law it must succeed." - In Re Halt Garage Ltd [1982] 3 AER 1016, 1023 (per Oliver J.).

[173] Mayor of Norwich v. Norfolk Railway Company (1855) 4 E&B 397, 119 ER 143.

[174] Ibid (1855) 4 E&B 397, 436; 119 ER 143, 158: the court "cannot be influenced by the consideration whether the defence set up is becoming or ungracious, being bound to decide the case according to the strict rules of law".

[175] See below at Chapter 9: "A Question of Remedies".

[176] C. Baxter, "The Role of the Judge in Enforcing Shareholder Rights" (1983) 42 CLJ 96, 100-101; H. Bond, "Ultra Vires – A Reassessment" (1983) NLJ 561, "Because the literal translation of the words is "beyond the powers," there are many cases in which the words have been applied to

of the articles of association.[177] Confusion may arise, particularly if the facts reveal discrete deficiencies in the impugned transaction, based both on capacity and some other rule. Imprecision in the language used by courts and commentators contributes to this confusion.[178] The situation is not helped by well-intentioned attempts to reconcile conflicting authorities by recategorising as not relating to capacity some of the familiar cases which themselves refer unambiguously to ultra vires.[179] The confusion of different legal principles is problematic: each has different tests and consequences.[180] Clear differentiation is necessary to ensure, firstly, that the doctrine is applied in the appropriate circumstances and, secondly, that it gives rise to the appropriate effects.[181]

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transactions which, although within the capacity of the company, are carried out otherwise than through the correct exercise of the powers of the company by its officers" - Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 91 (per Browne-Wilkinson LJ).

[177] C. Baxter, "The Role of the Judge in Enforcing Shareholder Rights" (1983) 42 CLJ 96, 101, citing Gregory v. Patchett (1864) 33 Beav. 595; 10 Jur. (N.S.) 1118; see also Bamford v. Bamford [1968] 2 AER 655; In Re Bansha Woollen Mills Co Ltd (1888) 21 LR Ir 181; K.W. Wedderburn, "Going the Whole Hogg v. Cramphorn?" (1968) 31 MLR 688.

[178] This "phrase is also sometimes used to describe acts which are not beyond the capacity of the company but simply beyond the authority of either the board of directors or a majority of the shareholders. In many instances the sense in which the phrase is being used is far from clear." – Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 79; [1986] Ch. 246, 287 (per Slade LJ).

[179] See eg: In Re Halt Garage Ltd [1982] 3 AER 1016 (per Oliver J.), proposing that Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654 and Parke v. The Daily News Ltd [1962] Ch. 927 were not ultra vires cases; Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 82-83; [1986] Ch. 246, 291 (per Slade LJ), holding that In Re David Payne and Company Ltd [1904] 2 Ch. 608 did not concern ultra vires.

[180] See below at 7.2: "Rolled Steel: the Nail in the Coffin".

[181] "A blurring of the principles is both conceptually and practically unacceptable." - H. Bond, "Ultra Vires – A Reassessment" (1983) NLJ 561, 564.

Brice reveals that such confusion existed even before the extension of the doctrine to registered companies.[182] He regards it as "unfortunate", for obscuring a subject which is already difficult.[183] In particular, he considers that it clouds the question of the effects of ultra vires acts and the impossibility of ratification and liability upon them.[184] Thus, he urges "the true and proper meaning",

> "that a corporation has certain powers only, and that it can be bound only when acting, whether directly or by agents, within the limits of these powers;"[185]

Linguistic imprecision should be avoided. In the interests of clarity, Lord Cairns L.C. in *Ashbury*[186] expressly comments on the terminology to be used in cases of ultra vires. He emphasises that he strongly prefers the expressions "*extra vires*" and "*intra vires*" to references to illegality in the context of corporate incapacity.[187] Brice regrets the confusion of ultra vires with the powers of the directors, that is, "what is beyond the powers of the executive part of a corporation."[188]

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[182] In the Earl of Shrewsbury v. North Staffordshire Railway Company 35 L.J. (Ch) 156, 172 (per Kindersley VC), it was suggested that ultra vires had two meanings, "When you speak of Ultra Vires of the company, you mean one or other of two things, either that you cannot bind all the shareholders to submit to it [i.e., that you cannot bind dissentient shareholders], or that it is Ultra Vires in this respect, that the legislature, for instance, having authorised you to make a railway, you cannot go and make a harbour."

[183] S. Brice, "A Treatise on the Doctrine of Ultra Vires" (Stevens & Haynes, London, 1874), pp.35-36.

[184] Ibid, at pp. 35-36: "to it is due not a little of the confusion that exists as to the cases in which corporations can ratify, and as to the extent to which they can be made liable for acts done and agreements entered into by itself or its agents in an informal manner, when such acts and agreements are in other respects within their powers."

[185] Ibid, at pp. 35-36.

[186] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[187] Ibid, at 672 (per Lord Cairns LC).

[188] S. Brice, "A Treatise on the Doctrine of Ultra Vires" (Stevens & Haynes, London, 1874), pp. 36-37.

Despite early awareness of this issue, the problem has continued throughout the lifetime of the ultra vires doctrine. The confusion and imprecision with which terms were used and interchanged contributed to further confusion at the level of principle and as to the contours of the doctrine of ultra vires.[189] Significantly, the corporate benefit test long used in gratuitous disposition cases built upon this confusion, as the test more properly relates to the proper exercise by directors of powers which are expressly within the capacity of the company.[190] It is important to outline the distinction between ultra vires and other proximate issues, such as illegality and directors' duties.

4.4.1. Illegality

Incapacity is not illegality.[191] The dissimilarity between the effects of common law incapacity for natural persons and corporations may have contributed to the conflation of illegality and incapacity. This is because, like corporate incapacity, illegality, which is motivated by policy reasons, deems contracts void.[192] Neither ultra vires nor illegal acts can be ratified by shareholders.[193] Furthermore, like ultra

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[189] This may have been motivated in part by a desire to benefit those asserting irregularities, enabling them to take a derivative action - C. Baxter, "The Role of the Judge in Enforcing Shareholder Rights" (1983) 42 CLJ 96, 101.

[190] See below at Chapter 6: "Powers, Corporate Benefit and Corporate Gifts" and at Chapter 7: "The Decline and Fall of the Corporate Benefit Test".

[191] See L.C.B. Gower, "Principles of Modern Company Law", 6th ed. (Sweet & Maxwell, London, 1997), p. 203, cited in cf C.A. Babb, "Rethinking the Concept of Ultra Vires in Company Law" (Ph.D. thesis, University of Cambridge, 2004); C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 71; In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 351 (per Murphy J.): "ultra vires [...] as such it was void though not illegal".

[192] See P. Birks, "Recovering Value Transferred under an Illegal Contract" (2000) 1 TIL 155.

[193] Cockburn v. Newbridge Sanitary Steam Laundry Company Ltd [1915] 1 IR 237; Peter Buchanan Ltd v. McVey [1954] IR 89; W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 204; L. MacCann, "Directors' Fiduciary Duties – Part 1" (1991) 9 ILT 80, 80.

vires, illegality relates to the "nature of the activity" proposed, as opposed to contractual defects.[194]

Illegal contracts are generally void because they are contrary to "law, morality or public policy".[195] Illegal transactions need not envisage breaches of the criminal law; they are simply transactions which the law refuses to permit.[196] The courts will not uphold a contract which is illegal.[197] It is of no effect, regardless of the state of mind of the parties.[198] It is only if the illegality is not evident on the face of the contract and one party was unaware of the illegal intent, that the innocent party may enforce it.[199] The long-standing view that no remedy can mitigate a declaration of ultra vires enhanced the resemblance between the two doctrines.[200]

Furthermore, those cases of illegality which arise from the capital maintenance rules resemble the ultra vires doctrine in that they share the common policy imperative of

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[194] S.A. Smith, "Contract Theory" (Clarendon, Oxford, 2004), p. 245.

[195] "To say that a contract is illegal seems, on the face of it, to be no more than a clumsy way of saying that an agreement is void of legal consequences" - G.L. Williams, "The Legal Effect of Illegal Contracts" (1942) 8 CLJ 51, 51; R. Grantham, "Illegal Transactions and the Powers of Company Directors" (1999) 115 LQR 296.

[196] S.A. Smith, "Contract Theory" (Clarendon, Oxford, 2004), p. 245.

[197] M. Furmston ed., "The Law of Contract" 3rd ed., (Lexis Nexis Butterworths, London, 2007), p. 1148; P.A. McDermott, "Contract Law" (Butterworths, Dublin, 2001), p. 813; Gray v. Cathcart (1899) 33 ILTR 35; Tribe v. Tribe [1995] 4 AER 236, 243 (per Nourse J.)

[198] M. Furmston ed., "The Law of Contract" 3rd ed., (Lexis Nexis Butterworths, London, 2007), p. 1150; R. Grantham, "Illegal Transactions and the Powers of Company Directors" (1999) 115 LQR 296, 300; St John Shipping Corporation v. Joseph Rank Ltd [1957] 1 QB 267, 283 (per Devlin J.)

[199] P.A. McDermott, "Contract Law" (Butterworths, Dublin, 2001), p. 815; Whitecross Potatoes v. Coyle [1978] ILRM 31, 33-34 (per Finlay J.); Archbold's (Freightage) v. Spanglett [1961] 1 QB 374; R.A. Buckley, "Illegality in Contract and Conceptual Reasoning" (1983) 12 Anglo-American Law Rev. 280, 281.

[200] Thompson suggests that historically the courts did adopt this view, treating ultra vires in the same manner as illegality - S.D. Thompson, "The Doctrine of Ultra Vires in Relation to Private Corporations" (1894) 28 American Law Review 376, 379; see below at 9.2.2: "The Rejection of Restitution".

protecting companies' assets to ensure that they are available for legitimate creditors.[201] These rules, elaborated by the courts during the same period as the extension of ultra vires to registered companies,[202] prohibited the payment of dividends out of capital[203] and the purchase by a company of its own shares.[204] No company can do such acts, for public policy reasons.

The problem of the purchase by a company of its own shares, as addressed in *Trevor v. Whitworth*,[205] demonstrates the proximity of the two areas.[206] In *Trevor v. Whitworth*,[207] the purchase of the company's shares was authorised in its articles but not the memorandum. The liquidator refused to pay the executors of a shareholder who sold shares to the company. If dealing in its shares was not listed in the company's objects clause, it was ultra vires. Even if the objects clause purported to authorise the purchase of the company's own shares, this would be void, because, according to Lord Macnaghten's reasoning, the purchase of its own shares could not legitimately be a company's sole or main object, and since it was therefore illegitimate, it could not be rendered legitimate by the coexistence of other valid objects.[208]

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[201] "A company's capital is embarked in its business, and it runs the ordinary risks of that business." - Anonymous, *Notes* (1889) 18 LQR 221, 221; see W.J.L Knight, "Capital Maintenance" Chapter 4, p 49, 57-58.

[202] H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 10; Peter Buchanan Ltd v. McVey [1954] IR 89, 97.

[203] In Re Exchange Banking Company, Flitcroft's Case (1882) 21 Ch. D. 519.

[204] Trevor v. Whitworth (1887) 12 AC 409.

[205] Ibid.

[206] See I.J. Levy, "Purchase by an English Company of its Own Shares" (1930) 79 1 UPLR&ALR 45, 51-54.

[207] Trevor v. Whitworth (1887) 12 AC 409.

[208] This reasoning may be disputed today according to modern capacity law, which gives effect to diverse express objects: Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1984] BCLC 466, [1985] 3 AER 52; see below at 7.2.1.4: "Express powers are always intra vires".

Despite the similarities of purpose, the two distinct sets of rules target different mischiefs. The rule in *Trevor v. Whitworth* targets the return of capital to members, not gifts to outsiders.[209] Despite dicta condemning gifts out of capital,[210] payments out of capital are not automatically ultra vires.[211] In *Re Halt Garage (1964) Ltd.*,[212] Oliver J. rejected the liquidator's submission that the *Lee Behrens*[213] test should be retained for all payments out of capital. If capacity was dependent on the act being for the prosperity of the company, it would be immaterial whether the assets used were disposable or capital or whether the company were solvent or not.[214] He points out that the liquidator's submission cannot be reconciled with *Parke v. Daily News*,[215] where the funds to be dispersed were disposable profits from the sale, yet the transaction was ultra vires.[216]

The essential conceptual difference is that ultra vires rules are subjective, turning on the contents of a particular company's statement of its objects, whereas illegality is objective, based on blanket prohibitions, usually statutory in nature, and external to

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[209] Trevor v. Whitworth (1887) 12 App. Cas. 409.

[210] Eg "A company can only lawfully deal with its assets in furtherance of its objects. The corporators [...] cannot take assets out of the company by way of voluntary disposition, however described, and if they attempt to do so, the disposition is ultra vires the company." - Aveling Barford Ltd v. Perion [1989] BCLC 626, 631 (per Hoffmann J.); "no company may make truly gratuitous dispositions of its assets" - Barclays Bank plc v. British & Commonwealth Holdings plc [1996] 1 WLR 1, 17 (per Harman J.).

[211] W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 70: "the ultra vires doctrine [...] applies to all transactions and to all the assets of a company and is not qualified by, nor limited to, a company's share capital."

[212] In Re Halt Garage Ltd [1982] 3 AER 1016.

[213] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[214] In Re Halt Garage Ltd [1982] 3 AER 1016, 1033.

[215] Parke v. The Daily News Ltd [1962] Ch. 927.

[216] In Re Halt Garage Ltd [1982] 3 AER 1016, 1033.

the company.[217] Brice alludes to the misuse of the term ultra vires in the context of illegality "as denoting what is outside the powers, not of a particular corporation, but of every corporation."[218]

Unfortunately, the language of ultra vires was sometimes used in relation to these general legal prohibitions.[219] In *Re Balgooley Distillery Company*,[220] Fitz Gibbon L.J. describes financial assistance for the purchase of the company's own shares as "ultra vires of the Company, as being a reduction of capital".[221] It is not entirely clear in the case whether the issue is properly one of illegality or capacity. It turns on whether a company can validly acquire its own shares as part of a beneficial transaction to divest itself of surplus stock, in the absence of an express power to do so. Fitz Gibbon L.J. would prefer "an absolute prohibition",[222] which implies illegality, yet the language of vires is used. Similarly, in *Buchanan v. McVey*,[223] the Supreme Court appears to condone the conflation of incapacity and illegality.[224] The case concerns an unlawful and fraudulent distribution of capital, but is discussed in

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[217] "The transaction was not a contract only because the building society were unable to enter into it. There was nothing wrong or illegal about it, but the plaintiffs being incompetent to enter into it, it did not exist in point of law." – Brougham v. Dwyer Brougham v. Dwyer (1913) 29 TLR 234, 235 (per Lush J.)

[218] S. Brice, "A Treatise on the Doctrine of Ultra Vires" (Stevens & Haynes, London, 1874), p. 37.

[219] "There is a widespread tendency to call any act 'ultra vires' a company which a company is legally not capable of performing, either because such act is contrary to the general law, or because such act is void merely on the ground that it is not authorized by the memorandum of association." - W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 73.

[220] In Re Balgooley Distillery Company (Weekes' Case) (1886) 17 LR Ir 239.

[221] Ibid, at 258.

[222] Ibid, at 263, which follows Dronfield Silkstone Coal Company Case (1880) 17 Ch. D. 76; 50 LJ Ch. 387.

[223] Peter Buchanan Ltd v. McVey [1954] IR 89.

[224] See also Precision Dippings Ltd v. Precision Dippings Marketing Ltd [1985] WLR 812, which Temple views as concerning illegality rather than capacity - R.M. Temple, "Ultra Vires: The Dual Approach" (1987) 137 NLJ 1069, 1070.

terms of vires.[225] More recently, Keane J., in *Re Greendale Developments Ltd. (No.2)*,[226] adverts to the "fundamental illegality" of an ultra vires disposition.[227]

Rajak deems it unsurprising that the same "language and concepts" were used in developing the law on capital maintenance and contractual capacity, because both the capital and objects are required to be stated in the memorandum of association.[228] The parallel is strengthened by the shared aim of both sets of rules to protect the pool of corporate assets to meet corporate debts. Horrwitz points to authorities in which the transaction was both illegal and outside the scope of the company's objects as blurring the distinction.[229]

However, other authorities are clear on the difference between ultra vires and illegality.[230] Lord Cairns was unequivocal in *Ashbury*.[231] In *Flood v. Irish Provident*

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[225] Peter Buchanan Ltd v. McVey [1954] IR 89, 97: "no memorandum, however specific, can sanction an act which is contrary to the provisions of the Companies Acts or to the fundamental principles of company law as laid down by the courts." (Kingsmill Moore J.)

[226] In Re Greendale Developments Ltd. (No.2) [1998] 1 IR 8, 24.

[227] Keane J. does not confuse the issues, but his use of the term illegality to emphasise complete voidness could fuel future confusion.

[228] H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 11.

[229] Guinness v. Land Commission of Ireland (1882) 23 Ch. D. 349, 358; Trevor v. Whitworth (1997) 12 App. Cas. 409; cited in W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66.

[230] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 86: "nowadays the application of the ultra vires doctrine to the rules concerning the reduction of capital must be regarded as absurd."

[231] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 672 (Lord Cairns LC); see also Buckley LJ, In Re Birkbeck Permanent Benefit Building Society [1912] 2 Ch. 232: "The act may be a perfectly legal act, but is one which that person cannot do."; cf C.A. Babb, "Rethinking the Concept of Ultra Vires in Company Law" (Ph.D. thesis, University of Cambridge, 2004), p. 22; see also: S. Brice, "A Treatise on the Doctrine of Ultra Vires" 2nd ed. (Stevens & Haynes, London, 1877); C.T. Carr, "The general principles of the law of corporations" (CUP, 1905), p. 71; H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), p.

Assurance Company,[232] Lord Walker clearly states that the insurance policy which was ultra vires the company due to its own restrictions was "not an illegal contract".[233] Despite the decisions which seem to suggest that ultra vires and illegality are related, most commentators agree that ultra vires is not illegality.[234] Horrwitz takes pains to clarify the "true scope" of the ultra vires doctrine, and to distinguish it from illegality.[235]

In contrast, Babb argues strenuously that the orthodox view is mistaken and that ultra vires does in fact equate to illegality.[236] She defines an ultra vires act as "one that an Act of Parliament incorporating or regulating a company has prohibited".[237] Because ultra vires transactions are prohibited by the Companies Acts, ultra vires is equivalent to illegality.[238] She asserts that this view can explain issues including the

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4; W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 74-75; W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 204.

[232] Flood v. Irish Provident Assurance Company 46 ILTR 214.

[233] Ibid, at 217.

[234] R. Grantham, "Illegal Transactions and the Powers of Company Directors" (1999) 115 LQR 296, 301: "Action which is beyond the company's capacity is not by that reason illegal and action which is illegal is not necessarily ultra vires."

[235] W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 73; W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 204.

[236] C.A. Babb, "Rethinking the Concept of Ultra Vires in Company Law" (Ph.D. thesis, University of Cambridge, 2004).

[237] Ibid, at p.1; Babb's assumptions are opposed to those of this author, in that she identifies ultra vires with the restriction of the capacity of statutory corporations by Parliament, whereas this author seeks to differentiate between statutory and registered companies (see Babb, p. 11). She also relies on US cases in support, whereas this author views them as misleading due to the different conceptions of the corporation (see Babb, p. 11). She interprets the effect of *Ashbury* as ruling that there is a statutory prohibition on contracts beyond companies' objects, whereas this author does not believe the doctrine is statutorily required (see Babb, p. 21). Furthermore, Babb ascribes to her theory the virtue of explaining cases which this author regards as conflating distinct concepts (see Babb, p. 12).

[238] Ibid, at p. 29.

initial introduction of the doctrine, the importance of knowledge, and the distinction between the capacity of chartered and statutory corporations.[239] Cases which designate as ultra vires contraventions of the general law include *Holmes v. Newcastle upon Tyne Abattoir Company*,[240] *Hope v. International Financial Society*[241] and *Ooregum Gold Mining Company v. Roper*.[242]

However, the relationship between illegality and incapacity is probably better presented as one whereby illegality is a subset of all that is beyond the capacity of a particular corporation. Since no memorandum can validly grant authority to break the imperative rules of company law, all illegal acts must fall outside the sphere of all companies' capacity.[243] The Irish case of *Cockburn v. Newbridge Sanitary Steam Laundry Co Ltd, and Llewellyn*[244] expressly endorses this expression of the relationship between the two concepts.[245]

A number of cases have considered the intersection of the two concepts, and in doing so, softened the distinction between them. In *Buchanan v. McVey*,[246] Kingsmill Moore J. equated illegality with ultra vires, on the basis that no

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[239] Ibid, at p. 4.

[240] Holmes v. Newcastle upon Tyne Abattoir Company (1875) 1 Ch. D.

[241] Hope v. International Financial Society (1876) 4 Ch. D. 327.

[242] Ooregum Gold Mining Company v. Roper [1892] AC 125.

[243] Section 5(1), Companies Act 1963 (Ireland): companies may be formed "for any lawful purpose"; illegal objects can lead to refusal of registration: R. v. Registrar of Companies ex p. More [1931] 2 KB 197, or quashing of registration: Bowman v. Secular Society Ltd [1917] AC 406, R. v. Registrar of Companies, ex p. Attorney-General [1991] BCLC 476; "if a power to purchase its own shares were found in the memorandum of association of a limited company, it would necessarily be void" - Trevor v. Whitworth (1887) 12 App. Cas. 409, 436 (per Lord Macnaghten).

[244] Cockburn v. Newbridge Sanitary Steam Laundry Co Ltd, and Llewellyn [1915] 1 IR 237.

[245] Ibid, at 254 (per O'Brien LC): "Illegality and ultra vires are not interchangeable terms, but it is difficult, if not impossible, to conceive a case in which a company can do an illegal act, the illegality arising from public policy, and act within its powers."

[246] Peter Buchanan Ltd v. McVey [1954] IR 89.

memorandum could sanction illegality.[247] It is true that a company's memorandum cannot extend its capacity into the sphere of illegality, but it should be understood that an act done contrary to this principle would be subject to analysis under illegality principles rather than capacity law. *Rolled Steel*[248] suggests that the use of an inoffensive express power in conditions which breach rules such as the capital maintenance rules must be intra vires, though it may nonetheless independently be void for illegality. *Buchanan v. McVey*[249] should be better regarded as a case of illegality than vires. The decision does not look to the company's memorandum of association. The decisive point, that the company could not validly ratify the disposal of its assets, stands whether the invalidity is due to incapacity or illegality.

There are other cases also in which the illegal act seems to be regarded as ultra vires. In *Re Duomatic*,[250] Buckley L.J. makes it clear that he equates circumstantial illegality with excess of capacity. He describes a payment to a director which failed to comply with the statutory requirement that all the company's members be notified,[251] as "an ultra vires payment, for it was a payment which the section says it was not lawful for the company to make."[252] Similarly, *Precision Dippings Ltd v. Precision Dippings Marketing Ltd*[253] treats as ultra vires a distribution prohibited by statute.[254] *In Re Halt Garage*[255] discusses the link between ultra vires and the capital

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[247] Ibid, at 97 (per Kingsmill Moore J.): "no memorandum, however specific, can sanction an act which is contrary to the provisions of the Companies Acts or to the fundamental principles of company law as laid down by the Courts."

[248] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52.

[249] Peter Buchanan Ltd v. McVey [1954] IR 89.

[250] In Re Duomatic Limited [1969] 1 AER 161.

[251] Section 191, Companies Act 1948.

[252] In Re Duomatic Limited [1969] 1 AER 161, 169 (per Buckley J.).

[253] Precision Dippings Ltd v. Precision Dippings Marketing Ltd [1986] Ch. 447.

[254] Section 39, Companies Act, 1980 (UK).

[255] In Re Halt Garage Ltd [1982] 3 AER 1016.

maintenance rules, with excessive payments to a director's wife being viewed as a disguised distribution.

Acknowledging that no company can have the capacity to do an illegal act, it is more useful to retain the term ultra vires to designate that subset of potentially legal acts which a particular company may not undertake because its constitution does not confer that capacity on it. Acts which are theoretically outside a company's capacity because they are illegal are subject to analysis on the basis of the rules governing illegality. The conflation of the two doctrines does not aid analysis of the law on capacity. Humans are mammals, but these two terms are not thereby rendered equivalent. Illegal acts may in a sense be ultra vires, but they are not the only, or even the most important form of ultra vires transaction. Studying illegality will not illuminate incapacity. The true nature of the relationship between the two concepts explains the authorities in which an illegal act is described as ultra vires,[256] but the distinction remains critical. The courts in the United Kingdom have rejected arguments that sought to avail of the validation conferred by statutory reforms on ultra vires acts[257] so as to render illegal acts effective.[258]

The doctrine of ultra vires properly focuses on whether a transaction is of a class which is envisaged by each company's particular memorandum of association. By shifting the focus away from the examination of the terms of a company's objects clause, the equation of illegality and incapacity risks distorting the law on capacity. The evolution of the law on capacity has heightened the analytical differences which always existed between incapacity and illegality. Subject to the qualification

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[256] Precision Dippings Ltd v. Precision Dippings Marketing Ltd [1986] Ch. 447, 455; Shaker v. Al-Bedrawi EWHC 26th July 2001 (Ch) Unrep, at 141, [2003] Ch. 350; Bairstow v. Queens Moat Houses plc [2001] 2 BCLC 531; Trevor v. Whitworth (1887) 12 AC 409; Babb also cites as support for her view K. Greenfield, "Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality" (2001) 87 Virginia Law Review 1279.

[257] Section 35, Companies Act, 1985; see below at 8.3.3: "The Outsider in English Law".

[258] A. Griffiths, "Contracting with Companies" (Hart, 2005) p. 165; citing In Re Halt Garage (1964) [1982] 3 AER 1016; Aveling Barford v. Perion [1989] BCLC 626; Bairstow v. Queen's Moat Houses [2001] 2 BCLC 531.

that historically the doctrine of ultra vires has sometimes departed from strict focus on the objects clause,[259] the proper question must whether the act is authorised by the company's objects clause. If the act falls within such a class as is provided for, but is executed in a manner which falls foul of some other legal prohibition, this does not render it ultra vires. Thus, in a modern context, transactions which constitute fraudulent preferences[260] are illegal and void on that basis, but do not also become ultra vires. It is not necessary for such transgressions also to be condemned as beyond the capacity of the company.

4.4.2. Breach of Directors' Duties

As with illegality, there is a close relationship between the principles governing corporate capacity and directors' duties. This is manifest in a number of ways. Firstly, the two concepts have been confused in the past;[261] it is vital to differentiate between them.[262] The rules governing directors' duties "have nothing to do with the capacity of the company but everything to do with the propriety of acts done within that capacity".[263] Secondly, the law on directors' duties may offer an appropriate

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[259] Eg the corporate benefit test (Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654; In Re Lee, Behrens & Co., Ltd [1932] AER 889; see below at 6.2: "Subordinating Powers to Pursuit of the Company's Objects"; see also insolvency raised in argument in Parkes & Sons Ltd. v. Hong Kong & Shanghai Banking Corporation [1990] 1 ILRM 341 and In Re Frederick Inns Ltd. [1991] ILRM 582 (HC), [1994] 1 ILRM 387 (SC); see B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26, 36; see also In Re Kill Inn Motel Ltd (High Court, Unreported, 16 September 1987, Murphy J.).

[260] Section 286 of the Companies Act 1963, as amended by Section 135, Companies Act 1990.

[261] See eg Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654; In Re W & M Roith Ltd [1967] 1 AER 427; Extrasure Travel Insurances Ltd v. Scattergood [2003] 1 BCLC 598; S.D. Thompson, "The Doctrine of Ultra Vires in Relation to Private Corporations" (1894) 28 American Law Review 376, 377-8.

[262] See J. Meade, "Ultra Vires or Directors' Abuses: when can shareholders right a wrong?" (1999) 6(7) CLP 198, 198: "immense terminological confusion, leading to a misunderstanding of the principles involved."

[263] In Re Halt Garage Ltd [1982] 3 AER 1016, 1029.

sanction where an undesirable transaction is within the capacity of the company.[264] Thirdly, the incidental breach of his duties by a director may open a remedy for loss sustained by virtue of a void contract.[265]

The concept of the directors as trustees acting for the body of shareholders is consistent with a nineteenth century view of the company,[266] echoing the deed of settlement company. Directors can be described as trustees of both corporate assets and their powers.[267] Later views regard the trust relationship as an analogy.[268] The established fiduciary duties of directors include acting bona fide in the interests of the company[269] and using their powers for a proper purpose.[270] Directors also have a

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[264] Pennycuick J. points to the utility of the rules on directors' duties as distinct from, and complementary to, the doctrine of ultra vires in Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185, 1188.

[265] J. Meade, "Ultra Vires or Directors' Abuses: when can shareholders right a wrong?" (1999) 6(7) CLP 198; see below at 14.2: "Directors' Duties".

[266] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 165; Great Eastern Railway Company v. Turner (1872-3) 8 Lr Ch. App. 149 (per Lord Selborne); AG v. Belfast Corporation (1855) 4 Ir Ch. Rep 119, 160 (per Maziere Brady LC); In Re Forest of Dean Coal Mining Company (1878) 10Ch. D. 450, 453 (per Jessel MR); the duties are owed to the company itself, not individual members: Percival v. Wright [1902] 2 Ch. 421; Smith v. Cork and Bandon Railway Company (1870) 5 Ir Eq 63; Dawson International plc v. Coats Paton plc [1989] BCLC 233.

[267] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 168.

[268] In Re Lands Allotment Company (1894) 1 Ch. 616; Imperial Hydropathic Hotel Ltd v. Hampson (1882) 23 Ch. D. 1; In Re City Equitable Fire Insurance Co Ltd [1925] Ch. 407.

[269] See In Re Smith and Fawsett Ltd [1942] Ch. 304, 306 (per Greene MR); the burden of proof is on the person alleging bad faith: In Re Dublin North City Milling Company [1909] 1 IR 179; In Re Hafner, Olhausen v. Powderley [1948] IR 426; but the director should respond to allegations made: Clark v. Workman [1920] 1 IR 107.

[270] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 165-166; R. Grantham, "The Powers of Company Directors and the Proper Purpose Doctrine" (1994-1995) 5 KCLJ 16, 20; see In Re City Equitable Fire Insurance Co Ltd [1925] Ch. 407; L. MacCann, "Directors' Fiduciary Duties" (Part 2) (1991) 9

common law duty to exercise reasonable care in exercising their functions.[271] The skill they are expected to demonstrate is that subjective standard which might reasonably be expected of someone of their knowledge and experience.[272] Equity is capable of delivering tailored and appropriate discretionary remedies for breaches, including the avoidance of transactions and the return of property, from the officer himself or from a third party.[273] However, even where the directors' conduct harms the company, the irregularity may be ratified by the shareholders.[274] Alternatively, the company may choose to disown the act which constitutes a breach of duty, subject to the equitable rights of those who deal with it in good faith.[275]

In addition, directors of companies threatened by insolvency have in recent times been determined to owe a duty to creditors,[276] contrary to the orthodox view.[277]

ILT 104, 105; the "substantial purpose" must be proper: Howard Smith Ltd v. Ampol Petroleum Ltd [1974] AC 821; Hogg v. Cramphorn Ltd [1967] Ch. 254.

[271] See L. MacCann, "Directors' Fiduciary Duties – Part 1" (1991) 9 ILT 80.

[272] In Re City Equitable Fire Insurance Co Ltd [1925] Ch. 407; Lagunas Nitrate Company v. Lagunas Syndicate [1899] 2 Ch. 392, 433 (per Lindley MR); In Re Brazilian Rubber Plantations and Estates Ltd [1911] 1 Ch. 425, 437 (per Neville J); In Re Denham & Company (1884) 25Ch. D. 752.

[273] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 168.

[274] Peter Buchanan Ltd v. McVey [1954] IR 89; Hogg v. Cramphorn Ltd [1967] Ch. 254; Bamford v. Bamford [1970] Ch. 212; K.W. Wedderburn, "Unreformed Company Law" (1969) 32 MLR 563; in Ireland, MacCann rejects Ussher's view that if the directors act *mala fides* their breach is unratifiable - L. MacCann, "Directors' Fiduciary Duties – Part 1" (1991) 9 ILT 80, 81; cf Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986) pp.253-255; Nash v. Lancegaye Safety Glass (Ireland) Ltd (1958) 92 ILTR 11.

[275] C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28(2) CLJ 280, 292.

[276] Byrne v. Shelbourne FC Ltd (High Court, Unreported, 8 February 1984, O'Hanlon J.), at 20; In Re Frederick Inns Ltd [1991] ILRM 582; see also Walker v. Wimborne (1976) 50 ALJR 446e; Nicholson v. Permakraft (N.Z.) Ltd [1985] 1 NZLR 242; Lonhro v. Shell Petroleum Ltd [1980] 1 WLR 627, 634; In Re Horsley & Weight Ltd [1982] 3 AER 1045; Winkworth v. Edward Baron Development Ltd [1987] 1 AER 114; West Mercia Safetywear Ltd v. Dodd [1988] BCLC 250; In Re Frederick Inns Ltd [1991] ILRM 582 (Lardner J., HC), [1994] 1 ILRM 387 (SC); Jones v. Gunn [1997] 2 ILRM 245; In Re Swanpool Ltd, McLaughlin v. McLannen [2006] 2 ILRM 217; See L.

Keane J. in the Supreme Court has suggested that directors must conduct the company's affairs in the interests not only of the shareholders, but of "any persons who might have an interest in its financial well being: specifically the creditors", without tying this duty to insolvency.[278] He implies that the duty always exists, but will "become paramount" on insolvency.[279] Directors also have a statutory duty to have regard to the interests of employees.[280] Identifying new beneficiaries challenges the logic which permits ratification by shareholders, traditionally viewed as the wronged party, and therefore empowered to forgive.[281] The statutory duty in respect of employees is owed to the company, notwithstanding that it serves to protect employees.[282] However, the position in relation to creditors, and possible ratification by shareholders, is less clear-cut.[283] MacCann advocates a duty owed to the company rather than directly to shareholders, adding that creditors could seek a winding up, allowing the liquidator to take an action against the directors.[284]

MacCann, "Directors' Duties: To Whom are They Owed?" (Part 2) (1991) 9 ILT 30 (MacCann's argument persuaded the court in Jones v. Gunn, supra).

[277] Wilson v. Lord Bury (1880) 5 QBD 518; In Re Wincham Shipbuilding & Boiler Company (1878) 9 Ch. D. 332; In Re Dronsfield Silkstone Coal Company (1881) 70 Ch. 76; see L. MacCann, "Directors' Duties: To Whom are They Owed?" (Part 2) (1991) 9 ILT 30.

[278] Belton v. Carlow County Council [1997] 2 ILRM 405, 414 (per Keane J.)

[279] Ibid, at 415 (per Keane J.)

[280] Section 52(1), Companies Act, 1990 (Ireland).

[281] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 173.

[282] L. MacCann, "Directors' Duties: To Whom are They Owed?" (Part 2) (1991) 9 ILT 30, 30.

[283] Ibid, at 30-32; the duty is owed to the company, but shareholders cannot ratify - Kinsela v. Russell Kinsela Pty Ltd (1986) 4 ACLC 215; 4 NSWLR 722; the shareholders in ratifying breaches owe no duty to future creditors – Multinational Gas & Petrochemical Company v. Multinational Gas & Petrochemical Services Ltd [1983] 3 WLR 492, cf Nicholson v. Permakraft (N.Z.) Ltd [1985] 1 NZLR 242, per Cooke J.; In Re Frederick Inns Ltd [1991] ILRM 582.

[284] L. MacCann, "Directors' Duties: To Whom are They Owed?" (Part 2) (1991) 9 ILT 30, 35.

4.4.2.1. Ultra vires acts as breaches of directors' duties

Carr writes that ultra vires and breach of trust are not synonymous, though an act might be both "when regard is had to both the capacity and the duty of the corporate body".[285] Similarly, Wedderburn suggests that incapacity and breach of fiduciary duty, "frequently become coterminous when improper distributions of corporate assets take place"[286] but must be clearly distinguished.[287]

MacCann, however, suggests that ultra vires acts are necessarily also breaches of directors' duties.[288] He asserts that one of the primary duties of directors is not to act illegally beyond the capacity of the company, and that ultra vires acts being incapable of ratification, "accordingly the directors may be liable in damages for any loss".[289] MacCann does not justify this assertion, which might result from a conflation of the issues of directors' duties and capacity. However, there is support for it in Boyle and Birds,[290] citing *In Re Sharpe*[291] and *Cullerne v. London & Suburban Building Society.*[292] Ferran argues that it is necessarily a breach of trust for directors to deal with company property in a manner which is not authorised by

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[285] C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 71.

[286] He cites Parke v. The Daily News Ltd [1962] Ch. 927 as an example.

[287] K.W. Wedderburn, "Ultra Vires or Directors' Bona Fides?" (1967) 30 MLR 566, 570.

[288] L. MacCann, "Directors' Fiduciary Duties – Part 1" (1991) 9 ILT 80, 80

[289] Ibid, at 80; However, he cites Selangor United Rubber Estates Ltd v. Craddock (No. 3) [1968] 1 WLR 1555, 1654-1656, which seems to be authority for the proposition that the illegal act to which the directors make the company a party does not preclude the company claiming there has been a breach of fiduciary duty, not that illegality is necessarily also breach of duty; MacCann cites inter alia Hirsche v. sims [1894] AC 654, In Re Exchange Banking Company, Flitcroft's case (1882) 21 Ch. D. 519, but cf Dovey v. Corey [1901] AC 477 which shows that illegality does not necessarily entrain personal liability.

[290] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 97.

[291] In Re Sharpe [1892] 1 Ch. 154.

[292] Cullerne v. London & Suburban Building Society (1890) 25 QBD 485, 490.

the memorandum.[293] Furthermore, the Supreme Court decision in *Frederick Inns*[294] may lend support. Blayney J. says,

> "being ultra vires, [the payments] constituted a misapplication by the directors of the companies' funds … This misapplication was a breach by the directors of their fiduciary duties".[295]

However, this statement is not explicit authority that ultra vires acts are automatically breaches of duty. Logically, in many cases, if an act has been condemned as void for want of capacity, it will matter little to say it is necessarily, and not merely circumstantially, also affected by the lesser defect. Even if the MacCann/Ferran view is correct, the corollary remains untrue: not every breach of directors' duties is necessarily ultra vires the company. It is here that there is potential for dangerous confusion.

4.4.2.2. The confusion between ultra vires and the abuse of directors' powers

Hutton v. West Cork Railway Company[296] exemplifies the potential for confusion between the issues.[297] Although the conclusion that it was not within the power of anyone in the company to make the gratuitous payments indicates that what was at issue was a question of ultra vires, Cotton L.J.'s language is noticeably ambiguous.

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[293] E. Ferran, "The Reform of the Law on Corporate Capacity and Directors' and Officers' Authority: Part 2" (1992) 13(9) Company Lawyer 177, 179; F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 294.

[294] In Re Frederick Inns Ltd [1994] 1 ILRM 387.

[295] Ibid, at 399.

[296] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

[297] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653; Cahill suggests at p.289 that this confusion undermines the authority of Hutton: "on closer inspection it would appear that the court may have clouded the issue, by intermingling its consideration of two separate matters, the issue of the company's *vires* and the separate issue of whether the directors have abused their fiduciary duty to act in the best interests of the company" - D. Cahill, "Corporate Finance Law" (Round Hall, Dublin, 2000).

Having posed the question of whether the payments were "intra vires", he continues by referring to the "powers of the directors".[298] Unfortunately, the confusion which can be detected in *Hutton*[299] recurred in a number of subsequent ultra vires cases. In *Re S.M. Barker Ltd*,[300] Gavan Duffy P., in obiter musings, asks whether the honesty and care of the directors, in a solvent company, could "validate, as being intra vires, a costly indulgence".[301] Principle demands an emphatically negative answer to the question posed: the honesty and competence of the directors is not relevant to determining the capacity of the company.[302]

The potentially confusing expression "ultra vires the directors" is used in a number of authorities.[303] In *Re Bansha Woollen Mills Co Ltd*,[304] a restriction on borrowing power imposed in the articles of association was deemed to render a transaction ultra vires. The reason was that the restriction in the articles expressly prohibited the general meeting from authorising borrowing in excess of the prescribed limits. If the general meeting was bound, it followed that the restriction was directed at the company itself.[305]

For many years, an accepted element of the ultra vires doctrine undermined the distinction between incapacity and directors' duties. This was the subordination of the exercise of powers expressly granted by the memorandum to a test of corporate benefit in determining the company's capacity.[306] Consequently, contracts were

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[298] Ibid, at 664 (per Cotton LJ).

[299] Ibid.

[300] In Re S.M. Barker Ltd [1950] IR 123.

[301] Ibid, at 136.

[302] That the question hints that they might be may reveal the influence of In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[303] Eg In Re Balgooley Distillery Company (Weekes' Case) (1886) 17 LR Ir 239, 258.

[304] In Re Bansha Woollen Mills Co Ltd (1888) 21 LR Ir 181.

[305] Ibid, at 185.

[306] See below at 6.2: "Subordinating Powers to Pursuit of the Company's Objects".

declared ultra vires and void even though they were within the objects of the company as expressly enumerated. In particular, the test established in *Re Lee Behrens*[307] asks in relation to capacity questions which might properly be considered in relation to directors' duties.[308] Eve J.'s test of capacity required that corporate powers must be exercised for a proper corporate purpose. This line of authority would ultimately be eradicated in later cases, such as *Charterbridge*[309] and *Rolled Steel*,[310] which insist that such considerations are not relevant to capacity.[311] Whether the application of the ultra vires doctrine to acts which were within a company's expressly conferred capacity was always a misapplication, due to confusion with the abuse of directors' powers, or whether modern criticism reflects a changing understanding of ultra vires is open to debate. Different opinions have been expressed on the question in academic writing,[312] and the better view may be that this approach was mistaken, and reflects an underlying confusion between the separate issues of capacity and directors' duties.

Despite the regular blurring of the boundaries, other authorities have emphasised the distinction. Lord Cairns in *Ashbury*[313] may seem to risk causing confusion by using the expression "extra vires the directors" to refer to acts inconsistent with the articles, but he is clear that there is a crucial distinction between breaches of the

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[307] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[308] See below at 6.3.1: "The Lee Behrens Corporate Benefit Test" and at 7.2: "Rolled Steel: the Nail in the Coffin".

[309] Charterbridge Corporation Ltd v. Lloyds Bank Ltd [1970] Ch. 62; [1969] 2 AER 1185.

[310] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1984] BCLC 466.

[311] See below at Chapter 7: "The Decline and Fall of the Corporate Benefit Test".

[312] See eg R.M. Temple, "Ultra Vires: The Dual Approach" (1987) 137 NLJ 1069; S. Griffin, "A Company's Contractual Capacity", in "Company Law: Fundamental Principles" 3rd ed. (Longman 2000), p. 103, at 106.

[313] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

memorandum and articles.[314] Similarly, *In Re Balgooley Distillery Company*[315] distinguishes clearly between acts which are not envisaged by the articles and therefore "ultra vires of the Directors" and those which are not contemplated in the memorandum and therefore "ultra vires of the Company".[316]

4.4.2.3. The importance of distinguishing director's duties from capacity

In some cases it is unclear whether a gratuitous disposition was invalidated on the ground of ultra vires or as a breach of directors' duties. Wedderburn argues that *In Re W & M Roith Ltd*,[317] in which Plowman J. applied the *Lee Behrens* test to invalidate a widow's pension, was not an ultra vires case.[318] Although in many cases the principles of ultra vires and of directors' duties coincide,[319] the distinction is important at the level of principle and in practice. In particular, the consequences of ultra vires and breaches of directors' duties are not the same.

In *Re Marseilles Extension Railway Company*,[320] Mellish L.J. advocates letting the shareholders of a company suffer the adverse consequences of directors' abuses.[321] Yet within the corporate structure, the interests of the shareholders and management are not identical, and it is the business of the law to protect shareholders from directors' abuses. Because shareholders are the victims of directors' misfeasance, they are empowered to ratify a wrong which is merely a breach of a director's

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[314] Ibid, at 668.

[315] In Re Balgooley Distillery Company (Weekes' Case) (1886) 17 LR Ir 239.

[316] Ibid, at 265.

[317] In Re W & M Roith Ltd [1967] 1 AER 427.

[318] K.W. Wedderburn, "Ultra Vires or Directors' Bona Fides?" (1967) 30 MLR 566.

[319] Ibid, at 570.

[320] In Re Marseilles Extension Railway Company [1871] LR 7 Ch. 161.

[321] Ibid, at 169-170 (per Mellish LJ): "if the directors of the Marseilles Company have been guilty of an improper application of the funds of the Marseilles Company it would be more just that the shareholders of the Marseilles Company, whose directors improperly applied this money, should bear the loss, than the innocent shareholders of the Crédit Foncier…"

duties.[322] They cannot ratify a void contract which exceeds the company's capacity. Sealy considers the possibility of ratification a flaw which, although consistent with trust logic, allows many questionable acts to escape censure where directors are also controlling shareholders.[323]

In addition to ratification, there is the question of the remedies to which a wrongful act on the part of directors may give rise. The director himself may be liable to account to the company for any loss suffered by it.[324] In addition, an outsider who knowingly receives the company assets in breach of trust is deemed to hold them on constructive trust for the company.[325] These consequences cannot be assumed necessarily to exist automatically in cases of incapacity.

It is reasonable that a company director who unwittingly enters into an agreement which is subsequently shown to have been outside the company's capacity should not automatically be deemed personally liable for any loss incurred by the company. It is entirely conceivable that the director be motivated purely by the best interests of the company in attempting to avail of new business opportunities. It may even be that the transaction is objectively profitable for the company, but nonetheless falls outside the scope of its objects clause. In such cases, the ultra vires character of the

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[322] In Re Burke Clancy & Company Ltd (Unrep) HC, 23 May 1974; Grant v. United Kingdon Switchback Railway Company (1880) 40 Ch. D. 35; Irvine v. Union Bank of Australia (1877) 2 AC 366, cited in L. MacCann, "Directors' Fiduciary Duties – Part 1" (1991) 9 ILT 80, 80-81; In Re Greendale Developments Ltd [1998] 1 IR 8, citing Buchanan v. McVey [1954] IR 89; J. Meade, "Ultra Vires or Directors' Abuses: when can shareholders right a wrong?" (1999) 6(7) CLP 198, 202.

[323] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 169.

[324] See below at Chapter 14: "Remedies against an Individual for Wrongful Conduct".

[325] Belmont Finance Corporation Ltd. v. Williams Furniture Ltd. (No. 2) [1980] 1 AER 393; In Re Frederick Inns Ltd [1994] 1 ILRM 387; Ulster Factors Ltd v. Entonglen Ltd (High Court, Unreported, 21st February 1997, Laffoy J.); see also Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 91 (per Browne-Wilkinson LJ): "the position of a company is analagous to that of a human being who has fiduciary powers".

act does not mean that there is also a breach of directors' duties.[326] The undertaking of an ultra vires transaction by company management may in some cases raise issues as to whether directors performed their duties with due skill, care and diligence. However, given the difficulty which arises in many cases, requiring a court decision finally to settle whether an act was within the company's capacity or not, it should not be assumed that those responsible for the act are necessarily at fault.

The relationship between the questions of ultra vires and directors' duties is somewhat intricate. In many cases, both issues may be raised. In some cases, there will indeed be both a breach of directors' duties and an excess of capacity. In other cases, however, there may be an ultra vires act without any breach of directors' duties and, equally, it is clear that not every breach of directors' duties involves an act which is outside the capacity of the company as a whole.

4.4.3. Agency

Agency is another related but distinct area of law.[327] Whereas directors' duties relate to the abuse of officers' powers, agency relates to the delegation of those powers in the first place.[328] Since a company can only act through individuals, agency principles determine when the act of an individual represents and binds the company.[329] This is "another distinction which tended to become blurred through the indiscriminate use of the term "ultra vires"."[330]

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[326] See below at 14.2.1: "Incapacity and Directors' Duties".

[327] See C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28(2) CLJ 280; Baxter also explores the confusion between agency and directors' duties; D.D. Prentice, "Section 9 of the European Communities Act" (1973) 89 LQR 518, 527-530; H. Linnane, "Corporate Capacity and Ostensible Authority and their "Inextricable" Entwinement on Display" (2000) CLP 37.

[328] R. Grantham, "The Powers of Company Directors and the Proper Purpose Doctrine" (1994-1995) 5 KCLJ 16, 29.

[329] See Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 91-92 (Browne-Wilkinson LJ); Thomas Williamson Ltd v. Bailieborough Co-operative Agricultural Society Ltd (High Court, Unreported, 31 July 1986, Costello J.); Freeman and Lockyer v. Buckhurst

A company's articles of association generally contain its internal regulations.[331] These rules include those which determine which officers are entitled to act as representatives of the company and to bind it.[332] Property cannot pass where the company's representative lacks authority.[333] However, excesses of authority are ratifiable by the principal.[334] In addition, the concept of ostensible authority might avail an outsider seeking to rely on an act which they might reasonably have supposed the person with whom they dealt to have the authority to make.[335] Company directors are generally assumed to have the authority to exercise all a company's powers.[336] If the delegation of authority in the articles is expressly subordinated to certain conditions, the internal management rule in *Turquand*'s

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Park Properties (Magnal) Ltd (1964) 2 QB 480; see also C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28(2) CLJ 280, 295-296; R. Keane, "Company Law", 4th ed. (Tottel, Dublin, 2007), pp. 153-159.

[330] H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 12; see also "Prentice Report", "Reform of the Ultra Vires Rule" (DTI, 1986), Chap. II, para. 3.

[331] See Roper v. Ward [1981] ILRM 408, 409: "they are subordinate to and controlled by the memorandum of association which is the dominant instrument".

[332] "The directors of an English company derive their authority to manage from the constitution and not from any rule of law" - D.D. Prentice, "Section 9 of the European Communities Act" (1973) 89 LQR 518, 529; see A. Griffiths, "Contracting with Companies" (Hart, 2005) p. 73 et seq.

[333] C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28(2) CLJ 280, 297.

[334] H. Rajak, "Judicial Control: Corporations and the Decline of Ultra Vires" (1995) 26 Cambrian Law Review 9, 12.

