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Stephen J. Leacock

The Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience Over Logic

*Stephen J. Leacock**

"Pure logical thinking cannot yield us any knowledge of the empirical world; all knowledge of reality starts from experience and ends in it."[1]

I. INTRODUCTION[2]

In free market[3] economies, corporate laws change over time. Moreover, experience has taught us that some legislative enactments, when

* Professor of Law, Barry University School of Law. Barrister (Hons.) 1972, Middle Temple, London; LL.M. 1971, London University, King's College; M.A. (Bus. Law) CNAA 1971, City of London Polytechnic (now London Guildhall University), London; Grad. Cert. Ed. (Distinction) 1971, Garnett College, London; B.A. (Bus. Law) (Hons.) CNAA 1970, City of London Polytechnic (now London Guildhall University), London. The author gratefully acknowledges research funds, in preparing this article for publication, provided by Barry University, School of Law. Research assistance provided by Therese L. O'Brien and Brad Robinson in the preparation of this article and research funds provided by DePaul University, College of Law that financed that research are also both gratefully acknowledged. The author also acknowledges the assistance of Head Librarian Sandra Wilkins, University of British Columbia, Faculty of Law, Vancouver, Canada in providing helpful materials, as well as Professor Janis Sarra, University of British Columbia, Faculty of Law, Vancouver, Canada, and Professor Stephen Griffin, University of Wolverhampton, England for help on specific issues. Thanks too to Information Access Librarian (Law) Aileen Weir, Australian National University, Canberra, and Marite Tweeddale, Librarian, Court of Appeal, Wellington, New Zealand, who pointed the author in the direction of helpful information for this article. Professor Leacock was a Committee Member of the Committee on Corporate Laws, Section of Business Law of the American Bar Association 1990-1996. However, this article presents the views and errors of the author and is not intended to represent the views of the American Bar Association, any of its Committees or Subcommittees, or any other person or entity.

1. ALBERT EINSTEIN, IDEAS AND OPIONIONS 271 (Sonja Bargmann trans., Bonanza Books 1954) (1954). Professor Leacock is aware that in metaphysics, "[E]mpirical science, empiricism, takes no account of the soul, no account of what constitutes and determines personal being." OLIVER SACKS, THE MAN WHO MISTOOK HIS WIFE FOR A HAT 39 (Touchtone Books, Simon & Schuster 1985).

2. "The call to reform and modernise. . .has reached company law . . . ." Robert Goddard, *"Modernising Company Law": The Government's White Paper*, 66 MOD. L. REV. 402 (2003). *See also* The Right Honourable The Lord Irvine of Lairg, *The Law: An Engine for Trade*, 64 MOD. L. REV. 333, 348 (2001) ("[T]he current Company Law Review [is a] prime [example] of an increasingly sophisticated law reform process led by government in consultation with the Law Commission and business.").

3. "Markets are a product of human creativity. . .They can be designed well or poorly. . ."

interpreted empirically, need to be modified in order to attain enhanced solutions to controversies unanticipated at the time of the initial legislation. Additionally, modernization[4] of corporate law[5] is, irrefutably, a crucial factor[6] in the commercial growth,[7] and continued development of free market economies in particular.[8] Indeed, modernization[9] increases the structural strength and protects the integrity of financial and economic institutions[10] on which survival of such economies depend.[11] As a result, concepts that have outlived their

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Herbert Hovenkamp, *Antitrust Violations in Securities Markets,"* 28 J. CORP. L. 606 (2003). Similar comments are equally applicable to corporate law concepts.

4. "[C]ompany law influences the extent to which the UK is an attractive venue for incorporation." Robert Goddard, *supra* note 2, at 421. This conclusion is also valid for the U.S.

5. "[C]ompany law should be *primarily enabling or facilitative* - i.e. it should provide the means for those engaged in business and other corporate activity to arrange and manage their affairs in the way which they believe is most likely to lead to mutual success and effective productive activity." Robert Goddard, *supra* note 2, at 406 (*quoting* Dep't of Trade and Indus., Modern Company Law for a Competitive Economy: Final Report: VOLS I AND II, ¶ 1.10 (2001). *See also* Timothy L. Fort & Cindy A. Schipani, *Corporate Governance in a Global Environment: The Search for the Best of All Worlds,"* 33 VAND. J. TRANSNAT'L L. 829, 831 (2000) ("[A] substantial portion of the twentieth century featured debates among American corporate theorists as to whether a corporation should be considered a natural entity with responsibilities for its stakeholders or a web resulting from a nexus of contracts among self-interested individuals who measure the success of the firm through profitability.").

6. "[T]he development of corporate law. . .is best characterised as a dynamic equilibrium in which the interests of the state and the corporators were constantly recalculated and rebalanced and one in which, given the way things have turned out thus far, unincorporated status is - or was - at most a second-best world." Gregory A. Mark, *The Role of the State in Corporate Law Formation*, in INTERNATIONAL CORPORATE LAW 16 (Fiona Macmillan ed. 2000).

7. "The benefits of free markets, transparency, and *efficiency* provide opportunities for large organizations that can take advantage of efficiencies of scale in intra-organizational synergies and in increasing market share." Fort & Schipani, *supra* note 5, at 855 (emphasis added).

8. "Informed market freedom underlies the operation of English companies legislation . . . ." The Right Honourable The Lord Irvine of Lairg, *supra* note 2, at 344. The same is true for American corporate legislation as well.

9. *See* Brian R. Cheffins, *Current Trends in Corporate Governance: Going from London to Milan via Toronto*, 10 DUKE J. COMP. & INT'L L. 5 (1999) "The experience of jurisdictions . . . should be used to discover the norms that need adjustment in an increasingly global market." *Id.* at 42.

10. "Despite the emphasis on shareholder wealth, few people see the current U.S. style of corporate governance as blindly profit-oriented at the expense of the community." Fort & Schipani, *supra* note 5, at 841. Although Lord Wedderburn, in championing the interests of employees in the mix of interests deserving of recognition when considering company law reform, has sounded a warning regarding the power of the "*addiction* to the cause of shareholder value." Lord Wedderburn of Charlton, *Employees, Partnership and Company Law*, 31 INDUS. L. J. 99, 108-09 (2002) (emphasis added).

11. "As trade barriers fall, markets expand, information flows improve, and restrictions on investment disappear, it will become progressively easier for investors of one country to invest in corporations in another. Movement towards a worldwide capital market could in turn have a substantial impact on corporate governance in individual countries." Cheffins, *supra* note 9, at 5.

utility,[12] and have therefore become barriers to the achievement of these objectives,[13] should be promptly eliminated where feasible.[14]

The ultra vires doctrine in corporate law[15] is such a concept.[16] It is

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12. "When resources are being used where their value is highest, or equivalently when no reallocation would increase their value, we may say that they are being employed efficiently." Richard A. Posner, Economic Analysis of Law, 10 (2003 6th ed. 2003). *But see* Judith Freedman, *Limited Liability: Large Company Theory and Small Firms,"* 63 MOD.L.REV. 317, 320 (2000) "[E]xclusive emphasis on efficiency may mask the consequences of risk shifting for certain groups who are the losers at the expense of others.". *Id.*

13. "Economizing is a priority of any corporation. . .To do so in an adaptive way places a priority on efficiency. . .The optimal goals of this process of efficiency are the survival and growth of the organization." Fort & Schipani, *supra* note 5, at 866-67.

14. One commentator has however stated: "[R]ather than being dead, the ultra vires doctrine remains vibrant in one important way. . .corporations are not authorized under their charters to commit crimes or otherwise act unlawfully." Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegalitys (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1281 (2001).

