European Communities Act 1972 and the Deregulation and Contracting Out Act 1994. These Acts, exceptionally, authorise the amendment of primary legislation by subordinate 'regulations' that by-pass the usual full parliamentary procedure (see 'Regulatory amendments to CA 2006', p 4). This has certain advantages—for instance, it enables the UK government to honour its obligations to implement EU Directives promptly without taking up precious parliamentary time—but it also has its drawbacks. There is not the same opportunity for scrutiny and debate that a normal Bill receives. And the amendments are necessarily restricted to doing no more than the empowering Act permits: the statutory instrument cannot effect related changes to other parts of company law, however logical or desirable such further measures might be. As a consequence, before the enactment of CA 2006, the companies legislation had become progressively more and more diffuse and untidy.

Despite acknowledging this, any future reforms of CA 2006 will still have to pursue these familiar and rather unsatisfactory reform routes. The CLR had usefully recommended that there should be a permanent Company Law Reporting Commission to keep company law and governance under review and submit an annual report to the Secretary of State. In turn, the Secretary of State would be under a duty to consult the Commission on proposed secondary legislation (*Final Report*, Vol 1, paras 5.21–5.37). The government rejected this suggestion, however, saying it preferred a flexible approach, and had already shown its commitment to reform and consultation by setting up the CLR itself (White Paper, Cm 5553-I, 2002, part II, paras 5.25–5.27).

In its 2005 White Paper, the government countered with its own proposal (Cm 6456, para 6.1). It suggested that after CA 2006 was enacted, future reform and restatement of company law should be made by a special form of secondary legislation, using a procedure like that for regulatory reform orders under the Regulatory Reform Act 2001. This would have involved consultation by the Secretary of State, examination by committees of both Houses and final approval by a resolution of each House. However, despite widespread earlier support, this proposal was defeated as an inappropriate process for large and potentially controversial reforms.

➢ Question

What are the advantages and disadvantages of these different models for law reform in ensuring that the UK has a 'modern company law for a competitive economy'? (In 2010, BIS conducted an evaluation of the main provisions of CA 2006, and concluded that further significant amendments were not warranted, although a number of smaller and more technical issues are now under review (eg narrative reporting by directors).[28])

(p. 20) The purpose of company law: enabling or regulatory?

Legal scholars, economists and social scientists have between them established an extensive body of literature that focuses on variants of the question: what is company law *for* ?—or, perhaps, what *should* it be for? At the one extreme, there are those who advocate that its role should be primarily that of *enabling* those engaged in commerce to order their affairs in whatever way suits their purpose best, with minimal interference from the state. A strong belief in the principle of freedom of contract and in the power of market forces characterises this philosophy. At the other extreme, it is contended that the potential for abuse inherent in the concept of limited liability and in the massive economic power wielded by the largest corporations requires the imposition of strong *regulatory* measures by the lawmakers—or, alternatively, that rules of a similar prescriptive nature can be used to make the company a powerful instrument of social engineering, supplementing the law in other areas such as employment law, environmental law, and so on.[29]

To some extent linked with these debates is a well-established classification of the rules of company law into those which are permissive ('may'), those which are presumptive ('may waive') and those which are mandatory ('must' or 'must not'). This analysis was pioneered by the doyen of American company law scholars, Professor Eisenberg, in an article in (1989) 89 Colum LR 1461.

The corporation laws of the United States jurisdictions are generally regarded as the most liberal and permissive, and those of Germany as among the most prescriptive. So far as English law is concerned, it is fair to say that

while much of the nineteenth-century legislation was enabling, the innovations of the twentieth century have been increasingly more regulatory in nature. Typically, the more recent reform packages have been introduced with the avowed intention of striking a balance between interfering with business as little as possible, on the one hand, and ensuring that adequate measures are in place to curb abuse and sharp practice, on the other. But invariably caution seems to have dictated that the scales should be tipped heavily in the latter direction. CA 2006 has clearly followed this pattern in some respects, but reversed it in others. Where the overall balance now lies is not so clear.

Classification of companies

The Companies Acts recognise a number of types and classifications of company, as described in the following sections.

Limited and unlimited companies: CA 2006 s 3

CA 2006 s 3 defines a 'limited company' and an 'unlimited company'. A company may be limited by shares or by guarantee by an appropriate limiting provision in the company's constitution. Where there is no such limiting provision on the liability of the company's members, a company is an 'unlimited company'.

