

ACCA Paper
F4

***Corporate &
Business Law***
(English variant)



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Chapter 1

STRUCTURE OF THE LEGAL SYSTEM

Civil Law

- Private law
- To settle disputes between individuals
- No concept of punishment
- Objective is to compensate the wronged party
- Need to prove 'on the balance of probability'
- Sued in court
- If liable, then compensation payable
- Plaintiff and defendant
- Personal action brought by the aggrieved party
- Court may award damages or an equitable remedy if damages are inappropriate



Criminal Law

- Public law
- A wrongdoer has broken the law
- A wrong done to society
- Prosecuted in court
- If guilty, then punished
- Community service, fine, imprisonment
- Prosecutor and accused
- Need to prove 'beyond reasonable doubt'
- Police decide whether to prosecute
- This decision is reviewed by the Crown Prosecution Service



Common Law

- Development started with effect from 1066
- King's representatives attended local courts
- Then met in London on a regular basis to discuss
- Over a period of 200 years, law was commonised – "Common Law"
- Cornerstone of Common Law is judicial precedent
- Ratio decidendi and obiter dicta
- With commonisation came recognition of deficiencies
- Highlighted the need for alternative remedies – Equity
- Common Law remedy is 'damages' – a monetary award
- Common Law courts were separate from court of equity until the late nineteenth century



Equity Law

- Grew from the recognition of deficiencies of Common Law
- If a monetary award of damages was not appropriate, there was nothing else to offer
- In fourteenth century, Aequitas
- Chancellor's court
- Early seventeenth century, Earl of Oxford's case
- Equity shall prevail
- Confirmed by 1873 – 1875 Judicature Acts
- Main remedies :
 - ▶ Specific performance
 - ▶ Injunction
 - ▶ Rescission
 - ▶ Rectification
- Remedies are given at Court's discretion
- Only given if damages is inappropriate



Ratio Decidendi

- Ratio is 'the reason for the decision'
- Ratio is binding on future judges in similar cases
- Reversing – higher court reverses lower court decision in same case
- Overruling – higher court overrules lower court decision in different case
- Distinguishing – court avoids earlier precedent by distinguishing the facts
- Ratio not binding if too obscure
- Ratio not binding if made without care (per incuriam)
- Ratio not binding if in conflict with a basic principle of law
- Ratio not binding if in conflict with European law
- Ratio not binding if too wide
- Ratio not binding if made in inferior court

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Chapter 2

COURTS

Hierarchy of the Courts

- European Court of Justice (ECJ)
 - ▶ Binds all English courts
 - ▶ Not bound by anyone, not even itself
- Supreme Court (judicial capacity) (SC)
 - ▶ Binds all English courts, but not itself
 - ▶ Bound by ECJ
- Court of Appeal (C of A)
 - ▶ Binds all lower courts
 - ▶ Bound by ECJ, SC and itself
 - ▶unless
-unless
 - ▶ Two similar decisions conflict – must then decide which to follow
 - ▶ Earlier decision conflicts with a later SC decision
 - ▶ Earlier decision made per incuriam



Hierarchy of the Courts continued

- High Court (HC)
 - ▶ 3 divisions
 - ▶ Binds all lower courts
 - ▶ Bound by all higher courts
 - ▶ And itself
- Crown Court (Crown C)
 - ▶ Criminal cases
 - ▶ Binds no-one, not even itself
 - ▶ Bound by all higher courts
- County Court (County C)
 - ▶ Civil cases
 - ▶ Binds no-one, not even itself
 - ▶ Bound by all higher courts



Hierarchy of the Courts continued

- Magistrates Courts (MC)
 - ▶ Binds no-one, not even itself
 - ▶ Bound by all higher courts
- Tribunals (eg Employment Tribunal)
 - ▶ Less formal procedures
 - ▶ Quicker
 - ▶ Hears disputes between employees and employers
 - ▶ Can appeal to
- Employment Appeal Tribunal (EAT)
 - ▶ Equal status as HC
 - ▶ Can further appeal to C of A
 - ▶ But only on a point of law, not on a matter of fact



Tracking

- 3 types of tracking :-small claims, fast, multi
- Small claims track
 - ▶ not more than £10,000
 - ▶ Quick
 - ▶ Informal
 - ▶ No need for legal representation
- Fast Track
 - ▶ more than £10,000 not more than £25,000
 - ▶ Trial will last < 1 day
 - ▶ Less formal court procedures
 - ▶ Claim will be determined within 30 weeks
- Multi Track
 - ▶ more than £25,000
 - ▶ Full court hearing, but management conference held to encourage alternative dispute resolution

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Chapter 3

STATUTE LAW

Statute Law

- Parliament passes laws (statutes), and only parliament can change / repeal those laws
- Green paper
 - a proposal for new law
- White paper
 - after comments received, a draft for the new law
- First reading
 - introduction to the House
- Second reading
 - debate about the merits of the proposed legislation
 - Committee stage
 - all-party committee discuss and amend the draft
- Report stage
 - the amended draft then presented to the House for approval
- Third reading
 - final approval by the House
- Same procedure in the other House
- Royal Assent



Statutory Interpretation Rules

- Literal rule – ordinary everyday meaning, unless
- Golden rule.... would lead to an absurdity
 - ▶ re Sigsworth
 - ▶ Whitely v Chappell
- Mischief rule-what is the statute trying to control
 - ▶ Gardner v Sevenoaks
 - ▶ Gorris v Scott
- Ejusdem generis
 - ▶ Evans v Cross
- Expressio unius est exclusio alterius
- Noscitur a sociis
- In pari materia
- Purposive approach, for example, civil partnerships
- Cannot interpret statute which would lead to conflict with European Law



Statutory Interpretation Presumptions

- As well as being bound by rules, judges are also bound by presumptions
- Statute is not to alter existing common law
- Where statute deprives a person of his property...
- Statute does not operate retrospectively
- Statute does not bind the Crown
- Statute is not to deprive a person of their liberty
- Statute operates throughout the UK...
- ...but not in conflict with Europe
- Unless perfectly clear, statute is not to create an offence of absolute liability
- Statute is not to conflict with existing statute



Aids to Interpretation

- 2 types : Intrinsic and extrinsic
- Intrinsic
 - ▶ The title of the statute may give an indication of its objective
 - ▶ Eg Anzac (Restriction on Trade Use of Word) Act 1916
 - ▶ The preamble – the introduction to the statute at the start of the document
 - ▶ Interpretation section within the statute
 - ▶ Margin notes
- Extrinsic
 - ▶ Reports of committees
 - ▶ Hansard
 - ▶ Dictionary
 - ▶ Books of authority
- Interpretation Act 1987



Delegated Legislation

- Statutory instruments (responsible ministers)
- Bye – laws (Burnley)
- Rules of Court (made by judiciary)
- Professional regulations (eg General Medical Council)
- Orders in Council (privy council – very rare)

• **ADVANTAGES / IMPORTANCE**

- ▶ Saves parliamentary time
- ▶ Greater flexibility
- ▶ Allows general principles to be written into statute, with fine detail added later by minister
- ▶ Allows very quick passing of statute in cases of eg national emergency
- ▶ Prevents parliament from being overwhelmed with excessive work-load

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Chapter 4

CONTRACT LAW

- A contract is an agreement, supported by consideration, made with intention to create legal relations.