15. *See* CHOPER, COFFEE, GILSON, CASES AND MATERIALS ON CORPORATIONS, (5th ed. 2000). "The term *ultra vires* is employed in such a variety of senses as to defy useful definition." *Id.* Courts tend not to distinguish between: (1) acts of corporations that exceed the powers articulated in the purposes (objects) clause(s) of their articles of incorporation (classic ultra vires), (2) acts of corporations that are beyond their legal capacity, because the particular acts go beyond the business activities that such corporations are statutorily empowered to engage in (ultra capacitas), and acts that are within the corporation's purposes clause(s), but which exceed the authority of particular corporate agents or officers (ultra authoritas). *See, e.g.,* Nelson v. Dakota Bankers Trust Co., 132 N.W.2d 903 (N.D. 1964) (Corporate activity characterized as ultra vires, where, without complying with applicable statutory provisions, a corporation engaged in commercial banking activities, although statutorily authorized to function as a surety and trust company, and *not as a commercial bank*); *see also* Real Estate Capital Corp. v. Thunder Corp., 287 N.E.2d 838 (Ohio Misc. 1972) (Corporate mortgage and rent assignment declared to be ultra vires because they were executed by the corporation gratuitously). *See also* Harry Rajak, *Judicial Control: Corporations and the Decline of Ultra Vires*, 26 CAMBRIAN L. REV. 9 (1995). "[T]he [ultra vires] doctrine has been held to apply, first where the company purports to act beyond its purposes as set out in its constitution, secondly, where the company purports to act in a way prohibited by statute and, finally, where the company purports to act through the agency of someone who lacks the requisite authority. *Id.* The essential focus of this paper is company action of Harry Rajak's first type, rather than addressing internal governance (Harry Rajak's third and final type), or action prohibited by statute (Harry Rajak's second type), as some other commentators have tended to do in their scholarship. *See, e.g.,* Greenfield, *supra* note 14 (other than section II, 1302-1313); Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265 (1998); Patrick J. Ryan, *Strange Bedfellows: Corporate Fiduciaries and the General Law Compliance Obligation in Section 2.01(a) of the American Law Institute's Principles of Corporate Governance*, 66 WASH. L. REV. 413 (1991).

16. The Cohen Committee in England recommended its abolition some 61 years ago. Board of Trade, Report of the Committee on Company Law Amendment (The Cohen Committee), Cmd. 6659, ¶ 12 (1945) [hereinafter Cohen Committee Report]. In the United States, "[m]ost states have sharply emasculated this doctrine in recent years, however, so that ultra vires is now largely a dead letter. Hence, it is another one of those issues modern lawyers most likely encounter only in law school and on bar exams." Stephen M. Bainbridge, CORPORATION LAW AND ECONOMICS 58 (2002).

vexing.[17] A number of problems emanating from application of this doctrine to companies in England and the Commonwealth Caribbean still survive. Furthermore, tenable solutions - such as those proposed in this paper - to actual and potential, residual problems[18] should be put into effect in a timely manner. In fact, attaining membership in the European Community[19] has proven to be invaluable for United Kingdom Company Law. The impact of the continuing evolution of the European Union[20] has stimulated significant corporate law reform by the English legislature.[21] However, a thorough and complete reformation of the ultra vires doctrine in England, as the United States has done,[22] remains partially incomplete.

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17. *See* Darvall v. N. Sydney Brick & Tile Co. Ltd. (1988) 14 A.C.L.R. 717 (Austrl.) ("It must be pointed out, however, that the expression *ultra vires* is also used in practice to describe the situation when the directors of the company have exceeded the powers delegated to them. This use is to be avoided for it is apt to cause confusion between two entirely distinct legal principles. When the *company* has exceeded its powers, it is not bound by its act because it lacks legal *capacity* to incur responsibility for it. When the directors exceed their powers, their company is not bound because its agents have exceeded their *authority*. But unless the company's own powers are exceeded, no question of capacity arises, and the company may ratify what the directors have done, and may. . .be unable to set up the directors' lack of actual authority when they have acted within their usual or ostensible powers.").

18. L.C.B. GOWER, THE PRINCIPLES OF MODERN COMPANY LAW 233 (Paul L. Davies ed., 6th ed. 1997) ("The present [United Kingdom company law] position may be somewhat lacking in coherent logic and a few ghostly relics of *ultra vires* continue to haunt us, but at least we seem to have reached a pragmatic result which is generally defensible.").

19. "Over the past 25 years the development of company law in the United Kingdom has been heavily influenced by European Community law." GOWER, *supra* note 18, at 54.

20. Fifteen nations are signatories to the Treaty on European Union (EU). Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU] (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty], *as amended by* Single European Act, 1987 O.J. (L 169/1), [1987] 2 C.M.L.R. 741 [hereinafter SEA], *in* TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987). These member states comprise the EU with a total population in excess of 350 million: viz. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, Sweden and the United Kingdom. *See generally* Roger J. Goebel, *The European Union Grows: The Constitutional Impact of the Accession of Austria, Finland and Sweden*, 18 FORDHAM INT'L L.J. 1092 (1995). Ten additional countries joined the EU on May 1, 2004, being Poland, Hungary, the Czech Republic, Cyprus, Lithuania, Slovenia, Estonia, Latvia, Slovakia and Malta. Two more, being Romania and Bulgaria are working towards joining within the next decade. *See generally* Catherine Phuong, *Enlarging 'Fortress Europe': EU Accession, Asylum, and Immigration in Candidate Countries*, 52 I.C.L.Q. 641 (2003).

21. "It was not until our entry into the European Community that we belatedly did anything effective and then only to the minimum extent thought necessary to comply with our obligations under the First Company Law Directive." GOWER, *supra* note 18, at 207.

22. *See* Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 186-87 (1985) ("Before the Civil War. . .the ultra vires doctrine was strictly applied by American courts. . .By 1930, the ultra vires doctrine was, if not dead, substantially eroded in practice. . .") (citations omitted).

In this paper, after the introduction, the formation of companies in common law jurisdictions generally is discussed, identifying similarities in this process globally, and highlighting differences with regard to individual jurisdictions. The ultra vires doctrine is then analyzed and discussed as it has developed in England and in the United States, identifying pertinent factors that have led to its progressive reform in England, the United States and other Common Law Jurisdictions globally, and articulating its current status in modern corporate law.

II. THE LOGIC ERA

A. *Formation of Companies*[23]

1. English, American, Commonwealth Caribbean, and other Common Law Jurisdiction Models

Formation of companies under English, American, and Commonwealth Caribbean[24] company law, as well as under the company law of other commonwealth common law jurisdictions is essentially quite similar.[25] Under English law, a company is formed by preparing a memorandum and articles[26] of association and registering them with

23. This paper deals with business corporations formed for profit and "company" and "corporation" will be used interchangeably in the paper.

24. The English speaking Caribbean territories of: Antigua, the Bahamas, Barbados, Belize, Bermuda, the Cayman Islands, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts, Nevis, Anguilla, St. Lucia, St. Vincent, Trinidad & Tobago and the Virgin Islands. English Common Law is also the Common Law of the Commonwealth Caribbean. *See* Patchett, *Reception of Law in the West Indies*, 1972 JAM. L.J. 17, 55.

25. The corporate statute specifies documents that must be prepared by specified personnel and thereafter filed with a specified state official. *See* GOWER, *supra* note 18, at 14 (In England the company's "constitution has to be set out in two separate documents, its memorandum of association. . .and its articles of association. . ."). *See also* L.S. SEALY, CASES AND MATERIALS IN COMPANY LAW, 86 (5th ed. 1992) ("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 has continued under successive Companies Acts to the present day.").

26. *See generally* GOWER, *supra* note 18, at 106-122. The articles of association govern the internal operation of the company (they are the equivalent of bylaws in American law) and there is the option of adopting Table A (a statutorily provided standard form of articles of association) in the schedules of the Companies Act in lieu of preparing and registering individualized articles of association. Indeed, if a company does not register any articles, the version of Table A statutorily in force on the date of the company's registration becomes the company's articles by operation of law. Moreover, the registration of articles which do not exclude or modify any particular provisions of the statutory version of Table A, incorporate those provisions by operation of law. Of course, during preparation of individualized articles of association, any specific provisions of the statutory version of Table A can be expressly incorporated by reference. *Id.* at 107.

the Registrar of Companies at the Companies Registry.[27] On opposite sides of the Atlantic, corporate philosophies with regard to the pursuit of business activities were initially similar. However, under the modern American model, they later diverged.

First, under English company law, historically, a company could not legally engage in any business activity at all, unless empowered to do so in the objects clause - or clauses - of its memorandum of association.[28] Consequently, in practice, the drafters of objects clauses tended to include a plethora of primary as well as secondary activities in addition to peripheral objects and subordinate powers.[29] All of this was done, in an attempt to provide the company with the greatest flexibility - semantically possible - to engage in every legal business activity imaginable. This practice was somewhat successful.

