The need to establish both these things was pointed out by Sargant LJ in*Houghton*'s case in a judgment which was concurred in by Atkin LJ; but his observations, as I read them, are directed only to a case where the contract sought to be enforced is not a contract of a kind which a person occupying the position which the agent was permitted by the board to occupy would normally be authorised to enter into on behalf of the company …

In the present case the findings of fact by the county court judge are sufficient to satisfy the four conditions, and thus to establish that Kapoor had 'apparent' authority to enter into contracts on behalf of the company for their services in connection with the sale of the company's property, including the obtaining of development permission with respect to its use. The judge found that the board knew that Kapoor had throughout been acting as managing director in employing agents and taking other steps to find a purchaser. They permitted him to do so, and by such conduct represented that he had authority to enter into contracts of a kind which a managing director or an executive director responsible for finding a purchaser would in the normal course be authorised to enter into on behalf of the company. Condition (1) was thus fulfilled. The articles of association conferred full powers of management on the board. Condition (2) was thus fulfilled. The plaintiffs, finding Kapoor acting in relation to the company's property as he was authorised by the board to act, were induced to believe that he was authorised by the company to enter into contracts on behalf of the company for their services in connection with the sale of the company's property, including the obtaining of development permission with respect to its use. Condition (3) was thus fulfilled. The articles of association, which contained powers for the board to delegate any of the functions of management to a managing director or to a single director, did not deprive the company of capacity to delegate authority to Kapoor, a director, to enter into contracts of that kind on behalf of the company. Condition (4) was thus fulfilled.

I think the judgment was right, and would dismiss the appeal.

WILLMER and PEARSON LJJ delivered concurring judgments.

➢ Notes

1. This case makes it clear that it is not possible to rely upon the ostensible authority of an agent if the person transacting with the company knew that the act was beyond the actual authority of that agent. Also see *Criterion Properties plc v Stratford UK Properties LLC* **[3.13]**.

2. In *AMB Generali Holding AG v Manches* [2005] EWCA Civ 1237, the court held that although a company that has endowed one of its members with ostensible authority (eg by virtue of an appointment to a given position) may withdraw that authority by sacking the 'agent', third parties may continue to rely upon the initial representation unless and until the withdrawal of authority is communicated to them specifically.

(p. 113) ***Implied actual authority.***

[3.09] Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549 (Chancery Division and Court of Appeal)

Richards was chairman of directors of the defendant company and its chief executive or '*de facto* managing director', who often committed the company to contracts on his own initiative and only disclosed the matter to the board subsequently. The board acquiesced in this practice. The plaintiff (referred to in the judgment as Lord Suirdale) was chairman and managing director of another company, 'Perdio', which it was planned should eventually be merged with the defendant. As part of an agreement to put more money into Perdio, the plaintiff (who had been made a director of the defendant company) was given certain letters (referred to as C 23 and C 26) signed by Richards, by which the defendant agreed to guarantee the repayment of money owed to the plaintiff and to indemnify him against certain losses. When sued on these undertakings, the defendant alleged that Richards had had no authority to make the contract in question. Roskill J held that Richards had *apparent* authority to bind

his company; the Court of Appeal affirmed his decision, but on the ground that he had *actual* authority.

ROSKILL J: The set-up in Brayhead is easy to envisage. It was an industrial holding company with a large number of subsidiaries. Its directors were in the main working directors, each in charge of a section of the holding company's subsidiaries. One would look after electronics, another engineering, and so on. They would all come back to Mr Richards for advice and—which is more important—decisions from time to time on matters concerning their own particular group. The final decision—and the final decision most especially on any matter concerning finance—was Mr Richards' and nobody else's. Sometimes, I dare say, the directors persuaded him to take or to refrain from taking a particular step; no doubt, like any wise chief executive, he sought and obtained advice before he made up his mind; but in all these cases the final decision, I am quite satisfied, rested with him and with nobody else.