[335] Hely-Hutchinson v. Brayhead Ltd (1968) 1 QB 549; Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480; Ulster Factors Ltd v. Entonglen Ltd (High Court, Unreported, 21st February 1997, Laffoy J.); see also H. Linnane, "Corporate Capacity and Ostensible Authority and their "Inextricable" Entwinement on Display" (2000) CLP 37; I.D. Campbell, "Contracts with Companies" (1959) 75 LQR 469.

[336] B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26, 40, citing Thomas Williamson Ltd v. Bailieborough Co-operative Agricultural Society Ltd (High Court, Unreported, 31 July 1986, Costello J.).

case[337] might serve to validate an act which was done without respecting those regulations.[338]

The *Turquand* principle is of no assistance in the context of incapacity, however, where the outsider is inevitably affected by voidness.[339] He is presumed to be aware of the contents of a company's memorandum of association, although he is not required to ensure that the company is fulfilling all its internal requirements and procedures.[340]

In *Rolled Steel*,[341] the directors exceeded their authority in using their powers for a purpose other than that for which they were intended. Slade L.J. interprets *David Payne*[342] as authority for this agency-based approach.[343] He sets out the principles of agency law which apply: unless the shareholders consent, directors only have actual authority to act for the purposes of the company; nonetheless, the outsider acting in good faith may rely on their ostensible authority, unless he is put on notice of the misuse of the power.[344] Grantham argues that where powers are used for an improper purpose, this is as much an excess of authority as a breach of fiduciary duty.[345] He affirms that even where a company confers wide powers of management

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[337] Royal British Bank v. Turquand (Turquand's Case) (1856) 6 E&B 327; 2 Jur. (N.S.) 663; [1843-1860] AER 435; Mahony v. East Holyford Mining Company (1875) LR 7 HL 869.

[338] C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28(2) CLJ 280, 296.

[339] See below at 8.2.1: "The Relevance of Constructive Notice to Ultra Vires Cases".

[340] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 179.

[341] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52.

[342] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[343] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 83-84.

[344] Ibid, at 85-86.

[345] R. Grantham, "The Powers of Company Directors and the Proper Purpose Doctrine" (1994-1995) 5 KCLJ 16, 16.

on its directors, without express limitations, they are only authorised to exercise those powers for the purposes of the company.[346]

4.5. Can the Capacity of a Company Vary over Time?

A final question which relates to the theoretical nature of the ultra vires doctrine concerns the possibility of a company's capacity varying throughout its lifespan, from incorporation to liquidation: can the capacity of a particular company be different at different times? There have been hints that the capacity of insolvent companies, or those which are being wound up, constricts. The ultra vires doctrine may have been applied particularly strenuously in cases where the company was insolvent or in the course of liquidation. This inclination is underpinned by the concern of the courts to protect the interests of creditors and shareholders, to which it is to be expected that they would be particularly alive when winding up is imminent.

The strict application of the rule in such circumstances emerges from the decision of the Court of Appeal in *Hutton v. West Cork Railway Company*,[347] which held a gratuitous disposition to be ultra vires because it did not result in any benefit to the company. The court reasoned that the company, having been taken over, "remained alive only for certain purposes", that is, to wind itself up.[348] The payment of compensation for past services was not incidental to this new business. This implies that the capacity of a company diminishes when it is being wound up. This implication is linked to the corporate benefit test.[349] It is logical to suggest that, if the validity of an act is conditional on future benefit accruing to the company, this test is failed if the company does not have a future. This logic recurs in *Parke v. Daily News Ltd.*[350]

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[346] Ibid, at 18.

[347] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

[348] Ibid, at 675 (per Bowen LJ).

[349] See below at Chapter 6: "Powers, Corporate Benefit and Corporate Gifts".

[350] Parke v. Daily News Ltd [1962] Ch. 927, [1962] 2 AER 929, [1962] WLR 566.

However, on a modern view which rejects external tests of validity,[351] the company's circumstances should not alter its capacity. Principle demands that, if the objects clause does not change, the capacity it confers remains constant. Since, by this analysis, corporate benefit only remains relevant to implied powers, it is only when the memorandum does not articulate a power that the outcome may vary between going concerns and those which are being wound up.[352]

Given the emphasis in *Ashbury* on the fact that the objects clause could not be modified, Bowen L.J.'s assertion in *Hutton* that, when a company was no longer a going concern, "it had a special and modified business [...] to wind itself up" appears inconsistent. This may have been the case in *Hutton*, under the Act regulating the takeover, but should not be generalised to all insolvent companies. Baggallay L.J.'s dissenting judgment in *Hutton* underlines that all stages of a company's existence are "portions of its business".[353] In general, company law does not have specific rules for companies at different stages of life. Sealy opposes the complexities of a company law in which rules would be overly dependant on the fluctuating financial status of the company at any given moment.[354] This approach is supported by *Parkes & Sons Ltd. v. Hong Kong & Shanghai Banking Corporation*,[355] where Blayney J. rejected the argument that dispositions made when a company is insolvent are automatically ultra vires. He concluded instead that they might be breaches of directors' duties.[356] He reasoned that to hold that any disposition by an insolvent company was necessarily ultra vires would have rendered the statutory prohibition on fraudulent preferences unnecessary.

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[351] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52; see below at 7.2: "Rolled Steel: the Nail in the Coffin".

[352] T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 358.

[353] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654, 679 (per Baggallay LJ).

[354] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 178-179.

[355] Parkes & Sons Ltd. v. Hong Kong & Shanghai Banking Corporation [1990] 1 ILRM 341.

[356] Ibid, at 349; L. MacCann, "Directors' Duties: To Whom are They Owed?" (Part 2) (1991) 9 ILT 30, 34; this argument was also made in In Re Frederick Inns Ltd. [1991] ILRM 582, 588.

This response is sound. Admittedly, the insolvent company presents particular problems, in that the issue of the division of assets among competing claimants becomes pressing.[357] Fletcher Moulton L.J. in *Re Birkbeck Permanent Benefit Building Society*[358] refers to "the far less difficult questions that arise in a liquidation."[359] The law responds to this concern in the area of directors' duties by creating a duty to take account of the interests of creditors.[360] While certain statutory and equitable rules come into effect or become more important as a company faces insolvency or liquidation,[361] it is not necessary or appropriate that the common law doctrine of ultra vires should mutate.[362]

The modern understanding dictates that the capacity of a company, dependent solely on its constitution, is not fluid. The external test which traditionally made the validity of gifts dependent on benefit accruing to the company in the future has been rightly expunged. If there is no corporate benefit test, except for the implication of unstated powers, then the problem of varying capacity disappears.

4.5.1. Conclusion

Thus, we return to the essential proposition from which logically flow the various elements of the ultra vires doctrine. This is simply that the ultra vires doctrine

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[357] Distribution being pari passu except for preferential and secured creditors; Section 285, Companies Act, 1963; see I. Lynch, "Reform in Haste, Repent at Leisure" (1994) 12(8) ILT 189, 190.

[358] In Re Birkbeck Permanent Benefit Building Society [1912] 2 Ch. 183.

[359] Ibid, at 224.

[360] In Re Frederick Inns [1994] 1 ILRM 387, 396; L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164; J. Kettle, "Improper Trading in Ireland and Britain" (1994) 12(4) ILT 91; see below at 15.3.1.1.1: "A duty to creditors".

[361] In Re Frederick Inns Ltd [1991] ILRM 582, 589-590.

[362] Cf Forde: "If the company had been insolvent [...] undoubtedly the transactions would have been ultra vires" - M. Forde & H. Kennedy, "Company Law", 4th ed., (Round Hall Sweet & Maxwell, 2007), p. 38.

dictates that companies possess limited capacity as defined by their memoranda of association. Equipped with this theoretical understanding of the principle, the next step towards evaluating it is to examine how the rules have developed and been applied in practice.

5. THE INTERPRETATION AND DRAFTING OF OBJECTS CLAUSES

> "The powers of a corporation, derived from its charter, or the general laws under which it is instituted, may be greatly extended or restricted, by the construction given thereto by the courts; and the virtue of a plea of ultra vires may depend upon such construction."[1]

5.1. THE APPLICATION AND EVOLUTION OF THE ULTRA VIRES DOCTRINE

The story of ultra vires in the courts is a dynamic one. *Ashbury*[2] was only the beginning. Subsequent decisions would elaborate and define the parameters of the application of the ultra vires doctrine to registered companies. In tracing the evolution of the doctrine through the case law and measuring its impact, both positive and negative, there are several threads to unravel. The first of these focuses on the objects clause itself, and significant changes to the drafting and interpretation of objects clauses. A second important dimension of the ultra vires doctrine was the question of whether the courts might subject the terms of the clause to external tests.[3] In relation to the first theme, which centres on the terms of the objects clause, the primary actors were the drafters of corporate constitutions and the judiciary.[4] The legislature played a supporting role when it authorised the amendment of objects clauses.[5] All of these changes combined to shape the familiar, unloved doctrine of ultra vires.

It began with the natural tension between the judiciary, which sought to give full effect to the doctrine by interpreting objects clauses restrictively, and those

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[1] G.W. Field, "Ultra Vires" (1879) 13 American Law Review 632, 640.

[2] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[3] See below at Chapter 6: "Powers, Corporate Benefit and Corporate Gifts".

[4] See below at 5.1: "The Application and Evolution of the Ultra Vires Doctrine".

[5] See below at 5.4: "Statutory Changes affecting Objects Clauses".

establishing and running companies, who conversely wished to escape potential fetters on their freedom to contract. Since the application of the ultra vires doctrine in practice requires the interpretation of each company's objects clause, this became the primary battleground. A company's capacity to undertake any particular transaction is not properly determined by consideration of an abstract legal rule, but rather turns on a careful examination of that company's objects clause.

The authorities disclose an ongoing battle of wits and wills between the promoters who constructed memoranda and the judges who construed them.[6] Repeatedly, the strict rules of interpretation adopted by the courts were countered by ingenious stratagems on the part of those engaged in drafting objects clauses. This conflict was possible due to the contradiction at the heart of the ultra vires doctrine: it is company promoters who define the capacity of a company, though they are held to that definition by the state.[7] In principle, the objects can be "whatever the original incorporators wish".[8] They held the tools to carve out a broad capacity for their companies.

The strategies adopted to expand the capacity of new companies as far as possible included drafting objects clauses which either were general and all-encompassing or detailed a multitude of potential objects in exhaustive and complex detail. Faced with rules of interpretation in the courts which sometimes found that purposes which were specified in a memorandum of association did not nonetheless suffice to extend the company's capacity,[9] the drafters were forced to adopt further techniques to guarantee the desired capacity. Where the courts initially applied the *ejusdem generis* rule of interpretation to restrictively limit stated objects by reference to the

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[6] If the judiciary was hostile to the registered company, the feeling was mutual – see R.S.T. Chorley, "The Conflict of Law and Commerce" (1932) 48 LQR 51, 51.

[7] See above at 3.3: "The House of Lords Prefers Limited Capacity".

[8] In Re Horsley & Weight Ltd [1982] 3 AER 1045, 1052 (per Buckley LJ); "All that the Courts can do is construe the memorandum as it stands" - Cotman v. Brougham [1918] AC 515, 518 (per Finlay LC).

[9] Judicial interpretation has been "inventive and of devastating effect" - T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 344.

main objects for which the corporation was established, this was countered and ultimately could be displaced by the inclusion of an independent objects clause, which asserted that each stated object constitutes a distinct object of the company.[10] Later, the courts reluctantly accepted clauses modelled on what came to be known as the *Bell Houses* clause.[11] These conferred on the company a wide power to carry on any activities which, in the opinion of the directors, would complement its business.[12] This insulated the subjective appreciation of the directors as to what actions would further the company in the operation of its business from the challenge of a judge's contrary determination that a transaction did not objectively advance the company's main objects.

As a result of the territory which the drafters gradually gained on these fronts, it eventually became possible, if a company was careful to phrase its objects in the right way, to minimise the risk of its future acts being deemed void for want of capacity. This apparent victory for company promoters[13] had wider negative consequences. The doctrine of ultra vires remained as a trap for the unlucky and the unwary, while the usefulness of the objects clause in most companies' memoranda of association was severely diminished.[14]

The reputed difficulty of the ultra vires doctrine was exacerbated by this struggle. Alongside the increasingly difficult challenge of interpreting companies' complex and obscure memoranda, much of the difficulty and confusion which clouded the

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[10] Cotman v. Brougham [1918] AC 515; see below at 5.3.5: "The Assault on the Main Objects Rule of Interpretation".

[11] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656; [1966] 2 AER 674.

[12] See below at 5.3.6: "The Bell Houses Clause and the Directors' Subjective Appreciation".

[13] Corporate constitutions now contain "enabling powers and self-serving licences of a breadth and indulgence which our grandparents would have found unbelievable" - L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 169.

[14] L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, 79: "objects clauses tend to be longwinded and wide-ranging and cover setting out virtually every conceivable type of commercial activity".

doctrine of ultra vires resulted from the courts' view that even where an activity was, on its face, envisaged by a company's objects clause, its exercise in a particular instance fell nonetheless outside the company's capacity.[15] Ussher pithily describes this as the "transformation of apparent reality into confirmed illusion".[16]

On ordinary principles, one might assume that "an express object gives an unchallengeable power to make the payment."[17] However, it has been indicated that the reading down of the terms of the memorandum can involve many techniques which override the apparent scope of the objects clause,[18] by reference to genuineness[19] or a benefit test, and the determination that some activities cannot be objects.[20] Complication arises in particular from the corporate benefit test imposed in a long line of authorities, notably *In Re Lee, Behrens*.[21] This approach made the valid exercise of a company's capacity, as defined in the express terms of its objects clause, contingent on the act in question furthering the company's main objects.[22] This corporate benefit test approach contrasts with the preferable modern view of the law, as stated in *Rolled Steel*,[23] that the issue of benefit to the company properly pertains to the issue of directors' duties, but not to whether an act falls within the capacity of the company itself.[24]

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[15] See Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221, where a solicitor read the company's objects clause but failed to appreciate the want of capacity.

[16] P. Ussher, "Company Law – Validation of Ultra Vires Transactions" (1981) DULJ 76, 77.

[17] K.W. Wedderburn, "Ultra Vires and Redundancy" [1962] CLJ 141, 144.

[18] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 207-208.

[19] In Re Halt Garage Ltd [1982] 3 AER 1016.

[20] In Re Introductions Ltd [1969] 1 AER 887.

[21] In Re Lee, Behrens & Co Ltd [1932] 2 Ch. 46.

[22] See below at Chapter 6: "Powers, Corporate Benefit and Corporate Gifts".

[23] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52.

[24] See below at 7.2: "Rolled Steel: the Nail in the Coffin for Corporate Benefit".

The determination of every company's capacity must turn on the interpretation of its objects clause, its "self-evident touchstone".[25] The centrality of the objects clause in the area of corporate capacity ensured that the primary changes in the evolution of the ultra vires doctrine were effected through modifying the contents of companies' objects clauses. Although shifts in the practical implementation of the ultra vires doctrine for a long time resulted from an essentially private dialogue between drafters of corporate memoranda and judges, the legislator has also occasionally interjected. The most significant of these changes, striking at the foundations of the ultra vires doctrine, was the decision to permit companies freely to amend their objects clauses after registration.[26] In England, Parliament also overruled the judicial preference by expressly permitting general commercial objects.

If it might appear that the effect of all these changes has been to soften the harshness of the incapacity rule, and so reduce the potential for criticism, this has not proved to be the case. In fact, they challenge the ultra vires doctrine at two levels: not only do they permit many companies, in many circumstances, to escape the doctrine's realm, but they also undermine the justifications which support the limitation of corporate capacity.

5.2. SETTING THE STAGE: COMPETING FORCES AND PRESSURES

5.2.1. The Promoters' Quest for Broad Capacity

Vagueness and obfuscation is not the province of the businessman, but of the lawyer. Those setting up businesses initially specified remarkably precise objects,[27] until they saw the severe consequences this risked under the law on capacity. Company promoters consequently sought to draft objects which would withstand judicial scrutiny and confer on the company sufficiently broad capacity to engage in

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[25] B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26, 36.

[26] See below at 5.4.1: "The Alteration of Objects Clauses".

[27] In Re German Date Coffee Company (1882) Ch.D. 169; Stephens v. Mysore Reefs (Kangundy) Mining Company Ltd [1902] 1 Ch. 745.

a wide range of activities. The case law reveals a chain of action and reaction which links each stage of restrictive interpretation and ambitious drafting.

In the first place, the severe, uncompromising effects of incapacity underline the need to articulate clearly the business in which a new company intends to operate.[28] Care was required. Mistakes or doubts could be costly. Jones urges that companies provide at least for their "immediate and probable future requirements".[29] If the memorandum fails to convey the necessary capacity, this risks directors' personal liability and "considerable inconvenience" for the company.[30] This inconvenience was multiplied at a time when it was impossible to modify or enhance the objects of an existing company. If a company drafted its objects deficiently, excluding one of its intended activities, the necessary establishment of a new replacement company would involve a signal waste of time, money and effort.

It was unwise to define the company's business too narrowly or specifically. The cases in which a company was wound up for failure of substratum because its intended business was impossible,[31] though other profitable alternatives were available, show the prudence of avoiding overly specific objects. In *Re German Date Coffee Company*,[32] the memorandum was evidently designed with the sole purpose in mind of obtaining and working a particular patent in Germany. The narrowness of this definition of the company's business thwarted the majority, which was willing to work profitably either without a patent or with a patent from another jurisdiction.

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[28] See above at 4.2: "Sanctioning the Ultra Vires Act".

[29] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 140.

[30] A.J. Boyle & R. Sykes (eds), "Gore-Browne on Companies" 44th ed. (Jordans, loose-leaf, 1986), para. 3.002C.

[31] Cotman v. Brougham [1918] AC 515, 520 (per Lord Parker): "failure of substratum is a question of equity between a company and its shareholders. The question whether or not a transaction is ultra vires is a question of law between the company and a third party."

[32] In Re German Date Coffee Company (1882) Ch.D. 169; see L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79.

It is a short step from careful enunciation of the intended objects to attempting to exclude the operation of the rule altogether. It is hardly surprising that companies sought to avoid the potentially devastating consequences of inadequate capacity, by acquiring from the beginning a scope of capacity which would extend beyond their actual and current needs. From the perspective of the company, its management and shareholders, the ultra vires doctrine was a potential source of calamitous mischief in its business operations. Neither shareholders nor company management would actively choose to fetter their own capacity to engage in the transactions which they desired, and if the law sought to fetter them in this way, it is understandable that they would seek to evade the restrictions as much as possible. For the company, restrictions on the use of powers in the articles of association are preferable to limits on capacity.[33] From the perspective of shareholders, it is better that they retain the power to sanction corporate activities, even those which carry the potential for harm, than that they abdicate that power to the courts.

Jones adverts to a counter-argument for narrow capacity, asserting that company accountants were sometimes hostile to such moves for fear of losing out on tax advantages.[34] The risk would be that exceptional transactions, would, if they were covered by the companies' objects, be viewed as taxable. However, this countervailing concern must surely have been outweighed for the vast majority of companies by the desire to enjoy the freedom to take up the business opportunities which presented themselves.

Their efforts to describe robust and broad capacity led to developments which radically altered the practical scope of ultra vires. These developments occurred in the face of resistance by the courts, which challenged at every stage both the legitimacy of the objective of circumventing the ultra vires doctrine and the techniques employed.

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[33] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 87.

[34] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 136.

5.2.2. The Courts as Champions of Strictly Limited Capacity

If all the parties to the creation of a company were ranged against the ultra vires doctrine, the courts saw themselves as upholders of the public interest. The judiciary often expressed disquiet at what they perceived as attempts to evade the doctrine and so deny shareholders and creditors the protection they deserved. Judges disapproved of attempts by company promoters to obtain the benefit of limited liability while avoiding the countervailing restrictions on the corporate form.[35] In many cases, their opposition seems almost instinctive, and the arguments are not articulated. It is "not right"[36] or "ridiculous"[37] that a company should acquire virtually unlimited capacity, the words used "never can mean"[38] what they seem.

The ultra vires doctrine offered the judiciary an unusual power to intervene to control corporate activities which they regarded as inappropriate despite the acquiescence of members. Where they lacked other tools to strike down dubious or seemingly dishonest transactions, ultra vires was an effective solution to the problem. In addition, once the House of Lords had decided in *Ashbury*[39] that limited capacity ought to be an attribute of the registered company, attempts to avoid the doctrine automatically looked suspect. The zealous application of the doctrine was informed by the same mistrust of the corporation and conception of the limited nature of the existence the state permitted it as well as the policy interests which had informed its introduction, though these attitudes perhaps faded somewhat as time went by, thereby allowing resistance to the companies' offensives to subside.

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[35] "It has always been the ambition apparently of the commercial community to stretch the objects clause of a memorandum of association, thus obtaining the advantage of limited liability with as little fetter on the activities of the company as possible." – per Harman LJ, In Re Introductions Ltd [1970] 1 Ch. 199, 209.

[36] Stephens v. Mysore Reefs (Kangundy) Mining Company Ltd [1902] 1 Ch. 745, 749 (per Swinfen Eady J.).

[37] In Re Crown Bank (1890) 44 Ch. 634, 645 (per North J.).

[38] In Re German Date Coffee Company (1882) Ch.D. 169, 185 (per Jessel MR).

[39] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

The evolution of the rule also occurred against a backdrop which saw the registered company become firmly embedded in the commercial and legal landscape and the manifold other rules and protections of company law introduced and enhanced. This background perhaps partially explains, in addition to the legal arguments themselves, why the courts were eventually persuaded to accept changes and exceptions which would reduce the effect of the doctrine.[40]

5.3. THE INTERPRETATION OF OBJECTS CLAUSES

5.3.1. Restrictive Interpretation of the Objects Clause

Ashbury[41] set the stage for the conflict. Its main effect was to restrict the capacity of limited companies to actions warranted by their memorandum of association and render void any actions which exceeded this capacity.[42] In addition, *Ashbury* favoured a restrictive approach to interpreting objects clauses, based on the *ejusdem generis* or main objects rule of interpretation. Accordingly, subsequent provisions would be interpreted in the light of the context provided by the initial or principal provisions. Consequently, expansive clauses would be limited by reference to the main purpose of the company, as in *Ashbury*, where the object of acting as "general contractors" was limited by reference to the main purpose of the company. This would prevent companies from benefiting from drafting elaborate objects clauses, aimed to allow them to engage in any business, as those broad clauses would be read down by reference to the company's main objects.

In *Ashbury*, Lord Cairns L.C. ruled that, according to the principle of *ejusdem generis*, "words must be referred to the part of the sentence which immediately precedes them."[43] Since the "business of mechanical engineers and general

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[40] See eg Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656.

[41] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[42] See above at Chapter 3: "The Initial Application of the Doctrine of Ultra Vires to the Registered Company".

[43] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653, 664 (per Lord Cairns LC).

contractors" was a single object, the term "general contractors" must be limited by reference to the business of mechanical engineers, to encompass only those contracts connected to the business of mechanical engineers.[44] Once the objects clause was interpreted in this way, it followed that the contracts to purchase the concession to build a railway line fund and to fund it were not within the objects of the company. The Lord Chancellor preferred this restrictive interpretation as a matter of policy, as the alternative might permit any contract at all, rendering the objects clause "altogether unmeaning."[45] The implication is that allowing companies to carry on any commercial enterprise by drafting their objects in the broadest of terms would defeat the statutory requirement that they specify their objects, and that the *ejusdem generis* rule is therefore justified as a necessary complement to the ultra vires doctrine to give effect to the requirement to state objects.

The House of Lords reasoned that the impugned acts not only fell outside the terms of the stated objects, but, furthermore, subcontracting construction to another person was the reverse of the implication that the company's business was to act as contractors for others, and so contravened the spirit as well as the letter of the memorandum. This idea, that the terms of an objects clause might appear to enumerate a power, but that this departs from what the company's business is supposed to be, and so constitutes an abuse and must be read down, is inherently limitative. For these reasons, *Ashbury*[46] stands for a judicial approach designed to reject a more extensive capacity which might be described in a memorandum in favour of what is perceived as the company's proper, sufficiently-focused capacity. Salmon J. later described the *main objects* rule as requiring that activities described after the first one, two or three "main objects" of a company be regarded as merely ancillary and restricted to serving that principal purpose.[47] In his view, the laudable

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[44] Ibid, at 665.

[45] Ibid, at 665.

[46] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[47] Anglo-Overseas Agencies v. Green [1961] 1 QB 1, 8 (per Salmon J.): "where a memorandum of association expresses the objects of the company in a series of paragraphs, and one paragraph, or the

purpose of the main objects rule of strict construction, like the purpose of the ultra vires doctrine itself, was to protect shareholders by informing them precisely how their investment could be used.[48]

This is consistent with the focus in *Re German Date Coffee Company*[49] on the main purpose or substratum of a company. According to Kay J., where the objects clause clearly specifies the company's fundamental purpose, then the express objects must be interpreted as ancillary to this main purpose.[50] The failure of substratum authorities permitted the winding up of the company if this specific main business for which the company was formed failed.[51] Kay J. speaks of "the first purpose, the main object"[52] and "the main and principal object".[53] Everything else must be "subsidiary and auxiliary".[54] As a result, though a memorandum might contain seemingly expansive powers,[55] the words' significance must be limited by being "regarded as ancillary to the purport of the scheme for which the company was formed."[56]

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first two or three paragraphs, appear to embody the 'main object' of the company, all the other paragraphs are treated as merely ancillary to this 'main object', and as limited or controlled thereby."

[48] Ibid, at 8 (per Salmon J.).

[49] In Re German Date Coffee Company (1882) Ch.D. 169; see L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79.

50 In Re German Date Coffee Company (1882) Ch.D. 169, 177: "where on the face of the memorandum you see there is a distinct purpose which is the foundation of the company".

[51] Baring v. Dix 1 Cox 213; In Re Suburban Hotel Company Law. Rep. 2 Ch. 737; Haven Gold Mining Company 20 Ch. D. 151; see above at 4.2.2: "Winding Up for Failure to Pursue Proper Objects".

[52] In Re German Date Coffee Company (1882) Ch.D. 169, 179.

[53] Ibid, at 183.

[54] Ibid, at 183.

[55] Ibid, at 183: "a variety of general words added which, if they are to be construed by themselves, would give powers to carry on almost any possible business".

[56] Ibid, at 187 (per Baggallay LJ).

In a similar move, *In Re Crown Bank*[57] limited the meaning to be attributed to the memorandum of association by reference to the company's name. However, *Cotman v. Brougham*[58] later refined the approach of *In Re Crown Bank.*[59] Lord Parker confirmed that the company's name "being part of the memorandum, can, of course, be considered."[60] However, it could not be used to cut down the obvious meaning in the absence of ambiguity.[61] Lord Parker added that though a company could change its name, this should not affect its capacity.[62]

The restrictive interpretation of clauses in the memorandum by reference to the main objects or name of the company represents a broader trend in judicial interpretation, in which the words used may be construed narrowly in the light of the judges' perception of what the business objects of the company are supposed to be.

5.3.1.1. Early decisions emphasised reasonableness

While observers often characterise the application of the doctrine in its early stages as relentlessly harsh and unforgiving, it was not uniformly so. Street asserts that commercial trading companies benefited from a generous interpretation of their objects clauses.[63] Certain authorities point to a more flexible application.

For example, Lord Campbell in *Simpson v. Westminster Palace Hotel Company*[64] takes a reasonably broad view of the powers of a company, ruling that on the facts

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[57] In Re Crown Bank (1890) 44 Ch. D. 634.

[58] Cotman v. Brougham [1918] AC 515.

[59] In Re Crown Bank (1890) 44 Ch. D. 634.

[60] Cotman v. Brougham [1918] AC 515, 521 (per Lord Parker).

[61] Ibid, at 521 (per Lord Parker).

[62] See also F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 106.

[63] H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), p. 58.

[64] Simpson v. Westminster Palace Hotel Company (1860) 8 HLC 712.

the arrangement to lease out its hotel was not ultra vires. He attaches importance to the fact that the unforeseen business had not displaced that envisaged in the company's objects clause and that the directors were not engaged in "any new undertaking".[65] He gives effect to the incidental objects clause in the company's memorandum, accepting the assertions of management and shareholders that this arrangement was advantageous to the company's business. The arrangement was profitable and temporary. Therefore, since the company's main object continued and the arrangement furthered that object, it was within the powers of the company. This finding that, though the company's capacity might be limited, the lease of the building fell within it hints at a more liberal approach than that which was to be adopted in *Ashbury*.[66] Similarly, in *Lyde v. Eastern Bengal Railway Company*,[67] Lord Romilly M.R. suggested that a railway company might legitimately operate a coal mine, if it served its main business, though it could not do so with the primary aim of entering the coal trade.[68]

One of the oft-cited authorities which followed soon after *Ashbury*[69] is known for emphasising the merits of reasonableness. *Attorney-General v. Great Eastern Railway Company*[70] confirmed the application of ultra vires to registered companies.[71] It is also significant for the House of Lords' insistence that the ultra vires rule must be applied reasonably. It stipulated that it was within the powers of a company to engage in actions which were envisaged either by objects or by powers which were incidental to the principal object, even if these were not included in the

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[65] Ibid, at 717 (per Lord Campbell LC).

[66] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[67] Lyde v. Eastern Bengal Railway Company (1866) 36 Beav 10.

[68] Ibid, at 16-17: "If, in truth, the real object of the colliery was to supply the railway with cheaper coals, it would be proper to allow the accidental additional profit of selling coal to others; but. If the principal object of the colliery was to undertake the business of raising and selling coals, then it would be a perversion of the funds of the company".

[69] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[70] AG v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473.

[71] See above at 3.3.7: "The Doctrine Takes Root".

memorandum.[72] This recognises the existence of implied powers, which, though not stated in the objects clause, may be inferred as necessary for the company to carry out its business.[73]

The company was a statutory corporation. It contracted with another railway company to provide and maintain trains and to haul traffic on a particular railway line. However, the arrangement between the companies was subsequently challenged as ultra vires. The question was whether, under the Act, the railway company was authorised to hire out its engines and carriages.[74] The House of Lords established that the doctrine of ultra vires, while binding, must be applied reasonably, and that companies' capacity extends to acts which are incidental to their main purposes. Although he viewed it as important to retain the rule on limited capacity, Lord Selborne conceded that it should be applied reasonably. Such reasonable construction included recognising companies' capacity to do things which were incidental to their official objects.[75] This statement was obiter in this case, as the acts concerned in this case were expressly authorised by the Act.[76] Instead, the dispensation for incidental powers would save acts which were "on the border line between authority and no authority", where they assisted the exercise of express objects.[77] In this way, the decision directly enshrined the concept of implied powers. As a result, companies are deemed to possess, in addition to all that is expressly provided for in their objects clauses, those further powers that are

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[72] See also: Small v. Small (1885) 10 App. Cas. 119; Deuchar v. Gas Light and Coke Company [1925] AC 691; Attorney-General v. Smethwick Corporation [1932] 1 Ch. 562.

[73] See also Foster v. London, Dover & Chatham Ry [1895] 1 QB 711.

74 AG v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473, 478 (per Lord Selborne LC).

[75] Ibid, at 478 (per Lord Selborne LC): "this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*."

[76] Ibid, at 478-479 (per Lord Selborne LC).

[77] Ibid, at 478 (per Lord Selborne LC).

incidental to or necessary in order to further their express purposes. However, it is not enough that the powers sought "can conveniently or advantageously be done or carried on in conjunction with" the companies business;[78] they must further the company's objects.[79]

It might reasonably have been expected before this authority that companies must automatically possess certain powers necessary to do business and attain their objects. Powers of this kind are not required to be enumerated in objects clauses[80] and Lord Wrenbury confirmed unequivocally in *Cotman v. Brougham*[81] that they should not be.[82] *Attorney-General v. Great Eastern Railway Company*[83] makes it absolutely clear that such powers as are appropriate will be granted to companies, without being specified. In doing so, it favours the type of short, clear objects clause which would fulfil its informational purpose, unlike the more restrictive rulings which resulted in increasingly complex and confusing clauses. Yet, although necessary powers would be implied under this authority, companies nonetheless cautiously included an express object confirming that they possessed necessary incidental powers.[84]

The existence of implied powers does not undermine the ultra vires doctrine because, when supplementing the express contents of the objects clause, only those

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[78] Bell Houses Ltd v. City Wall Properties Ltd [1966] 1 QB 207, 228 (per Mocatta J.).

[79] Further, even an express power to do all that was incidental, interpreted on its own terms, could not be used to establish new business - London Financial Association v. Kelk (1884) 26 Ch. D. 107.

[80] By Section 12, Joint Stock Companies Act, 1862.

[81] Cotman v. Brougham [1918] AC 515.

[82] Ibid, at 522 (per Lord Wrenbury): "Powers are not required to be, and ought not to be, specified in the memorandum."

[83] AG v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473.

[84] Eg "to do all such other things as may be deemed to be incidental or conducive to the attainment of the above objects or any of them"; see In Re Baglan Hall Colliery Company (1870) 5 Ch. App. 346; Simpson v. Westminster Palace Hotel Company (1860) 8 HCLC 712; Taunton v. Royal Insurance Company (1864) 2 H. & M. 135; In Re Peruvian Railways Company (1867) LR 2 Ch. 617.

powers which could reasonably be implied would be allowed, and anything which was not reasonably incidental would remain outside the company's capacity. Parliament may have impliedly permitted certain activities in addition to those expressly envisaged, but everything else remains unauthorised.[85]

The dual effect of *Great Eastern Railway Company* was that *Ashbury*'s position was confirmed, but the doctrine would not be applied so as to constrict unreasonably the scope of corporate capacity. It is a counterpoint to the corporate benefit test which restricted the use of express powers. It operates to the opposite effect: it expands the company's capacity beyond what is spelled out by reference to activities which further the corporate aims.

Writing in 1879, Field confidently believes that the tendency of the courts is to adopt an expansive view of capacity. He regards the many instances of liberal interpretation as unsurprising, reflecting judicial willingness to save parties from the ultra vires doctrine.[86] This view is contrary to the later assumption of judicial hostility. Either the liberal early cases were exceptions to the true trend towards the restriction of corporate capacity, or the approach of the courts only later hardened into the familiar restrictive interpretation. Anderson views *Great Eastern Railway Company* as the beginning of the "relaxation" of the doctrine,[87] but if so, the doctrine has been in decline almost since its inception and, in any case, this neglects the later rigidity of the doctrine. It is perhaps more meaningful to acknowledge that

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[85] AG v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473, 481 (per Blackburn J.): "where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited."

[86] G.W. Field, "Ultra Vires" (1879) 13 American Law Review 632, 643, 645: "These and many other instances of liberal construction of corporate powers indicate the disposition of courts to relieve parties, as far as possible, from the odious plea of ultra vires [...] It is not remarkable, therefore, that the courts are inclined to extend by construction the powers of private corporations".

[87] J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 263, 270.

there has always been a strand of liberality, but that the true tipping point would come much later, in the 1960s.[88]

5.3.2. The Attempt to Draft All-encompassing Objects Clauses

Despite hints at a generous approach in certain early cases[89], the predominant approach followed that adopted in *Ashbury*. As a rule, the courts were inclined to interpret the terms of objects clauses narrowly. In response, those drafting companies' constitutions who desired unlimited capacity tried two alternative strategies. The first was to express briefly that the capacity of the company was as broad and all-encompassing as possible; the second, to enumerate a multitude of different aims in the hopes of creating as exhaustive a list as possible. Other technical devices were inserted in attempts to force reluctant courts to interpret the objects with the broad scope desired by the drafters.

5.3.3. The Short and Broad Approach

5.3.3.1. How broad may a company's objects be?

Since those drafting memoranda of association in principle possess the power to secure for the company their desired capacity, the first, obvious approach is simply to express the object of the company in terms as wide and general as possible. Early drafters must soon have considered something along the lines of the "general commercial company" object, recently permitted under UK law,[90] if only contemplating it briefly before rejecting it in favour of a more prudent, exhaustive approach. The controversy relating to a broad enunciation of capacity is whether such a clause fulfils the requirement of the Companies Acts that objects be specified. Ultimately, it appears that once the Registrar of Companies has accepted

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[88] See Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656; Charterbridge Corporation v. Lloyd's Bank [1970] Ch. 62; In Re New Finance and Mortgage Company Ltd [1975] 1 Ch. 420.

[89] Simpson v. Westminster Palace Hotel Company (1860) 8 HCLC 712; AG v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473.

[90] Section 3A, Companies Act, 1985; inserted by Section 110, Companies Act, 1989 (UK).

a memorandum of association, it constitutes a valid statement of objects, but there has been much judicial resistance to giving such objects their full intended effect.

Baker speculated in 1966 that memoranda could be phrased so as to permit the broadest of activities. He dismissed an object "to carry on any business whatever which the directors might think profitable" as an inadequate primary delimitation of objects,[91] but suggested that such an object might be acceptable in combination with other purposes.[92] One advantage of brief, all-encompassing objects along these lines would be "to reduce the prolixity of modern memoranda of association".[93] In addition, it would assist the security of transactions, counteracting the potential for contracting parties to fall foul of the doctrine.[94] This reflects the fact that permitting expansive general objects would enable companies effectively to circumvent the restrictions on their capacity, sidelining the ultra vires doctrine. The conflicting perspectives on broad objects directly mirror the competing views on the ultra vires doctrine itself.

On the other hand, from the standpoint which views the ultra vires doctrine itself as beneficial for the protection of shareholders, broad and general objects must not be permitted to subvert it. Lindley L.J. in *Re German Date Coffee Company*[95] views the subordination of "general words [which] construed literally may mean anything"[96] to the main object as necessary for the protection of shareholders. The imperative is to avoid the general words becoming "a trap for unwary people".[97]

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[91] See In Re Crown Bank (1890) 44 Ch. 634, 644.

[92] P.V.B., *Notes* (1966) 82 LQR 463, 465 : "a memorandum which stated one or more specified objects and then went on to authorise "any other business which the directors might think profitable" coupled with the declaration that each paragraph was to be construed independently".

[93] Ibid, at 465.

[94] Ibid, at 465.

[95] In Re German Date Coffee Company (1882) Ch.D. 169.

[96] Ibid, at 188.

[97] Ibid, at 188.

The main object is "the thing for which the people subscribe their money".[98] Therefore, it would be an abuse to allow the company to change its business dramatically from that on which the investors had relied, under the aegis of general terms in the objects clause.

In Re Crown Bank[99] directly demonstrates the readiness of the courts to cut down an exceedingly broadly drafted objects clause. Though the memorandum in question was of the exhaustive variety, including "numerous and wide" objects,[100] North J. also expressed hostility to short, sweeping objects. The company was established as a bank, but instead traded in stocks and shares. Its broadly drafted objects apparently covered these activities[101] but a number of shareholders sought to have it wound up. North J. described as "ridiculous" and "absurd" the idea that the memorandum could convey virtually unlimited capacity.[102]

In addition, North J. expressed the opinion that if an objects clause were drafted too widely, it would not satisfy the requirement of the Joint Stock Companies Act, 1862.[103] Accordingly, he asserted that an object to engage in any activity which the company viewed as profitable[104] would not comply with the statutory requirement and would not constitute a statement of objects at all.[105] Harman L.J. later echoed

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[98] Ibid, at 188.

[99] In Re Crown Bank (1890) 44 Ch. 634.

[100] Ibid, at 641.

[101] In Re Crown Bank (1890) 44 Ch. 634, 635: "all banking and monetary operations, and [...] the acquisition and holding or resale of real and personal estate either by way of security, investment or otherwise"

[102] Ibid, at 645; During counsel's argument, North J. interjected that the objects in this case were wide enough to supposedly allow it to establish a line of balloons to the moon.

[103] Ibid, at 644-645.

[104] Ibid, at 644: "to carry on any business whatever which the company might think would be profitable to the shareholders".

[105] Ibid, at 645.

this view in *Re Introductions*,[106] observing that "you cannot have an object to do every mortal thing you want, because that is to have no object at all".[107] Building on the premise that a company's objects must be limited to be valid, North J. in *Re Crown Bank*[108] refers to the prospectus[109] and the name of the company[110] to limit the meaning which can be attributed to terms in the objects clause by reference to the intent which the words sought to express. He concludes that, once the objects were construed in the light of the company's intended business, the memorandum could not authorise activities entirely unrelated to banking.[111]

This ruling might seem to found an excessively rigid view of capacity, by limiting companies to just one primary business, and subjecting express objects to the condition that they form part of this business. It was later acknowledged that a company could have "two or more definite different objects", if these were clearly identified.[112] Alternatively, North J.'s decision may be viewed as related to the facts of the particular case, where the company had departed from the single purpose for which it was founded, rather than as a dogmatic statement of principle to be applied to all companies. Salmon L.J. in *Bell Houses Ltd v. City Wall Properties Ltd*[113] argues for a restrictive interpretation of *Crown Bank*, closely linked to the issues of failure of substratum and just and equitable winding up.[114]

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[106] In Re Introductions Ltd [1970] 1 Ch. 199.

[107] Ibid, at 209 (per Harman LJ); see also Stephens v. Mysore Reefs (Kangundy) Mining Company Ltd [1902] 1 Ch. 745, 750 (per Swinfen Eady J.): "A mere stringing together of a large number of very wide powers does not satisfy that section".

[108] In Re Crown Bank (1890) 44 Ch. 634.

[109] Ibid, at 643.

[110] Ibid, at 644.

[111] Ibid, at 645.

[112] Stephens v. Mysore Reefs (Kangundy) Mining Company Ltd [1902] 1 Ch. 745, 750 (per Swinfen Eady J.).

[113] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656.

[114] Ibid, at 691 (per Salmon LJ).

5.3.3.2. Does shareholder protection justify rejecting broad objects?

The *Crown Bank*[115] case rests on the assumption that a company's objects must be restricted in order to protect shareholders. The genuine problem was that the shareholders had invested on foot of prospectus stating that the business of the company was to be banking, and this business continued for little more than a year. Thus, the plaintiff shareholders may have felt cheated and that their investment was being misapplied. The problem was real, but was the solution appropriate?

The ultra vires doctrine was used to combat this mischief by excluding capacities which the company had purported to confer on itself, allowing the company to be wound up. However, from the circular sent to members, it seems the company's expansion of business was not due to dishonesty, but because the original business failed to prosper.[116] In such circumstances, it seems that imposing the winding up of the company, which may or may not be engaged profitably in its new line of business, is potentially a drastic interference with the business decisions of the majority of shareholders and the management. Had the court accepted that the company might possess the capacity it claimed, the plaintiff might have had an alternative, more proportionate remedy. Counsel for the bank argued that the shareholders would have been able to have their shares cancelled if the divergence between the prospectus and the business of the company constituted misrepresentation. Even if this legal avenue were not available, might they not have sold their stake in the company if it engaged in different business within its capacity to that which had led them to invest? Surely the convenience to these dissentient shareholders of treating the change in focus as excess of capacity sufficient to ground winding up must be weighed against the inconvenience to the company as a whole, including what may have been the majority of shareholders. Perhaps some other shareholders had subscribed precisely because the memorandum appeared to confer wide powers to engage in new activities. In the event, the arrangement which the shareholders ultimately entered into for those who supported the new business to

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[115] In Re Crown Bank (1890) 44 Ch. 634.

[116] Ibid, at 639.

buy out those who opposed it shows both that it was not in the commercial interests of the parties for the company to be wound up, and that a sale of their shares was a sufficient remedy for those who took the action.

More broadly, is it the case that broad objects disproportionately endanger shareholders? Dine asserts that the ultra vires doctrine ceased to be protective when exceedingly widely drafted objects became possible.[117] To an extent, this assertion is true. Goulding J. in *Re New Finance and Mortgage Company*,[118] even while giving the objects before him broad meaning, acknowledges that a "loosely drawn" objects clause is of little "real value" to potential members or trading partners.[119] Wide objects reduce the informational value of memoranda, but they also facilitate flexibility and shield transactions from the risk of invalidity.

It is not entirely true that an object which permits the company to do all things is not an object at all. Such a clause, though broad, would nonetheless be informative. Shareholders could examine the company's memorandum before investing and choose to avoid companies with wide objects clauses if they required the comfort of knowing the company's business would be limited to specified activities. This is the logic expressed in *Bell Houses Ltd v. City Wall Properties Ltd.*[120] Accepting the premise that shareholders subscribe if they agree to the terms of the memorandum, why is it necessary to restrict the options which might be put by the company to its prospective members?[121] Perhaps other shareholders in *Crown Bank*[122] would have been happy to invest on the basis that if the proposed business proved fruitless, the company would use the broad powers in its memorandum to engage in alternative ventures. The very fact of a memorandum stating that the company could engage in business of any kind would arguably serve as sufficient warning to those proposing

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[117] J. Dine, "Company Law" 3rd ed. (Macmillan, 1998), p. 44.

[118] In Re New Finance and Mortgage Company Ltd [1975] 1 Ch. 420; noted at [1974] JBL 234.

[119] Ibid, at 425; see also Anglo-Overseas Agencies Ltd v. Green [1961] 1 QB 1, 8.

[120] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656.

[121] See Danckwerts LJ, Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656, 686.

[122] In Re Crown Bank (1890) 44 Ch. 634.

to deal with it that drastic changes in operations could occur. Certainly, it would defeat the purpose of the Act if every company adopted such a clause, but if the contents of a company's constitution are really relied upon by outsiders, such companies would find it more difficult to secure investment than those which stated their business clearly and unambiguously.

The reading down of broad express objects goes a step beyond *ultra vires* to *ultra vires extra*. It is not a necessary concomitant of the general principle of limited capacity. The *ejusdem generis* rule is not indispensable to enable prospective investors to understand the capacity of the company. What is important is that the rules of interpretation employed should be certain, and ideally logical, so that shareholders can trust to their own reading of the constitution.

The interpretation of objects clauses by the application of the *ejusdem generis* principle in *Ashbury*[123] may have offered some protection to investors by reducing the risk of unobtrusive phrases tucked away deep in the clauses of objects expanding capacity in an unexpected direction. However, turning to external factors such as the company's name and prospectus goes a stage further, and is harder to justify at the level of principle.[124] The memorandum is the fundamental document, and it seems inappropriate to subordinate it to external, secondary sources.

5.3.3.3. Acceptance of broad objects

If the early cases show a marked hostility to broad objects, a number of more recent cases demonstrate a new approach. Since the 1970s, the courts are more willing to countenance permissive objects. In *Bell Houses Ltd v. City Wall Properties Ltd*,[125]

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[123] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[124] Goulding J. refuses to endorse the reliance on external materials, saying, "North J., rightly or wrongly, looked at a prospectus and at a circular" - In Re New Finance and Mortgage Company Ltd [1975] 1 Ch. 420, 425.

[125] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656; see below at 5.3.6: "The Bell Houses Clause and the Directors' Subjective Appreciation".

Salmon L.J.[126] rejects the views expressed by North J. in *Re Crown Bank.*[127] Polack suggests that these dicta seem to indicate that the courts would now accept a clause stating that the objects of a company were "to carry on any business whatever which the company might think would be profitable to the shareholders", once it was registered by the Registrar of Companies.[128] Since then, other authorities demonstrate the acceptance and broad construction of particularly wide objects.[129]

In Re New Finance and Mortgage Company[130] provides an example of an exceptionally broad object, which covered a wide range of financial and commercial activities, culminating in the phrase, "and merchants generally".[131] The company operated two petrol stations its fuel supplier lodged a proof in its winding up. The liquidator rejected the claim on the ground that the business in which the company had been engaged was ultra vires.[132] Goulding J. focused on the "linguistic problem" of interpreting the objects clause.[133] In layman's terms, a "merchant" would be understood as "any trader who buys and sells to make a profit".[134] The fact that the "very first" objects clause was so broad distinguished this case from *In Re Crown Bank,*[135] where the company could be said to have a "true primary object"

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[126] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 WLR 1323, 1342 (per Salmon LJ).

[127] In Re Crown Bank (1890) 44 Ch. D. 634.

[128] K. Polack, "Company Law - Ultra Vires - Construction of Objects Clauses" [1966] CLJ 174, 176-177.

[129] M. Forde & H. Kennedy, "Company Law", 4th ed., (Round Hall Sweet & Maxwell, 2007), pp. 58-59.

[130] In Re New Finance and Mortgage Company Ltd [1975] 1 Ch. 420; noted at [1974] JBL 234.

[131] Ibid, at 423: "business as financiers, capitalists, concessionaires, bankers, commercial agents, mortgage brokers, financial agents and advisers, exporters and importers of goods and merchandise of all kinds, and merchants generally."

[132] The voluntary winding up had begun before the coming into operation of Section 9(1) of the European Communities Act 1972.

[133] In Re New Finance and Mortgage Company Ltd [1975] Ch. 420, 423.

[134] Ibid, at 425.

[135] In Re Crown Bank (1890) 44 Ch. 634.

by reference to which subsequent objects could be interpreted limitatively.[136] Goulding J. characterised the real dilemma facing the court as whether to read the phrase "and merchants generally" as limited by the preceding reference to exporters and importers of merchandise, or to interpret this as extending the company's objects to engaging in "all purely commercial occupations".[137] He chose the latter, more extensive interpretation, which was wide enough to include operating a filling station. This broad construction, while it does not directly challenge the earlier view that objects must necessarily be limited, shows that the courts now accept very broad objects without feeling obliged to read them down.

The trend of allowing companies to have ever broader objects continued with *Newstead (Inspector of Taxes) v. Frost.*[138] In *Newstead*, a television entertainer sought to reduce his United Kingdom tax liability for overseas earnings by entering into a partnership agreement with a Bahamian company. This scheme was challenged by the Revenue, which argued that the partnership was invalid because it was ultra vires the company's objects. Its memorandum, whose latitude surpasses that of *In Re New Finance and Mortgage Company*,[139] went further. In addition to the list of specific professions provided for, it extends to "all kinds of [...] other operations" and all transactions that "an individual capitalist" may conduct.[140] The taxpayer won his case at every level. The Court of Appeal interpreted the words "other operations" widely, in the context of the clause's prior reference to "bankers, capitalists, financiers, concessionaires and merchants".[141] The House of Lords also

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[136] In Re New Finance and Mortgage Company Ltd [1975] Ch. 420, 425.

[137] Ibid, at 428.

[138] Newstead (Inspector of Taxes) v. Frost [1980] 1 WLR 135.

[139] In Re New Finance and Mortgage Company Ltd [1975] 1 Ch. 420; noted at [1974] JBL 234.