An *unlimited company* has no limit on the liability of its members. In other words, members can be called upon to satisfy personally the whole of its liabilities to its creditors. In a *limited company*, this liability is restricted by law to an amount fixed by the terms of issue of **(p. 21)** the shares or by the company's constitutional documents. Unlimited companies are exempt from the statutory obligation to publish their accounts and reports (s 448).

Companies limited by shares and companies limited by guarantee

There are two types of limited company. In a company *limited by shares* a member is not liable for the company's debts beyond the amount remaining unpaid on his or her shares. This is, of course, in addition to what he or she (or a previous owner of the shares) has already paid on those shares. Thus, if a company allots to Smith a share of nominal value £1 'at par' (ie for a price of £1), and 60p is paid to the company by Smith on the issue of that share to him, the maximum potential liability of Smith or any later holder of that share to meet the company's debts is the outstanding balance of 40p.

In a company *limited by guarantee* a member is only liable to make a contribution to the assets of the company in the event of its being wound up, and the amount of this contribution (very commonly a nominal sum such as £5) is fixed at the outset by the company's constitution.

Companies limited by guarantee are used mainly for non-profit-making purposes, ranging all the way from some of the major charities to the local golf club. Since they must be formed without any share capital, they have to look elsewhere for their funding, for example to subscriptions or fees.

Public and private companies: CA 2006 s 4

CA 2006 s 4 defines 'private' and 'public' companies in the following terms: a 'private company' is any company that is not a public company; and a 'public company' is a company with a certificate of incorporation that states it is a public company, and that has complied with all the necessary provisions of the Act (or former Companies Acts) as regards registration or re-registration as a public company. There is a minimum share capital requirement (the 'authorised minimum'), currently £50,000 (CA 2006 ss 761 and 763). This authorised minimum may be satisfied in sterling or the euro equivalent of the prescribed sterling amount (s 763).

Only a company limited by shares may be a public company. Public companies have the advantage of being able to offer their shares by advertisement to the public for investment (s 755); but they are subject to a greater degree of regulation by the law.

A *private company* is any company that is not a public company. The legislation makes a number of concessions for private companies—for example, a private company may have only one director while a public company must

have at least two (s 154), and a public company is subject to minimum capital requirements (ss 761ff). Only private companies may take advantage of the written resolutions procedure for decision-making (ss 288ff).

The name of a public company ends with the designation 'plc', and that of a private company with the word 'Limited' (ss 58ff).

English company law, unlike that of most other European countries, deals with both public and private companies in the same Act. From time to time there have been suggestions that the law should be reframed so that each category has its own statute, or that the law should go even further to accommodate the special needs of the smallest businesses by having a separate, simplified, legislative regime especially designed for them (as was done for a short time by the Close Corporations Act in South Africa). However, neither the CLR nor the Law Commissions considered that there was any great support for such a proposal in this country, and it is unlikely to be advanced further.

Change of company status

CA 2006 ss 89ff permit a company to alter its status (eg from limited to unlimited, or from private to public) by re-registration.

(p. 22) In each case various conditions have to be met. These relate to: (i) the agreement of the company's members to the change of status (eg sometimes it is necessary to have the unanimous support of members, sometimes the support of a special resolution (ie 75% vote) of the members agreeing to the change); (ii) satisfying the conditions necessary for the new status; and (iii) ensuring there are no historical circumstances that militate against the change.

Charitable and community interest companies

A company of the types already mentioned may also be a charity (if it meets the legal requirements to attract that classification) or a community interest company (if it meets the requirements of Pt 2 of C(AICE)A 2004).

A limited company wishing to register as a community interest company (CIC) must be approved by the Regulator of Community Interest Companies, who must be satisfied that the company meets the 'community interest' test and is not an excluded company. A company meets the community interest test if a reasonable person might consider that its activities are being carried out for the benefit of the community (C(AICE)A 2004 s 35(2)). Excluded companies are companies devoted to political campaigning. CICs are subject to limitations on the dividends they may pay to their members.

European public limited-liability companies (SEs)

It is possible to register a European public limited-liability company (*Societas Europaea* or SE) in any EU state under Regulation (EC) 2157/2001. There are strict preconditions to be met, so that in effect the formation of an SE requires collaboration between at least two companies registered in different member states. Together they may then register as an SE. The SE must register as an SE in the member state in which it has its registered office, and it then will be treated in every state as if it were a public limited liability company formed in accordance with the law of the member state in which it has a registered office.