Invitations, offers and acceptance

- An invitation must be distinguished from an offer
- An invitation is not capable of acceptance
- An invitation is inviting another person to make an offer
- Goods in a supermarket are invitations (Boots)
- Goods in a shop window are invitations (Bells)
- Adverts are normally invitations (Birds)
- Very occasionally, adverts may be taken to be offers (Balls)
- Mail catalogues are invitations (Grainger v Gough)
- The process of an auction sale constitutes the auctioneer inviting offers to be made
- An advert offering a reward is an offer, not an invitation (Williams v Carwardine, R v Clark, Carlill v Carbolic)



Termination of Offer

- May be revoked at any time before acceptance
- Revocation must be communicated to the offeree
- Postal rule does not apply
- Lapse of time (Ramsgate Victoria Hotel v Montefiori)
- Rejection (Hyde v Wrench)
- Death (personal services)
- Notification of death (non-personal services)(Bradbury v Morgan)
- Failure of a condition precedent
- Notice of revocation may be communicated through a reliable third party (Dickinson v Dodds)
- Counter offer
- Acceptance
- Refusal



Offers

- Half of the 'agreement'
- An expression of willingness to be bound on specific terms
- Must be certain (Gunthing v Lynn)
- Must still exist when 'accepted'
- Must be distinguished from invitations
- Must be distinguished from statements of intent (Harris v Nickerson)
- A response to a request for information is not an offer (Harvey v Facey)
- A request for information is not a counter offer (Stevenson v McLean)
- Revocation must actually be communicated to the offeree (Byrne v Van Tienhoven)
- May be made to the world at large (R v Clark, Williams v Carwardine, Carlill v Carbolic)



Acceptance

- The other half of the 'agreement'
- Acceptance must be complete and unconditional
- Acceptance cannot vary the original offer. That would be a counter-offer (Northland Airlines v Dennis Ferranti Meters)
- The offer must still be 'open' at the time of acceptance (Hyde v Wrench)
- Acceptance must be communicated to the offeror, but offeror may waive the right of communication (Carlill v Carbolic)
- It may be communicated by a reliable third party (Powell v Lee)
- Silence cannot be acceptance (Felthouse v Bindley)
- Acceptance may be by conduct (Brogden v Metropolitan Railways)
- Once you've started the acts of acceptance the offeror cannot revoke the offer (Errington v Errington)
- Postal rule applies (Household Fire Insurance Co v Grant)
- Acceptance must be made within a reasonable time (Ramsgate Victoria Hotel v Montefiori)



Consideration

- Every contract must be supported by consideration except specialty
- Consideration is a two-way thing in simple/parol contracts (only one way is necessary in specialty contracts/deeds)
- Currie v Misa
- Dunlop v Selfridges
- Executed – an act in exchange for a promise
- Executory – a promise in exchange for a promise (or an act)
- Past consideration is no consideration (re McArdle), (Roscorla v Thomas)
- Consideration must be legal and possible
- Consideration must move from the promisee (privity of contract)
- Courts may imply an implied promise to pay a reasonable sum (Lampleigh v Braithwait)



Consideration – Sufficient Not Necessarily Adequate

- Courts will not look at the adequacy of agreed consideration
- Consideration must have some value (sufficient)(Chappell v Nestle)
- Not sufficient if in accordance with a natural duty already owed (White v Bluett)
- Not sufficient if in accordance with a legal duty already owed (Collins v Godefroy)
- Not sufficient if in accordance with a contractual duty already owed (Stilk v Myrick)
- If over and above a natural duty, OK (Ward v Byham)
- If over and above a legal duty, OK (Glasbrook v Glamorgan)
- If over and above a contractual duty, OK (Hartley v Ponsonby)
- Williams v Roffey
- Thomas v Thomas



Privity of Contract

- Only a party to a contract may sue to enforce it, but there are exceptions
- A person entitled to benefit under third party motor insurance can sue the insurer
- A principal may sue to enforce a contract entered into by his agent
- A holder-in-due-course of a bill of exchange can sue all prior parties
- Where a special relationship exists; for example, an executor may sue to enforce a contract entered into by the deceased (Beswick v Beswick)
- A beneficiary may sue a trustee (Keech v Sandford) (Shamia v Joory)
- A manufacturer of goods may be sued by the ultimate consumer (Donohue v Stevenson)
- An employer may be sued for the negligent acts (tort, not contract) of its employees (Mersey Docks v Coggins)
- Restrictive covenants on land apply to subsequent owners (Tulk v Moxhay)
- In collateral contracts, an injured party can sue even though the other party is not a party to the contract (Shanklin Pier v Detel Products)



Pinnell and its Exceptions

- General principle – part payment of a debt does not achieve full settlement (Pinnell's case)
- Illustrated by Foakes v Beer, but there are exceptions
- Receiving something different to which you were not already entitled
- Goods instead of cash
- Settlement before the due date
- Arrangement with creditors generally that collectively they agree to accept only part payment
- Payment by someone other than the debtor (Welby v Drake)
- Payment at a different location than originally agreed
- Doctrine of promissory estoppel
- Central London Property Trust v High Trees House
- Combe v Combe
- D & C Builders v Rees



Intention to Create Legal Relations

- May be express or implied
- Presumed unless rebutted
- Domestic arrangements, husband and wife, living together
 - ▶ Balfour v Balfour
 - ▶ Spellman v Spellman
- Domestic arrangements, husband and wife, living apart
 - ▶ Merritt v Merritt
- Domestic arrangements, other than husband and wife
 - ▶ Simpkin v Pays
 - ▶ Jones v Padavatton
 - ▶ Parker v Clark
- Commercial agreements
 - ▶ Rose & Frank v Crompton
- Express exclusions – binding in honour only
 - ▶ Jones v Vernon Pools
 - ▶ Appleson v Littlewoods
- Presumptions – assumed until proved otherwise
- Rebuttal – disproving a presumption
- Carlill v Carbolic – payment of £1,000 into bank account



Representations

- Not terms of a contract
- Pre-contractual statements of some known or provable fact made with the intention of inducing another person to enter a contract
- Not a statement of law
- Not an opinion, unless...
- ... it is clearly not a genuine opinion (Bisset v Wilkinson)
- Not a statement of intent
- if the representation is false, that's a misrepresentation



Contractual Terms

- Conditions and warranties
- A term which is a condition is fundamental to the contract
- Breach of a term which is a condition allows the injured party to treat the contract as discharged and sue for damages
- Poussard v Spiers and Pond
- A warranty is superficial to the contract
- Breach of warranty allows the injured party to claim damages
- But the contract is not discharged
- Bettini v Gye
- Innominate terms are those where it is not clear, until breached, whether they are fundamental or merely superficial
- Universal Furniture Products v Maple Flock Company



Contractual Terms

- May be express or implied
- Express terms are those agreed by the parties and may be written into the contract or simply agreed orally
- Implied terms may be judicially or statutorily implied
- Judicially implied terms -business efficacy (The Moorcock) (Express Newspapers v Silverstone)
- Judicially implied terms – trade custom (Hutton v Warren)
- Judicially implied terms – course of trade (Hillas v Arcos)
- Statutorily implied terms eg Sale of Goods legislation
 - ▶ Title
 - ▶ Satisfactory quality
 - ▶ Fit for purpose (Brown v Craiks)
 - ▶ Sample
 - ▶ Description
- Limited ability to exclude statutorily implied terms
- Term re title cannot be excluded in ANY contract
- Others from Sale of Goods legislation cannot be excluded in a consumer contract



Exclusion Clauses

- Used in contracts in an attempt to eliminate or limit the extent of a breaching party's liability
- Must be communicated to the other party at the time the contract is entered into (Olley v Marlborough Court Hotel) (Thornton v Shoe Lane Parking)
- Should be brought to the attention of the other party (Chapelton v Barry UDC) (Thompson v LMS Railway)
- Where a document apparently has a legal affect, should make sure before you sign it (L'Estrange v Graucob)
- Oral statements by an employee can destroy the effectiveness of an exclusion clause (Curtis v Chemical Cleaning Co)
- Where parties have a history of trade, other party may be deemed to be aware of the exclusion clause (Spurling v Bradshaw)
- But this course of trade should be more than 3 or 4 occasions in the previous 5 years (Hollier v Rambler Motors)
- Hardwick v Suffolk – more than 100 times in a 3 year period
- Any ambiguity will be read strictly against the party seeking to rely on it (Andrews v Singer)
- Possible to exclude liability for fundamental breach (PhotoProductions v Securicor)



Unfair Terms Legislation

- Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contract Regulations 1999
- Restrict or limit extent of liability for negligence in consumer contracts
- Some are void, others are subject to a test of reasonableness
- Cannot exclude liability for negligence resulting in death or personal injury
- Cannot exclude liability for partial or incomplete performance by the seller
- Cannot have a term which binds the consumer but allows seller to avoid the contract
- Reasonable? S11 UCTA 77 takes account of:
 - ▶ Relative bargaining power
 - ▶ Any inducement offered, or normal trade custom
 - ▶ Special ordered goods
 - ▶ Fair and equitable treatment of the consumer by the seller
 - ▶ Extent of ability to cover by insurance
- Regulations apply to terms which have not been separately negotiated
- A consumer is a 'natural person who is acting for purposes outside his business'
- An unfair term is "any term which causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer"



Breach of Contract

- May be 'during' or 'anticipatory'
- 'During' – one party refuses to continue
- injured party may treat the contract as discharged (if a breach of condition) and sue for damages immediately
- 'Anticipatory' - one party gives notice, before the contract start date, that they will not go ahead with their obligations
- injured party may sue immediately (Hochster v De La Tour)
- or ignore, go ahead with their obligations, and then sue (White and Carter Councils v MacGregor)
- or wait, and hope the other party will change their minds
- but if they choose to wait, they could lose their right to sue (Avery v Bowden)
- to be able to achieve full compensation, the injured party must have been in a position to complete their obligation at the date the contract was due to start
- The Mihalis Angelos