If one goes through the minutes and documents which have been put before me, one can see repeated examples of Mr Richards acting in this way. Sometimes, of course, the matter would come back to the board for formal ratification after he had committed Brayhead perhaps technically without express authority. On other occasions, of which there are a number of examples in the minutes, he plainly committed Brayhead and then, as it were, reported the matter afterwards … I have no doubt that the board knew that he was doing this sort of thing all the time, and that whenever he thought it was necessary he assumed, or purported to assume, authority to bind Brayhead and that the board allowed him to do it and acquiesced in his doing it. That is not to say, to use Mr Finer's phrase yesterday, that all the directors were 'Yes men'; I am sure they were nothing of the kind. Mr Richards knew they were nothing of the kind. Mr Richards was a forceful personality; he knew his own mind. I think he quite clearly was allowed by Brayhead to hold himself out as having ostensible or apparent authority to enter into commitments of the kind which he entered into or purported to enter into, when he signed C 23 and C 26. …

[The Court of Appeal affirmed the decision of ROSKILL J, but on the ground that Richards had actual authority.]

LORD DENNING MR: I need not consider at length the law on the authority of an agent, actual, apparent or ostensible. That has been done in the judgments of this court in *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* **[3.08]**. It is there shown that actual authority may be expressed or implied. It is *express*when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be a managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or **(p. 114)** implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it.

Ostensible or apparent authority is the authority of an agent as it *appears* to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his *actual* authority is subject to the £500 limitation, but his *ostensible* authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. …

Apply these principles here. It is plain that Mr Richards had no express authority to enter into these two contracts on behalf of the company: nor had he any such authority implied from the nature of his office. He had been duly appointed chairman of the company but that office in itself did not carry with it authority to enter into these contracts without the sanction of the board. … The judge held that Mr Richards had ostensible or apparent authority to make the contract, but I think his findings carry with it the necessary inference that he had also actual authority, such authority being implied from the circumstance that the

board by their conduct over many months had acquiesced in his acting as their chief executive and committing Brayhead Ltd to contracts without the necessity of sanction from the board.

LORDS WILBERFORCE and PEARSON delivered concurring judgments.

➢ Questions

1. Is it right to think in terms of the 'usual' authority of a managing director? Is it not likely that the terms of appointment of managing directors will vary from case to case? (See *Harold Holdsworth & Co (Wakefield) Ltd v Caddies* [1955] 1 WLR 352, HL.)

2. If Richards had implied actual authority to make the contract in *Hely-Hutchinson v Brayhead Ltd*, should not the trial judge in *Freeman and Lockyer* **[3.08]** have made a similar finding about Kapoor?

➢ Notes

1. *Guinness plc v Saunders* **[5.01]** provides a dramatic illustration of how easy it is to purport to contract with parties who lack actual authority to bind the company (here, it was a subcommittee of the board that lacked actual authority to negotiate remuneration issues), and the dire consequences that can ensue.

2. Remember that acts that are beyond the actual authority of directors or other agents of a company can be ratified: see 'Consent, approval or authorisation by members: CA 2006 s 180', pp 436ff and 'Ratification of acts of directors: CA 2006, s 239', p 437ff.

Directors' authority and breach of directors' duties

What is the appropriate analysis when a contract has been entered into by a director in breach of the director's duties to the company? To take a simple example, suppose a director has express actual authority to enter into contracts under £10,000 on behalf of the company,[20] and enters into **(p. 115)** such a contract, but for improper purposes or in breach of fiduciary duty. Is the contract valid and binding on the company, being within the authority of the agent, but voidable by the company as against third parties who are not bona fide purchasers for value without notice of the company's equitable rights? Or, alternatively, is the contract void, being outside the actual authority of the agent (who can have no actual authority to act in breach of duty), unless the third party can rely on the ostensible authority of the agent to enter into such engagements? Put like this, it is evident that the practical outcome is likely to be the same on either analysis, although importantly the onus of proof lies in different places, and that can be important in practice.

An agent has no actual authority to act in breach of duty (dicta).

[3.10] Hopkins v TL Dallas Group Ltd [2004] EWHC 1379 (Ch)

The question in this case was whether a deputy managing director had actual or ostensible authority to sign a letter on behalf of his company committing the company to pay a sum of £994,000 to a third party. Lightman J held that the director had no actual authority, either because the 'usual' authority of such a deputy managing director did not extend to agreeing to such exceptionally onerous undertakings, or (as is of special interest here) because a director's actual authority could never extend to acting for improper purposes or in breach of fiduciary duty (as was the case here). Further, on the facts here, the third party could not rely on the agent's ostensible authority, since the third party had actual knowledge or was at least on notice that the transactions were both abnormal and suspicious and therefore required confirmation of their propriety and regularity from the company's managing director.