Classifications based on size

The categories noted in the previous sections are classifications of companies formally set out by CA 2006—companies are *registered* within these categories. In addition, a division of private companies and groups is made on the basis of *size* by CA 2006 ss 444ff, and 465ff, which give dispensations from certain of the accounting requirements to 'small' and 'medium-sized' companies and groups, and by CA 2006 ss 475ff, which exempt 'very small' companies from the obligation to have their accounts audited.

'Single member' companies

Since 1992, it has been possible for private companies to have a single member. (The minimum number was formerly two.) These companies are subject to some special rules under the Act (eg CA 2006 s 357, which requires decisions taken by the single member to be recorded in writing). Thus single member companies may be regarded as a further sub-species of company for classification purposes.

Notwithstanding these special provisions, and the CA 2006 approach of 'think small first', BIS announced in early 2011 that it was considering a new corporate form for one person businesses.[30]

(p. 23) Parent and subsidiary companies: CA 2006 s 1159

Larger enterprises often operate as corporate groups, or in structures where the parent company or holding company owns (either wholly or partially) a number of subsidiary companies. CA 2006 s 1159 defines one company to be a 'subsidiary' of another (the 'holding' company) where the holding company (i) holds a majority of the voting rights in it; or (ii) is a member of it and has the right to appoint or remove a majority of its board of directors; or (iii) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it; or (iv) is a subsidiary of a company that is itself a subsidiary of the holding company. Although holding companies and subsidiaries are separate legal persons, CA 2006 makes certain special provisions in relation to corporate groups, in at least partial recognition of the practical intuition that the 'group' acts as a combined enterprise.

The recent Supreme Court case of *Enviroco Ltd v Farstad Supply A/S* [2011] UKSC 16, [2011] 1 WLR 921 provides a rather dramatic illustration of these rules in operation. A contractor and its affiliates (which included its co-subsidiaries) were all covered by an indemnity clause in a charterparty. At the time the damage was incurred, the parent company had mortgaged the shares it owned in the subsidiary, so that the lender rather than the parent was their registered legal owner (albeit only by way of security).[31]This was enough to deny the relationship of parent and subsidiary according to the statutory definition, and so was also enough to deny the protection of the indemnity clause in relation to the damage caused by the subsidiary.

Companies and partnerships

There are many types of organisation which have structures that are to a greater or lesser degree similar to those of companies, but which are governed by separate legislation. Some of these are regarded in law as being 'persons' in their own right, distinct from their members: for example, building societies, friendly societies and industrial and provident societies (ie the co-operatives). Others are not, the most familiar example being trade unions. Partnerships generally have no separate personality (although they do in Scotland, and see later).

The most important business alternatives to adopting a corporate structure are sole traders and partnerships. Neither typically has limited liability, although there are some exceptions with partnerships. Partnerships may be divided into three categories: 'ordinary' partnerships, in which every member has unlimited liability for the debts and obligations of the firm; *limited partnerships*, in which the active partners have unlimited liability but the 'sleeping' partners' liability is limited; and *limited liability partnerships*, formed and registered under the Limited Liability Partnerships Act 2000, which do have separate personality and whose members enjoy limited liability.[32]

(p. 24) Incorporation, registration and the role of the registrar

Incorporation

To incorporate a company under CA 2006 ss 7ff, it is necessary to draw up two basic documents, the *memorandum of association* and the company's constitution or*articles of association* (to the extent that this is not supplied by default application of the Model Articles, see s 20). (Note that the memorandum here is not part of the company's constitution; it is not at all the same type of document as the memorandum under the previous Companies Acts legislation.)

The memorandum must be signed or authenticated by the first member or members ('subscribers') and delivered

by them or their agent[33] to the Registrar of Companies, together with the prescribed fee and certain supporting documents (see ss 9ff). These include statements of the company's proposed name, registered office, whether members' liability is to be limited, proposed company directors (and secretary, if there is one[34]) and their consents to act, initial share capital (if it is a company with shares), proposed articles of association (or, by default, the Model Articles will apply) and, finally, a statement of compliance (s 13).

Since the documents have to include the company's name, it is prudent to check in advance that a proposed name is likely to be available. See the rules on names in CA 2006 ss 53ff.