Damages

- 2 parts to 'damages'- remoteness and measurement
- An award of damages is the main common law remedy
- Intended to be an award of monetary compensation
- It is not intended as a punishment
- Remoteness – only awarded if the damage suffered should have been in the reasonable contemplation of the ordinary man
- Loss suffered should either arise as a natural consequence of the breach or...
- ...the breacher was aware of the special circumstances of the injured party
- Hadley v Baxendale
- Victoria Laundry v Newman Industries
- Re The Heron II



Damages – Measurement

- Courts determine how much award is necessary to put the injured party into the position they would have achieved if there had been no breach
- C & P Haulage v Middleton
- May take account of speculative loss (Thompson v Robinson)
-but may not (Anglia TV v Reed) (Lazenby Garages v Wright)
- may consider non-financial loss
- Jarvis v Swan Tours
- ...but may not (Alexander v Rolls Royce)
- if the cost of 'repair' far outweighs the loss suffered, courts may make an award based on loss of amenity
- Ruxley Electronics v Forsyth
- The injured party has a duty to mitigate their loss

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Chapter 5

COMMON LAW

Remedies for Breach

- Common law and equity
- Damages (CL)
- Action for price (CL)
- Quantum meruit (CL) *Hoenig v Isaacs*, *Planche v Colborn*, *De Barnardly v Harding*
- Specific performance (E)
- Injunction (E)
- Rescission (E)
- Rectification (E)
- Mareva injunction (E)
- Liquidated damages – genuine attempt to quantify potential loss (*Dunlop v New Garage*) if a 'penalty', courts will not allow it (*Interfoto v Stiletto*, *Ford v Armstrong*)



Remedies – Sundry Points

- Equitable remedies are discretionary
- Cannot be claimed as of right
- Will never act in personam against the breacher (Warner Bros v Nelson)
- Delay defeats equity (Doctrine of Laches)
- Will not be awarded if the contract has been affirmed
- Rescission will not be awarded if it is not possible to restore the parties to their original pre-contractual position
- Equitable remedies will not be awarded if the injured party has not acted fairly (clean hands)
- Equitable remedies will not be awarded if some innocent third party would be adversely affected
- Limitation Act – 6 years (specialty contracts – 12 years)
- ...6 years from the date the breach could have been discovered (Lynn v Bamber)

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Chapter 6

LAW OF TORT

Types of Tort

- Trespass against the person
 - ▶ Battery – intentional bringing a material object into contact with another person
 - does not necessarily involve violence (Nash v Sheen)
 - ▶ Assault – intentional bringing another person into reasonable fear of battery
 - ▶ False imprisonment – depriving a person of their liberty
- Trespass (land) – entering, remaining or placing objects on another person's land
- Nuisance – causing distress to another by, eg noise or smell
- Defamation – libel – ridicule of another in permanent form (crime)
- Defamation – slander – ridicule of another in oral (not permanent) form (civil wrong)
- Deceit – deliberately misleading another into a detrimental position
- Passing-off – use of a similar name in a similar business such that confusion results in the minds of the public
- Negligence - carelessness or recklessness. More of this later



Negligence Generally

- 3 things to establish
 - ▶ Duty of care exists
 - ▶ Breach of that duty
 - ▶ Consequential loss, damage or injury to another party
- We all owe a duty of care to our legal neighbours
- Those people so directly affected by our acts that we should have them in mind as likely to be affected when we commit those acts (Donohue v Stevenson)
- Now developed into a 3 stage test
 - ▶ Reasonable foreseeability
 - ▶ Proximity (legal neighbour)
 - ▶ Fair, just and reasonable to impose a duty of care



Negligence Generally continued

- 2nd thing to establish is breach of the duty
- A greater degree of care is needed if risk of injury is high
- Glasgow v Taylor
- Take into account the seriousness of the risk (Paris v Stepney)
- Take into account the practicality and cost of risk avoidance (Latimer v AEC)
- Take into account standard practice
- Take into account the social benefit eg accident caused by emergency ambulance
- Professions (e.g the medical profession) establish their own levels of care
- Res ipsa loquitar – Richley v Fould
- Mahon v Osborne



Negligence Generally continued

- 3rd thing to establish is causality and possibility of 'breaking the chain'
- The 'but for' test (Barnett v Chelsea and Kensington Hospital)(Wilsher v Essex)
- Multi-causes (Fairchild v Glenhaven)
- Novus actus interveniens
 - ▶ Acts of the injured party were unreasonable (McKew v Holland)
 - ▶ Acts of a third party increased the damage (Lamb v Camden)
 - ▶ Act of God (Carslogie v Norway)
- Remoteness of foreseeability (The Wagon Mound) (Jolley v Sutton)
- Defences
 - ▶ Contributory negligence (Sayers v Harlow)
 - ▶ Volenti non fit injuria (ICI v Shatwell)



Negligence – Accountants

- Ultramares v Touche
- Hedley Byrne v Heller
- JEB Fasteners v Marks Bloom
- Caparo v Dickman
- ADT v BDO
- NRG v EY
- Barings v Coopers
- BCCI v EY
- Incorporate
- Limited liability partnership

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Chapter 7

EMPLOYMENT LAW

Employment Law

- Necessary to distinguish between a contract of service and a contract for services
- Courts apply 3 tests
 - ▶ Control test (Mersey Docks v Coggins)
 - ▶ Integration test (Cassidy v Ministry of Health)
 - ▶ Economic reality test (Readymix Concrete)
- Difference is important because :-
 - ▶ Tax and social security contributions
 - ▶ Sales tax
 - ▶ Employment protection provisions
 - ▶ Vicarious liability
 - ▶ Liquidation



Employment Law

- Indicators that a worker is self-employed
 - ▶ Own tools and equipment
 - ▶ Ability to delegate
 - ▶ Ability to choose which hours to work
 - ▶ Ability to accept or refuse work
 - ▶ Ability to take holidays without restrictions
 - ▶ Paid for the project
 - ▶ Work for different organisations
- But no individual indicator is normally sufficient
- Courts will consider all the circumstances
- And it doesn't matter what the 'employer' / 'worker' have agreed between them – it's the economic reality which is important



Dismissal

- 4 types
- Summary – serious breach of contract by employee
- Constructive
 - ▶ Reduction in pay rate
 - ▶ Change in the nature of the job
 - ▶ Failure to follow proper disciplinary procedures
 - ▶ Failure to provide appropriate working environment
 - ▶ Failure to provide suitable work
- Wrongful
- Unfair



Wrongful Dismissal

- Not wrong if justified. If wrong, remedy is damages – lost earnings
- Justified if :-
 - ▶ Disobedience
 - ▶ Dishonesty
 - ▶ Incompetence / negligence
 - ▶ Immorality
 - ▶ Drunkenness
 - ▶ Misconduct
 - Accepting money
 - Assault
 - Disclosure of information



Unfair Dismissal

- Automatically unfair
 - ▶ Completed prison sentence
 - ▶ Dismissed on transfer of ownership
 - ▶ Exercising rights re length of working day
 - ▶ Insistence on minimum wage
 - ▶ Refusing to work on Sundays
 - ▶ Taking steps to ensure health and safety
 - ▶ Trade union membership or activities
 - ▶ Whistle blowing



Unfair Dismissal

- Not all dismissals are unfair – some are fair
- Automatically fair
 - ▶ Unofficial strike action
 - ▶ Actions threatening national security
- Potentially fair
 - ▶ Incapable
 - ▶ Not competent to do the work for which employee is qualified
 - ▶ Redundancy, see later
 - ▶ Legal reasons eg losing driver's licence when employed as a chauffeur
 - ▶ Losing qualifications – eg becoming disqualified as a doctor



Redundancy

- A form of dismissal from employment caused by the employer needing to reduce the workforce
- Reasons include:-
 - ▶ new technology or a new system makes your job unnecessary
 - ▶ the job no longer exists
 - ▶ the need to reduce the labour costs means staff numbers must be reduced
 - ▶ the business is closing down or re-locating
- if 20 or fewer are to be made redundant, this requires individual consultation
 - ▶ this involves direct consultation and ...
 - ▶ ... looking at any alternative to redundancy
 - ▶ if no consultation takes place, any redundancy may be unfair dismissal
- if more than 20 are to be made redundant, this is known as collective redundancy
- collective redundancy requires the employer to consult with employees' representative
- if no consultation takes place, a claim to an Employment Tribunal could result in compensation of up to 90 days' pay
- selection of redundant workers should be fair and objective
- if not fair and objective, dismissal will be automatically unfair