[140] "To carry on business as bankers, capitalists, financiers, concessionaires and merchants and to undertake and carry on and execute all kinds of financial commercial trading or other operations and generally to undertake and carry out all such obligations and transactions as an individual capitalist may lawfully undertaken and carry out."

[141] Newstead (Inspector of Taxes) v. Frost [1978] 1 WLR 1441.

upheld the agreement. Viscount Dilhorne's speech seems to suggest that "other operations" could be taken to mean every conceivable type of transaction.[142]

According to Pettet, it is unclear whether the decision of the House of Lords in *Newstead* rejects the established principle that a company could not have unlimited objects.[143] He suggests that the decision did reject this position, but it did so without expressly discussing the novelty of its position. He criticises the ambiguity present, since, if it is correct that the words "other operations" could cover "any lawful activity", then the usual detailed list of company objects has become redundant.[144] Indeed, the trend to ever broader statements of objects could be said to constitute an almost complete undermining of the importance of the statement of objects itself. The long established principle, set forth in *Re Crown Bank*,[145] that objects must be finite in order to meet the statutory obligation to state them in a company's memorandum of association, was seemingly removed in *Newstead.* Referring to Harman L.J.'s dismissal of unlimited objects clauses in *Re Introductions*,[146] Pettet observes that unlimited objects are at least arguably permissible since *Newstead (Inspector of Taxes) v. Frost.*[147]

While some uncertainty may remain, it is evident that the courts now take a significantly different approach from the older authorities such as *In Re Crown Bank.*[148] Their newfound tolerance of broad objects probably reflects the wider swing against the ultra vires doctrine. In the early cases, the courts sought to limit capacity as much as possible, in the interests of protecting shareholders, but as time

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[142] Newstead (Inspector of Taxes) v. Frost [1980] 1 WLR 135, 141: "I doubt if the business of the partnership is properly to be described as a commercial operation, but if it is not a financial or commercial operation it certainly is covered by the words 'all kinds of. other operations.'"

[143] B.G. Pettet, "Unlimited Objects Clauses?" (1981) 97 LQR 15, 18.

[144] Ibid, at 17.

[145] In Re Crown Bank (1890) 44 Ch. D. 634, 644 (per North J.).

[146] In Re Introductions Ltd [1970] 1 Ch. 199, 209.

[147] Newstead (Inspector of Taxes) v. Frost [1980] 1 WLR 135.

[148] In Re Crown Bank (1890) 44 Ch. 634.

passed, ultra vires came to be perceived as more harmful than beneficial.[149] In addition to changing perspectives on the issue of ultra vires, other developments might have favoured the courts' willingness to attribute to objects clauses the meanings intended by their writers. For example, whatever doubts might have been expressed in *Re Crown Bank*[150] or *Re Introductions*[151] as to the sufficiency of unlimited objects, it had been accepted in *Cotman v. Brougham*[152] that, while excessively broad objects were undesirable,[153] registration of the company rendered moot subsequent judicial musings on the adequacy of an objects clause.[154]

If the disfavour of the ultra vires doctrine informed the recognition of broad objects, the acceptance of potentially unlimited objects clauses feeds back into the decline of the doctrine. Given the importance in the *Ashbury*[155] rationale of Section 12 and the requirement for the company to state objects, which were both limited and unalterable, the judicial development which reached its high point in *Newstead*[156] logically undermined the rationale for maintaining the ultra vires doctrine itself.

Statutory reform in the United Kingdom subsequently explicitly permitted general commercial objects, though this is not currently possible in Ireland.[157] It is likely

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[149] "Jenkins Report", Board of Trade Company Law Committee Report (1962) Cmnd 1749, paras. 35-42; Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656; [1966] 2 AER 674 has been identified as the moment of a major shift in judicial attitudes to ultra vires - J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 91.

[150] In Re Crown Bank (1890) 44 Ch. D. 634.

[151] In Re Introductions Ltd [1970] 1 Ch. 199, [1969] 1 AER 887.

[152] Cotman v. Brougham [1918] AC 515.

[153] Ibid, at 522 (per Lord Wrenbury).

[154] Ibid, at 518 (per Lord Finlay LC); Polack explains that it was only in 1900 that registration became absolutely conclusive - K. Polack, "Company Law - Ultra Vires - Construction of Objects Clauses" [1966] CLJ 174, 176.

[155] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[156] Newstead (Inspector of Taxes) v. Frost [1980] 1 WLR 135.

[157] Section 3A, Companies Act, 1985; inserted by Section 110, Companies Act, 1989 (UK).

that broad objects of the kind approved in *Re New Finance and Mortgage Company*[158] would similarly be upheld here. However, the prudence of drafters of corporate constitutions has rendered the alternative strategy of registering long, exhaustive lists of objects more popular.

5.3.4. The Phenomenon of Long and Complicated Objects Clauses

If the courts were long sceptical of a simple clause purporting to confer wide powers, the other approach adopted by drafters was to list out a multitude of activities in the hope of naming every conceivable transaction. In *Cotman v. Brougham*,[159] Lord Parker discusses the practice of adopting long objects clauses, explaining it by reference to the preference of those engaged in commerce for the security conferred by express authorisation for proposed transactions. Buckley J. in *Re Introductions*[160] characterises long objects clauses of this kind as involving,

> "a number of objects or powers about as diverse in their character as the topics of conversation proposed by the walrus to the carpenter, but in many a case much more numerous"[161]

In *Cotman v. Brougham*,[162] Lord Wrenbury also criticises the adoption of long and complicated objects clauses as contrary to the purpose of the requirement to state objects. He considers that the effect of the practice is to "bury beneath a mass of words the real object" of the company.[163] Although this practice has repeatedly been

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[158] In Re New Finance and Mortgage Company [1975] 1 Ch. 420; noted at [1974] JBL 234.

[159] Cotman v. Brougham [1918] AC 515.

[160] In Re Introductions Ltd [1968] 2 AER 1221; [1970] 1 Ch. 199.

[161] In Re Introductions Ltd [1968] 2 AER 1221, 1223.

[162] Cotman v. Brougham [1918] AC 515.

[163] Ibid, at 523 (per Lord Wrenbury): "the function of the memorandum is taken to be, not to specify, not to disclose, but to bury beneath a mass of words the real object or objects of the company with the intent that every conceivable form of activity shall be found included somewhere within its terms."

criticised in judicial decisions, it is possible because there is no statutory limit on the number of a company's objects.[164]

In addition to stating their objects, actual and potential, companies also filled their memoranda with lists of the powers they might need to pursue them. Powers are acts which a company does in the course of business which are not ends in themselves but a necessary part of doing business in pursuit of its objects.[165] Commercial companies generally possess implied powers including borrowing,[166] settling disputes,[167] and mortgaging property.[168] Powers do not need to be listed in the memorandum of association.[169] *Attorney-General v. Great Eastern Railway Company*[170] confirmed that a company's capacity extends to those acts which are necessary to pursue its objects. Nonetheless, the practice evolved of listing out powers as well as objects. According to Lord Parker, since the implied powers of a company depend on its circumstances, there was a perception of risk in relying on the necessary powers being implied.[171] Company promoters and those dealing with companies believed that the expression of powers offered greater security than relying on the courts to infer them. The enumeration of powers as well as objects contributed to the development of long, uninformative objects clauses.

Although companies themselves had the power of writing objects clauses, the courts retained the power of interpreting them. Thus, the enumeration of a multitude of

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[164] Ibid, at 520.

[165] Attorney-General v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473; Attorney-General v. London County Council [1901] 1 Ch. 781; In Re Introductions Ltd [1970] 1 Ch. 199; see below at 6.1: "Powers and Objects".

[166] General Auction Estate Company v. Smith [1891] 3 Ch. 432.

[167] Bath's Case (1878) 6 Ch. D. 334; In Re Irish Provident Assurance Company [1913] 1 IR 352.

[168] In Re Patent File Company (1870) LR 6 Ch. 83.

[169] Cotman v. Brougham [1918] AC 515, 522 (per Lord Wrenbury).

[170] AG v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473.

[171] Cotman v. Brougham [1918] AC 515, 520:."Even a power to borrow money could not always be safely inferred, much less a power such as that of underwriting shares in another company."

possible activities met the substantial obstacle of the courts' restrictive approach to interpretation. Since *Ashbury*,[172] the "main objects" principle was "the first response of the courts"[173] to companies' attempts to expand their capacity. This interpretation denied objects clauses their full effect, on the basis that the existence of the activities enumerated was subsidiary to the company's main purpose.[174]

5.3.5. The Assault on the Main Objects Rule of Interpretation

Cotman v. Brougham[175] provided the tool for companies to escape the application of the *ejusdem generis* principle. This was a clause expressly designed to oust the main objects rule. Although the House of Lords disapproved strongly of the broad objects and this "main objects" clause in the company's memorandum, it was constrained to hold that the company had not exceeded its capacity. The Lords Justice stated that once an objects clause had been accepted by the Registrar of Companies, it was not possible for the courts to declare it invalid. Thus, in *Cotman v. Brougham*,[176] as the objects set out in the memorandum were not sufficiently clear for it to be possible to identify the company's principal object, it was also impossible to limit the other objects by reference to a main object.

The company in *Cotman v. Brougham*[177] underwrote a share issue by another enterprise. It was allotted a block of shares, for which it owed a balance to the second company. When both companies were wound up, the subscribing company was listed as a debtor of the other. Its liquidator applied to have it removed from the

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[172] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[173] D. Cahill, "Corporate Finance Law" (Round Hall, Dublin, 2000), p. 284.

[174] In Re German Date Coffee Company (1882) Ch.D. 169, 187 (per Baggallay LJ): objects "must be taken within certain limits [...] they must be regarded as ancillary to the purport of the scheme for which the company was formed."

[175] Cotman v. Brougham [1918] AC 515.

[176] Ibid.

[177] Ibid.

list, claiming its share application had been ultra vires. The application was dismissed by Neville J., a decision affirmed up to and including the House of Lords.

The company's memorandum contained a "vast variety" of objects.[178] Under the *Ashbury*[179] rules of interpretation, these would be interpreted restrictively by reference to the company's main objects. However, the final clause contained an "extraordinary" provision, which purported to prevent the terms of any sub-clause being limited by reference to any other part of the objects clause. All the objects and powers enumerated were to be fully exercisable, rather than being relegated as ancillary to the main objects.[180] The Court strongly disapproved of this clause. It doubted whether, by purporting to confer on the company such a profusion of objects, it complied with the Act's requirement that the company's objects be stated. Lord Wrenbury indicated that the purpose of the requirement would be defeated as the saving clause would make it impossible for the reader to know the company's area of business.[181] However, the judges felt they could not question the validity of the clause as the Registrar had accepted it and given the company a certificate of incorporation, which was deemed conclusive evidence that the requirements of the Act had been complied with. Therefore, given that the objects clause did include

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[178] Ibid, at 517 (per Finlay LC).

[179] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[180] Cotman v. Brougham [1918] AC 515, 517 (per Finlay LC): "The objects set forth in any sub-clause of this clause shall not, except when the context expressly so requires, be in any wise limited or restricted by reference to or inference from the terms of and sub-clause, or by the name of the company. None of such sub-clauses or the objects therein specified or the powers thereby conferred shall be deemed subsidiary or auxiliary merely to the objects mentioned in the first sub-clause of this clause, but the company shall have full power to exercise all or any of the powers conferred by any part of this clause in any part of the world, and notwithstanding that the business, undertaking, property or act proposed to be transacted, acquired, dealt with or performed do not fall within the objects of the first sub-clause of this clause."

[181] Ibid, at 522 (per Lord Wrenbury): "when the Act says that the memorandum must "state the objects" the meaning is that it must specify the objects, that it must delimit and identify the objects in such plain and unambiguous manner as that the reader can identify the field of industry within which the corporate activities are to be confined."

wide powers to deal in shares, it was "impossible" to deny that the company had the capacity claimed.[182] The effect of this influential ruling was to enable companies, by including independent objects clauses, to prevent the main objects or *ejusdem generis* rule being used by a court in order to restrictively interpret their objects clauses.

A similar clause had previously been rejected by Swinfen Eady J. in *Stephens v. Mysore Reefs (Kangundy) Mining Company Ltd.*[183] He refused to allow the clause to open the door to "a construction which would virtually enable the company to carry on any business or undertaking of any kind whatever".[184] However, it is not clear whether this decision held that no form of words could effectively displace the main objects rule, in which case it was implicitly overruled by *Cotman v. Brougham*,[185] or that the form of words there used did not suffice, in which case it was later overruled by *Anglo-Overseas Agencies v. Green.*[186]

Cotman's significant contribution to the struggle for wider objects was the reluctant recognition of the independent objects clause. The independent objects clause, as used in *Cotman v. Brougham*,[187] can be employed to prevent objects being relegated to the status of mere powers. If an object is stated to be independent, and not ancillary or subordinate to any other objects, then that object can validly be used for any purpose. However, it does not operate to elevate a power to the status of an object. Certain powers were deemed incapable of becoming independent objects.[188] This distinction is important if - as was the orthodox view until the 1980s - the law

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[182] Ibid, at 519 (per Lord Finlay LC).

[183] Stephens v. Mysore Reefs (Kangundy) Mining Company Ltd [1902] 1 Ch. 745.

[184] Ibid, at 749.

[185] Cotman v. Brougham [1918] AC 515.

[186] Anglo-Overseas Agencies Ltd v. Green [1961] 1 QB 1, see especially 9-10.

[187] Cotman v. Brougham [1918] AC 515.

[188] In Re Introductions Ltd [1970] 1 Ch. 199, 210 (per Harman LJ); see below at 6.4.2: "Powers and "Mere Powers".

requires express powers to be exercised in a manner which advances the company's objects in order to be intra vires.[189]

Anglo-Overseas Agencies v. Green[190] illustrates the subsequent effective use of a multiple objects clause to carve out wide capacity. The company's main business was the importation and exportation of goods, but it sued on a contract for the acquisition of a building lease of desirable property in a shopping centre. The company's objects were "wide enough, if looked at alone, to engage in the business of property development".[191] The *ejusdem generis* rule of interpretation would be excluded if the independent objects clause inserted in the memorandum was valid. The form of words used as an independent objects clause[192] had previously been rejected in *Stephens v. Mysore Reefs (Kangundy) Mining Company Ltd.*[193] Nonetheless, Salmon J. overruled this authority and gave the independent objects clause its "plain meaning".[194] He observed that the independent objects clause in *Cotman v. Brougham* was "merely an amplification" of the clause in this case,[195] and consequently held that the main objects rule was excluded in the present case.

The conjunction of broad or detailed objects clauses with an independent objects clause can have far-reaching effects. The LQR note on *Anglo-Overseas Agencies v. Green*[196] expresses dissatisfaction with the recognition of a clause which, once released from the main objects rule by an independent objects clause, "seems to give the company unlimited powers to enter into all contracts, except possibly those

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[189] See below at 6.2: "Subordinating Powers to Pursuit of the Company's Objects".

[190] Anglo-Overseas Agencies Ltd v. Green [1961] 1 QB 1.

[191] Ibid, at 9, 11.

[192] "[T]he intention is that the objects specified in any paragraph of this clause shall, except where otherwise expressed in this clause, be in nowise limited or restricted by reference to or reference from the terms of any other paragraph or this name of the company."

[193] Stephens v. Mysore Reefs (Kangundy) Mining Company Ltd [1902] 1 Ch. 745.

[194] Anglo-Overseas Agencies Ltd v. Green [1961] 1 QB 1, 11.

[195] Ibid, at 11.

[196] Ibid.

of marriage".[197] The independent objects clause was a major step forward, empowering companies to present an expansive list of express objects with the confidence that the courts would not ignore or limit certain clauses.

5.3.6. The Bell Houses Clause and the Directors' Subjective Appreciation

A subsequent development allowed companies further latitude in extending their capacity beyond that which was specified in the document. *Bell Houses Ltd v. City Wall Properties Ltd*[198] is a milestone case from the 1960s. It reflects a shift in judicial views on the ultra vires doctrine and its value.[199] If *Cotman v. Brougham*[200] saw the courts constrained reluctantly to cede territory to the corporate promoters, it seems that by the 1960s judges themselves were less keen to defend the ultra vires doctrine. Gore-Browne refers to their "liberal policy" which allowed the draftsmen to succeed.[201] Pettet implies that in *Bell Houses*[202] the courts had finally changed sides, joining forces with the drafters.[203]

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[197] Anonymous, *Notes,* (1961) 77 LQR 11, 11.

[198] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656.

[199] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 91; The Australian High Court previously recognised a similar clause in H.A. Stephenson & Son Ltd v. Gillanders Arbuthnot & Company (1931) 45 CLR 476 - L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, 81.

[200] Cotman v. Brougham [1918] AC 515.

[201] A.J. Boyle & R. Sykes (eds), "Gore-Browne on Companies" 44th ed. (Jordans, loose-leaf, 1986), para. 3.004: "liberal policy of allowing the draftsman of the objects clause to defeat the apparent purpose of the ultra vires doctrine"

[202] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656; [1966] 2 AER 674.

[203] Pettet, "Unlimited Objects Clauses?" (1981) 97 LQR 15, 18: "gradual attempts by conveyancers and now Parliament and the judiciary, to restrict its application."; F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 296: "This case marks the surrender by the English judiciary [which] had clearly lost its faith in the ultra vires doctrine."

Bell Houses Ltd v. City Wall Properties Ltd[204] greatly extended the breadth of permissible objects by upholding an objects clause which authorised any activities which in the opinion of the directors would be beneficial to the company in carrying out any of its authorised objects. This element of subjectivity significantly enlarged the contractual capacity of companies that enacted clauses in this form. It could add unenumerated powers to the contents of the memorandum of association, not only where they could reasonably be implied by the court under *AG v. Great Eastern Railway Company*[205] as ancillary to the company's express objects, but also where the company's management formed the view that they were ancillary. The objective view of the courts could be displaced by the subjective determination made by management.

This was not the first attempt to force the courts to defer to the internal judgment of the company. The company in *Re Jon Beauforte*[206] had included in its memorandum of association a clause similar to that which would later be upheld in *Bell Houses.*[207] This clause permitted the company to carry on any trade which could "in the opinion of the board of directors, be advantageously carried on by the company in connection with or as ancillary to" any of its stated businesses. In 1956, Jones dismisses such clauses, doubting that they added anything beyond the powers which would be implied by law.[208] Similarly, Roxburgh J.'s short decision did not give the clause any attention. Although objectively the business of manufacturing veneered panels is not in any way connected to the general business of the company, the clause might have saved the transaction if the directors had had a genuine, albeit mistaken, belief that it was so connected. This argument was not canvassed,

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[204] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656.

[205] Attorney-General v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473.

[206] In Re Jon Beauforte (London) Ltd (1953) 1 Ch. 131; [1953] 1 AER 634.

[207] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656; [1966] 2 AER 674.

[208] Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 135: "it is doubtful whether this sentence adds anything to what is already implied by law as incidental to the objects specifically included in the memorandum".

presumably because it would have strained credulity to suggest that the directors had so believed.

However, the clause was considered and its validity upheld a decade later in *Bell Houses Ltd v. City Wall Properties Ltd.*[209] The plaintiff company's principal business was developing housing estates. It became aware of a source of finance at a time when it had no need for such finance. Consequently, it arranged to introduce the defendants to a financier in return for a substantial procuration fee. The introduction was made but the defendants failed to pay the fee. The plaintiff company sued and the defendants claimed in their defence that the contract had been ultra vires the plaintiff. At first instance, Mocatta J. accepted that the transaction was ultra vires but the Court of Appeal reversed this decision.[210] Mocatta J.'s judgment provoked much commentary.[211] He ignored the reference to the judgment of directors on the basis that their opinion would not change the ultra vires nature of a transaction.

In the Court of Appeal, Danckwerts L.J. examined the relevant clauses of the company's memorandum of association. The principal object of the company was the business of engineering contractors. However, the memorandum contained a novel clause[212] purporting to authorise the company to,

> "carry on any other trade or business whatsoever which can, in the opinion of the board of directors, be advantageously carried on by [the

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[209] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656.

[210] Mocatta J.'s views on whether the company's incapacity can be invoked against it were not disturbed by the Court of Appeal, which focused on its determination that the company had capacity; see K. Polack, "Company Law - Ultra Vires - Construction of Objects Clauses" [1966] CLJ 174; G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111.

[211] Bell Houses Ltd v. City Wall Properties Ltd [1966] 1 QB 207; See G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, J.H. Thompson, "Ultra Vires etc" (1966) J. Bus. L. 66, K.W. Wedderburn, "What is the Point of Ultra Vires" (1966) 29 MLR 191, K. Polack, "Company Law – Allegation that a Contract is Ultra Vires the Plaintiff" (1966) CLJ 28.

[212] Sub-clause 3(c).

plaintiff company] in connexion with or as ancillary to any of the above businesses or the general business of [the plaintiff company]."[213]

Danckwerts L.J. proposed that this clause should be given its clear meaning, unless the authorities compelled the court to give it a different meaning.[214] Salmon L.J. agreed that the meaning of the clause was clear.[215] On its natural meaning, the clause opens the umbrella of capacity over all acts which the directors subjectively believe to be connected to the company's main objects. It does not matter if objectively, the directors are wrong.[216] To depart from this natural interpretation of the clause would require the clearest authority.[217]

The court emphasised that the company had not abandoned its original business, which grounded a distinction from the contrary authorities. Danckwerts L.J. rejected the defendants' characterisation of the transaction as though it were a deliberate embarking into a new field of business.[218] Instead, this was an isolated transaction designed to create goodwill and turn a profit. Consequently, Danckwerts L.J. distinguished the early failure of substratum cases.[219] Similarly, he dismissed the relevance of *In Re German Date Coffee Company*,[220] on the basis that the continuation of the company's main business is a prerequisite for the company honestly to decide that something can be done in connection with it.[221] The Court of Appeal considered that the expression "in the opinion of the board of directors"

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[213] Bell Houses Ltd v. City Wall Properties, Ltd [1966] 2 AER 674, 679 (per Danckwerts LJ).

[214] Ibid, at 680 (per Danckwerts LJ).

[215] Ibid, 687 (per Salmon LJ): "as a matter of pure construction, the meaning of these words seems to me to be obvious".

[216] Ibid, at 687 (per Salmon LJ).

[217] Ibid, at 687 (per Salmon LJ).

[218] Ibid, at 678 (per Danckwerts LJ).

[219] Ibid, at 681 (per Danckwerts LJ).

[220] In Re German Date Coffee Company (1882) Ch.D. 169.

[221] Bell Houses Ltd v. City Wall Properties, Ltd [1966] 2 AER 674, 683 (per Danckwerts LJ).

qualified the whole of the clause in question.[222] Danckwerts L.J. rejected the position of Mocatta J. that the opinion of the directors could not render an activity intra vires. On the contrary, the directors' bona fide opinion could dispose of the matter.[223] The test is the honest view of the directors.[224] It is not necessary that there be a resolution of the board expressing its opinion.

At a policy level, Danckwerts L.J. did not see why the subjective appreciation clause should not be effective. Describing the clause as, "a matter of internal management principally", he observed that it was open to shareholders to subscribe to a company on the basis of a memorandum which gave the directors the power to decide whether a transaction was, in their opinion, conducive to the company's business. Furthermore, even outsiders dealing with the company would be "helped rather than hindered" by the certainty engendered by the increased latitude.[225] This observation implies a negative view of the ultra vires doctrine, as a trap for contractual partners.

Bell Houses can be commended for its careful scrutiny of the words of the memorandum. According to Pettet, the decision was, "not really a departure from the basic idea."[226] It sticks to the terms of the memorandum, and integrates the concept of corporate benefit, even if it is as an extension to stated capacity, rather than a restriction. As well as upholding the subjective element of the objects clause, the court held that the transaction was here objectively incidental and conducive to the company's objects.[227] Not only would it enable the plaintiff to cement its good relations with the financier, but it also fell within the object of turning the company's assets to account.[228]

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[222] Ibid, at 683 (per Danckwerts LJ).

[223] Ibid, at 683, 686 (per Danckwerts LJ).

[224] Ibid, at 687 (per Salmon LJ).

[225] Ibid, at 683 (per Danckwerts LJ).

[226] Pettet, "Unlimited Objects Clauses?" (1981) 97 LQR 15, 16.

[227] Ibid, at 681, 686 (per Danckwerts LJ); at 689 (per Salmon LJ).

[228] Ibid, at 681 (per Danckwerts LJ); at 689 (per Salmon LJ).

Yet the effects of the decision are more radical than it might seem. Like the implied powers doctrine, Bell Houses extends capacity beyond the powers enumerated in the memorandum. Now the company's directors are empowered to decide, and the test is no longer whether an activity is necessary but whether it might be a useful adjunct to the company's business. Commentators considered that the decision in *Bell Houses*[229] could have the effect of completely undermining the doctrine of ultra vires.[230] Wedderburn asserts that it permits all companies, with care, to avoid the rule in the future.[231] Procaccia suggests that a company with a *Bell Houses* clause limits the potential operation of the ultra vires doctrine only to cases of failure of substratum or mala fides acts by management.[232] The latest innovation outstrips previous gains because "the simple introduction of a subjective formula will be all embracing".[233] The independent objects clause forced the courts to acknowledge the powers inserted in the objects clause, but still required the inclusion of words which would cover the impugned activity. Under the *Bell Houses* clause, there is no need to envisage and cover the activity in advance.

The effect of the *Bell Houses* Clause is so radical that, even today, certain authors are unwilling to acknowledge its full effect. Cahill claims that, even where the clause is present, the directors must establish that the activity is objectively beneficial, because otherwise a company could "conceivably have as its subject the

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[229] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656; [1966] 2 AER 674.

[230] P.V. Baker, (1966) 82 LQR 463, 465: it "placed wide powers in the hands of the directors and we must now see how far it goes in abrogating the doctrine of ultra vires."; K. Polack, "Company Law - Ultra Vires - Construction of Objects Clauses" [1966] CLJ 174, 177: "If such clauses came to be common form, the *ultra vires* rule would be dead".

[231] K.W. Wedderburn, "The Death of Ultra Vires?" (1966) 29 MLR 673, 675: it "may have destroyed altogether the vitality of the ultra vires principle. With a well-drafted clause in subjective terms no company need be bothered by it again."

[232] G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 116.

[233] Ibid, at 116.

doing of anything that to the directors might wish."[234] This statement suggests a strong wish to arrest the liberalisation of the law. In fact, it is only necessary to show that the directors honestly believed the action to be in the interests of the company. Forde distinguishes between the English requirement that the opinion of the directors be "bona fide"[235] and the Irish requirement of "reasonableness",[236] but acknowledges that this distinction may be illusory.[237] The inclusion of a *Bell Houses* clause effectively insulates a large number of potentially ultra vires transactions from the threat of incapacity.

5.4. STATUTORY CHANGES AFFECTING OBJECTS CLAUSES

5.4.1. The Alteration of Objects Clauses

If the constant struggle between company promoters and the judiciary is the major theme in the evolution of objects clauses, statutory changes have also had an effect. In particular, it became increasingly easy for companies to modify their memoranda. These moves would allow every company, with sufficient foresight, to ensure in advance that it had the capacity to engage in any doubtful transactions.

The Section 12 prohibition of amending objects[238] was gradually eroded and finally removed by legislation. This process began with the Companies (Memorandum of Association) Act, 1890. According to Wilton, the possibility of amending objects clauses became a "business necessity".[239] It permitted those in charge of a company to modify its business so as to "keep pace with economic and scientific

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[234] D. Cahill, "Corporate Finance Law" (Round Hall, Dublin, 2000), p. 286.

[235] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656, 683, 688.

[236] Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221, 226.

[237] M. Forde, "Company Law", 3rd ed. (Round Hall Sweet & Maxwell, 1999), p. 98.

[238] Section 12, Joint Stock Companies Act 1862, 25 & 26 Vict. c.89.

[239] G.W. Wilton, "Alteration of Memorandum Objects of Companies" (1914) 30 LQR 185, 185.

developments",[240] without having to establish a new company.[241] From 1890, it was possible to alter companies' objects for a number of stated purposes, such as carrying out its business more efficiently, adopting new technology or changing the location of its operations. The confirmation of the courts was required.

There have long been calls for the relaxation of the restrictions on altering a company's objects clause.[242] Over the past century, the consistent trend has been for it to become easier for registered companies to alter their objects clauses. The possibility of altering a company's memorandum was restated in 1908[243] and extended in English law in 1929.[244] Then in 1948, the new UK Companies Act removed the requirement for the court's consent to the amendment of a company's objects clause. Only if fifteen per cent of the shareholders or debenture holders objected within twenty-one days would it be necessary to seek the confirmation of the court. If no objection was made, the company would be free to proceed with an alteration of its memorandum even if it did not come within the specified cases of Section 5. The removal of the creditor's right to object to a proposed alteration in the Companies Act, 1948 constituted a watershed in terms of free alteration. Jones describes it as a shift in the burden of proof: alterations would henceforth be

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[240] B.J. Davies, "Alteration of a Company's Objects Clause and the Ultra Vires Rule" (1974) 90 LQR 79, 81.

[241] G.W. Wilton, "Alteration of Memorandum Objects of Companies" (1914) 30 LQR 185, 185: it avoided "the roundabout and costly method of achieving the same object by going into voluntary liquidation with the view of forming a new company with the remodelled and more elastic constitution."

[242] Ibid, at 189: "It is difficult to see why a company should not be allowed to deal with its undertaking with the absolute freedom of the private trader under the safeguards always of (1) proper notice to its corporators and of their sanction being duly obtained as prescribed by its regulations, (2) existing creditors not sustaining any prejudice, and (3) confirmation by the Court of the desired alteration subject to any condition appropriate in the particular circumstances to the interests of members or creditors."

[243] Companies (Consolidation) Act, 1908, 8 Edw. 7, c.69.

[244] Companies Act 1929 (UK); in Ireland, the provisions of the 1908 Act were followed by Section 10 of the Companies Act 1963.

assumed to be fair and reasonable unless it was shown otherwise.[245] Holt describes this as a "compromise solution", which avoided enacting the recommendation of the Cohen Committee that objects clauses should be freely alterable by special resolution and should operate solely as internal contracts.[246] Companies could now change their objects with greater ease and reduced expense.[247]

There is no longer any limit on the changes which may be made to a company's objects.[248] In Ireland, Section 10 of the Companies Act, 1963 allows registered companies to alter their memoranda by special resolution.[249] This requires the support of three quarters of shareholders at a meeting for which twenty-one days' notice of the meeting and the proposed resolution have been given.[250] An application to cancel the alteration may be made to the court within three weeks by the holders of at least fifteen per cent of the company's shares, provided they did not consent to the alteration.[251] The company has fifteen days from the end of the objection period to notify the Registrar of Companies of changes to its objects and its new memorandum.[252]

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[245] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 142.

[246] W.B.P. Holt, "Alteration of a Company's Objects and the Ultra Vires Doctrine" (1950) 66 LQR 493, 493; see "Cohen Committee Report", Report of the Committee on Company Law Amendment (1945) Cmd. 6659/45, para. 12.

[247] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 142.

[248] A. FitzGerald, "A Consideration of the Companies Act, 1948, Companies Act (Northern Ireland), 1960, and Companies Act, 1963" (1966) 1 Ir Jur (N.S.) 16, 21: "companies in the Republic may, to the convenience of their advisors, adopt a new set of objects if desired."

[249] Section 10(1) Companies Act, 1963 (Ireland); the Irish regime is more permissive than that in the UK under the Companies Act, 1985 - L.S. Sealy, Book Review: "Company Law in Ireland" [1985] CLJ 504.

[250] Section 141(1) Companies Act, 1963 (Ireland).

[251] Section 10(2) – Section 10(5) Companies Act, 1963 (Ireland).

[252] Section 10(9) Companies Act, 1963 (Ireland).

5.4.1.1. The ability to escape ultra vires by amending objects

Now that companies may amend their objects with relative ease, they can, with a little foresight, sidestep the risk of transactions being deemed to be ultra vires. The First Report of the Company Law Review Group indicates that this is current commercial practice, though it points out that it imposes cost and inconvenience on the company and its contractual partner.[253]

However, a question which arose when such changes became possible was whether they could retroactively empower a company for a transaction it had already begun. Holt adopted an expansive interpretation of the effect of the 1948 Act, claiming that a transaction outside the company's objects, although invalid, could no longer be regarded as void and incapable of ratification.[254] Instead a company could alter its objects by special resolution and thereby make the transaction intra vires.[255]

However, the preferable view is that the alteration of objects merely allowed companies to restart questionable transactions from the beginning once they were authorised by amended objects. Gower rejected Holt's view that this could be equated with ratification. He reasoned that Holt's argument would only be correct if the alteration of an objects clause had retrospective effect, but this that was not the case.[256] A new transaction would have to be negotiated and concluded, and the contracting party would have the opportunity to insist on new terms.[257] Gower's

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[253] Company Law Review Group, First Report (Dublin, 2001), para. 10.6.2.

[254] W.B.P. Holt, "Alteration of a Company's Objects and the Ultra Vires Doctrine" (1950) 66 LQR 493, 496.

[255] Ibid, at 496; cf H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), p. 8: "it is possible to describe an act as ultra vires subject to the power of enlarging the constitution so as to make it intra vires."

[256] L.C.B. Gower, "Alteration Of a Company's Objects and the Ultra Vires Doctrine" (1951) 67 LQR 41, 44.

[257] Ibid, at 42: "the position arising from an *ultra vires* transaction can now be put right by altering the objects clause and starting again. This, however, is not the same as ratification. [...] The chief practical difference between ratification of the original transaction and entry into the transaction

argument was upheld in *Northern Bank v. Quinn*,[258] which held that the alteration of the company's objects could not retrospectively validate a transaction entered into at a time when the company lacked the requisite capacity, no more than a subsequent restriction of a company's objects could render previously unimpeachable transactions ultra vires.[259] *Securities Trust Ltd v. Associated Properties Ltd*[260] reiterated that the transaction must be done again after the alteration.

In allowing companies which are aware in advance of a potential difficulty in relation to capacity a means to expand their capacity, the possibility of amending objects clauses has no doubt saved many transactions.[261] Those cases where a company was engaged in a completely new business but continued to operate with an outdated memorandum, which would endanger all its contracts,[262] need no longer arise.

However, in practice some companies may neglect to take the necessary step to ensure that their capacity is sufficiently broad because they fail to appreciate that the original wording of their objects clause does not authorise the activity in question. This risk is heightened by the confusion which has often surrounded the doctrine in the past. Even lawyers may read a company's objects clause and fail to understand that a proposed activity is outside its capacity.[263] If the informed and careful

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again, is that pending ratification of the contract the other party cannot withdraw from it, whereas if it has to be entered into afresh he is of course at liberty to withdraw."

[258] Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221.

[259] T.M. Ashe, "Case Raises Questions on Notice and Ultra Vires" (1980) 1 Company Lawyer 161.

[260] Securities Trust Ltd v. Associated Properties Ltd (High Court, Unreported, 19 November 1980, McWilliam J.).

[261] The "congenital defect" referred to by C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 64 can now be cured.

[262] See In Re Jon Beauforte (London) Ltd (1953) 1 Ch. 131; [1953] 1 AER 634; In Re Introductions Ltd [1970] 1 Ch. 199.

[263] See Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221.

company now has the means to ensure that its transactions do not fall foul of the law on corporate capacity, that has not had the same effect as reforming or abolishing the doctrine on a consistent basis across the board. In fact, that leaves the ill-informed or careless company - and all those who deal with it - in a somewhat anomalous situation.

5.4.1.2. General commercial objects

In addition to the alteration of objects, English law embraced the concept of general commercial objects. The English Companies Acts 1985 and 1989[264] did not follow the recommendations of the Prentice Report to abolish objects clauses and give companies the full legal capacity of a natural person.[265] Instead they introduced a standard type of objects clause authorising companies to pursue any commercial activity.[266] Companies could adopt this new clause by passing a special resolution. However, it has not proven successful, and where adopted, has often been tacked on to longer clauses.[267]

5.4.1.3. Local authorities

While the emphasis is generally on registered companies, local authorities, being statutory corporations, also possess limited capacity, as defined in statute. Sections 6(1) and 8(1) of the Local Government Act, 1991 sought to relax the ultra vires doctrine as it applies to local authorities in Ireland by granting wide capacity to engage in transactions which promote the interests of the community or are conducive to their general functions.[268]

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[264] Companies Act, 1989 (UK).

[265] See also below at 8.3.3: "The Outsider in English Law".

[266] Section 3A, Companies Act, 1985; inserted by Section 110, Companies Act, 1989 (UK).

[267] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), pp. 87, 102.

[268] G. Hogan & D. Gwynn Morgan, "Administrative Law in Ireland" 3rd ed., (Round Hall Sweet & Maxwell, Dublin, 1998), pp. 200-205.

5.5. THE CUMULATIVE EFFECT OF THESE CHALLENGES

The cumulative effect of the independent objects and *Bell Houses* clauses is extensive. These cases equipped companies with the tools to avoid most of the problems connected to incapacity.[269] Provided a company chooses to avail of these mechanisms, it can evade much of the impact of the ultra vires doctrine.[270] Thus, the prudent draftsman would, in the first place, "list several different items as company objects"[271] and, secondly, insert an independent objects clause and a *Bell Houses* clause into his company's memorandum of association. It is usual for legal draftsmen to adopt techniques which have been upheld in the courts, so that the successful innovative clause "soon becomes a standard-clause of every new memorandum".[272] "Standard practice" now includes multiple objects and "every conceivable power".[273] In 1956, Jones reassured readers that, "the sting has been taken out of the doctrine" as a cumulative result of the advances gained by the drafters of corporate constitutions.[274] Thompson argues that shareholders generally benefited from the ability of companies to move into "more lucrative fields".[275]

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[269] "[T]he English legal profession is rarely embarrassed by these rules and has no difficulty in steering the company clear of them." - L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. LR 1369, 1399.

[270] G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 116: "it will be left to the free choice of promoters or shareholders whether to subject their company to the practical application of the ultra vires doctrine or not."

[271] D. Cahill, "Corporate Finance Law" (Round Hall, 2000) p. 281.

[272] G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 115.

[273] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 90; J.H. Thompson, "The Ultra Vires Doctrine and the Jenkins Report" (1963) JBL 143, 143; see Anglo-Overseas Agencies v. Green [1961] 1 QB 1.

[274] F.H. Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 131.

[275] J.H. Thompson, "The Ultra Vires Doctrine and the Jenkins Report" (1963) JBL 143, 143.

The decision of the Supreme Court of New Zealand in *Christchurch Corporation v. Flamingo Coffee Lounge Ltd*[276] shows the extent to which the recognised devices can enable a company to engage in business far divergent from that originally intended. Gray[277] describes its liberal approach as "an intriguing contrast" with the more restrictive approach adopted in England in *Re Jon Beauforte*.[278] The facts of the case disclose a striking, clear-cut example of a company abandoning its original course of business to adopt a new one. The company was originally formed to deal in textiles, but later ran a restaurant and coffee lounge instead, without changing its memorandum. The company's memorandum contained clauses authorising it to acquire concessions, an independent objects clause and a *Bell Houses* type clause.[279] The court found that running the main restaurant was conducive to acquiring a concession at the airport, and so was also intra vires. Gray comments on the limited scope which this seems to leave for ultra vires to operate.[280] If a company is permitted to engage in activities so clearly outside the business envisaged by its memorandum, the purpose underlying both the statement of objects and the limitation of capacity, that of enabling potential shareholders and creditors to ascertain the field of a company's business, appears to be wholly undermined.[281]

On the other hand, the decision of the courts to give effect to independent objects and *Bell Houses* clauses could only save those companies which availed of them. The company in *Bell Houses* had neglected to include an independent objects clause. The potential remained for some to fall foul of the doctrine at its harshest:

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[276] Christchurch Corporation v. Flamingo Coffee Lounge Ltd [1959] NZLR 986.

[277] H.R.Gray "Cotman v. Brougham and the Ultra Vires Rule" (1960) 23 MLR 561.

[278] Ibid, at 561.

[279] Sub-clause 35 of the objects clause authorised it to "do all such other things as in the opinion of the company may be incidental or conducive to the attainment of any of the foregoing objects", quoted by H.R.Gray "Cotman v. Brougham and the Ultra Vires Rule" (1960) 23 MLR 561, 562.

[280] H.R.Gray "Cotman v. Brougham and the Ultra Vires Rule" (1960) 23 MLR 561, 562: "In the light of such a situation, one cannot help wondering what value there can be in (a) a precise objects clause, or (b) an ultra vires rule".

[281] Ibid, at 563.

whether companies or those dealing with them. Nor could these devices save every impugned transaction. Subsequent decisions, such as *In Re Introductions*,[282] a "high point of judicial antipathy",[283] underlined the continued vitality of the doctrine.[284] *In Re Introductions* proves that the sting was not entirely removed from ultra vires. For Cahill, the case "demonstrates the limited effectiveness of circumvention devices such as *Cotman* and *Bell Houses* devices."[285] Furthermore, an outsider could not assume that a company had incorporated the necessary devices in its objects clause without examining it. While *Bell Houses*[286] shows newfound permissiveness from the courts, this attitude is not universal. The statutory amendments which made it ever easier for companies to modify their objects clause were also viewed by some as having the potential to undermine completely the ultra vires doctrine, but in fact, since the effect of the changes to objects clauses could not be used retroactively to validate previous transactions, these predictions were not borne out.[287]

It would be a mistake to imagine that the ultra vires doctrine was completely sidelined as a result of these developments. Other battles remained to be fought concerning the use of corporate powers and whether they could only be exercised for the benefit of the company.[288] This constituted another significant issue in the courts' application of the ultra vires doctrine. It was for a long time not enough that a particular class of transaction figure in the objects clause as drafted. Even where an objects clause did contain an express power to do a thing, this power would be

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[282] In Re Introductions Ltd [1970] 1 Ch. 199.

[283] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 92.

[284] See below at 6.4.2: "Powers and "Mere Powers".

[285] D. Cahill, "Corporate Finance Law" (Round Hall, Dublin, 2000), p. 287.

[286] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656.

[287] See W.B.P. Holt, "Alteration of a Company's Objects and the Ultra Vires Doctrine" (1950) 66 LQR 493.

[288] See below at Chapter 6: "Powers, Corporate Benefit and Corporate Gifts".

limited so that only those uses of it which furthered the main objects of the company were deemed to fall within its corporate capacity.

If they succeeded to some extent in their aim to evade the doctrine of ultra vires, the draftsmen's efforts also had a substantial negative effect on the usefulness and clarity of objects clauses.[289] The 1985 Prentice Report found that the utility of the doctrine was completely undermined by the techniques employed by companies to widen their capacity.[290] In theory, the *Bell Houses* clause should have made it possible to reduce the length and complexity of objects clauses, but companies did not take the risk.[291] Gower asserts that the end result of this struggle is purely negative in that it has destroyed the benefits of limited capacity, leaving only the inconvenience and danger.[292] Not only may objects clauses be uninformative, they may even be positively misleading.[293]

In *Cotman v. Brougham*, Lord Parker observes that there is a balance to be struck, given the dual protective function of the objects clause. Requiring narrow, precise objects serves the interests of shareholders, in theory at least, by minimising the risks they face, whereas permitting wider objects favours the security of transactions

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[289] K.W. Wedderburn, "Some Recent Developments in British Company Law" (1972) 6 International Lawyer 487, 491; K. Polack, "Company Law - Ultra Vires - Construction of Objects Clauses" [1966] CLJ 174 , 177.

[290] "Prentice Report", "Reform of the Ultra Vires Rule" (DTI, 1986), Part II, Chapter 2, para. 6.

[291] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 AER 674, 685 (per Danckwerts LJ): "this practice continues and I have heard it defended by eminent company lawyers on the ground that it satisfies nervous company directors that they have the ordinary powers which management of the company requires."

[292] L.C.B. Gower, "Principles of Modern Company Law", 6th ed. (Sweet & Maxwell, London, 1997), p. 204: "The result of these devices was to destroy any value that the *ultra vires* doctrine would have had as a protection for members or creditors; it had become instead merely a nuisance to the company and a trap for unwary third parties."

[293] "A shareholder, who thinks that he is protected by a clause stating the objects of the company in precise terms may find that he has been completely misled because of a later omnibus clause." - Anonymous, *Notes* (1961) 77 LQR 11, 12.

with other contracting parties.[294] The gains won by drafters between the end of the nineteenth and twentieth centuries represents a shift in the balance struck between these competing interests.

The changed face of the objects clause becomes clear when the various independent changes are considered together. Initially, the law required a statement of limited objects, which could not be altered, and would be interpreted restrictively in the light of the main objects. Now companies can have potentially unlimited objects, which may be altered, and may be interpreted liberally, especially where memoranda contain devices which confer equal importance on all objects listed and reserve significant additional discretion to directors. Now, more than ever, the rule of limited capacity only restricts companies to the scope of capacity which they choose for themselves. It seems a rather democratic sort of tyranny.

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[294] Cotman v. Brougham [1918] AC 515, 520 (per Lord Parker).

6. POWERS, CORPORATE BENEFIT AND CORPORATE GIFTS

6.1. POWERS AND OBJECTS

The ultra vires doctrine binds companies to the objects which they are required to state in their memoranda of association.[1] However, the courts reasonably considered that not everything found expressed in company's objects clause was necessarily an object of the company. Consequently, an activity could be enumerated in the objects clause, yet not increase the company's capacity.

Literature on corporate capacity traditionally emphasises the fundamental distinction drawn between objects and powers.[2] The objects are the purposes which the company has been established to pursue,[3] whereas the powers are merely subsidiary methods which the company might employ to achieve its primary goals. Common powers include owning premises or borrowing money. Each act envisaged in a company's objects clause may be identified as either an object of the company or an incidental power.

This categorisation, which distinguishes among the express contents of the objects clause, implies a third category: the implied powers, which are not specified in the objects clause but are inferred by the courts wherever they are necessary and ancillary to the company's undertaking.[4] Powers do not necessarily need to be

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[1] See above at 3.3.2: "The Statutory Foundation".

[2] See eg T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17, 17.

[3] They are "its raison d'être" - M. Forde & H. Kennedy, "Company Law", 4th ed., (Round Hall Sweet & Maxwell, 2007), p. 34.

[4] AG v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473; see also Lord Wrenbury, Cotman v. Brougham [1918] AC 515, 522; Buckley J., In Re David Payne and Company Ltd [1904] 2 Ch. 608, 612; see also L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, 80 for a list of implied powers.

expressly enumerated for a company to possess them.[5] Yet nervous draftsmen commonly list them.[6] Their caution is undoubtedly reinforced by the fear of restrictive judicial interpretations which the doctrine of ultra vires has historically engendered in corporate promoters.[7] Unfortunately, adding increasingly comprehensive and complex constitutional provisions has not resulted in clarity, extensive capacity and commercial satisfaction.[8]

The courts' response was to interpret restrictively the powers expressly stated in companies' memoranda. The rationale was that powers, unlike objects, did not define a company's capacity. Thus, the exercise of a power could only be intra vires if the purpose for which it was employed was a valid object.[9] This amounted to an external judicial control on the use to which corporate powers were put. In effect, it was as if a condition were presumed to be inserted by operation of law, qualifying

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[5] In Re David Payne and Company Ltd [1904] 2 Ch. 608, 612 (per Buckley J.): "Every trading association has power to borrow for the purposes of its business and the introduction of this clause is only to express in words what would otherwise be the law."; Cotman v. Brougham [1918] AC 515, 522 (per Lord Wrenbury): "Powers are not required to be, and ought not to be, specified in the memorandum"; Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1986] Ch. 246, 287 (per Slade LJ): "Strictly, therefore, it is not essential for the memorandum to insert any reference at all to mere powers as distinct from objects."

[6] This is reminiscent of the listing of powers in Acts establishing statutory corporations, see eg Section 15, 26 & 27 Vict. c. lxix, at issue in AG v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473.

[7] See above at Chapter 5: "The Interpretation and Drafting of Objects Clauses".

[8] "It has arrived now at a point at which the fact is that the function of the memorandum is taken to be, not to specify, not to disclose, but to bury beneath a mass of words the real object or objects of the company with the intent that every conceivable form of activity shall be found included somewhere within its terms" – Cotman v. Brougham [1918] AC 515, 523 (per Lord Wrenbury); the problem is exacerbated if the meaning of the words is cut down by external rules not contained in the document.

[9] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654; Evans v. Brunner Mond Co Ltd [1921] 1 Ch. 359; In Re Lee, Behrens & Co., Ltd [1932] AER 889; In Re Introductions Ltd [1968] 3 AER 1221; Parke v. The Daily News Ltd [1962] Ch. 927.

each power expressed in the objects clause as existing subject to the proviso that it was exercised to further the principal objects of the company.

This mirrored the approach initially adopted to the interpretation of objects themselves.[10] Under the *ejusdem generis* rule, both objects and powers were interpreted by reference to the main objects of the company. Following the acceptance of independent objects clauses in *Cotman v. Brougham*,[11] it became possible for a company to avoid this by designating each of its objects as separate and independent.[12] However, the courts refused to accept that this device could extend to powers, which would continue to be subservient to the company's main objects.[13] The key effect of this was that certain actions expressly envisaged by the objects clause could fall outside the capacity of the corporation, should they be categorised as powers.

This reading down of the capacity of the company to less than might appear on the face of the memorandum is the polar opposite of the extension of a company's capacity beyond what is specified so as to include necessary but unstated implied powers.[14] The superficial similarity of referring to "reasonable ancillariness" in one context[15] and the furtherance of main objects in the other[16] belies this fundamental opposition. In *Re Balgooley Distillery Company*,[17] Fitz Gibbon L.J. applies the test propounded in *Hutton*[18] to find an implied power.[19] It is reasonable that an unstated

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[10] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653; see above at 5.3.1: "Restrictive Interpretation of the Objects Clause".

[11] Cotman v. Brougham [1918] AC 515.

[12] See above at 5.3.5: "The Assault on the Main Objects Rule of Interpretation".

[13] In Re Introductions Ltd [1970] 1 Ch. 199, [1969] 1 AER 887.

[14] AG v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473.

[15] Ibid.

[16] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654; In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[17] In Re Balgooley Distillery Company (Weekes' Case) (1886) 17 LR Ir 239.

[18] Ibid, at 263.

power might only be implied "as part of a transaction incidental to its business and conducive to the attainment of its objects".[20] However, it is a very different proposition to use a similar test to deny the apparent meaning of the terms of the memorandum. Where *Attorney-General v. Great Eastern Railway Company*[21] is expansive, *Lee Behrens*[22] is restrictive.

