

## Chapter 1

# Incorporation and the Corporate Constitution

### 1.1 Corporate Personality

A company is a legal entity independent of its members (*Salomon v Salomon & Co* [1897] AC 22). The consequences of a company having separate personality are that it is able to enter into contracts and to own property in its own name, it can sue and be sued in its own name and it is taxed in its own right. In the case of a registered company, it comes into being upon the issue by the Registrar of Companies of a Certificate of Incorporation and continues in existence until someone takes action to have it wound up or struck off the register. It therefore survives the death or bankruptcy of any or all of its members (so long as there remains the statutory minimum number of members (see Table 1.2)).

### 1.2 Reasons for Incorporation

There are a number of reasons for using a company to run a business as opposed to carrying it on as a sole trader or entering into a partnership, which are the most likely alternatives. The principal reasons for incorporation together with some of the drawbacks and other considerations are set out in Table 1.1.

#### **Table 1.1**

##### *The principal reasons for using a company*

The principal reasons for using a company are as follows:

- to take advantage of the consequences of separate legal personality (see 1.1 above);
- to take advantage of possible limitations on the liability of members (see 1.3 below);
- to attract investors – the requirements for capital may be beyond the means of a sole trader or partnership;

- there is greater borrowing potential through the use of a floating charge (see 14.2.5);
- the business may have a large and potentially fluctuating membership;
- the business may be too large to be carried on by a sole trader or partnership or may have outgrown these structures (note the prohibition on partnerships consisting of more than 20 members contained in s716 although there are exceptions for accountants, solicitors, stock-brokers etc);
- to take advantage of more sophisticated administrative structures including the formation of group structures;
- to take advantage of possible tax benefits.

The drawbacks of using a company include the following:

- there are greater formalities involved in forming, running and winding up a company (especially a public company – see 1.4 below). In particular, its accounts need to be audited and the affairs of the company must be conducted in accordance with its constitution, which add to the expense of running the business;
- the Companies Act imposes obligations to disclose certain information, in particular its accounts which have no parallel in the case of partnerships (other than partnerships governed by the Limited Liability Partnerships Act 2000 (see 7.2)) or businesses carried on as a sole trader, which leads to some loss of privacy.

## **1.3 Limited Liability**

### **1.3.1 Classification of companies by liability of the members**

Section 1 of the Act provides for the incorporation of companies having the liability of its members:

- limited to the amount, if any, unpaid on their shares (companies limited by shares);
- limited to the amount of their guarantee (companies limited by guarantee); and
- unlimited (unlimited companies).

Companies limited by guarantee are not well suited for carrying on a commercial business and unlimited companies are not generally used for this purpose unless there is some compelling reason. For example, a business subject to the rules of a professional body which permits its members to incorporate but not to limit their liability may use an unlimited company. Further information on these types of companies is set out in Chapter 16.

### **1.3.2 The meaning of limited liability**

The concept of limited liability relates to the obligations of the members to contribute to the assets of the company if it is wound up owing money to creditors. The liability of the company itself is not generally limited although it can be limited in specific cases by contract or statute (e.g. compensation for unfair dismissal under the Employment Rights Act 1996).

In the case of a company limited by shares, the liability of the members is limited to the amount, if any, unpaid on their shares. It is frequently the case that shares are fully paid up on issue and therefore the members face no further liability if the company ceases to trade with outstanding debts.

#### **Problem Area 1.1**

Arrows Ltd has an issued share capital of £100,000 divided into 100,000 shares of £1 each. It has two shareholders. Brian owns 50,000 shares which have been paid up in full. Charles has 50,000 shares which have been paid up as to 50p each. The company is subsequently wound up with unpaid debts of £30,000. Brian has no liability to contribute to the assets but Charles is liable to pay £25,000 being the amount outstanding on his shares.

However, the full effect of limited liability is often undermined in smaller companies where members are also the directors of the company. Banks and other financial institutions often demand personal guarantees from members in return for lending money to the company.

## **1.4 Public Companies and Private Companies**

### **1.4.1 Public companies and private companies distinguished**

The Act distinguishes between public companies and private companies (a private company being defined in s1(3) as a company other than a “public company”). Most of the companies registered in England and Wales are private companies limited by shares. This type of company will satisfy most business requirements. However, a private company has two significant limitations:

- It is prohibited from offering any of its shares or debentures to the public or allotting or agreeing to allot any of its shares or debentures with a view to all or any of them being offered for sale to the public (s81) – Note – s81 has generally been repealed (following the coming into force of the Public Offers of Securities Regulations 1995, SI 1995/1537, and as

subsequently modified by SI 2001/3649 under the FSMA) but remains in force for this purpose (see SI 1995/1583). There is a presumption that an allotment or agreement to allot such shares or debentures was made with a view to their being offered for sale to the public if the securities were actually sold to the public within six months of the allotment or if, at the time of the offer, the company had not received the whole consideration for the shares or debentures (s58(3)).

- Its shares or debentures cannot be listed or traded on any stock exchange (see requirements under 3.2 and 3.18 of the UK Listing Authority's Listing Rules which respectively provide that if an applicant for listing is a company incorporated in the UK, it must not be a private company, and that a sufficient number of the applicant's shares must be distributed to the public by the time of admission).

No assistance is given as to what constitutes an offer to the public. The Act merely provides that an offer to the public includes an offer to any section of the public (s 742A).

However, the Act does provide (in s742A(2)) that an offer will not constitute an offer to the public if the offer is:

- not calculated to result, directly or indirectly, in the shares or debentures becoming available for subscription or purchase by persons other than those receiving the offer; or
- otherwise purely of a "domestic concern" of the persons receiving and making it.

There is a presumption that an offer is in the nature of a "domestic concern" if it is made to:

- an existing shareholder or debenture holder;
- an existing employee or the securities are to be held under an employees' share scheme;
- a close family relation of any shareholder or employee as specified in s742A(6).

If it is intended that shares or debentures should be offered to the public or that they should be listed on a stock exchange, the company should be formed as or re-registered as a public company (see 1.4.2 below).

A public company is a company limited by shares or by guarantee and having a share capital whose Memorandum of Association states that it is to be a public company and in relation to which the provisions for the registration or re-registration of the company as a public company have been complied with on or after 22 December 1980 (s1(3)). Note however, that with effect from that date, a company can no longer be formed as, or become, a company limited by guarantee with a share capital (s1(4)). As already mentioned, a company which does not fulfil the above conditions is

automatically a private company. This is a reversal of the position prior to 22 December 1980 when a company which did not satisfy the requirements for registration as a private company was automatically a public company.

The registration provisions which need to be complied with by a public company over and above those which apply generally are:

- the name of a public company must end with the words “public limited company” (or certain abbreviations thereof such as plc) or the Welsh equivalent (s25);
- the share capital of the company as stated in its Memorandum of Association is at least the authorised minimum which is currently £50,000 but can be varied by statutory instrument (ss11 and 118).

#### **1.4.2 Establishment of a public company**

A public company may be established in one of two ways. It can be registered as a public company on its original incorporation. However, it must not do business or exercise any borrowing powers until the Registrar has issued it with a certificate under s117 (or it has re-registered as a private company). This certificate is obtained only if the Registrar is satisfied that the company has allotted share capital in nominal amount of at least the authorised minimum and there is delivered to him an application and statutory declaration (or equivalent statement delivered by electronic communications) stating this and certain other matters. Section 101 provides that a public company shall not allot a share unless it is paid up at least as to one quarter of its nominal value and the whole of any premium. This does not apply in the case of shares allotted in pursuance of an employees share scheme. However, shares allotted under such a scheme may only be taken into account for the purposes of s117 if paid up as to at least a quarter of nominal amount and the whole of any premium (s117(4)).