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Chapter 8

AGENCY LAW

Formation and Authority

● Formation maybe :-

- ▶ Express (orally or in writing)
- ▶ Implied
- ▶ By subsequent ratification
- ▶ By estoppel (Freeman & Lockyer v Buckhurst Park Properties)
- ▶ By necessity (GNR v Swaffield)

● Authority maybe :-

- ▶ Express
- ▶ Implied (Watteau v Fenwick) (Hely – Hutchinson v Brayhead)
- ▶ Apparent / ostensible (Freeman & Lockyer)



Termination and Liability

- Termination of agency agreement may be by agreement or by operation of law:-
 - ▶ Principal or agent dies
 - ▶ Principal or agent becomes insane
 - ▶ Principal (or sometimes agent) becomes bankrupt
- Liability
 - ▶ So long as acting within authority, agent has no liability under contract, nor can he enforce a contract
 - ▶ But, sometimes, agent may be held personally liable
 - Where agent enters a contract without disclosing his position as an agent
 - Where agent is acting on his own behalf, even though claiming to act on behalf of the principal
 - Where usual trade custom has established liability of the agent

When you have finished this chapter you should attempt the [ONLINE F4 MCQ TEST](#)



Chapter 9

PARTNERSHIP

Partnership Law

- A partnership is defined as “the relationship which subsists between two or more people carrying on business in common with a view to profit”
- Much of present-day partnership law is contained in the Partnership Act 1890
- Partners may agree amongst themselves how their firm is to operate, so long as their arrangement is legal (Evert v Williams)
- The business must be being “carried on”. It should be more than a one-off transaction, and must be continuing
- It must be “with a view to profit” and is more than the simple sharing of gross revenues
- If a business relationship satisfies the definition, the courts may well determine that a partnership exists, regardless of any written documentation (or intention of the parties) to the contrary
- As a general rule, partners in a firm are jointly and severally liable for partnership debts
- Every partner is an agent of the firm and the other partners for the purpose of the business of the firm
- The acts of every partner done in the course of the firm’s business bind the firm and the partners unless the partner was exceeding his authority and
- ... the other party knew that fact, or was not aware that the person was a partner



The Agreement

- Partnerships are formed by agreement, and the internal arrangements are a matter for agreement amongst the partners
- Typical matters to be agreed upon include:-

- ▶ A
- ▶ D
- ▶ D
- ▶ C
- ▶ I
- ▶ S
- ▶ C
- ▶ G
- ▶ T



1890 Act

In the event that partners fail to make an arrangement about some matter which is later disputed, then the 1890 Act establishes what should happen. The main provisions are :-

- M
- E
- D
- I
- C
- S
- I
- N
- B
- E
- D



Dissolution Grounds – Automatic and By Court Order

- D
- I
- S
- S
- O
- L
- U
- T
- I
- O
- N
- S



LPA 1907 and LLPA 2000

- Limited Partnerships Act 1907 main features are :-

- ▶ At least one general partner (with unlimited liability) and one limited partner (with limited liability)
- ▶ Must be registered with the registrar of companies
- ▶ Limited partner should take no part in the management of the firm
- ▶ If the firm becomes bankrupt, only the general partners are liable for the firm's debts

- Limited Liability Partnerships Act 2000 main features are :-

- ▶ Combination of the advantages of a partnership with those of a limited company
- ▶ Must be registered with the registrar of companies
- ▶ Must file financial statements and be audited
- ▶ As a separate legal entity, the partners are not liable for the firm's debts, thereby protecting themselves from personal disasters. However, the provisions relating to wrongful and fraudulent trading apply.

When you have finished this chapter you should attempt the [ONLINE F4 MCQ TEST](#)





Chapter 10

COMPANY LAW

Types of Corporation and Ways of Formation

- Corporation sole – a public office occupied by a natural person. Death of the person does not affect the continuing survival of the corporation. The Mayor of London is a corporation sole.
- Corporation aggregate – a collection of like-minded people who combine to form an artificial person – the corporation aggregate. Death of individual members has no effect on the existence of the corporation.
- Formation may be by any of 3 ways
 - Royal Charter – eg East India Tea Company, many UK universities
 - Very rare in modern times
 - Statute – equally (if not more) rare
 - Eg British Waterways
 - Registration – by far the most common method
 - Eg Tesco plc, Small & Co Ltd.
- Since 2004 a new form of company, the Community Interest Company (CIC) is available for organisations created for the benefit of the community/society rather than for the pursuit of profit



Types of Company

- Public quoted
 - ▶ Share price quoted on a recognised stock exchange
 - ▶ Must be limited by shares
- Public unquoted
 - ▶ Again limited by shares, but not quoted
- Private – unlimited
- Private – limited by shares
- Private – limited by guarantee, and having a share capital
- Private – limited by guarantee but with no share capital
- Community interest companies



Public Companies

- A company is a public company if it satisfies the definition
- It is a company which is limited by shares
- The constitution states that it is public
- The name ends with the words "public limited company" or "plc"
- It has an allotted share capital not less than £50,000...
- ...of which not less than 25% is credited as paid up....
-together with the whole of the share premium
- Any company which does not satisfy the definition is a private company
- Although a public company exists from the date on its certificate of incorporation, it cannot commence to trade until it acquires a trading certificate



Trading Certificates

- Public companies cannot commence to trade until after they have received a trading certificate
- This is issued by the registrar following an application made by the company
- The application states
 - ▶ That the nominal value of allotted shares is not less than £50,000
 - ▶ The preliminary / formation expenses
 - ▶ And to whom these have been paid (or are still payable)
- The application must be accompanied by a statement of compliance
- If a public company does in fact commence trading before the receipt of the trading certificate, an innocent third party is protected
- But the company, and any officer in default, is liable to a fine
- If a public company fails to obtain a trading certificate within 12 months of incorporation, the court on application may grant a liquidation order against the company



Advantages of Being a Company as Distinct From a Partnership

- Separate legal personality (Salomon v Salomon)(Adams v Cape Industries)
- Limited liability
- Perpetual existence
- Raising finance
 - ▶
 - ▶
- Ownership of property
- Number of members
- Transfer of interest
- **BUT there are disadvantages**
- Legal implications
- Expense
- Publicity and disclosure



Disadvantages (Expanded)

- Legal implications
 - ▶ Formation
 - ▶ Audit
 - ▶ Share issues
 - ▶ Meetings and resolutions
 - ▶ Liquidation
 - ▶ "Proper accounting records"
- Expense
- Publicity
 - ▶ Details of directors and their remuneration
 - ▶ Business details



Lifting the Veil

- The court will look behind the veil of incorporation where justice requires it to prevent fraud, illegality or oppression:-
 - ▶ Gilford Motor Co v Horne
 - ▶ Daimler v Continental Tyre and Rubber
 - ▶ Ebrahimi v Westbourne Galleries
 - ▶ R v Oll
 - ▶ Re F G Films
 - ▶ DHN v Tower Hamlets
- The veil will also be lifted under the provisions of statute:-
 - ▶ Fraudulent trading
 - ▶ Wrongful trading
 - ▶ Commencing to trade without a trading certificate
 - ▶ Abuse of company name
- Other situations:-
 - ▶ Preparation of group accounts
 - ▶ Tax law
 - ▶ Personal guarantees



Formation

- Formed by promoters (see next)
- Pre incorporation contracts (Kelner v Baxter)
- Documents to be filed :-
 - ▶ Application for registration
 - ▶ Memorandum
 - ▶ Articles
 - ▶ Statement of compliance
 - ▶ Statement of capital and initial shareholders
 - ▶ Registration fee
 - ▶ Certified translation



Formation - role and duties of promoters

• Roles

- ▶ act, under instruction, to form a company
- ▶ this involves:
 - finding people who will sign the memorandum and articles of association, and act as the company's first directors
 - select a suitable name for the company
 - determine the form and amount of the company's share capital
 - determine the rights to be attached to the different classes of share capital
 - prepare the constitution of the company
 - submit all the necessary forms to the registrar of companies
 - pay all the preliminary and formation expenses of the company

