Finally, even if the intended transfer is by way of gift, the donee may acquire equitable ownership in advance of the transfer of legal title. In two cases, each coincidentally named **(p. 586)** *Re Rose*, reported in [1949] Ch 78 and [1952] Ch 499, it was held that where the donor of shares has done everything in his power to divest himself in favour of the donee (eg by delivering to the donee, or to the donee's agent, or to the company, an executed transfer and the relevant share certificate), then the gift is complete in equity despite the absence of registration.[31] This rule applies even where the directors have a discretion to refuse registration of the transfer, although then the transferee's rights are subject to that restriction. By way of illustration, contrast the successful arguments in the *Rose* decisions with the unsuccessful attempt to apply the same arguments in *Zeital v Kaye* [2010] EWCA Civ 159, CA, where there was no written transfer document and the share certificate had gone missing without the transferor applying for a duplicate.

The rule in *Re Rose* was extended still further in *Pennington v Waine* [2002] EWCA Civ 227, [2002] 1 WLR 2075, CA, where the court found that equitable title had passed even though the transferor still had functions to perform in transferring legal title. This conclusion is difficult to justify, unless the particular facts entitle the transferee to rely on equitable estoppel, as in *Curtis v Pulbrook* [2011] EWHC 167 (Ch).

Also see *Hawks v McArthur* **[11.18]**, illustrating the problems exemplified in the next section, where there are competing legal and equitable claims to the same parcel of shares.

These problems in determining when equitable interests arise have emerged rather dramatically over the past few decades in the context of dealings in part only a shareholder's holding, as in dispositions by way of trust of '50 of my 950 shares' (*Hunter v Moss* [1994] 1 WLR 452, CA) or by way of sale (*Re Harvard Securities Ltd* [1997] 2 BCLC 369 (Ch, Neuberger J).[32] In that context, see the detailed analysis of Campbell J in *White v Shortall* [2006] NSWSC 1379.

Competing claims to shares

A legal title to shares will prevail over an earlier equitable title; but a transfer of the legal title is not perfected until registration of the transferee as holder of the shares.[33]

[11.15] Shropshire Union Railways and Canal Co v R (1875) LR 7 HL 496 (House of Lords)

Mrs Robson sought a writ of mandamus to compel the directors of the company to register a transfer of stock to her from George Holyoake, in whose name it stood. (Holyoake had given the transfer as security for a loan made by Mrs Robson's late husband.) She failed because Holyoake had only a bare legal title (the beneficial interest being in the defendants themselves) and nothing which had happened had displaced the defendants' earlier equity.

> LORD CAIRNS LC: [Undoubtedly] the position of matters was, that the defendants had the whole beneficial interest in the stock … Theirs was the equitable title. Holyoake was a person who held merely the legal title and the right to transfer the stock. He was able, if not interfered with, to **(p. 587)** transfer the stock to any other person, and to give a valid receipt for the purchase-money to any person who had not notice of the beneficial interest of the defendants. On the other hand, any person with whom Holyoake might deal by virtue of his title upon the register, had, or ought to have had, these considerations present to his mind. He ought to have known that although Holyoake's name appeared upon the register as the owner of these shares, and although Holyoake could present to him the certificates of this ownership, still it was perfectly possible either that these shares were the beneficial property of Holyoake himself, or that they were the property of some other person. If he dealt merely by equitable transfer, or equitable assignment with Holyoake, and if it turned out that the beneficial ownership of Holyoake was co-incident and co-extensive with his legal title, well and good; his right would be accordingly, so far as Holyoake was concerned, complete. But, if, on the other hand, it should turn out that Holyoake's beneficial interest was either nil, or was not coextensive with the whole of his apparent legal title, then I say any person dealing with Holyoake, by way of equitable bargain or contract, should have known that he could only obtain a title which was imperfect, and would not bind the real beneficial owner. And, my Lords, he also might have known, and should have known, this, that if he desired to perfect his title, and make it entirely secure, he had the most

simple means open to him—he had only to take Holyoake at his word. If Holyoake represented that he was the real owner of these shares, the proposed transferee had only to go with Holyoake, or to go with the authority of Holyoake in his possession, to the company, and to require a transfer of those shares from the name of Holyoake into his own name. If he had obtained that transfer, and the company had made it, no question could have arisen, and no litigation could subsequently have taken place …

LORDS HATHERLEY and O'HAGAN delivered concurring opinions.