The alternative method of forming a public company is to re-register a private company as a public company under s43 of the Act. In this case, the share capital requirements are more stringent (s45). Not only must the company have an allotted share capital in nominal amount of at least the authorised minimum but:

- allotted shares must be paid up at least as to one quarter of its nominal amount and the whole of any premium;
- if any shares have been fully or partly paid up, as to nominal amount or premium, by an undertaking to do work or perform services, the undertaking must have been performed or otherwise discharged; and
- if shares have been allotted as fully or partly paid up, as to nominal amount or premium, otherwise than in cash and the consideration for the allotment is or includes any other undertaking, either the undertaking must have been performed or otherwise discharged or there must be a contract under which it is to be performed within five years.

For the purposes of these three requirements the following can be disregarded:

- (a) shares allotted before 22 June 1982 provided they and any shares to be disregarded under (b) below do not exceed in nominal value one-tenth of the company's allotted share capital (such allotted share capital not including for this purpose shares to be disregarded under (b)); and
- (b) shares allotted pursuant to an employees' share scheme if they would prevent the share capital requirements being satisfied.

Any shares so disregarded do not count in deciding whether the allotted share capital reaches the authorised minimum.

Public companies are not necessarily listed on the London Stock Exchange (the "Stock Exchange"). It is not possible for a company to obtain a listing on the Exchange unless it is a public company, but there are many public companies which are not listed. The only significant benefit of being an unlisted public company is the ability to offer its securities to the public, although it is sometimes perceived that there is more prestige associated with a public company.

However, public companies have much less flexibility than their private counterparts. Whilst public companies and private companies are subject to the same basic system of statutory and common law regulation, there are many areas in which the statutory regulations operate more stringently on public companies and some additional levels of statutory regulation apply. Companies which are listed on the Stock Exchange are subject to yet further levels of regulation.

It is a relatively simple process to convert from a private company to a public company (basically involving the passing of a special resolution and delivering a completed application for re-registration to the Registrar of Companies together with the necessary documents (s43)). It will therefore probably be more attractive to incorporate as a private company and convert when the time comes, rather than burden the company and its directors with public company status from the outset on the off chance that it may wish to make an offer to the public at some point in the future. Table 1.2 provides a summary of the principal differences between public and private companies.

## **1.5 Group Companies**

### **1.5.1 Holding companies and subsidiaries**

It is quite common to see companies formed into groups consisting of a holding company which owns a number of subsidiary companies. The functions of the holding company may be limited to managing its subsidiaries which in turn run the underlying businesses.

A company is a *subsidiary* of another company if its holding company (s736):

- (a) holds a majority of the *voting rights* in it; or
- (b) is a member of it and has the right to appoint or remove a majority of its board of directors; or
- (c) is a member of it and controls alone, pursuant to an agreement with other shareholders or members, a majority of the *voting rights* in it; or
- (d) it is a subsidiary of a company which is itself a subsidiary of the *holding company*.

*Voting rights* mean the rights conferred on shareholders to vote at general meetings of the company on all or substantially all matters (s736A(2)): accordingly, votes attaching to securities such as preference shares, which confer voting rights only where the matters to be decided relate to the interest of preference shareholders, are disregarded.

References to the right to appoint or remove a “majority” of the board of directors mean directors together holding a majority of the rights to vote at meetings of the board; again on all, or substantially all matters (s736A(3)). A company is not regarded as having the “right to appoint a director” if that right is exercisable only with the consent or concurrence of another person. However, a company is deemed to have the right to appoint a director if that person’s appointment flows necessarily from his appointment as a director of the holding company or if the directorship is held by the holding company itself.

Rights which are exercisable only in certain circumstances are regarded as “voting rights” only when either the circumstances have arisen (for so long as they continue) or when the circumstances are within the control of the person allegedly having the rights. For example, Preference Shares usually only have a general right to vote where the preference dividend is in arrears. Rights which are normally exercisable but temporarily incapable of exercise (e.g. when shares are disenfranchised by virtue of failure to comply with notices pursuant to s212 of the Act see 3.3.3 below) continue to be taken into account (s736A(4)).

Any rights exercisable in a fiduciary capacity are to be treated as not exercisable by a suspected holding company (s736A(5)).

In contrast, rights exercisable by any person as a nominee for the suspected holding company (except where the suspected holding company is concerned only in a fiduciary capacity) are generally to be treated as held or exercisable by the suspected holding company (s736A(6)); and shares held or powers exercisable by, or by a nominee for, a subsidiary of the suspected holding company (not being a subsidiary concerned only in a fiduciary capacity) are to be treated as held or exercisable by the suspected holding company. Rights attaching to shares held by way of security are generally treated as held by the person providing the security.

**Table 1.2**  
*Summary of principal differences between public and private companies*

	<b>PUBLIC COMPANY</b>	<b>PRIVATE LIMITED COMPANY</b>
<b>REGISTRATION</b>		
• Name of Company	must include "public limited company" or "plc" (s25(1))	must include "limited" or "Ltd" (s25(2))
• Memorandum of Association	must state that it is a public company (s1(3))	no equivalent
• Minimum number of members	2 (s24 (see also s1(1)))	1 (s1(3A) and s24)
• Minimum number of directors	2 (s282(1))	1 (s282(3))
• Commencement of business	on issue of certificate to commence business (s117)	upon incorporation under s13(7)
<b>SHARE CAPITAL</b>		
• Authorised minimum	£50,000 (ss11, 117 and 118)	none
• Authority to allot	limited to 5 years (s80(4))	by use of elective resolution may be an indefinite or fixed period (s80A)
• Offer shares or debentures to the public	permitted	prohibited (s81)
<b>PAYMENT FOR SHARES</b>		
• Allotments	One quarter of nominal value plus the whole of any premium (s101)	no amount specified
• By means of an undertaking to perform work or services	prohibited (s99(2))	permitted

<ul style="list-style-type: none"> <li>• Undertaking to make payment to be performed more than 5 years after allotment</li> <li>• Consideration in form on non-cash assets</li> <li>• Consideration given by subscribers</li> <li>• Transfer of non-cash assets</li> </ul>	<p>prohibited (s102)</p> <p>possible but requires formal valuation (s103) cash only (s106)</p> <p>s104 requires a valuation of assets if transferred within 2 years of certificate being issued under s117 or within 2 years of re-registration as a public company</p>	<p>permitted</p> <p>no requirement</p> <p>cash or other consideration</p> <p>no requirement</p>
<b>FINANCIAL ASSISTANCE</b>		
<ul style="list-style-type: none"> <li>• Given by company for purchase of its shares</li> <li>• Certain exceptions from the general prohibition e.g. to enable employees to purchase shares</li> </ul>	<p>only possible if an incidental part of some larger purpose and given in good faith in the interests of the company (ss151, 153)</p> <p>only possible where net assets are not reduced or is provided from distributable profits (s154)</p>	<p>may also be provided if “whitewash” procedures are followed and the financial assistance does not reduce net assets or is provided from distributable profits (s155(2))</p> <p>no restriction</p>
<b>MAINTENANCE OF CAPITAL</b>		
<ul style="list-style-type: none"> <li>• Net assets are half or less of share capital</li> </ul>	<p>must call an extraordinary meeting within 28 days (s142(1))</p>	<p>no requirement</p>