LIGHTMAN J: … Before I look at the facts I should say a word on the relevant law. The authority of an agent is 'actual (express or implied) where it results from a manifestation of consent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself': *Bowstead & Reynolds on Agency* 17th ed ('Bowstead') Article 22(1). This authority extends to doing 'whatever is necessary for, or ordinarily incidental to, the effective execution of his actual authority': Bowstead Article 27. The authority may in appropriate circumstances extend to raising funds and giving security for borrowings for the purpose of fulfilling the functions and duties assigned to him. Where a board of directors appoint one of the members to an executive position 'they impliedly authorise him to do all such things as fall within the usual scope of that office' (*Hely-Hutchinson v Brayhead Ltd* **[3.09]**, at 583).

The grant of actual authority to an agent will not normally include authority to act for the agent's benefit rather than that of his principal and therefore, without agreement, the scope of actual authority will not include this. The grant of actual authority should be implied as being subject to a condition that it is to be exercised honestly and on behalf of the principal: *Lysaght Bros & Co Ltd v Falk* (1905) 2 CLR 421. It follows that, if an act is carried out by an agent which is not in the interests of his principal, for example signing onerous unconditional undertakings, then the act will not be within the scope of the express or implied grant of actual authority. As a result there cannot be actual authority: 'the agent is simply not authorised to act contrary to his principal's interests: and hence that an act contrary to those interests is outside his actual authority. The transaction is therefore void unless the third party can rely on the doctrine of apparent authority' (Bowstead para 8-218).

In the case of *Macmillan Inc v Bishopgate Trust (No 3)* [1995] 1 WLR 978, Millet [sic] J (as he then was) stated that 'English law … recognises the distinction between want of authority and abuse of authority' (at 984). He then went on to approve the statement that 'an act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests'. Bowstead suggests that this statement of the law should be limited to apparent authority i.e. that acting fraudulently or in furtherance of own interests will by its very nature nullify actual authority, but not apparent authority. I respectfully agree.

(p. 116) ➢ Question

Does the distinction drawn by Millett J (and rejected by Lightman J) mirror the distinction drawn in *Rolled Steel* **[3.04]** between want of capacity and abuse of capacity? Why did the Court of Appeal in *Rolled Steel* see this distinction as important?

[3.11] Rolled Steel Products (Holdings) Ltd v British Steel Corpn [1986] Ch 246 (Court of Appeal)

For the facts and another part of the decision, see **[3.04]** and **[3.17]**. On the question of 'want of authority' and 'abuse of authority', Slade LJ (with whom Lawton LJ agreed) and Browne-Wilkinson LJ appear to differ.

SLADE LJ: … [Considering the judgment of Buckley J in *In re David Payne & Co Ltd* [1904] 2 Ch 608:] He [Buckley J] asked the question, at p. 612:

> 'is it a condition attached to the exercise of the power that the money should be borrowed for the purposes of the business, or is that a matter to be determined as between the shareholders and the directors?'

… his conclusion was, at p. 613:

> ‘If this borrowing was made, as it appears to me at present it was made, for a purpose illegitimate so far as the borrowing company was concerned, that may very well be a matter on which rights may arise as between the shareholders and directors of that company. It may have been a wrongful act on the part of the directors. But I do not think that a person who lends to the company is by any words such as these required to investigate whether the money borrowed is borrowed for a proper purpose or an improper purpose. The borrowing being effected, and the money passing to the company, the subsequent application of the money is a matter in which the directors may have acted wrongly; but that does not affect the principal act, which is the borrowing of the money.’

In these circumstances, he held, at p. 614, that the defendants:

> ‘who have paid this money and taken this debenture without notice that the money was going to be applied as it was, are not affected by anything arising in regard to that.’