If the registrar is satisfied that the requirements of the Act as to registration are met, he will register the documents (s 14), and issue a certificate of incorporation, signed by the registrar and authenticated by his seal (s 15). Note that a company may not be formed for an unlawful purpose, so this can be grounds for refusing registration (see s 7(2)).

The certificate of incorporation is conclusive evidence that the requirements of the Act have been complied with and that the company is duly registered (s 15(4)).[35] The effects of incorporation are set out in s 16, including that the body corporate is capable of exercising all the functions of an incorporated company (s 16(3)).

Memorandum of association

CA 2006 s 8 deals with the memorandum of association, replacing s 3(1) of the 1985 Act. Under the new legislation the memorandum serves a more limited, but nonetheless important, purpose: it evidences the intention of the subscribers to the memorandum to form a company and become members of that company on formation. In the case of a company that is to be limited by shares, the memorandum also provides evidence of the members' agreement to take at least one share each in the company. It is not possible, or necessary, to amend or update the memorandum; if the members want to change the company's constitution, they do that by changing the articles ('History', p 25 and Chapter 4).

All of the companies formed under the old Acts (such as CA 1985) will have been formed with an 'old-style memorandum' and articles. The memorandum was the primary public constitutional document of the company, setting out the company's fixed financial information, and its objects (or powers). This document was supplemented by the articles of association, which generally dealt with the internal management of the company. CA 2006 s 28 provides that any provisions in the memoranda of existing companies that are not of the type described in CA 2006 s 8 will be treated as if they were provisions in the company's articles.

(p. 25) This includes both substantive provisions and also any provisions for their entrenchment. Existing companies will, therefore, not be required to amend their articles to reflect these statutory changes in CA 2006, but they may do so if they wish.

Constitutional documents: articles of association and the company's objects

The articles of association (as amended from time to time) provide the company with its constitution (s 17). Every company must have articles. These will be either articles registered by the company itself on its incorporation (s 9(5)(b)), or the Model Articles for limited companies that are deemed by CA 2006 s 20 to apply if no articles are registered, or, if articles are registered, to the extent that the Model Articles are not specifically excluded or modified. The default provisions are 'Model Articles' in CA 2006, and 'Tables A–F' for CA 1985.

Under previous legislation (CA 1985 and its predecessors), all companies were required to have *objects*, and these objects had to be specified in the ('old-style') memorandum. So, for example, a company's objects might be the running of schools, the building of canals or the pursuit of research into medical diseases. The 'objects' were the activities that the company had been formed to pursue. Their statement was intended to provide comfort to members and creditors, who could rest secure in the knowledge of the ventures the company would pursue. It was also intended to constrain the directors, preventing them exercising their powers for unauthorised ends. But the courts soon came to the view that purported activities outside the company's objects were void, being *ultra vires*, or outside the company's capacity to act. This had a significant and detrimental effect on both the company and those it had dealings with: contracts entered into in good faith were rendered void, with all that followed from

that. This was commercially unacceptable, and statutory provisions were enacted to protect third parties while still restraining directors.

The public role played by a statement of the company's objects was recognised as inessential, and CA 2006 s 31(1) now provides that a company will have unrestricted objects unless the objects are specifically restricted by the articles. This means that unless a company makes a deliberate choice to restrict its objects, the objects will have no bearing on what a company can do. If a statement restricting the objects is made, it must be made as part of the company articles of association (s 31(2)).

CA 2006 s 33 provides that the company's constitution binds the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe the provisions. This has significant ramifications: see Chapter 4.

History

Prior to the Joint Stock Companies Act 1856, companies were formed on the basis of a *deed of settlement*—an elaborate form of partnership deed. The Act of 1844 provided for the registration of the deed of settlement and the grant of corporate status in return. The 1856 Act introduced a new constitutional framework based on two documents—the *memorandum of association* and the *articles of association*—and this pattern continued under successive Companies Acts. The memorandum was the more fundamental document: the articles could not modify the memorandum, and if there was any inconsistency, the terms of the memorandum prevailed (*Guinness v Land Corpn of Ireland* (1822) 22 Ch D 349, CA). In addition, statutory provisions such as CA 1985 s 125 (CA 2006 s 22) made it possible to 'entrench' rights by writing them into the memorandum with a prohibition or restriction on their alteration.

Under CA 2006, this question of primacy as between the company's two constitutional documents, its memorandum and its articles, does not arise, as all the company's constitutional provisions are contained in the articles; the memorandum is nothing more than a statement by the first members that they intend to form a legal entity.