	<b>PUBLIC COMPANY</b>	<b>PRIVATE LIMITED COMPANY</b>
<ul style="list-style-type: none"> <li>• Payments for redemption or purchase</li> </ul>	may only be made out of distributable profits or proceeds of a fresh issue of shares (s160)	may also be made out of capital if approved by a special resolution (s171)
<b>DISCLOSURE OF INTERESTS</b>		
• Substantial shareholdings	obligation to disclose interest in 3% or more (s198) to be kept (s211)	no requirement
• Register of substantial shareholdings		no requirement
• Duty upon company to investigate certain interests	requirement (ss212, 214)	no requirement
• Registration of interests disclosed	requirement (s213)	no requirement
<b>ACCOUNTS</b>		
• Preparation (under Part VII of the Act)	no exemptions	certain exemptions may apply for small and medium sized companies (s246)
• Period for laying and delivering accounts	7 months after the end of the relevant accounting reference period (s244(1)(b))	10 months after the end of the relevant accounting reference period (s244(1)(a))
• Accounting records to be kept	6 years from the date on which they are made (s222(5)(b))	3 years from the date on which they are made (s222(5)(a))
<b>DISTRIBUTION</b>		
• Distributions can be made of available profits when:	net assets exceed the aggregate of called up share capital plus	realised profits exceed realised losses (s263)

	undistributable reserves and will not cause net assets to fall below the aggregate (s264)	
<b>RESOLUTIONS</b>		
<ul style="list-style-type: none"> <li>• Elective resolutions to dispense with certain requirements e.g. duration of directors authority to allot shares, necessity to hold AGMs etc</li> </ul>	not permitted	permitted (s379A)
<b>MISCELLANEOUS</b>		
<ul style="list-style-type: none"> <li>• Company secretary</li> <li>• Age limit for directors</li> <li>• Appointment for two or more directors by a single resolution</li> <li>• Right of proxy to speak at meetings</li> </ul>	<p>must be suitably qualified (s286)</p> <p>70 years (unless re-elected each year by shareholders) (s293)</p> <p>only permitted where resolution has not been objected to (s292(1))</p> <p>none</p>	<p>no qualification requirements none unless the subsidiary of a public company (s293(1)(b))</p> <p>permitted</p> <p>same rights as member (s372)</p>
<b>TAKEOVER CODE</b>		
	applies automatically where offeree is a public company	may apply in certain limited circumstances
<b>LISTING</b>		
	may apply if satisfies conditions for listing	application prohibited

A body corporate is the *wholly owned subsidiary* of another body corporate if it has no members except that other and that others wholly-owned subsidiaries and persons acting on its or their behalf (s736(2)).

For the purposes of the definition of a subsidiary, the expression “company” includes any body corporate (e.g. a statutory, chartered or foreign company may be a subsidiary of a registered company) (s736(3)).

### **1.5.2 Parent and subsidiary undertakings**

The 1989 Companies Act introduced an additional concept of parent and subsidiary undertakings for the purposes of identifying which entities are to be included in consolidated accounts.

Prior to the 1989 Act, a company was required to produce consolidated accounts only for itself and its subsidiaries. Now, however, the requirement is for consolidated accounts in respect of a parent company and its *subsidiary undertakings* (s227(2)). The definitions of *parent* and *subsidiary undertakings* are contained in ss258 and 259 of and Sched 10(A) to the Act.

An *undertaking* is defined as a body corporate or partnership, or an unincorporated association carrying on a trade or business with or without a view to profit (s259(1)). Accordingly, a joint venture established by way of partnership will be an undertaking and it will fall to all corporate partners to determine whether it is also a *subsidiary undertaking* which should be consolidated in its group accounts.

Section 258 provides that an undertaking is a *parent undertaking* in relation to another undertaking, a *subsidiary undertaking*, in any one of the situations described below:

- (a) If it holds the majority of the voting rights in the undertaking: this calculation is the same as for the equivalent test to determine whether a company is a “subsidiary” (see 1.5.1). In the case of undertakings which are not companies, the expression is defined as the right under the undertaking’s constitution to direct the overall policy of the undertaking or to alter its constitution.
- (b) If it has the right to appoint or remove a majority of the subsidiary undertakings board of directors: again, this is the same calculation as the equivalent test for determining whether a company is a “subsidiary”. For undertakings which are not companies, a “director” is the person performing the equivalent function for that undertaking.
- (c) If it has the right to exercise a “dominant influence” by virtue of the undertaking’s Memorandum or Articles or by virtue of a control contract – a contract which lawfully confers such a right which is authorised by the Memorandum and Articles of the undertaking and lawful in the relevant jurisdiction. Dominant influence is the right to give directions with respect to the operating and financial policies of the undertaking which its

directors are bound to comply with, regardless of whether it is in the best interests of the undertaking.

- (d) If it is a member and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in the undertaking.

An undertaking is also a parent undertaking in relation to a subsidiary undertaking if it has a “participating interest” in the subsidiary undertaking and it actually exercises a dominant influence over it, or it and the subsidiary undertaking are managed on a unified basis. A “participating interest” is defined in s260 as an interest in shares (which in relation to an undertaking which does not have a share capital means an interest conferring rights to share in the profits or losses of the undertaking or giving rise to an obligation to contribute to the debts or expenses of the undertaking in a winding-up) which it holds, on a long-term basis for the purpose of securing a contribution to its activities via the exercise of control or influence arising from or related to that interest. A holding of 20 per cent or more of the shares of an undertaking is deemed to be a participating interest unless the contrary is shown. An “interest” in shares for these purposes includes an interest in convertible securities or in options.

As for the determination of whether a company is a subsidiary of another company, interests held in a fiduciary capacity are not included, nor are security interests in the circumstances described above. In addition, a parent undertaking is deemed to hold the rights held by any of its subsidiary undertakings (s258(5)).

## **Examples of Corporate Relationships**

### **Problem Area 1.2**

C is a company with an issued share capital of 100 ordinary shares, all of one class. Company A and B each hold 50 shares and are parties to an agreement which provides that A will have the right to approve budgets and otherwise settle the financial policy of C and to appoint its managing director and auditors. C will be a subsidiary undertaking of A.

### **Problem Area 1.3**

The facts are the same as in Problem Area 1.2 above but B has the right to appoint seven out of 12 directors. C will be a subsidiary undertaking of both A and B.

### **Problem Area 1.4**

C is a company with an issued share capital of 100 ordinary shares, all of the same class. B holds 30 shares. A holds 30 shares. A agrees with B always to vote in accordance with B's directions. C is a subsidiary undertaking of B.

### **Problem Area 1.5**

C is a company with an issued share capital of 1,000 shares. A holds 200 shares and B holds 800 shares. A in fact, over a period of years, has determined the financial policy of the company and performed all of its management functions. C is a subsidiary undertaking of A and B.

### **Problem Area 1.6**

A and B are companies which operate a partnership on terms that each contribute equally to its capital and share equally in its profits. A, however, manages partnership affairs and controls partnership finances. The partnership is a subsidiary undertaking of A.