… The one crucially important point to which Buckley J. and the Court of Appeal in *David Payne* did not expressly advert is the basis upon which the lenders would have lost their security if they had known of the improper purpose for which the moneys lent were going to be applied. The basis is, in my opinion, this. The directors of the borrowing company in fact had no authority from the company to take the loan and grant the debenture because these transactions were not effected for the purposes of the company. Nevertheless, as a general rule, a company incorporated under the Companies Acts holds out its directors as having ostensible authority to do on its behalf anything which its memorandum of association expressly or by implication gives the company the capacity to do. In *David Payne* the company’s memorandum gave it the capacity to borrow. As a matter of construction of the company’s memorandum, the court was not prepared to construe the words ‘for the purposes of the company’s business’ as limiting its corporate capacity but construed them simply as limiting the authority of the directors. In the absence of notice to the contrary, the lenders would thus have been entitled to assume, on the authority of the principle in *Turquand’s case* **[3.16]** and on more general principles of the law of agency, that the directors of the borrowing company were acting properly and regularly in the internal management of its affairs and were borrowing for the purposes of the company’s business: see, for example, *In re Hampshire Land Co.* **[3.31]** … However, a party dealing with a company cannot rely on the ostensible authority of its directors to enter into a particular transaction if it knows they in fact have no such authority because it is being **(p. 117)** entered into for improper purposes. Neither the rule in *Turquand’s* case nor more general principles of the law of agency will avail him in such circumstances …

[He also referred to] … the powerful judgment of Pennycuick J. in *Charterbridge Corporation Ltd. v. Lloyds Bank Ltd*. [1970] Ch. 62, where one finds the following statement of principle, at p. 69:

> ‘Apart from authority, I should feel little doubt that where a company is carrying out the purposes expressed in its memorandum, and does an act within the scope of a power expressed in its memorandum, that act is an act within the powers of the company. The memorandum of a company sets out its objects and proclaims them to persons dealing with the company and it would be contrary to the whole function of a memorandum that objects unequivocally set out in it should be subject to some implied limitation by reference to the state of mind of the parties concerned.
>
> ‘Where directors misapply the assets of their company, that may give rise to a claim based on breach of duty. Again, a claim may arise against the other party to the transaction, if he has notice that the transaction was effected in breach of duty. Further, in a proper case, the company concerned may be entitled to have the transaction set aside. But all that results from the ordinary law of agency and has not of itself anything to do with the corporate powers of the company.’

Pennycuick J., having subsequently proceeded to review the authorities cited to him, apparently saw no

reason to qualify this statement of the law and neither do I. I respectfully agree with it in its entirety and would regard the principles stated in the *David Payne* case [1904] 2 Ch 608 as giving effect to the 'ordinary law of agency.'

I also respectfully agree with the following observations made by Oliver J., after an extensive review of the authorities, in *In re Halt Garage (1964) Ltd*. [1982] 3 All ER 1016 **[5.03]**, 1029–1030:

> 'I cannot help thinking, if I may respectfully say so, that there has been a certain confusion between the requirements for a valid exercise of the fiduciary powers of directors (which have nothing to do with the capacity of the company but everything to do with the propriety of acts done within that capacity), the extent to which powers can be implied or limits be placed, as a matter of construction, on express powers, and the matters which the court will take into consideration at the suit of a minority shareholder in determining the extent to which his interests can be overridden by a majority vote. These three matters, as it seems to me, raise questions which are logically quite distinct but which have sometimes been treated as if they demanded a single, universal answer leading to the conclusion that, because a power must not be abused, therefore, beyond the limit of propriety it does not exist.'

To sum up, my conclusions on the ultra vires point are these. The relevant transactions of 22 January 1969 were not beyond the corporate capacity of the plaintiff and thus were not ultra vires in the proper sense of that phrase. However, the entering into the guarantee and, to the extent of the sum guaranteed, the debenture was beyond the authority of the directors, because they were entered into in furtherance of purposes not authorised by the plaintiff's memorandum. Despite this lack of authority, they might have been capable of conferring rights on Colvilles if Colvilles had not known of this lack of authority. Colvilles, however, did have such knowledge and so acquired no rights under these transactions. Even if the no due authorisation point discussed earlier in this judgment were not open to the plaintiff, because Mr. Shenkman had duly declared his interest at the relevant board meeting [and thus had *actual* authority], the plaintiff could disclaim these transactions, which its directors had carried out on its behalf, as being unauthorised, inasmuch as they were carried out for improper purposes.