The question of alterability was, originally, perhaps the most important distinction between the two documents: apart from changing its name (in very limited circumstances) and **(p. 26)** increasing its capital, a company could do nothing under the Act of 1856 to alter any of the terms of the memorandum, while the articles could be changed simply by a special resolution of the members. With time it became possible to alter virtually all the provisions of the memorandum by one procedure or another, and so this distinction was of subsidiary importance. Broadly speaking, however, we can say that by its memorandum a company proclaimed to the world the *external* aspects of its constitution, such as its name, domicile, objects, status (as limited or unlimited, public or private, etc) and capital structure, while the articles were concerned with matters of *internal* organisation, which are primarily of interest to its own members and officers, for example the procedures for paying the subscription price for shares and for transferring shares, the convening and conduct of members' and directors' meetings, the appointment, removal and remuneration of directors and the payment of dividends.

Under CA 2006 s 21(1), as in CA 1985, the general rule is that provisions of a company's articles of association (its constitution) may be altered by special resolution. Through entrenchment provisions, however, more restrictive procedures can be introduced: CA 2006 s 22. Note that CA 2006 s 22(2) has not been brought into force because of concerns that it would prevent the alteration of class rights contained in the articles (see CA 2006 and Limited Liability Partnerships (Transitional Provisions and Savings) (Amendments) Regulations 2009 (SI 2009/2476) reg 2(1)).

Company names

CA 2006 introduced a system of company name adjudication to deal with problems of confusingly similar names. An application to the Companies Name Adjudicator stating the objection must be made. Two possible grounds for an application are specified in CA 2006 s 69: (i) it is the same as a name associated with the applicant in which he has goodwill; or (ii) it is sufficiently similar to such a name that its use in the UK would be likely to mislead by suggesting a connection between the company and the applicant. An objection will be upheld if either of these

grounds is satisfied, unless the defendant company can establish one of the defences listed in s 69(4). The cases on 'passing off' are likely to be material in interpreting this provision (see, eg, *Reckitt & Coleman Ltd v Borden Inc* [1990] 1 All ER 873; *Exxon Corpn v Exxon Insurance Consultants International Ltd* [1982] Ch 119; *Asprey & Garrard Ltd v WRA (Guns) Ltd* [2001] EWCA Civ 1499, CA).

The registrar's decision to register

The registrar cannot refuse registration if the objects of the company are lawful and the documents are in order.

[1.04] R v Registrar of Companies, ex p Bowen [1914] 3 KB 1161 (King's Bench Divisional Court)

Application was made to register a proposed company named The United Dental Service Ltd. The subscribers to the memorandum were seven unregistered dental practitioners. The registrar refused to register the company unless either the memorandum was altered so as to provide that the work of the company should be undertaken only by registered dentists, or the name of the company was amended so as not to include the word 'dental' or 'dentist'. The applicants sought a writ of mandamus to compel the registrar to register the company. It was held that the registrar's refusal was unjustified, and mandamus was granted.

> LORD READING CJ: In my opinion the question turns in the main … upon whether the use of these words, 'The United Dental Service', would amount to an offence under the Dentists Act 1878 … I think these words, 'United Dental Service', imply a description of the acts to be performed, and do **(p. 27)** not imply that the persons who will perform them are persons specially qualified under the statute of 1878. The Registrar of Companies would be entitled, if the use of the proposed name would be an offence under the statute (either under this or any other statute), to refuse to register the company with that name; but, having arrived at the conclusion that that would not be the effect of the use of the words 'United Dental Service', I hold that the registrar was wrong in refusing registration upon that ground. …
>
> AVORY J delivered a concurring judgment.
>
> BANKES J concurred.

➢ Note

The registrar's powers in relation to company names have varied under successive Companies Acts. For the present law, see CA 2006 ss 53ff. The use of the word 'Dental' is now restricted by regulations made under the previous CA 1985 s 29 (now see CA 2006 ss 55 and 56) and requires the consent of the General Dental Council.

The registrar may refuse to register a company whose objects are unlawful.

[1.05] R v Registrar of Joint Stock Companies, ex p More [1931] 2 KB 197 (Court of Appeal)

The registrar refused to register a company formed to sell tickets in an Irish lottery. The Court of Appeal held that the lottery was illegal in England and that his refusal was right.