## **1.6 Mechanics of Formation**

A company comes into legal existence upon the issue of a certificate of incorporation, which is obtained by filing with the Registrar of Companies the following documents:

- (a) a Memorandum of Association signed by each subscriber and attested by at least one witness and dated;
- (b) Articles of Association (if desired), signed by each subscriber to the Memorandum and attested by at least one witness and dated;
- (c) a statement of the first registered office and the names and particulars of the first directors and secretary, signed by or on behalf of the subscribers to the Memorandum of Association, containing a consent to act signed by each person named as a director or secretary (Form 10) (s10 and Sched 1);
- (d) a statutory declaration, by a solicitor engaged in the formation of the company or by a person named in the statement of particulars (see (c) above) as a director or secretary of the company, as to due compliance with the requirements of the Act (Form 12) (s12(3)). Section 12(3A) allows a statement to be delivered to the registrar by electronic communications instead of the full statutory declaration. A person who makes a false statement under s12(3A) is liable to a fine and imprisonment or both.

Registration fees in accordance with the regulations for the time being in force must be paid when the documents are lodged. Two weeks should be allowed for the Registrar of Companies to issue a certificate of incorporation. However, on payment of a higher fee the Registrar will issue a certificate on the same day that the documents are received provided everything is in order. The current fee for incorporation in the ordinary course is £20 and for the same day service is £80.

The issue of the certificate of incorporation is conclusive evidence that the requirements of the Act have been complied with (s13(7)).

## **1.7 Buying a Company Off the Shelf**

As an alternative to incorporating a company from scratch, it is possible to purchase a ready made company off the shelf from some firms of solicitors and company formation agents. Such a company will have been formed some time earlier specifically for the purpose of selling it to a client. The company will not have traded prior to purchase. The Memorandum of Association will usually provide that the objects of the company are to carry on business as a general commercial company (see 1.10.1 below).

The advantage of purchasing a company off the shelf is that it can be used immediately upon changing the directors, the registered office and transferring the subscriber shares. A number of other changes may be required to tailor the company to the specific requirements of the purchaser, for example changing the secretary, the name of the company, possibly the accounting reference date and maybe the Articles of Association, but these will not generally prevent it trading in the interim.

## **1.8 Company Names**

A public company (which is necessarily a limited company) must have at the end of its name the words Public Limited Company or the abbreviation plc (which abbreviation can be rendered in upper or lower case letters, or with the “p” in upper case and the “l” and “c” in lower case, and with or without intervening spaces or full stops) or, if its Memorandum states that its registered office is to be situated in Wales, their Welsh equivalents “Cwmni Cyfyngedig Cyhoeddus” or “CCC” (ss25 and 26). A private limited company must normally have as the end of its name “Limited” or “ltd” or, if its Memorandum states that its registered office is to be situated in Wales, “Cyfyngedig” or “cyf” (ss25 and 26).

However, a private company limited by guarantee need not comply with the above, provided its objects are the promotion of commerce, art, science, education, religion, charity or any profession, and anything incidental or conducive to any of those objects, and its Memorandum or Articles:

- require it to apply its profits in promoting its objects;
- prohibit payment of dividends to members; and
- require it on a winding-up to transfer surplus assets to a body with similar objects or charity (s30).

(The same applies to a company which on 25 February 1982 was a private company limited by shares with a name which, by virtue of a licence under s19 of the former Companies Act 1948, did not include “Limited” provided its objects and Memorandum or Articles satisfy the above conditions.) A statutory declaration or statement delivered by electronic communications must be filed at the Companies Registry as

provided respectively in ss30(4) and 30(5A) before a company may be formed or may change its name as permitted by s30.

By s351(1)(d), a limited company exempt from the obligation to use the word "Limited" (or an equivalent) as part of its name must state that it is a limited company on all business letters and order forms.

Before any documents are filed for the purposes of incorporating a company, a search should be made at the Companies Registry to ascertain whether there is already a company registered with the same name or one very similar. The registration of a company with the same name as one already registered is prohibited (s26(1)(c)) and if a company is registered with a name which in the opinion of the Secretary of State is too like the name of an existing company, the Secretary of State may within a year of its formation require the new company to change its name (s28(2)). When considering whether a name is "too like" an existing name, no regard will be paid to the nature or business or geographical area within which a company is operating, nor will the fact that the company is not actively trading be of any relevance. Certain minor matters (e.g., "The" at the beginning of a name and "Company" or "Limited" (or abbreviations thereof) at the end of a name and in the case of letters, spaces and punctuation marks) are disregarded in determining whether two names are the same or too like one another (ss26(3) and 28(2)).

If an existing company knows in time of the formation of a new company with the same or a very similar name, it may ask the Secretary of State to exercise his power under s28(2) to require the new company to change its name.

Quite apart from compliance with the Act, the use of a name which is the same as or very similar to an existing name may give rise to an action for passing off. In *Exxon Corporation and Others v Exxon Insurance Consultants International Ltd* [1981] 3 WLR 541 the court granted an injunction to restrain the new company from allowing its name to remain on the register in the offending form and to restrain it from passing off. A similar remedy is available where an unincorporated partnership or an individual attempts to deceive the public by adopting a name similar to that of an existing company. The 12-month time limit imposed upon the Secretary of State under s28(2) does not apply in the case of a passing off action, however, there must be no delay in bringing an action as soon as the company becomes aware of the facts, otherwise the possibility of obtaining an injunction will be lost.

Arrangements can be made with the Registrar, however, for the name of an existing company to be adopted by another company (whether existing or newly formed) subject to the existing company first, or simultaneously, changing its name.

A company may not be registered with a name:

- which includes otherwise than at its end "Limited", "Unlimited" or "Public Limited Company" or their Welsh equivalents or their abbreviations

(s25(1)). As already mentioned above, this provision does not apply to a private company limited by guarantee or a company which on 25 February 1982 was a private company limited by shares with a name which, by virtue of a licence under section 19 of the Companies Act 1948, did not include “limited” provided, in both cases that the company’s constitutional documents comply with the requirements of s30(3);

- which includes, at any place in the name, the expression “limited liability partnership” or its Welsh equivalent (as provided for by the Limited Liability Partnerships Regulations 2001, SI 2001/1090), reg 9, Sched 5, para 9 as from 6 April 2001);
- the use of which would in the opinion of the Secretary of State be a criminal offence;
- which in the Secretary of State’s opinion is offensive; or
- except with the Secretary of State’s approval, which (a) would in its opinion be likely to give the impression that the company is connected with Her Majesty’s Government or any local authority or (b) includes any word or expression specified in the Company and Business Names Regulations 1981 (SI 1981/1685 as amended by SI 1982/1653, SI 1992/1196, SI 1995/3022, SI 2001/259, SI 2001/3050 and as applied and modified by SI 2001/1090) (such as Royal, United Kingdom, England, Insurance, Chamber of Commerce and University – see Table 1.3 below) (s26).

The Secretary of State may also direct a company to change its name within a specified period of not less than six weeks if the Secretary of State is of the opinion that the name by which a company is registered gives so misleading an indication of the nature of its activities as to be likely to cause harm to the public (s32). Application may be made to the court within three weeks to set aside the direction. An overseas company may be restrained from carrying on business in Great Britain under its corporate name if registration under that name would not have been permitted had it been a British company (s694).