➢ Note

This rule has some surprising consequences. If the legal owner of shares enters into transactions that purport to deliver equitable ownership interests to each of two innocent purchasers, it is possible for the holder of the later interest to obtain priority over the holder of the prior interest if that registration is secured first, and it does not matter that the registration process was pursued in full knowledge of the earlier equitable interest: *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 1 WLR 978 (Millett J) (affd on different grounds in [1996] 1 WLR 387, CA); and *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, CA.

Where the equities as between successive transferees of shares are equal, the first in time prevails.

[11.16] Peat v Clayton [1906] 1 Ch 659 (Chancery Division)

Clayton assigned all his property, including the blocks of shares in question, to trustees for the benefit of his creditors, but failed to hand over the share certificates when requested to do so. The trustees then gave notice of the assignment to the company, but took no further steps. (It should be appreciated that the company was not bound to receive this notice: see s 360 of the Act [CA 2006 s 126].) Clayton later sold the shares through Cohen & Co, brokers, on the Stock Exchange, handing over the certificates and transfers duly executed. When the company refused registration, Cohen & Co provided their purchaser with other shares in the company, and then in these proceedings sought to resist a claim brought by the trustees, as plaintiffs, for a declaration that they were entitled to the shares. It was held, however, that the trustees' interest prevailed, being prior in time.

JOYCE J: As I understand the law, where there are several claimants to shares registered in the name of a third person, the equitable title which is prior in time prevails, unless the claimant under **(p. 588)** a subsequent equitable title proves that, as between him and the company, he had acquired an absolute and unconditional right to be registered as the owner of the shares before the company received notice of the other claim.[34] In my opinion, therefore, the plaintiffs appear to be entitled to these forty shares in the Randfontein company. But Messrs Cohen claim a lien upon them. If they have any lien, however, it is only equitable, and can only be upon Clayton's interest, which is subject to the right of the plaintiffs under the deed of assignment. Then it was said that the plaintiffs had disentitled themselves by negligence. I see no negligence on the part of the plaintiffs, unless it be, as Messrs Cohen allege, in not adopting the procedure now substituted by Ord 46, r 4, for the old procedure by distringas.[35] I cannot accede to the contention that by reason of the omission to adopt this course the plaintiffs must be postponed. If they had proceeded by distringas the result would have been just the same. It would only have prevented the company from registering the transfer to the purchaser, which in fact they did refuse to do by reason of the notice given to them on 8 November on behalf of the plaintiffs …

The result is that the plaintiffs are entitled to a declaration in their favour, and to an order … to register them as the holders of the shares.

Also see *Hawks v McArthur* **[11.18]**.

Although a company is not ordinarily bound by notice of a trust or other equitable interest affecting its shares, this rule does not apply when the company itself asserts an interest in the shares in competition with the person who gave notice.

[11.17] Mackereth v Wigan Coal and Iron Co Ltd [1916] 2 Ch 293 (Chancery Division)

Shares in the defendant company which had formerly belonged to James Hodgson, deceased, were registered in the name of the trustees of his estate, one of whom was the son of the deceased, James Hodgson, junior. The company had notice that the registered shareholders held only as trustees. Later James Hodgson, junior, became indebted to the company and the company, purporting to exercise a lien conferred upon it by the articles, impounded certain dividends due on the shares and subsequently sold the shares to reduce the amount of the debt. It was held that this was an infringement of the rights of the beneficiaries of the estate, and that neither s 27 of the Companies Act 1908 [CA 2006 s 126] nor an article in similar terms applied in a case such as this, where the company was itself involved in the transaction.