• Duties

- ▶ act with reasonable skill and care
- ▶ disclose any profit or potential conflict of interest
 - either to the first independent board of directors
 - or to the company's existing or intended shareholders
- ▶ breach of duty - ie non-disclosure - allows the company to rescind the contract and recover the purchase price (Erlanger v New Sombrero Phosphate Mining Co)
- ▶ the company may require the promoter to pay over to the company any undisclosed profits
(Gluckstein v Barnes) (Whaley Bridge v Green)
- ▶ the company may sue the promoter and claim damages for breach of fiduciary duty
(Leeds and Hanley)



Formation (continued)

- The application for registration details:-
 - ▶ Proposed name
 - ▶ Registered office (England and Wales)
 - ▶ Proposed postal address of registered office
 - ▶ Limitation of members liability (shares or guarantee)
 - ▶ Public or private
- Certificate of incorporation
 - ▶ If everything is in order, registrar will issue a certificate of incorporation
 - ▶ The date on the certificate is conclusive proof
 - ▶ Jubilee Cotton Mills v Lewes



Memorandum and the Constitution

- Historically a major document
- Since 2006, now just a matter of record
- States that the subscribers
 - ▶ Wish to form a company
 - ▶ Agree to become members
 - ▶ Agree to take at least one share each
- Company's constitution comprises
 - ▶ Articles
 - ▶ Resolutions (affecting the articles)
 - ▶ Agreements (affecting the articles)



Articles – Contractual Force

- When a person becomes a member of a company, it is as though they have separately entered a contract with the company and with all the other members individually
- The terms of that contract are contained within the articles
- The effect is to bind the members to the company
- Hickman v Kent or Romney Marsh Sheepbreeders Association
-and the company to the members
- Pender v Lushington
-and the members to the members
- Clarke v Dunraven
- But the articles do not create a contract between the company and third parties
- Eley v Positive Government Life Assurance Co.



Articles – Alterability

- Basic rule – can only alter if for the benefit of the company as a whole
- Individual hypothetical member of the future
- Greenhalgh v Arderne Cinemas
- No outside contract shall prevent a change, but company may become liable for breach of that contract (Southern Foundries v Shirlaw)
- Even if proposed alteration adversely affects only one member, it may still be valid (Allen v Gold Reefs of West Africa)
- Alterations allowing compulsory purchase of minority's shares will be (normally) disallowed (Dafen Tinplate v Llanelli Steel)
- Allowing expulsion of defrauding director – OK (Shuttleworth v Cox Brothers)
- Allowing expulsion of competing members – OK (Sidebottom v Kershaw Leese)
- Possible to prevent alteration by weighted voting rights
- Bushell v Faith



Articles – Procedure for Alteration

- Special resolution
- 75% majority
- 14 days notice
- copy of resolution to registrar within 15 days
- copy of amended articles to registrar
- alteration is binding on all members
- articles may say that, for a meeting proposing an alteration, the affected member must be present
- so affected member can prevent alteration by not attending
- articles may require a greater majority than 75%
- ...but can never be drafted to prevent amendment



Company Names

- Basic rule – company can have any name selected by promoters
- But there are restrictions
- Registrar may refuse to register a company with a name which is misleading or offensive
- Connection with royalty, banks.....
- Name may be restricted by statute
- ANZAC
- Name will not be allowed if the same as an existing company
- Name may be disallowed as a tort (passing-off)
- Ewing v Buttercup Margarine
- The word 'limited' (or plc) shall not appear anywhere except at the end of the name



Name Change

- Compulsory or voluntary
- May be required to change by order from the registrar
-within 12 months if the company has been, by mistake, registered with a name too similar to an existing company
-within 5 years if misleading information was supplied
- At any time if the use of the name is likely to cause harm to the public
- Special resolution
- 75% majority
- 14 days notice
- Copy of resolution and amended constitution to registrar within 15 days
- Registrar issues new certificate of incorporation



Objects

- Company can do anything so long as it is legal
- So since 2006, only reason to mention objects in the articles is restrictively
- If company tries to ignore the restriction, ultra vires
- Member can object (Ashbury Railway v Riche)
- "The validity of a transaction shall not be called into question on the grounds of lack of capacity"
- "In favour of a third party acting in good faith, the power of the directors to bind the company shall be deemed to be free of any limitation under the company's constitution"
- These apply only to third parties, not to members
- Good faith – but this is presumed unless shown otherwise
- No requirement for third party to make enquiries
- So third parties are protected, but company cannot sue to enforce an ultra vires transaction

When you have finished this chapter you should attempt the [ONLINE F4 MCQ TEST](#)





Chapter 11

COMPANY LAW: DIRECTORS AND OFFICERS

General Points

- A director is anyone who occupies the position of ...
- A shadow director is a person in accordance with whose instructions the directors are accustomed to act
- De facto director – a person who purports to act as though they were a director
- Alternate director – a person appointed by a director who is unable to attend a board meeting
- Executive directors – more on these next
- Non – executive directors
 - ▶ Integral element of corporate governance
 - ▶ Bring an independent view
 - ▶ Help in providing effective leadership
 - ▶ Help to establish and maintain financial probity
 - ▶ Keep a watchful eye on the effectiveness of the executive directors



Number and Eligibility

- Private company – at least one
- Public company – at least two
- Anyone may be a director (but some restrictions)
- Must be over 16
- May be a non-natural person
- Must not be disqualified under CDDA (see later)
- Must not be bankrupt
- Must not be of unsound mind
- Should not be absent, without permission, from board meetings for a period in excess of 6 months



Company Directors Disqualification Act

- On application to the Court, a director may be disqualified by court order on a number of grounds:
 - ▶ for an offence committed in the promotion, formation, management, liquidation or striking off a company
 - ▶ where persistently in default (3 offences in 5 years) of filing returns
 - ▶ when found guilty of fraudulent or wrongful trading
 - ▶ when involved in a company insolvent liquidation
 - ▶ following a Department of Trade investigation
 - ▶ in general, the disqualification period is “up to 15 years”
 - ▶ breaking the disqualification order → up to 2 years in prison



Directors Appointment

- First directors – named in documents sent to registrar before incorporation
- Subsequent directors may be appointed by :-
 - ▶ Members in general meeting
 - ▶ Other directors – to fill a casual vacancy
 - ▶ The court (rare)
 - ▶ A lender (if part of the loan agreement)
 - ▶ Administrator – under an administration order
- 1/3 rotation procedure
- FTSE top 350 company? All directors retire every year
- Appointed by ordinary resolution
- Registrar notified



Directors Removal

- Ordinary resolution
- Special notice
 - ▶ 28 days notice to company
 - ▶ 21 days notice to members
- Opportunity to make written representations of reasonable length and not defamatory in nature
- Reasonable length
- Must also satisfy legal restrictions – 100 members holding \geq £100 share capital on average
- Notice to registrar
- Weighted voting rights can make removal impossible
- Bushell v Faith
- Company may have to pay substantial compensation to a removed director (Southern Foundries v Shirlaw)



Directors – Statutory Duties

- 2006 Act put into statute many of the established common law principles
- 7 duties
 - ▶ Act within their powers
 - ▶ Perform their duties with reasonable skill, care and diligence
 - ▶ Promote success of company (see next)
 - ▶ Independent judgement
 - ▶ Avoid conflicts of interest
 - ▶ No benefits from third parties
 - ▶ Declare interest in transactions/contracts
- Common law cases which the courts will follow in interpreting these statutory duties follow



Directors' Duties – Common Law Cases

- Re City Equitable Fire Insurance
- Re Brazilian Rubber Plantations and Estates
- Dorchester Finance Co v Stebbing
- Cook v Deeks
- IDC v Cooley
- Regal (Hastings) v Gulliver
- Peso Silver Mines v Cropper
- Howard Smith v Ampol Petroleum
- Bamford v Bamford
- Hogg v Cramphorn
- Clemens v Clemens



Directors – Promoting Success

- Statute trying to encourage long-term approach by directors
- Directors to have regard for all stake-holders
- Non-exhaustive list of matters for directors to consider:
 - ▶ Long-term consequences of their decisions
 - ▶ Employees' interests
 - ▶ Good relationships with customers and suppliers
 - ▶ Local community and environmental impact
 - ▶ High standards of business conduct
 - ▶ Good reputation
 - ▶ Fair treatment for all members