Due to the courts' restriction of the valid exercise of powers, the terms of the objects clause often failed in reality to communicate to the company or its trading partners the true boundaries of its capacity. This lack of clarity led to the undesirable insecurity of commercial transactions[23] and undermined the constructive notice logic that all those dealing with a company have clear notice of the scope of its capacity. Furthermore, the focus on extrinsic constraints distracts from the primary task of interpreting the terms of the memorandum.

These issues pose a number of questions of principle about the scope of a company's capacity. The law's responses dictate the shape of the ultra vires doctrine. The first question is whether a company's acts must all further its main business. The subsidiary question concerns the test which should be formulated if it is decided that powers can only be used for proper purposes.

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[19] Cf Evans v. Brunner Mond Co Ltd [1921] 1 Ch. 359, 368-369 (Eve J.): "When an act of the company is challenged on the ground that it is beyond the powers of the company the challenge is not disposed of by proving that the act is beneficial to the company: it must be established that it is an act the doing of which is authorized by the company's constitution."

[20] In Re Balgooley Distillery Company (Weekes' Case) (1886) 17 LR Ir 239, 263.

[21] Attorney General v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473.

[22] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[23] A "person proposing to deal with a company could not be absolutely safe, for powers specified as objects might be read as ancillary to and exercisable only for the purpose of attaining what might be held to be the company's main or paramount object, and on this construction no one could be quite certain whether the Court would not hold any proposed transaction to be ultra vires." - Cotman v. Brougham [1918] AC 515, 520 (per Lord Parker).

For a long time the courts decreed that a company's capacity only covered the use of express powers when they furthered its main objects and were to its benefit. More recently, this central issue has been revisited.[24] Acknowledging and appreciating this dramatic change is fundamental to evaluating the ultra vires doctrine today.[25] However, an awareness of the history of the ultra vires doctrine is also essential. The question of corporate benefit shaped the discussion of the doctrine for over a century. It still informs the presentation of the law, and may still exert an undeserved influence on judicial decision-making.[26] Furthermore, the rules applied in the past influenced the criticism which continues to be levelled at the doctrine today. In particular, the charge of complexity and confusion has its roots in these issues.

The subjection of the valid exercise of express powers to judicial control through the mechanism of the corporate benefit test produced two significant doctrinal discussions. The first of these is the distinction between objects and powers.[27] The case law multiplied the categories into which the contents of objects clauses might be classed, from express objects and powers, to substantive objects and mere powers. The categories remain, even though, on a modern analysis, the labels become immaterial.[28] The second major focus of debate has been the making of gifts by corporations. Gratuitous dispositions regularly fell foul of the corporate benefit test unless a resultant advantage to the company could be identified. The authorities suggested that gratuitous dispositions might form a discrete class of transaction which was difficult or impossible to justify under the ultra vires doctrine. This pervasive hostility to corporate gifts is manifest whether they are authorised by implied powers,[29] express powers[30] or even express objects.[31]

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[24] See below at Chapter 7: "The Decline and Fall of the Corporate Benefit Test".

[25] See below at Chapter 15: "Judging the Ultra Vires Doctrine".

[26] See below at 7.3: "Rolled Steel and the Law in Ireland".

[27] See below at 6.1: "Powers and Objects".

[28] See below at 7.2.1.4: "Express powers are always intra vires".

[29] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

These doctrinal issues have been inextricably linked throughout most of the history of the ultra vires doctrine. Although, on a modern view of the law on capacity, the spotlight should drift away from them, they have been central concerns for a century and a half, and still inform the debate on ultra vires. As a first step towards teasing out these issues, it is appropriate to ask whether, as a matter of principle, express powers ought to be subordinated to the company's main business, on pain of incapacity.

6.2. SUBORDINATING POWERS TO PURSUIT OF THE COMPANY'S OBJECTS

6.2.1.1. Should incapacity be used to sanction the improper use of powers?

The proposition that a company should direct all its actions to its main goals appears perfectly reasonable. Slade L.J.[32] recalls the assertion by Lord Selborne in *Ashbury* that a corporation is "limited, as to all its powers, by the purposes of its incorporation".[33] He acknowledges that "strict logic" might therefore support the restriction of capacity to the use of powers for the purposes of incorporation.[34] On the other hand, just because an act is improper does not mean it must be outside the company's capacity. It may seem self-evident that powers should only be used for proper corporate purposes, but incapacity is a particularly absolute form of invalidity with which to sanction misuse.[35] An alternative would be to sanction any misuse of corporate powers through the law on directors' duties, rendering it ratifiable rather than void. Oliver J. highlights the flawed reasoning which assumes that incapacity is the appropriate sanction for all corporate misdemeanours.[36]

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[30] In Re W & M Roith Ltd [1967] 1 AER 427.

[31] In Re Horsley & Weight [1982] 3 AER 1045.

[32] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1986] Ch. 246, 290.

[33] Ashbury Railway Carriage and Iron Co. Ltd. v. Riche (1875) LR 7 HL 653, 693.

[34] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1986] Ch. 246, 290.

[35] See above at 4.2.3: "A Concluded Act which is Ultra Vires".

[36] In Re Halt Garage Ltd [1982] 3 AER 1016, 1029-1030 (per Oliver J.): "questions which are logically quite distinct [...] have sometimes been treated as if they demanded a single, universal

As early as 1871, the Court of Appeal in *Re Marseilles Extension Railway Company*[37] viewed it as self-evident that the power to borrow could only be used to further the company's objects.[38] Yet, the interest of protecting shareholders[39] could have been served by the law on directors' duties, without resorting to incapacity. Indeed, Baxter argues that the case did concern breach of trust, not capacity.[40] If the case was really one of breach of duty, that would explain the other problematic aspect, whereby the court chose to allow the innocent lender to rely on the allegedly ultra vires loan.[41]

If capacity ought to turn on the contents of the memorandum of association, but the courts, justifiably, wish also to subordinate the exercise of the company's powers to a condition of furthering the company's business, the proper set of rules which governs the exercise of powers in a company is that governing directors' duties. The confusion of the two issues of ultra vires and directors' duties is particularly unfortunate because the effects of an action being deemed to be ultra vires are so much more extensive than if it is merely an abuse of the directors' powers.[42]

Fundamentally, the existence of a corporate benefit test cuts down the capacity of the company to engage in activities set out expressly in the objects clause. This produces the undesirable outcome that a company's capacity can no longer be

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answer leading to the conclusion that, because the power must not be abused, therefore, beyond the limit of propriety it does not exist."

[37] In Re Marseilles Extension Railway Company [1871] LR 7 Ch. 161.

[38] Ibid, at 166 (per Mellish LJ): the company "had the most unlimited authority--*of course for the purposes of the company*--to borrow money upon the security of bills of exchange and promissory notes".

[39] "Shareholders in a company had certain protections thrown over them, and it did not follow that any sum borrowed by the directors constituted a debt against the shareholders. It must be borrowed for a purpose within the powers conferred upon the directors by their deed of settlement." - In Re Marseilles Extension Railway Company [1871] LR 7 Ch. 161, 164 (per Malins VC).

[40] C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28 CLJ 280, 284.

[41] See below at 8.2.3: "The Absence of Notice Used to Protect the Outsider".

[42] See above at 4.4.2: "Breach of Directors' Duties".

determined solely by reference to the contents of its objects clause.[43] *Lee Behrens*[44] is a hall-of-mirrors distortion of *Attorney General v. Great Eastern Railway Company*,[45] where, instead of stepping in to enhance the stated objects to achieve a reasonable outcome, the courts may intervene to deny the clear meaning of a clause. If it is true that the capacity of every company is based on what is set out in its own objects clause,[46] supplemented by additional powers which are inferred because they are necessary to carry out its business,[47] then creating a test which involves disregarding the express contents of that clause appears to be, not only theoretically illogical, but also an unnecessary source of confusion which undermines the purpose of the statement of objects itself. Lord Parker warns in *Cotman v. Brougham* that an external test denying the words of the objects clause is contrary to legal certainty.[48]

On the other hand, Leigh argues that the imposition of external constraints which limit the apparent effect of express powers is not unprecedented. He points out that express powers "are, after all, read down so as not to justify an illegality."[49] Gregory also defends it, describing the first and third limbs of the *Lee Behrens* test

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[43] "The memorandum of a company sets out its objects and proclaims them to persons dealing with the company and it would be contrary to the whole function of a memorandum that objects unequivocally set out in it should be subject to some implied limitation" – Charterbridge Corporation v. Lloyd's Bank [1970] Ch. 62, 69 (per Pennycuick J.)

[44] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[45] Attorney General v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473.

[46] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653; "the question whether a particular transaction is within or outside its capacity must depend on the true construction of the memorandum." - per Slade LJ, Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 85.

[47] Attorney General v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473.

[48] Cotman v. Brougham [1918] AC 515, 520 (per Lord Parker): "on this construction no one could be quite certain whether the Court would not hold any proposed transaction to be ultra vires".

[49] L.H. Leigh, "Objects, Power and Ultra Vires" (1970) 33 MLR 81, 83.

as "unobjectionable", though he does accept that, "the second question is rightly rejected".[50]

By ignoring the terms of the objects clause, the *Lee Behrens*[51] corporate benefit test purports to apply to all companies, regardless of the terms in which their own constitutions are drafted. By doing so, it contradicts the premise that those who draft corporate constitutions control the scope of the capacity which the new company possesses. Instead, increased external control is handed to judges. Ultra vires becomes a "control mechanism" to strike down transactions which incur judicial disapproval.[52]

For some, restriction of the use of express powers is a necessary corollary of the doctrine of ultra vires.[53] Choong fears that, if express powers were treated in the same way as objects, this "would render a company's limited capacity limitless" and thus constitute an "insidious enlargement" of a company's capacity.[54] However, this argument is not entirely persuasive, given the nature of powers. Borrowing money, for example, is a means to an end. If that end is itself ultra vires, then the company can be restrained from pursuing it, regardless of whether or not the borrowing stage is deemed intra vires.

6.2.1.2. Authority relates corporate benefit to capacity

Though using incapacity law to sanction the use of powers for improper purposes may not be the ideal response, it is irrefutable that this solution has traditionally been adopted in well-known ultra vires cases. Each of the key authorities in this area is simultaneously an affirmation that the law of capacity requires express powers to

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[50] R. Gregory, "Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation" (1985) 48 MLR 108, 112.

[51] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[52] T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17, 23.

[53] Ibid, at 20.

[54] Ibid, at 20.

be used to further the company's objects and a proponent of a particular test to adjudge the required connection.

Hutton v. West Cork Railway Company[55] is a firmly-established authority relating to the exercise of powers and to gratuitous dispositions. As an early and influential expression of corporate benefit thinking, it subjects the grant of a gratuity to the condition that it be "reasonably incidental to the carrying on of the business".[56] In this case, the doctrine of ultra vires frustrated the intention of a statutory corporation which was being wound up to reward the officers and staff who had served it loyally. These gratuitous dispositions were held to be ultra vires because the company was being wound up and so no resulting benefit could accrue to its business.

The West Cork Railway Company was taken over under an Act of Parliament. The company's directors had never been remunerated, and the company elected to pay some of the sums received from the takeover to them. It voted also to compensate officials who lost their jobs. The plaintiff debenture-holder sought an injunction to prevent the payments. At first instance, Fry J. ruled that the general meeting had the power to approve the payments, on the ground of fairness, so as to respect the directors' "moral right" to remuneration.[57]

The Court of Appeal, however, held that the resolution was invalid. It reasoned that it was outside the company's powers to pay gratuities when it was being wound up, as this was no longer incidental to its business or of potential benefit to the company. Cotton L.J. reasoned that, in a going concern, the directors have wider implied powers which cover giving gratuities to workers, as that may benefit the

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[55] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

[56] Ibid, at 673 (per Bowen LJ); cf In Re Halt Garage Ltd [1982] 3 AER 1016, 1029 (Oliver J.): Oliver J. reinterprets Hutton as concerning "whether a majority could bind a dissentient minority".

[57] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654, 658 (per Fry J): "To hold otherwise would preclude directors from foregoing their right to remuneration when a company might be in trouble and difficulty, and asserting their moral right to remuneration when the company had become prosperous by reason of their services."

company in the long run, but in this case, since the company had no future, the payments were simply a gift, not an inducement.[58] In these circumstances, no organ of the company had the power to award them. Bowen L.J. emphasised that even shareholders are constrained in their use of corporate assets. He stated that they,

> "can only spend money which is not theirs but the company's, if they are spending it for the purposes which are reasonably incidental to the carrying on of the business of the company."[59]

This firmly situates the decision within the area of capacity: the restriction applies to all organs of the company. The effect of the decision is that, while most business require "liberal dealings", this is only permissible to the extent that it benefits the company. Thus, in a going concern, gratuities and the retrospective remuneration of directors could be justified, provided they secured an advantage to the company. This authority was very influential in subsequent ultra vires cases.[60]

6.3. What Test for the Beneficial Exercise of Powers?

If it is accepted, as in *Hutton*,[61] that the capacity to exercise corporate powers only exists where their use serves a legitimate purpose, the critical question which follows is how to assess whether the use is valid. *Hutton* itself referred to the concept of profit[62] and whether the transaction was "reasonably incidental to the

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[58] Ibid, at 665 (per Cotton LJ): "the company was gone as a company carrying on business for the purpose of making profit, and the sums paid, therefore to its officials and managing directors, could not be looked upon as an inducement to them to exert themselves in the future, or as an act done reasonably for the purpose of getting the greatest profit from the business of the company, but must be looked upon simply as a gratuity".

[59] Ibid, at 673 (per Bowen LJ).

[60] It is still cited as recently as Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221; In Re Kill Inn Motel Ltd (High Court, Unreported, 16 September 1987, Murphy J.); In Re Greendale Developments Ltd. (No.2) [1998] 1 IR 8.

[61] In Re Marseilles Extension Railway Company [1871] LR 7 Ch. 161.

[62] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654, 665 (per Cotton LJ).

carrying on of the business of the company".[63] Eve J. in *Evans v. Brunner Mond*[64] required that the act could "fairly be regarded as incidental or conducive to the main or paramount purpose for which the company was formed".[65] Buckley L.J. in *Re Horsley & Weight Ltd*[66] required the intra vires exercise of powers to be "in fact ancillary or incidental to the pursuit of some dominant object."[67] Vinelott J. refers to an "authorised purpose".[68] Yet these measures remain vague and do not define a precise test.[69] Should a power, to be intra vires, be used to further an express object, to further the main business of the company, or to profit it, or is the connection vaguer than any of these specific relationships, allowing the courts to invalidate such acts as they deem improper?

Tomkinson v. South Eastern Railway Company[70] rejects the view that the corporate benefit test could be used to legitimise any expenditure which was remotely or indirectly beneficial to the company.[71] A more liberal approach in *Evans v. Brunner Mond Company Ltd*[72] permitted a large donation to universities and scientific institutes to advance scientific education and research, on the somewhat tenuous ground that this would contribute to the creation of a pool of suitable individuals

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[63] Ibid, at 673 (per Bowen LJ); MacCann favours the "reasonably incidental" test - see L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, 84.

[64] Evans v. Brunner Mond Co Ltd [1921] 1 Ch. 359.

[65] Ibid, at 364.

[66] In Re Horsley & Weight Ltd [1982] Ch. 442; [1982] 3 AER 1045.

[67] Ibid, at 448; [1982] 3 AER 1045, 1051.

[68] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1982] 3 AER 1057, 1077.

[69] C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28 CLJ 280, 286: the authorities suggest a transaction will be "ultra vires a company if it is not, in some ill defined way, for the benefit of that company".

[70] Tomkinson v. South Eastern Railway Company (1887) 35 Ch. D. 675.

[71] K. D. Ewing, "Company Political Donations and the Ultra Vires Rule" 47 (1984) MLR 57, 64-65.

[72] Evans v. Brunner Mond Co Ltd [1921] 1 Ch. 359.

within which the company might in future be able to find employees.[73] The court may have been favourably disposed towards this altruistic donation, which was neither a gift to a particular individual[74] nor a means to further partisan policies.[75]

6.3.1. The Lee Behrens Corporate Benefit Test

In Re Lee, Behrens & Co., Ltd[76] is synonymous with the corporate benefit requirement. It introduced a new, more restrictive test for the valid exercise of express powers. This decision was arguably a "deviation from the established norms"[77] in that it imposed new conditions for powers to be intra vires, thereby allowing the courts to intervene more frequently and expansively to invalidate transactions.[78] It was not the fact of the test which was in question, according to an orthodox understanding of the law on express powers, but the nature of the test proposed. In Choong's view, *Lee Behrens*[79] "developed as an alternative touchtone" to the main objects for the creation of implied powers.[80]

The company agreed to pay an annuity to the widow of a former managing director. On its liquidation, she claimed the capital value of the annuity. The liquidator rejected her proof on the grounds that the agreement was ultra vires and void, that it had not been authorised by the shareholders, and that a gratuity could only be paid out of profits. The company's memorandum of association contained an express

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[73] Ibid, at 366.

[74] Cf In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[75] Cf Simmonds v. Heffer [1983] BCLC 298.

[76] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[77] T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17, 18.

[78] "With respect, the rule may be clear, but the principle on which it is based is not." - C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28 CLJ 280, 290.

[79] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[80] T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17, 28.

power to provide for the welfare of former employees and their widows. Yet, Eve J. held that the annuity exceeded the powers of the company. Observing that all such grants "involve an expenditure of the company's money",[81] he stated that corporate assets could only be spent for purposes reasonably incidental to the company's business. He proposed a three-part test for the valid exercise of express and implied powers. Firstly, the transaction must be reasonably incidental to the carrying on of the company's business. Secondly, it must be a bona fide transaction. Thirdly it must be done for the benefit and to promote the prosperity of the company.[82]

Eve J. ruled that there was no evidence that the transaction was taken for the benefit of the company or was reasonably incidental to its business. On the contrary, the company's motivation was the altruistic desire to provide for the applicant and it never considered whether any benefit would flow to the company.[83] Eve J. added that perhaps a "more insurmountable difficulty" was that the annuity constituted a gift out of the company's assets to a director, which required the authorisation of a properly convened a shareholders' meeting. However, it is the three-part test for the validity of the exercise of powers which is most significant, and most controversial, in this decision. The *Lee Behrens* corporate benefit test was adopted and applied in a substantial body of case law.[84] Nonetheless, it was subject to criticism, principally on the ground that it confused the questions of capacity and breach of directors' duties.

6.3.1.1. Criticism of the Lee Behrens Approach

Even if some form of corporate benefit test is accepted, the *Lee Behrens*[85] test is a highly restrictive formulation. The three limbs of the test are cumulative. All must be satisfied if the act is to escape voidness. Choong is profoundly mistaken in

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[81] In Re Lee, Behrens & Co., Ltd [1932] AER 889, 891 (per Eve J.).

[82] Ibid, at 891 (per Eve J.).

[83] Ibid, at 891 (per Eve J.).

[84] See eg Parke v. The Daily News Ltd [1962] Ch. 927.

[85] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

viewing it as too permissive.[86] For one commentator, the application of the Eve test is "illogical", yet "understandable"; informed by a desire to prevent directors evading the control on their activities which ultra vires provides.[87] Yet it should be remembered that there are other rules with which company law governs internal company relations and restrains unwise directors: using the law on capacity resembles taking a sledgehammer to crack a nut.

The test takes the idea of good faith and turns it into a restriction on capacity. As a matter of principle, intentions and good faith should not affect capacity, which is dependent on the contents of the memorandum. The "subjective good faith of the directors" is irrelevant.[88] Transactions initiated with the best of intentions are void if they fall outside the company's objects. *Bell Houses*[89] clauses may bring the subjective discretion of the directors into the equation in some cases as a means of extending capacity to unforeseen objects, but only where such a clause expressly incorporates it, and there the good faith decisions of directors expand a company's capacity. *Lee Behrens* does the contrary, erecting lack of good faith into a barrier to capacity, stigmatising acts not entered into in good faith in the interests of the company. Thus, it diminishes capacity below what is envisaged by the constitution, by virtue of an external test. MacCann explains the second and third limbs as based on the aspects of *Hutton*[90] dealing with directors' duties, and asserts that Eve J. has confused the two issues to create a "hybrid" test.[91]

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[86] Cf T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17, 28; "tantamount to suggesting that a company has the power to enter into any transaction so long as it can be vaguely justified as being reasonably incidental to the carrying on of the company's business." – ibid, at 22.

[87] Including "the "lunatic director" made famous by Bowen LJ" – W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 206-7.

[88] T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17, 22.

[89] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656; [1966] 2 AER 674.

[90] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

[91] L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, 84.

Later authorities would draw on criticism of *Lee Behrens* and ultimately withdraw from it.[92] However, the long domination of the *Lee Behrens* view strongly informed many aspects of the ultra vires doctrine and persisting perceptions of it. Furthermore, it is not sufficiently clear from the Irish decisions of the 1990s that the courts here have completely departed from corporate benefit reasoning.[93] For these reasons, it is valuable to highlight those aspects of the traditional ultra vires doctrine which derive from the existence of a corporate benefit test governing the capacity to exercise express powers. Before considering the consequences of the corporate benefit reasoning for the law on capacity, however, it is necessary to engage a little further with the concept of corporate benefit. The eventual rejection of the *Lee Behrens* incarnation of the corporate benefit test does not necessarily logically equate to the elimination of any reference to corporate benefit.

6.3.2. Defining "Corporate Benefit"

If the exercise of express corporate powers, and particularly giving gifts, is only permissible when it serves the company's interests, it becomes essential to define the interests of the company. Silberberg[94] describes this concept as "never satisfactorily defined" before *Greenhalgh v. Arderne Cinemas, Ltd.*[95] There, Lord Evershed M.R. identified the interests of the company with those of the shareholders.[96] Accordingly, the court should consider the interests of "an individual hypothetical member".[97] In *Parke v. Daily News*,[98] Plowman J. referred

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[92] Charterbridge Corporation v. Lloyd's Bank [1969] 2 AER 1185, Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52; see below at Chapter 7: "The Decline and Fall of the Corporate Benefit Test".

[93] See below at 7.3: "Rolled Steel and the Law in Ireland".

[94] H. Silberberg, "Gratuitous Payments for the Benefit of a Company" [1968] JBL 213.

[95] Greenhalgh v. Arderne Cinemas, Ltd. [1951] Ch. 286.

[96] Ibid, at 291 (Evershed MR): "the phrase 'the company as a whole' does not [...] mean the company as a commercial entity, distinct from the corporators; it means the corporators as a general body."

[97] Ibid, at 291.

to the benefit of the shareholders as a whole,[99] explicitly approving *Greenhalgh.*[100] Silberberg concludes that the idea of corporate benefit is inextricably tied to the interests of the shareholders.[101]

This gives rise to a number of criticisms. Pennington[102] questions whether Plowman J. should have vaunted the "bare financial interests" of members over all else.[103] He contrasts this with the more liberal approach adopted in *Evans* v. *Brunner, Mond & Co.*[104] It has been asked whether, in a small company, where there are close relations between the shareholders and directors, the benefit test becomes "little more than a "meaningless" demand that they must properly consider primarily their own interests?"[105] Furthermore, it seems odd that the judge's estimation of the interests of the hypothetical shareholder should outweigh the expressed intent of the actual shareholder. Silberberg argues on this ground that it is unreasonable to condemn a transaction to which the shareholders unanimously agree[106] as not serving the company's interests.[107] Silberberg criticises the inconsistent approach of

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[98] Parke v. Daily News Ltd [1962] Ch. 927.

[99] Ibid, at 963.

[100] Greenhalgh v. Arderne Cinemas, Ltd. [1951] Ch. 286.

[101] H. Silberberg, "Gratuitous Payments for the Benefit of a Company" [1968] JBL 213, 219: "it is clear, therefore, that "the benefit of the company" cannot be divorced from the shareholders of a company."

[102] R.R. Pennington, "Terminal Compensation for Employees of Companies in Liquidations" (1962) 25 MLR 715, 718.

[103] Ibid, at 718: the decision "emphasised the bare financial interests of the shareholders as the governing criterion to the exclusion of all else."

[104] Evans v. Brunner Mond [1921] 1 Ch. 359; R.R. Pennington, "Terminal Compensation for Employees of Companies in Liquidations" (1962) 25 MLR 715, 718.

[105] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 208.

[106] Such as In Re W & M Roith Ltd [1967] AER 427; [1967] 1 WLR 432.

[107] The "confusion becomes worse confounded when, in spite of the fact that all "real" shareholders have accepted that a particular transaction was for the benefit of the company [...] an outsider subsequently conjures up the ghost of a "hypothetical" member to challenge the validity of such a

In Re W & M Roith,[108] which disregards separate legal personality to deem the service agreement in the case a sham, but simultaneously insists on a somewhat fictional conception of separate legal personality to distinguish the company's interest from that of the single controlling shareholder.[109]

Silberberg also points out that, while the corporate benefit test may be formulated so as to promote the interests of the company itself, in practice, the authorities concern competing claims between "two opposing parties each of which disputed the other's right to receive a benefit *from* the company."[110] Thus, the apparent merit of focusing on the interests of the company as part of the test for capacity is revealed as somewhat illusory in reality. The application of the test rarely serves to benefit the company itself.

6.3.2.1. The interests of groups of companies

If the company must exercise its powers for its own benefit, this poses a particular problem in relation to companies which are members of a group. To what extent may the interests of the group as a whole or other members of the group be used to justify the exercise of a company's powers?

Morgan[111] explains why it is often the practice in groups of companies for a subsidiary to guarantee the debt of the holding company: this facilitates the raising of capital, while ensuring that the lender benefits from the asset-backed security of

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transaction" - H. Silberberg, "Gratuitous Payments for the Benefit of a Company" [1968] JBL 213, 220.

[108] In Re W & M Roith Ltd [1967] 1 AER 427.

[109] H. Silberberg, "Gratuitous Payments for the Benefit of a Company" [1968] JBL 213, 215-216: "to prove that in law the benefit of a single controlling shareholder cannot be equated with the bona fides benefit of the company."

[110] Ibid, at 227: "Therefore it would seem that the time has come to place less emphasis on a somewhat theoretical benefit of the company and the abstract views of the "hypothetical" shareholder and to stress the conflicting interests of all those who claim to share in the profits or the assets of a company for their personal benefit."

[111] D. Ll. Morgan, "Corporate Collateral Security"[1970] JBL 256.

the subsidiary rather than the holding company.[112] It seems reasonable to infer that the grant of a guarantee for the debts of a related company may benefit the individual guarantor company and that whether or not it does so depends on the circumstances of the case. Therefore, given that the commercial reality may, even from the limited perspective of one single group member's interests, inform the giving of such guarantees, it would seem perverse that the law should step in and denounce them as beyond the capacity of the company.

In *Charterbridge Corporation v. Lloyd's Bank*,[113] Pennycuick J. criticised corporate benefit requirements, but nonetheless argued obiter that consideration should be taken of the intertwined interests of group companies. If directors of group members could not legally take account of the interests of the group as a whole, it would impose "an unduly stringent test and would lead to really absurd results".[114] The interests of each company should be assessed in the context of the benefit to the group, though the particular company could not be sacrificed to serve other separate legal entities. The test for group companies should be whether an honest and intelligent director could reasonably have believed that the action was advantageous for his company.[115] Pennycuick J. considered that on the facts of the case this test would be fulfilled, given the interdependence of the group companies and the detrimental effect on the company if its parent company had collapsed.

Citing *Charterbridge*,[116] Dawson asserted in 1991 that the most likely judicial approach would be to require each company to focus on its own interests, while

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[112] Ibid, at 256.

[113] Charterbridge Corporation v. Lloyd's Bank [1970] Ch. 62.

[114] Ibid, at 74 (per Pennycuick J.)

[115] Ibid, at 74 (per Pennycuick J.): "whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed to have a transaction was for the benefit of the company."

[116] Ibid.

acknowledging that these could be affected by group companies.[117] However, he believed that there would be merit in a test which instead considered directly the interests of the subsidiary as a member of the group.[118] This recommendation predicts the approach taken by Murphy J. in *Re PMPA Garage (Longmile) Ltd.*[119]

Many companies within the PMPA group guaranteed the repayment of loans made to certain group companies. The lender's liquidator demanded payment from the guarantor companies, which disputed liability, claiming that the loans were ultra vires both the lender and the guarantors. Murphy J. held that the guarantees were not ultra vires. Without analysing the memoranda of the guarantor companies in detail, he found that they all had the power to grant guarantees in furtherance of the objects for which they were created. The case then turned on the issue of whether the granting of guarantees could be for their benefit. Murphy J. indicated that related companies cannot safely ignore each other's problems.[120] Thus, even though there was no evidence that the directors of each subsidiary had carefully examined the potential benefits and burdens for their company of giving the guarantee, their "almost intuitive" agreement was legitimate.[121] Murphy J.'s decision recognises the common commercial reality of the common and interwoven interests of related companies. *In Re Frederick Inns*[122] shows the limits of the connection of group

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[117] F. Dawson, "Commercial Benefit" (1991) 107 LQR 202, 205: "orthodoxy requires that the directors of a subsidiary focus their attention on the interests of the subsidiary".

[118] Ibid, at 205.

[119] In Re PMPA Garage (Longmile) Ltd [1992] 1 IR 315

[120] Ibid, at 324 (per Murphy J.): even "the most independently minded director of any such related company would necessarily realise that he should and perhaps must protect the interests of the group as a whole or else take steps to secure that the particular company disassociates itself from the group."

[121] Ibid, at 324-325 (per Murphy J.): "their almost intuitive reaction to the request from the auditors for such a guarantee and its renewal each year was justifiable as a matter of law although as a matter of commerce it ultimately proved a disaster."

[122] In Re Frederick Inns Ltd [1994] 1 ILRM 387.

companies' interests: furthering the interests of related companies no longer benefits a particular group company when it is insolvent.[123]

Thus, the basic corporate benefit test refers to the financial interests of the company and its members, but it does take account of the interrelated interests of group companies.

6.4. THE CONSEQUENCES OF CORPORATE BENEFIT

Around *Hutton v. West Cork Railway Company*[124] and *Lee Behrens*[125] there developed a body of authority which firmly insisted that implied and express powers must both advance the company's objects in order to be intra vires. This principle informed a number of themes and discussions which were regarded as central to the law on corporate capacity until very recently. Three of these themes should be considered in order to be fully aware of the issues related to the ultra vires doctrine. These are the question of the outsider's awareness of the improper purpose for which a power is used, the distinction drawn between powers and "mere powers" and the issue of gratuitous dispositions.

6.4.1. The Outsider's Awareness of the Improper Purpose

As a rule, any act which exceeds a company's capacity is automatically void.[126] Where the lack of capacity is evident on the face of the memorandum, because the proposed transaction is simply not mentioned, it is easy to justify this.[127] Its legitimacy is bolstered by reference to the doctrine of constructive notice.[128] However, the corporate benefit principle, by condemning as ultra vires transactions

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[123] Ibid.

[124] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

[125] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[126] See above at 4.2.3: "A Concluded Act which is Ultra Vires".

[127] See also below at 8: "The Effect of the Ultra Vires Doctrine on the Innocent Outsider": the position of the outsider has been the source of deep concern.

[128] See below at 8.2: "Third Parties and Constructive Notice".

which might appear to be envisaged in a company's objects clause, had the potential to penalise outsiders for circumstances which were entirely beyond their knowledge.

This problem is illustrated by *In Re David Payne*,[129] which endorsed the corporate benefit approach, but in a nuanced fashion with respect to the effects on third parties. *In Re David Payne*[130] is authority for the proposition that where a valid corporate power was employed for a purpose which was not authorised by the company's memorandum of association, and the other party to the transaction was aware that the objective was to further an ultra vires action, the use of the power would be voidable unless ratified by the company's members. It is not necessarily clear that incapacity is the basis of the rule[131] and recent reaction against the corporate benefit test demands its re-evaluation.[132]

A passage in the judgment of Buckley J. was subsequently relied on to support the view that the use of a power other than to further the company's main objects was ultra vires and void. After pointing out that it was unnecessary to enumerate powers which would in any case be implied, Buckley J. added that expressing the limitation that the power could only be exercised for the company's business was also unnecessary, as a company could only act intra vires for the purposes of its business.[133] This statement seems on its face clearly to state that the use of a power other than "for the purposes of its business" is outside a company's capacity.[134]

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[129] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[130] Ibid.

[131] Buckley L.J. summarily dismisses the case's relevance as involving "quite different considerations" in Re Horsley & Weight Ltd [1982] 3 AER 1045, 1053.

[132] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 82 (per Slade LJ); see below at 7.2.1.2: "David Payne reinterpreted".

[133] In Re David Payne and Company Ltd [1904] 2 Ch. 608, 612 (per Buckley J): "A corporation cannot do anything except for the purposes of its business, borrowing or anything else; everything else is beyond its power, and is ultra vires."

[134] See In Re M.J. Cummins Ltd; Barton v. Bank of Ireland [1939] IR 61 (per Johnston J.); MacCann also accepts the ultra vires interpretation: "Although the loan was enforceable, the court did not deny

However, Buckley J. also mitigated the consequences for the outsider by affirming that the outsider is not required to investigate the purposes for which the company is entering the transaction.[135] Thus, if the circumstance which renders the use of an express power ultra vires is not known to the outsider, he can rely on the transaction. In *Re Introductions*[136] Buckley J. announced unequivocally that borrowing "for any purpose other than the legitimate activities of the company" is ultra vires.[137] Reprising *In Re David Payne*,[138] he affirmed that a lender who was aware of the improper purpose could not recover the loan.[139]

After subsequent adjustments in the interpretation of *In Re David Payne*,[140] Buckley J.'s assertion that powers can only be used for the company's business has been downgraded to "ambiguous".[141] One difficulty with the "capacity" interpretation of *In Re David Payne*[142] is the inconsistency of suggesting that an act which was ultra vires could be voidable, dependent on the awareness of the parties, as opposed to simply void, as one would expect.[143] Baxter describes this as "absurd".[144] Dawson

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that it amounted to an ultra vires transaction." - L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, 85.

[135] In Re David Payne and Company Ltd [1904] 2 Ch. 608, 613 (per Buckley J): "A corporation, every time it wants to borrow, cannot be called upon by the lender to expose all its affairs".

[136] In Re Introductions Ltd: Introductions Ltd v. National Provincial Bank Ltd [1968] 3 AER 1221; affirmed on appeal at [1969] 1 AER 887.

[137] In Re Introductions Ltd [1968] 3 AER 1221, 1225 (per Buckley J.).

[138] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[139] In Re Introductions Ltd [1968] 3 AER 1221, 1225 (per Buckley J.).

[140] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[141] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185, 1193 (Pennycuick J.): "that decision really does not advance the argument of counsel for the plaintiff company in the present case."

[142] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[143] See above at 4.2.3: "A Concluded Act which is Ultra Vires".

[144] C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28 CLJ 280, 280.

refers to the difficulties involved in understanding the theoretical basis for *David Payne*'s emphasis on knowledge.[145] Subjecting invalidity to the knowledge of the parties would sometimes deprive the company's shareholders and creditors of the protection which the doctrine was intended to provide. Commentators struggled to explain the decision. Slade J. in *Rolled Steel*[146] later reinterpreted *David Payne*[147] as stating that powers used for an improper purpose were "ultra vires the directors".[148] Nonetheless, for many years, it was taken as authority that the outsider's knowledge of the purpose for which a power was being used could determine the validity of the transaction.[149]

6.4.2. Powers and "Mere Powers"

Developments throughout the history of the ultra vires doctrine's application to registered companies demonstrate that the drafters of corporate constitutions are not impotent in the face of interventionist judges.[150] In principle it is they who define the scope of the company's capacity. In practice, they can skilfully draft clauses which evict the courts' favoured approaches. Would this capacity serve to free powers from restrictive interpretation, as it had objects?[151]

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[145] F. Dawson, "Commercial Benefit" (1991) 107 LQR 202, 207.

[146] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52.

[147] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[148] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 82 (per Slade LJ): "in using the phrase "ultra vires" in this particular context Buckley J. can only have meant "ultra vires the directors.""; F. Dawson, "Commercial Benefit" (1991) 107 LQR 202, 207: "For a long time the generally received view was that *Re David Payne* was to be explained as being a case in which a loan was validly made but its proceeds were subsequently misapplied. However, in recent times the explanation that has been favoured is that cases involving the exercise of an express power do not involve questions of capacity at all but are in fact concerned with excess of directors' authority".

[149] In Re Introductions Ltd [1968] 3 AER 1221.

[150] See above at 5.3.2: "The Attempt to Draft All-encompassing Objects Clauses".

[151] See above at 5.3.5: "The Assault on the Main Objects Rule of Interpretation".

It emerged that independent objects clauses, even when recognised as saving objects from the *ejusdem generis* rule of interpretation, could not release powers from their submission to the company's main objects. This was because certain powers were deemed incapable of constituting objects. This view was hinted at in 1902 in *Stephens v. Mysore Reefs (Kangundy) Mining Company Ltd.*[152] There, Swinfen Eady J. refused to give effect to a form of independent objects clause. He pointed to the power of registering the company in other jurisdictions and observed that it "would be obvious nonsense to read this alone, as an independent object".[153]

In Re Introductions[154] further embodies this approach. The plaintiff company was incorporated to offer tourist services. Its memorandum of association contained an independent objects clause and a power to borrow money. After a dormant period, it began a pig breeding business under new management, borrowing money for this new activity. When the company later went into liquidation, it fell to be decided whether the bank could recover the loans or enforce its security. The bank was aware both of the purpose for which the company was established and its actual field of business.[155] Buckley J. affirmed that the company only had the capacity to borrow for its legitimate objects.[156] He further found that the independent objects clause could not apply to the power of borrowing because some parts of an objects clause "are incapable of constituting independent objects".[157] Borrowing fell into this category as it could only be used as a means to an end. Borrowing, in the abstract, without a particular purpose in mind "would be a senseless operation."[158] Therefore, though the power to borrow as articulated in the memorandum was not

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[152] Stephens v. Mysore Reefs (Kangundy) Mining Company Ltd [1902] 1 Ch. 745.

[153] Ibid, at 750.

[154] In Re Introductions Ltd: Introductions Ltd v. National Provincial Bank Ltd [1968] 3 AER 1221; affirmed on appeal at [1969] 1 AER 887.

[155] Cf In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[156] In Re Introductions Ltd [1968] 3 AER 1221, 1225 (per Buckley J.).

[157] Ibid, at 1225.

[158] Ibid, at 1227.

expressly limited by reference to the purposes of the company, its "very nature" suggested that such a limitation must be implied.[159] It followed that the impugned borrowing for ultra vires activities was not valid.[160]

This decision heralded a new category of acts known as mere powers, which were express powers that could never, by their nature, constitute objects.[161] This introduction of a new subcategory of activity to the law on corporate capacity further exacerbated the confusion which often surrounded the doctrine. Students and practitioners were henceforth required to be aware of objects, powers, mere powers and implied powers, in discerning the extent of a company's capacity from the contents of its objects clause. Furthermore, the implication of unstated restrictions contradicts "the basic doctrine on express objects" which defines a company's capacity by reference to the terms of its objects clause.[162] *In Re Introductions*[163] establishes that, even if the drafters should wish to create an absolute power unconnected to the company's main business, their intention will be disregarded.[164]

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[159] In Re Introductions Ltd [1968] 3 AER 1221, 1227; cf K.W. Wedderburn, "Unreformed Company Law" (1969) 32 MLR 563, 565-566.

[160] In Re Introductions Ltd [1968] 3 AER 1221, 1227; the traditional view of In Re Introductions was that the misuse of the borrowing power was ultra vires, but the Court of Appeal in Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52 reinterpreted the case as "not a decision relating to ultra vires in the strict sense" – ibid, at 93 (per Browne-Wilkinson LJ).

[161] See also In Re Horsley & Weight Ltd [1982] 3 AER 1045, 1050-1051 (per Buckley LJ.): "It has now long been a common practice to set out in memoranda of association a great number and variety of 'objects' so called, some of which (for example, to borrow money, to promote the company's interests by advertising its products or services, or to do acts or things conducive or incidental to the company's objects) are by their very nature incapable of standing as independent objects which can be pursued in isolation as the sole activity of the company. Such 'objects' must, by reason of their very nature, be interpreted merely as powers incidental to the true objects of the company and must be so treated notwithstanding the presence of a separate objects clause".

[162] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 207.

[163] In Re Introductions Ltd: Introductions Ltd v. National Provincial Bank Ltd [1968] 3 AER 1221; affirmed on appeal at [1969] 1 AER 887.

[164] It is the "most blatant example of use of the objects/powers distinction by the courts to impose their will" - G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University

McMullen suggests that draftsmen could expressly provide that no distinction was to be made between a company's objects and powers, but warns that the effectiveness of such a device would depend on the response of the court.[165]

Despite the court's disregard of the terms inserted by the company's creators, the rule that some purported objects must remain powers notwithstanding the presence of an independent objects clause has been defended as possibly "good legal policy if the ultra vires doctrine is to survive at all."[166] That is, given the success of drafters in composing ever more inclusive constitutional documents, the ultra vires doctrine would risk becoming entirely irrelevant if judges did not adapt it to actively control dubious corporate transactions. The imposition of external limits on the content of the memorandum fetters the ability of promoters to draft all-encompassing objects clauses. Thus, if judicial control takes precedence over information, the inescapable subordination of mere powers to the greater legitimate aim is justifiable. Furthermore, this level of external judicial control allows the results in particular cases to reflect the view of the court as to the desirability of the impugned transaction. An anonymous commentator observes that the judges who insist that it is simply a matter of construction whether stated objects are truly objects or merely powers, in fact allow judicial policy to have a bearing on their interpretation and classification.[167] He contrasts the interpretation of the express objects in *Re Horsley & Weight*,[168] where the court did not disapprove of the transaction, with the hard line taken in *Re Introductions*.[169]

College Cork, 1989), p. 83; cf In Re Horsley & Weight Ltd [1982] 3 AER 1045; Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 81: provisions capable of being substantive objects and so expressed in the memorandum are independent; even giving gratuitous guarantees is capable of being a substantive object.

[165] J. McMullen, "Objects, Powers and Ultra Vires" (1983) 42 CLJ 58, 61: it may simply transpire that the court "disturbed a drafting device [...] again to remove a label it thought inappropriate."

[166] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 207.

[167] Ibid, at 207-208.

[168] In Re Horsley & Weight Ltd [1982] 3 AER 1045.

[169] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 207-208.

Subsequent developments have reduced the importance of *In Re Introductions*, although its legacy of a category of mere powers remains. Once the corporate benefit test is removed,[170] then all express powers fall within the capacity of the company, regardless of the purpose for which they are in any particular circumstance exercised. That certain powers cannot attain the status of objects becomes moot if there is no obstacle to the exercise of powers.

6.5. GRATUITOUS DISPOSITIONS AND THE CORPORATE BENEFIT TEST

Perhaps the most important recurring theme in the case law concerns the capacity of companies to make gratuitous dispositions. This question was born out of the debate about objects, powers and corporate benefit, but it has outgrown its original context so that it now merits specific attention as an important dimension of the ultra vires doctrine. The gift cases may be viewed simply as examples of the wider corporate benefit approach or, alternatively, as a category of case subject to its own distinct rules.

Commercial practice does not exclude non-beneficial acts. As Gavan Duffy P. indicates in *Re S.M. Barker Ltd*,[171] "a trading company may from time to time reduce or forgive a debt; and where is the line to be drawn?"[172] Yet, while many companies appear to believe that they are capable of disposing of their assets to a good cause, such dispositions have frequently been challenged as beyond their capacity. The courts incline to the view expressed by Street that "it is no part of a corporation's business to give its funds away".[173] In many cases, it has been held to

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[170] Rolled Steel Products Ltd v. British Steel Corporation [1984] BCLC 466; [1986] Ch. 246; [1985] 3 AER 52.

[171] In Re S.M. Barker Ltd [1950] IR 123.

[172] Ibid, at 136.

[173] H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), p. 90

be outside a company's powers to make gratuitous dispositions of its assets.[174] Pickering suggests that the authorities are more likely to condemn "excessive" donations.[175]

Applying the general principles of the doctrine of ultra vires, the starting point in considering the capacity of a company to make a donation should be the interpretation of its objects clause. The company's capacity will depend on whether there is an implied power, an express power, or an object, which covers the gift. However, the authorities give the strong impression that cases of gratuitous dispositions are decided on the basis of judicial reluctance to countenance corporate gifts rather than careful application of the usual rules of capacity.[176]

6.5.1. The Power to Make Gifts Subject to Corporate Benefit

The corporate benefit test, propounded in *Hutton*[177] and *Lee Behrens*,[178] has been applied to ensure that the power to make gifts is exercised for legitimate purposes. Some gifts may satisfy a corporate benefit test and so be justified, if they lead to a return benefit for the company. In *Evans v. Brunner Mond*,[179] it was deemed sufficient benefit to the company that the pool of scientific experts from which the company could source employees would be enhanced, and this justified grants by the company to further scientific education.[180] Frequently, however, the gift is made in circumstances such that it would not be possible to argue that it benefits the company. Often the genuine and understandable motivation is to make a gift to

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[174] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654; In Re Lee, Behrens & Co Ltd [1932] 2 Ch. 46; Parke v. The Daily News Ltd [1962] Ch. 927; In Re W & M Roith Ltd [1967] 1 AER 427; K.W. Wedderburn, "Ultra Vires or Directors' Bona Fides?" (1967) 30 MLR 566, 567.

[175] M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31 MLR 481, 488.

[176] See In Re Halt Garage Ltd [1982] 3 AER 1016, 1030.

[177] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

[178] In Re Lee, Behrens & Co Ltd. [1932] 2 Ch. 46.

[179] Evans v. Brunner Mond [1921] 1 Ch. 359.

[180] Ibid.

benefit the recipient, but this motivation has not been favoured by the law on ultra vires.

Parke v. Daily News[181] is a striking illustration of the judicial condemnation of a corporate gift both because it is relatively recent, dating from the 1960s, when the ultra vires doctrine might already have been thought to be in decline,[182] and because the motives underlying the gift were clearly understandable, even laudable, but insufficient to render it legal.[183] The defendant company sold its loss-making newspapers, resulting in the termination of two thousand employees. Its board announced that, subject to shareholder approval, it would use some of the purchase price to provide compensation and pension benefits for former workers. The plaintiff, a minor shareholder in the company, sought an injunction on the basis that such payments would be ultra vires.

Plowman J. held that the decision to devote the purchase price to the employees was not in the interests of shareholders, being motivated by the desire to treat the employees generously. It was consequently ultra vires. He followed the established gratuitous disposition cases of *Hutton v. West Cork Railway Company*[184] and *In Re Lee, Behrens & Co Ltd.*[185] The principles he derived from these were that corporate assets cannot be used to make gratuitous payments, that the purpose of any apparent gift will be investigated, and that the three elements of the *Lee Behrens*[186] test must

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[181] Parke v. The Daily News Ltd [1962] Ch. 927; [1962] 2 AER 929; [1962] 3 WLR 566.

[182] K.W. Wedderburn, "Ultra Vires and Redundancy" [1962] CLJ 141, 142; note also 1960s developments such as Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 AER 674 and the "Jenkins Report", Board of Trade Company Law Committee Report (1962) Cmnd. 1749/62.

[183] Parke v. Daily News Ltd [1962] Ch. 927, 963; see R.R. Pennington, "Terminal Compensation for Employees of Companies in Liquidations" (1962) 25 MLR 715, 719.

[184] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

[185] In Re Lee, Behrens & Co Ltd. [1932] 2 Ch. 46.

[186] Ibid.

be satisfied in order for a gift to be intra vires.[187] Thus, only gifts which could be proven ultimately to be self-interested would be permissible.[188]

A further implication of this reasoning is that, if gifts can only be justified by the prospect of future corporate benefit, capacity constricts when a company becomes insolvent or ceases trade.[189] Baxter points out that donations at the end of corporate life, anonymous charitable donations, and simultaneous political contributions would inevitably fail.[190] Wedderburn criticises the reaffirmation in *Parke* of the restrictions placed on gratuitous dispositions by strict application of the *Lee Behrens* corporate benefit test.[191] He views it as somewhat surprising, given previous indications that the law was becoming more flexible in the case of solvent companies, such as *Evans v. Brunner Mond* and the Jenkins Report.[192] Wedderburn also points out that the company in *Parke* was in a unusual position in that it was neither trading nor being wound up, and could not therefore avail of authorities relating to the creation of future goodwill.[193] Ultimately Wedderburn describes

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[187] Parke v. The Daily News Ltd [1962] Ch. 927, 954 (per Plowman J.): "first, that a company's funds cannot be applied in making *ex gratia* payments as such; secondly, that the court will inquire into the merits actuating any gratuitous payment, and the objectives which it is intended to achieve; thirdly, that the court will uphold the validity of gratuitous payments if, but only if, after such inquiry it appears that the tests enumerated by Eve J. are satisfied; fourthly, that the onus of upholding the validity of such payments lies on those who assert it."

[188] See eg Evans v. Brunner Mond Co Ltd [1921] 1 Ch. 359.

[189] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654; see D.H.J. Cohen, "Gratuitous Payments to Employees and the Ultra Vires Doctrine" (1984) NLJ 716, 716: "it is difficult to conceive of circumstances in which a company about to cease trading would derive any benefit from making gratuitous payments to its employees."; see also above at 4.5: "Can the Capacity of a Company Vary over Time?".

[190] C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28 CLJ 280, 293.

[191] K.W. Wedderburn, "Ultra Vires and Redundancy" [1962] CLJ 141, 142.

[192] Ibid, at 142: "Although this rule had been firmly applied in the case of companies being wound up, there was reason to believe that elsewhere it was being relaxed in recent years."

[193] Ibid, at 144.

Parke as "little better than arbitrary" since it seems that if the compensation had been to be paid by the transferee company, then it would have been valid.[194]

6.5.1.1. Gifts under express powers

Shortly after *Parke v. Daily News*,[195] Wedderburn[196] expressed doubt as to whether the corporate benefit test as expounded in cases such as *Hutton*[197] and *Lee Behrens*[198] applied to express as well as implied powers. Most cases had involved implied powers.[199] As Buckley L.J. recalls in *Re Horsley & Weight*,[200] although Eve J. formulated his corporate benefit test[201] as applying equally to implied and express powers, it was obiter dictum in relation to express powers.[202] Wedderburn asks whether *Parke v. Daily News*[203] would have been decided differently had the company's memorandum contained an express power to make compensation for redundancy.[204]

It was "strongly implicit" in the judgment of Plowman J. in *Parke*[205] that "express authority in the memorandum to make the payments would make no difference."[206] Yet there was controversy at the time as to whether or not the corporate benefit test

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[194] Ibid, at 146.