> PETERSON J: For the company it was argued that under s 27 of the Act of 1908, and the articles of association, no notice of any equitable interest or trust can affect the company in any way, and that, as the notice of the trust in the present case, which the company in fact received, must be treated as non-existent, or at least ineffectual, the lien which is conferred by the articles is operative. The argument leads far; for it would follow that, if a trustee of shares in a company informed the company that he held the shares for the benefit of other persons, and that he had not as against his cestui que trust any power of mortgaging them for his own benefit, he could yet effectually charge them to the company as security for money lent to him by the company … In several cases it has been stated in broad terms that a company 'need not take notice in any way of trusts': per Brett MR in *Société Générale de Paris v Tramways Union Co*;[36] or that any notice is **(p. 589)** absolutely inoperative to affect a company with any notice: per Lord Selborne in the same case in the House of Lords—*Société Générale de Paris v Walker*.[37] These observations had, however, reference to the obligation of the company to register transfers of shares. If the passages in the judgments to which I have referred were intended to be of universal application, they are not in accordance with the judgments of the House of Lords in *Bradford Banking Co Ltd v Briggs, Son & Co Ltd*.[38]The effect of this decision is briefly stated by Stirling LJ in *Rainford v Keith and Blackman Co Ltd*,[39] in these words: 'Where the company in which the shares are held sees fit to deal with the shares for its own benefit, then that company is liable to be affected with notice of the interest of a third party.'
>
> I am therefore of opinion that s 27 of the Act of 1908 and article 9 of the articles of association do not protect a company which, in the face of notice that the shareholder is not the beneficial owner of the shares, makes advances or gives credit to the shareholder … The result is that the company in the present case was wrong in asserting a lien against the beneficiaries, and must account for the proceeds of sale of the shares, and for the dividends which it has applied towards the satisfaction of the indebtedness of James Hodgson, junior.

➢ Note

Although CA 2006 s 126 provides that no notice of any trust affecting shares shall be 'entered on the register of members … or be receivable by the registrar',[40] it is possible by using the procedures described as 'stop orders' or 'stop notices' (Charging Orders Act 1979 s 5(2)(a) and (b) respectively, and Civil Procedure Rules 1998 rr 73.11–73.15 and 73.16–73.21 respectively) to prohibit a company from registering any transfer of the shares in question or paying any dividend on them, or, alternatively, to require a company to refrain from doing these things without first sending a notice to the person serving the stop notice and giving him or her a specified time to take action.

➢Question

To what extent does a stop notice give a person with an equitable interest in shares effective protection? (See *Drayne v McKillen* [2011] EWHC 3326 (QB) in which the court refused an interlocutory application to discharge a stop notice granted in favour of the alleged beneficial owner of the shares in question, where there was a real prospect of demonstrating such an interest.)

A transfer of shares for valuable consideration, even if it is irregular under the company's articles, is effective to transfer an equitable interest to the purchaser which will prevail over another equitable right accruing at a later date, for example a charging order.

[11.18] Hawks v McArthur [1951] 1 All ER 22 (Chancery Division)

The facts appear from the judgment.

VAISEY J: The plaintiff is the holder of a charging order affecting five hundred ordinary shares of £1 each in a private company called W Lucas & Sons Ltd, which stand in the name of, and **(p. 590)** were originally the property of, the first defendant, Mr Theodore Hunter McArthur, who has not entered an appearance in these proceedings. He claims that that charging order operates on Mr McArthur's interest in those shares, which, he says, is a complete interest, both legal and equitable. The second and third defendants, Mr Roberts and Mr Fraser, claim that the beneficial interest in the shares in question has passed to them as a result of transfers executed in their favour by Mr McArthur in pursuance of certain agreements entered into between themselves and Mr McArthur prior to the execution of those transfers, and they allege that Mr McArthur had no interest in the shares at the date of the charging order on which the charge could operate …

There is, undoubtedly, a basic principle that a charging order only operates to charge the beneficial interest of the person against whom the order is made, and that it is not possible, for instance, to obtain an effective charging order over shares where the person against whom the order is made holds them as a bare trustee. The charging order affects only such interest, and so much of the property affected, as the person whose property is purported to be affected could himself validly charge … [His Lordship then observed that the transfers of the shares had been made in total disregard of the requirements of the articles of association, which obliged an intending transferor to give notice to the company so that the other members could exercise rights of pre-emption. He continued:]