> SCRUTTON LJ: This is a short point involving the construction of, s 41 of the Lotteries Act 1823. Two gentlemen proposed to sell tickets in England in connection with an Irish lottery. For some reason they did not propose to do this themselves; they proposed to form a private company to do it. It is merely conjecture on my part that this may be due to the fact that the provisions in the Act of 1823 making

offenders liable to be punished as rogues and vagabonds do not apply to a company, and so the two gentlemen intending to form this company wished in this way to avoid the risk of being prosecuted under the Act. They accordingly lodged the memorandum and articles of association of the proposed company with the Registrar of Companies, who, when he saw that the object of the company was to sell tickets in a lottery known as the Irish Free State Hospitals Sweepstake, refused to register the company. Whereupon an application was made to the court for a writ of mandamus directing the registrar to register the company. To succeed in that application the applicant must show that it is legal to sell in England tickets for the Irish Free State Hospital Sweepstake authorised by an Act of the Irish Free State. The only Act which can be supposed to authorise the selling in England is an Irish Act, but the Irish Parliament has no jurisdiction in England, and that being so, the Irish Parliament cannot authorise lottery tickets to be sold in England. The authority to sell in any place must be given by the Parliament having jurisdiction in that place, and the Imperial Parliament has given no authority to sell lottery tickets in England. … The appeal must be dismissed.

GREER and SLESSER LJJ delivered concurring judgments.

Registration does not establish conclusively that the objects of a company are lawful, but after the issue of a certificate of incorporation the regularity of the incorporation cannot be challenged on the grounds of illegality except in proceedings specially brought in the name of the Crown to have the registration cancelled.

[1.06] Bowman v Secular Society Ltd [1917] AC 406 (House of Lords)

The main object of the society, which was registered as a company limited by guarantee, was 'to promote … the principle that human conduct should be based upon natural knowledge, **(p. 28)** and not upon super-natural belief, and that human welfare in this world is the proper end of all thought and action …'. It was alleged that this object, involving a denial of Christianity, was against public policy, so that a bequest to the society was invalid. The House of Lords upheld the view of the courts below that this object was not unlawful. This extract from the speech of Lord Parker of Waddington is concerned with the incidental point of the conclusiveness of the certificate of incorporation. His views were supported by Lords Dunedin and Buckmaster.

LORD PARKER OF WADDINGTON: My Lords, in the present case … the testator has given his residuary estate through the medium of trustees for sale and conversion to the Secular Society Limited, and the question is as to the validity of this gift. There is no doubt as to the certainty of the subject-matter, or as to the testator's disposing power, or as to the validity of his will. So far as the conditions essential to the validity of the gift are concerned, the only doubt is as to the capacity of the donee.

The Secular Society Limited was incorporated as a company limited by guarantee under the Companies Acts 1862 to 1893, and a company so incorporated is by, s [18] of the Act of 1862 [CA 2006 s 16(3)] capable of exercising all the functions of an incorporated company. Prima facie, therefore, the society is a corporate body created by virtue of a statute of the realm, with statutory power to acquire property by gift, whether inter vivos or by will. The appellants endeavour to displace this prima facie effect of the Companies Acts in the following manner. If, they say, you look at the objects for which the society was incorporated, as expressed in its memorandum of association, you will find that they are either actually illegal or, at any rate, in conflict with the policy of the law. This being so, the society was not an association capable of incorporation under the Acts. It was and is an illegal association, and as such incapable of acquiring property by gift. I do not think this argument is open to the appellants, even if their major premise be correct. By the first section of the Companies Act 1900 [CA 2006 s 15(4)] the society's certificate of registration is made conclusive evidence that the society was an association authorised to be registered—that is, an association of not less than seven persons associated together for a lawful purpose. The section does not mean that all or any of the objects specified in the memorandum, if otherwise illegal, would be rendered legal by the certificate. On the contrary, if the directors of the society applied its funds for an illegal object, they would be guilty of misfeasance and liable to replace the money, even if the object for

which the money had been applied were expressly authorised by the memorandum. In like manner a contract entered into by the company for an unlawful object, whether authorised by the memorandum or otherwise, could not be enforced either in law or in equity. The section does, however, preclude all His Majesty's lieges from going behind the certificate or from alleging that the society is not a corporate body with the status and capacity conferred by the Acts. Even if all the objects specified in the memorandum were illegal, it does not follow that the company cannot on that account apply its funds or enter into a contract for a lawful purpose. Every company has power to wind up voluntarily, and moneys paid or contracts entered into with that object are in every respect lawfully paid or entered into. Further, the disposition provided by the company's memorandum for its surplus assets in case of a winding up may be lawful though all the objects as a going concern are unlawful. If there be no lawful manner of applying such surplus assets they would on the dissolution of the company belong to the Crown as bona vacantia: *Cunnack v Edwards*.[36]