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27. In the U.S. "One or more persons may act as the incorporator or incorporators of a corporation by delivering articles to the secretary of state for filing." MODEL BUS. CORP. ACT § 2.01 (1984) (amended 2002) [hereinafter MBCA]. *See* Robert W. Hamilton & Jonathan R. Macey, STATUTORY SUPPLEMENT TO CASES AND MATERIALS ON CORPORATIONS: INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 107 (8th ed. 2003) [hereinafter HAMILTON: STATUTORY SUPP. 2003]. "The Revised Model Business Corporation Act (1984) is designed to be a convenient guide for revision of state business corporation statutes, reflecting current views as to the appropriate accommodation of the various commercial and social interests involved in modern business corporations. This Act is designed for use by both publicly held and closely held corporations. . ." MODEL BUS. CORP. ACT, introductory cmt. at xvii. *See also* ROBERT W. HAMILTON, STATUTORY SUPPLEMENT TO CASES AND MATERIALS ON CORPORATIONS: INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 118 (6th ed. 1998) [hereinafter HAMILTON: STATUTORY SUPP. 1998] ("[The MBCA] was prepared and is maintained by the Committee on Corporate Laws of the Section on Business Law of the American Bar Association. Earlier versions. . .were influential in the development of state corporation statutes[,]. . .were used by more than 30 states as a model in the recodification of their business corporation statutes, and had noticeable but less significant influence in a number of other states. The 1984 Model Business Corporation Act is a complete revision of earlier [versions,]. . .was approved by the Committee on Corporate Laws [as] the "Revised Model Business Corporation Act (1984)" and was renamed the "Model Business Corporation Act (1984)" in 1987. It has been used as the model for corporation statutes in 22 states. . ."). *See also* ROBERT W. HAMILTON, STATUTORY SUPPLEMENT TO CASES AND MATERIALS ON CORPORATIONS: INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 94 (7th ed. 2001) [hereinafter HAMILTON: STATUTORY SUPP. 2001] ("The [MBCA] is a free-standing general corporation statute that can be enacted substantially in its entirety by a state legislature."). In Barbados, "Subject to subsection(2), one or more persons may incorporate a company by signing and sending articles of incorporation to the Registrar of Companies." S.4(1). Companies Act, cap. 308 (Barb. 1991).

28. The particular activity had to be: (a) legal and (b) specifically included in the objects clause of the particular corporation's memorandum of association. *See, e.g.*, Sarah Worthington, *Corporate Governance: Remedying and Ratifying Directors' Breaches*, 116 LAW. Q. REV. 638, 644 (2000) (Currently, "[i]n general terms, a company's capacity may be limited by the general law (which, as with individuals, makes certain dealings illegal), the Companies Act 1985, and the company's own memorandum and articles.").

29. *See* GOWER, *supra* note 18, at 106, 203.

2. Modern American Model[30]

In contrast, under the modern American model, based upon the almost inherent impulse to freedom[31] that seems to typify the American approach to business activity,[32] almost inordinate flexibility is statutorily provided. In fact, the corporate statute in force in the individual states[33] expressly empowers any business corporation to engage in *any lawful business*,[34] unless the incorporator – or incorporators – *expressly* prohibit it from engaging in specific activities. Such prohibitions are mandated by including a restraining provision to that effect, in its articles of incorporation.[35] Furthermore, individual state legislatures have allocated general,[36] as well as emergency powers,[37] to each corporation incorporated in the particular state. This practice pro-

30. Typified by the MBCA, *see* MBCA *supra*, note 27. *See* HAMILTON: STATUTORY SUPP. 2001, *supra* note 27, at 95 ("The Committee on Corporate Laws does not view the MBCA as a "uniform" statute. Rather it is a "model" statute that contemplates that each state may make amendments or changes to reflect local interests, needs, or problems.").

31. "[I]ndividual freedom understood as freedom from interference on the part of everybody, including the authorities." BRUNO LEONI, FREEDOM AND THE LAW 75 (3d ed. 1991).

32. "Economic rights are as important to a larger, if less articulate, part of the population." POSNER, *supra* note 12, at 705. "The abrogation of laws restricting economic freedom would often benefit the poor more than other groups." *Id.* at 706.

33. *See* MBCA, *supra* note 27. Since there is no Federal incorporation in the United States, each corporation has to be incorporated under the laws of one of the individual fifty states.

34. As a result, when forming corporations in the United States, incorporators can exclude objects (purposes) clauses altogether when preparing and filing articles of incorporation. *See* FRANKLIN A. GEVURTZ, CORPORATION LAW, 222 (2000) (Of course, with regard to *business*, "the predominant significance potentially remaining to the ultra vires doctrine involves activities which do *not* have *any* business purpose. Specifically, if a corporation simply gives away some of its assets, a shareholder might charge that the action is ultra vires.") (emphasis added). *See, e.g.*, Real Estate Capital Corp. v. Thunder Corp., 287 N.E.2d 838 (Ohio Misc. 1972) (Gratuitous corporate mortgage and rent assignment invalidated). *But see*, Theodora Holding Corp. v. Henderson, 257 A.2d 398, 405 (Del. Ch. 1969) (noting that a reasonableness test is to be applied with regard to gratuitous charitable gifts by corporations); Kahn v. Sullivan, 594 A.2d 48, 61 (Del.1991). *See also* MacQueen v. Dollar Sav. Bank Co., 15 N.E.2d 529, 531 (Ohio 1938) ("Yet if the rights of creditors are not affected and all stockholders consent,. . .the well-recognized principle of law [is] that, subject to the rights of creditors, a corporation may give away its property or pay out from its treasury if the stockholders consent and the act is not illegal. . . . Of course, in a case in which a question of public policy is involved or the rights of the state or the public are concerned a different question would be presented. . ."); Worthington, *supra* note 28, at 673 (writing about the English company law position: "A company can give away its assets, provided the decision is taken for proper purposes and does not contradict any express restrictions in the company's constitution. The company will be doing exactly this *whenever* it decides to exonerate its defaulting directors.").

35. *E.g.*, MBCA, *supra* note 27, § 3.01(a) ("Every corporation incorporated under this Act has the purpose of engaging in *any lawful business* unless a more limited purpose is set forth in the articles of incorporation.") (emphasis added).

36. *E.g.*, MBCA, *supra* note 27, § 3.02.

"General Powers:

Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual

to do all things necessary or convenient to carry out its business and affairs, including without limitation power:

(1) to sue and be sued, complain and defend in its corporate name;

(2) to have a corporate seal, which may be altered at will, and to use it, or a facsimile of it, by impressing or affixing it or in any other manner reproducing it;

(3) to make and amend bylaws, not inconsistent with its articles of incorporation or with the laws of this state, for managing the business and regulating the affairs of the corporation;

(4) to purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located;

(5) to sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property;

(6) to purchase, receive, subscribe for, or otherwise acquire; own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of; and deal in and with shares or other interests in, or obligations of, any other entity;

(7) to make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations, (which may be convertible into or include the option to purchase other securities of the corporation), and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;

(8) to lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;

(9) to be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity;

(10) to conduct its business, locate offices, and exercise the powers granted by this Act within or without this state;

(11) to elect directors and appoint officers, employees, and agents of the corporation, define their duties, fix their compensation, and lend them money and credit;

(12) to pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, share option plans, and benefit or incentive plans for any or all of its current or former directors, officers, employees, and agents;

(13) to make donations for the public welfare or for charitable, scientific, or educational purposes;

(14) to transact any lawful business that will aid governmental policy;

(15) to make payments or donations, or do any other act, not inconsistent with law, that furthers the business and affairs of the corporation."

Id.

The Supreme Court of South Dakota, in interpreting similar statutory language in the equivalent South Dakota Corporate Statute, enunciated that such language "clearly provides that [the corporation] had authority to enter into valid contracts." Nelson v. WEB Water Dev. Ass'n, Inc., 507 N.W.2d 691, 695 (S.D. 1993). Such language is "an adoption of the idea 'that modern business mandates that parties be bound by the contracts they enter into absent fraud or duress.'" *Nelson*, 507 N.W.2d at 696.