The real question in this case, I think, is whether the alleged agreements … operated so as to amount in equity to a transfer of the shares held by Mr McArthur, as to 200 of them to Mr Roberts, and as to 300 of them to Mr Fraser, or whether the failure or neglect to follow the code laid down by articles 11, 12 and 13 completely vitiates the whole transaction, so that the transfers are worthless and there has been a total failure of consideration for the moneys which were admittedly paid over by Mr Roberts and Mr Fraser to Mr McArthur. It is suggested on behalf of Mr Roberts and Mr Fraser that, notwithstanding the complete failure to comply with the articles, the transfers and the antecedent agreements which must have been made—for one does not execute a transfer without a previous intention to do so—did, in fact, operate as a sale by Mr McArthur to Mr Roberts and Mr Fraser of, at any rate, the beneficial interest in the shares—otherwise the result would be that Mr Roberts and Mr Fraser paid their money and got nothing for it …

Admittedly, Mr McArthur is still the legal owner of the shares. Admittedly, the plaintiff's rights under this charging order are in the nature of equitable rights. And admittedly, the rights of Mr Roberts and Mr Fraser, if they have any rights, are also equitable rights. As I have come to the conclusion that Mr Roberts and Mr Fraser have some rights and that what they did was not a complete nullity, the question is whose rights should prevail. A not irrelevant circumstance is that the equitable rights of Mr Roberts and Mr Fraser precede the equities or quasi-equitable rights under the charging order. In my opinion, the rights of Mr Roberts and Mr Fraser had already accrued at the time the charging order was obtained, and I think, as between the merits (not moral merits, but legal merits) of the plaintiff and the defendants, the rights of the

second and third defendants, Mr Roberts and Mr Fraser, must prevail over the claims of the plaintiff …

Disclosure of substantial interests in shares

It is often material to know who has controlling interests in a company. For public companies, there are requirements relating to disclosure of substantial interests in shares: see 'Transparency obligations: investigation and notification of major voting shareholdings in certain public companies', pp 720ff.

(p. 591) Valuation of shares

In the valuation of shares,[41] ***the valuer is entitled to consider the realities of the company's situation, and may, for example, decline to value the company's assets as a going concern if there is no expectation that the business will make profits.***

[11.19] Dean v Prince [1954] Ch 409 (Court of Appeal)[42]

Dean (now deceased), Prince and Cowen had formed a private company in 1938, taking respectively 140, 30 and 30 shares. All three were 'working directors'. The company's articles provided that on the death of a director his shares should be bought by the surviving directors at a price to be certified as fair by the auditor. On Dean's death in 1951, his holding was valued for the purpose of this article at £7 per share. His widow challenged the valuation in these proceedings, but the Court of Appeal, reversing Harman J, held that the correct principles had been followed by the auditor and upheld his valuation.

DENNING LJ: In this case Harman J has upset the valuation on the ground that the auditor failed to take into account some factors and proceeded on wrong principles. I will take the points in order:

1. *The right to control the company*. Harman J said that the auditor should have taken into account the fact that the 140 shares were a majority holding and would give a purchaser the right to control the company. I do not think that the auditor was bound to take that factor into account. Test it this way: suppose it had been Prince who had died, leaving only 30 shares. Those 30 shares, being a minority holding, would fetch nothing in the open market. But does that mean that the other directors would be entitled to take his shares for nothing? Surely not. No matter which director it was who happened to die, his widow should be entitled to the same price per share, irrespective of whether her husband's holding was large or small. It seems to me that the fair thing to do would be to take the whole 200 shares of the company and see what they were worth, and then pay the widow a sum appropriate to her husband's holding. At any rate if the auditor was of opinion that that was a fair method, no one can say that he was wrong. The right way to see what the whole 200 shares were worth, would be to see what the business itself was worth: and that is what the auditor proceeded to do.