BROWNE-WILKINSON LJ: [where, in context, the reference to abuse of the *company's* powers should, it seems, be taken a referring to abuse of the *directors'* powers] … (5) If a company enters into a transaction which is *intra vires* (as being within its capacity) but in excess or abuse of its powers, such transaction will be set aside at the instance of the shareholders. (6) A third party who has notice—actual or constructive—that a transaction, although *intra vires* the company, was entered into in excess or abuse of the powers of the company cannot enforce such transaction against the **(p. 118)** company and will be accountable as constructive trustee for any money or property of the company received by the third party. (7) The fact that a power is expressly or impliedly limited so as to be exercisable only 'for the purposes of the company's business' (or other words to that effect) does not put a third party on inquiry as to whether the power is being so exercised, i.e., such provision does not give him constructive notice of excess or abuse of such power.

➢ Question

Does the detail of Slade LJ's analysis support his conclusions? Is the analysis persuasive in any event? What is to be made of the comments of Oliver J in *In re Halt Garage (1964) Ltd*. ?

[3.12] Clark v Cutland [2003] EWCA Civ 810, [2004] 1 WLR 783 (Court of Appeal)

The facts are immaterial.

ARDEN LJ:

26 There seems to me to be a basic inconsistency between [counsel's] submission that the payments to the pension fund trustees were void and his main submission. His submission on this point seems to me to accept that the contributions were misapplications of the company's assets. However that may be, [the company's articles provided that] directors were not entitled to any remuneration unless it was authorised by the company in general meeting. The judge held that there was no such authorisation in the present case. It follows that the payments of pension contributions to the pension fund trustees were without legal effect and not merely voidable: see *Guinness plc v Saunders* **[5.01]**, 693, per Lord Templeman, with whom Lord Keith of Kinkel, Lord Brandon of Oakbrook and Lord Griffiths agreed, and at pp 698–702, per Lord Goff of Chieveley, with whom Lord Griffiths also agreed.

27 If those payments had merely been made by Mr Cutland in breach of his duty to the company, and he had not also made them without the authority of the company, Mr Stockill's submission that the payments were voidable would have been correct. However, where an agent carries out a transaction without authority, the consequence is (as I have stated) that the transaction is without legal effect. This consequence is more serious in law than that which attaches to a transaction which is voidable since the right to rescind a voidable transaction can be lost. Because the sanction attaching to an unauthorised transaction is more serious, it must supersede the sanction of voidability that would otherwise attach in the present case.

[3.13] Criterion Properties plc v Stratford UK Properties LLC [2004] UKHL 28, [2004] 1 WLR 1846 (House of Lords)

More detailed facts appear in Lord Scott's opinion. This was an appeal against a decision of the Court of Appeal ([2003] BCLC 50) that a 'poison pill' arrangement was binding on the claimant company and should not be set aside. The 'poison pill' was intended to thwart a hostile takeover of Criterion. The issue before the House of Lords was whether it was open to the board of directors of a public company to authorise the signing on the company's behalf of a 'poison pill' agreement intended to deter outsiders from making offers to members to purchase their shares. In particular, was it open to the board to authorise the signing of a 'poison pill' agreement where, as here, the deterrence consisted of a contingent divesting of the company's assets? Companies Act 1985 s 35A [CA 2006 s 40] was relevant. The House of Lords dismissed the appeal. **(p. 119)**

LORD NICHOLLS OF BIRKENHEAD:

4 … If a company ('A') enters into an agreement with B under which B acquires benefits from A, A's ability to recover these benefits from B depends essentially on whether the agreement is binding on A. If the directors of A were acting for an improper purpose when they entered into the agreement, A's ability to have the agreement set aside depends upon the application of familiar principles of agency and company law. If, applying these principles, the agreement is found to be valid and is therefore not set aside, questions of 'knowing receipt' by B do not arise. So far as B is concerned there can be no question of A's assets having been misapplied. B acquired the assets from A, the legal and beneficial owner of the assets, under a valid agreement made between him and A. If, however, the agreement is set aside, B will be accountable for any benefits he may have received from A under the agreement. A will have a proprietary claim, if B still has the assets. Additionally, and irrespective of whether B still has the assets in question, A will have a personal claim against B for unjust enrichment, subject always to a defence of change of position. B's personal accountability will not be dependent upon proof of fault or 'unconscionable' conduct on his part. B's accountability, in this regard, will be 'strict'.