37. *E.g.*, MBCA, *supra* note 27, § 3.03.

"Emergency Powers

(a) In anticipation of or during an emergency defined in subsection (d), the board of directors of a corporation may:

(1) modify lines of succession to accommodate the incapacity of any director, officer, employee, or agent; and

(2) relocate the principal office, designate alternative principal offices or regional offices, or authorize the officers to do so.

(b) During an emergency defined in subsection (d), unless emergency bylaws provide otherwise:

vides the most extensive flexibility in the conduct of corporate business activities. American companies are thereby empowered to engage in the widest possible spectrum of lawful business activities. This is effective. It has obviated any need for the profuse drafting that English company case law[38] necessitated.

B. *Ultra Vires Doctrine*[39]

1. Effect of English Common Market Entry

In England, with entry into the European Community,[40] a sense of urgency to remove these anomalous restrictions on corporate business activity emerged, and the impetus for corporate law reform gained momentum.[41] However, the American approach to finding workable solutions has not yet completely won the day in England. Upon examination, as indicated below, English company law approaches to reforming the ultra vires doctrine have tended to become mired in almost inextricable complexity. In contrast, the United States approach is simple and elegant, and has come closest to an efficient and effective resolution of problems inherent in the doctrine. Moreover, the Commonwealth Caribbean as well as other commonwealth common law jurisdictions would be well advised to prefer the American, rather than the English approach to reform of the doctrine. Australia,[42] Barbados,[43] Canada,[44] and New Zealand[45] have all emulated the American approach. This is based on sound reasoning.

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(1) notice of a meeting of the board of directors need be given only to those directors whom it is practicable to reach and may be given in any practicable manner, including by publication and radio; and

(2) one or more officers of the corporation present at a meeting of the board of directors may be deemed to be directors for the meeting, in order of rank and within the same rank in order of seniority, as necessary to achieve a quorum.

(c) Corporate action taken in good faith during an emergency under this section to further the ordinary business affairs of the corporation:

(1) binds the corporation; and

(2) may not be used to impose liability on a corporate director, officer, employee, or agent.

(d) An emergency exists for purposes of this section if a quorum of the corporation's directors cannot readily be assembled because of some catastrophic event."

Id.

38. *See* Ashbury Ry. Carriage & Iron Co. Ltd. v. Riche, (1875) L.R. 7 H.L. 653.
39. *See generally*, GOWER, *supra* note 18, at 202.
40. *See* GOWER, *supra* note 18 at 54.
41. *Id.*
42. *See infra* note 200.
43. *See infra* note 183.
44. *See infra* note 195.
45. *See infra* note 210.

2. England[46]

Historically, the ultra vires doctrine set the legal parameters within which companies could appropriately operate, and delineated the business activities which they could lawfully pursue. For example, in England, if carrying on a particular business activity[47] was not explicitly, or by necessary implication, included in the objects clause - or clauses - of the company's memorandum of association, the company had no legal power or authority to carry on such a business. Moreover, if the company *did* nevertheless engage in business activity falling outside its objects clause, the courts declared such business activity ultra vires,[48] and therefore void.[49] Any suits brought by or against the company based on such business activity failed.[50] This led to harsh business results.

3. History and Early Development of the Doctrine in England[51]

The history of the ultra vires doctrine in England is instructive in demonstrating the problems that the doctrine exemplifies. The seminal case with regard to registered companies was decided by the House of Lords in 1875.[52] In *Ashbury Railway Carriage & Iron Co. Ltd. v. Riche*,[53] the House of Lords held that a company's legal power to do business depended upon the objects clause in its memorandum

46. Discussion of the ultra vires doctrine in England is limited to companies formed under the English Companies Acts. The doctrine may still be relevant with regard to other entities *e.g.* building societies, industrial and provident societies, friendly societies, statutory companies, insurance companies and banks that operate under a number of different Acts of Parliament and charters. *See generally* Michael Draper, *Reducing Uncertainty*, 89 LAW SOCIETY'S GAZETTE 18, 25 (May 13, 1992).

47. *E.g.*, pig-breeding.

48. *E.g.*, beyond the lawful powers of the company. In this paper, *ultra vires* is discussed with respect to the powers of the company as an artificial person and not generally with regard to agency authority of an agent when acting on behalf of her/his principal. *See, e.g.*, GOWER, *supra* note 18, ch. 10.

49. *See generally*, SEALY, *supra* note 25, at 126 ("[A]ny act which was outside those objects was. . .beyond the capacity of the company itself - in the eyes of the law a nullity, having no effect whatever. It followed that not even the unanimous decision of the shareholders could authorise or ratify such an act. . .").

50. *See, e.g.*, Introductions Ltd. v National Provincial Bank, Ch. 199 (C.A. 1970). *See generally*, K. W. Wedderburn, *Unreformed Company Law*, 32 MOD. L. REV. 563 (1969). The decision in *Introductions* evidently 'resurrected' the ultra vires doctrine from its apparently 'premature' *coup de grace* allegedly delivered by the Court of Appeal in 1966 in Bell Houses Ltd. v. City Wall Properties Ltd., 2 Q.B. 656 (Eng. C.A. 1966). *See* Rajak, *supra* note 15, at 26 ("This [*Bell Houses*] decision, it has been authoritatively observed, administered the *coup de grace* to the ultra vires doctrine.") (citation omitted).

51. *See generally* GOWER, *supra* note 18, ch. 2, 3.

52. *See* Ashbury Railway Carriage & Iron Co. Ltd. v. Riche, (1875) L.R. 7 H.L. 653.

53. *Id.*

of association.[54] Primary justification for the doctrine was articulated as the dual protection of: (i) investment interests of the company's shareholders; and (ii) security interests of its creditors.[55] Conceptually, the doctrine was intended to ensure that company assets were devoted exclusively to the purposes set out in its objects clause, rather than being squandered in the pursuit of unauthorized activities. Thus, shareholders' investment would be devoted to, and be at risk from, business activities which they had intentionally agreed that the company should undertake. Similarly, company creditors would be protected from risks[56] emanating from business activities that were not

54. *See, e.g.*, 1 O'NEAL & THOMPSON, O'NEAL'S CLOSE CORPORATIONS §8.08 (3d ed. 1992) ("[T]he corporation repudiated a contract after partial performance and avoided liability because of the application of ultra vires. The corporation's charter authorized it to "sell or lend all kinds of railway plants, to carry on the business of mechanical engineers and general contractors, etc." The contract in question was to purchase a concession to construct and operate a railway line in Belgium. The court held that while there was nothing illegal about the contract, it was void because *the operation of a railway line was not in the charter.* The court held that the contract would be ultra vires even if all the shareholders had approved the contract.") (emphasis added). *See also* ROBERT W. HAMILTON AND JONATHAN R. MACEY, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES, 275-276 (8th ed. 2003) [hereinafter HAMILTON: CORPORATIONS] ("Riche was apparently to construct the railroad line, and the corporation was to raise the necessary capital."). In contrast, one commentator has suggested that "[u]nder American law, unanimous shareholder approval barred the ultra vires *defense* unless creditors would be injured." MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS, 129 (8th ed. 2000) (emphasis added) (*citing* Note, "Ultra Vires" Corporate Credit Transactions, 83 U. PA. L. REV. 479, 488-92 (1935).

55. *See* Jill Poole, *Abolition of the Ultra Vires Doctrine and Agency Problems*, 12 COMP. LAW. 43 (1991) ("The doctrine of ultra vires in company law. . .was stated by Lord Cairns in Ashbury Railway Carriage and Iron Co. v. Riche to be for the benefit of current and prospective shareholders. . .and for the benefit of creditors of the company. . .") (citations omitted). In the modern era, it has been argued *in a different context*, that "creditors are able to take care of their of their own interests and do not need any other protection than that which is granted either by existing legislation or the terms of the contract under which credit is extended." Andrew Keay, *Directors' Duties to Creditors: Contractarian Concerns Relating to Efficiency and Over-Protection of Creditors*, 66 MOD. L. REV. 665, 687 (2003). *See also* DEP'T OF TRADE AND INDUS., REFORM OF THE ULTRA VIRES RULE: A CONSULTATIVE DOCUMENT 14, 17-18 (1986) [hereinafter "PRENTICE REPORT"] ("The doctrine. . .has failed to provide any significant protection to either creditors or shareholders."). The Prentice Report is a Department of Trade and Industry commissioned report by Professor D. Prentice. Actually, the creditors whom the doctrine was intended by the court to protect were the corporation's *de jure* creditors (*i.e.*, those creditors with respect to business activities falling within the corporation's objects clause). *See* SEALY, *supra* note 25, at 127. However, with regard to the corporation's *de facto* creditors (*i.e.*, those creditors with respect to business activities falling *outside* the corporation's objects clause), see O'NEAL & THOMPSON *supra* note 54, § 8.08, ("The doctrine had the potential to disadvantage [*de facto*] creditors if corporate participants could use the ultra vires doctrine to attack a transaction that turned out to be a bad bargain for the corporation.").