2. *Valuation of the business 'as a going concern'*. Harman J seems to have thought that the auditor should have valued the business as a going concern. I do not think that the auditor was bound to do any such thing. The business was a losing concern which had no goodwill: and it is fairly obvious that, as soon as Mrs Dean had sold the 140 shares to the other two directors—as she was bound to do—she would in all probability call in the moneys owing to herself and to her husband amounting to over £2,000. The judge said that she was not likely to press for the moneys because that would be 'killing the goose that laid the eggs', but he was wrong about this; because as soon as she sold the shares, she would have got rid of the goose and there was no reason why she should not press for the moneys. She was an executrix and the company's position was none too good. It had only £1,200 in the bank to meet a demand for £2,200. In these circumstances the auditor was of opinion that there was a strong probability of the company having to be wound up: and he rejected the going-concern basis. For myself, I should have thought he was clearly right, but at any rate no one can say that his opinion was wrong.

3. *Valuation of the assets of the business*. Once the going-concern basis is rejected, the only possible way of valuing the business is to find out the value of the tangible assets. Harman J **(p. 592)** thought that the assets should have been valued as a whole in situ. It was quite likely, he said, that 'some one could have been found who would make a bid for the whole thing, lock, stock and barrel'. But the judge seems to have forgotten that no one would buy the assets in situ in this way unless he could also buy the premises; and the company had no saleable interest in the premises. In respect of part of the premises the company had only a monthly tenancy; in respect of the rest the company had only a contract for the purchase of the premises on paying £200 a year for twenty-five years. It had no right to assign this contract; and its interest was liable to be forfeited if it went into liquidation, either compulsory or voluntary; and the probability was, of course, that, if it sold all the assets, it would go into liquidation, and hence lose the premises. The company could, therefore, only sell the assets without the premises. That is how the auditor valued them and no one can say that he was wrong in so doing.

4. *Valuation on a 'break-up' basis*. The auditor instructed the valuer, Colonel Riddle, to value the plant and machinery at the break-up value as loose chattels on a sale by auction. Harman J thought that that was a wrong basis because it was equivalent to a forced sale. I would have agreed with the judge if the business had been a profitable concern. The value of the tangible assets would then have been somewhere in the region of £4,000 or £5,000, being either the balance sheet figure of £4,070 or Pressley's figure of £4,835. But the business was not a profitable concern. It was a losing concern: and it is a well-known fact that a losing concern cannot realise the book value of its assets. There is an element to be taken into account which is sometimes spoken of as 'negative goodwill'. It comes about in this way: if a business is making a loss, that shows that its assets, regarded as an entity, are not a good investment. A purchaser will decline, therefore, to buy on that basis. He will only buy on a piecemeal basis, according to what the various assets taken individually are worth: and it is obvious that on a sale of assets piecemeal, the vendor will suffer heavy losses as compared with the book figures. The auditor was therefore quite justified in asking the valuer to value the assets as loose chattels sold at an auction. At any rate, if he honestly formed that opinion, no one can say that he was wrong.

5. *The special purchaser*. Harman J thought that someone could have been found to buy the 140 shares who would use his majority holding to turn out the two directors, and reorganise the factory and put in his own business. In other words, that the shares would have a special attraction for some person (namely, the next-door neighbour) who wanted to put his own business into these premises. I am prepared to concede that the shares might realise an enhanced value on that account: but I do not think that it would be a fair price to ask the directors to pay. They were buying these shares—under a compulsory sale and purchase—on the assumption that they would continue in the business as working directors. It would be unfair to make them pay a price based on the assumption that they would be turned out. If the auditor never took that possibility into account, he cannot be blamed; for he was only asked to certify the fair value of the shares. The only fair value would be to take a hypothetical purchaser who was prepared to carry on the business if it was worth while so to do, or otherwise to put it into liquidation. At any rate if that was the auditor's opinion, no one can say that he was wrong.

I have covered, I think, all the grounds on which Harman J upset the valuation. I do not think they were good grounds. I would, therefore, allow the appeal and uphold the valuation.

EVERSHED MR and WYNN-PARRY J delivered concurring judgments.