Directors – Controls

- Service contracts ≥ 2 years require approval by members
- Acquisition of non-cash assets need members' approval if $\geq 10\%$ of company's assets
-but not less than £5,000
- ...and always if $> £100,000$
- No company may lend money, provide security nor guarantee a loan to a director of itself, nor of its holding company unless approved by members
- Relevant companies cannot quasi-lend (unless $< £5,000$)
- ... relevant companies cannot approve credit transactions (unless $< £10,000$) unless approved by members
- Any company may lend up to £5,000
- Loans by money lending companies allowed for purchase or improvement of main or only residence up to £100,000
- Relevant company restrictions apply also to connected persons



Directors – Remedies

- Make them account for personal gain (Regal (Hastings) v Gulliver)
- Make them indemnify the company against loss caused by their negligence (see below)
- Rescind the contract where director has a conflict of interest
- Ask the court to declare a transaction is ultra vires
- Directors are not liable for the acts of other directors
- May be held liable by the court looking behind the veil of incorporation
- May be held liable by the court for fraudulent or wrongful trading
- Liable for negligence?
- Not if honest (Pavlides v Jensen)
- But if negligence results in personal benefit? (Daniels v Daniels)



Company Secretary

- Every public company must have one
- Should be appropriately qualified
- Duties, determined by the directors, are administrative in nature (Panorama Developments v Fidelis Furnishing Fabrics)
 - ▶ Maintaining company's statutory records (see later)
 - ▶ Filing returns with the registrar
 - ▶ Taking minutes of meetings
 - ▶ Ensuring the company complies with statutory requirements
 - ▶ Signing documents as required by law
 - ▶ Review and amend confirmation statement sent annually by Registrar of Companies in place of the former Annual Return
- Under principles of corporate governance should also:-
 - ▶ Advise the board on governance matters
 - ▶ Arrange the induction process for new neds
 - ▶ Enable effective communication between board and its various sub-committees



Company Secretary: Statutory books

- every company must maintain certain records required by statute – “the statutory books”
- these records must be kept at the company’s registered office, unless ...
- ... the register of members is maintained by an independent organisation – the company’s registrars
- in this situation, certain other books may be kept also at the offices of the company’s registrars
- registers include:
 - ▶ members
 - ▶ directors
 - ▶ secretary
 - ▶ mortgages and charges
 - ▶ debenture holders
 - ▶ directors’ interests
 - ▶ substantial shareholders
 - ▶ persons with significant control (PSC) (see below)
- PSCs are those people that satisfy any of the following criteria:
 - ▶ they hold >25% of the company’s shares
 - ▶ they hold > 25% of the company’s voting rights
 - ▶ they have the right to appoint and remove a majority of the company’s board of directors
 - ▶ they are individuals that have the right to exercise significant control over the company
 - ▶ where a trust can exercise significant control, they are a member of that trust with significant control over the trust



Auditors

- Required (unless 'small')
- Appointed by:-
 - ▶ Directors (first and casual vacancies)
 - ▶ Members (subsequent and casual vacancies)
 - ▶ Secretary of state (if no-one else does)
- Must be appropriately qualified
- Cannot be :-
 - ▶ Director or employee of the company
 - ▶ Partner or employee of the above
 - ▶ Undischarged bankrupt
- Professionally prevented from
 - ▶ Owning beneficial interest
 - ▶ Being close relative of company officers or employees



Auditors – Rights and Duties

- Rights
 - ▶ Access to company records
 - ▶ Information and explanations
 - ▶ Notice of and attendance at company general meetings
 - ▶ Written representations (when proposed for removal)
 - ▶ Receive copies of proposed written resolutions
- Duties
 - ▶ Express an opinion on truth and fairness (and proper preparation)
 - ▶ Report if directors' report is inconsistent or misleading
 - ▶ (For quoted companies) report on certain elements of the directors' remuneration report
- Auditors should sign and date the audit report
- Report, by exception, if proper accounting records not kept

When you have finished this chapter you should attempt the [ONLINE F4 MCQ TEST](#)



Chapter 12

COMPANY LAW: MEETINGS AND RESOLUTIONS

Annual General Meeting

- Public companies must hold an AGM
- ...every calendar year (Gibson v Barton)
- First no more than 18 months after incorporation
- Subsequent, no more than 15 months after previous
- Private company members can request an AGM
- 21 days notice
- Ordinary business:-
 - ▶ Formal presentation of the financial statements
 - ▶ Reappointment of directors
 - ▶ Reappointment of auditors
 - ▶ Approval of dividend proposed by directors



Resolutions

- Ordinary
 - ▶ simple majority
 - ▶ ordinary business and (some) special business
 - ▶ 14 days notice
- Special
 - ▶ 75%
 - ▶ 14 days notice
- Written
 - ▶ private companies only
 - ▶ any resolution (ordinary or special)
 - ▶ ...except for removal of auditor or director
 - ▶ auditor needs to approve the wording
 - ▶ resolution passed on the date required majority is reached



Resolutions – Special Notice

- Special notice applies only to some ordinary resolutions
- 28 days notice is given to the company
- The company gives 21 days notice to the members
- Resolutions requiring special notice :-
 - ▶ to remove a director
 - ▶ to remove an auditor
 - ▶ to appoint a new auditor other than the retiring auditor
 - ▶ to fill a casual vacancy in the office of auditor
 - ▶ to confirm in appointment an auditor appointed by the directors in the mid-term to fill a casual vacancy
 - ▶ overage director for a plc
- Director / auditor may write written representations of reasonable length and not defamatory in nature



Resolutions

- Normally the directors will determine the agenda for a meeting
- But sometimes members may require a resolution
- Members must hold at least 5% of the total voting rights, or ...
- ... not less than 5% in number of the members, or ...
- ... be not less than 100 members holding on average not less than £100 each in paid up share capital
- The request should be in hard copy form, or electronic form
- The request must be delivered not less than 6 weeks before the general meeting
- The requisitionists may request that a statement of reasonable length be circulated together with the notice of the meeting
- Reasonable length is, as usual, not more than 1,000 words
- The requisitionists will bear the incidental costs unless....
-the company resolves otherwise



Proxies

- A proxy is 'a written statement authorising another person to vote on behalf of an absent shareholder'
- The person appointed need not be a member of the company – it can be anyone
- The word 'proxy' is used to describe both the form and the person appointed by the form
- Proxies may speak at the meeting
- They may vote on a poll and on a show of hands
- They may demand a poll
- Companies will provide 'two-way' proxy forms so that the absent member can indicate which way the proxy should vote – 'for' or 'against' each resolution
- Proxy forms should be delivered to the company not less than 48 hours before the meeting
- A proxy appointed by a member which is a company is called a 'representative'
- A person may be appointed by more than one member as their proxy



Quorum

- A quorum is the minimum number of members who shall be present at a meeting before the meeting may validly pass resolutions
- The minimum number is normally contained within the constitution
- Typically, the minimum number is 2 members present, in person or by proxy
- But the word 'meeting' implies that there should be at least 2 persons
- So one member in person who also holds a proxy for another member cannot, normally, be a quorum
- It is, however, possible!
 - ▶ In the situation of a class meeting, where all the shares of that class are owned by a single person
 - ▶ If the company is a private company with only one member
 - ▶ If the court directs that a quorum shall be a single person
- If a meeting is inquorate at the scheduled start time it will normally be adjourned to 'same time, same place, next week'



Voting

- Following discussion about a resolution, the chair will call for a vote
- Initially, this will be by 'show of hands'
- Each member, no matter how many shares they hold, therefore has only one vote
- But members holding many shares may ask, following a show of hands, for a vote count – a poll
- Polls may be demanded by
 - ▶ Not less than 5 members
 - ▶ Members holding not less than 10% of the total voting rights
 - ▶ Members holding not less than 10% of paid-up capital
 - ▶ The chair
- Votes are counted, whether by show of hands or by poll
- Abstentions are not counted, neither 'for' nor 'against'
- The chair's decision about the result of the vote is final

When you have finished this chapter you should attempt the [ONLINE F4 MCQ TEST](#)





Chapter 13

COMPANY LAW: LOAN CAPITAL

Loan Capital

- A debenture is 'the written acknowledgement of a debt by a company'
- May be secured or unsecured
- May be a single debenture or a series of debentures
- If issued as a series, debenture holders rank 'pari passu inter se'
- Security / the charge may be fixed or floating
- To be valid, the charge must be registered within 21 days of its creation
- If there are 2 charges over the same property, a fixed charge will take precedence over a floating charge
- If there are 2 fixed charges (or 2 floating charges) over the same property, the earlier one will take precedence
- The earlier one is the one which is registered first!
- Debenture holders are creditors of the company, not members