56. *See* POSNER, *supra* note 12, at 411 (Corporate "limited liability is a means *not* of eliminating the risks of entrepreneurial failure but of shifting them from individual investors to the voluntary and involuntary creditors of the corporation — it is they who bear the risk of corporate default.") (emphasis added).

included in the company's object clause, or clauses, when the company was registered. The doctrine was therefore intended to prevent the diversion of corporate funds into ventures different from those enunciated in corporate objects clauses. Corporations that had initially accepted shareholder investment, and received credit, based on lower- risk objects listed in their objects clause, or clauses, would be confined to those objects. Companies would therefore be precluded from entering into ventures that were more speculative and entailed higher-risks than those listed in their objects clause, or clauses. It did not work.

The doctrine did not effectuate its goals.[57] Rather than serving as a reliable and effective shield for shareholders and creditors as anticipated, on the contrary, it became a troublesome barrier to the conduct of legitimate business activities. It was unscrupulously exploited to invalidate otherwise legally valid contracts, and thereby prevented companies from pursuing potentially profitable activities. Companies were legally disabled from pursuing business activities not stated in the objects clause of their memorandum of association, at a time when objects clauses were unalterable[58] because of the Companies Act of 1862.[59] Ironically, the economic interests of shareholders and intra-vires creditors that the doctrine had been conceived to protect were being financially impaired by it.[60] Something needed to be done.

III. FROM LOGIC TO EXPERIENCE[61]

> "Little by little the old doctrine is undermined. Often the encroachments are so gradual that their significance is at first obscured. Fi-

57. "[T]he doctrine of *ultra vires* is an illusory protection for the shareholders and yet may be a pitfall for third parties dealing with the company. . ." *See* Cohen Committee Report, *supra* note 16, para 12.

58. *See* HAMILTON: CORPORATIONS, *supra* note 54, at 276 ("At the time [of Ashbury Railway Carriage & Iron Co. Ltd. v. Riche], British law apparently did not permit corporations to amend their memoranda of association so that a new corporation would have to have been formed. . .").

59. Companies Act, 1862, 25 & 26 Vict., c. 89 (Eng.). .

60. *See, e.g.*, EISENBERG, *supra* note 54, at 127 ("Early cases often held that a corporation had no power to enter into a partnership unless that power was explicitly granted by a statute or by the certificate of incorporation.").

61. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Little, Brown & Co. 1938) (1881) ("The life of the law has not been logic: it has been experience."). Similarly, in Collins v Reynard, 154 Ill.2d 48, 50 (1992), (Per Justice Heiple, in the context of "long established practice and custom[, l]ogic may be a face card but custom is a trump."). *See, e.g.*, Keay, *supra* note 55, at 694-95 ("One of the fundamental problems for proponents of law and economics is that they hold to the view that in a perfect market, that is where all creditors are apprised of all relevant information, there are no transaction costs and no uncertainty, creditors will be adequately compensated for the level of risk which they are bearing. But it is axiomatic that there is no such thing as a perfect market.") (citation omitted).

nally we discover that the contour of the landscape has been changed . . . ."[62]

A. *Further Development of the Doctrine in England*

Five years after the *Ashbury Railway Carriage & Iron Co. Ltd. V. Riche*[63] decision, its restrictive legal impact was ameliorated by the House of Lords.[64] In *A.G. v. Great Eastern Railway, Co.*,[65] the House of Lords emphatically enunciated the legality of activities appropriately incidental to, or consequential upon, specified objects in the company's objects clause. The House of Lords reasoned that "whatever may fairly be regarded as incidental to, or consequential upon the specified objects ought not to be ultra vires."[66] This reasoning led to court toleration of the legal viability of a plethora of powers inserted in each company's memorandum of association as objects clauses, in order to permit the company to conduct any lawful business that it could conceive of, and effectively articulate. The landscape was changing.

Circumvention of the restrictions imposed earlier by the House of Lords in *Ashbury Railway Carriage & Iron Co. Ltd. V. Riche*, is now accomplished by the practice of filing effusive and prolix objects clauses.[67] These clauses did not differentiate between objects and powers. In fact, it was expressly stated that each articulated activity was itself a separate and distinct object, which was not limited by any other clause. This approach culminated in *Cotman v. Broughman*,[68]

62. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 178 (1963).

63. Ashbury Ry. Carriage & Iron Co. Ltd. v. Riche, (1875) L.R. 7 H.L. 653.

64. *See* A.G. v. Great E. Ry., Co. (1880) 5 App.Cas. 473 (H.L.). *See* SEALY, *supra* note 25, at 134 ("The company was incorporated. . .to acquire the undertaking of two existing railway companies and to construct and run certain other railways. The question before the court was whether it was within its powers. . .to hire out locomotives and rolling stock to another company operating in the same area.").

65. A.G. v. Great E. Ry., Co. (1880) 5 App.Cas. 473 (H.L.).

66. *See A.G. v. Great E. Ry.*, Co. (1880) 5 App.Cas. 473, 478 (H.L.).

67. In the U.S. judicial activism also alleviated the harsher effects of the doctrine on deserving third parties. *See* HAMILTON: CORPORATIONS, *supra* note 54, at 277 ("Some courts avoided the *ultra vires* doctrine by construing purposes clauses broadly and finding implied purposes from the language used. . .Other doctrines that have found acceptance include estoppel, unjust enrichment, quasi-contract, and waiver. In particular, these doctrines were applied to ensure that completed transactions would not be disturbed, and to permit tort claimants to recover for injuries suffered as a consequence of the corporation's conduct of an *ultra vires* business.").

68. Cotman v. Brougham, A.C. 514 (H.L. 1918). *See* SEALY, *supra* note 25, at 135 (quoting Lord Finlay LC: "[T]he question is whether it was intra vires of the Essequibo Rubber Company to [underwrite an issue of shares in] another company. . .The question depends upon the interpretation. . .[of the objects clauses] of the memorandum of association. . .which specifically authorised dealings in shares, and. . .I agree with both courts below in thinking that it is impossible to say that. . .these powers [were] ultra vires. . .the Essequibo Company.").

where the House of Lords upheld the legality of this practice by declaring that each individual objects-clause must be treated as independent of other clauses.[69] This decision helped.

Then, in *Bell Houses Ltd. V. City Wall Properties Ltd.*,[70] the Court of Appeal took this reasoning to perhaps the outer contours of its logical limits. The Court held legally valid an objects clause which expressly empowered the company "to carry on any other trade or business whatsoever which can, in opinion of the board of directors, advantageously be carried on by the company in connection with or as ancillary to any of the above businesses or the general business of the company."[71] The Court concluded that the clause should be legally interpreted to realize its natural and ordinary meaning.[72] This decision seemed to have successfully authorized companies in England to carry on essentially any legal business whatsoever.[73] The landscape had changed.

A jarring halt to this development was effected by the Court of Appeal in deciding *Introductions Ltd. V. National Provincial Bank.*[74] This decision was a setback. In *Introductions*,[75] a company was formed around the time of the Festival of Britain in 1951, with the main object of providing accommodation and services to overseas visitors. The company pursued this business activity for a number of years. Later, after a change in the shareholders and directors occurred, the company pursued solely the business of pig-breeding. In the course of carrying on its pig-breeding activities, the company obtained from a

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69. *Id.* at 518-19.

70. Bell Houses Ltd. v. City Wall Properties Ltd., 2 Q.B. 656, (Eng. C.A. 1966). *See generally*, P.V. Baker, Notes: LAW. Q. REV. 463 (1966); K.W. Wedderburn, *Notes of Cases: The Death of Ultra Vires?*, 29 MOD. L. REV. 673 (1966).