[195] Parke v. The Daily News Ltd [1962] Ch. 927; [1962] 2 AER 929; [1962] 3 WLR 566.

[196] Ibid.

[197] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

[198] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[199] In Re Halt Garage Ltd [1982] 3 AER 1016, 1030 (Oliver J.).

[200] In Re Horsley & Weight Ltd [1982] 3 AER 1045.

[201] In Re Lee, Behrens & Co Ltd. [1932] 2 Ch. 46.

[202] In Re Horsley & Weight Ltd [1982] 3 AER 1045, 1052 (per Buckley LJ).

[203] Parke v. The Daily News Ltd [1962] Ch. 927; [1962] 2 AER 929; [1962] 3 WLR 566.

[204] K.W. Wedderburn, "Ultra Vires and Redundancy" [1962] CLJ 141, 144.

[205] Parke v. The Daily News Ltd [1962] Ch. 927; [1962] 2 AER 929; [1962] 3 WLR 566.

[206] G. Shapira, "Ultra Vires Redux" (1984)100 LQR 468, 472.

was necessarily to be applied to express powers. On one hand, academic writers considered that it did not apply, but on the other, the courts seemed to suggest that it did. Wedderburn asserts that the "ordinary rules" of the doctrine of ultra vires require recognising the capacity of the company to make payments expressly envisaged in the objects clause, without subjecting such payments to an external corporate benefit test.[207] However, he concedes that the authorities indicate that, on the contrary, even express powers are deemed to be subject to the *Lee Behrens* test.[208] He points to Plowman J.'s "unqualified support" in *Parke v. Daily News Ltd*,[209] for Eve J.'s dictum, which explicitly subjects dispositions made under both express and implied powers to his test.[210] If this is so, then express powers are subjected to an unwritten qualification that they only exist when their use serves the company's purposes.[211]

In *Re W & M Roith*,[212] Plowman J. reinforces the view that express powers, like implied powers, are subject to the corporate benefit test.[213] There the company granted a widow's pension to the wife of its controlling shareholder, in return for his management services for life, shortly before he died. The pension was paid for a

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[207] K.W. Wedderburn, "Ultra Vires and Redundancy" [1962] CLJ 141, 144.

[208] "But a perusal of the judgments leaves a doubt."- K.W. Wedderburn, "Ultra Vires and Redundancy" [1962] CLJ 141, 144.

[209] Parke v. Daily News Ltd [1962] Ch. 927; [1962] 2 AER 929; [1962] 3 WLR 566.

[210] K.W. Wedderburn, "Ultra Vires and Redundancy" [1962] CLJ 141, 144, citing In Re Lee, Behrens & Co., Ltd [1932] AER 889, 891 (per Eve J.): ""*whether they be made under an express or implied power,* all such grants involve an expenditure of the company's money," and are therefore subject to the three tests".

[211] In Re Halt Garage Ltd [1982] 3 AER 1016, 1029 (per Oliver J.): "every power, express or implied, would have to be read and qualified by some such words as 'if (but only if) it is for the benefit of the company's business and to promote its interests'"

[212] In Re W & M Roith Ltd [1967] 1 AER 427; see H. Silberberg, "Gratuitous Payments for the Benefit of a Company" [1968] JBL 213.

[213] Cf Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185, which later adopted the alternative approach.

number of years. In the company's liquidation, his executors sought the capitalised value of the pension, but the liquidator rejected the claim because the agreement was not reasonably incidental to the carrying on of the company's business and bona fide for the benefit of the company. The company's objects clause included an unequivocal express power to grant pensions to officers' widows.[214] Neither party questioned that the Eve test applied to this express power. The executors argued that the agreement was justified under the corporate benefit test.[215] They claimed that widows' pensions were a normal means of remunerating directors and so were reasonably incidental to carrying on a company's business, that it was for the benefit of the company that the services of "the architect of its prosperity" should be retained, and that there was no evidence of bad faith.[216] The liquidator countered that the service agreement was not entered into bona fide in the interests of the company, but instead to provide for his widow.[217] Plowman J. agreed that the pension was ultra vires the company, as, "really the whole object of the plan of campaign was to benefit not the company but Mrs. Roith".[218]

Plowman J. appears to confirm that his intention in *Parke*[219] was that the *Lee Behrens*[220] test should apply to all gratuitous dispositions, including those made pursuant to express powers.[221] The implications are far-reaching in that once a transaction is deemed a gift, the will of a solvent company, expressed first in

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[214] Sub-clause 3(N) - In Re W & M Roith Ltd [1967] 1 AER 427, 429.

[215] In Re W & M Roith Ltd [1967] 1 AER 427, 430.

[216] Ibid, at 430; see also H. Silberberg, "Gratuitous Payments for the Benefit of a Company" [1968] JBL 213, 216-217, 223.

[217] In Re W & M Roith Ltd [1967] 1 AER 427, 431.

[218] Ibid, at 431.

[219] Parke v. Daily News Ltd [1962] Ch. 927; [1962] 2 AER 929; [1962] 3 WLR 566.

[220] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[221] MacCann agrees that express powers are subject to a corporate benefit test: "the same principles apply to the exercise of an express power to make gifts contained in the objects clause" - L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, 84.

drafting its objects clause and then unanimously voting a resolution, can be overridden by the courts.[222]

6.5.2. Gifts under Express Objects

Despite extensive judicial control of companies' capacity to make gifts under implied and express powers, there is one other possibility to consider. A company could possess an object of donating its assets. Certainly, a company may be set up with a charitable purpose, in which case its primary objects would include making donations.[223] Might commercial companies also include among their true objects the giving of gifts? *In Re Introductions*[224] proposes that certain express powers must always be ancillary: they cannot by nature constitute objects. Does this qualification apply to donations? If so, must an express power to make charitable donations among the objects of a trading company automatically be dismissed as a mere power, which can only be used to advance the company's interests?

In Re Horsley & Weight[225] answers these questions. It affirms that, even if the *Lee Behrens* test remained applicable to express powers and mere powers could not be independent objects, a company could nonetheless have a substantive object of making gratuitous dispositions, and that this substantive object would not be read down by reference to other main objects.

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[222] G. Shapira, "Ultra Vires Redux" (1984)100 LQR 468, 472; subject, since In Re Horsley & Weight Ltd [1982] 3 AER 1045 to the possibility that the gift be covered by a substantive object; see also C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28 CLJ 280, 293: "This is the same thing as saying that neither the directors nor the company have any such powers at all, notwithstanding that the constitution accepted by the registrar says that they have."

[223] In Re Horsley & Weight Ltd [1982] 3 AER 1045, 1052 (Buckley LJ): "The objects of the company do not need to be commercial; they can be charitable or philanthropic; indeed, they can be whatever the original incorporators wish, provided that they are legal."

[224] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 207-208.

[225] In Re Horsley & Weight [1982] 3 AER 1045; W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204.

In *Re Horsley & Weight*,[226] a shopfitting company purchased a pension policy for a former director and employee. The company became insolvent and its liquidator applied for declarations that the pension was ultra vires, constituted misfeasance and was held on trust for the company. The company's objects expressly authorised the grant of pensions to former employees[227] and contained an independent objects clause.[228] Oliver J. rejected the liquidator's claim.

In the Court of Appeal, Buckley L.J. reiterates the distinction[229] between true, substantive objects and ancillary objects or mere powers and indicates that the terms of a company's memorandum may identify a clause as a power.[230] Adhering to the corporate benefit approach, he reasons[231] that ancillary objects or express powers, like implied powers, must be used to further a company's substantive objects.[232] In contrast, however, he proposes that all acts authorised by express substantive objects must by definition be within the capacity of the company. If there is an independent objects clause, any provision which is capable of being an object is protected.[233] Buckley L.J. affirms that a commercial company may possess non-commercial objects.[234] In this instance, the object of giving pensions is capable of

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[226] In Re Horsley & Weight [1982] 3 AER 1045.

[227] Clause 3(O): "To grant pensions to employees and ex-employees and directors and ex-directors".

[228] "All the foregoing objects shall be read and construed as separate and distinct objects and the generality of any such objects shall not be abridged or cut down by reference to any other object of the company."

[229] In Re Introductions Ltd [1968] 3 AER 1221.

[230] In Re Horsley & Weight Ltd [1982] 3 AER 1045, 1050-1051 (per Buckley LJ).

[231] This is obiter dictum, since the clause here is a substantive object.

[232] In Re Horsley & Weight Ltd [1982] 3 AER 1045, 1051 (per Buckley LJ).

[233] Ibid, at 1051 (per Buckley LJ): "the doing of an act which is expressed to be, and is capable of being, an independent object of the company cannot be ultra vires, for it is by definition something which the company is formed to do and so must be intra vires."

[234] Ibid, at 1052 (Buckley LJ).

being a real substantive object.[235] Since the clause also envisages charitable donations, it could hardly be subject to an implied limitation that it only be exercised where it would benefit the company's business. This clause made both pensions and charitable donations substantive objects of the company,[236] which are not subject to a corporate benefit test, unless the terms of the clause require one.[237] This implies that the *ejusdem generis* rule of interpretation might no longer apply even in the absence of an independent objects clause.

In Re Horsley & Weight[238] attempts to reconcile adherence to the old corporate benefit approach with an interpretation of the objects clause which does not assume that gratuitous dispositions form a category of automatically invalid acts. Giving gifts may indeed constitute a corporate object.[239] This depends on construction,[240] which is likely influenced by policy concerns. In many cases, the clause authorising gifts will be deemed a power rather than an object, from which designation might

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[235] Ibid, at 1051 (per Buckley LJ).

[236] Ibid, at 1052 (per Buckley LJ): "It is worthy of note that the judge used the word 'power', not the word 'object'."

[237] Ibid, at 1054 (per Buckley LJ): "if the memorandum of association expressly or by implication provides that an express object only extends to acts which benefit or promote the prosperity of the company, regard must be had to that limitation; but, where there is no such express or implied limitation, the question whether an act done within the terms of an express object of the company will benefit or promote the prosperity of the company or of its business is, in my view, irrelevant."

[238] Ibid; W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204; approved by Slade L.J. in Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 80.

[239] Cf doubts as to the likelihood of companies incorporating such an object: "in the realm of theory a memorandum of association may authorise a company to give away all its assets to whomsoever it pleases [...] But in the real world of trading companies, charitable or political donations to widows of ex-employees and the like apart, it is obvious that such a power would never be taken." – per Nourse LJ, Brady v. Brady [1988] BCLC 20, 38.

[240] In Re Horsley & Weight Ltd [1982] 3 AER 1045, 1051 (per Buckley LJ): stated objects "may on construction fall to be treated as no more than powers which are ancillary to the dominant or main objects of the company".

follow the imposition of a corporate benefit test to legitimise the gift.[241] Given W.'s argument that judicial policy will influence the construction of the memorandum in each case,[242] it is unsurprising that powers to make gifts have rarely been accorded the status of objects.

While Buckley L.J.'s account of the traditional view of the law seems straightforward, and the decision is positive in allowing some companies to reassert some control over their capacity to make gifts, it has a downside. It adds yet another class of provision to the litany found in objects clauses. Now the list of objects, express powers, implied powers, and mere powers is joined by a new distinction between ancillary objects and substantive objects. Is it really helpful to businessmen or lawyers to require those reading a memorandum to divine whether each provision contains a substantive object, ancillary object, power or mere power?[243] Added to the unstated group of implied powers, the relationship between the objects clause drafted by a company and the capacity the courts will deem it to confer became ever more complicated.

6.5.2.1. Gifts: a Distinct Category of Transaction?

The readiness of the courts to declare gifts ultra vires hints that gratuitous dispositions might be a class of transaction which is subject to particular and unforgiving restrictions under the law on capacity. Wedderburn believes that the general principle of ultra vires, which is predicated on giving effect to the capacity described in the memorandum, does not mandate the imposition of an external control on the making of gifts under an express power. If the law does indeed police gifts by imposing a corporate benefit test, does this suggest that the ordinary rules of the doctrine do not apply to gifts? The courts' refusal to countenance gifts which do not attract reciprocal benefits raises the possibility that purely altruistic gratuitous

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[241] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654; Evans v. Brunner Mond Co Ltd [1921] 1 Ch. 359; In Re Lee, Behrens & Co., Ltd [1932] AER 889; In Re Introductions Ltd [1968] 3 AER 1221; Parke v. The Daily News Ltd [1962] Ch. 927.

[242] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 207-208.

[243] These distinctions are important in the presence of an independent objects clause.

dispositions form a discrete category of transaction which will always fall foul of the doctrine of ultra vires, regardless of the contents of a company's constitution.[244] If the more restrictive view, that even express powers would be subject to the corporate benefit test, is correct, Wedderburn suggests that this implies that altruistic gifts are subject to a general prohibition: a rule of illegality instead of incapacity.[245]

Judicial hostility to corporate gifts can be seen in Pennycuick J.'s strong condemnation of gratuitous dispositions in *Ridge Securities Ltd v. IRC*.[246] This arose in the context of a dishonest tax-avoidance scheme which disguised dividends as interest payments.[247] Pennycuick J. declared that companies can only lawfully deal with their assets to further their objects and that disposing voluntarily of corporate assets is ultra vires.[248] He applied the Eve test,[249] finding that the impugned payments fulfilled none of its requirements. This strong view was

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[244] In Re Frederick Inns Ltd [1991] ILRM 582 (per Lardner J): "even if one supposes that in the present case these companies had been empowered by their memoranda and articles to make gratuitous payments [...] it is a supposition which in this case is so inconsistent with some of the basic principles of company law as to be hardly made."; see also C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28 CLJ 280, 293: "Taking a short-sighted view, such payments could never be for the benefit of a company. In terms of corporate capacity the company would have powers that could never be exercised".

[245] K.W. Wedderburn, "Ultra Vires and Redundancy" [1962] CLJ 141, 144: "then rules on gifts become part of something more fundamental, - a prohibition imposed by the law, akin to that imposed in *Trevor* v. *Whitworth*"; a logically open position - M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31 MLR 481, 488.

[246] Ridge Securities Ltd v. IRC [1964] 1 WLR 479; [1964] 1 AER 275; see Schmitthoff ed, "Companies" [1964] JBL 244.

[247] See Ridge Securities v. IRC [1964] 1 AER 275, 286-287 (Pennycuick J.).

[248] Ibid, at 288 (per Pennycuick J.): "A company can only lawfully deal with its assets in furtherance of its objects. The corporators may take assets out of the company by way of dividend or, with leave of the court, by way of reduction of capital, or in winding up. They may, of course, acquire them for full consideration. They cannot take assets out of the company by way of voluntary disposition, however described, and, if they attempt to do so, the disposition is *ultra vires* the company."

[249] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

undoubtedly coloured by the unsympathetic plaintiff, which did not make a strong argument that the payments were intra vires.[250] Pennycuick J. later regretted[251] uncritically approving *Lee Behrens* and emphasised that there was no express power in *Ridge*.[252]

Oliver J. in *Re Halt Garage (1964) Ltd.*[253] regards gifts as constituting a discrete category of transaction. He doubts that cases such as *Hutton* and *In Re Lee Behrens* were correctly interpreted as ultra vires cases, yet he concedes that the Lee Behrens test does apply, on the strength of binding precedent, to gifts.[254] He distinguishes *Charterbridge*,[255] asserting that it cannot displace the "distinctive principles" which the case law has established in relation to corporate gifts.[256] His view is that gratuitous dispositions constitute a class of prohibited or restricted transaction, regardless of developments which affect the general principles of the doctrine of ultra vires as a whole.[257]

An alternative view is that the authorities on gratuitous dispositions should be re-evaluated now that the law on corporate capacity has moved on from *Lee Behrens*.[258] Similarly, by recognising substantive objects to make gifts, *In Re*

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[250] As Pennycuick J. points out, he was not shown the memoranda of the companies in question.

[251] Charterbridge Corporation Ltd v. Lloyds Bank Ltd [1969] 2 AER 1185, 1193 (per Pennycuick J.).

[252] Ridge Securities Ltd v. IRC [1964] 1 WLR 479; [1964] 1 AER 275.

[253] In Re Halt Garage Ltd [1982] 3 AER 1016.

[254] Ibid, at 1030 (per Oliver J.): "it cannot, I think, be doubted that, whether it be logically defensible or not and whether it be labelled an application of the ultra vires doctrine or the protection of minorities, the courts have over the past hundred years evolved a series of principles which have been stated to be of general application to gratuitous dispositions of the property of trading companies. These principles were expressed by Plowman J in Parke v. Daily News Ltd"

[255] Charterbridge Corporation v. Lloyd's Bank [1969] 2 AER 1185.

[256] In Re Halt Garage Ltd [1982] 3 AER 1016, 1032 (per Oliver J.).

[257] See below at 7.1.1.2: "Judicial doubts about the corporate benefit test".

[258] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

Horsley & Weight[259] tempers the view that gratuitous dispositions form a category of their own which must necessarily be subjected to more restrictive tests of corporate benefit than transactions for value.

However, given the long hostility of the courts to corporate gifts, and particularly the perennity of the corporate benefit test, it is not yet entirely clear that they are not regarded as a single, undesirable, species of transaction.[260] The perception that gratuitous dispositions constitute a class distinct from other transactions is deep-rooted and persists, even as the rationale on which is it based is removed. While *Charterbridge*, "had been thought to permit any gift falling within the express objects",[261] one commentator wrote in 1983 that in recent case law, the courts seemed reluctant to accept that proposition.[262] Similarly, modern Irish decisions continue to treat gratuitous dispositions as a particular category of transaction which is particularly likely to be ultra vires.[263]

6.5.2.2. A bilateral transaction can be treated as a gift

In Re W & M Roith Ltd[264]is a somewhat problematic gratuitous dispositions case, in part because the transaction is not, on its face, a gift. Plowman J. rules in a summary manner that a payment forming part of a contract containing reciprocal obligations was ultra vires as failing the *Lee Behrens* test. Wedderburn supports the argument unsuccessfully advanced that, as part of a reciprocal bargain, the vires of the

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[259] In Re Horsley & Weight [1982] 3 AER 1045; W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204.

[260] See below at 7.3: "Rolled Steel and the Law in Ireland".

[261] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 208.

[262] Ibid, at 208: "the courts shows signs of limiting that inevitable conclusion, to the extent that "distinctive principles" are said to apply "to gratuitous dispositions of the companies' assets" - at any rate for "trading companies." Thus, dispositions that appeared to fall within the express objects may be said to be "not genuine" or a "sham.""; W. alludes to In Re Halt Garage Ltd [1982] 3 AER 1016.

[263] See below at 7.3: "Rolled Steel and the Law in Ireland".

[264] In Re W & M Roith Ltd [1967] 1 WLR 432; [1967] AER 427.

transaction should have been easier to establish.[265] Silberberg also argues that the bilateral service agreement is a distinguishing factor.[266] He suggests that whether the parties involved knew of Roith's imminent death at the time that the service agreement was drawn up was crucial in determining whether the agreement was a sham.[267] Given the absence of direct evidence as to the knowledge and intentions of the parties,[268] he considers that the decision may well have been strongly influenced by the assumption that the parties knew that Roith was soon to die. Consequently, it may be possible in future to distinguish *In Re W. & M. Roith* on its facts: the mala fides which were assumed here would not be found in other cases.[269] There is also Irish authority, though obiter, which suggests that a transaction for value may be viewed as a gift.[270] This is of concern if gifts are subjected to a distinct capacity regime.

6.5.3. Gratuitous Dispositions and Policy

Some authorities suggest that truly altruistic actions effected under implied, or even express, powers might necessarily fall foul of the law.[271] Barely submerged in this approach is a sense that companies have no business making gifts. A substantive object to make gifts may be freed from these restrictions,[272] but this distinction may in some cases be somewhat arbitrary or subjective. The gift issue is one where there is a risk of becoming mired in technicalities. The elephant in the room is the policy

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[265] K.W. Wedderburn, "Ultra Vires or Directors' Bona Fides?" (1967) 30 MLR 566, 567: "majority opinion clearly has it that [...] a transaction for value is "easier to justify" than a gift".

[266] H. Silberberg, "Gratuitous Payments for the Benefit of a Company" [1968] JBL 213.

[267] Ibid, at 222.

[268] Ibid, at 223: "it is not surprising that there was no direct evidence available on this point since almost ten years had elapsed".

[269] Ibid, at 223.

[270] In Re Kill Inn Motel Ltd (High Court, Unreported, 16 September 1987, Murphy J.), 004318; see also B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26, 36-37.

[271] Parke v. Daily News Ltd [1962] Ch. 927; [1962] 2 AER 929; [1962] 3 WLR 566.

[272] In Re Horsley & Weight Ltd [1982] 3 AER 1045.

approach to gratuitous dispositions.[273] The appropriateness of a corporate benefit test for the exercise of corporate powers depends on whether the law chooses, as a matter of policy, to treat profit maximisation as the imperative underlying company law.

The emphasis which the traditional rules governing the valid exercise of powers placed on tangible financial benefit to the company and its owners reflects a narrow conception of the purpose of the corporation. The company is legally precluded from acting to further interests other than its own finances, regardless of the intentions of its owners. It must be protected from its own charitable impulses. Since what is at issue is capacity, this is not simply a means of protecting the shareholders from imprudent governance by directors, but the courts imposing on corporate owners a paternalistic protection from themselves. From another angle, bearing in mind that ultra vires aims to protect the shareholders and creditors, should it really be invoked to prevent the company making gratuitous dispositions when the shareholders are all amenable and the company is solvent?

Pennington frames the policy question posed by *Parke v. Daily News Ltd*[274] as whether the law should impose profit maximisation to the neglect of all else as an imperative obligation on those running companies.[275] He concludes that the law should adopt a less restrictive approach more consonant with "modern views about the functions of business enterprises in society".[276] Wedderburn also argues for the law on capacity to acquire "a twentieth-century face",[277] like American law, which permits companies to "discharge social as well as private responsibilities".[278] Given

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[273] See also below at 17.1.3.2: "Should gratuitous dispositions be permitted?"

[274] Parke v. Daily News Ltd [1962] Ch. 927; [1962] 2 AER 929; [1962] 3 WLR 566.

[275] R.R. Pennington, "Terminal Compensation for Employees of Companies in Liquidations" (1962) 25 MLR 715, 719.

[276] Ibid, at 719.

[277] K.W. Wedderburn, "Ultra Vires and Redundancy" [1962] CLJ 141, 146.

[278] Ibid, at 146; citing Smith Manufacturing Company v. R. Barlow (1953) 98 A. 2d., 586.

the evolution in business practice and mores, directors should be relieved from the "myopia" which the law imposes.[279]

With this in mind, Wedderburn argues that express powers ought not to be required to fulfil the *Lee Behrens*[280] requirements, and that those companies which choose to declare a power to make gifts should have the capacity to exercise that power. Not only does he regard this approach as preferable in principle, but he suggests that it reflects the assumptions of companies which create express powers to donate their assets.[281]

6.5.4. Conclusion

The subordination of the express terms of a company's objects clause has been responsible for much of the complexity and potential for confusion which is still associated with the ultra vires doctrine. While the courts welcomed a technique which allowed them to police corporate activities, a focus on extrinsic criteria for validity moved the focus away from the terms of the objects clause. These aspects of the development of the doctrine are to blame for most of the bad press it continues to attract.

Eventually, the tide began to turn. The corporate benefit test began to be regarded with judicial disfavour. It is thanks to the second stage of the doctrine's evolution that the law on corporate capacity has now arrived at far more satisfactory state: it is more legitimate at the level of principle and conducive to the clarity and simplicity which serve justice, commercial efficiency, and legal certainty.

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[279] R.R. Pennington, "Terminal Compensation for Employees of Companies in Liquidations" (1962) 25 MLR 715, 719; See also: "Jenkins Report", Board of Trade Company Law Committee Report (1962) Cmnd. 1749, ss 52; this expectation was soon contradicted by Parke v. Daily News Ltd [1962] Ch. 927; [1962] 2 AER 929; [1962] 3 WLR 566 (though the newspapers in the case were ceasing publication, and therefore had no interest in future goodwill); K.W. Wedderburn, "Ultra Vires and Redundancy" [1962] CLJ 141, 142.

[280] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[281] K.W. Wedderburn, "Ultra Vires and Redundancy" [1962] CLJ 141, 145.

7. THE DECLINE AND FALL OF THE CORPORATE BENEFIT TEST

For many years, the orthodox view was the one firmly established in authorities such as *Hutton*[1] and *Lee Behrens*.[2] The powers of a company could only be exercised intra vires if the circumstances of their use furthered the main business of the company and advanced its interests.[3] The three-limbed *Lee Behrens* test for the valid exercise of powers was widely adopted and followed. Eventually, however, commentators and judges began to criticise both the *Lee Behrens* approach and the idea of a corporate benefit test to restrict the exercise of express powers. The landmark decision which finally rejected corporate benefit as a test of capacity was *Rolled Steel Products (Holdings) Ltd v. British Steel Corporation*.[4] This changed the whole landscape of the ultra vires doctrine.

In England, the statutory abolition of the ultra vires doctrine for registered companies[5] in the 1985 Act[6] superseded *Rolled Steel*[7] so that its consequences were not fully explored in later English authorities. The single most critical question in determining what rules govern corporate capacity in Ireland today is whether, and to what extent, *Rolled Steel*[8] has been accepted into Irish law. If corporate benefit has now been rejected, then the categorisation, the confusion and the criticism which it engendered are no longer of any relevance in judging the merits of the ultra vires doctrine.

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[1] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

[2] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[3] See above at Chapter 6: "Powers, Corporate Benefit and Corporate Gifts".

[4] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1984] BCLC 466.

[5] But not for other corporations; see Hazell v. Hammersmith and Fulham London Borough Council [1992] 2 AC 1.

[6] Section 35, Companies Act, 1985, as amended by Companies Act, 1989 (United Kingdom).

[7] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1984] BCLC 466.

[8] Ibid.

7.1. RETREAT FROM THE CORPORATE BENEFIT TEST

Criticism of the corporate benefit test, and the complex distinctions it implied between objects and powers[9] arose in parallel with mounting scorn for the ultra vires doctrine as a whole. In judging the ultra vires doctrine, the broad overarching question is whether capacity should be limited; a narrower focus targets the subordination of the contents of the objects clause to an external corporate benefit test. The observer who is hostile to the ultra vires doctrine as a whole is more likely to object to restrictions on the exercise of corporate powers, but it is equally entirely coherent to suggest that capacity should be limited, but that there is no place for a corporate benefit test in assessing capacity.

7.1.1.1. Laying the groundwork: academic criticism of corporate benefit

From the late 1960s, a number of commentators questioned whether the purpose for which powers were used really affected capacity. Wedderburn's 1967 criticism[10] of *In Re W. & M. Roith,*[11] which denies that the case was truly one of ultra vires, anticipates the later evolution in the doctrine.[12] Wedderburn's argument prefigures the modern criticisms which would ultimately overwhelm *Lee Behrens*.[13] He asserts that the decision turns on "bona fides and breach of directors' fiduciary duties" as distinct from capacity.[14] This analysis of the case seems strongly to reflect the author's preferred direction for ultra vires, one which would be shared by judges in

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[9] Substantive objects, ancillary objects, powers, mere powers etc.

[10] K.W. Wedderburn, "Ultra Vires or Directors' Bona Fides?" (1967) 30 MLR 566.

[11] In Re W & M Roith Ltd [1967] 1 AER 427; [1967] 1 WLR 432.

[12] K.W. Wedderburn, "Ultra Vires or Directors' Bona Fides?" (1967) 30 MLR 566, 566; See also K.W. Wedderburn, "Ultra Vires and Redundancy" [1962] CLJ 141 which also argues against the application of a corporate benefit test to express powers.

[13] In Re Lee, Behrens & Co., Ltd [1932] 2 Ch. 46; [1932] AER 889.

[14] K.W. Wedderburn, "Ultra Vires or Directors' Bona Fides?" (1967) 30 MLR 566, 571.

later authorities. Similarly, Baxter asks whether the misuse of corporate powers is not "simply a breach of duty"[15]

7.1.1.2. Judicial doubts about the corporate benefit test

Soon these views garnered judicial support. Pennycuick J. in *Charterbridge Corporation v. Lloyd's Bank*[16] expressed the view that the corporate benefit test conflated the two separate issues of capacity and directors' duties. This launched the positive law's journey away from the corporate benefit test and the condemnation of gratuitous dispositions as a class.[17]

In *Charterbridge*,[18] a purchaser of property which had been mortgaged by its prior owner challenged that mortgage as ultra vires because it was taken out to benefit other companies in the previous owner's group. The company's memorandum of association contained an express power to enter into mortgages[19] and an independent objects clause. Despite the express power, the plaintiff argued under the *Lee Behrens* test, that the guarantee and mortgage were made for purposes outside the scope of the company's business and were not for the benefit of the company. Pennycuick J. accepted that the decision to execute the mortgage was taken "looking to the interests of the group as a whole" rather than those of the guarantor company in isolation.[20] However, he held that the mortgage was within the company's capacity: he advanced alternative justifications, based on the

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[15] C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28 CLJ 280, 284.

[16] Charterbridge Corporation v. Lloyd's Bank [1969] 2 AER 1185.

[17] See L.H. Leigh, "Objects, Power and Ultra Vires" (1970) 33 MLR 81.

[18] Charterbridge Corporation v. Lloyd's Bank [1969] 2 AER 1185.

[19] Clause 3(H): "to secure or guarantee by mortgages, charges or otherwise the performance and discharge of any contract, obligation or liability of the company or of any other person or corporation with whom or which the company has dealings or having a business or undertaking in which the company is concerned or interested whether directly or indirectly." - Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185, 1187.

[20] Ibid, at 1188.

rejection of a corporate benefit test and the fulfilment of such a test in a group of related companies with intertwined interests.

The case directly posed the question of whether an act done under an express power should be invalidated because the motivating factor was not the company's own interests. Pennycuick J. expresses the view that, in principle, all acts undertaken under an express power should be within the capacity of the company. He reasons that the function of the memorandum is to inform, and it would be contrary to this aim if its apparently clear meaning could be denied by virtue of people's intentions.[21]

Pennycuick J. questions whether *Lee Behrens*[22] was genuinely a capacity case[23] and criticises the decision's failure to distinguish between incapacity and ratifiable invalidity. Consequently, he reasons, the famous test[24] was based on a confusion of the issues of ultra vires and directors' duties.[25] He proceeds to dismantle the test, limb by limb. The requirement that the transaction must be reasonably incidental to the carrying on of the company's business should only be relevant to the definition of the scope of implied powers.[26] The bona fides of the transaction should be

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[21] Ibid, at 1189: "The memorandum of a company sets out its objects and proclaimed them to persons dealing with the company and it would be contrary to the whole function of a memorandum that objects unequivocally set out in it should be subject to some implied limitation by reference to the state of mind of the parties concerned."

[22] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[23] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185, 1190 (per Pennycuick J.): this conclusion did not "fully reflect the content of the judgment."

[24] See In Re Lee, Behrens & Co., Ltd [1932] AER 889, 891.

[25] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185, 1191 (Pennycuick J.): "it seems to me, on the best consideration I can give to this passage, that the learned judge must have been directing his mind to both the issues raised by the liquidator, without differentiating them."

[26] Ibid, at 1191: "In truth (i), the first of the three pertinent questions which he raises, is probably appropriate to the scope of the implied powers of company where there is no express power."

considered for implied powers and, more importantly, directors' duties.[27] The criterion of the intent to benefit and promote the prosperity of the company is, on Pennycuick J.'s analysis, not properly relevant to the capacity to employ express powers.[28]

Even if Eve J. did intend so to restrict express powers, Pennycuick J. characterises this restriction as obiter, given that there was no express power in that case, and so not binding.[29] He also distinguishes *In Re David Payne*,[30] *In Re Introductions*[31]and *Ridge Securities v. IRC*.[32] Thus, Pennycuick J. concludes that, consistent with his understanding of principle, the authorities do not warrant the imposition of a requirement that express powers be used to further the interests of the company in order to be intra vires.[33] Capacity is an objective matter, based on the memorandum, not subjective,[34] dependent on the state of mind of the company's officers.[35]

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[27] Ibid, at 1191: "Question (ii) is appropriate in part again to the scope of implied powers, and in part, and perhaps principally, to the duty of directors."

[28] Ibid, at 1191: "Question (iii) is, I think, quite inappropriate to the scope of express powers, and notwithstanding his words "whether they be made under an express or implied power" at the beginning of the paragraph, I doubt very much whether the learned judge really intended to apply this last question to express powers."

[29] Ibid, at 1191 (per Pennycuick J.).

[30] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[31] In Re Introductions, Ltd [1968] 2 AER 1221 (Buckley J.); [1969] 1 AER 887 (CA); see Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185, 1193 (per Pennycuick J.).

[32] Ridge Securities v. IRC [1964] 1 AER 275; Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185, 1193 (per Pennycuick J.).

[33] Ibid, at 1194 (per Pennycuick J.).

[34] Unless a subjective element is expressly incorporated to expand capacity through a Bell Houses clause.

[35] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185, 1194 (per Pennycuick J.)

7.1.1.3. Reaction to Charterbridge

Pennycuick J.'s conclusion that the Eve test arose from the conflation of ultra vires and extraneous questions cast doubt on the test.[36] This was a thoroughly modern decision, which influenced the current conception of the role and scope of ultra vires.[37] It resonated with those who desired the removal of the external restriction of the exercise of express powers.[38] *Lee Behrens* has been critically described as having long "bedevilled" company law.[39] While corporate benefit is undoubtedly logically relevant in determining the existence and extent of implied powers,[40] *Charterbridge*[41] confidently declares that "benefit and prosperity" is irrelevant to capacity granted under express powers.[42]

A rejection of the *Lee Behrens*[43] test does not necessarily equate to a repudiation of the principle, dating back to *Hutton*,[44] that powers must be used for the benefit of the company or to serve its main objects. A general corporate benefit test could still survive in a different formulation. However, *Charterbridge*[45] directly engages with

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[36] See Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221, 227 (per Keane J.).

[37] See B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26, 35.

[38] Baxter describes it as taking the "first steps towards a reassertion of sound principle" - C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28 CLJ 280, 285.

[39] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 206.

[40] Ibid, at 206: the power would not be implied in order to supplement the express provisions of the objects clause were it not ancillary to the objects.

[41] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185.

[42] D. Ll. Morgan, "Corporate Collateral Security"[1970] JBL 256, 258: "the *Charterbridge* case is authority for the view that it is not relevant in considering whether the exercise of a power, or at any rate an express power, is *ultra vires*"; unless, of course, the terms of the clause expressly impose such a limitation - W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 206.

[43] In Re Lee, Behrens & Co., Ltd [1932] 2 Ch. 46; [1932] AER 889.

[44] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

[45] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185.

a basic corporate benefit test[46] and claims to eliminate entirely external restrictions on the capacity to use express powers.

Leigh challenges Pennycuick J.'s dismissal of the corporate benefit test, defending the approach employed in *Lee Behrens* and *Parke*.[47] He argues that, while intent to benefit the company is not necessary as a "proposition of substantive law", it is relevant to showing that the act is reasonably incidental to the main business, which, he insists, is necessary. [48] He claims that powers cannot have independent validity; they are inherently ancillary to objects.[49] He asserts that the contrary view would produce "an unjustified distinction" between express and implied powers.[50] This defence of the traditional, pre-*Lee Behrens*, corporate benefit test is not convincing. Implied powers are implied, despite not being mentioned in the memorandum, for the reason that they are necessary to achieve a particular purpose. That is why it can be argued that they should be used for that purpose. By contrast, express powers are there because the company specifically acted to reserve the power to do those things. The distinction between express and implied powers is no more arbitrary or unjustified than the one drawn between objects and powers. Given the potential difficulty in distinguishing between objects and powers, it makes sense for express powers to be treated the same as objects, that is, for everything which is stated in the memorandum to be within the capacity of the company. This promotes clarity and security and is consonant with the premise that capacity is defined by the words of the memorandum.

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[46] Ibid, at 1190: the Lee Behrens test boils down to a simple corporate benefit test.

[47] Leigh, "Objects, Power and Ultra Vires" (1970) 33 MLR 81.

[48] Ibid, at 83.

[49] Ibid, at 83: "powers whether express or implied do not have a substantive and independent validity of their own: their validity is limited by a purpose."

[50] Ibid, at 83.

7.1.1.4. Charterbridge turns the tide

Charterbridge[51] became a highly influential decision. In Ireland, Keane J. referred approvingly to *Charterbridge*[52] in *Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company.*[53] Keane J. implicitly criticised the hard line taken in *Hutton*[54] and *Lee Behrens.*[55] He refused to approve a submission that if the memorandum contained an express power to execute a guarantee, the impugned transaction would nonetheless be *ultra vires* since no conceivable benefit could result to the company from it. Instead, Keane J. stated in an obiter dictum that the rejection in *Hutton* of the capacity of a company to make charitable dispositions "may have been extended too far in *In Re Lee, Behrens & Company*". Keane J. added that the authority of the latter case was put in doubt by the decision in *Charterbridge.*[56]

In England, the turn away from *Lee Behrens* was confirmed in *Re Halt Garage*[57] and, indirectly, in *Re Horsley & Weight Ltd.*[58] *In Re Halt Garage Ltd*[59] sought to retain some leeway for judicial intervention in respect of express powers by

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[51] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185.

[52] Ibid.

[53] Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221.

[54] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

[55] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[56] Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221, 227.

[57] In Re Halt Garage Ltd [1982] 3 AER 1016.

[58] In Re Horsley & Weight Ltd [1982] 3 AER 1045; see W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 205.

[59] In Re Halt Garage Ltd [1982] 3 AER 1016.

requiring that the transaction be "genuine".[60] *In Re Horsley and Weight*[61] avoids the corporate benefit problem by determining that the clause authorising the grant of pensions along with charitable donations constitutes a substantive object of the company.[62] Ewing characterises this as "rather strange".[63] It hints at discomfort with the corporate benefit test, while ostensibly upholding it. The new reasoning was unequivocally endorsed and the confusion between capacity and directors' duties finally eradicated in *Rolled Steel Products Ltd v. British Steel Corporation.*[64]

7.1.1.5. Reconciling the authorities after Charterbridge

The major obstacle in disowning the link between corporate benefit and capacity is that it becomes exceedingly difficult to reconcile all the cases which have traditionally been viewed as concerning ultra vires.[65] *Charterbridge*[66] was decided around the same time as *In Re Introductions.*[67] The two decisions are, if not contradictory, very different in spirit. Leigh highlights the inconsistency[68] between

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[60] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 208.

[61] In Re Horsley & Weight Ltd [1982] 3 AER 1045.

[62] It "sidestepped" the need to consider whether a power had been used to further the objects: J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 92-93.

[63] K. D. Ewing, "Company Political Donations and the Ultra Vires Rule" 47 (1984) MLR 57, 62.

[64] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1984] BCLC 466.

[65] R.M. Temple, "Ultra Vires: The Dual Approach" (1987) 137 NLJ 1069, 1070; L.H. Leigh, "Objects, Power and Ultra Vires" (1970) 33 MLR 81, 81: "the cases on exercise of powers cannot all be subsumed under the head of *ultra vires*."

[66] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185.

[67] In Re Introductions Ltd: Introductions Ltd v. National Provincial Bank Ltd [1968] 3 AER 1221; affirmed on appeal at [1969] 1 AER 887; see above at 6.4.2: "Powers and "Mere Powers"".

[68] L.H. Leigh, "Objects, Power and Ultra Vires" (1970) 33 MLR 81, 83-84: "the cost of assimilating this judgment [In Re David Payne] by according absolute validity to acts attributable to any express power is to create inconsistencies elsewhere and notably in relation to *Re Introductions Ltd.* where the scope of the power is read down in the light of its purpose: that of effectuating the objects of the company."

these two contemporaneous authorities: *Charterbridge* views the use of express powers as always within corporate capacity,[69] whereas *In Re Introductions*[70] condemns borrowing under an express power for any purpose other than a legitimate purpose of the company as ultra vires.[71] The liquidator in *Re Halt Garage Ltd*[72] argued that the rejection of the Eve test for express powers in *Charterbridge*[73] could not stand with the decision in *Re Introductions*.[74] However, Oliver J. denied that there was a conflict between *Charterbridge* and *Introductions*. He considered that *Introductions* did not invoke the *Lee Behrens* principle "but was a question of construction" and so did not affect or undermine the decision in *Charterbridge*.[75] It is now clear that *Charterbridge*[76] was a sign of things to come, whereas *In Re Introductions*[77] clung to the past.

In Re Halt Garage (1964) Ltd.[78] confirmed *Charterbridge*, but only for transactions other than gifts. It also made a novel attempt to grapple with the inconsistent authorities. The case concerned a garage company, run by a married couple. When it went into insolvent liquidation, the liquidator sought to recover such part of the husband's remuneration as exceeded the market value of his services to the company and payments made to the wife after she became ill. The liquidator argued that these payments were ultra vires the company as being gratuitous payments

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[69] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185, 1194 (per Pennycuick J.)

[70] In Re Introductions Ltd [1968] 3 AER 1221.

[71] Ibid, at 1225 (per Buckley J.)

[72] In Re Halt Garage Ltd [1982] 3 AER 1016.

[73] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185.

[74] In Re Introductions Ltd: Introductions Ltd v. National Provincial Bank Ltd [1968] 3 AER 1221; affirmed on appeal at [1969] 1 AER 887.

[75] In Re Halt Garage Ltd [1982] 3 AER 1016, 1032.

[76] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185.

[77] In Re Introductions Ltd: Introductions Ltd v. National Provincial Bank Ltd [1968] 3 AER 1221; affirmed on appeal at [1969] 1 AER 887; see above at 6.4.2: "Powers and "Mere Powers"".

[78] In Re Halt Garage Ltd [1982] 3 AER 1016.

made out of capital which were not for the benefit of the company and to promote its prosperity.

Oliver J. discussed the familiar capacity cases, beginning with *Hutton v. West Cork Railway Company*,[79] and attempted the difficult task of reconciling them by developing a novel analysis of ultra vires. He characterised *Hutton* as concerned with "whether a majority could bind a dissentient minority"[80] and denied that it was authority for the proposition that the payment of remuneration to directors must fulfil a corporate benefit test in order to be intra vires. Like Pennycuick J. in *Charterbridge*, he concluded that the reference in *Re Lee Behrens*[81] to the intent to promote the prosperity of the company was relevant to the issue of fiduciary duties.[82] He doubted that the rules articulated in *Lee Behrens* are correctly part of the ultra vires doctrine.[83] In particular, he indicated that such an extensive principle, subjecting the exercise of every power to the benefit of the company itself, would cast doubt on a practice as ordinary as the payment of dividends.[84]

Nonetheless, Oliver J. was obliged by the case law to accept that the *Lee Behrens* test applied to gifts, as confirmed in *Parke v. Daily News*.[85] He could not therefore

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[79] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

[80] In Re Halt Garage Ltd [1982] 3 AER 1016, 1028; see also at 1029-1030: ultra vires authorities confused capacity and "the matters which the court will take into consideration at the suit of a minority shareholder in determining the extent to which these interests can be overridden by majority vote".

[81] In Re Lee, Behrens & Co., Ltd [1932] 2 Ch. 46; [1932] AER 889.

[82] In Re Halt Garage Ltd [1982] 3 AER 1016, at 1029.

[83] Ibid, at 1029.

[84] Ibid, at 1029 (per Oliver J.): "if that has to be read into every power, it is difficult to see how the company (at least in the case of a company whose affairs are not public knowledge and whose status or credit could not be affected by its dividend record) could ever declare a dividend, which was necessarily reduce the assets available for the promotion of the company's business."

[85] In Re Halt Garage Ltd [1982] 3 AER 1016, 1030 (per Oliver J.): "whether it be logically defensible or not and whether it be labelled an application of the ultra vires doctrine or the protection of minorities, the courts have over the past hundred years evolved a series of principles which have

accept that *Charterbridge* displaced the *Lee Behrens* corporate benefit concept from all cases involving express powers. He qualified the "clear rejection" of the Eve test for express powers in *Charterbridge* as applying "in the context of dealings for value between the company and an outsider"[86] and denied that it affects the "distinctive principles" governing gifts.[87] Provided a bilateral transaction under an express power, such as directors' remuneration, was "genuine", there was no need for a benefit test.[88]

Oliver J. categorised the awkward case law into two groups, neither of which relates directly to the ultra vires doctrine.[89] The first set, such as *Parke v. Daily News*,[90] he suggested concerned "the extent to which a majority in general meeting could force a particular measure on a dissentient minority."[91] Here, Oliver J. considered that the test of corporate benefit relates to the interests of the corporators as a general body. The second group of cases, according to Oliver J., concerns the proper use of corporate powers and includes *Lee Behrens*,[92] *In Re W & M Roith*,[93] *Ridge Securities*[94] and *Charterbridge*.[95] Here, Oliver J. considers that the test of corporate benefit relates to the company as a corporate entity. Neither line of case would

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been stated to be of general application to gratuitous dispositions of the property of trading companies. These principles were expressed by Plowman J in Parke v. Daily News Ltd"

[86] In Re Halt Garage Ltd [1982] 3 AER 1016, 1030 (per Oliver J.).

[87] Ibid, at 1032 (per Oliver J.).

[88] Ibid, at 1038-1039.

[89] Ibid, at 1035.

[90] Parke v. The Daily News Ltd [1962] Ch. 927.

[91] In Re Halt Garage Ltd [1982] 3 AER 1016, 1035 (per Oliver J.).

[92] In Re Lee, Behrens & Co., Ltd [1932] 2 Ch. 46; [1932] AER 889.

[93] In Re W & M Roith Ltd [1967] 1 AER 427; [1967] 1 WLR 432.

[94] Ridge Securities v. IRC [1964] 1 AER 275.

[95] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185; all cited in Re Halt Garage Ltd [1982] 3 AER 1016, 1035.

strike down a unanimously-approved disposition made under an express power.[96] This radical reclassification, which claims that none of the gratuitous disposition cases were really about corporate capacity, is necessary because of the quandary in which Oliver J. finds himself. Logically, he accepts that the *Lee Behrens* test cannot determine the capacity of a company, but the authorities suggest that it is indeed applied to gratuitous dispositions.

W. challenges Oliver J.'s reinterpretation of "the classical ultra vires cases" as strained.[97] His imaginative approach to explaining the authorities likely springs from reluctance to countenance the alternative: the prospect that some of the old cases must be acknowledged to be inconsistent with the modern conception of the doctrine of ultra vires. In any case, Oliver J.'s valiant effort to reconcile the divergent authorities was soon overshadowed by the truly seminal case in this area, *Rolled Steel Products (Holdings) Ltd v. British Steel Corporation.*[98]

The *Charterbridge*[99] premise, that some of the well-known ultra vires cases turn out, on closer inspection, to concern directors' fiduciary duties, was endorsed and amplified in *Rolled Steel*[100] and has proved more persuasive and enduring than the *Halt Garage*[101] variant. Leigh observes that *Charterbridge* has the "great merit" of

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[96] In Re Halt Garage Ltd [1982] 3 AER 1016, 1037.

[97] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 211: many "seem not to fit that readjustment."

[98] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1982] 3 AER 1057; [1985] 3 AER 52.

[99] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185.

[100] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1982] 3 AER 1057; [1985] 3 AER 52.

[101] In Re Halt Garage Ltd [1982] 3 AER 1016.

explaining many of the difficult cases.[102] On this view, *In Re Lee Behrens*[103] and *In Re W & M Roith*[104] can now be explained as voidable excesses of power, whereas *Parke v. Daily News*[105] is "correctly classified as a case of *ultra vires*."[106] Morgan addresses the problematic contrast between *In Re Introductions* and *Charterbridge*.[107] In *Charterbridge*, Pennycuick J. distinguished *In Re Introductions*[108] on the grounds that the company was not carrying on any authorised business, and that the power to borrow could not exist in isolation from a business.[109] Morgan argues that the lender's constructive knowledge in *Introductions* of the ultra vires business was also relevant under the precedent of *David Payne*.[110] However, *David Payne* itself is difficult to accommodate in the conception of capacity which looks solely to the contents of the memorandum without reference to extrinsic circumstances. This was a challenge which the Court of Appeal faced in *Rolled Steel*.[111]

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[102] L.H. Leigh, "Objects, Power and Ultra Vires" (1970) 33 MLR 81, 84: the "great merit of *Charterbridge* is [...] to provide a basis upon which most of the difficult cases in this area can be explained".

[103] In Re Lee, Behrens & Co Ltd [1932] 2 Ch. 46.

[104] In Re W & M Roith Ltd [1967] 1 AER 427.

[105] Parke v. The Daily News Ltd [1962] Ch. 927.

[106] L.H. Leigh, "Objects, Power and Ultra Vires" (1970) 33 MLR 81, 84; cf C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28 CLJ 280, 288: Wilberforce J.'s "language seems appropriate to the question of directors' duties".

[107] D. Ll. Morgan, "Corporate Collateral Security" [1970] JBL 256, 264.

[108] The judgment at first instance.

[109] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185, 1193 (per Pennycuick J.)

[110] D. Ll. Morgan, "Corporate Collateral Security" [1970] JBL 256, 264: "in saying that it is irrelevant, Pennycuick J. was doubtless directing his mind to the different and wider considerations raised in *Re Lee, Behrens & Co. Ltd*".

[111] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1982] 3 AER 1057; [1985] 3 AER 52.

7.1.1.6. Rolled Steel Products (Holdings) Ltd v. British Steel Corporation

Rolled Steel[112] was the landmark case which firmly endorsed the *Charterbridge*[113] analysis and rejected corporate benefit. Vinelott J.'s judgment at first instance garnered a lot of attention, but it was the Court of Appeal's decision which was revolutionary. If completely accepted, it dramatically simplifies the law on corporate capacity, mandating that full effect be given to the terms of companies' memoranda in defining their capacity.

The facts were complex, but boil down to the use of an express power for an improper purpose, which was of no benefit to the company itself. One individual, Shenkman, controlled a number of companies, one of which ran up a large debt to a supplier. As the debtor company was at risk of liquidation, its suppliers looked to Rolled Steel for payment. The companies developed a complex scheme involving a loan from the supplier to Rolled Steel which Rolled Steel would use to discharge a debt to its related company, which could then use the funds to pay the suppliers. In addition, Rolled Steel guaranteed the balance owed.[114] The transaction was covered by an express power in the memorandum.[115] It had not been authorised by a valid resolution of the board of directors, it had not been agreed to by the minority shareholders and it was of no benefit to the company.