My Lords, some stress was laid on the public danger, or at any rate the anomaly, of the courts recognising the corporate existence of a company all of whose objects, as specified in its memorandum of association, are transparently illegal. Such a case is not likely to occur, for the registrar fulfils a quasi-judicial function, [37] and his duty is to determine whether an association applying for **(p. 29)** registration is authorised to be registered under the Acts. Only by misconduct or great carelessness on the part of the registrar could a company with objects wholly illegal obtain registration. If such a case did occur it would be open to the court to stay its hand until an opportunity had been given for taking the appropriate steps for the cancellation of the certificate of registration. It should be observed that neither, s 1 of the Companies Act 1900, nor the corresponding section of the Companies (Consolidation) Act 1908, is so expressed as to bind the Crown, and the Attorney-General, on behalf of the Crown, could institute proceedings by way of certiorari to cancel a registration which the registrar in affected discharge of his quasi-judicial duties had improperly or erroneously allowed. But … I do not think that the present is a case requiring such action on the part of your Lordships' House.

My Lords, it follows from what I have already said that the capacity of the Secular Society Limited to acquire property by gift must be taken as established, and, all the conditions essential to the validity of the gift being thus fulfilled, the donee is entitled to receive and dispose of the subject-matter thereof …

LORDS DUNEDIN, SUMNER and BUCKMASTER delivered concurring opinions.

LORD FINLAY LC dissented.

[1.07] HA Stephenson & Son Ltd v Gillanders, Arbuthnot & Co (1931) 45 CLR 476 (High Court of Australia)

EVATT J: [The] effect of formal incorporation is not regarded by the legislature as empowering the registrar to ignore compliance with the Act; but the legislature wishes to ensure that after the new legal entity has been brought into existence by the formal act of a state functionary, it will not be necessary for persons dealing with the company to ascertain at their peril whether the various statutory requirements have been complied with … It is not so much a power given to the registrar by the legislature, as a protection given to the public who may be dealing with the company because of the assumption that the registrar will be careful in the matter …

See also *Salomon v Salomon & Co Ltd* **[2.01]** and *Scott v Frank F Scott (London) Ltd* **[4.01]**.

➢ Notes

1. CA 2006 s 15(4) appears to make it unnecessary for English company law students to consider the topics of defective incorporation and declaration of nullity which have traditionally occupied a substantial amount of

space in the textbooks in other European countries and in parts of the United States. It was not considered necessary for the UK to take any steps to implement Arts 11 and 12 of the First EU Company Law Directive, which deal with these questions. However, this may have been a misjudgement, in the light of *R v Registrar of Companies, ex p AG* **[1.08]**.

2. The Companies Act and many textbooks encourage the belief that companies are formed by a genuine 'association' of people with a real business that they wish to incorporate, who have constitutional documents drawn up for that specific purpose, subscribe to them and send them off to the registrar for registration. But this is to turn a blind eye to the facts. In the case of about 60% of the companies formed in the UK today, the incorporation procedure is a charade: it is purely a paper exercise carried out by people who have no intention of using the company themselves for any business whatsoever. These incorporations are undertaken to meet the very considerable demand for 'ready-made' or 'shelf' companies; and (as a glance at the advertisements in any solicitors' professional journal will show) many firms exist which specialise in supplying such companies to buyers, and hold extensive stockpiles of dormant companies of every type and kind ready to be 'delivered' to customer's order. The initial **(p. 30)** subscribers and officers will be clerks in the firm's employment, and the company's name a figment of someone's imagination.

3. There is one statutory exception to the principle that incorporation is freely available: the Trade Union and Labour Relations (Consolidation) Act 1992 s 10(3) states that a trade union shall not be registered as a company under CA 2006, and that any such registration is void.[38]

4. For many years, there was no recorded case in which the AG had brought proceedings to have a company's registration cancelled in the manner suggested in*Bowman v Secular Society Ltd* **[1.06]**. This gap has now been filled by the case next cited.