### **Table 1.3**

The following are examples of words and expressions as set out on the Companies House website ([www.companieshouse.co.uk](http://www.companieshouse.co.uk)) which will require the consent of the Secretary of State before their use will be allowed in a company name:

- (i) words which imply national or international pre-eminence e.g.:
- |                |               |          |         |
|----------------|---------------|----------|---------|
| International  | Great Britain | Scotland | Ireland |
| National       | British       | Scottish | Irish   |
| European       | England       | Wales    |         |
| United Kingdom | English       | Welsh    |         |

- (ii) words which imply governmental patronage or sponsorship e.g.:  
Authority            Board            Council
  
- (iii) words which imply business pre-eminence or representative status e.g.:  
Association        Society            Institution  
Federation        Institute
  
- (iv) words which imply specific objects or functions e.g.:  
Assurance        Register            Foundation  
Insurance        Registered        Fund  
Patent            Trust                Charter  
Stock Exchange    Group                Holdings

The Department of Trade and Industry (the “DTI”) provides Guidance Notes on sensitive words and expressions which advise when these sensitive words will be considered acceptable in a company or business name. For example:

“*British*” – normally ownership should be British and the company must show pre-eminence in its field, preferably by independent support e.g. from a government department;

“*Group*” – when used in the sense that there are a number of companies under one ownership, then association (or proposed association) with two or more British or overseas companies should be shown;

“*Holdings*” – the company should be shown to be (or an undertaking given that it will become) a holding company within the meaning of s736 CA 1986;

“*Trust*” – in the context of a financial trust requires a written assurance that substantial paid-up share capital will be achieved within a reasonable period from incorporation. The DTI has confirmed that financial trust does not include “unit trust”, although use of these words requires DTI approval.

There are also words and expressions which require not only the Secretary of State’s consent but permission from some specified relevant Department or body, e.g. charity, charitable, royal, King, Queen, Windsor, police.

## **1.9 The Registered Office**

Every company must at all times have a registered office to which all communications and notices may be addressed (s287(1) as substituted by s136 of the Companies Act 1989).

The Memorandum of Association states in which part of Great Britain the registered office is to be situated (i.e. England and Wales, Wales or Scotland). The

address of a company's registered office on incorporation must be specified in the statement of particulars to be delivered on application for registration (Form 10) and notice of any change in the situation of the registered office must also be given to the Registrar within 14 days of the change (s287(3) and (4)) (Form 287). For publication of the address of the registered office on business letters and order forms, see 1.14 below.

## **1.10 The Memorandum of Association**

### **1.10.1 Contents of the Memorandum**

Every company must have a Memorandum of Association (s1), which must state:

- the name of the company;
- whether the registered office is to be situated in England and Wales, Wales or Scotland;
- the objects of the company;
- that the liability of members is limited (if it is); and
- the amount of the share capital (if any) (s2).

The country in which the registered office is to be situated could, in the case of companies incorporated before the Companies Act 1985, be stated as England alone since England includes Wales. A company whose Memorandum of Association states that its registered office is to be situated in Wales may have its Memorandum and Articles drawn up in Welsh and deliver it to the Registrar of Companies in Welsh without it, in certain circumstances, being accompanied by a certified English translation (s710B and The Companies (Welsh Language Forms and Documents) Regulations 1994 (SI 1994/117) as amended by SI 1994/727 and SI 1994/734).

It is important to draft the objects clause widely, for a company is able to pursue only those objects which are either expressly set out in or are reasonably incidental to its objects as stated in the Memorandum. A company is permitted to state in its Memorandum that its object is to carry on business as a general commercial company and this will permit the company to carry on any trade or business whatsoever (s3A). Although the company is then deemed to have power to do all such things as are incidental or conducive to the carrying on of any trade or business, it is not clear whether certain actions (such as making charitable donations) would be permitted. Whether an act is incidental or conducive will depend on the type of business chosen and the normal activities a company engaged in that business undertakes (*Breay v Royal British Nurses Association* [1897] 2 Ch 272). For example, in the absence of a special power in the memorandum, a company may not take shares in another company carrying on a different class of business (*Re Lands Allotment Co* [1894] 1 Ch 616). However, no such express power is required in the memorandum of a banking company as it is inherent in the nature of banking business, that a banking company may advance money on securities

such as shares (*Royal Bank of India's Case* (1869) 4 Ch App 2520). For certainty, therefore, it is advisable to list the company's objects exhaustively.

Historically, a distinction has been made between objects and powers in an objects clause. Objects are the primary objectives of the company whereas powers are the means by which such objectives are achieved. Powers may only be used for the fulfilment of the objects and any other use, whilst not *ultra vires*, is an abuse by the directors of their powers (*Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246). Accordingly, it became important to construe the memorandum in order to discover whether the problem arose from a lack of capacity (i.e. the act was outside the objects) or a lack of authority (i.e. use of a power by the directors for an improper or unauthorised purpose). There are a number of points to note in relation to the interpretation of the objects clause:

- The ordinary contract law rules of construction and interpretation apply to the interpretation of the objects clause and the clause should be construed in the context of the memorandum as a whole.
- Even if a particular power is not expressed, a court will imply all the powers that are necessary or conducive to the attainment of a company's main objects (*Attorney General v Great Eastern Railway Company* (1880) 5 App Cas 473).
- Whilst it is not legitimate to specify that a company has all the powers of a natural person, a company is able to include in its objects clause the right for the company to carry on any trade or business which, in the opinion of its board of directors, could be advantageously carried on in connection with or ancillary to its main business (*Bell Houses Ltd v City Wall Properties Ltd* [1966] 2 QB 656).
- Problems have arisen in the past from the courts interpreting all the paragraphs following the main objects as powers to be used for the fulfilment of the main objects. Accordingly, a paragraph is included at the end of the objects clause expressing that each clause is to be treated as an independent object (*Cotman v Brougham* [1918] AC 514). It should be noted that whilst courts accept the legitimacy of such a clause its effect will not necessarily be to change all the powers into objects. The rule is that all paragraphs will be treated as substantive objects unless:
  - (i) the subject matter of the paragraph is by its nature incapable of constituting a substantive object. For example, *Re Introductions* [1970] Ch 199 held that a power to borrow money was (save in the case of a bank or money-lending institution) incapable of being an object and had to be treated as a power;
  - (ii) the wording of the paragraph shows expressly or by implication that the paragraph was intended to be a power. For example in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246, the court was construing a paragraph that gave the company the ability to give guarantees in favour of such persons "as may

seem expedient". The court held this constituted a power since it could only mean as may seem expedient for the furtherance of the objects of the company.

Even where a transaction is within the scope of an express object, it may be *ultra vires* (see 1.11 below) if no reasonable person could have concluded that it was entered into for the benefit of the company (*Charterbridge Corporation v Lloyds Bank Ltd* [1970] Ch 62). See further *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016; *Rolled Steel Products (Holdings) v British Steel Corporation* [1985] 2 WLR 908 CA; and *Rosemary Simmons Memorial Housing Association Ltd v United Dominions Trust Ltd* [1986] 1 WLR 1440.

### **Problem Area 1.7**

The Memorandum of C Limited states that its object is "to carry on business as a general commercial company". After realising large profits in its salmon farming business, it is decided that the company should sell its less profitable cod fishing business and also make a generous donation to a local charity which supports retired fishermen. In view of its strong financial position the company is also asked to guarantee the obligations of a new subsidiary company in the Group.

*Are these activities covered by s3A?*

It remains unclear precisely what powers are conferred by the provision in s 3A(b) that a company has power to do all things as are incidental or conducive to the carrying on of any trade or business. Section 3A provides that a company is treated as having the objects of carrying on any trade or business whatsoever. In this case it is carrying on the business of salmon and cod fishing and the issue is whether the proposed acts are "incidental or conducive to the carrying of any trade or business by it".