The decision of Vinelott J. at first instance[116] is a reasoned and plausible approach to making sense the tangle of authorities.[117] Vinelott J. held that the express power

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[112] Ibid.

[113] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185.

[114] See J. Birds, "Ultra Vires in the Companies Court – an Unreported Case" (1982) 3(3) Company Lawyer 123 for a summary of the facts.

[115] Clause 3(k).

[116] J. Birds, "Ultra Vires in the Companies Court – an Unreported Case" 3(3) (1982) Company Lawyer 123.

[117] Vinelott J.'s decision discusses: In Re Introductions Ltd [1968] 3 AER 1221; Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185; In Re Halt Garage Ltd [1982] 3 AER 1016, and In Re Horsley & Weight Ltd [1982] 3 AER 1045.

in Rolled Steel's memorandum of association authorising it to lend and advance money was not a separate independent object, but merely an ancillary power which could only be exercised in pursuance of the company's main objects.[118] Since the defendants knew that the granting of the guarantee and debenture under this ancillary power was not in the interests of Rolled Steel, then the guarantee and debenture were ultra vires transactions.[119] Rolled Steel was entitled to have the guarantee set aside and have the sum guaranteed repaid with interest. Birds welcomes this outcome at first instance on the facts.[120]

Vinelott J. considered that whether a clause created an object or a mere power depended in each case on the interpretation of its terms.[121] Thus, any power, including borrowing, could be an object in certain circumstances,[122] but in most cases the power to borrow is intended to serve the company's interests.[123] He also proposed a new distinction between two types of ultra vires which arose in the cases. The first, "narrow", sense of ultra vires touched those transactions which fall entirely outside the contents of the objects clause, as supplemented by the implied objects doctrine.[124] A second, distinct type of ultra vires explained the cases, such as

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[118] Ibid, at 1078: "a power ancillary to and to be exercised when expedient in furtherance of the objects of the company"; this follows In Re Introductions Ltd [1968] 3 AER 1221; affirmed on appeal at [1969] 1 AER 887.

[119] Ibid, at 1082.

[120] J. Birds, "Ultra Vires in the Companies Court – an Unreported Case" 3(3) (1982) Company Lawyer 123, 125.

[121] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1982] 3 AER 1057, 1075 (per Vinelott J.): "whether a stated 'object' is truly an independent object or purpose is always a question of construction."

[122] For example, in the case of a bank or financial institution.

[123] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1982] 3 AER 1057, 1075 (per Vinelott J.).

[124] Ibid, at 1076 (per Vinelott J.): "a transaction which is outside the scope of the powers expressed in the memorandum of association of a company or which can be implied as reasonably incidental to the furtherance of the objects thereby authorised."

In Re David Payne,[125] where the validity of a transaction depended on its ultimate purpose and the knowledge of an outsider.[126] According to Vinelott J., both these types of invalidity constituted ultra vires, in so far as they were incapable of being cured by the unanimous assent of members.[127] Thus, the misuse of a power becomes more than a ratifiable breach of fiduciary duty. However, the distinction between the two types of incapacity was that, while the former type of transaction, being entirely outside the scope of the memorandum, could have no legal effect whatsoever, the latter, which would not be evident to the outsider reading the memorandum, might give some rights to the outsider who was unaware of the misuse.[128]

Finally, Vinelott J. reiterated that it was "now clear"[129] that the question of whether a transaction is made for the benefit and to promote the prosperity of the company is not relevant to capacity.[130] Thus, while the second variety of ultra vires sanctioned

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[125] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[126] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1982] 3 AER 1057, 1076 (per Vinelott J.): "a transaction which, although it falls within the scope of the powers of a company, express or implied, is entered into in furtherance of some purpose which is not an authorised purpose."; Vinelott J. views In Re Jon Beauforte (London) Ltd (1953) 1 Ch. 131; [1953] 1 AER 634 in this light.

[127] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1982] 3 AER 1057, 1077 (per Vinelott J.)

[128] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1982] 3 AER 1057, 1077 (per Vinelott J.): "a transaction which is ultra vires in the wider sense may confer rights on a third party who can show that he dealt with the company in good faith and for valuable consideration and did not have notice of the fact that the transaction, while ostensibly within the powers, express or implied, of a company, was entered into in furtherance of a purpose which was not an authorised purpose."; J. McMullen, "Objects, Powers and Ultra Vires" (1983) 42 CLJ 58, 60.

[129] He cites Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185; In Re Halt Garage Ltd [1982] 3 AER 1016, and In Re Horsley & Weight Ltd [1982] 3 AER 1045.

[130] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1982] 3 AER 1057, 1077 (per Vinelott J.): corporate benefit "is not conclusive nor always even relevant to the question whether the disposition was ultra vires the company whether in the narrow or the wider sense."

the use of powers for anything other than an "authorised purpose",[131] there was no room for a strict *Lee Behrens* criterion of corporate benefit and prosperity in confirming that the transaction served a legitimate object.

The strength of Vinelott J.'s explanation is that it accommodates and explains the authorities; its weaknesses are its relationship to theory[132] and the new complexity it introduces. It advocates a categorisation which would add yet another layer of confusion to the topic.[133] It would be preferable to retain one type and one definition of ultra vires: beyond the capacity of a company, as set out in its objects clause, and therefore void and unratifiable.[134] Slade L.J., in the Court of Appeal, commented obiter on the decision of Vinelott J. at first instance. He did not endorse Vinelott J.'s distinction between ultra vires in a 'narrow' and 'wide' sense. Rather, he suggested that the concept of "ultra vires 'in the wider sense'" could lead to confusion, because it denied the underlying principle that ultra vires transactions cannot confer rights on a third party.[135]

7.2. ROLLED STEEL: THE NAIL IN THE COFFIN FOR CORPORATE BENEFIT

The Court of Appeal decision in *Rolled Steel* was at the least a "valuable restatement",[136] but its full ramifications are more profound: it remodels the ultra vires landscape. The main decision was delivered by Slade L.J.[137] In it, he addressed

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[131] Ibid, at 1077.

[132] Cf Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185, 1189 (per Pennycuick J.): ultra vires transactions are void.

[133] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 211: "Unhappily, Vinelott J. roamed even further afield".

[134] See above at Chapter 4: "Defining Ultra Vires".

[135] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 87.

[136] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 93.

[137] Browne-Wilkinson L.J. unequivocally agrees with his analysis.

two important related questions of principle.[138] Firstly, are transactions which are authorised by the memorandum but done for a purpose other than that for which they are intended within the capacity of the company?[139] Secondly, in what circumstances can such transactions done through the misuse of express powers confer rights on outsiders? Slade L.J. emphasises the primary importance of interpreting the company's memorandum in each case.[140]

7.2.1.1. The giving of the guarantee as a substantive object

The defendants argued that the empowering provision was a separate independent object. Slade L.J. acknowledges that if this were the proper interpretation of the clause the transaction would unambiguously lie within the company's capacity under *Horsley & Weight*.[141] In order to determine whether the clause constituted a separate independent object, Slade L.J. examines the memorandum. He affirms that objects should be considered substantive unless they are either incapable of constituting substantive objects or the proper interpretation of the memorandum reveals that they were intended to be no more than ancillary powers.[142] As a company could be formed for the purpose, however unusual, of giving gratuitous guarantees, this power is not incapable of being a substantive object.[143] This indicates an expansive approach to finding that provisions constitute independent substantive objects; it reduces the scope for the "mere powers" rule established in

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[138] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 79 (per Slade LJ).

[139] Ibid, at 79: it was clear that the transaction "fell within the letter" of the objects clause.

[140] Ibid, at 80 (per Slade LJ): "whether a particular transaction, carried out in purported exercise of an express or implied power contained in a company's memorandum of association, is within the capacity of the company must still depend on the true construction of that memorandum."

[141] Ibid, at 80 (per Slade LJ), citing In Re Horsley & Weight Ltd [1982] 3 AER 1045, 1052 (Buckley LJ).

[142] Ibid, at 81 (per Slade LJ).

[143] Ibid, at 81 (per Slade LJ).

Re Introductions.[144] However, Slade L.J. reasons that the phrase "as may seem expedient" ties the company's power to give guarantees to the furtherance of its objects.[145] Therefore, the terms of the memorandum dictate that the power to give guarantees is an ancillary power rather than a substantive object.[146] The impugned transaction was capable of falling within the objects of the company, but involved the use of a power for an unauthorised purpose.[147]

7.2.1.2. David Payne reinterpreted under agency principles

Next, Slade J. confronts the problematic authorities, in particular *In Re David Payne*.[148] He engages with the Vinelott J.'s proposition that transactions which seem to be within the scope of the company's objects clause but which are entered into for unauthorised purposes are ultra vires the company in a "wider sense", and may confer rights on third parties without notice of the unauthorised purpose.[149] Slade L.J. highlights the anomalous position which this entails. He underlines that "strict logic" would render ultra vires and "wholly void" any exercise of ancillary powers which served purposes other than those for which the company was incorporated. This would entrain "intolerable" practical difficulties for those dealing with the company.[150]

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[144] Slade L.J. limits the authority of Russell LJ's decision in Re Introductions "as being limited to the facts of that particular case" - ibid, at 84.

[145] The phrase "necessarily implies that there is some criterion by which expediency is to be tested. The only possible criterion, in my opinion, can only mean 'as may seem expedient for the furtherance of the objects of the company'." - ibid, at 81 (per Slade LJ).

[146] Ibid, at 81 (per Slade LJ).

[147] Ibid, at 81 (per Slade LJ).

[148] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[149] See Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1982] 3 AER 1057, 1076 (per Vinelott J.)

[150] "Strict logic might therefore appear to require that any act purported to be done by a company in purported exercise of powers ancillary to its objects conferred on it by its memorandum association, whether express or implied, (e.g. a power to borrow) would necessarily, and in every case be beyond its capacity and therefore wholly void if such act was in fact performed for purposes other than those

For Slade L.J., the decision in *David Payne*, as he interprets it, provided the correct response to this problem. He argues that *David Payne* did not in fact rule that such transactions were truly ultra vires, but rather that Buckley J. meant they were "ultra vires the directors".[151] Similarly, Browne-Wilkinson L.J. relies on the premise that incapacity inexorably leads to voidness to find that *David Payne* held the transaction in question "not to be ultra vires".[152]

Instead of capacity, *In Re David Payne*[153] can be viewed as based on the general principles of agency and ostensible authority. Slade L.J. reasons that the directors of the company did not have the authority to borrow the money for purposes which were outside the objects of the company. The memorandum created the capacity to borrow, and the words, "for the purposes of the company's business" limited the authority of the directors rather than the capacity of the company, so that the directors had ostensible authority for the transaction in question. In the absence of notice to the contrary, the rule in *Turquand's Case* applied, and the lenders would be entitled to assume that the directors of the borrowing company were acting properly. Of course, this presumption could be rebutted if the third party knew that the directors had no authority because the transaction was been entered into for improper purposes.[154]

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of its incorporation. However, the practical difficulties resulting from such a conclusion for persons dealing with a company carrying on a business authorised by its memorandum, would be intolerable." - Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 82 (Slade LJ).

[151] Ibid, at 82; Browne-Wilkinson L.J. agrees, ibid, at 91: "It is therefore established that a company has capacity to carry out a transaction which falls within its objects even though carried out by the wrongful exercise of its powers."; this avoids the "absurd" proposition that capacity varies according to the outsider's knowledge of the company directors' intent – see C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28 CLJ 280, 280.

[152] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 92 (per Browne-Wilkinson LJ).

[153] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[154] Ibid, at 83.

Similarly, Slade L.J. deemed the decision in *Re Introductions*, on its "true analysis" to be explicable by the general principles of agency, rather than capacity.[155] Browne-Wilkinson L.J. acknowledges that *In Re Introductions* is "the main difficulty in reconciling the authorities".[156] He indicates that the Court of Appeal decisions do not state that the decision is based on ultra vires, and refers to Buckley J.'s characterisation of the case as one of capacity as "merely an unguarded use of language".[157] Two obstacles to the new analysis are thus removed.

7.2.1.3. Endorsing Charterbridge: powers are intra vires regardless of purpose

Having reinterpreted *David Payne*[158] and *In Re Introductions*,[159] as indicating that the misuse of powers does not equate to incapacity, Slade L.J. emphatically approves the decision of Pennycuick J. in *Charterbridge*.[160] He endorses the statement of principle that an act done within the scope of a power expressed in the memorandum is within the capacity of the company, and that where the directors misapply the company's assets, a claim may arise against the other party if he has notice, due to the ordinary law of agency.[161] In addition, Slade L.J. agrees with the observations of Oliver J. in *Re Halt Garage*[162] that there had been confusion between the issues of valid exercise of directors' fiduciary powers, the extent to which powers could be implied or limits placed on express powers, and the matters which the court could take into consideration to prevent the interests of minority shareholders being overridden by the majority.[163] He strongly condemns the *Lee*

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[155] Ibid, at 84.

[156] Ibid, at 93.

[157] Ibid, at 93.

[158] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[159] In Re Introductions Ltd [1968] 3 AER 1221.

[160] Charterbridge Corporation v. Lloyd's Bank [1969] 2 AER 1185.

[161] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 85.

[162] Ibid, at 85; see In Re Halt Garage Ltd [1982] 3 AER 1016.

[163] See In Re Halt Garage Ltd [1982] 3 AER 1016, 1029-1030.

Behrens test as unhelpful, even misleading, in as a test of capacity.[164] The three-limbed test should "be finally laid to rest" in relation to capacity though its criteria may be useful in considering whether there is a breach of fiduciary duty.[165] Browne-Wilkinson L.J. also endorses the rejection of *Lee Behrens* in the light of *Charterbridge*.[166]

Slade L.J. clearly expounds a comprehensive set of general principles governing the capacity of corporations, based on the authorities which he approves as good law.[167] The fundamental premise is that registered companies have the capacity to do acts envisaged by their objects clause or reasonably implied as necessary to attain their objects. The interpretation of the objects clause in each case must be central. If an act is done under a power which is capable of being used to further the company's objects, but is used for another purpose, then, unless the terms of the memorandum express a qualification on the use of the power, the intent and knowledge of the parties does not affect whether the act is intra vires or not.

On this view, the phrase "for the purposes of the company" qualifying a power will usually be understood to create a limitation on the directors' authority, rather than limiting the capacity of the company to exercise the power. Directors do not have the authority to use express or implied powers for unauthorised purposes without the consent of shareholders. As directors have ostensible, if not actual, authority, to engage in all transactions foreseen by the company's express and implied powers, outsiders without notice dealing in good faith with a company are entitled to hold the company to transactions which exceed the directors' authority because they involve the use of powers for improper purposes. However, ostensible authority will

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[164] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 80-81 (per Slade LJ): it is "of no assistance, and indeed positively misleading, when the relevant question is whether a particular gratuitous transaction is within the company's corporate capacity."

[165] Ibid, at 80-81 (per Slade LJ).

[166] Ibid, at 92 (per Browne-Wilkinson LJ): "I consider the reasoning of the decision in Re Lee Behrens & Co Ltd [...] to be wrong for the reasons given by Pennycuick J. in the Charterbridge case".

[167] Ibid, at 85-86 (per Slade LJ).

not avail an outsider who has notice that the power is being used for an improper purpose.[168]

It is clear that the emphasis of this set of principles moves from capacity to directors' authority. The central idea is that the scope of the ultra vires doctrine is reduced, so that fewer acts will be struck by incapacity, and they will fall instead to be judged by the law on directors' duties. Slade L.J. asserts that, where a transaction which "falls within the letter of the express or implied powers" is used for an unauthorised purpose, that misuse can be ratified by the shareholders, and therefore cannot be regarded as ultra vires.[169] Similarly, Browne-Wilkinson L.J. concludes that a company's capacity includes all transactions which are envisaged by its objects, even if they involve the wrongful use of corporate powers.[170]

Applying these principles to the facts, Slade L.J. holds that Rolled Steel had the capacity to give guarantees.[171] The transactions effected under the express power were intra vires.[172] The fact that the guarantees were given in circumstances where they were not in the interests of the company's business constituted an abuse of powers by the directors. Under the ordinary law of agency, since the other parties to the transaction were aware that the guarantee and debenture were not executed for a legitimate purpose, they could not rely on them.[173]

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[168] Ibid, at 85-86 (per Slade LJ).

[169] Ibid, at 86-87 (per Slade LJ).

[170] Ibid, at 91 (per Browne-Wilkinson LJ): "a company has capacity to carry out a transaction which falls within its objects even though carried out by the wrongful exercise of its powers."; ibid, at 92-93: "If the objects clause contains provisions (whether objects or powers) which show that a transaction of the kind in question is within the capacity of the company, that transaction will not be ultra vires."

[171] Ibid, at 94 (per Browne-Wilkinson LJ).

[172] Ibid, at 94 (per Browne-Wilkinson LJ).: "no question of ultra vires arises."

[173] Ibid, at 86 (per Slade LJ).

7.2.1.4. Express powers are always intra vires

The clear consequence of this decision is that transactions conducted under express powers are not subject to any benefit test in order to come within the capacity of the company.[174] McMullen confirms that "Eve J.'s words should no longer be used as authority in the context of express powers where the issue is ultra vires."[175] It is now immaterial to the question of capacity whether an act done pursuant to an express provision in the memorandum benefits and promotes the prosperity of the company.[176] Any activities which fall within the express objects as set out in the memorandum of association, or are reasonably incidental to their attainment, come within the capacity of the company. This is so even if, in a particular instance, the transaction is not carried out for the purposes of the company.

The qualification that the power should be "capable of falling within the objects of the company"[177] should not be viewed as limitative. It is construed simply as meaning that the alleged power emerges from the interpretation of the objects clause. The meaning of the other similar phrase is more problematic. Slade L.J. refers to acts which are "capable of being performed as reasonably incidental to the attainment or pursuit of its objects".[178] The significance of this qualification is unclear, but, again, it seems that it should not be taken as an important restriction on

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[174] An "improper purpose cannot influence the parameters of a company's capacity" - S. Davis, "The Ultra Vires Rule" 136 NLJ 907, 908; MacCann seems to misunderstand the decision: "The court went on to hold that the guarantee was ultra vires and void because BSC had been aware that the guarantee was of no benefit to RSP." - L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, 85.

[175] J. McMullen, "Objects, Powers and Ultra Vires" (1983) 42 CLJ 58, 61.

[176] J. Meade, "Ultra Vires or Directors' Abuses: when can shareholders right a wrong?" (1999) 6(7) CLP 198: "any question of corporate capacity falls to be determined by proper construction of a company's memorandum and should not be based upon the yardstick of 'corporate' or 'commercial benefit'."

[177] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 93 (per Browne-Wilkinson LJ).

[178] Ibid, at 85 (per Slade LJ).

the principle that express powers are necessarily intra vires.[179] The qualification seems to imply that there is a category of express power which is not capable of being performed in pursuit of the objects.[180] It is hard to conceive of what type of power this might be. The proviso is unclear, but it does not seem to be incompatible with a broad reading of the effect of *Rolled Steel*. Ultimately, it seems justifiable to disregard this qualification as insignificant unless future cases show it to be relevant. The only focus in the case on what powers are "capable of" refers to their suitability to constitute a substantive object, as envisaged in *Horsley & Weight*.[181] Is it possible that the concept of what an express power is capable of constituting leaked from that aspect of the decision into the general statement of principles? Furthermore, other parts of the decision present no such limitation to the general principle that the contents of the objects clause are intra vires.[182] Slade L.J. quotes approvingly from *Charterbridge*,[183] which does not include any such apparent limitation.[184]

The invalidity which strikes powers employed for an improper purpose is not incapacity, but a lesser matter of excess of authority. Consequently, if a third party involved in the transaction is unaware of the breach of the directors' duty, the company will be bound by the transaction. The outsider is entitled to rely on the ostensible authority of the directors and is not required to inquire whether a transaction which is within the objects as stated in the memorandum is being made to further the company's purposes. On the other hand, if the third party is aware or has notice of the breach of duty by the directors, he cannot, according to the rules of

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[179] Meade shares this view - J. Meade, "Ultra Vires or Directors' Abuses: when can shareholders right a wrong?" (1999) 6(7) CLP 198, 199.

[180] See also A.J. Boyle et al, eds, "Gore-Brown on Companies", (44th ed.) (Jordans, Bristol, 1986; 31st supp., 1999), at 3.010, cited by J. Meade, "Ultra Vires or Directors' Abuses: when can shareholders right a wrong?" (1999) 6(7) CLP 198.

[181] In Re Horsley & Weight [1982] 3 AER 1045.

[182] Eg Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 86-87.

[183] Charterbridge Corporation Ltd v. Lloyds Bank Ltd [1970] Ch. 62; [1969] 2 AER 1185.

[184] Ibid, at 85.

agency, hold the company to the transaction. Furthermore, as an internal breach of company regulations, it is ratifiable by the company.

The declaration that all that is expressly provided for in a company's objects clause is within the company's capacity is good law at the level of principle: capacity is defined by the objects clause composed by the promoters, and should not be a matter of subsequent interventionist judicial control. Furthermore, it aids clarity and simplicity. As Lord Parker underlined in *Cotman v. Brougham*, those dealing with companies should be able to assume that the express contents of a company's objects clause accurately portray its capacity.[185] It is unfair to all who might be prejudiced by a transaction being void to declare that although the capacity of a company is defined by its objects clause, this capacity can be restricted by reference to external tests described in decades-old cases. The layman should not be expected to know the *Lee Behrens*[186] three-limbed test.

The logical consequence of the line of reasoning espoused in *Charterbridge* and *Rolled Steel*, is that gratuitous dispositions subject to an express power are permissible just like other transactions.[187] It should no longer be the case that "distinctive principles"[188] govern gratuitous dispositions. However, there seems to have been some judicial reluctance to accept this novel freedom, both in the UK and in the subsequent Irish decisions.[189] This is unnecessary. Even if gratuitous

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[185] Cotman v. Brougham [1918] AC 515, 521 (per Lord Parker): "A person who deals with a company is entitled to assume that a company can do everything which it is expressly authorized to do by its memorandum of association, and need not investigate the equities between the company and its shareholders."

[186] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[187] See above at 6.5: "Gratuitous Dispositions and the Corporate Benefit Test".

[188] In Re Halt Garage Ltd [1982] 3 AER 1016, 1032 (per Oliver J.).

[189] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 208; see below at 7.3.2: "The Irish Cases of the 1990s".

dispositions are not sanctioned by the law on capacity, there are sufficient other protections to ensure that they do not dissipate companies' assets.[190]

Boyle and Birds point to uncertainty as to "how far this line of argument can be pushed".[191] They ask whether an express power can now be used to effect a permanent switch to an entirely novel area of business. Logically, it would seem that it could, given the terms of the ruling. This would certainly reduce the utility of the memorandum as an indication of a company's primary business. However, this is dependent on there being an express power which embraces the proposed activity and which could also be used for the original business. Furthermore, it is to be hoped that in such cases companies would avail of the convenient statutory mechanism to modify their objects. Thus this should not in practice present as a major concern.

7.2.1.5. The effect on the distinction between express powers and objects

The distinction between objects and powers continues to exist,[192] but capacity no longer turns on the "fine interpretation" of various kinds of objects and powers.[193] This accords with the view of Lord Parker in *Cotman v. Brougham*,[194] that "to distinguish between power and object and to determine what is the main or paramount object of the company" should only be relevant to discern if the

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[190] "Prentice Report", "Reform of the Ultra Vires Rule" (DTI, 1986), Chapter 4; J. Birds, "The Demise of Ultra Vires" (1986) 7(5) Company Law 203, 203; see also below at 15.3: "Alternative Modes of Protecting Shareholders and Creditors".

[191] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 93.

[192] See Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 93-94.

[193] Ibid, at 92-93 (per Brown-Wilkinson LJ): "If the objects clause contains provisions (whether objects or powers) which show that a transaction of the kind in question is within the capacity of the company, that transaction will not be ultra vires."; L. Cane, "Ultra Vires and Political Donations" (1984) NLJ 749, 750; see above at 6.1: "Powers and Objects".

[194] Cotman v. Brougham [1918] AC 515.

company's substratum had disappeared.[195] Choong considers that the implicit reason why the differentiation must be maintained is that only true objects can delineate the scope of a company's capacity.[196] This position does not appear to be correct in principle, drawing out the full consequences of *Rolled Steel*.[197]

In Re Introductions, though narrowly interpreted by *Rolled Steel*,[198] is still good authority, so that the independent objects clause cannot elevate mere powers to the status of objects.[199] Certain powers are incapable of becoming objects by virtue of an independent objects clause. This may depend on the nature of the power or on the terms in which it is couched.[200] Given that giving guarantees is not deemed incapable of being an object,[201] the *In Re Introductions* rule may apply only to borrowing. Nonetheless, this detail becomes irrelevant if all uses of express ancillary powers are automatically intra vires, regardless of whether they further the company's interests.

Similarly, the principle established in *Horsley v. Weight*[202] continues to be good law, but becomes irrelevant to the question of capacity.[203] Certain clauses authorising gifts may, on their true construction, constitute substantive objects, but this classification need no longer be invoked in order to save them from being read down by reference to the company's main objects. In *Rolled Steel*, the power in

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[195] Ibid, at 521; the distinctions also remain relevant to breach of directors' duties,

[196] T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17, 25-26.

[197] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52.

[198] Ibid, at 84, 93.

[199] In Re Introductions Ltd [1968] 3 AER 1221.

[200] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52; T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17, 27.

[201] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 81.

[202] In Re Horsley & Weight [1982] 3 AER 1045.

[203] R.M. Temple, "Ultra Vires: The Dual Approach" 137 NLJ 1069, 1070.

question failed the "object" test,[204] but its use, which did not benefit the company, was intra vires.

Thus, the distinction between objects and powers fades from view in the context of capacity, and remains relevant only to determining the extent of authority and proper use of powers within the company.[205] The use of the company's powers for improper purposes might be a breach of directors' duties or a ratifiable internal wrong within the company. The distinction also remains relevant outside capacity because the Companies Act[206] requires objects to be set out in the memorandum. It is necessary therefore to distinguish between those items which are required to be enumerated, and those other mechanisms, or powers, which companies choose also to specify due to a traditional caution.[207]

Gregory criticises *Rolled Steel* because the decision "transforms the nature of the ancillary power" and grants to it "an efficacy which transcends even that appointed for objects."[208] Gregory has a point, though it is not necessarily the argument against the decision which he intends. Traditionally, the *ejusdem generis* rule applied to the interpretation of objects to subordinate ordinary objects to the company's main business. Implicitly, then, the decision in *Rolled Steel* to free the contents of the objects clause from such shackles also removes the objects from this constraint. The court may have relied on the assumption that in practice all objects clauses now contain an independent objects clause. The logical consequence of *Rolled Steel* is that all the contents of the company's objects clause are now within

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[204] Ibid, at 84-85, 86.

[205] Thus negating "a major source of difficulties" - R.M. Temple, "Ultra Vires: The Dual Approach" 137 NLJ 1069, 1070.

[206] Section 2(1)(c), Companies act, 1948 (United Kingdom).

[207] "The statutory requirement that the objects of a company shall be specified in the memorandum marks one important difference between objects and powers." – Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1986] Ch. 246, 287 (per Slade LJ).

[208] R. Gregory, "Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation" (1985) 48 MLR 108, 112.

its capacity, without any of them being limited by reference to others. The independent objects clause is no longer needed.[209]

7.2.1.6. Implied powers must still further objects

Though *Rolled Steel* does not explicitly address implied powers,[210] logic suggests that inferred unstated powers must continue to further the main objects of the company.[211] *AG v. Great Eastern Railway Company*[212] itself authorises the implication of unstated powers to the extent that, and because, they "may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized".[213] Buckley L.J. in *Horsley & Weight*[214] reasoned, obiter dictum, that implied powers must be used to further a company's substantive objects, because it is this subservience which justifies the implication.[215] In more recent developments, it is the clear implication of *In Re Greendale Developments Ltd*[216] that implied powers can only be used for the benefit of the company. Keane J. for the Supreme Court approves *Hutton v. West Cork Railway Company*[217] as "settled

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[209] Cp In Re Horsley & Weight Ltd [1982] 3 AER 1045, 1054.

[210] As "the Rolled Steel case concerned an express power it is difficult to know to what extent the decision affects implied powers." - R.M. Temple, "Ultra Vires: The Dual Approach" 137 NLJ 1069, 1071.

[211] See B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26, 38; L.H. Leigh, "Objects, Power and Ultra Vires" (1970) 33 MLR 81, 83.

[212] AG v. Great Eastern Railway Company (1879-80) LR 5 App. Cas. 473.

[213] Ibid, at 478 (per Selborne LC).

[214] In Re Horsley & Weight Ltd [1982] 3 AER 1045.

[215] Ibid, at 1051 (per Buckley LJ): "Ex hypothesi an implied power can only legitimately be used in a way which is ancillary or incidental to the pursuit of an authorised object of the company, for it is the practical need to imply the power in order to enable the company effectively to pursue its authorised objects which justifies the implication of the power."

[216] In Re Greendale Developments Ltd. (No.2) [1998] 1 IR 8.

[217] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

law".[218] Citing *Charterbridge Corporation Ltd v. Lloyds Bank Ltd*,[219] Keane J. observes that if an express power had been involved, "different considerations might apply".[220] On this basis, *Parke v. Daily News*[221] was correctly treated as an ultra vires case despite the presence of corporate benefit considerations, because the power relied upon was implied, not express.[222] However, the three-limb *Lee Behrens*[223] test is highly unlikely to have any place as good law, even in the determination of implied powers.[224]

Furthermore, it is consistent with the philosophy underlying the *Rolled Steel* development that the scope of capacity is to be clearly defined in each memorandum of association. This philosophy does not demand that capacity be expanded beyond the document itself to incorporate all sorts of unconnected activities which are not hinted at in the text.[225]

Since express powers will no longer shimmer in and out of being dependent on the motivations for their use, then, despite Lord Wrenbury's admonition in *Cotman v. Brougham*,[226] it now becomes advantageous to list express powers and not merely depend on the implication of necessary powers under the *AG v. Great Eastern Railways* principle.

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[218] In Re Greendale Developments Ltd. (No.2) [1998] 1 IR 8, 22.

[219] Charterbridge Corporation Ltd v. Lloyds Bank Ltd [1970] Ch. 62; [1969] 2 AER 1185.

[220] In Re Greendale Developments Ltd. (No.2) [1998] 1 IR 8, 22.

[221] Parke v. Daily News Ltd [1962] Ch. 927.

[222] L.H. Leigh, "Objects, Power and Ultra Vires" (1970) 33 MLR 81, 84.

[223] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[224] T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 357.

[225] B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26, 38: "it is clear that a gift by a company may be ultra vires in the absence of an appropriately worded objects clause."

[226] Cotman v. Brougham [1918] AC 515, 522.

7.2.2. Rolled Steel Faces its Critics

Rolled Steel has been described as including "some extremely controversial propositions".[227] The decision leaves "very little scope" for the ultra vires doctrine,[228] especially if its consequences are fully explored and accepted. Sealy points out that the "ultra vires chapter of the text-books should as a result become much shorter and a good deal more logical",[229] but at the same time, "the sections on directors' duties and shareholder-ratification are likely to become correspondingly longer."[230]

It has been welcomed in some quarters for both its logical consistency[231] and the protection it offers to innocent outsiders.[232] The decision's simpler view of ultra vires reduces the confusion which has long bedevilled the construction of objects clauses and their restrictive interpretation according to external tests.[233] Davis welcomes the simplification of the doctrine in the line of cases culminating in *Rolled Steel* as beneficial for clarity and certainty.[234] It heightens commercial security.[235] Davis lauds the "stronger emphasis placed upon the plain terms of the memorandum" which will ultimately increase the level of information it offers

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[227] T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17, 28.

[228] J. Birds, "The Abolition of Constructive Notice" (1986) 7(3) Company Lawyer 104, 105.

[229] Advice taken to heart by Keane: see R. Keane, "Company Law", 4th ed. (Tottel, Dublin, 2007), pp. 149-152.

[230] L.S. Sealy, "Ultra Vires and Agency Untwined" [1985] CLJ 39, 39.

[231] R.M. Temple, "Ultra Vires: The Dual Approach" 137 NLJ 1069, 1070.

[232] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 95.

[233] Rolled Steel "provided a welcome clarification of the doctrine of ultra vires and has finally disposed of a beguiling dictum of Eve J. in *Re Lee Behrens*"- Anonymous, *Notes* (1986) 102 LQR 169.

[234] S. Davis, "The Ultra Vires Rule" 136 NLJ 907.

[235] R.M. Temple, "Ultra Vires: The Dual Approach" 137 NLJ 1069, 1071.

shareholders.[236] Boyle and Birds particularly welcome the removal of the "logically dubious" proposition that a company's capacity could depend on the state of mind of the person dealing with it.[237]

Yet the excision of the corporate benefit test has its critics. Gregory concludes that *Rolled Steel* "points company law in the wrong direction"[238] MacCann says it "is not good law and should not be followed in Ireland".[239] Dawson strongly regrets the rejection of the corporate benefit test as "doubly unfortunate": inconsistent with authority and undesirable as policy.[240] The case law provides an important objection. Gregory refers to *Hutton.*[241] He argues that this decision was not heresy, and that it has since then unarguably formed a cornerstone of the law on ultra vires.[242] *Hutton*[243] is a firmly established authority, unquestioned in a century. Constrained by a desire to reorient the law without admitting that previous decisions may have been in error, the Court of Appeal found itself in a looking-glass world

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[236] S. Davis, "The Ultra Vires Rule" 136 NLJ 907, 908.

[237] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 95; see also L.S. Sealy, "Ultra Vires and Agency Untwined" [1985] CLJ 39.

[238] R. Gregory, "Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation" (1985) 48 MLR 108, 113.

[239] L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, 86; he also describes it as "a more dubious case" ibid, at 85.

[240] F. Dawson, "Commercial Benefit" (1991) 107 LQR 202, 207: it is "inconsistent with previous authority and in particular the House of Lords decision in *Sinclair* v. *Brougham".*

[241] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

[242] R. Gregory, "Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation" (1985) 48 MLR 108, 111: "With no disrespect to Slade L.J. or Gower, Bowen L.J. was no heretic. His judgment explicitly rejected *bona fides* as the test of *ultra vires* three times. He subsumed his "cakes and ale" in the "incidental-to-the-scope-of-the-business" test and there is too much authority supporting this latter as a test of *ultra vires* both for implied and express powers."

[243] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

where, it asks us to believe, nothing was ever quite what it seemed.[244] *Rolled Steel* asks us to deny that there ever was a corporate benefit test for the intra vires exercise of express and implied powers, whereas a long line of authority demonstrates that there was.[245]

Reconciling the various conflicting decisions on ultra vires is indisputably a difficult task.[246] Any development in the law in the area requires old cases to be revisited and reinterpreted in as consistent a manner as possible. Having rejected the efforts of Vinelott J., the Court of Appeal had to find its own way to make sense of the conflicting decisions. Its response addresses the logical inconsistency implicit in *David Payne*, that a void act could become effective by reference to the knowledge of one party.[247] Sealy points out that the Court could not overrule such well-established authorities as *David Payne* and *In Re Introductions*, so it reinterpreted them.[248] The extent of this revisionist approach to the authorities gives rise to doubts: *David Payne* was framed and understood as an ultra vires case.[249] Accepting the reinterpretation of this case as necessary in order to solve the problem, questions remain. Other decisions, such as *Jon Beauforte*,[250] were not explicitly revisited but

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[244] Eg In Re David Payne and Company Ltd [1904] 2 Ch. 608; In Re Introductions Ltd [1968] 3 AER 1221.

[245] See above at Chapter 6: "Powers, Corporate Benefit and Corporate Gifts".

[246] R.M. Temple, "Ultra Vires: The Dual Approach" 137 NLJ 1069, 1070: "Many of the cases concerning ultra vires seem inconsistent".

[247] An inconsistency unfortunately shared by Section 8 of the Companies Act, 1963 (Ireland).

[248] This occurred "along the lines presaged by Baxter" - L.S. Sealy, "Ultra Vires and Agency Untwined" [1985] CLJ 39, 40; see C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28 CLJ 280.

[249] In Re M.J. Cummins Ltd; Barton v. Bank of Ireland [1939] IR 61; L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, 85-86; cf J. Meade, "Ultra Vires or Directors' Abuses: when can shareholders right a wrong?" (1999) 6(7) CLP 198 for whom the court's action was to "clarify and solidify" the understanding of ultra vires in the earlier cases.

[250] In Re Jon Beauforte (London) Ltd (1953) 1 Ch. 131; [1953] 1 AER 634.

their place in the canon must now be questionable.[251] The results of the shakeup are far-reaching: many classical ultra vires cases are no longer to be viewed as capacity cases at all.[252] *Hutton* is a clear example of a case which is deeply rooted and inconsistent with the modern approach.[253]

Boyle and Birds suggest that the attempt to reconcile the earlier decisions with the new approach is not "entirely persuasive".[254] It is implausible to propose that *Rolled Steel*[255] represents the doctrine of ultra vires as understood for the previous century. However, sometimes judges do change the common law.[256] Notwithstanding the importance of precedent, the *Rolled Steel* approach represents an eminently satisfactory statement of the law, and should not be dismissed for its divergence from certain authorities. Perhaps the better approach is not to attempt to force the earlier authorities into moulds which can be explained as conforming to the new approach, but rather to admit that the law in the area has indeed changed direction, and that some of the old cases are no longer good law.[257]

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[251] L.S. Sealy, "Ultra Vires and Agency Untwined" [1985] CLJ 39, 40: "*Jon Beauforte* was curiously not mentioned at all; but it must now be of doubtful authority".

[252] "All these cases are now to be regarded as having turned on the fact that the transactions were beyond the directors' authority (as a matter of agency) or involved an abuse of their powers or breach of fiduciary duty (so making them voidable in equity). *Lee Behrens* must be explained on this ground and no other." - L.S. Sealy, "Ultra Vires and Agency Untwined" [1985] CLJ 39, 40.

[253] R. Gregory, "Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation" (1985) 48 MLR 108, 111: "there is too much authority supporting this latter ["incidental-to-the-scope-of-the-business" test] as a test of *ultra vires* both for implied and express powers."

[254] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 93; see also L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, who is quite clear that David Payne [1904] 2 Ch. 608 concerned incapacity.

[255] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52.

[256] See eg Sinclair v. Brougham [1914] AC 398 and Westdeutsche Landesbank Girozentrale v. Islington BC [1996] AC 669; E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000).

[257] See Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 378.

In another authority based objection, Gregory questions the premise underlying the Court of Appeal's reasoning, namely, "that a transaction tainted by *ultra vires* must be declared void".[258] He points to *Sinclair v. Brougham*[259] to illustrate that ultra vires transactions could create equities for the parties.[260] However, a distinction should be drawn between giving effect to a contract and offering a remedy once the contract is declared void. It is correct that *In Re David Payne*[261] appeared, on its face, to give effect to an ultra vires transaction. However, the Court of Appeal cut the Gordian knot by reinterpreting *David Payne* as not a case of incapacity. Having done so, the existence of non-contractual remedies in cases such as *Sinclair v. Brougham* does not threaten the validity of the premise that incapacity equates to voidness.

There is an almost visceral reluctance to accept the radical change introduced to the established conception of the doctrine. Choong criticises *Rolled Steel* because it departs from a "normative model" which requires the necessary subordination of express powers to the pursuit of authorised objects. This is necessary, in his view, if the doctrine is not to be emptied of meaning.[262] However, this reasoning is somewhat circular. For MacCann, *Rolled Steel* is unacceptable because "the company would have capacity to exercise its powers for purposes beyond the stated objects."[263] This assumes that the consequences of the decision are so inherently absurd as to illustrate its deficiency.

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[258] R. Gregory, "Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation" (1985) 48 MLR 108, 110.

[259] Sinclair v. Brougham [1914] AC 398.

[260] R. Gregory, "Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation" (1985) 48 MLR 108, 110: "*Sinclair* v. *Brougham* compels recognition of such equities and shows that discovering an ultra vires taint is not the stopping, but the starting point for equitable inquiry".

[261] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[262] T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17, 20.

[263] L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, 85.

It seems that it is difficult for some commentators to accept that the removal of the old corporate benefit restriction is not a misguided and permissive loophole, but rather a wholescale remodelling of the doctrine.[264] It only constitutes a devious subversion to fail to distinguish between powers and objects if the law ought to treat them differently. If, on the other hand, one accepts that powers ought to be freely exercisable within the stated capacity of a company, then there is no reason to emphasise the distinction between objects and powers. For Choong, express powers are "baffling"[265] because they cloud the distinction between objects, which ought necessarily be within capacity, and powers, which should not be allowed unless they further the objects, but the alternative approach is perfectly straightforward: if it is expressed, then it is within the company's capacity. The key focus is now on the fact of expression, and not characterisation as an object or power.

Choong further criticises the decision for grafting the law of agency onto the doctrine of capacity.[266] This misperception underestimates the significance of the decision. Because the grounds for restricting capacity are reduced, the ambit of the ultra vires doctrine contracts and room develops for the law of agency to operate. *Rolled Steel* is not necessarily wrong simply because it reduces the scope of the ultra vires doctrine. The traditional contours of the doctrine are neither infallible nor immutable: the rules can legitimately evolve if they are judged on their merits and found wanting.

Policy objections arise from fears that, with ultra vires ousted as a tool for controlling unscrupulous managers, the resulting lacuna will permit undesirable activity to go unchecked.[267] Although Sealy welcomes the decision, he concedes

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[264] MacCann asks rhetorically: "How can a company have power to do something which is not in pursuit of one of its authorised objects?" - Ibid, at 86.

[265] T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17, at 21, quoting G. Shapira, "Ultra Vires Redux" (1984) 100 LQR 468, 468.

[266] Ibid, at 18.

[267] See also below at 15.3: "Alternative Modes of Protecting Shareholders and Creditors".

that in smaller companies, it might become "all too easy to raid the corporate till".[268] Gregory fears that it "will narrow the range of legal answers available to meet the range of legal questions asked."[269] He suggests that harmful transactions may no longer be dubbed misapplications, and will generate less extensive remedies.[270]

However, the danger of widespread misuse of corporate assets is not as grave as one might initially assume. Under agency principles, approval of transactions carried out in excess of the agent's powers and authority depends on ratification by a shareholder majority in the absence of oppression of the minority. Why should shareholders not be permitted to approve a transaction which uses corporate powers for unforeseen ends? The hesitation to accept *Rolled Steel* has been called into question given the role of shareholders at the heart of the company.[271] Doubts have been raised that Slade L.J.'s ruling may require *unanimous* shareholder consent to ratify the use of corporate powers for an improper purpose,[272] but Sealy reminds us that company law does not attribute particular legal significance to unanimity, and valid ratification by the majority should suffice.[273] The rules on minority oppression should counter the risk that a transaction might be ratified despite it being contrary to the wishes of a minority of shareholders.[274] The law on fiduciary duties will also sanction genuinely harmful transactions, including acts which are not bona fide in

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[268] L.S. Sealy, "Ultra Vires and Agency Untwined" [1985] CLJ 39, 40.

[269] R. Gregory, "Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation" (1985) 48 MLR 108, 112.

[270] Ibid, at 112; see also F. Dawson, "Commercial Benefit" (1991) 107 LQR 202, 207: the purpose of the old rules was "to ensure that the company's funds are utilised for proper corporate purposes."

[271] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 210.

[272] R.M. Temple, "Ultra Vires: The Dual Approach" 137 NLJ 1069, 1070, citing Boyle & Sykes, "Gore-Browne on Companies", 44th ed., (1986) Vol 1, para. 3.2.4.

[273] L.S. Sealy, "Ultra Vires and Agency Untwined" [1985] CLJ 39, 40: "The members of the Court of Appeal in *Rolled Steel* speak throughout of ratification by the unanimous consent of the shareholders, as if such a corporate act had some special significance. It does not…"

[274] See below at 15.3.1.4: "Minority shareholder protection".

the company's interests. Dawson's concerns focus on unsecured creditors.[275] However, is an effective blanket ban[276] on corporate donations[277] really a necessary or appropriate protection? It is true that the making of gifts by an insolvent company may prejudice creditors but, in those circumstances, the law regulates very carefully the use of corporate assets.[278]

The new approach is both theoretically legitimate, as it returns the focus to the contents of each company's objects clause, and has the benefit of dispelling the source of much of the confusion which has been experienced in this area.[279] It is appropriate that questions of the use to which powers are put should be treated as issues of directors' authority and duties rather than capacity. This permits a company's shareholders instead of the courts to control the appropriateness of corporate transactions. Any unease which might be felt at curtailing the scope of the ultra vires doctrine is reduced if one considers the other principles of modern company law which protect shareholders and creditors from a range of threats.[280]

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[275] F. Dawson, "Commercial Benefit" (1991) 107 LQR 202, 207: "If accepted, this view would clearly lead to the position of unsecured creditors being prejudiced in the type of fact situation raised in the *Qintex* case [(1990) 8 ACLC 791], for shareholders in general meeting would clearly have the authority to cause the company to enter into the transaction".

[276] Cf Evans v. Brunner Mond Co Ltd [1921] 1 Ch. 359.

[277] Except those specifically authorised in a substantive object: In Re Horsley & Weight Ltd [1982] 3 AER 1045.

[278] Eg Section 297, Companies Act, 1963 (fraudulent trading); Section 297A, Companies Act, 1963 (reckless trading); Section 298, Companies Act, 1963 (personal liability for misfeasance); Section 160, Companies Act 1990 (as amended by section 42(b) of the Company Law Enforcement Act, 2001 – directors' disqualification); see also In Re Frederick Inns Ltd [1991] ILRM 582 (Lardner J., HC), [1994] 1 ILRM 387 (SC); Jones v. Gunn [1997] 2 ILRM 245 (directors' duty to creditors in insolvency).

[279] See above at Chapter 6: "Powers, Corporate Benefit and Corporate Gifts".

[280] See below at 15.3: "Alternative Modes of Protecting Shareholders and Creditors".

7.3. ROLLED STEEL AND THE LAW IN IRELAND

Rolled Steel changes the entire landscape in the area of corporate capacity.[281] If it is fully accepted, transactions which would previously have been ultra vires and void as using express powers for an improper purpose are now within the capacity of the company. However, the courts can be reluctant to engage in the fundamental rethink which it demands and have struggled at times to reconcile the "received learning"[282] with the full implications of *Rolled Steel*. An anonymous commentator presciently refers to "the nagging doubts that judges often suffer in this area."[283]

Despite the merits of the *Rolled Steel* approach,[284] it can only be law in Ireland[285] if it has been followed by the Irish courts.[286] English decisions are strongly persuasive[287] but not binding.[288] The Irish cases are ambiguous on the key question

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[281] "A whole new world / A new fantastic point of view / No one to tell us no / Or where to go / Or say we're only dreaming" – "A Whole New World", lyrics by Tim Rice, from the film "Aladdin" (1992); "the Court of Appeal [...] has now thrown in the towel" - L.S. Sealy, Editorial, (1986) 7 Company Lawyer 90, 90.

[282] L.S. Sealy, "Ultra Vires and Agency Untwined" [1985] CLJ 39, 39.

[283] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 210.

[284] See above at 7.2.2: "Rolled Steel Faces its Critics".

[285] Due to Section 35, Companies Act, 1985 there have been fewer ultra vires decisions in the UK since Rolled Steel; It has been applied to corporations other than registered companies: Halifax Building Society v. Meridian Housing Association Ltd [1994] 2 BCLC 540; Hazell v. Hammersmith and Fulham London Borough Council [1992] 2 AC 1; it has also been followed in Scotland: James Finlay Corporation Ltd v. Mearns [1987] SC 317.

[286] Hutchinson affirmed in 1989 that Rolled Steel was not Irish law - G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 127.

[287] McC v. McC [1994] 1 IR 293, 303: "the decisions of the English courts [...] are of persuasive weight and should not lightly be ignored."; 50% of cases cited in headnotes of Irish decisions are English - R. Byrne & J.P. McCutcheon, "The Irish Legal System", 4th ed. (Butterworths, 2001), p. 355.

[288] "Whilst the judgments in cases decided in the English courts at all levels will, on a great many occasions, provide convenient and, indeed, convincing statements of principle and attractive arguments in favour of such principles, they are no more than that and must be examined and

of whether *Rolled Steel* is law in this jurisdiction, as are domestic commentators.[289] Meade[290] and Murray,[291] both proponents of *Rolled Steel*,[292] differ as to its adoption.[293] MacCann[294] and Meade[295] represent diametrically opposing views on this critical issue. MacCann clearly adopts the pre-*Rolled Steel* perspective, writing in 1992 that it is "well-settled" that gifts under express or implied powers are only permissible where "reasonably incidental" to the company's business.[296] Espousing a directly contrary position, Meade considers that the corporate benefit test "no longer prevails"[297] under "current thinking".[298]

While the authorities are not entirely consistent, it appears that *Rolled Steel* has been adopted as law in Ireland but that it has not yet been fully appreciated and correctly

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questioned in the light of a jurisprudence whose fundamental law is radically different." - Irish Shell Ltd v. Elm Motors Ltd [1984] IR 200, 227 (per McCarthy J.).

[289] Meade favours a Rolled Steel view whereas MacCann opposes it; see: J. Meade, "Ultra Vires or Directors' Abuses: when can shareholders right a wrong?" (1999) 6(7) CLP 198; L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79.

[290] J. Meade, "Ultra Vires or Directors' Abuses: when can shareholders right a wrong?" (1999) 6(7) CLP 198, 198: "the concepts of corporate capacity and corporate benefit no longer inhabit the same realm."

[291] B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26, 34-36.

[292] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52.

[293] Meade considers it to be law in Ireland, and Murray points to the confusion in recent cases; cf other commentators who do not express their views on this issue: J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 38 Ir. Jur. 263; D. Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27.

[294] L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79.

[295] J. Meade, "Ultra Vires or Directors' Abuses: when can shareholders right a wrong?" (1999) 6(7) CLP 198.

[296] L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, 83.

[297] J. Meade, "Ultra Vires or Directors' Abuses: when can shareholders right a wrong?" (1999) 6(7) CLP 198, 198.