71. *See Bell Houses Ltd. v. City Wall Properties Ltd.*, 2 Q.B. 656, 677 (C.A. 1966) (citing clause 3(c) of plaintiff company's memorandum of association).

72. *Id.* at 692. *Cf.* Jacksonville, M., P. Ry. & Nav. Co. v. Hooper, 160 U.S. 514, 523-524 (1896) (The United States Supreme Court decided somewhat similarly, in allocating the natural and ordinary meaning to relatively similar statutory language. The railroad had leased a summer hotel at its seaside terminus, and had contracted to keep the hotel insured for a specified sum, which it had failed to do. When the hotel was wholly destroyed by fire, suit was filed against the railroad, and one of its defenses was that the lease and its terms were ultra vires. The U.S. Supreme Court ruled the transactions intra vires. It interpreted statutory power "to. . .lease. . .real estate. . .and maintain all convenient buildings. . .for the accommodation and use of [its] passengers. . ." as naturally and ordinarily including the railroad's lease of the hotel, and the railroad's undertaking of the contractual obligation to insure the hotel.).

73. Indeed, the rubric of a Note on the case asked the premature question: "*The Death of Ultra Vires?*" *See* K.W. Wedderburn, *Notes of Cases: The Death of Ultra Vires?*, 29 MOD. L. REV. 673 (1966).

74. Introductions Ltd. v Nat'l Provincial Bank, Ch. 199 (C.A. 1970); *See* sources cited *supra* note 50.

75. Introductions Ltd. v Nat'l Provincial Bank, Ch. 199 (C.A. 1970).

bank, a significant loan which it secured by issuing debentures. The creditor-bank had been: (i) provided with a copy of the company's memorandum of association, and (ii) was treated by the courts as knowing that pig-breeding was the sole business-activity that the company was currently carrying on at the time of the loan.[76] The creditor-bank should therefore have entered into the transaction with its eyes wide open, rather than wide shut.

The Court of Appeal decided that the loan was not binding on the company at all, having concluded that the pig-breeding business which it conducted was ultra vires. Since pig-breeding was not *expressly* listed in the company's objects-clause as one of its specified business activities, it was too far removed from those activities actually listed therein. As a result, pig-breeding could not rationally be implied. Moreover, the courts ruled that a sub-clause included in the company's memorandum of association – which empowered it to borrow money – had to be necessarily limited to *borrowing money for its legitimate business purposes.* This clause could not legally be extended to borrowing money for ultra vires purposes. The Court of Appeal thereby completely rejected the argument that borrowing money *per se* was one of the legitimate objects of this company.[77] Indeed, Harman L.J. articulated the fundamental philosophy of English company law by declaring that a company "cannot have an object to do every mortal thing [it] want[s], because that is to have no object at all."[78] The question arises, however, as to whether or not this conception is rationally convincing.

Presumably, if a company wanted to expand its business activities beyond those initially selected, and included in its objects clause, or clauses, when its memorandum of association was initially registered, then it should amend its memorandum to add the additional business activities in its objects clause, or clauses. However, prior to 1948, amendment of a company's memorandum was virtually prohibited.[79] Then, in section 5 of the Companies Act 1948,[80] the legislature statutorily empowered companies formed under that Act to alter their objects clauses by special resolution to this effect without court consent.[81] For practical purposes, however, in the intense struggle to

76. *Id.* at 208.

77. *Id.* Clearly, the corporation did not qualify as a bank under pertinent banking laws.

78. *Introductions*, Ch.199 (C.A. 1970) at 209.

79. GOWER, *supra* note 18, at 14 ("[U]nder the early Companies Acts, the company itself had virtually no power to effect alterations.").

80. 1948 Companies Act, 1948, 11 & 12 Geo. 6, c. 38 § 5 (Eng.).

81. *See* Companies Act, 1929, 19 & 20 Geo. 5, c. 23, § 5 (Eng.) (Requiring court consent before companies could alter their objects clauses by special resolution.).

survive in the competitive world of commerce, the statutory need to effect changes was too often overlooked.

Then, in section 35 of the 1985 Companies Act,[82] the English legislature addressed the problem more directly. The section targeted transactions that the *directors* had decided to carry out. This, however, fell short of addressing the problem in its entirety. In reality, *other persons* acting on behalf of the company may have decided upon the pertinent transactions in controversy. In practice, corporate directors cannot be perfectly ubiquitous. That is unrealistic.

At least, section 35 had the effect of protecting third-parties who dealt with companies in good faith.[83] Companies were now bound by transactions that its directors had decided to carry out on its behalf, whether or not such matters were specifically stated in the companies' objects clause.[84] Moreover, under the section, a third party dealing with a company was statutorily relieved of any duty to inquire as to the company's capacity to enter into the specific transaction.[85] However, section 35 did not completely abrogate the ultra vires doctrine. Rather, a number of lacuna survived.

For instance, section 35 (2) protected a third party presumed to have acted in good faith.[86] Facially, this solution seems equitable. Nevertheless, exceptions persisted. The good faith requirement is apparently subjective.[87] It could therefore shield a genuinely ignorant third party from the consequences of an ultra vires transaction. However, it did not necessarily protect a third party who had previously

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82. Companies Act, 1985 c.6 § 35 (Eng.) (implementing § 9(1) of the European Communities Act, 1972 c.68. which states:
"In favor of a person dealing with a company in good faith, any transaction decided on by the directors is deemed to be one within the capacity of the company to enter into, and the power of the directors to bind the company is deemed to be free of any limitation under the memorandum of articles of association; and a party to a transaction so decided on is not bound to inquire as to the capacity of the company to enter into it or as to any such limitation on the powers of the directors, and is presumed to have acted in good faith unless the contrary is proved.").

83. *Id.*

84. *Id.*

85. *Id.* This section arguably abrogated the decisional power of *Ashbury Ry. Carriage & Iron Co. Ltd. v. Riche*, (1875) L.R. 7 H.L. 653, where transactions between companies were nullified to the detriment of the third party when a company's director(s) entered into agreements not authorized by the objects clause.

86. Unless the contrary is proven (*i.e.* a rebuttable presumption).

87. This can be defined as a person who acts honestly in light of the facts and circumstances of the particular case, rather than analyzing whether a reasonably prudent person would have acted similarly in the same circumstances. The House of Lords left intact the conclusion that it was intra vires for T.O.S.G. Trust Fund Ltd. (Tour Operators Study Group) corporation to deal with certain bond monies in the way it did, because its memorandum of association conferred complete discretion as to ways to alleviate the losses of holidaymakers in the event that losses were experienced. *See* Barclays Bank Ltd. v. TOSG, 1 A.C. 626, (H.L.1984).

dealt with the company. Nor did it protect a third party who had otherwise actually acquired knowledge of a company's objects.[88] As a result, the section could possibly be partially nullified by continued drafting of prolix, all-encompassing objects clauses. Third parties could then be defeated by simply providing proof that a particular third party was actually aware of a pertinent clause or clauses. This impaired progress.

1. Practical Effects

Moreover, the protection provided by section 35 was limited to transactions "decided on by the directors."[89] In *Smith v. Henniker-Major & Co.*,[90] the court decided that this provision in section 35A is subject to a condition precedent that the board must act *as a board.*[91] This conclusion by the court necessitates interpretation of the articles of association of the particular company in order to ascertain the quorum requirements for valid board action.[92] Interpreting section 35A in accordance with this decision would nullify the purported goal[93] of section 35A.[94]

In practice, however, quite a number of corporate business transactions are decided on by corporate officers, or managers, other than directors of a company.[95] Therefore, decisions of non-director finan-

88. Actual knowledge is not automatically equated with bad faith, but a third party who deliberately ignored a provision in a company's objects clause *might* be treated on the same footing as someone who acted in bad faith.

89. *See supra* note 82. *See* Smith v. Henniker-Major & Co., 2001 WL 1135246, at *4 (Ch. October 17, 2001); *see also* Claire Howell, *Section 35A of the Companies Act 1985 and an Inquorate Board: One Won't Do*, 23 COMPANY LAW, 96-98 (2002).