Fixed Charges

- Attaches to specific assets
- Company is not free to deal / dispose of those charged assets
- Fixed charge created within the 6 months immediately prior to a company commencing liquidation may be invalid
- A liquidator will try to prove invalidity
- A receiver may prove validity if
 - ▶ The charge was granted in exchange for new 'money' or
 - ▶ The company was solvent at the date of creation of the charge
- In the event of a liquidation, the fixed charge debenture holder ranks number one in the sequence of asset distribution
- Where a floating charge exists over an asset, there may be a negative pledge clause
- The effect is to ensure that a floating charge debenture holder has to be notified of any proposed fixed charge over the same asset



Floating Charges

- Unlike fixed charges, floating charges do not attach to specific assets
- Defined in the case re Yorkshire Woolcombers as:-
 - ▶ A charge on a class of assets of a company, present and future
 - ▶ Where the class changes from time to time in the ordinary course of business
 - ▶ And the company may deal with these assets until the charge crystallises
- Typically applies to the current assets of inventory and accounts receivable
- Whether a charge is fixed or floating is a matter of commercial reality rather than how it has been named
- In re Tunbridge a 'fixed' charge was held by the court to be floating because all three Yorkshire criteria were met
- In re Cimex a 'floating' charge was held to be fixed because the assets did not change from time to time in the ordinary course of business
- A floating charge will be invalid if created within the 12 months immediately prior to the commencement of a liquidation



Debentures Compared with Shares

- Fixed rate of interest
- Payable even though no profits
- No votes
- Security (not always)
- Preferential entitlement to return of money
- Possession of the charged asset
- Rights when company defaults
 - ▶ Apply to court for liquidation order
 - ▶ Apply to court for administration order
 - ▶ Appoint a receiver (provided no administration order is in effect)

When you have finished this chapter you should attempt the [ONLINE F4 MCQ TEST](#)



Chapter 14

COMPANY LAW: LIQUIDATIONS

Liquidation

- Compulsory or voluntary
- Voluntary may be members' or creditors'
- Essential difference is solvency
- Court may order liquidation if:-
 - ▶ Special resolution
 - ▶ Number of members falls below 2 (plcs only)
 - ▶ Failure to obtain a trading certificate within 12 months of incorporation (plcs only)
 - ▶ Suspension of business for 12 months (or failure to commence business within 12 months)
 - ▶ Unable to pay its debts as they fall due
 - ▶ Just and equitable



Compulsory Liquidation

- Unable to pay its debts as they fall due
 - ▶ Need to show the court that the company has owed the petitioning creditor more than £750 for more than 21 days
 - ▶ The debt should not be in dispute
- Just and equitable
 - ▶ Failure of substratum
 - Re German Date Coffee Co.
 - ▶ Deadlock on the board
 - Re Yenidji Tobacco
 - ▶ Quasi-partnership situation
 - Ebrahimi v Westbourne Galleries
- But just and equitable only given in the absence of alternative remedy (re A Company)



Administrator Appointed by the Court

- Application to the court by :-
 - ▶ Members ordinary resolution, directors or by creditors
- Court may grant if:-
 - ▶ Company is unable to pay its debts
 - ▶ The order, if granted, is likely to achieve the desired result
- Effect of an order
 - ▶ Moratorium on company's debts
 - ▶ Powers of management passed to administrator
 - ▶ Petitions for winding-up are dismissed
 - ▶ Any administrative receiver already in office must step aside



Duties of an Administrator

- Agent of the company and the creditors
- So has fiduciary duties as well as legal
- Must send notice of appointment to creditors
- Must obtain a list of creditors
- Must send notice of appointment to registrar within 7 days
- Must require a statement of affairs
- Must identify appointment on all company business letters / correspondence
- Must prepare proposals for achievement of administration objectives
- Must manage the affairs of the company



Advantages of Administration Compared with Liquidation

- Company may continue after the process is completed
- Company is sheltered from creditors allowing time to design acceptable proposals
- Creditors are therefore prevented from applying for a liquidation
- Administrator can challenge previous transactions
- Creditors more likely to get some money back
- Members will hold shares in a viable company (possibly)
- Any creditor can apply to the court
- Floating charge debenture holders can appoint without reference to the court
- Creditors (potentially) will have a continuing customer
- Directors could avoid acquiring the reputation of having been involved in an insolvent company



End of Administration Period

- Automatically ends:-
 - ▶ When successfully completed
 - ▶ 12 months after appointment
 - ▶ Application to court by administrator
 - ▶ Application to court by a creditor
 - ▶ When original applicant is discovered to have had an inappropriate motive
- Administrator can apply to court
 - ▶ On determining that administration cannot be effective
 - ▶ The company should never have been in administration
 - ▶ (if appointed by the court) the administration has been successful



Sequence of distribution of assets in a liquidation

- 1= liquidator's fees and expenses
- = amounts due to lenders secured by way of fixed charge including:
 - ▶ outstanding capital
 - ▶ interest on overdue payments
 - ▶ lenders expenses incurred in connection with the recovery of the amount due
3. amounts due to preferential creditors (not to be confused with preference shareholders!) including:
 - ▶ outstanding company contributions to employees' pension funds
 - ▶ amounts outstanding in respect of social security contributions
 - ▶ employees' remuneration outstanding up to a value representing the lower of 4 months' remuneration or £800 for each employee
4. *** amounts due to lenders secured by way of floating charge
5. any creditor that has a specific claim over any of the company's assets - for example a claim over inventory that the company has not yet paid for
6. any further amounts outstanding to creditors / payables including any debts still not fully satisfied from higher up this list - for example, unpaid wages that exceeded the 4 month / £800 limit
7. any calls paid in advance by shareholders
8. preference shareholders
9. equity / ordinary shareholders

*** from this point onwards up to and particularly including category 6, distribution is potentially affected by the introduction of the "Prescribed Part"



The “Prescribed Part”

- the concept of the prescribed part was introduced in 2003 in an effort to ring-fence / secure / set aside / protect an amount from the proceeds of sale of the assets of the company in liquidation for the benefit of the unsecured creditors / payables in category 6 on the previous page
- it ensures that those people that have no security for the amounts owed to them will have at least something due to them from the liquidation
- the prescribed part is calculated as follows:
 - ▶ where net assets in the liquidation are less than £10,000, the prescribed part is 50% of that amount
 - ▶ where net assets are greater than £10,000 but lower than £600,000, the prescribed part is
 - 50% of the first £10,000 net assets +
 - 20% of the excess over £10,000 net assets up to a maximum of £600,000 net assets
 - ▶ the effect is that, even though there may be an amount remaining unsatisfied to the lenders secured by floating charge debenture, the proceeds of the sale of the assets that are the subject of the floating charge shall be partially set aside as prescribed part for the benefit of those ranking lower than the secured debenture holders

When you have finished this chapter you should attempt the [ONLINE F4 MCQ TEST](#)



Chapter 15

COMPANY LAW: ILLEGALITIES

Wrongful Trading

- Previous law extended by Insolvency Act 1986
- Previously, directors could only be liable for company's debts where they were guilty of fraudulent trading – difficult to prove
- I.A. 1986 designed to give creditors increased protection
- An example of lifting the veil
- Directors (and sometimes others too) may be held liable when:-
 - ▶ Company has commenced insolvent liquidation
 - ▶ They knew, or should have known, that this was probable
 - ▶ They held a position of power (director)
- Court may allocate financial penalty on the liquidator's application
- Directors may escape liability if they can show the court that they took every step necessary to mitigate / minimise the creditors' potential loss



Fraudulent Trading

- two offences under the name “fraudulent trading”
- a criminal offence under the Companies Act 2006, and
- a civil offence under the Insolvency Act of 1986
- the criminal offence applies to the situation where an entity has been set up
- or allowed to continue trading specifically with the intention of defrauding creditors
- penalty is a fine and/or imprisonment up to 10 years
- the civil offence applies when an entity is being liquidated
- where it becomes apparent that an entity has continued trading with the intention of defrauding creditors, the liquidator can take action against anyone who was knowingly a party
- if found liable, the Court may direct that those persons liable shall contribute to the shortfall in the entity’s assets in such amounts as the Court thinks fit



Money Laundering

- A process whereby the proceeds of criminal activity are converted into assets appearing to have a legitimate origin
- Usually involves 3 distinct phases
 - ▶ Placement of the funds into legitimate business activity
 - ▶ Transfer of money from business to business (or place to place) to conceal its original source
 - ▶ Integration – the money takes on the appearance of having come from a legitimate source
- Proceeds of Crime Act 2002 seeks to control money laundering by the creation of 3 categories of criminal activity
 - ▶ Laundering (maximum 14 years prison and / or fine)
 - ▶ Failure to report (maximum 5 years prison and / or fine)
 - ▶ Tipping-off (maximum 5 years prison and / or fine)
- The offence of failure to report relates only to individuals acting in the course of business – for example, accountants