LORD SCOTT OF FOSCOTE:

Introduction

6 This appeal arises out of an application for summary judgment made in an action in which the appellant,

Criterion Properties plc ('Criterion'), is seeking to establish that an agreement into which it had apparently entered is not binding upon it and should be set aside. The respondent, Stratford UK Properties LLC (which I will refer to as 'Oaktree' for reasons I will later explain) contends, on the contrary, that there is nothing the matter with the agreement and has counter-claimed for specific performance. …

Criterion's case

28 This is a case in which Criterion appears to have entered into a contract with Oaktree granting Oaktree the put option that I have described. The SSA was signed by Mr Glaser and Mr Palmer, purporting to do so on Criterion's behalf. Did they have actual authority to do so? That is the first question. But there are sub-questions. It is accepted that Criterion in general meeting did not authorise or subsequently ratify the SSA. But did the board of Criterion do so? If the board did do so, did it have the power to do so? The effect of s 35A of the Companies Act 1985, may have to be taken into account. If the answer to these sub-questions is 'No', then it would seem to follow that Mr Glaser and Mr Palmer had no actual authority to sign the SSA.

29 If Mr Glaser and Mr Palmer had no actual authority to sign the SSA, did they have apparent, or ostensible, authority to do so? The answer to this question depends on a number of considerations as to which there is at present no clear evidence and at least one of which raises an issue of considerable public importance. The issue I have in mind is whether it is open to a board of directors of a public company to authorise the signing on the company's behalf of a 'poison pill' agreement intended to deter outsiders from making offers to shareholders to purchase their shares. And, in particular, is it open to a board to authorise the signing of a 'poison pill' agreement where, as here, the deterrence consists of a contingent divesting of company assets? The issue of the apparent authority of the board, or of Mr Glaser and Mr Palmer, must also take into account the features of the SSA that went beyond simply including provisions to deter an unwanted predator but would have deterred also the most desirable of predators, would have entrenched the chairman's and the managing director's continuance in their then current offices, and would have put them in a position in which their voluntary decision to relinquish office would potentially attract a heavy financial penalty for their company. Could it be said that they, or any of them, had apparent authority to conclude such an agreement? Here, too, s 35A of the Companies Act 1985, may be relevant.

(p. 120) 30 This case turns, in my opinion, on the 'authority' issue. If Mr Glaser and Mr Palmer either had actual authority to conclude the SSA, given by a person or body with power to confer that authority (see *British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) Ltd* [1983] 2 Ll Rep 9 and especially Lord Brandon of Oakbrook at p 17), or, if they did not have actual authority, had apparent authority to do so, then I can see no reason why the SSA should not be held enforceable against Criterion. If, on the other hand, Mr Glaser and Mr Palmer had neither actual nor apparent authority to conclude the SSA, then the SSA could not be held enforceable against Criterion. Mr Glaser and Mr Palmer might be liable to Oaktree for breach of warranty of authority, but the SSA would not be Criterion's contract. The conscionability or unconscionability of Oaktree's behaviour in seeking to hold Criterion to the SSA would in either case be irrelevant.

31 Both Hart J and the Court of Appeal thought that the SSA was clearly contrary to the commercial interests of Criterion. Hart J thought that Oaktree must have known, or be taken to have known, that that was so. I do not wish to be taken to be saying that knowledge of this sort on the part of Oaktree, or knowledge by Oaktree that Mr Glaser and Mr Palmer were, in signing the SSA, in breach of the duty they owed to Criterion, would be irrelevant to the authority issue. If a person dealing with an agent knows that the agent does not have actual authority to conclude the contract or transaction in question, the person cannot rely on apparent authority. Apparent authority can only be relied on by someone who does not know that the agent has no actual authority. And if a person dealing with an agent knows or has reason to believe that the contract or transaction is contrary to the commercial interests of the agent's principal, it is likely to be very difficult for the person to assert with any credibility that he believed the agent did have actual authority. Lack of such a belief would be fatal to a claim that the agent had apparent authority.

32 In my opinion, the authority issue cannot be resolved by your Lordships on this appeal. The authority issue was not addressed in the courts below, as in my opinion it should have been, and as a result your Lordships have not had the assistance of the courts below in identifying the principles which should be

applied in determining the issue. Nor have counsel had much opportunity, in the period between the opening of the appeal when my noble and learned friend Lord Nicholls of Birkenhead raised the point and the conclusion of the hearing on the following day, to research the point. Moreover there are, as I have endeavoured to indicate, a number of factual matters that may be relevant to the issue that have not yet been placed in evidence. In these circumstances it seems to me, to my regret, that your Lordships cannot finally resolve the issue here and now but must leave the issue either to be resolved at trial or, perhaps, if Criterion are so advised, on a further Civil Procedure Rules, Pt 20 application.