The registrar's decision to incorporate a company is subject to judicial review at the suit of the Crown.

[1.08] R v Registrar of Companies, ex p AG (1980) [1991] BCLC 476 (Queen's Bench Divisional Court)

The facts appear from the judgment.

> ACKNER LJ: This application has many of the indicia that one might expect to find in a students' end of term moot. It appears indirectly to have been stimulated by the action of the Policy Division of the Inland Revenue.
>
> The Attorney-General applies to quash the incorporation and registration by the Registrar of Companies nearly a year ago, that is on 18 December 1979, of Lindi St Claire (Personal Services) Ltd as a limited company under the provisions of the Companies Act 1948 to 1976.
>
> The grounds of the application, to state them quite briefly, are these. In certifying the incorporation of a company and in registering the same the Registrar of Companies acted ultra vires or mis-directed himself or otherwise erred in law, in particular as to the proper construction and application of, s 1(1) of the Companies Act 1948 in that the company was not formed for any lawful purpose but, on the contrary, was formed expressly with the primary object of carrying on the business of prostitution, such being an unlawful purpose involving the commission of acts which are immoral and contrary to public policy.
>
> The first point to consider is the validity of the procedure which has been adopted in this case, that is by way of application for judicial review, such application being made by the Attorney-General.
>
> [His Lordship referred to *Bowman v Secular Society Ltd* **[1.06]** and continued:] So clearly the Attorney-General is entitled to bring these proceedings.
>
> Now as to the facts, these come within a very short compass and they amount to the following. A firm of certified accountants, Gilson Clipp & Co, on 16 August 1979 wrote to the Registrar of Companies at Companies House, Crown Way, Maindy, Cardiff pointing out that they had received a letter from the Inland

Revenue Policy Division, who stated that they considered prostitution to be a trade which is fully taxable, and that they, the certified accountants, saw no reason why their client should not be able to organise her business by way of a limited company. They asked whether the name 'Prostitute Ltd' was available for registration as a limited company, pointing out the main object of the company would be that of organising the services of a prostitute.

The registrar did not like that name and did not accept it, nor did he accept another name 'Hookers Ltd' which was offered. But subsequently two further names were offered, 'Lindi St Claire (Personal Services) Ltd' and 'Lindi St Claire (French Lessons) Ltd', and it was the former which he registered.

The memorandum of association said in terms that the first of the objects of the company was 'To carry on the business of prostitution'.

(p. 31) The only director of the company is Lindi St Claire, Miss St Claire describing herself specifically as 'Prostitute'. The other person who owns also one share is a Miss Duggan, who is referred to as 'the cashier'.

Leave having been obtained to apply for judicial review, Miss St Claire wrote in these terms:

> I would like to say that prostitution is not at all unlawful, as you have stated, and I feel it is most unfair of you to take this view, especially when I am paying income tax on my earnings from prostitution to the government Inland Revenue.
>
> Furthermore, I feel it is most unfair of you to imply that I have acted wrongly, as I was most explicit to all concerned about the sole trade of the company to be that of prostitution and nothing more. If my company should not be deemed valid, then it should have not been granted in the first place by the Board of Trade. It is most unfair of the government to allow me to go ahead with my company one moment, then quash it the next. …

It is well settled that a contract which is made upon a sexually immoral consideration or for a sexually immoral purpose is against public policy and is illegal and unenforceable. The fact that it does not involve or may not involve the commission of a criminal offence in no way prevents the contract being illegal, being against public policy and therefore being unenforceable. Here, as the documents clearly indicate, the association is for the purpose of carrying on a trade which involves illegal contracts because the purpose is a sexually immoral purpose and as such against public policy.

Mr Simon Brown submits that if that is the position, as indeed it clearly is on the authorities, then the association of the two or more persons cannot be for 'any lawful purpose'.

To my mind this must follow. It is implicit in the speeches in the Bowman case to which I have just made reference. In my judgment, the contention of the Attorney-General is a valid one and I would order that the registration be therefore quashed.

SKINNER J concurred.

➢ Questions

1. Tom, Dick and Harry wish to incorporate the plumbing business which they have carried on in partnership for some years. What would you say might be (i) the advantages and (ii) the disadvantages for them in buying a ready-made company rather than having one incorporated by their own solicitor?

2. If they do decide to use a ready-made company, what steps will have to be taken in order to transfer the