Clearly the power to sell the cod fishing business is incidental to carrying on that business. What is less clear is the provision of guarantees. Given the guarantee is, presumably, for the benefit of the company in that it allows one of its subsidiaries to trade – it could be reasonably argued that it falls within the scope of being incidental or conducive to the carrying out of the company's business. It is, however, fair to say the matter is not beyond doubt and hence the need to incorporate specific objects is a necessity.

On the face of it, the donation to the local charity provides no direct benefit to the company. However the donation may be comparable to acts such as paying pensions and gratuities to previous employees, depending on the local characteristics and membership of the charity. Alternatively, the donation could be viewed as incidental and conducive to the business on the basis

that provision and support of retired fisherman is necessary for the continued survival of the fishing industry. However, the courts have generally been reluctant to recognise such non-commercial acts as falling within the carrying on of a trade or business or as being necessarily incidental or conducive to the carrying on of trade or business.

Because of these uncertainties, it would be highly advisable (for the avoidance of doubt) to include in the memorandum a general commercial company objects clause supported by a long list of ancillary powers.

### **1.10.2 Subscribers to the Memorandum**

Section 2(6) of the Act requires that the Memorandum must be signed by each subscriber in the presence of at least one witness (who must attest the signature) unless the Memorandum is delivered to the Registrar “otherwise than in legible form” (i.e. communicated electronically), in which case, the Registrar can direct the manner in which each subscriber must authenticate the Memorandum (Companies Act 1985 (Electronic Communications) Order 2000, SI 2000/3373 and s2(6A) of the Act). Except in the case of a single private member company (Companies (Single Member Private Limited Companies) Regulations 1992 (SI 1992/1699)), every company must have at least two subscribers and they must take at least one share each. By subscribing to the Memorandum, the subscribers agree to become members of the company, and on its registration, their names will be entered in the Register of Members. A subscriber may be a natural person, a firm or a company.

### **1.10.3 Alteration of Memorandum**

*General* – While the Articles may be altered by means of a special resolution (s9), the method of altering the Memorandum will vary according to the nature of the alteration. The following is a summary of the points most likely to be encountered. As to certain general restrictions on amendments under s16, see 1.12.2.

*Name* – To change the name of a company it is necessary to obtain the sanction of the shareholders by special resolution (s28(1)). The prior consent of the Registrar to the new name is not required, but the provisions of ss26 and 28 should be borne in mind (see 1.8).

A copy of the resolution must be filed with the Registrar (s380(4)(a)) and the fee prescribed by the regulations for the time being in force under s708 must be paid (currently £10 unless it is desired to use the same day service in which case the fee is currently £80).

The Registrar will enter the new name on the register and issue a certificate of incorporation on change of name (s28(6)). The change of name takes effect from

the date of issue of this certificate. Unless using the same day service, two weeks should be allowed for the certificate to be issued. Replacement stationery and name plates should be ordered as soon as possible for use once the certificate is issued (see 1.14 and 1.15). The Memorandum itself remains unaltered; but since the resolution will evidence a change in the Memorandum the filing requirements of s18 will apply (see 6.7.5).

*Registered office* – The situation of the registered office may be changed by the company, within the limits of the country named in the Memorandum, without altering that document. Notice of the change must be given to the Registrar (on Form 287) and takes effect immediately but third parties may still validly serve documents at the old address for 14 days after registration (s287(4)).

In order to change the country of domicile mentioned in the Memorandum, it would be necessary to obtain Parliamentary sanction (s2(7)), but, if such a change were needed, it would probably be found less expensive to reconstruct the company.

*Objects* – The objects may be altered by a special resolution (s4).

Where, however, a resolution altering the objects is passed, application to the court may be made, by a minority holding not less than 15 per cent of the issued share capital, within 21 days of the date of the resolution, for the alteration to be cancelled (s5). It should, however, be remembered that acts outside the objects clause may now be ratified by special resolution (75 per cent) of shareholders present at a general meeting (s35). Accordingly whilst a minority could seek to prevent a change in the objects of the company, they would be unable to stop the majority ratifying ultra vires actions (although, in certain circumstances, this could give rise to a claim for unfair prejudice – see 3.16.1). Such proceedings are therefore unlikely to be brought in practice and the objects of a company are generally regarded as freely alterable.

*Limited liability* – Sections 49 to 52 of the Act provide for limited companies being re-registered as unlimited and unlimited companies being re-registered as limited. No public company may apply under s49 to be re-registered as an unlimited company (s49(3)).

*Capital* – For alteration of the share capital as shown in the Memorandum see 3.12.

*Alteration of non-essential contents of Memorandum* – It is possible to include in the Memorandum matters which could lawfully be provided for by the Articles, e.g. class rights of shareholders. Section 17 provides that any provision contained in the Memorandum, which could lawfully have been contained in the Articles, may be altered by special resolution. This general rule is subject, however, to the following modifications:

- it does not apply where the Memorandum itself provides for or prohibits the alteration of all or any of such provisions;

- it does not authorise any variation or abrogation of the special rights of any class of members (see 3.13);
- where such a special resolution is passed, application may be made to the court by members (but not debenture holders) to cancel the alteration as if the resolution altered the objects of the company. The procedure laid down by s5 for dealing with such applications will apply. It is not necessary, however, to give notice of a special resolution for this purpose to debenture holders;
- no alteration can require a member to take or subscribe for more shares than the number held by him at the date on which the alteration is made, nor can it increase a member's liability to contribute to share capital unless he consents (s16). All alterations are subject to s459 (power of court to grant relief where members are unfairly prejudiced).

### **1.11 The *Ultra Vires* Doctrine**

Where any act of a company is outside its permitted objects as set out in its Memorandum the *ultra vires* doctrine provides that such act is void and cannot be enforced by or against third parties. The Act has largely abolished this doctrine in relation to third parties although it expressly retains the doctrine with regard to shareholders so that they are still able to bring an action against directors for *ultra vires* acts.

Section 35(1) provides:

“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.”

This section is subject to three exceptions:

- A shareholder is able to obtain an injunction against the company in respect of acts proposed to be done outside the objects clause. However, no injunctive proceedings can be brought in respect of an act that is required to be done in fulfilment of a legal obligation arising from a previous act of the company (s35(2)). Accordingly, if, for example, a company enters into a contract to purchase land, being an act outside its objects clause, then a shareholder will not be able to obtain an injunction to prevent the company completing the purchase.
- An act outside a company's objects clause is able to be ratified by a special resolution of shareholders (s35(3)) and if shareholders' approval is obtained in advance no injunctive proceedings will be able to be brought.
- The benefits of s35(1) do not apply where it is a director of a company or its holding company or a person connected with him that is the person dealing with the company (s322 A).

Section 35A(1) provides additional relief to:

“a person dealing with a company in good faith, in respect of whom the power of the board of directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company’s constitution.”

A person is treated as dealing with a company if he is a party to any transaction or other act to which the company is a party which includes being the recipient of a gift from the company.

Section 35A(2)(b) provides that a person shall not be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company’s constitution. Accordingly, the fact that a third party had actual knowledge of the contents of the memorandum or articles of association will not itself deprive him of protection if he honestly and reasonably failed to appreciate that they had the effect of precluding the company (or any director or other person acting on its behalf) from entering into the transaction. This is designed to afford protection to corporate third parties, for example a bank, where one branch has knowledge of a company’s memorandum but the branch making the loan does not. Similarly, it will protect a third party who, although he has knowledge of the memorandum, fails to understand its implications. Therefore, in order for a person to lose the protection of s35A, it will be necessary for the company to show that such person has actual knowledge of the company’s or directors’ lack of capacity and that, armed with this knowledge, it can be proved that he acted otherwise than in good faith. For example, if the third party knew that the directors knew that they were acting outside their authority derived from the company’s constitution this may deprive him of the protection of s35A.