➢ Notes

1. In holding that it was proper for the auditor not to take into account the fact that the block of shares carried with it control of the company, Denning LJ was no doubt correct on the particular facts of this case; but his remarks should not be accepted as laying down a general rule. In the court below, Harman J had held that the control factor was of paramount importance. In the Court of Appeal, Evershed MR said that he 'should not himself quarrel' with a rateable apportionment of an assets valuation among all the shares, but his judgment

turned essentially on other points; while Wynn-Parry J held that no extra value should be placed **(p. 593)** on the controlling shares because (i) the article in question referred to the current worth of *the company's* shares, not the deceased director's shares; and (ii) whereas the seller might be parting with control, none of the surviving directors was necessarily *buying* it, since they were more than one in number.

2. It was established by *Short v Treasury Comrs* [1948] AC 534 that where one purchaser is buying control but none of the vendors is itself selling a controlling interest, the extra value should be disregarded. But there are *dicta* in that case which strongly support the view that where a majority shareholding is sold by a single seller to a single buyer, it is proper to value the holding more highly. The same point is made *obiter dicta* in *Re Grierson, Oldham & Adams Ltd* **[15.11]** and *Gold Coast Selection Trust Ltd v Humphrey* [1948] AC 459 at 473.

3. An indication of the value of 'control' in practice can be gained from the following relative figures put by an expert on the value of different holdings in a small private company:[43]

Value of 100% shareholding:	£100,000
Value of 51% shareholding:	£48,000
Value of 50% shareholding:	£35,000
Value of 20% shareholding:	£5,000
Value of 10% shareholding:	£1,000

4. There are other alternatives to assets-based formulae for ascertaining the value of a share. For example, in *Re Macro (Ipswich) Ltd* **[13.28]** Arden J preferred to use a valuation reckoned by grossing up the average dividend yield. This would be appropriate in a case where the company is making steady profits but its assets are difficult to value or are undervalued in its accounts. In *Ng v Crabtree* [2012] EWCA Civ 333, CA, the Court of Appeal accepted the experts' opinion that an earnings-based approach was appropriate in valuing 'a company generating earnings, or a small profitable trading company'. On the facts, therefore, it was appropriate to ignore a debt owed to the company's principal supplier, since valuation was being undertaken on a different basis.

5. Special considerations arise when the price of a minority holding of shares has to be fixed when the court orders it to be bought by the majority shareholders pursuant to an order under the 'unfairly prejudicial conduct' section (CA 2006 s 994): see 'Unfairly prejudicial conduct of the company's affairs', pp 681ff.

Further Reading

GREGORY, A and HICKS, A, 'Valuation of Shares: A Legal and Accounting Conundrum' [1995] JBL 56.
Find This Resource

PENNINGTON, R, 'Can Shares in Companies be Defined?' (1989) 10 *Company Lawyer* 140.
Find This Resource

WORTHINGTON, S, 'Shares and Shareholders: Property, Power and Entitlement—Parts I and II' (2001)

22 *Company Lawyer* 258 and 307.
Find This Resource

WORTHINGTON, S, 'Sorting Out Ownership Interests in a Bulk: Gifts, Sales and Trusts' [1999] JBL 1.
Find This Resource

Notes:

[1] See RR Pennington, 'Can Shares in Companies be Defined?' (1989) 10 *Company Lawyer* 140; S Worthington, 'Shares and Shareholders: Property, Power and Entitlement—Parts I and II?' (2001) 22 *Company Lawyer* 258 and 307.

[2] In *Investment Trust Corpn Ltd v Singapore Traction Co Ltd* [1935] Ch 615, one 'management share' could outvote the remaining 399,999! A device of this kind (normally termed a 'golden share') is sometimes employed to retain government control when a nationalised industry is privatised.

[3] (1865) 2 Drew & Sm 514 at 521.

[4] The term 'contributory' is used in a winding up to refer to members and some former members: see Insolvency Act 1986 (IA 1986) s 79.

[5] [1933] Ch 142.

[6] [1914] AC 11 at 13.

[7] [1912] 2 Ch 571.

[8] Note that the new CA 2006 provisions on variation of class rights extend the rules to companies without share capital, eg companies limited by guarantee with different classes of members having different voting rights. CA 2006 ss 631, 335 and 635 provide appropriate rules in the same terms as those discussed earlier.