90. Smith v. Henniker-Major & Co., 2001 WL 1135246. *See* Howell, *supra* note 89, n. 10 ("*Smith v. Henniker-Major & Co.*, unreported, Ch D., transcript HC 0102108.").

91. *Smith v. Henniker-Major & Co.*, 2001 WL 1135246 (Ch. October 17, 2001), at *5 ("In this context, the reference in s. 35A to the power of the 'board of directors to bind the company' can sensibly only be to powers exercisable by the directors when they gather together and act as a board."). *See* Howell, *supra* note 89, at 97 (". . . Rimer J. held that section 35A only applies to powers exercisable by the directors when they gather together and act as a board.").

92. *See* Howell, *supra* note 89, at 97 ("It is still necessary to look at the company's constitution to see if the board has in fact acted.").

93. Abolition of the ultra vires doctrine.

94. In *Smith v. Henniker-Major & Co.*, [2003] Ch. 182, the Court of Appeal affirmed Rimer J.'s *decision*, but based their conclusions on substantive principles that do not affirm Rimer J.'s interpretation of section 35A and its effect. *See generally* Claire Howell, *Companies Act 1985, S. 35A and 322A: Smith v. Henniker-Major and the Proposed Reforms*, 24(9) COMPANY LAW, 264, 265 (2003) ("We are now unfortunately left with four different readings of [section 35A], as the interpretation of the three judges in the appellate court was not in accordance with that of Rimer J.").

95. *See* GOWER, *supra* note 18, at 221 ("[E]xcept where the company is very small or the transaction is very large, the third party will probably not have had dealings through the board. His dealings will be in practice more often with someone who is an executive of the company or

cial officers, attorneys, vice-presidents and other executive agents of the company would be excluded from Section 35 protection. For example, in *TCB v. Gray*,[96] a debenture executed by a director's attorney was challenged on the grounds that the company's articles required a *director* to actually execute the debenture.[97] Since the debenture was not physically executed by a director, the challenge asserted that the debenture was not binding on the company, because the company's articles did not permit an attorney[98] to act on behalf of the director. The trial court ruled that debenture was binding on the company[99] under the substantive application of section 9(1) of the European Communities Act 1972.[100] On appeal from Sir Nicolas Browne-Wilkinson V.- C.'s judgment, the Court of Appeal dismissed the appeal on grounds of common law agency principles, based upon the findings of fact made by Sir Nicolas Browne-Wilkinson V.- C.[101] The Court of Appeal therefore found it unnecessary to consider the legal issues pertaining to the interpretation of section 35 of the Companies Act 1985, that Sir Nicolas Browne-Wilkinson V.- C. had considered in reaching his decision. It is submitted that Sir Nicolas Browne-Wilkinson V.- C.'s reasoning in the trial court's interpretation of section 35 of the Companies Act 1985 is more convincing as an outcome intended by the legislature in enacting the section.[102] Undeniably, the Court of Appeal was disinclined to elucidate the meaning of this section on the facts of this controversy. This is unfortunate.

B. *The 1989 Companies Act*[103]

Further progress was made in the 1989 Companies Act.[104] This Act addressed the doctrine, pursuant to the PRENTICE REPORT.[105] In

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even a comparatively lowly employee of whom the members of the board may never have heard.").

96. TCB Ltd. v. Gray, 1 All E.R. 587 (1986).

97. *Id.* at 634 ("The debenture was not signed by any director of [the company], but by an attorney for a director. There is no power in the articles of [the company] for a director to act by an attorney.").

98. Actually a solicitor (who is an attorney in the American context) whom the trial court ruled *did* in fact have a power of attorney from a director, because the director was estopped to deny the validity of the grant of the power of attorney. *Id.*

99. *Id.* at 635.

100. *See* GOWER, *supra* note 18, at 207 ("Section 9(1) of the European Communities Act 1972 [was] later re-enacted as section 35 of the Companies Act 1985. . .").

101. TCB Ltd. v. Gray, 1 All E.R. 108 (1988).

102. *Id.*

103. *See generally* David A. Bennett, *The Companies Act 1989*, 35 J. L. SOC'Y Scot. 396, 469 (1990) (the article is a 3-part article in total).

104. Companies Act, 1989, c. 40 §§ 108-12 (Eng.).

105. *See* PRENTICE REPORT, *supra* note 55.

December 1985, the Department of Trade and Industry appointed Professor Prentice to examine reformation of the ultra vires doctrine.[106] The 1989 Companies Act[107] implemented a number of the changes recommended by Professor Prentice, but not all of them.[108] The implementing provisions are enacted in sections 108-112 of the Companies Act 1989,[109] and a number of them became effective in February 1991. Unfortunately, the 1989 Companies Act did not adopt Professor Prentice's recommendation that companies be statutorily empowered to dispense with objects clauses entirely.[110] This is lamentable.

1. Section 110

In section 110[111] of the 1989 Companies Act, the legislature's stance shifted to a certain extent. The section permits a company to adopt an expansive objects clause empowering it to engage in essentially any lawful[112] business.[113] Actually, this statutory language in section 110 (a) is practically identical to that upheld by the Court of Appeal in *Bell Houses Ltd.*[114] The legislature's stance has not completely shifted though.

The apparent legislative intention seems to be the enactment of plenary power in subsection (a), that is *not* to be diminished by the provisions of subsection (b), which is conjunctive. Arguably, the company

106. *See generally* Stephen Griffin, *The Effect of the Companies Act 1989 Upon Ultra Vires and Unauthorized Transactions*, 42 N. IR. LEGAL Q. 38, 39 (Spring, 1991).

107. Companies Act, 1989, c. 40, §§ 108-12 (Eng.).

108. *See* GOWER, *supra* note 18 at 208 ("Professor Prentice had recommended that companies should be afforded the capacity to do any act whatsoever and should have the option of not stating their objects in their memoranda. Unfortunately this straightforward solution was not adopted, notwithstanding the precedents for it in some other common law countries.").

109. Companies Act, 1989, c. 40, §§ 108-12 (Eng.).

110. *See* PRENTICE REPORT, *supra* note 55, at 46 ("It is proposed that: i) companies should have an option of not registering objects. . ."). This solution is analogous to the American solution adopted and enacted by the individual states. *See* MBCA § 3.01, *supra* note 35; *see also* MBCA supra note 35, at §2.02(b)(2)(i) ("The articles of incorporation *may* set forth:. . .(2)(i) the purpose or purposes fro which the corporation is organized. . .).

111. Amending the 1985 Companies Act by inserting a new section 3A.

112. *See* Greenfield, *supra* note 14 at 1314 ("T]he doctrine sets off illegal activities as ultra vires for corporations.").

113. Companies Act, 1989, c. 40, § 110 (Eng.).(stating that "[w]here the company's memorandum states that the object of the company is to carry on business as a general company: (1) the object of the company is to carry on any trade or business whatsoever, and (2)the company has power to do all such things as are incidental or conducive to the carrying on of any trade or business by it.").

114. Bell Houses Ltd. v. City Wall Properties Ltd., 2 Q.B. 656, 677. (Eng. C.A. 1966) (upholding the statutory provision: "(c) to carry on any other trade or business whatsoever which can, in the opinion of the board of directors, be advantageously carried on by the company in connection with or ancillary to any of the above businesses or the general business of the company. . .").

is *not* required to have a primary business. Rather, in addition to carrying on any lawful business whatsoever, it is empowered to engage in all activities that are "incidental or conducive" to *any* business that it actually pursues. Of course, an argument is still conceivable that a restrictive interpretation of subsection (a) *can* be imposed by subsection (b). This argument would be based upon interpreting subsection (a) as permitting the selection of *any* business whatsoever, as its *primary* business. The argument would also require an interpretation that, identification of a primary business was legally mandatory under subsection (a). This interpretation is not entirely convincing though, because presumably the legislature intended subsection (b) to *amplify*, rather than to restrict, restrain, or qualify any powers allocated in subsection (a).