33 I would for these reasons dismiss the appeal.

LORDS RODGER OF EARLSFERRY, WALKER OF GESTINGTHORPE and CARSWELL agreed.

➢ Question

The validity of the contract in this case was seen as a question of the directors' authority to commit the company to the arrangement. Given the judgments in *Rolled Steel*, and the law on 'improper purposes' (see 'Failure to act for proper purposes', p 331), is this the most appropriate approach? Is it the only approach that protects third parties dealing with defaulting directors? See P Watts, 'Authority and Mismotivation' (2005) 121 LQR 4.

➢ Notes

1. In *Rubin v Cobalt Pictures Ltd* [2010] EWHC 2240 (Ch), a director entering into an agreement contrary to the interests of his company on the verge of its insolvency was held to be acting without actual authority. The counterparty to the agreement was held unable to rely on the director's ostensible authority if he knew that the director had no actual authority, since 'he is unlikely to be able to assert that he believed that the director had actual authority if he knows that the director is acting contrary to the commercial interests of his company … If the **(p. 121)** same person is purporting to act on behalf of both parties to a transaction, it is self-evident that the counterparty must be taken to know of any lack of authority of that person to act for the company' [55].

2. A third party only has an obligation to inquire whether the transaction is outside the agent's authority if the circumstances of the transaction are somehow abnormal or suspicious: *Hopkins v TL Dallas Group Ltd* **[3.10]**.

'Usual authority' and its uses

See 'Summary of agency principles', pp 95–96.

The functions of a managing director are not fixed by law, but depend on the particular terms of his appointment.

[3.14] Smith v Butler [2012] EWCA Civ 314 (Court of Appeal)

The primary issue in this appeal was whether a managing director (B) had implied or usual power to suspend the company's executive chairman (S) in the absence of an express delegation of powers by the board. The issue arose in the context of a dispute in a two man company, where B (who owned 31.2% of the shares) alleged that S was defrauding the company, and S (who owned 68.8% of the shares) threatened to use his majority voting power to sack B.

ARDEN LJ (RIMER AND RYDER LJJ concurring):

The primary issue: the powers of a managing director

15 We are not in this case concerned with the more usual question whether a third party dealing with a managing director is entitled to assume that he has power to do what he did. As Lindley LJ held in *Biggerstaff v Rowatt's Wharf* [1896] 2 Ch 93 at 102, a person dealing with a managing director must see whether according to the constitution of the company a director *could have* the powers which that director is purporting to exercise. This appeal, however, is concerned with the question of what powers the managing director *actually had*. There is surprisingly little authority on that point. The powers of a managing director are not, of course, statutorily defined. The parties could have defined Mr Butler's powers when he was appointed. However, they did not do so. In *Hely-Hutchinson v Brayhead* **[3.09]** at 560, Roskill J, whose decision was affirmed by this court, comprising unusually Lord Denning MR, Lord Wilberforce and Lord Pearson, went so far as to state that the question of the implied authority of a managing director was one of 'considerable difficulty', as well as being 'one upon which there appears to be little or no relevant authority'. …

25 In my judgment, the judge's conclusion on this primary issue was correct but the inquiry should proceed not, as the judge analysed it, from the special provisions of the Company's articles as to quorum but from the provisions of its articles setting out the powers of the board to appoint a managing director. [These are from Table A ('the 1985 Table A'), and give the board the power to appoint a managing director and to delegate any of their powers to the managing director.] …

27 In this case, however, there is no express delegation of any specific powers by the board to Mr Butler. Mr Butler simply has a contract of employment appointing him as a managing director. … On the other hand, it was clearly intended that some powers should be implicitly delegated to him. …

28 [Counsel's] proposition is that, in principle, the implied powers of a managing director are those that would ordinarily be exercisable by a managing director in his position. In my judgment, [counsel's] proposition is correct. In *Hely-Hutchinson v Brayhead* **[3.09]** at 583, Lord Denning MR held that the board of directors, on appointing a managing director, 'thereby impliedly authorise him to do all such things as fall within the usual scope of that office.' … Another way of putting that point is that the managing director's powers extend to carrying out those functions on which he did not need to obtain the specific directions of the board. This is simply the default position. It is, **(p. 122)** therefore, subject to the company's articles and anything that the parties have expressly agreed. In essence, the issue is one of interpreting the contract of appointment or employment in the light of all the relevant background, and asking what that contract would reasonably be understood to have meant (*Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1485, PC, and see my judgment in *Stena Line v Merchant Navy Ratings Pension Fund Trustees Ltd* [2010] EWCA Civ 543 at 36–41).