Section 35A protects third parties from lack of authority derived from “any limitation under the company’s constitution”, which includes limitations deriving from a resolution of the company in general meeting or from any agreement between the members or of any class of members (i.e. written resolutions and those requiring to be filed pursuant to s380(4)(c) and (d)).

Accordingly, s35A will be of no assistance to the third party in the following cases:

- where the act is illegal: for instance, where the directors authorise the company to give financial assistance in connection with the purchase by the company of its own shares contrary to s151 (see Chapter 5);
- where the directors act in breach of their fiduciary duties and it is claimed that a third party has received the company’s property in knowledge of the breach of duty and is a constructive trustee (see 9.4.3.2);
- where the limitation arose from a resolution of the board itself. So that, for example, if the board passes a resolution prohibiting the finance director from entering into contracts for more than £1,000 and the finance director does so then s35A will not be relevant in determining whether the third party can enforce the contract because this is not a limitation

under the company's constitution and the third party will be required to rely on the traditional ostensible authority rules (see *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480) see 9.13.

Accordingly, as a result of a number of difficulties with the legislation, some of which are outlined above, it is still necessary if acting for a third party in dealing with a company to obtain and review:

- Board minutes of the company authorising a relevant individual or class of individual to enter into the transaction. A minute signed by the chairman of the board meeting is evidence of the proceedings (s382(2)).
- A company search in order to determine whether the directors have been properly appointed and ensure no receiver, administrator or liquidator has been appointed which would restrict the directors' powers; s35A may not provide adequate protection in such a case and a third party may have constructive knowledge of the contents of the register, notwithstanding s711A(1) if and when it comes into force under the Companies Act 1989.
- The Articles of Association in order to determine whether there are any special requirements for the execution of documents. Again s35A may not extend to procedural formalities.

### **Problem Area 1.8**

Kumquat plc has the principal object in its memorandum of sale and distribution of exotic fruits. The board of the company, fearing that the company is becoming too specialised, decides to become a general fruit seller and, given the lack of expertise in this area, passes a board resolution to limit individual directors' authority to enter into general fruit sales to not more than £500,000 without obtaining board approval. The Finance Director subsequently enters into an agreement with a customer to sell fruit with a value of £750,000 without taking the matter to the board. Is the company bound?

There are two elements to this issue:

- (a) Insofar as relates to the company's memorandum then, in absence of a Bell Houses clause or other wider objects, it would appear that the sale of fruits other than exotic fruits is *prima facie* ultra vires. However, s35A will protect the third party purchaser on the basis he is unaware of the lack of capacity.
- (b) Section 35A cannot, however, assist the third party with the Finance Director having no actual authority to enter into sale since this is not a limitation on the power of the company arising from its constitution. The general test has to be applied to determine whether the Director has apparent authority (see 9.14). Given the Finance Director was held

out by the board as having general authority to enter into such contracts and the third party, in effect, relied in that representation it would seem that the Finance Director would have apparent authority and the company would be bound. It should be noted that the company may well have a claim against the Finance Director for breach of warrant of authority.

The distinction between objects and powers (see 1.10.1 above) remains relevant for the purpose of ratification. If the directors are acting outside the objects of the company then their action can be ratified only by a special resolution (s35(3)). Furthermore, if the directors wish to be relieved from personal liability in respect of the unauthorised transaction this must be done by separate resolution so that shareholders have the opportunity to affirm the act without, necessarily, releasing the directors from liability. If, however, the directors are acting within the objects but outside their powers then, since it is not a matter relating to corporate capacity, the transaction concerned can be ratified by an ordinary resolution.

## **1.12 The Articles of Association**

### **1.12.1 The purpose and content of the Articles**

The Articles of Association provide the machinery for the conduct of the company's affairs, laying down regulations, e.g. for the summoning and holding of meetings of members, the appointment, retirement and powers of directors, the keeping of accounts, and the issuing of shares. In SI 1985/805 (as amended by SI 1985/1052 and, more recently, following the enactment of the Electronic Communications Act 2000, SI 2000/3373) there is a model set of Articles of Association known as Table A. This model set forms the Articles of a company registered after 30 June 1985 if no special Articles are registered; and, even where special Articles are registered, those regulations of Table A apply which are not expressly excluded or contradicted by the special Articles (s8).

Table A, as it appears in that statutory instrument, differs from the forms of Table A which appeared in various Companies Acts prior to 1985, and care must be taken to ascertain which form of Table A, if any, is applicable to a particular company. Companies formed before 1 July 1985 are not governed by Table A in SI 1985/805 unless they take steps to adopt that version of Table A (Companies Consolidation (Consequential Provisions) Act 1985, s31(8)). Companies formed under the Acts of 1862, 1908, 1929 or 1948 may still be governed by the version of Table A adopted when the company was formed, unless it has been excluded or a later version of Table A has been adopted. Many provisions in older versions of Table A are, however, overridden by the Act. Considerable care must, therefore, be taken in applying earlier versions of Table A.

Part II of the 1948 Table A (restrictions on transfer of shares, number of members etc) applied only to private companies and was repealed for new companies by the Companies Act 1980; it will however, unless excluded, continue to apply to private companies registered before 22 December 1980.

The Electronic Communications Act 2000 amended the Act to enable companies to use electronic means to deliver company communications and has led to consequential amendments to Table A.

### **1.12.2 Alteration of Articles**

Section 9 of the Act empowers every company to alter or add to its Articles by a special resolution. This statutory power cannot be excluded in the Articles (*Walker v London Tramways Co* (1879) 12 Ch D 705) or by contract but this does not prevent the current shareholders entering into an agreement between themselves restraining them from voting on a resolution to amend the Articles in a particular way (*Russell v Northern Bank Development Corporation* [1992] 1 WLR 588).

An alteration to the Articles must be consistent with the Memorandum otherwise the alteration will be void (*Ashbury v Watson* (1885) 30 Ch D 376).

Thus, the Articles cannot be altered so as to permit the company to do what is *ultra vires* (*Guinness v Land Corporation of Ireland Ltd* (1882) 22 Ch D 349); and the court may restrain the company from making an alteration which necessarily causes a breach of contract (*British Murac Syndicate Ltd v Alperton Rubber Co Ltd* [1915] 2 Ch 186). If the company has different classes of shares and the proposed alteration will affect the class rights attached to those shares it will be necessary to comply with procedures governing the variation of class rights. Note also, that those shareholders may have rights to object to the variation (see 3.13.1).

The power to alter the Articles must be exercised *bona fide* for the benefit of the company as a whole (*Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656). The court will apply the test that the amendment must be for the benefit of the company as a whole i.e. taking the case of an individual hypothetical member, is the amendment, in the honest opinion of those who voted in its favour, for that person's benefit. In practice this test is almost impossible to apply since the answer depends on whether the hypothetical member supports or contests the amendment. The fact that an alteration operates to the detriment of some members does not inevitably render it void (*Sidebotham v Kershaw, Leese & Co Ltd* [1920] 1 Ch 154). However, there must be no oppression of the minority shareholders or discrimination between the majority and the minority so as to give the former an advantage of which the latter are deprived (*Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286). For example, a failure by the majority of shareholders to persuade the minority to sell their shares which is followed by an alteration to the Articles compelling such a sale may be void (*Brown v British Abrasive Wheel Co* [1919] 1 Ch 290). Neither

can the Articles be altered so as to deprive shareholders of their statutory rights (*Peeveril Gold Mines Ltd* [1898] 1 Ch 122).