[298] Ibid, at 199.

applied. Meade refers to "a perception of support" and indicates that the consensus among the authors of text books that *Rolled Steel* is Irish law.[299] Yet, of the main texts,[300] only Keane presents an unambiguously modern view of the law: emphasising that corporate benefit relates only to directors' duties, citing *Rolled Steel*, and omitting reference to gratuitous dispositions.[301]

If the modern approach is law, *Rolled Steel's* effect has been misunderstood and underestimated. It is as if those who were used to the old structure of the law on ultra vires have been loath to abandon it and have sought instead to accommodate the changes within that structure, although the changes should instead have made that structure redundant.[302] Some texts and decisions still focus on gratuitous dispositions as though they were a separate category, although this is no longer necessary.[303] Courtney, though he quotes Slade L.J. in *Rolled Steel*, nonetheless concentrates on the distinction between substantive objects and ancillary powers, which are "always conditional",[304] and whether the purpose for which powers are exercised benefits the company.[305] He addresses gratuitous dispositions as a distinct

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[299] Ibid, at 199: Meade cites: R. Keane, "Company Law in the Republic of Ireland", 2nd ed. (Butterworths, Dublin, 1991), p. 128; M. Forde, "Company Law", 3rd ed. (Round Hall Sweet & Maxwell, 1999), p. 82; T.B. Courtney, "The Law of Private Companies" (Butterworths, Dublin, 1994), p. 217 and W. Johnston, "Banking and Security Law in Ireland" (Butterworths, Dublin, 1998), p. 651.

[300] *Keane*, *Courtney* and *Forde* are leading Company Law textbooks in this jurisdiction.

[301] R. Keane, "Company Law", 4th ed. (Tottel, Dublin, 2007), p. 152: "If, for example, the company borrows money for an object not stated in the memorandum, the act of borrowing, while within the capacity of the company, is nonetheless unlawful."

[302] See L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79.

[303] See T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002); M. Forde & H. Kennedy, "Company Law", 4th ed., (Round Hall Sweet & Maxwell, 2007); Forde presents Rolled Steel but does not discuss its implications: ibid, pp. 37-38.

[304] T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002).

[305] Ibid, at pp. 346-350; cf R. Keane, "Company Law", 4th ed. (Tottel, Dublin, 2007), pp. 149-152.

category.[306] Yet he discusses the "new school of thought" with the clear implication throughout that he approves its analysis and cites *Rolled Steel* as illustrating "the switch in judicial thinking".[307] Courtney ultimately accepts that the modern approach is law.[308] In other cases, it is unclear which stance an author prefers: Forde links the capacity to make gifts to corporate benefit,[309] yet suggests that *Parke*[310] really concerned a fraud on the minority.[311] Ellis describes *Rolled Steel* as "the UK position".[312] Such divergent opinions are possible because the cases permit "an unacceptable state of confusion".[313]

The full effect of *Rolled Steel*[314] has not been clearly and unequivocally embraced in the Irish courts. The authorities permit two possible competing interpretations: either *Rolled Steel* is law here, but has been imperfectly applied, or the *Rolled Steel* principle that any use of an express power is intra vires does not form part of Irish law and a corporate benefit test remains relevant to capacity. In order to choose between these alternative viewpoints, it is necessary systematically to examine the approach taken in each of the more recent Irish cases and ask whether it is consistent or inconsistent with a modern approach whose hallmarks include emphasis on the distinction between directors' duties and capacity, careful examination of objects clauses and recognition of full capacity in the exercise of

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[306] T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 357.

[307] Ibid, at pp. 350-351: "The new school of thought holds that the exercise of an express power contrary to the express or implied conditions attached to its exercise will always be intra vires the capacity of the company."; Courtney unambiguously rejects Lee Behrens at p. 357.

[308] Ibid, at p. 365: "Only the pursuit of non-objects and the purported exercise of powers not stated in the objects clause will attract the doctrine of ultra vires."

[309] M. Forde & H. Kennedy, "Company Law", 4th ed., (Round Hall Sweet & Maxwell, 2007), p. 35.

[310] Parke v. The Daily News Ltd [1962] Ch. 927.

[311] M. Forde & H. Kennedy, "Company Law", 4th ed., (Round Hall Sweet & Maxwell, 2007), p. 36.

[312] H. Ellis, "Modern Irish Company Law", (Jordans, Bristol, 2001), p. 457.

[313] B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26, 38.

[314] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1986] Ch. 246.

express powers.[315] This survey can usefully begin in the 1970s, after *Charterbridge*[316] raised doubts about the corporate benefit test in England.[317]

7.3.1.1. The 1970s and 1980s

A number of unreported Irish decisions from the 1970s and 1980s touch on this question. In *Re Metro Investment Trust Ltd*,[318] the company had issued a promissory note to a creditor of another company, which was claimed on the company's liquidation. The liquidator argued that the promissory note was ultra vires as neither furthering the company's objects nor being to its benefit, despite an express power to make such notes. McWilliam J. refers to the *Hutton*[319] and *Lee Behrens*[320] line of authorities as well as *Charterbridge*.[321] While he accepts without question that the authorities establish that "money can only be spent by a company for a purpose reasonably incidental to the carrying on of the company's business", McWilliam J. distinguishes this case from the body of cases concerning gratuitous dispositions. He identifies *Charterbridge*[322] as the most relevant authority.[323] McWilliam J. views

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[315] Certain cases which touch briefly or indirectly on corporate capacity are not discussed: eg Roper v. Ward [1981] ILRM 408: there is merely a bald assertion that the shareholders "did not have power to give away the company's assets", at 415; Thomas Williamson Ltd v. Bailieborough Co-operative Agricultural Society Ltd (High Court, Unreported, 31 July 1986, Costello J.): the company's capacity to grant guarantees required Board approval, of which there was no evidence, at 13.

[316] Charterbridge Corporation v. Lloyd's Bank [1969] 2 AER 1185.

[317] Courtney suggests that there is preexisting obiter support for a Charterbridge agency approach in Re Cummins, Barton v. Bank of Ireland [1939] IR 60, but Cummins is consistent with the traditional view corporate benefit approach which was undoubtedly firmly established at that time and thereafter - T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 354.

[318] In Re Metro Investment Trust Ltd (High Court, Unreported, 26 May 1977, McWilliam J.).

[319] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

[320] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[321] Charterbridge Corporation v. Lloyd's Bank [1969] 2 AER 1185.

[322] Ibid.

Charterbridge[324] as establishing that, where there is consideration and the transaction is authorised under an express power, the outsider dealing with the company is not required to consider whether the transaction is of benefit to the company.[325] This decision hints at a reluctance to embrace the full consequences of the orthodox corporate benefit view.[326] However, by focusing on consideration and seeming to relate to enforceability by an outsider, rather than the validity of the transaction,[327] it does not fit the modern approach. McWilliam J. does not advert to *Charterbridge's*[328] criticism of the *Lee Behrens* test.[329] However, Hutchinson views the decision as rejecting the third limb of the test.[330] *Metro Investments* is possibly consistent with, but does not endorse, Pennycuick J.'s view that all transactions authorised by an express power should be within the capacity of the company.[331]

In *Securities Trust Ltd v. Associated Properties Ltd*,[332] McWilliam J. found that the company had no power in its objects clause to lend money, so that a loan made to

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[323] Ussher cites this support for Charterbridge as evidence of the rejection of Lee Behrens - P. Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986), p. 122.

[324] Charterbridge Corporation v. Lloyd's Bank [1969] 2 AER 1185.

[325] In Re Metro Investment Trust Ltd (High Court, Unreported, 26 May 1977, McWilliam J.), 948: "a third party who enters into a transaction involving a company which has power to enter into that transaction is not concerned to investigate the possibility of the transaction not being for the benefit of the company."; cp In Re Halt Garage Ltd [1982] 3 AER 1016.

[326] B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26, 36.

[327] Echoing a David Payne line of thought.

[328] Charterbridge Corporation v. Lloyd's Bank [1969] 2 AER 1185.

[329] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[330] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 88.

[331] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185, 1189 (per Pennycuick J.).

[332] Securities Trust Ltd v. Associated Properties Ltd (High Court, Unreported, 19 November 1980, McWilliam J.).

assist the purchase of its shares was invalid.[333] The company had modified its objects clause to authorise the transaction, but would have to pass a new resolution after the alteration.[334] Perhaps significantly, McWilliam J. does not suggest that the validity of a new loan might be subject to any corporate benefit considerations.

On the other hand, obiter comments by Murphy J. in *Re Kill Inn Motel*[335] point to a traditional acceptance of corporate benefit rules.[336] In *Kill Inn Motel*,[337] a company which owed substantial taxes leased its entire hotel business to another company controlled by the same people. The assets were worth many times more than the total price due.[338] The company's liquidator challenged the conveyance as void and a fraud on the creditors.[339] Murphy J. accepted this argument, and commented obiter on the question of capacity.[340] He observed that the transaction was "effectively a gift" and would be "very difficult to justify".[341] Citing *Hutton*,[342] he states that, "it has long been held that commercial companies do not have the power to make gifts"[343] and that this principle applies particularly when there is no prospect of a reciprocal benefit to the company.[344]

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[333] Ibid, at p.11 (001614); the transaction was not invalid under Section 60 of the Companies Act, 1963.

[334] Ibid, at p. 12 (001615).

[335] In Re Kill Inn Motel Ltd (High Court, Unreported, 16 September 1987, Murphy J.).

[336] Though there was no argument on the ultra vires point – see p. 004318.

[337] Ibid.

[338] Ibid, at p. 004315.

[339] Ibid, at p. 004317.

[340] Ibid, at p. 004318.

[341] Ibid, at p. 004318.

[342] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654, 673.

[343] In Re Kill Inn Motel Ltd (High Court, Unreported, 16 September 1987, Murphy J.), p. 004318.

[344] Citing Parke v. The Daily News Ltd [1962] Ch. 927.

7.3.1.2. Northern Bank: a welcome for Charterbridge

The first real hint of movement in Ireland comes in the better-known 1979 *Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company*,[345] which indicates greater willingness to depart from corporate benefit thinking.[346] In this case, Keane J. implicitly criticises the hard line taken in *Hutton*[347] and *Lee Behrens*.[348] He rejects a submission that if the memorandum contained an express power to execute a guarantee, the impugned transaction would nonetheless be *ultra vires* since no conceivable benefit could result to the company from it. Instead, Keane J. states in an obiter dictum that *Hutton's* denial of companies' capacity to make charitable dispositions "may have been extended too far in *In Re Lee, Behrens & Company*".[349] He adds that the persuasive authority of *Lee Behrens* would be open to challenge following *Charterbridge*.[350] Keane J.'s apparent opposition to the corporate benefit test remains obiter because there is no express power in this case.

The plaintiff bank was seeking to enforce a guarantee and mortgage executed by an unlimited company for a loan to another person. Keane J. closely examined the company's objects; an approach consistent with the modern emphasis on the precise contents of the memorandum itself ahead of extraneous restrictions. The company had the power to borrow or secure loans, and guarantee its liabilities.[351] The bank

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[345] Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221.

[346] Ussher believed in 1986 that Northern Bank had dispelled the corporate benefit confusion in Ireland - P. Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986), pp. 119, 122.

[347] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

[348] In Re Lee, Behrens & Co., Ltd [1932] AER 889.

[349] Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221, 227.

[350] Ibid, at 227: Lee Behrens "as a persuasive precedent would require reconsideration today in the light of the decision in *Charterbridge Corporation Ltd v. Lloyds Bank Limited*".

[351] Clause 2(k): "to raise or borrow or secure the payment of money in such manner and on such terms as the directors may deem expedient [...] and to guarantee the liabilities of the company".

argued that the clear intention was to enable the company to guarantee the liabilities of third parties. The company also had a *Bell Houses*[352] clause,[353] which the bank argued was wide enough to authorise the guarantee.[354] Keane J. held that the purpose of the borrowing clause was to enable the company itself to borrow and secure its own borrowings, rather than to guarantee others' debts.[355] To accept that the intent of the clause was to permit guaranteeing the liabilities of other persons, "would not merely be to do violence to the actual language used but would also be inappropriate" in the context of the clause.[356] Keane J. also rejected the argument based on the *Bell Houses* clause, as the transaction "could not reasonably be regarded as 'incidental or conducive to the attainment of any of' the objects set out".[357] The company intended the guarantee to facilitate the borrower, rather than furthering any of its own objects. Consequently, Keane J. concluded that the company possessed no express or implied power to guarantee a third party's debt.[358]

Since there was no power authorising the transaction, Keane J. stated that it was unnecessary to express a "final opinion" on the alternative argument put forward by the company that even if it had an express power to give the guarantee, the transaction would be ultra vires as it derived no benefit from it, under the *Lee Behrens* line of cases. Nonetheless, Keane J. took the opportunity to express his

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[352] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 AER 674; see above at 5.3.6: "The Bell Houses Clause and the Directors' Subjective Appreciation".

[353] Clause 2(t): "to do and carry out all such other things as may be deemed by the company to be incidental or conducive to the attainment of the above objects or any of them or calculated to enhance the value of or render profitable any of the company's properties or rights."

[354] Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221, 225.

[355] Ibid, at 226 (per Keane J.): "the wording used plainly indicates that it was essentially intended to confer a power of borrowing on the company."

[356] Ibid, at 226 (per Keane J.).

[357] Ibid, at 226 (per Keane J.).

[358] Ibid, at 226 (per Keane J.).

doubts about the *Lee Behrens* test. [359] This criticism by the future Chief Justice hinted that the Irish courts might be open to following the English courts in rejecting the corporate benefit test.

7.3.2. The Irish Cases of the 1990s

The 1990s brought a profusion of reported cases to test this proposition. The first of these cases which might have had an opportunity to adopt *Rolled Steel* was *Parkes & Sons Ltd. v. Hong Kong & Shanghai Banking Corporation.*[360] The claimant company, Parkes, gave a guarantee and mortgage over its property, when it was insolvent, for debts owed by a related company to the respondent. In Parkes' liquidation proceedings, it fell to be decided whether the disposition was ultra vires.[361] Deciding the case, Blayney J. disposes very quickly of ultra vires issue.[362] He does not fully engage with the issues surrounding the doctrine[363] or look to the company's memorandum.[364] It is not even stated whether the company has the power to give guarantees.

The arguments made were that the guarantee was automatically outside the powers of the company: firstly, because the company was insolvent, and secondly, because there was no consideration and so it constituted a gift.[365] Blayney J. decided that this was not a gratuitous disposition because there was consideration, which the lender gave to the related company in the form of more time to pay back its debt, so the

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[359] Ibid, at 227 (per Keane J.).

[360] Parkes & Sons Ltd. v. Hong Kong & Shanghai Banking Corporation [1990] 1 ILRM 341.

[361] The main issue related to fraudulent preference.

[362] In the last two pages of the judgment: Parkes & Sons Ltd. v. Hong Kong & Shanghai Banking Corporation [1990] 1 ILRM 341, 348-349.

[363] B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26, 37.

[364] Ibid, at 36.

[365] The point concerning consideration implicitly follows on from In Re Metro Investment Trust Ltd (High Court, Unreported, 26 May 1977, McWilliam J.).

guarantee was not a gift.[366] In response to the insolvency point, Blayney J. held that dispositions made when a company is insolvent may breach directors' duties but are not automatically ultra vires.[367] He clearly perceived that the authority relied on, *West Mercia Safetywear Ltd v. Dodd*,[368] concerns the duties owed by directors of insolvent companies to creditors, not ultra vires. Blayney J. further reasoned that principle does not require that insolvent companies lose the capacity to make dispositions, as otherwise, the statutory restrictions imposed on insolvent companies would be redundant.[369]

As the court was constrained to ruling on the basis of the general arguments put to it,[370] this case may not have provided a real opportunity to recognise *Rolled Steel*. It is therefore necessary to assess whether the decision is consistent with either the old or new approach. There are signals that point in both directions. The failure to examine the contents of the company's objects clause[371] distances this decision from the modern approach, which emphasises the importance of the objects clause.[372] It also obscures the significance of the decision because it is not sufficiently clear whether or not the company had an express power to give guarantees, or the limits of any such power.

The finding that the guarantee was not a gift passed up a chance to say it could be a gift and still valid, although this would have been obiter dictum.[373] Moreover, this finding is questionable: it reflects a new conception of gratuitous disposition,

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[366] Parkes & Sons Ltd. v. Hong Kong & Shanghai Banking Corporation [1990] 1 ILRM 341, 348.

[367] Ibid, at 349.

[368] West Mercia Safetywear Ltd v. Dodd [1988] BCLC 250.

[369] Eg Section 286, Companies Act, 1963.

[370] See Parkes & Sons Ltd. v. Hong Kong & Shanghai Banking Corporation [1990] 1 ILRM 341, 348.

[371] Cf Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979].ILRM 221.

[372] B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26, 36.

[373] As it was the view of the court that there was consideration.

moving away from that traditionally found in the ultra vires cases. Was this not a gift from the guarantor to the related borrower company? Traditionally, gifts were treated as distinct because they brought no benefit to the company: the focus was clearly on the assets of the company itself. The present case may, under the logic of group companies,[374] not really have been a gift from the perspective of the guarantor company, but this reasoning is not set out. Murray[375] challenges Blayney J.'s finding that the transaction was not a gift.[376] Firstly, although the provision of extra time sufficed to constitute legal consideration, the existence of consideration is not determinative of whether a transaction is, in substance, a gift.[377] Secondly, the consideration was given, not to *Parkes*, but to the related company, and if the court was willing to pierce the corporate veil in this regard, why did it not do so in relation to the issue of fraudulent preference?

These criticisms seem valid: the case should have been dealt with as one of a gratuitous disposition, and it should have been made clear whether there was an express power. Then the constraints on the exercise of express powers could have been explored. Does the court's insistence that this was not a gift hint that it would have been viewed as determinative if it were? The central problem with this decision from the point of view of ascertaining the current state of the law in Ireland is that it appears to view the question of capacity as turning on whether or not the payment was a gift, as if such a characterisation disposes of the matter. The arguments do not explicitly rely on a corporate benefit test, but the focus on gratuitous dispositions as a discrete category must be significant, if ambiguous. The underlying implication that gifts automatically fail a corporate benefit test is not consistent with *Rolled Steel*. Alternatively, the focus on gifts could offer support for a partial acceptance of the new approach, if the unstated reasoning is that expressly

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[374] Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185; In Re PMPA Garage (Longmile) Ltd [1992] ILRM 337.

[375] B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26.

[376] Ibid, at 36-37

[377] See In Re Kill Inn Motel Ltd (High Court, Unreported, 16 September 1987, Murphy J.), p. 004318: Murphy J. considers an exchange of £600,000 for £40,000 "effectively a gift".

authorised transactions for value are now fully permissible and that restrictions only continue to apply to gifts.[378] This would implicitly acknowledge that *Rolled Steel* has eliminated a benefit test for non-gratuitous transactions.

On the other hand, the clear distinction which Blayney J. draws between capacity and fiduciary duties[379] is consonant with modern thinking.[380] Courtney views this as significant.[381] On the insolvency point, by finding that even insolvent companies can have the capacity to make dispositions, *Parkes* does diverge from *Hutton.* Perhaps this point, by permitting gifts even when they cannot benefit the company, might distance *Parkes* a little from the old law. Furthermore, it is possible that the specific arguments advanced and the consequent failure to focus on the company's memorandum constitute an implicit recognition of the new approach to the doctrine of ultra vires. This presupposes that the company did in fact possess an express power to give guarantees, and that the argument proposed imposing external limits on such a power. If the company simply had no relevant power, would that not have been the natural argument to advance? On this view, the case may be viewed as a rejection of a novel attempt to circumscribe the broad capacity which companies now enjoy.

Keane views *Parkes* as in the *Rolled Steel* vein. He cites it as an application of the principle that an outsider can enforce a transaction involving the improper use of corporate powers, emphasising that such transactions "are within the power of the company."[382] Nonetheless, *Parkes*, which contains signs pointing in both directions, is not decisive. As the position in Ireland remains unclear to this day, its clues must be considered in conjunction with those found in other cases.

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[378] Cp In Re Halt Garage Ltd [1982] 3 AER 1016.

[379] Parkes & Sons Ltd. v. Hong Kong & Shanghai Banking Corporation [1990] 1 ILRM 341, 349.

[380] B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26, 37; this aspect leads Courtney to cite Parkes as supportive of the "new school": T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 355.

[381] T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 355.

[382] R. Keane, "Company Law", 4th ed. (Tottel, Dublin, 2007), p. 152.

7.3.2.1. PMPA: do as I say, not as I do

The next decision, *In Re PMPA Garage (Longmile) Ltd*,[383] is problematic in another way. On one hand, it purports to follow *Rolled Steel*. On the other, it seems to fail to appreciate and therefore misapply that authority. In a group of companies, all the members guaranteed loans made to some of them. The companies came to be wound up and the liquidators disputed liability on foot of the guarantee. The lender, which was a provident society and therefore a statutory corporation, was also wound up and it was claimed the loan was also outside its capacity to make. Murphy J. considers the objects clauses and holds that the memoranda do contain express power to make guarantees.[384] However, since he does not examine the objects in detail, it is unclear whether his construction of them as granting a power to give guarantees "in furtherance of the objects" is based on the terms of the clauses or an external restriction which he imposes.[385]

Murphy J. asserts that he approves *Rolled Steel*.[386] However, the interpretation which he approves raises questions. In Murphy J.'s view, what *Rolled Steel* demonstrated is that a clause permitting guarantees or gratuitous dispositions could constitute a valid separate independent object.[387] However, he holds that the nature of the business of the debtor companies and the terms of their memoranda mean that here they are no more than express powers.[388] By focusing on whether the express

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[383] In Re PMPA Garage (Longmile) Ltd [1992] ILRM 337, 349.

[384] Ibid, at 340.

[385] In Re PMPA Garage (Longmile) Ltd [1992] ILRM 337, 341 (per Murphy J.): "it is unnecessary to analyse in detail the relevant terms of the memoranda which are set out in the affidavits [...] to establish the proposition that each of the debtor companies does have the power (and that is what it is) to grant guarantees in furtherance of the objects for which they were incorporated."

[386] Rolled Steel "has demonstrated (in my view correctly) how a clause dealing with the provision of guarantees or even the making of gratuitous payments could constitute a valid separate independent object of a company..." - In Re PMPA Garage (Longmile) Ltd [1992] ILRM 337, 340-341 (per Murphy J.).

[387] Ibid, at 340-341; cp In Re Horsley & Weight Ltd [1982] 3 AER 1045.

[388] In Re PMPA Garage (Longmile) Ltd [1992] ILRM 337, 340-341.

power constitutes a substantive object, this reasoning appears to miss the point of *Rolled Steel*. Whether an express power is a substantive object should no longer be determinative. Given his finding that the companies have the power to grant guarantees in furtherance of their objects, Murphy J. next asks whether the granting of the guarantees "could have advanced the business of garage proprietors" pursued by each individual guarantor.[389] As a group of companies, he concludes, it is reasonable for each to take into account the interests of related companies.[390] The use of the powers of guarantee to benefit group companies was therefore intra vires.[391] Although the guarantees were intra vires, the loans were ultra vires the lender because they were made to persons other than members and without specific security.[392]

The court's reasoning in relation to the guarantor companies counteracts the purported adoption of *Rolled Steel* by apparently retaining the corporate benefit test. Under *Rolled Steel*, acts envisaged by express powers are automatically intra vires, whether or not they further the company's interests, although they may involve breaches of directors' duties. It is not necessary for a clause to constitute an independent object in order to be released from a test of corporate benefit. In *Rolled Steel* itself, although the power to give guarantees was a "mere power" and not an

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[389] Ibid, at 341.

[390] "In the nature of things companies associated with each other as parent and subsidiary or through common shareholders or who share common management and common titles or logos can not safely ignore the problems of each other. Even the most independently minded director of any such related company seeking to advance the interests of a particular company would recognise that he should and perhaps must protect the interests of the group as a whole" - In Re PMPA Garage (Longmile) Ltd [1992] ILRM 337, 343 (per Murphy J.); "it was in the interest and for the benefit of each individual company to ensure and promote the success of the other companies in the group" – ibid, at 345.

[391] In Re PMPA Garage (Longmile) Ltd [1992] ILRM 337, 343 (per Murphy J.): "such a guarantee and its renewal each year was justifiable as a matter of law".

[392] Ibid, at 348; Courtney emphasises that this was an express restriction on the power ab initio so the finding does not impact on express powers generally: T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 356.

independent object, the execution of the guarantee was within the company's capacity. The speech of Slade L.J. in *Rolled Steel* is explicit and unequivocal on this point.[393] Thus, it appears that, despite the apparent endorsement of *Rolled Steel*, *PMPA* does not support its adoption into Irish law. MacCann writes after this decision that *Hutton* remains good law in Ireland and treats its requirement of corporate benefit as a general principle, not contingent on the terms of the power in question.[394]

The most credible manner in which *PMPA*'s clear focus on corporate benefit could be reconciled with *Rolled Steel* is if the terms conferring the express powers in fact explicitly restricted them by reference to the company's interests.[395] However, it is impossible to tell if this is the case, as Murphy J. deems it unnecessary to present the clauses in question.[396] Alternatively, Meade argues that, on a "careful reading", this case is consistent with *Rolled Steel*: he views the benefit analysis as unrelated to capacity, but instead affecting fiduciary duties and the validity of guarantees not executed under seal.[397] Overall, despite *PMPA's* explicit reference to *Rolled Steel*, it does not sit easily with the modern approach.

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[393] If an act "is capable of being performed as reasonably incidental to the attainment or pursuit of its objects, it will not be rendered ultra vires the company merely because in a particular instance its directors in performing the act in its name are in truth doing so for reasons other than those set out in its memorandum." - Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1986] Ch. 246, 295 (per Slade LJ).

[394] Whether the guarantee "is reasonably incidental to the company's business"- L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, 83.

[395] "Subject to any express restrictions on the relevant power which may be contained in the memorandum…" - Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1986] Ch. 246, 295.

[396] In Re PMPA Garage (Longmile) Ltd [1992] ILRM 337, 341.

[397] J. Meade, "Ultra Vires or Directors' Abuses: when can shareholders right a wrong?" (1999) 6(7) CLP 198, 200: "At no point did Murphy J. return to the question of benefit in the context of a discussion of vires."

7.3.2.2. In Re Frederick Inns Ltd.

The Supreme Court considered corporate capacity in *Re Frederick Inns.*[398] A number of companies in a group which operated public houses paid money to the Revenue Commissioners to discharge the tax liabilities of the entire group. The liquidator challenged the payments as ultra vires, since they had gratuitously reduced the companies' assets at a time when they were insolvent.[399] Lardner J. in the High Court adopted a pre-*Rolled Steel* view that the payments were gifts, and in the absence of evidence that they were for the benefit of the payers, they were "clearly ultra vires."[400] Furthermore, Lardner J. appears to conflate breach of directors' duties[401] and ultra vires, by linking incapacity to insolvency.[402] Murray criticises Lardner J.'s decision as unsatisfactory for not examining the memorandum[403] and conflating directors' duties with capacity.[404]

On appeal to the Supreme Court, Blayney J.[405] examined the companies' memoranda of association.[406] Since these do not confer a power to pay others'

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[398] In Re Frederick Inns Ltd. [1991] ILRM 582 (HC), [1994] 1 ILRM 387 (SC).

[399] In Re Frederick Inns Ltd. [1991] ILRM 582, 588.

[400] "[T]hey can only be regarded as voluntary payments made without consideration for the benefit of third parties and as such in the evidence that such excess payments were for the benefit of the paying companies they are clearly ultra vires." - In Re Frederick Inns Ltd. [1991] ILRM 582, 588 (Lardner J.); Lardner J. did not examine the companies' memoranda, despite Blayney J.'s assertion to the contrary at [1994] 1 ILRM 387, 391; see B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26, 37.

[401] The payments "were also misapplications of the respective companies' assets because they were made when the companies were insolvent and the payments were in disregard of the rights and interest of the general creditors" - In Re Frederick Inns Ltd. [1991] ILRM 582, 590.

[402] In Re Frederick Inns Ltd. [1991] ILRM 582, 591.

[403] B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26, 36.

[404] Ibid, at 37-38.

[405] O'Flaherty and Denham JJ. concurring.

[406] In Re Frederick Inns [1994] 1 ILRM 387, 393-394.

debts, there is no express power. Equally, no implied power can be inferred. Therefore the transactions were ultra vires.[407] Furthermore, the recipient could not invoke Section 8(1) of the Companies Act, 1963, because the payments were made in breach of the duty owed by the directors of an insolvent company to its creditors.[408] Thus, the Supreme Court arrives at the same outcome as the High Court, but by the crucially different means of construing the memorandum rather than reliance on general restrictions on the giving of gifts or transactions during insolvency.

The Supreme Court's clarification on the facts that there was no express power at issue is important. Firstly, this fact may legitimise Lardner J.'s approach. On this interpretation, corporate benefit was properly considered in the High Court, not because that is a relevant consideration in relation to the exercise of express powers, but in order to determine whether an implied power exists. Secondly, it explains why the Supreme Court does not follow the *Rolled Steel* developments on capacity even though it expressly relies on *Rolled Steel* in relation to constructive trusts.[409] Since there was no express power, the facts do not support reliance on *Rolled Steel*'s rejection of the corporate benefit test for express powers. Nonetheless, the Supreme Court's decision is consistent with the modern approach, and Murray's recommendations,[410] in its deliberate substitution of interpretation of the objects for the general principles espoused by Lardner J.[411] It reinforces that the courts must in each case examine a company's objects and powers to determine whether a transaction is ultra vires. Furthermore, as Courtney points out, the Court's clear

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[407] Ibid, at 394.

[408] Ibid, at 397.

[409] Ibid, at 398.

[410] B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26 criticising the High Court decision.

[411] See J. Meade, "Ultra Vires or Directors' Abuses: when can shareholders right a wrong?" (1999) 6(7) CLP 198, 200.

differentiation between directors' duties and capacity, adopts another important aspect of the modern approach.[412]

7.3.2.3. Ulster Factors v Entonglen: an absence of evidence

The subsequent authorities are not illuminating. *Ulster Factors v Entonglen*[413] arose from a factoring agreement between the parties.[414] The defendant's liquidator disputed a payment which the plaintiff had made to a third party at the request of one of the directors of the defendant company as unauthorised and ultra vires. The ultra vires argument was that the company had no power in its memorandum of association to pay the debts of a third party. Laffoy J. pointed to an absence of evidence about the nature and purpose of the payment and added that the plaintiff was merely the conduit, and not the recipient.[415] Ultimately, this case is not instructive, as it lacks firm evidence and detailed examination of the issues, and turns on the particular circumstances where the alleged ultra vires transaction was made by an outside agent on behalf of the company.

7.3.2.4. In Re Greendale Developments: corporate benefit but no express power

Capacity arose indirectly in *Re Greendale Developments Ltd. (No.2)*.[416] A solvent company made payments to two of its members before being wound up.[417] The liquidator sought to recover the assets under misfeasance proceedings.[418] The

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[412] T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 355-356.

[413] Ulster Factors Ltd v. Entonglen Ltd (High Court, Unreported, 21st February 1997, Laffoy J.).

[414] The defendant company transferred its debts to the plaintiff which would periodically make payments on its behalf.

[415] Ibid, at 3892.

[416] In Re Greendale Developments Ltd. (No.2) [1998] 1 IR 8.

[417] See M. Forde, "Company Law", 3rd ed. (Round Hall Sweet & Maxwell, 1999), pp. 103-107 for discussion of this case by erstwhile counsel for the defendants.

[418] Section 298(2), Companies Act 1963.

appellant challenged the order made, arguing that as the payments had been assented to by all the company's members, they could not constitute misfeasance. This argument presupposed that the payments were invalid because they were not for the benefit of the company but were nonetheless intra vires.[419] However, the Supreme Court[420] rejected the argument that they were intra vires, since no clause of the company's memorandum had been produced to show the power to make such payments existed.[421] Being ultra vires, the consent of shareholders was irrelevant.

In the absence of evidence of an express power to make the payments, the case concerns implied powers. It confirms the accepted view that an unstated power will not be inferred unless it is ancillary to the company's business. Implied powers still depend on corporate benefit.[422] Courtney explains the case's discussion of corporate benefit as the exclusion of any implied power, and describes the absence of any power, not the absence of benefit, as the "genesis" of the decision.[423] The absence of an express power precludes the Court from addressing the question of whether *Rolled Steel* now applies to express powers in Ireland.

However, the tenor of Keane J.'s decision is reminiscent of the corporate benefit authorities. He underlines the fact that company received no benefit.[424] He approves *Hutton*,[425] saying that it is settled law that a company can only dispose of its property for purposes which are reasonably incidental to the carrying on of its

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[419] "Since ex hypothesi the company obtained no benefits whatever from the impugned payments, the respondents' submission necessarily involve the proposition, which counsel did not shrink from asserting, that such payments are nonetheless intra vires." - In Re Greendale Developments Ltd. (No.2) [1998] 1 IR 8, 22 (per Keane J.).

[420] Keane J., Blayney and Murphy JJ. concurring.

[421] In Re Greendale Developments Ltd. (No.2) [1998] 1 IR 8, 22.

[422] T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), pp. 356-358.

[423] Ibid, at p. 363.

[424] In Re Greendale Developments Ltd. (No.2) [1998] 1 IR 8, 22, 24.

[425] Hutton v. West Cork Railway Company (1883) 23 Ch. D. 654.

business.[426] Even more surprisingly, Keane J. cites *Lee Behrens*.[427] For Meade, all this is "troubling".[428] Furthermore, Keane J. does not mention *Rolled Steel*. He concedes that, if there was an express power, "different considerations might apply", but founds this on *Charterbridge*.[429] It is as if *Rolled Steel* was never decided, though this is perhaps natural if the point was not argued.

Forde criticises the decision.[430] He points out that the raison d'être of trading companies is to distribute surpluses to their members. Therefore, distributing surpluses being an implicit object of every trading company, there is no need for a specific power to be expressed.[431] While this argument is interesting, it is not conclusive, and it does not seem unreasonable that companies which desire a power freely to distribute assets to members enunciate such a power in their objects clauses.[432]

Like the other Irish authorities, *In Re Greendale Developments* offers no conclusive answer to the most important question relating to the current state of the ultra vires doctrine. It leaves the door open to fully adopting *Rolled Steel*. It is not inconsistent with it, as implied powers logically remain subordinate to the corporate interest.[433]

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[426] "It has been settled law since the decision in Hutton v. West Cork Railway Company [...] that a company cannot spend money or dispose of its property except for purposes which are reasonably incidental to the carrying on of the business of the company." - In Re Greendale Developments Ltd. (No.2) [1998] 1 IR 8, 22 (per Keane J.).

[427] Ibid, at 22; cf Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221.

[428] J. Meade, "Ultra Vires or Directors' Abuses: when can shareholders right a wrong?" (1999) 6(7) CLP 198, 200.

[429] In Re Greendale Developments Ltd. (No.2) [1998] 1 IR 8, 22.

[430] M. Forde, "Company Law" 3rd ed. (Round Hall Sweet & Maxwell, 1999), pp. 105-107.

[431] See also W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 72.

[432] M. Forde, "Company Law" 3rd ed. (Round Hall Sweet & Maxwell, 1999), pp. 105.

[433] Courtney emphasises the fact that there was no express power as a "very important aspect": T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 363.

7.3.2.5. Conclusion

It seems that the Irish courts are now willing to distinguish between capacity and directors' duties in a manner consistent with modern analysis.[434] There is also a trend towards the careful examination of objects clauses. *Rolled Steel* has been mentioned and even purportedly adopted in a number of cases. Yet there remains an unwelcome anachronistic focus on gifts and corporate benefit. There is no definitive statement as to whether the exercise of express powers must still serve the company's interests to be intra vires. However, many commentators prefer the view that *Rolled Steel* would be followed in Ireland, should a good opportunity arise. Judicial clarification would require a case where an express power was used for an improper purpose, and the making of appropriate arguments by counsel.

If it is the case that the Irish courts have already accepted *Rolled Steel*, but not yet fully integrated its ramifications, there is less need for reform or abolition of the ultra vires doctrine than is widely assumed. If companies have the capacity to exercise all objects and powers stated in their memoranda, for any purpose, this provides the simplicity and clarity which have historically been lacking. It returns control of the scope of a company's capacity to its own hands, forcing judges to relinquish their use of the ultra vires doctrine as a tool for externally policing companies' actions. The ultra vires doctrine becomes logical and straightforward; the objects clause becomes functional and informative. This addresses one set of concerns engendered by the doctrine. The other critical issue, which colours any evaluation of the law on capacity, relates to the severe effects of incapacity, and the position of the outsider who deals with a company in excess of its capacity.

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[434] Parkes & Sons Ltd. v. Hong Kong & Shanghai Banking Corporation [1990] 1 ILRM 341, 348; In Re Frederick Inns [1994] 1 ILRM 387, 398.

8. THE EFFECT OF THE ULTRA VIRES DOCTRINE ON THE INNOCENT OUTSIDER

> "In dealing with a limited company, which must act strictly within its constitution, a contracting party must watch his step"[1]

8.1. INTRODUCTION: THE OUTSIDER'S PLIGHT

A purported contract which is beyond the capacity of one party is completely void and without legal effect.[2] A contract being usually a bargain between two parties, the determination that a purported contract is void for want of capacity generally affects not only the company, but also the outsider with whom it dealt.[3] The consequences for the other party when the contractual relationship evaporates are a key issue in the doctrine of ultra vires. The revelation that an apparent agreement, which has been relied upon, was illusory, can trouble the same sense of justice which reproaches breach of contract.

There are cases in which incapacity can render an agreement void without raising the problem of the outsider. Where an injunction is sought in advance to prevent a company exceeding its capacity, the problem does not arise. Even after the bargain is struck, if the contract remains purely executory, it is straightforward to erase the arrangement. Nor does the problem arise in relation to gifts, which impose an obligation only on the company. Unilateral contracts can be set aside without causing prejudice to the outsider, other than a disappointment of expectation.

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[1] In Re Cummins, Barton v. Bank of Ireland [1939] IR 60, 70 (Johnston J.).

[2] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[3] Carr identifies the 1860 case in which the rights of a party external to the company were first affected - C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 66: Attorney General v. Great Northern Railway Company 1 Drewry and Smales Rep., 159, 161: "it is competent for the Attorney-General in case of injury to public interests from such a cause, to file an information for an injunction."

Contract law has traditionally had little regard for gifts, as evidenced by the doctrine of consideration.[4]

The real problem occurs where a bilateral contract is partly or fully executed before it is found to be void. In *Re Introductions*, the borrowing of money for an ultra vires purpose was determined to be ultra vires and void.[5] This ruling invalidated the bank's debentures, leaving the bank unable to recover the money it had lent the company. In principle, striking down a partly-performed contract can cut both ways, depending which party has performed. Assuming that most cases of excess of capacity arise unwittingly, it is just as likely that the company itself should have unsuspectingly performed a void obligation. Concerns have occasionally been expressed at the idea of a doctrine designed to protect corporate assets being used to prejudice the company.[6] However, the greatest injustices have arisen in practice where third parties were prejudiced by the company's reliance on its own incapacity.

The "extension" of the doctrine to invalidate executed agreements had "remarkable results", enabling corporations "to evade liability upon an irksome contract".[7] *In Re Jon Beauforte*[8] is often cited to exemplify the harsh effects of the ultra vires

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[4] "The traditional common law rule may well reflect a common understanding to the effect that gratuitous undertakings are concessions, freely withdrawable on notice given, at least so long as they have not been relied upon." – P.S. Atiyah, "Contract and Fair Exchange" (1985) 35 U. Toronto L.J. 1, 7.

[5] In Re Introductions, Ltd [1968] 2 AER 1221 (Buckley J.); [1969] 1 AER 887 (CA).

[6] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 AER 674, 690 (per Salmon LJ): "it seems strange that third parties could take advantage of the doctrine, manifestly for the protection of the shareholders, in order to deprive the company of money which in justice should be paid to it by the third parties."; see D.D. Prentice, "Section 9 of the European Communities Act" (1973) 89 LQR 518, 523-524; he deems the First Companies Directive "unsatisfactory" because it would allow ultra vires to be used against the company; see also above at 4.3.1: "The Ultra Vires Doctrine as a Defence by the Outsider".

[7] C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 66.

[8] In Re Jon Beauforte (London) Ltd (1953) 1 Ch. 131; [1953] 1 AER 634.

doctrine on outsiders.[9] The decision that the company's suppliers had no legal right to be compensated for goods provided is roundly condemned as "blatantly unfair".[10] Stamp cites the case when referring to the "havoc that [the doctrine] can wreak on commercial relationships."[11] In *Re PMPA Garages (No.2)*,[12] Murphy J. characterises as "monstrous injustice" the proposition that benefits transferred ultra vires could be retained without compensation.[13]

The innocent outsider has achieved almost mythic status in discourse on corporate capacity. It is the outsider who most invites our sympathy. The onlooker's sense of justice is offended that an ordinary creditor can be denied the remuneration due because of a defect which rests primarily within the knowledge and fault of the company with whom it dealt.[14] Keane J., in *Northern Bank v. Quinn*,[15] asks whether "the vendor's failure to appreciate the lack of *vires* should be visited on the heads of the blameless shareholders."[16] Yet, this characterisation seems to ignore the company's knowledge of the limits on its own capacity. Why should the company's inattention to its own affairs be visited on the outsider? The outsider considered himself bound, and acted accordingly, yet the company was never bound, and if it

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[9] Anderson describes it as "classic and infamous" - J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 263, 274.

[10] It allows "third parties, who transacted with the company in good faith, to sustain losses in circumstances which were blatantly unfair."- S. Davis, "The Ultra Vires Rule" (1986) 136 NLJ 907, 908; It is often overlooked that Roxburgh J. did envisage that there might be remedies, such as tracing, available: In Re Jon Beauforte (London) Ltd (1953) 1 Ch. 131, 137.

[11] M. Stamp, "Reform of the Ultra Vires Rule: A Consultative Document" (1986) 136 NLJ 962, 971.

[12] In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] 1 IR 332.

[13] Ibid, at 336.

[14] As "an ultra vires borrower the company figures as a consummate hypocrite, not to say rogue" - Anonymous, *Notes* (1896) 46 LQR 110.

[15] Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221.

[16] Ibid, at 229.

did not know this, it should have.[17] By relying on its own incapacity, the company seems to offend against what Atiyah describes as the "homely maxim that you cannot both have your cake and eat it."[18] It would be an abuse for either party to avail of the doctrine to knowingly avoid its obligations.[19] Outrage on behalf of the outsider is fostered by the observation that the doctrine of ultra vires, which was designed in part to protect creditors as a class, can arbitrarily turn against any creditor.[20] Perhaps this contradiction is illusory: the creditor whom the ultra vires doctrine seeks to protect from the dissipation of the company's assets through illegitimate transactions is the pre-existing creditor of the company, not the creditor with whom the ultra vires contract is concluded. Nonetheless, the idea that the outsider should pay the price of the company's unauthorised act shocks.

Despite a visceral sense that the outsider should not be at the mercy of limitations internal to the company, and realistically outside his awareness, the outsider was long penalised by the doctrine of constructive notice, which meant that in law, if not in reality, he was presumed to have a knowledge of the incapacity equal to that of the company itself.

There appear to be three possible stages at which law could take account of the distinct predicament of the outsider. One possibility would be to constrain the pleading of the question, insisting that a company cannot invoke its own incapacity against an outsider.[21] Another would be to modify the operation of the ultra vires doctrine itself, so that its operation would vary where the rights of an outsider are at

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[17] Atiyah writes that the rules requiring consensus ad idem, "reflect a deep-seated belief that it is somehow unfair that one party to a transaction should be bound while the other remains free. An inchoate exchange of this character is so unbalanced that it simply offends the sense of justice." - P.S. Atiyah, "Contract and Fair Exchange" (1985) 35 U. Toronto L.J. 1, 8.

[18] Ibid, at 13.

[19] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 AER 674, 690 (per Salmon LJ): to "have the security of knowing that that they might safely enter into a contract [...] without any obligation to honour their contractual promise after they had received the services."

[20] M. Stamp, "Reform of the Ultra Vires Rule: A Consultative Document" (1986) 136 NLJ 962, 971.

[21] See above at 4.3.2: "Can the Company Raise its own Incapacity?"

stake. The *David Payne* principle, which sought to limit the striking down of transactions where the reason for the incapacity was hard for an outsider to discern, exemplifies this approach.[22] Finally, it might be possible to soften the blow of voidness, by offering a remedy outside the contract to protect the innocent outsider.[23]

For many years, the law did not find a satisfactory solution to the dilemma of implementing the principles governing corporate capacity without sacrificing trading partners at their altar. Outsiders who had executed their part of an apparent bargain with the company were prejudiced when the contract was set aside. Authority confirmed that the company could rely on its own incapacity; a solution consistent with principle.[24] The outsider, deemed to be constructively aware of the limits of the company's capacity as circumscribed in its memorandum of association, was not protected.[25] Criticism of the harsh treatment of contracting parties grounded widespread condemnation of the ultra vires doctrine.[26] Typically, Procaccia asserts that limited capacity "acted primarily as a snare to third parties".[27] In addition to considerations of individual justice, the security of (apparent) bargains, which is of particular importance in commercial contexts, may be jeopardised when contracts are readily declared void for incapacity. The detrimental effect of the doctrine may affect not only the individual contracting party, but the entire pool of potential traders, unless a fair means of application can be ensured.[28]

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[22] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[23] See below at Chapter 9: "A Question of Remedies".

[24] See above at 4.3.2: "Can the Company Raise its own Incapacity?"

[25] See Fountaine v. Carmarthen Railway Company L.R. 5 Eq. 322 (Hatherly LJ); Royal British Bank v. Turquand (Turquand's Case) (1856) 6 E&B 327, at 332 (Jervis C.J.); In Re Jon Beauforte (London) Ltd (1953) 1 Ch. 131; [1953] 1 AER 634.

[26] "Today it is widely felt that the doctrine is productive only of injustice." - M.P. Furmston, "Common Law Corporations and Ultra Vires" (1961) 24 MLR 518, 518.

[27] G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 117.

[28] J.H. Thompson, "The Ultra Vires Doctrine and the Jenkins Report" [1963] JBL 143, 143-144

Many well-known cases show up the unjust effect of the operation of the ultra vires doctrine in the absence of a legal remedy to prevent the loss lying where it fell.[29] It was traditionally assumed that the party to a void contract could not benefit from legal remedies, so that critics equated a finding of incapacity with an uncompensated loss to the party which had performed.[30] It is central to a more modern view that one must examine separately the distinct issues of the doctrine of ultra vires and the availability of remedies subsequent to a finding of voidness.[31] While, historically, remedies were inconsistent and insufficient, radical changes in the field of remedies colour how the substantive doctrine itself must be adjudged. This distinction between the questions of substantive voidness and remedies has not always been emphasised. Obvious injustices have been blamed on the ultra vires doctrine instead of the inadequacy of non-contractual remedies.

Concerns for the interests of the outsider have had an important influence on the operation of the ultra vires doctrine and determinations of voidness. The traditional position of the outsider at common law was vulnerable. This was explained as connected to the doctrine of constructive notice. The perceived injustice which the doctrine caused outsiders was a primary motive for the trenchant criticism of ultra vires which became the firmly-established orthodox attitude from the middle of the twentieth century. Courtney considers that the doctrine of constructive notice is unfair because the outsider's prejudice can only be justified if he is aware of the wrongdoing.[32]

Whereas the unjust cases might be viewed as evidence of the need for better remedies where goods were transferred without a valid contract, instead, they prompted calls for the abolition of the doctrine of ultra vires. Legislators responded, at first through statutory intervention to protect the outsider who deals with a

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[29] See In Re Jon Beauforte (London) Ltd (1953) 1 Ch. 131; [1953] 1 AER 634; In Re Introductions Ltd [1969] 1 AER 887.

[30] See Sinclair v. Brougham [1914] AC 398.

[31] See below at 9.3: "Modern Remedies in Ultra Vires Cases".

[32] T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 350

company in good faith. Today's laws substantially limit the operation of the ultra vires doctrine by allowing the person who deals with the company in some cases to rely on the void contract, notwithstanding the lack of capacity.[33] Ultimately, the same momentum, inspired by abiding concern for the innocent outsider, continues to push towards the abolition of the principle of limited corporate capacity.[34]

8.2. THIRD PARTIES AND CONSTRUCTIVE NOTICE

8.2.1. The Relevance of Constructive Notice to Ultra Vires Cases

> "Platitude: an idea (a) that is admitted to be true by everyone, and (b) that is not true."[35]

It is well-known that the doctrine of constructive notice has operated to the detriment of outsiders in the field of incapacity.[36] Members of the public are presumed to be aware of the contents of corporate constitutions and therefore of limitations on companies' powers.[37] However, it is not entirely clear that constructive notice should be the scapegoat for the doctrine of ultra vires itself. In

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[33] Section 8(1), Companies Act 1963 (Ireland); Article 6, European Communities (Companies) Regulations, 1973 (Ireland), implementing the First Companies Directive (68/151/EEC); see also Section 9, European Communities Act, 1972 (UK) and Section 35, Companies Act 1985 (UK); see Northern Bank Finance Corporation v. Quinn and Achates Investment Company [1979] ILRM 221.

[34] See below at 16.1.2: "Legislative Reform in the Common Law World".

[35] H.L. Mencken, "The Jazz Webster", in "A Book of Burlesques", 2nd ed (Alfred A. Knopf, New York, 1924), p. 207.

[36] Though, as Campbell points out, this is a fallacy - I.D. Campbell, "Contracts with Companies" (1959) 75 LQR 469, 470: "constructive notice, in this context, is a superfluous, an inoperative doctrine."; see also J.H. Thompson, "The Ultra Vires Doctrine and the Jenkins Report" [1963] JBL 143, 148.

[37] Fountaine v. Carmarthen Railway Company L.R. 5 Eq. 322; the outsider "is told that he dealt at his own risk, and, therefore, can expect no sympathy" - C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 70; see also I.D. Campbell, "Contracts with Companies" (1959) 75 LQR 469, 469.