29 On this basis, as might be expected, the test of what is within the implied actual authority of a managing director coincides with the test of what is within the ostensible authority of a managing director: see *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* **[3.08]**.

30 The holder of the office of managing director might today more usually be called a chief executive officer in (at least) a public company. He or she has generally to work on the basis that his appointment does not supplant that of the role of the board and that he will have to refer back to the board for authority on matters on which the board has not clearly laid out the company's strategy. He or she would thus be expected to work within the strategy the board had actually set.

31 In this case, however, it was clear that the strategy of the board was that Mr Smith should be executive chairman. Therefore, his suspension was clearly a matter for the board, and not for Mr Butler acting alone. To my mind it is inconceivable that Mr Butler did not need the instructions of the board on the question of the suspension of the chairman of the board. The fact that Mr Smith has special rights as a director and shareholder under the quorum provisions in the Company's articles reinforces this conclusion, but my conclusion does not rest on those provisions.

32 I do not accept the submission that my conclusion renders Mr Butler powerless to act even if Mr Smith

controlled the board and could prevent any investigation into the claims against himself contrary to the best interests of the Company. Mr Butler is a shareholder himself and has the right to seek relief from unfairly prejudicial conduct by the majority shareholder under section 994 of the 2006 Act. Indeed that is the course which he has now taken. …

33 Alternatively, Mr Butler could have brought a statutory derivative action against Mr Smith in accordance with Part 11 of the 2006 Act. Those provisions could be used even if it was necessary to obtain urgent relief. …

➢ Notes

1. In *British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) Ltd* [1983] BCLC 78, HL, it was held that a branch manager of a multinational insurance company had no 'usual' authority to represent to a bank that a subordinate employee had actual authority to execute undertakings to pay moneys to the bank. The evidence was that all such undertakings were in practice executed by insurance companies at their head office.

2. This decision may be contrasted with *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] BCLC 1409, CA. The senior manager in charge of the Manchester office of the defendant bank (as the plaintiff company's representative knew) had no actual authority to sanction a credit facility for the plaintiff. However, he had signed a letter to the plaintiff offering to provide it with finance. He had no actual authority to sign this letter, either; but he was held to have had ostensible authority, by virtue of his position, to communicate such an offer on behalf of the bank—that is, to inform the plaintiff that head office approval had been given for the offer to be made—and so the bank was bound. (Note: it is not possible to rely upon the ostensible authority of an individual if the person transacting with the company knew that the act was beyond the actual authority of the acting official: *Criterion Properties plc v Stratford UK Properties LLC* **[3.13]**.)

3. Also see *Holland* **[7.02]** which discusses the role of *de facto* directors as fiduciary agents of the company.

(p. 123) ***The secretary of a company has usual authority to bind the company in matters concerned with administration.***

[3.15] Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd [1971] 2 QB 711 (Court of Appeal)

The secretary of the defendant company, Bayne, hired cars from the plaintiff, ostensibly for the company's business; but in fact he fraudulently used them for his own purposes. The company was held bound by the contracts to pay the hire charges.

LORD DENNING MR: [Counsel] says that the company is not bound by the letters which were signed by Mr Bayne as 'Company Secretary'. He says that, on the authorities, a company secretary fulfils a very humble role: and that he has no authority to make any contracts or representations on behalf of the company. He refers to *Barnett v South London Tramways Co*[21] where Lord Esher MR said: 'A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all …' Those words were approved by Lord Macnaghten in *George Whitechurch Ltd v Cavanagh*.[22]They are supported by the decision in *Ruben v Great Fingall Consolidated* **[11.13]**. They are referred to in some of the textbooks as authoritative.

But times have changed. A company secretary is a much more important person nowadays than he was in 1887. He is an officer of the company with extensive duties and responsibilities. This appears not only in the modern Companies Act, but also by the role which he plays in the day-today business of companies.