Section 16 provides that no member of a company is bound by an alteration of the Memorandum or Articles which requires him to increase his holding of shares or increases his liability to pay money to the company, unless (a) the alteration is made before he becomes a member, or (b) he agrees in writing to be bound. Further, a member who considers the alteration unfairly prejudicial may apply to the court (ss17 and 459). Apart from these provisions, an alteration of the Articles may be retrospective in effect (*Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656); but this will not, for example, enable the company to acquire a lien over shares after they have been transferred for value by a debtor (*McArthur (W & A) Ltd (Liquidator) v Gulf Line Ltd* [1909] SC 732).

Notice of intention to alter the Articles must indicate the nature of the alteration, and, as in the case of any other special resolution, a copy must be filed with the Registrar (see 6.7.5). If the resolution is for the adoption of new Articles, a print of such Articles identified by the signature of an officer of the company, usually the chairman or secretary, must also be delivered. In any event, by s18, a special resolution altering the Articles which is filed with the Registrar must be accompanied by a printed copy of the Articles as altered which should have endorsed thereon a certificate signed by a director or the secretary that the print is a true copy of the Articles as altered. Small alterations may be dealt with by a rubber stamp or typed or by permanently affixing the new version to a copy of the original in such manner as to obscure the amended words.

### **1.12.3 Copies of Memorandum and Articles**

If any member of the company so requires, he must be sent a copy of the Memorandum and Articles (s19). A fee of not more than 5p may be charged. Every copy of the Memorandum issued must contain all alterations made prior to the date of issue and every copy of the Articles must embody or annex special resolutions for the time being in force which will include those altering the Articles (ss20 and 380(2)).

## **1.13 Use of a Business Name**

Trading by a company under a name other than its corporate name (called below a business name) is controlled by the Business Names Act 1985 (except where a company merely adds to its corporate name an indication that its business is carried on in succession to a former owner of the business, e.g. Y Limited, successor to J Smith). A company may not, without the written approval of the Secretary of State, trade in Great Britain under a business name which would be likely to give the impression that the business is connected with Her Majesty's Government or a

local authority or includes a word or expression specified in the Company and Business Names Regulations 1981 (SI 1981/1685 as amended by SI 1982/1653, SI 1992/1196, SI 1995/3022, SI 2001/259, SI 2001/3050 and as applied and modified by SI 2001/1090 – see also Table 1.3 above) save that:

- a company which acquires a business may carry it on under its former lawful business name for a year (s2(2) of the Business Names Act); and
- a company may continue to carry on a business indefinitely under the name under which it lawfully carried it on immediately before 26 February 1982 (s2(3) of the Business Names Act).

### **1.14 Display of Name**

The name of a company must be painted or affixed and kept painted or affixed outside every office or place of business in a conspicuous position and in easily legible letters (s348(1)). In addition, the name must be mentioned in legible letters in all business letters, notices and other official publications of the company, and in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods which purport to be signed by or on behalf of the company, and in all invoices, receipts and letters of credit of the company (s349).

The company and officers of the company may incur criminal penalties if these provisions are not observed. Further, where the default consists of signing a bill of exchange, promissory note, cheque or order for money or goods on which the company's name is not given correctly, the officer signing will be personally liable for the amount thereof if payment is not made by the company (s349(4)). In *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* [1968] 2 QB 839, it was held, however, that the plaintiff, who had himself incorrectly prepared a form of acceptance in the name of "M Jackson (Fancy Goods) Ltd" for signature by a director – the "M" should have read "Michael" – was estopped from enforcing personal liability under s349 (contrast *Maxform SpA v Mariani and Goodville* [1979] 2 Lloyds Rep 385). Note that a default will be committed under these provisions if the full name of the company is not included, so that the omission of the word Limited may render an officer liable (*Atkins & Co v Wardle* (1899) 58 LJQB 377; *British Airways Board v Parish* [1979] 2 Lloyds Rep 361); though liability will not be incurred merely by abbreviating "Limited" to "Ltd" (*Stacey & Co v Wallis* (1912) 106 LT 544) or "Company" to "Co" (*Banque de L'Indochine et de Suez SA v Euroseas Group Finance Co Ltd* [1981] 3 All ER 198). Signature of a cheque with the omission of an ampersand in the company's name can result in personal liability under s349 (*Hendon v Adelman* (1973) 117 SJ 631).

## **1.15 Particulars on Business Letters, Order Forms etc**

A company must also state in legible characters on its business letters and order forms (in addition to its name, and the fact that it is limited if it is exempt from ending its name with Limited or Cynfyngedig – see 1.8 above):

- (a) the country in which it is registered, i.e. England and Wales, Wales or Scotland;
- (b) its registered number;
- (c) the address of its registered office; and
- (d) if it is an investment company within the meaning of s266 the fact that it is such (s351).

Appropriate wording for the country of registration of a company registered in England and Wales (unless it is a company whose Memorandum states that its registered office is to be in Wales) is “Registered in England and Wales”. However, the Registrar would not object to “Registered in Cardiff”, “Registered in England” or “Registered in London” (*Law Society’s Gazette*, 23 March 1977, p243).

The company, officers of the company and any persons who on its behalf issue or authorise the issue of any business letter or order form not complying with the above are liable to a fine.

## **1.16 Commencement of Business**

A private company may commence business as soon as a certificate of incorporation has been issued; but a company originally formed as a public company may not do business or exercise any borrowing powers until the Registrar has issued it with a certificate under s117 (or it is re-registered as a private company). The Registrar issues this certificate on receipt of an application (which incorporates either a statutory declaration or a statement delivered by electronic communications) (Form 117), if satisfied that the company fulfils the share capital requirements for a public company (see 1.4.2).

Pre-incorporation contracts are not binding on, and cannot be ratified by, a company although they can be taken over by novation. However, by s36C a pre-incorporation contract will, unless otherwise agreed, impose personal liability on the person purporting to act for the company in entering into it: for an illustration see *Phonogram Ltd v Lane* [1982] QB 938.

A company which does not commence business within one year after its incorporation or which being a public company originally formed as such is not issued with a certificate under s117 within that time may be wound up by the court (Insolvency Act 1986, s122).

### **1.17 Transfers of Non-cash Assets by Subscribers**

In certain circumstances s104 imposes requirements relating to expert valuation where a public company contracts with a subscriber to its Memorandum. These requirements apply if:

- the company was originally formed as a public company;
- the contract is for the transfer by the subscriber of non-cash assets during the first two years in which the company is entitled to do business; and
- the consideration to be given by the company equals or exceeds one tenth of its issued share capital.

### **1.18 Company Seal**

A company need not have a corporate seal (s36A(3)), but if it does, its full name must be engraved on the seal in legible characters (s350) (see 17.1 concerning the use of the company seal).

### **1.19 Company Registers**

The Act requires all companies to keep and maintain certain registers, for example a Register of Members (s352), a Register of Directors and Secretaries (s288), a Register of Directors Interests (s325) etc. Further information about the various registers can be found in the appropriate chapters of this book.