Insider Dealing

- Insider – a person who has a business connection with a company as a result of which they may acquire relevant information
- Dealing – buying or selling shares or securities in a company
- Unpublished price – sensitive information is information about the company which is not in the public domain.....
-is less than 6 months old, and.....
-is, on publication, likely to have a material impact on the market price of the company's shares
- An insider in possession of unpublished price – sensitive information should not deal
- An offence is also committed if the insider encourages another person to deal
- A person dealing as a result of that encouragement, and believing the source to be an insider, is also committing an offence
- Disclosure of inside information, other than in the proper course of employment to an authorised person, is also an offence
- Some defences are available to be claimed



Bribery

- Bribery Act 2010 targets both bribery and corruption
- 4 offences
 - bribing another person
 - receiving a bribe
 - bribing a foreign public official (FPO) (see next page)
 - commercial organisation failing to prevent bribery (see next)
- bribing = offering financial or other advantage to perform a relevant function or activity improperly
- relevant function or activity:
 - any function of a public nature
 - any activity connected with a business
 - any activity performed in the course of a person's employment
 - any activity performed by, or on behalf of, a group of persons
- these "relevant functions or activities" may be anywhere in the world



Bribing an FPO

- offence to offer, directly or indirectly, a financial or other advantage to an FPO intending to influence them in gaining business or an advantage in connection with business
- an FPO holds an administrative, legislative or judicial position outside the UK
- commercial organisation failing...
 - ▶ a company or partnership is liable if an agent, employee or subsidiary bribes another person intending to gain a business advantage
- Defence - if a company can show that it had adequate procedures in place, appropriate to the level of risk
 - ▶ "adequate procedures" based on six guidance principles



The Six principles

- proportionate procedures
 - ▶ proportionate to risks faced and size of company
- commitment by management
 - ▶ management should assess the nature and extent of risks faced and develop appropriate procedures to manage that risk
- due diligence
 - ▶ the company should apply due diligence procedures in respect of company personnel who are at greater risk of offering bribes
- communication
 - ▶ to ensure all employees / connected persons are aware of the company's culture and attitude
 - ▶ includes training and education procedures
- monitoring and review
 - ▶ procedures should be regularly reviewed and improved as necessary
- "adequacy of procedures" is a matter for a court to decide
- NB "hospitality" that is reasonable and proportionate is acceptable, ie is it not prohibited by the Act.



Penalties

- an individual who is found guilty faces imprisonment up to 10 years
- a guilty company is liable to an unlimited fine
- but, in addition, there is reputation loss...
- ... and potentially, civil claims against the directors for failing to implement adequate procedures

First conviction

- Munir Patel found guilty of accepting £500 to suppress a driving conviction from court records. Serving a 3 year prison sentence

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Chapter 16

CAPITAL MAINTENANCE

Capital Maintenance

- The members contribute capital to the company
- This should be maintained within the company by way of net assets
- Known as the buffer fund
- Called "shareholders' equity" and comprises share capital plus undistributable reserves
- Undistributable reserves are :-
 - ▶ Share premium account
 - ▶ Capital redemption reserve
 - ▶ Accumulated unrealised profits less accumulated unrealised losses
 - ▶ Any other reserve identified by the company's constitution as undistributable
- Development of the principle of capital maintenance addresses three areas:-
 - ▶ Restrictions on the payment of dividends
 - ▶ Restrictions on the reduction of capital
 - ▶ Assistance given to outsiders to acquire the company's shares



Capital Maintenance – Payment of Dividends

- Power to declare dividends is given to the directors by the company's constitution
- Members do not have an automatic right to receive a dividend (they approve one at the company's general meeting but cannot vote to increase the dividend proposed by the directors)
- Dividends are normally paid based on the paid-up capital of the company
- Dividends may be in the form of a cash payment (normal) or in another form (for example, a scrip dividend)
- A dividend is a company debt only from the date it is declared and due for payment
- If it is declared and unpaid, it is a deferred debt
- Unclaimed dividends become statute barred after 6 years
- Dividends may only be declared out of profits available for the purpose
- This is defined as 'accumulated realised profits less accumulated realised losses'
- There is no distinction drawn between capital profits and revenue profits



Capital Maintenance – Reduction of Capital

- A company may reduce its capital, but only under the strictest control
- 3 authorities are required
 - ▶ Special resolution
 - ▶ Power in the constitution
 - ▶ Consent of the court
- And for only 3 reasons/situations
 - ▶ The company's capital is no longer represented by available assets (it has been suffering losses)
 - ▶ The company wishes to extinguish / cancel the liability of a class of share – for example a £1 share, 70p paid could become a 70p share fully paid
 - ▶ The company wishes to restructure its capital funding and may, for instance, now wish to replace some of its shares by way of loan capital
- The court is involved because creditors' rights could be adversely affected



Share Capital

- It is illegal to issue shares for an amount which is lower than the nominal value of the share
- Where shares are issued, whether for cash or otherwise, for an amount in excess of their nominal value, an amount equal to that excess shall be credited to the Share Premium Account
- The share premium account is an undistributable reserve and has very limited uses:-
 - ▶ Finance the issue of fully paid bonus shares to existing members
 - ▶ Write off preliminary and formation expenses
 - ▶ Provide for the premium payable on the redemption of shares or debentures
 - ▶ Write off the expenses of, discounts allowed on or commissions paid on any issue of shares or debentures
- But the combination of 'discounts allowed on' and 'issue of shares' is an illegal combination
- Despite the principle that shares may not be issued at a discount, private companies are able to issue shares in consideration for non-cash goods or services received
- The true / fair value of these goods or services could be lower than the nominal value of the shares issued. This is not illegal – but only applies to private companies



Share Capital

- Variation of class rights

- ▶ Rights attach to a particular class of share and typically refer to:-
 - voting rights
 - entitlement to dividends
 - return of capital in a liquidation
- ▶ If the variation of rights is specified by the constitution, then follow the constitution
- ▶ If not specified by the constitution, then special resolution is needed
- ▶ Note, if constitution provides for the variation, it could require merely an ordinary resolution or could even require some greater majority than 75%
- ▶ These provisions apply even for companies without a share capital, for example a company limited by guarantee



Treasury shares

- For many years within English Law it was illegal for a company to hold shares in itself or in its holding company. As a natural pre-cursor it was illegal for a company to purchase its own shares.
- But then, towards the end of the last century, the law was changed and companies were allowed to purchase their own shares and cancel them.
- There is a lot of commercial sense in this basic concept. If the board of directors have confidence in the company's prospects, and if the company has available funds, what better target for their investment than the company's own shares? Subsequent cancellation would reduce the number of shares in issue and potentially strengthen earnings per share.
- A basic rule established from the start of this allowable activity was that the acquisition should be financed from distributable profits. The reasoning behind this particular requirement is to protect the interests of the company's creditors. The practicalities of the rule are that an amount equal to the nominal value of the purchased shares should be transferred to a non-distributable element of equity out of "profits which would otherwise have been available for distribution" – more commonly referred to as "distributable profits".
- The effect of this is to maintain the "buffer fund" or "creditors' buffer fund", statutorily described as "share capital plus undistributable reserves". Historically, these purchased shares had to be cancelled.
- Most recently, a public company is now allowed to purchase its own shares and, instead of cancelling them, it may now choose to hold them "in treasury" until such time as it chooses either to cancel the shares or to sell them – effectively to re-issue them.
- These are called "Treasury Shares" and here are some one-liners about them.
- Shares held in treasury:
 - ▶ are available for re-issue without the normal formalities associated with a share issue
 - ▶ must have been quoted on a recognised stock exchange
 - ▶ shall carry no voting rights
 - ▶ shall not be entitled to receive a dividend or similar distribution
 - ▶ when sold, shall cause any consideration received to be treated as a realized profit
 - ▶ when cancelled, shall cause the company to send a return to the Registrar within 28 days detailing the cancellation and the number and nominal value of the cancelled shares
 - ▶ may be held from initial issue by a company holding back a proportion of its shares for the purposes of a subsequent issue
- When treasury shares are cancelled the company must send a return to the Registrar – a Statement of Capital – effectively confirming that the company continues to satisfy the minimum share capital requirements for a public company.

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