[9] This effects a change to the Companies Act 1985 (CA 1985), which only allowed the company to impose conditions that were *more* onerous than the statute. The company could do this by inserting the conditions into the memorandum, the articles or the terms of the share issue itself: see CA 1985 s 125.

[10] And any provisions inserted in a company's memorandum before CA 2006 will be treated as contained in the company's articles: CA 2006 s 28.

[11] Interestingly, the term is used in the heading to s 630, but not in the section itself, which refers to 'variation of the rights attached to a class of shares'. The 2006 Act then specifies that 'shares are of one class if the rights attached to them are in all respects uniform' (s 629(1)). Another way of putting the question posed in the previous paragraph is to ask whether shares are of a *different* class, for the purpose of s 630, if some of the rights attached to them are different, even if the right being varied is the same for all of them. The assumed answer is no, and the analysis is invariably one that approaches the issue from a 'class rights' perspective, as discussed earlier. CA 1985 s 125 was in the same terms in this respect (although not in others), and this was the conclusion.

[12] This is not covered by the new CA 2006 s 631, which concerns companies without share capital.

[13] [1912] 2 Ch 324.

[14] See *Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104, CA.

[15] Bearer shares ('share warrants', CA 2006 s 779—these are rare in practice) are an exception: these are transferable by delivery. In Canada, the transfer of shares is governed by a modern code which comes close to making all share certificates negotiable instruments.

[16] See Chapter 12.

[17] A great deal of information about CRESTCo is given on its website at: www.euroclear.com/site/public/EUI.

[18] 'Blank' transfer forms, sometimes used by shareholders to provide security to lenders, are these transfer forms completed in all the details other than the name of the transferee.

[19] A share certificate is prima facie evidence of title: CA 2006 s 768.

[20] Contrast this with art 63(5) of the Model Articles for public companies, which gives a general power of refusal only in relation to partly paid shares, and transfers that do not comply with administrative requirements.

[21] (1837) 6 Ad & El 469.

[22] (1848) 2 Exch 654.

[23] But see the Notes following this case extract, and see **[11.14]**.

[24] (1855) 5 HL Cas 389.

[25] This case concerns debentures rather than shares, but the issues are general.

[26] *Saunders v Vautier* (1841) 4 Beav 115. Also see *Stablewood Properties v Virdi* [2010] EWCA Civ 865 (declaration of conditional trust nevertheless taking effect immediately).

[27] Sales of shares in public companies, where shares are freely available on the market, are not specifically enforceable; sales of shares in private companies are: *Duncuft v Albrecht* (1841) 12 Sim 189, 59 ER 1104.

[28] *Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104, CA; *Wood Preservation Ltd v Prior* [1969] 1 WLR 1077, CA.

[29] *Hardoon v Belilios* [1901] AC 118, PC; *Musselwhite v CH Musselwhite & Son Ltd* [1962] Ch 964.

[30] *Hardoon v Belilios* [1901] AC 118, PC; *Musselwhite v CH Musselwhite & Son Ltd* [1962] Ch 964. Also see *Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104, CA; *Stablewood Properties v Virdi* [2010] EWCA Civ 865.

[31] Thus equity provides relief against the old strict rule in *Milroy v Lord* (1862) 4 De GF & J 264 that equity will not assist a volunteer, and that a gift of shares by deed is therefore ineffective.

[32] See S Worthington, 'Sorting Out Ownership Interests in a Bulk: Gifts, Sales and Trusts' [1999] JBL 1.

[33] The requirement of registration had more justification in an earlier period when it was common for shares to be only partly paid up, but it makes less sense in the case of the fully paid, listed security, of the present day, where the responsibilities of a shareholder are negligible, the directors have no discretion to refuse registration, and the mechanics of transfer are a matter of pure routine. It is not obvious, eg, why the law should continue to refuse to recognise the possibility of a transfer of the legal title to such shares by, say, a deed of gift.