Re David Payne,[38] Buckley J. expressly raises the question of whether it was important whether the other party knew that an act was ultra vires the company, acknowledging that the contracting party's knowledge of the ultra vires character of an act "may be immaterial".[39] In principle, knowledge has no effect on the validity of an agreement for which one party lacks capacity.[40] After all, the ultra vires doctrine requires no assistance to make the impugned agreement entirely void.[41] Campbell emphasises that "invalidity follows inexorably from the legal incapacity and is in no way affected by the state of mind of the parties."[42]

What need, then, for constructive notice to act against the outsider? Two answers present themselves. Firstly, constructive notice may be perceived as a moral justification of the prejudice caused to the outsider, since, in law, he may be deemed equally aware of the limits on the company's capacity and therefore responsible for his own misfortune.[43] Baxter relates judicial emphasis on the knowledge of the parties to "a sense of justice."[44] Besides, it may appear from the authorities that constructive knowledge becomes important in those cases where the ultra vires act was deemed to arise from the use of an express power for an improper purpose. In such cases, the outsider could honestly distance himself from the circumstance which rendered the transaction void, unless fixed with full notice of the

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[38] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[39] Ibid, at 612 (per Buckley J.): "If an act ultra vires the corporation be done, it may be immaterial whether the other party to that act had knowledge or had not knowledge that the corporation could not do it…"

[40] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 121.

[41] J.H. Thompson, "The Ultra Vires Doctrine and the Jenkins Report" [1963] JBL 143, 148.

[42] I.D. Campbell, "Contracts with Companies" (1959) 75 LQR 469, 470.

[43] "Creditors in such a case […] are not prejudiced, for, in the first place, they must be taken to have read the memorandum and articles of the company they are dealing with" - Anonymous, *Notes* (1889) 18 LQR 221, 222.

[44] C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28 CLJ 280, 283-284.

memorandum's limitations. In any case, the cases do link the doctrines of ultra vires and constructive notice, and that association has tarnished the reputation of each.

8.2.2. Constructive Notice of the Memorandum of Association

The doctrine of constructive notice which deems all members of the public to be aware of the contents of companies' memoranda and articles of association is not statutory in origin, but can be traced to *Ernest v. Nicholls*.[45] In *Ernest v. Nicholls*,[46] Lord Wensleydale enunciates the principle, reasoning that, when the legislature enabled companies to incorporate, it also provided "that all the world should have notice" of the persons authorised to bind the company.[47] Consequently, the public must be deemed aware of the contents of companies' constitutional documents, and, if people choose not to inform themselves, they are to blame and can shoulder the consequences.[48]

While *Ernest v. Nicholls* concerned agency, the same principle was unhesitatingly applied to capacity. In *Mahony v. East Holyford Mining Company*,[49] Lord Hatherley observes, as an application of the doctrine, that a person dealing with an enterprise established in one field could not claim rights based on a contract in a different domain.[50] As well as restating the principle,[51] Lord Hatherley relates the idea of

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[45] Ernest v. Nicholls (1857) LR 6 HL 401; (1857) 10 ER 1351; see M.J. Trebilcock, "Company Contracts" (1963-1966) 2 Adelaide L.R. 311, 332.

[46] Ernest v. Nicholls (1857) 6 HLC 401.

[47] Ibid, at 419.

[48] Ibid, at 419: "If they do not choose to acquaint themselves with the powers of the directors, it is their own fault".

[49] Mahony v. East Holyford Mining Company (1875) LR 7 HL 869; see also County of Gloucester Bank v. Rudry Merthyr Colliery Company [1895] 1 Ch. 629, 633.

[50] Mahony v. East Holyford Mining Company (1875) LR 7 HL 869, 894: "a person dealing with such a company as this, a mining company, could not attempt to set up any right upon a policy of insurance as having been granted to him by the directors of the company".

[51] Ibid, at 897: "those who deal with joint stock companies are bound to take notice of that which I may call the external position of the company.[...] Those articles of association and that partnership

constructive notice to determining where a loss might fairly lie, as between two competing parties[52] He asks which party might have been bound to act differently. However, this reasoning militates against constructive notice allowing the company to trump the outsider in a capacity context: surely the company's knowledge of its excess of capacity must be presumed to be greater than that of the outsider.

Nonetheless, the doctrine of constructive notice was invoked in capacity cases to penalise the outsider.[53] Given that ultra vires contracts are generally void, without need to rely on the doctrine of constructive notice as against the outsider, it is worth considering those ultra vires cases which have associated those two doctrines in the public consciousness.[54] These cases are *In Re David Payne*,[55] *In Re Jon Beauforte*[56] and *In Re Introductions*.[57] The common thread which links these cases is clear: they concern the misuse of corporate powers for an improper purpose, which was

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deed are open to all who are minded to have any dealings whatsoever with the company, and those who so deal with them must be affected with notice of all that is contained in those two documents."

[52] Ibid, at 897: "Now, if the question came to be which of two innocent parties (as it is said) was to suffer loss, I apprehend, my Lords, that in point of law what must be considered in cases of that kind is this: which of the two parties was bound to do, or to avoid, any act by which the loss has been sustained."

[53] The "doctrine of constructive notice [...] does not operate against a company, but only in its favour." - Rama Corporation LD. v. Proved Tin and General Investments LD [1952] 2 QB 147, 149 (per Slade J.); in some cases, the outsider has actual notice: Hennessy v. National Agricultural and Industrial Development Authority [1947] 1 IR 159, 203.

[54] Accepting for the moment that these cases concerned capacity – cf Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1985] 3 AER 52, 82 (per Slade LJ): they "cannot, in my opinion, be properly regarded as beyond its corporate capacity (and, therefore, *ex hypothesi* wholly void) if they are capable of conferring rights on a third party"; see above at 7.2.1.2: "David Payne reinterpreted under agency principles".

[55] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[56] In Re Jon Beauforte (London) Ltd (1953) 1 Ch. 131; [1953] 1 AER 634.

[57] In Re Introductions, Ltd [1970] 1 Ch. 199.

therefore deemed ultra vires.[58] This fact suggests the role that constructive notice may play: while knowledge is irrelevant in most capacity cases, the state of mind of the parties was assumed to be relevant in this hypothesis.[59] Yet Campbell shows that, even here, constructive notice is not really at play: it is the absence of actual notice of the improper purpose which is deemed to allow the innocent outsider to escape the voidness which attends the excess of capacity.[60]

8.2.3. The Absence of Notice Used to Protect the Outsider

A number of cases use the absence of notice to allow the outsider to rely on the transaction, despite incapacity arising from the use of a corporate power for an unauthorised purpose.[61] As Campbell points out, the outsider has no actual knowledge of the condition which renders the act ultra vires,[62] and the courts declined to impose constructive notice of that circumstance.

This approach is hinted at in *Re Marseilles Extension Railway Company*,[63] where the lender, who was not aware of the improper use of the power, could rely on the loan, notwithstanding the incapacity.[64] Mellish L.J. regarded it as a matter of fairness as between, "two innocent sets of shareholders", and chose to favour the outsider, which had acted properly within its own capacity.[65] While it may be "understandable" if viewed as an attempt by the courts to protect corporate assets

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[58] See above at 6.4.1: "The Outsider's Awareness of the Improper Purpose" and 6.5.1.1: "Gifts under Express Objects".

[59] "If the contract is prima facie within the powers of the company but is in fact entered into by the company for a purpose which takes it outside the range of the objects specified in the memorandum it is nevertheless enforceable as an intra vires contract unless the other party had notice of the actual purpose." - I.D. Campbell, "Contracts with Companies" (1959) 75 LQR 469, 470.

[60] Ibid, at 470-471.

[61] See In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[62] Ibid, at 470-471.

[63] Re Marseilles Extension Railway Company [1871] LR 7 Ch. 161.

[64] C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28 CLJ 280, 284.

[65] Ibid, at 169-170 (per Mellish LJ).

from foolish directors,[66] this approach appears to disregard the absence of capacity on which ultra vires is founded. How can the capacity of the borrower depend on the state of mind of the lender?[67]

The better-known *In Re David Payne*[68] refined the constructive notice rule, holding that third party lenders were not required to investigate whether the purpose to which their loan would be put by the company was within the scope of its objects. A company formed for the business of printing and stationery executed a mortgage in order to pay for patents unrelated to its business and help other, insolvent companies. On its liquidation, the liquidator sought a declaration that the mortgage was ultra vires and void. Although the company possessed the power only to borrow for its own business purposes, Buckley J. rejected the idea that this imposed a duty on outsiders to investigate the purpose for which the power was to be used. He stated that it would be impossible to require lenders to satisfy themselves that loans would be used for the purposes of the company.[69] It is implicit in the decision that if the lender had known that the funds were to be used for an improper purpose, then the transaction would have been ultra vires. It therefore appears that Buckley J. concluded it was material whether the third party was aware that the act was ultra vires, in these circumstances at least.

8.2.4. Constructive Notice Penalising the Outsider

The putative link between constructive notice and ultra vires was invoked by Roxburgh J. in *Jon Beauforte*.[70] A number of creditors sought payment for materials supplied to a company whose objects were clothing manufacture but which in fact, to their knowledge, made veneered panels. Roxburgh J. found against the fuel

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[66] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 206-207.

[67] T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17, 23.

[68] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[69] Ibid, at 613 (per Buckley J): "A corporation, every time it wants to borrow, cannot be called upon by the lender to expose all its affairs".

[70] In Re Jon Beauforte (London) Ltd [1953] 1 AER 634.

suppliers because "they had notice that the transaction was ultra vires".[71] Even though the fuel could have been used for a legitimate purpose, the suppliers were fixed with actual notice of the unauthorised business and therefore constructive notice of the incapacity. The harshness of this judgment is mitigated slightly by the statement that the rejection of the claims must be accompanied by a reservation of tracing rights.[72] However, the remedy of tracing is not available in all circumstances and would not be likely to benefit the suppliers of consumptibles like veneer or fuel.

In *Re Introductions*, the knowledge of the lending bank that the loan was to be used for an ultra vires purpose was also relied upon in ruling the loan invalid.[73] Harman L.J. drew a direct link from the bank's knowledge of the improper purpose to the consequence that it could not rely on the debentures.[74] Similarly, in *Re Cummins*,[75] Johnston J. identifies the bank's knowledge of the improper purpose as the central question.[76] Thus, while endorsing *David Payne*,[77] he finds that the lender, which did have notice of the improper purpose of the loan, cannot rely on it.

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[71] Ibid, at 636.

[72] Ibid, at 637 (per Roxburgh J.).

[73] In Re Introductions, Ltd [1970] 1 Ch. 199, 210 (per Harman LJ): "I would agree that, if the bank did not know what the purpose of the borrowing was, it need not inquire, but it did know, and I can find nothing in *Cotman v. Brougham* to protect it notwithstanding that knowledge."

[74] Ibid, at 211: "The borrowing was not for a legitimate purpose of the company: the bank knew it, and, therefore, cannot rely on its debentures."

[75] In Re Cummins, Barton v. Bank of Ireland [1939] IR 60.

[76] Ibid, at 65: he asks "whether the bank had knowledge of the wrongful purpose for which this money was being raised".

[77] Ibid, at 64: "it is the law that while a proposed lender in his dealings with a public company must be presumed to have notice of the provisions of its Memorandum and Articles of Association, he is not called upon in the case of a company which has a general power of borrowing, to make any inquiries as to the purpose of the loan".

8.2.5. Criticism of the Doctrine of Constructive Notice

Doubts about the proposition that an ultra vires transaction could in some circumstances be effective led to the reclassification of *David Payne* in *Rolled Steel*.[78] Furthermore, if, as on a modern view, the use of express powers is necessarily intra vires, there is little scope left to ask whether the outside party was aware of the extrinsic circumstance which renders the exercise of the power invalid. Now, more than ever, consistently with Campbell's argument, ultra vires transactions are void and the knowledge of the parties is irrelevant to this. The knowledge of the parties may instead affect the outcome where a transaction is intra vires but otherwise problematic. In *Re Frederick Inns Ltd*,[79] the Supreme Court relied on constructive notice of the ultra vires character of payments in order to fix the recipients with knowledge of breach of trust.[80]

Aside from the objection that ultra vires contracts are void regardless of notice, the reasoning and effect of the constructive notice doctrine in the ultra vires context has provoked much criticism.[81] Gower characterises constructive notice as artificial, complicated and harmful.[82] Constructive notice is presented as the other side of the publicity coin, but this is questionable. The availability of information about a company for the benefit of outsiders should not necessarily create a duty on the part of outsiders to seek out that information, at risk of being penalised. Instead of a self-

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[78] See above at 7.2.1.2: "David Payne reinterpreted under agency principles".

[79] In Re Frederick Inns Ltd [1994] 1 ILRM 387.

[80] Ibid, at 399: "if they had read the memoranda of association of the four companies, as they could have done since they are documents of public record, they would have seen that the companies had no power to make the payments."

[81] Constructive notice caused "commercial inconvenience and frequent injustice" - TCB Ltd v. Gray [1986] 1 AER 587, 596 (per Browne-Wilkinson VC).

[82] L.C.B. Gower, "The Principles of Modern Company Law", 3rd ed. (Stevens & Sons, London, 1969), p. 53: "an entirely artificial doctrine which has been fraught with complication and which has caused the basically healthy publicity principle to do almost as much harm as good"; Hosegood v. Hosegood (1950) 66 TLR 735, 737 (per Denning LJ): "these constructive doctrines always lead to trouble."

protecting possibility, checking the capacity of a contracting partner has been transformed into an obligation. The combination of the ultra vires doctrine and the constructive notice rule obliged outsiders to "hunt up the musty statute and find out its meaning" on pain of their dealings with the company being deemed invalid.[83]

The line of reasoning adopted by Lord Herschell in *Salomon v. Salomon & Company Ltd*,[84] that it is up to those dealing with companies to decide whether or not to deal with them,[85] explains, according to a nineteenth century mindset, the underlying rationale. Even should we today accept the premise that creditors should make an informed choice whether to deal with a company, it is less obvious that their caution should involve examining its objects clause than its financial reputation.

There are risks to which those who deal with limited liability companies might be expected to be alive, but incapacity is not foremost among these. In any case, for the modern observer, the desire to encourage individual responsibility on the part of contracting parties is trumped by concerns that the doctrine works injustice. Furthermore, even if a third party did go to the Companies' Registration Office and read a company's memorandum of association, the complexity of both companies' objects clauses and the law on ultra vires would conspire to make it extremely difficult for that person to judge whether a proposed transaction was within the company's capacity or not.[86] In principle, constructive notice is generally predicated on the assumption "that the exercise of reasonable care would ensure actual

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[83] S.D. Thompson, "The Doctrine of Ultra Vires in Relation to Private Corporations" (1894) 28 American Law Review 376, 384-385.

[84] Salomon v. Salomon & Co Ltd [1897] AC 22.

[85] Ibid, at 46 (per Lord Herschell).

[86] See Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221; "to impute knowledge of the probable construction the courts would put upon these statutes and articles of incorporation to determine questions upon a given contract proposed is carrying the doctrine of notice to an extent which can only be denounced as preposterous."- Denver Fire Insurance Company v. McClelland (1886) 9 Colo. 11, cited in A.B. Frey, "Ultra Vires and Estoppel" (1909) 43 American Law Review 81, 93.

knowledge".[87] The appropriateness of this assumption in the context of commercial dealings with registered companies is doubtful.[88]

Besides, such expectations are misplaced in the world of commerce. Griffin emphasises that the doctrine was "not conducive to commercial practice".[89] Lindley L.J. in *Manchester Trust v. Furness*[90] expressed general hesitation about employing the doctrine of constructive notice in the commercial sphere because "there is no time to investigate" and the doctrine might risk "paralyzing the trade of the country".[91] For all these reasons, Prentice wholeheartedly endorses abolishing the "commercially unrealistic doctrine of constructive notice."[92] Sealy further notes that "all progressive company law codes" in the common law world abandoned the constructive notice doctrine by the 1980s.[93]

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[87] M.J. Trebilcock, "Company Contracts" (1963-1966) 2 Adelaide L.R. 311, 333.

[88] Ibid, at 333.

[89] S. Griffin, "The Rise and Fall of the Ultra Vires Rule in Corporate Law" (1998) 2 MJLS (www.solent.ac.uk/law/mjls/papers/griffen.pdf), p. 9.

[90] Manchester Trust v. Furness [1895] 2 QB 539.

[91] Ibid, at 545; see also In Re National Insurance and Investment Association (1862) 45 Eng. Rep. 1112, 1125: "I am not prepared, more especially having regard to this having been a commercial transaction, to carry the doctrine of constructive notice to such an extent as has been contended for…" (per Turner LJ); ; Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221, 229; "The abrogation of the doctrine of constructive notice would be the consummation of a commendable trend discernible in latest case law towards introducing not only a degree of intelligibility but also a degree of business reality into a field in which in the past both elements have been sadly lacking." - M.J. Trebilcock, "Company Contracts" (1963-1966) 2 Adelaide L.R. 311, 335.

[92] D.D. Prentice, "Section 9 of the European Communities Act" (1973) 89 LQR 518, 527: "There is nothing to recommend the rightly criticised and commercially unrealistic doctrine of constructive notice."

[93] L.S. Sealy, "Company Law – Gazetting and Constructive Notice" [1985] CLJ 207, 208.

8.3. LEGISLATIVE REFORM TO PROTECT THE OUTSIDER

Statutory reform related to corporate capacity in the UK and Ireland has occurred in two stages. Initial parallel modifications in these jurisdictions targeted the consequences of an ultra vires act, rather than whether the act was within the scope of corporate capacity.[94] They aimed to exempt the innocent outsider from the harsh effects of the legal rule. This step was followed by moves towards complete abolition of the ultra vires doctrine.

Concern for the plight of the innocent third party was repeatedly articulated in official reports and recommendations.[95] These reports consistently criticised the operation of the ultra vires doctrine,[96] recommending one of two solutions. First, the Cohen committee,[97] established in 1943,[98] condemned the ultra vires doctrine as "an illusory protection" coupled with a "pitfall for third parties".[99] Nonetheless, the Companies Act 1948 refused to abolish the doctrine.[100] Next, Ireland's 1958 Cox

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[94] Section 9 "does not abolish the doctrine of ultra vires in that it does not vest a company with all the powers of a natural person." - D.D. Prentice, "Section 9 of the European Communities Act" (1973) 89 LQR 518, 523; J.G. Collier & L.S. Sealy, "European Communities Act 1972 – Company Law" (1973) 32(1) CLJ 1, 2.

[95] See: "Cohen Committee Report", Report of the Committee on Company Law Amendment (1945) Cmd. 6659/45; "Jenkins Report", Board of Trade Company Law Committee Report (1962) Cmnd 1749; "Cox Report", Report of the Company Law Reform Committee (PR 4523) (1958); Company Law Review Group, First Report (Dublin, 2001).

[96] "Section 8, being a simplified version of Jenkins and, with admirable prescience exactly in line with the subsequent E.E.C. Directive, was part of this trend, and part indeed of something greater." - P. Ussher, "Company Law – Validation of Ultra Vires Transactions" (1981) DULJ 76, 78.

[97] L.S. Sealy, "The Bell Tolls for Ultra Vires" (1986) 7 Company Lawyer 90, 90.

[98] Considering reform of the Companies Act 1929 (UK).

[99] "Cohen Committee Report", Report of the Committee on Company Law Amendment (1945) Cmd. 6659/45, para. 12: "an illusory protection for the shareholders [that] yet may be a pitfall for third parties dealing with the company".

[100] Unlike many of the other reforms proposed; this is explained by the Board of Trade's concern that such far-reaching reform would delay the Act – Company Law Review Group, First Report (Dublin, 2001), para 10.4.1.

Report[101] agreed that the doctrine was "waste of time and paper".[102] Yet, despite the committee's inclination,[103] it refrained from advocating abolition, given that the Cohen Report's recommendation had not been adopted.[104] The 1962 Jenkins Report[105] proposed the approach which found favour with legislators. It did not recommend the grant of full capacity to companies, but instead concentrated on protecting the outsider from the harsh effects of the doctrine. Firstly, it recommended that the company be precluded from pleading that a contract which another party entered in good faith was beyond its capacity.[106] Secondly, it recommended that the doctrine of constructive notice should no longer apply, so that a contracting party acting in good faith could rely on the assumption that the company had the capacity to do that which it purported to do.[107]

The spirit of these concerns and calls for reform found expression in two sets of rules which now enable certain protected parties to rely on the validity of a transaction which would, at common law, be void for want of capacity.[108] This half-way house approach attempts to "alleviate hardship" while maintaining some of the

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[101] Cox Report, Report of the Company Law Reform Committee (PR 4523) (1958); see P. Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986), pp.2-3; see also Company Law Review Group, First Report (Dublin, 2001), para 10.4.

[102] Cox Report, Report of the Company Law Reform Committee (PR 4523) (1958) p. 20, para. 49.

[103] Ibid, at para. 49; see D. Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27; cf Current proposals to grant unlimited capacity to private, but not public companies, allowing private companies to choose to have limited objects: Company Law Review Group, First Report (Dublin, 2001).

[104] Cox Report, Report of the Company Law Reform Committee (PR 4523) (1958) p. 20, para. 50: "we must assume that there were strong reasons for this decision".

[105] "Jenkins Report", Board of Trade Company Law Committee Report (1962) Cmnd 1749, paras. 35-42; see Editorial [1962] JBL 229, 230; J.H. Thompson, "The Ultra Vires Doctrine and the Jenkins Report" (1963) JBL 143.

[106] Ibid, at para 42.

[107] Ibid, at para 42.

[108] See L. MacCann, "The Capacity of the Company" (Part 2) (1992) 10 ILT 151.

intended protection of shareholders.[109] The major Irish statutory provision is Section 8(1) of the Companies Act, 1963.[110] This was "one of the real innovations" of the Principal Act,[111] based on the recommendation of the Cox Report.[112] The equivalent English statute was enacted in the Companies Act, 1985.[113] The common European provision formulated in the First Companies Directive was implemented in Ireland through the Companies Regulations, 1973.[114] The Directive aimed to increase the security of transactions with companies.[115] The similarity of the moves to protect the outsider in Ireland and the United Kingdom is only partly explained by the Directive, as the Irish statute preceded it: these provisions all fit into the same trend.[116] Their common aim was to protect the outsider who dealt with a company in good faith from the combined effect of the doctrines of ultra vires and constructive notice.[117]

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[109] G.H. Treitel, "The Law of Contract" 11th ed., (Sweet & Maxwell, London, 2003), p. 561.

[110] See D. Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27.

[111] A. FitzGerald, "A Consideration of the Companies Act, 1948, Companies Act (Northern Ireland), 1960, and Companies Act, 1963)" (1966) 1 Ir Jur (N.S.) 16, 20.

[112] "Cox Report", Report of the Company Law Reform Committee (1958) (PR 4523), p. 20, para. 49.

[113] Which consolidates Section 9, European Communities Act, 1972 (UK): see J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 85.

[114] Article 6(1), European Communities (Companies) Regulations, 1973; see also Section 9, European Communities Act, 1972 (UK).

[115] First Company Law Directive (68/151/EEC), *Preamble*: "Whereas the protection of third parties must be ensured by provisions which restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid"; P. Ussher, "Company Law – Validation of Ultra Vires Transactions" (1981) DULJ 76, 78; D.D. Prentice, "Section 9 of the European Communities Act" (1973) 89 LQR 518, 523.

[116] See P. Ussher, "Company Law – Validation of Ultra Vires Transactions" (1981) DULJ 76, 78.

[117] L.S. Sealy, "Company Law – Gazetting and Constructive Notice" [1985] CLJ 207, 208: "all progressive company law codes in the English-speaking jurisdictions have rejected the constructive notice doctrine outright".

8.3.1. Section 8(1) of the Companies Act, 1963

Section 8 of the Principal Act is the significant Irish provision. It endorses the doctrine of ultra vires,[118] but introduces a new protection for the outsider in the form of "a simplified version of Jenkins".[119] This allows an outsider who enters into a transaction with a company, unaware of limitations on its capacity in the memorandum, to enforce it against the company, even if it transpires that the company lacks the capacity to engage in the transaction. It applies where the outside party is unaware of the company's excess of capacity, and the transaction would be lawful and effective if intra vires. In those circumstances, the outsider can rely on the act.[120] This overrules the fundamental common law principle that the ultra vires act can have no legal effect.[121] The Act also gives a statutory footing to the liability of directors who cause the company to exceed its capacity[122] and the right of shareholders and debenture holders to seek an injunction to restrain the company from acting ultra vires.[123]

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[118] Following the Cox Report: see "Cox Report", Report of the Company Law Reform Committee (1958) (PR 4523), p. 20, para. 49.

[119] P. Ussher, "Company Law – Validation of Ultra Vires Transactions" (1981) DULJ 76, 78; "to that extent the section implemented the recommendations of Jenkins"- Keane, p. 143.

[120] "Any act or thing done by a company which if the company had been empowered to do the same would have been lawfully and effectively done, shall, notwithstanding that the company had no power to do such act or thing, be effective in favour of any person relying on such act or thing who is not shown to have been actually aware, at the time when he so relied thereon, that such act or thing was not within the powers of the company, but any director or officer of the company who was responsible for the doing by the company of such act or thing shall be liable to the company for any loss or damage suffered by the company in consequence thereof." – Section 8(1), Companies Act 1963.

[121] See above at 4.1: "Ultra Vires is Incapacity".

[122] Section 8(1), Companies Act 1963 (Ireland).

[123] Section 8(2), Companies Act 1963 (Ireland).

8.3.1.1. The awareness which deprives the outsider of protection

As the benefit of Section 8 is predicated on the lack of awareness of the outsider, it is important to identify the level of knowledge which displaces its protection. In principle, the provision evicts the doctrine of constructive notice by requiring the outsider to be "actually aware" of the incapacity to lose its benefit. In the context of the law on corporate capacity, however, the opacity of objects clauses[124] and uncertainty as to the legal tests[125] evoke the problem of the outsider who has all the necessary information at his disposal, but fails to understand that the transaction is unauthorised. Jenkins recommended that the transaction should be enforceable even where the memorandum and articles had been read, provided that the person reading them had "honestly and reasonably failed to appreciate that they had the effect of precluding the company from entering into the transaction".[126]

Keane J. addressed this issue in *Northern Bank Finance Corporation v. Quinn and Achates*.[127] This, the first authority on the qualities which the outsider must possess, reveals the gaps in protection which exist.[128] The plaintiff bank had lent money to an individual on foot of a mortgage executed by an unlimited company. The bank's

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[124] The objects in Northern Bank were "couched in the obscurities traditional in such documents, so much so that eight pages of the judgment are devoted to its interpretation." - P. Ussher, "Company Law – Validation of Ultra Vires Transactions" (1981) DULJ 76, 76.

[125] "Such a transformation of apparent reality into confirmed illusion is common in the interpretation of objects clauses, and one is not disposed to quarrel with this instance of it." – Ibid, at 77.

[126] Cmnd. 1749, paras 35-42; See D. Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27, 28-29.

[127] Northern Bank Finance Corporation v. Quinn and Achates Investment Company [1979] ILRM 221; see T.M. Ashe, "Case Raises Questions on Notice and Ultra Vires" (1980) 1 Company Lawyer 161.

[128] Before *Northern Bank* v. Quinn "there was no specific authority on the qualities to be possessed by an outsider seeking to rely on the Section." - P. Ussher, "Company Law – Validation of Ultra Vires Transactions" (1981) DULJ 76, 76; "ultra vires is alive and well and living in Ireland" - G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), *Preface*, at vii.

solicitor inspected the company's memorandum of association,[129] but "failed to draw the appropriate inference" from them.[130] The company successfully argued that it only had power to guarantee its own borrowings. The bank invoked the protection granted to outsiders by Section 8 of the Companies Act 1963. Keane J. found that the plaintiff's solicitor had read the memorandum, and so was aware of the contents of the objects clause.

The question was whether that constituted actual awareness of the lack of vires, such as would preclude the operation of Section 8(1).[131] Keane J. accepted that the purpose underlying the statute was to remove the doctrine of constructive notice, due to "the manifest injustice and inconvenience" it caused.[132] The test was therefore actual knowledge of the incapacity. Yet, the motivation being to protect those who did not read a company's constitution, he saw "no reason in logic or justice" why the section should have been intended to protect a party which failed to understand a memorandum of association.[133] Applying the principle that ignorance of the law is no excuse,[134] the bank was deemed to be "actually aware" of an incapacity of which it ought to have been, but was not, aware, and consequently unable to avail of the section.[135] Keane J. approves Fitzgerald's[136] view that Section

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[129] Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221, 228 (per Keane J.).

[130] Ibid, 229 (per Keane J.).

[131] Prentice predicted in 1973 that the question of the outsider's good faith would raise difficulties where he read the memorandum but failed to understand it - D.D. Prentice, "Section 9 of the European Communities Act" (1973) 89 LQR 518, 525.

[132] Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221, 228 (per Keane J.).

[133] Ibid, at 229.

[134] *ignorantia iuris haud neminem excusat.*

[135] Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221, 230: "where a party is shown to have been actually aware of the contents of the memorandum but failed to appreciate that the company were not empowered to thereby to enter into the transaction in issue, s.8(1) has no application."

8(1) does not cover the person who reads the memorandum but does not understand, and characterises the alternative as "uncertain and therefore bad law."[137]

Ussher regrets the approach adopted in the case,[138] observing that the court's "interpretation of actual awareness [...] appears to run directly counter to the plain words of the statute."[139] That the bank could not rely on the statutory protection is the "sting in the tail" for those who are cautious enough to read a company's constitutional documents in advance of transacting.[140] Given the confusion which clouds ultra vires, it is perfectly reasonable that a person might not discern the limits on a company's capacity from a careful reading of its objects.[141] Furthermore, Ussher argues that the reference to ignorance of the law is misplaced, as the maxim only applies where a person is under a legal duty, which the contracting party is

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[136] A. FitzGerald, "A Consideration of the Companies Act, 1948, Companies Act (Northern Ireland), 1960, and Companies Act, 1963)" (1966) 1 Ir Jur (N.S.) 16, 20.

[137] Ibid, at 20.

[138] "Since the advent of *Quinn* one may be excused for wishing that the law had remained in its previous state of comfortable limbo, or at least that the abandoned appeal to the Supreme Court had been pursued." - P. Ussher, "Company Law – Validation of Ultra Vires Transactions" (1981) DULJ 76, 76.

[139] P. Ussher, "Company Law – Validation of Ultra Vires Transactions" (1981) DULJ 76, 76.

[140] D. Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27, 29.

[141] P. Ussher, "Company Law – Validation of Ultra Vires Transactions" (1981) DULJ 76, 77: "one must take issue with the notion that the solicitor after only a short perusal of the documents should be deemed to be *actually aware* of something which it took the lengthy and contested arguments of counsel to establish, and of which it was actually found by the Judge as a fact that he was not aware."; J.H. Thompson, "The Ultra Vires Doctrine and the Jenkins Report" [1963] JBL 143, 147-148.

not.[142] The irony is that, under this interpretation, the statute gives constructive notice new life.[143] Ussher comments that Keane J. finds himself "out on a limb which one might pardonably think had been sawn off by Section 8."[144]

Keane J. refused to countenance that the company's shareholders should bear the loss instead of the outsider.[145] Since the fundamental problem is the company's lack of capacity rather than the third party's failure to understand it, this desire to preserve the "blameless shareholders" at the expense of the outsider is questionable. In every aspect of the doctrine of ultra vires, there is a trade off between protecting shareholders from possible loss and putting outsiders at risk. By choosing to protect the shareholder that little bit more, Keane J. tugs the statutory safety blanket away from the outsider. Surely an example could just as easily be formulated whereby drawing the line in this place gives rise to a greater injustice, perpetrated by a dishonest company on an innocent outsider, with no reason to suspect that the memorandum hid a restriction on the company's capacity to enter the transaction?

Ussher suggests that in cases where the outsider has read but claims not to have understood a company's objects clause, there should be a rebuttable presumption that the outsider is aware of the incapacity.[146] This could take account of the actual complexity of discerning the capacity in each case. Forde suggests that it may be that the courts will take account of the level of expertise of the outsider reading an

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[142] See Kiriri Cotton Co. Ltd v. Ranchoddas Keshavji Dewani [1960] AC 1 92, 204; Dolan v. Neligan [1967] IR 247, 260; Rogers v. Louth County Council [1981] ILRM 144, 147; "For the maxim to apply therefore, there should be some *duty* on the solicitor which he failed to fulfil. Yet Section 8 imposes no duty upon the outsider, whether a duty to investigate or otherwise."- P. Ussher, "Company Law – Validation of Ultra Vires Transactions" (1981) DULJ 76, 77.

[143] Cf Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221, 228 (Keane J.): "If constructive notice can still be relied on in answer to a party claiming the protection of this section, the protection in question would be, to a significant extent, eroded."

[144] P. Ussher, "Company Law – Validation of Ultra Vires Transactions" (1981) DULJ 76, 78.

[145] Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221, 229.

[146] P. Ussher, "Company Law – Validation of Ultra Vires Transactions" (1981) DULJ 76, 78.

objects clause and may adopt "more legalistic" interpretations where the reader is knowledgeable.[147] This approach would not seem to be desirable on principle since it would permit the capacity of a company to vary dependent on the legal knowledge of the person with whom it was dealing. Yet, in so far as the statutory protection of the outsider already departs from principle in granting validity to a void transaction, it may be considered.

8.3.1.2. The lawful act requirement

The Supreme Court in *Re Frederick Inns Ltd.*[148] also adopted a restrictive approach to the statutory protection of outsiders. The outside party, the Revenue Commissioners, was not deemed to be actually aware of the incapacity,[149] even though it had constructive notice of the excess of capacity.[150] However, the court focused on the requirement that the transaction would otherwise be lawfully and effectively done, were it not for the incapacity. The case arose when a number of insolvent companies discharged the tax debts of related companies. As the donor companies were insolvent, they were no longer the beneficial owners of their assets. The gifts were in breach of directors' duties to creditors, so they were not lawful and the outsider could not therefore rely on Section 8(1).[151] Laffoy J. later emphasised in *Ulster Factors v Entonglen*[152] that the withdrawal of protection under

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[147] M. Forde, "Company Law", 2nd ed., (Mercier Press, Cork, 1992), p. 97: "It may well be that [...] if it can reasonably be expected that the other party will employ legal expertise to vet the proposed arrangement, the objects clause will be interpreted in a more legalistic manner."

[148] In Re Frederick Inns Ltd. [1994] 1 ILRM 387.

[149] Ibid, at 395.

[150] Ibid, at 399.

[151] "Once the company clearly had to be wound up and its assets applied pro tanto in discharge of its liabilities, the directors had a duty to the creditors to preserve the assets to enable this to be done, or at least not to dissipate them." – In Re Frederick Inns Ltd. [1994] 1 ILRM 387, 396 (per Blayney J.).

[152] Ulster Factors Ltd v. Entonglen Ltd [1997] IEHC 34 (High Court, Unreported, 21 February 1997, Laffoy J.).

Section 8 was solely due to the companies' known insolvency.[153] Birds asks "what degree of notice on their part of misuse of power by directors [...] should be sufficient to disentitle them from suing the company".[154] If the outsider is indirectly obliged to investigate the company's solvency instead of its capacity, this does not abolish constructive notice.

8.3.2. The First Companies Directive

Article 6 of the Companies Regulations[155] is very similar to the existing Section 8 protection. Ussher condemns the enactment of the new provision[156] as a "sorry story" and "legislative blunder", which was unnecessary because Section 8 already served the desired end.[157] Article 6[158] favours the outsider by deeming any contract entered into by an authorised organ to be within the capacity of the company, despite any restriction on the powers of the agent or the capacity of the company in the corporate constitution. The outsider's good faith is presumed,[159] a presumption which can be rebutted by proof that the person knew or cannot have been unaware that the contract was ultra vires.[160] Sealy observes that constructive notice is thus

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[153] Ibid, at p. 3892.

[154] J. Birds, "The Demise of Ultra Vires" (1986) 7(5) Company Law 203, 204.

[155] Article 6, European Communities (Companies) Regulations 1973, implementing the First Company Law Directive (68/151/EEC); see also Section 9, European Communities Act, 1972 (UK); see also V. Edwards, "Ultra Vires and Directors' Authority – An EC Perspective" (1995) 16(7) Company Lawyer, 202.

[156] Ibid.

[157] P. Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986), pp. 134-136; G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), pp. 135-136.

[158] Article 6, European Communities (Companies) Regulations 1973, implementing the First Companies Directive (68/151/EEC); see also Section 9, European Communities Act, 1972 (UK).

[159] Article 6(2), European Communities (Companies) Regulations, 1973.

[160] International Sales v. Marcus [1982] 3 ER 551, 559 (per Lawson J.).

"thrown out the front door".[161] Although the ultra vires act cannot be relied on against the outsider, the doctrine of ultra vires continues to govern internal affairs, and shareholders may restrain ultra vires acts.[162] However, Article 6 is less frequently invoked than Section 8(1).[163] In *Re Frederick Inns Ltd*,[164] it was pleaded, but did not avail because the acts had not been done by the boards of directors and no authorised representatives had been registered under the Regulations.[165] The limitations on the provision include that it does not stop incapacity being argued against the company,[166] and it does not avail recipients of gifts.[167] For Davis, it only "went some way towards remedying" the injustice suffered by outsiders.[168]

8.3.3. The Outsider in English Law

The English statutes were similar to the Irish provisions in their aim to protect third parties from the consequences of an act being ultra vires.[169] However, even before the Companies Act 2006 took the next step of abolishing ultra vires for registered companies, the English approach was more extensive. The 1972 Act implemented

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[161] L.S. Sealy, "Company Law – Gazetting and Constructive Notice" [1985] CLJ 207, 208.

[162] D.D. Prentice, "Section 9 of the European Communities Act" (1973) 89 LQR 518, 526; S. Davis, "The Ultra Vires Rule" (1986) 136 NLJ 907.

[163] Ussher predicts that it will "remain a dead letter" - P. Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986), p. 137.

[164] In Re Frederick Inns Ltd [1994] 1 ILRM 387.

[165] Ibid, at 394.

[166] D.D. Prentice, "Section 9 of the European Communities Act" (1973) 89 LQR 518, 524.

[167] H. Bond, "Ultra Vires – A Reassessment" (1983) NLJ 561, 564; citing Lawson J., International Sales v. Marcus [1982] 3 AER 551, 559; though Prentice argues that "there is little reason for restricting subsection 9(1) to purely commercial transactions" - D.D. Prentice, "Section 9 of the European Communities Act" (1973) 89 LQR 518, 525.

[168] S. Davis, "The Ultra Vires Rule" 136 NLJ 907, 908.

[169] F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293.

the Companies Directive,[170] and was later consolidated in Section 35 of the Companies Act, 1985. The rule in the 1985 Act was regarded as unsatisfactory,[171] until it was amended by the Companies Act 1989.[172] Thereafter Section 35(1) of the 1985 Act provided unequivocally that,

> "The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum."[173]

Unlike the Irish position, this provides "two-way" protection from the doctrine after the fact, covering both the outsider and the company itself.[174] Furthermore, the new Section 35A(2)(a) extended the protection to the recipients in good faith of gratuitous dispositions.[175] Sections 35A(2)(b) and 35A(2)(c) clarified the meaning of good faith, stating that a person is not to be deemed to act in bad faith solely as a result of knowing that a corporate act was beyond the powers of the directors under the company's constitution. Thus, even actual awareness of the incapacity does not disqualify the outsider, which is very different to the approach adopted in *Northern*

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[170] J.G. Collier & L.S. Sealy, "European Communities Act 1972 – Company Law" (1973) 32(1) CLJ 1.

[171] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 85; it "only succeeded in making the subject more difficult and complex" - R.M. Temple, "Ultra Vires: The Dual Approach" 137 NLJ 1069, 1069.

[172] Section 108, Companies Act 1989; see J. Birds, "The Abolition of Constructive Notice" (1986) 7(3) Company Lawyer 104; D.S. Glass, ""Ultra Vires" – The Saga Continues" (1990) 11(7) Company Lawyer 138.

[173] See A. Griffiths, "Contracting with Companies" (Hart, 2005) p. 164; S. Griffin, "Directors' Authority: The Companies Act 1989" (1991) 12(5) Company Lawyer 98.

[174] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 98; G.H. Treitel, "The Law of Contract" 11th ed., (Sweet & Maxwell, London, 2003), p. 561.

[175] It covers "a party to any transaction or other act to which the company is a party." - Section 35A(2)(a), Companies Act 1985 (UK); E. Ferran, "The Reform of the Law on Corporate Capacity and Directors' and Officers' Authority: Part 1" (1992) 13(7) Company Lawyer 124, 126.

Bank v. Quinn.[176] The 1989 Act stipulated that directors could not avail of the general protection to validate transactions between them and the company.[177] It also introduced a new Section 35A(1) to the Companies Act 1985, dealing with agency and ostensible authority. This abolished constructive notice in the context of agency.[178] In addition, it amended the 1985 Act so as to expressly abolish the principle of the constructive notice of corporate documentation in all contexts.[179]

Despite the possibility of relying on ultra vires acts, they remained ultra vires for internal purposes,[180] and shareholders could obtain an injunction to restrain the company.[181] The effect of Section 35(3) was unclear in so far as it allowed the ratification by special resolution of ultra vires acts by directors.[182] There were doubts as to whether a special resolution was required to cure the directors' excess

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[176] Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221.

[177] J. Poole, "Abolition of the Ultra Vires Doctrine and Agency Problems" (1991) 12(3) Company Lawyer 43, 49.

[178] "In favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or authorise others to do so, shall be deemed to be free of any limitation under the company's constitution." - Section 35A(1), Companies Act, 1985; "the doctrine of constructive notice is now a dead letter" - J. Beatson, "Anson's Law of Contract" 28th ed., (Oxford, 2002), p. 232; see J. Birds, "The Abolition of Constructive Notice" 7(3) Company Lawyer 104; TCB Ltd v. Gray [1986] 1 AER 587.

[179] Section 711A, Companies Act 1985, as inserted by Section 142, Companies Act 1989 (UK), repealed as unnecessary by Section 1295, Companies Act 2006 (UK); F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 304.

[180] Section 35(3), Companies Act, 1985 (UK): "it remains the duty of the directors to observe any limitations on their powers flowing from the company's memorandum".

[181] Section 35(2), Companies Act, 1985; A. Griffiths, "Contracting with Companies" (Hart, 2005) p. 165; J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 85, 99; cf the new approach under the Companies Act 2006 (UK).

[182] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 99.

of authority before enforcing a transaction outside the memorandum.[183] This interpretation was criticised as "strained",[184] inconsistent with Section 35(1) and contrary to the intention to remove the grounds on which corporate transactions can be avoided.[185]

By virtue of these changes, ultra vires has been regarded as "virtually abolished"[186] in the UK since 1989, though the swaps cases offer a reminder of its continued relevance beyond the limited company.[187] The Companies Act 2006 would eventually go further, abolishing the ultra vires doctrine by removing the requirement for an objects clause, and providing that where companies choose to retain objects, these form part of the Articles.[188] Ireland is now at the stage of considering whether to move beyond the current approach of protecting the outsider in certain circumstances.[189]

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[183] See J. Poole "Abolition of the Ultra Vires Doctrine and Agency Problems" (1991) 12 Company Law 43,45; Ferran "The Reform of the Law on Corporate Capacity and Directors' and Officers' Authority: Part 1" (1992) 13 Company Lawyer 124, 128; see also remarks of Lord Strathclyde: ratification would "enable the company to enforce the contract if that is what the shareholders believe to be in the interests of the company", Hansard, HL Debates, 21 February, 1989, col. 516, cited in J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 99.

[184] A.J. Boyle & R. Sykes (eds), "Gore-Browne on Companies" (Jordans, 44th edn, 1986, loose-leaf)., para. 3.1.1.

[185] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 100. Nonetheless, the authors advise companies to obtain a special resolution to be safe.

[186] C.A. Babb, "Rethinking the Concept of Ultra Vires in Company Law" (Ph.D. thesis, University of Cambridge, 2004), p. 4; this also reflects the aim expressed by Lord Strathclyde, introducing the Bill in the House of Lords, Hansard HL Debates, 21 February 1989, cols 508-512, quoted in J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 85.

[187] Hazell v. Hammersmith and Fulham London Borough Council [1992] 2 AC 1.

[188] Companies Act 2006 (UK).

[189] See below at 16.3: "The Current Irish Proposals".

8.3.4. Assessing the Statutory Protections

It is indisputable that outsiders suffered unjust results from the application of the ultra vires doctrine in the past. These resulted directly from the absolute voidness which results from transactions which exceed one party's capacity. If it is accepted that ultra vires transactions are necessarily void at common law, then the constructive notice issue is revealed to be a red herring. *David Payne*[190] provided a concession to the outsider when the circumstance which rendered the exercise of a power ultra vires was not known to the outsider, but if, on a *Rolled Steel*[191] approach, a company is deemed to have the capacity to do all acts set out in its memorandum, for whatever purpose, there is no need for any such dispensation. The problem is simply caused by voidness.

While the introduction of statutory protections for the outsider is to be welcomed at a practical level, it is not coherent at the level of principle. Section 8(1) is predicated on the fictional and somewhat inconsistent approach that a void and therefore non-existent contract can be relied upon. This is not the only objection.

The current statutory provisions "leave untouched" the position of and remedies available to any person who is not covered by them.[192] Ultra vires applies "in its full rigour" where the outsider falls outside the statutory protections.[193] Rather than remove swathes of transactions from the doctrine, it would have been more desirable fully to reform the substantive law in line with modern thinking. The statutory exception approach is necessarily hit and miss, and does nothing to improve the law governing all those parties who are excluded from protection.

The current approach is also fundamentally imbalanced. It is not always and exclusively the outsider who merits legal protection. Horrwitz indicates that the unlimited company presents a particular problem: the outsider can enforce the

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[190] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[191] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1986] Ch. 246,

[192] E. O'Dell, "Contract – Estoppel and Ultra Vires Contracts" (1992) 14 DULJ 123, 123.

[193] D.D. Prentice, "Section 9 of the European Communities Act" (1973) 89 LQR 518, 525.

personal liability of shareholders for acts which they never authorised the company to do.[194] Company law is predicated on the separation of ownership and control, which means that the company should not be made to suffer in order to punish the misdeeds of management. The authorities also emphasise this point when they show a liquidator trying to recover a company's assets in the interests of creditors. Surely, therefore, it is imperative to ensure that the doctrine of ultra vires itself operates fairly, and that the law of remedies offers recompense to any party who has performed a non-existent legal obligation.

Ultimately, Section 8(1) is unsatisfactory in its operation, because it purports to protect the innocent outsider but fails to do so in many circumstances, because it does not protect other parties, including the company itself, who might be prejudiced by its agents purporting to act ultra vires, and because it confers a theoretically unjustifiable validity on acts for which the actor has no capacity. It presents a narrow technical cure to the problems historically caused by the voidness of part-performed agreements, in competition with and as a distraction from the general and coherent remedies now offered by both equity and the common law. These remedies, by contrast, solve the problem without distorting the fundamental finding that the contract is void for want of capacity.[195]

8.3.4.1. The next step: abolition?

If the first phase of statutory reform focused on permitting certain parties to rely on an ultra vires transaction, a likely second step is to abolish the doctrine of ultra vires and grant unlimited capacity to registered companies. Calls for the abolition of restrictions on corporate capacity abound, from the Cohen Report to the present. The changes which have occurred in the law on capacity have not dampened this demand.[196] In the United Kingdom, the 1985 Prentice Report was commissioned to

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[194] W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 75.

[195] See below at Chapter 9: "A Question of Remedies".

[196] See above at 7.2: "Rolled Steel: the Nail in the Coffin" and at 8.3: "Legislative Reform to Protect the Outsider ".

examine the implications of finally abolishing ultra vires.[197] It was understood from the outset that ultra vires ought to be abolished[198] and public consensus supported the report's views.[199] Although the Report urged lawmakers to "complete the job"[200] and remove all limits on companies' capacity,[201] this was not followed until the Companies Act, 2006. The current position in Ireland is that the Company Law Review Group has recommended that many companies, including the majority of private limited companies, be granted full and unlimited capacity.[202] This proposal is expressed in a draft bill, which has not yet been moved.[203]

The central question which must be addressed is whether it is necessary or advisable that the ultra vires doctrine should be abolished. The negative reputation engendered by the cases which are acknowledged to be unjust continues to fuel the distaste with which the ultra vires doctrine is regarded to this day, but, given the developments which have occurred in the doctrine itself and the availability of remedies, it is not self-evident that the ultra vires doctrine deserves its notorious reputation.

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[197] "Prentice Report", "Reform of the Ultra Vires Rule" (DTI, 1986); the announcement was welcomed as reforming Company Law to meet "the needs of modern business practice": L.S. Sealy, Editorial, (1986) 7 Company Lawyer 90.

[198] This is clear from the study's terms of reference; "He is to be concerned not with establishing the case for abolition but with the implications for commerce and the law of going ahead with it [...] it is now (rightly) taken for granted that this archaic doctrine must go" - L.S. Sealy, "The Bell Tolls for Ultra Vires", (1986) 7 Company Lawyer 90, 90.

[199] J. Birds, "The Demise of Ultra Vires" (1986) 7(5) Company Lawyer 203, 203; Anonymous, "News: IOD Urges Removal of Ultra Vires Rule" (1986) 7 Company Lawyer 127.

[200] J. Birds, "The Demise of Ultra Vires" (1986) 7(5) Company Lawyer 203, 204.

[201] "Prentice Report", "Reform of the Ultra Vires Rule" (DTI, 1986), Chapter 4, para. 4.

[202] Company Law Review Group, First Report (Dublin, 2001), para. 10.9.2.

[203] See the Companies Bill at http://www.clrg.org/companiesbill/default.asp; see also Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27.

8.3.5. Conclusion: Might the Problem already be Solved?

The real problem of potential injustice to the outsider has already led to one legislative response, and now a second, more radical step is being considered. Yet there is another possibility. This is that the real problems which motivated the movement for reform could be directly and effectively addressed. In fact, it is even possible that these problems have already been solved by developments in the law.

The problems which made the ultra vires doctrine so dangerous for those who dealt with companies were, firstly, that it became impossible to discern the true extent of a company's capacity from the terms of its memorandum, and, secondly, that there was no comprehensive, principled system of remedies which might come into play in corporate incapacity cases. The first step to curing these ills has almost certainly already been taken. The *Rolled Steel* analysis returns the focus to the terms of companies' objects clauses, releasing them from external corporate benefit tests.[204] Provided it is law in Ireland, it remedies much of the potential for injustice which the ultra vires doctrine created in the past. Limited capacity is not inherently unfair if those who deal with companies can realistically be expected to appreciate the boundaries of a company's capacity. The answer to the second part of the problem lies in the law of remedies. Might it offer a way to mitigate the harsh effects of voidness in order to protect the innocent victims of incapacity? This is of vital importance far beyond the context of corporate incapacity. Within the context of ultra vires, it has the potential to change everything.

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[204] See above at Chapter 7: "The Decline and Fall of the Corporate Benefit Test".