[34] In spite of assertions to this effect both here and in other cases, it is generally accepted that nothing short of the registration of the subsequent transferee as legal owner will defeat the prior equity.

[35] This is a 'stop notice': see *Hawks v McArthur* **[11.18]**.

[36] (1884) 14 QBD 424 at 439.

[37] (1885) 11 App Cas 20 at 30.

[38] (1886) 12 App Cas 29.

[39] [1905] 2 Ch 147 at 161.

[40] This wording is probably not quite what might be expected of a provision having the effect described in **[11.17]**.

[41] See generally N Easterway, H Booth and K Eamer, *Practical Share Valuation* (4th edn, 1998); A Gregory and A Hicks, 'Valuation of Shares: A Legal and Accounting Conundrum' [1995] JBL 56.

[42] This case was overruled in *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832, although it remains relevant in respect of the valuation of shares.

[43] RM Walters [1977] *British Tax Review* 34 at 44.

12. Borrowing, Debentures and Charges

Chapter: (p. 594) 12. Borrowing, Debentures and Charges
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General issues

Most companies do not operate using only equity funding from shareholders. Borrowing from lenders, and use of credit such as deferred payment for goods and services, provide additional and important methods of financing corporate activity.

The rights of lenders (bank lenders, creditors, debenture holders, etc: see later) depend on the precise terms of their contract with the company. As a general rule, creditors are entitled to an agreed rate of interest (fixed or variable) regardless of the commercial success of the company. Their loan agreements may be secured or unsecured providing different protection to different creditors should the company become insolvent. However, all creditors are paid out, in full if possible, before the shareholders are entitled to any return (see Chapter 16). Shareholders, on the other hand, generally expect to receive a higher total return (dividend plus capital growth of share value) on their equity funding than providers of debt funding. The level of dividend depends on the commercial success of the company and on the discretion of the directors. The rate of share value growth depends upon the company's overall actual and projected success. Debt is commonly considered a cheaper (ie its cost in terms of interest, versus dividend plus share value appreciation) but less flexible form of corporate funding than equity funding.

In this chapter, the focus is on *secured* debt, looking at options that are used by small and large companies alike (with the exception of use of the Financial Collateral Arrangements (No 2) Regulations 2003 (SI 2003/3226) and subsequent amendments, which are beyond the scope of this book[1]). But some general comments are warranted first. Like any other legal person, a company may borrow money, subject to any restrictions in its constitution.[2] There are, however, a number of special features of corporate borrowing that are worth noting.

(i) To raise very large sums of money, a company may wish to attract funds on the investment market, that is, to borrow from very many lenders at once, or in sequence, all on the same terms. The mechanics of such a procedure are not greatly different from those involved in making an issue of shares, and indeed such issues may (but need not) be traded on the Stock Exchange subject to the same rules as equivalent dealings in equity securities (see Notes following, p 596). The investors will become a class of *creditors* of the company rather than *members* of the company; and the *debentures* (or more often *bonds*, in Europe and the United States, and increasingly here) held by each creditor will be *marketable securities*. The theoretical differences between being a creditor and a member are considerable, from a legal point of view, but (at least in the case of a solvent and prosperous company) the practical consequences (including, often, the total returns, ie interest plus capital appreciation) for investors, apart sometimes from tax considerations, may be very similar.
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(ii) Where numerous investors advance money to a company in this way, it is usual for their rights to be regulated by a debenture trust deed, under which trustees are appointed to represent the investors as a class vis-à-vis the company. In the trust deed, provision is made for the collective views of investors to be ascertained by votes taken at meetings, with the usual apparatus of proxies, etc. Recall that where creditors vote as a class, the majority is prohibited from voting in ways which oppress the minority, just as shareholders are restrained: see *British America Nickel Corpn Ltd v O'Brien* **[11.06]**; *Assénagon Asset Management SA v Irish Bank Resolution Corporation Ltd (Formerly Anglo Irish Bank Corporation Ltd)* **[11.07]**; cp *Azevedo v Imcopa Importacao Exportaacao e Industria de Oleos Ltda* [2013] EWCA Civ 364. Two basic arrangements are common. In the first, each investor lends to the company directly, and