Of course, if each subsection is interpreted independently, companies would be statutorily empowered to conduct any legal business activity whatsoever. For, other than illegal acts, there are relatively few acts that might *not* be interpreted as incidental to *any lawful trade or business whatsoever.*[115]

Of course, there may well be limits to court tolerance of parameter-extension. A business activity will not necessarily be interpreted as incidental in *every* situation where it proves to be profitable, or where it generates income[116] for the pertinent company.[117] For example, in *Halifax Building Society*,[118] the Chancery Division held that the construction of an office block[119] was indeed incidental to a corporate object of providing housing.[120] It is conceded that this decision is not

115. *Id.* Arguably, *A.G. v. Great Eastern Railway, Co.* exemplifies the tolerance that the courts adhere to in concluding that conduct by companies is incidental or conductive to conducting their business. *A.G. v. Great E. Ry., Co.* (1880) L.R. 5 App. Cas. 473, (H.L.). *See* Rajak, *supra* note 15 at 22-25.

116. Even if the corporation only breaks even.

117. *See* Halifax Bldg. Soc'y v. Meridian Hous. Assoc., Ltd., 2 B.C.L.C. 540 (1994) (the issue of an activity's fundamental nature as being, or not being *incidental to a company's primary business* will be determined objectively).

118. *Id.*

119. Under the pertinent statute, Meridian Housing Association, Ltd. was a corporation formed to provide residential housing. However, in its objects (purposes) clauses, it was empowered ". . . to do all things necessary or expedient for the fulfillment of its objects." *Id.* The High Court, Chancery Division upheld the Association's construction of new buildings, in which the ground (first) floor would be used as offices, and the upper floors as flats (apartments). *Id.* The Chancery Division ruled that rationally interpreted, the construction of the offices was reasonably incidental to the Association's objects of providing residential housing. *Id.*

120. Halifax Bldg. Soc'y, 2 B.C.L.C. at 540. Although, arguably, *residential* housing differs from *commercial* housing, in appropriate circumstances, the one *may* be necessarily incidental to the other, or, conceivably, *vice versa.*

an interpretation of the Companies Acts at all.[121] Nevertheless, it may be perceived as shedding light on the Chancery court's conception of what constitutes incidental acts in the context of business activities.

Additionally, although not enacted with retroactive legal effect, the 1989 Companies Act seems to grant currently operating companies the option to alter their objects-clauses by special resolution.[122] Thus, if they see fit to do so, companies formed prior to 1989 would be statutorily permitted to adopt open-ended objects clauses by substituting such clauses for their prior ones.

2. Section 108

Section 108 of the 1989 Companies Act[123] expressly prevents companies from using the ultra vires doctrine as a sword.[124] This section does not permit the doctrine to be used by companies against innocent third parties in any effort to invalidate otherwise valid transactions.[125] The section was intended to unambiguously confer on third parties the statutory right to transact business with companies, without fear of later having such transactions legally nullified by the courts. Additionally, the elimination of references to "transactions decided upon by directors of the company" extends the protection of third parties to a wider spectrum of business transactions. Third parties are now protected when they do business with any agent of the corporation, with whom a third party may reasonably have transacted such business, rather than limiting protection of third parties to transactions conducted by directors only.

Moreover, although the requirement of "good faith" by a third person dealing with a company was retained,[126] its contours are more

121. Meridian Housing Association, Ltd. was a corporation formed under the English Provident Societies Act 1965, and not under the Companies Act.

122. *See* Companies Act, 1989, c. 40, § 110 (stating that a company may, by special resolution, alter its memorandum with respect to the statement of the company's objects).

123. Companies Act, 1989, c. 40, § 108 (substituting §§ 35, 35A and 35B for the original § 35 of the 1985 Companies Act). This amendment was strongly recommended by Dr. Prentice acknowledging company practices of acting through agents. *See* PRENTICE REPORT, *supra* note 55 at 26-28.

124. Rather than as a shield.

125. The *new* § 35(1) provides that "[t]he validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum." Companies Act, 1989, c. 40, § 108.

126. Section 35A(1) states that "[i]n favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or authorise others to do so, shall be deemed to be free of any limitations under the company's constitution." *Id.*

helpfully delineated.[127] Rationally interpreted, even third parties who may be consciously aware that the company was engaging in transactions beyond its articulated objects would not be barred, *per se*, from enforcing such transactions against the company. Erecting such absolute barriers would be too rigid.

However, a legal distinction has been drawn between shareholder-vigilance and shareholder-procrastination. The legal efficacy of shareholder action to restrain a company from conducting business transactions beyond its stated objects is dependent upon sequence criteria.[128] In some instances, section 35 (1) can be interpreted as disabling shareholders of a company from curtailing business transactions that lie beyond the company's objects.[129] For example, if a shareholder *does* take action to restrain the company *before* it acts beyond its objects, the court could certainly enforce such restraints by granting the shareholder an injunction. In such instances, the court would be rewarding shareholder-vigilance, in taking action *before* the transaction was actually entered into.[130]

On the other hand, if the company succeeded in entering into a transaction *before* shareholders took action to restrain the transaction, then a legally valid obligation would arise from the company's conduct. Shareholder-procrastination would create an estoppel, disabling the shareholders from contesting the validity of the transaction.[131] Their failure to be vigilant and to act preemptively would be treated as a waiver of any legal, or equitable rights to restrain the company from embarking upon the particular transaction. This failure to restrain the company from acting, followed by the fact that the company *did* engage in the pertinent transaction with a third party, could amount to a waiver, justifying reasonable reliance by the third party. This waiver, followed by *justifiable reliance by the third party*, would

127. Section 35A(2) states that "(a) a person "deals with" a company if he is a party to any transaction or other act to which the company is a party; (b) a person shall not be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution; and (c) a person shall be deemed to have acted in good faith unless the contrary is proved." *Id.*

128. The *new* § 35(2) states that "[a] member of a company may bring proceedings to restrain the doing of an act which but for subsection (1) would be beyond the company's capacity; but no such proceeding shall lie in respect of an act to be done in fulfillment of a legal obligation arising from a previous act of the company." *Id.*

129. Companies Act, 1989, c. 40, s. 108.

130. *See* Anthony Hofler, *Company Contracts*, 136 SOLIC. J. 452 (1992).

131. This would arguably include long term obligations, thus preventing shareholders from restraining future performances of the company required by such obligations. *See* GOWER, *supra* note 18, at 212.

arguably give rise to a perhaps irrefutably successful use, by third parties, of the equitable shield of estoppel.[132]

In addition, by implication, director accountability to the corporation is addressed. In appropriate circumstances, certain conduct by directors will subject them to liability to the corporation.[133] Director action which causes the corporation to become a party to transactions, that would have been ultra vires for the corporation to undertake under former company law provisions, can trigger personal liability for such directors.[134] This is a rational. The subsection clearly empowers shareholders to demonstrate their approval of the transaction by special resolution. If the shareholders *did* pass such a resolution, this would absolve the directors who participated in the transaction from any liability.[135] Impliedly, therefore, a failure by the shareholders[136] to pass such a resolution could indicate the shareholders' intention to leave the implicated directors potentially liable to the company.[137] Shareholder decisiveness would provide clarity.

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132. *Id.*

133. *See, e.g.*, Worthington, *supra* note 28, at 659 ("[T]he common law position is. . .if a director disposes of corporate assets without authority, then he or she is strictly liable to compensate the company for the loss caused. The remedy is available against the defaulting director. . .It is equitable compensation, calculated in the same way as is a trustee's duty to reinstate the trust fund after a misapplication.").

134. *See* GOWER, *supra* note 18, at 213. The *new* § 35(3) states that "[i]t remains the duty of the directors to observe any limitations on their powers flowing from the company's memorandum; and action by the directors which but for subsection (1) would be beyond the company's capacity may only be ratified by the company by special resolution. Companies Act, 1989, c. 40, s. 108. *See also* Worthington, *supra* note 28, at 657 ("If the company. . .desire[s]. . .exoneration of its defaulting directors from a specific exercise. . .in excess of power, then. . .[i]f the restriction on the directors' power arises because of the company's limited objects,. . .a special resolution will do.")(citations omitted).

135. For purposes of completeness with respect to director-absolution from liability in these contexts, see generally Rod Edmunds & John Lowry, *The Continuing Value of Relief for Directors' Breach of Duty*, 66 MOD. L. REV. 195 (2003) which states that "[a]n errant director may seek total or partial relief from liability under section 727 of the Companies Act 1985 provided the breach of duty is honest and reasonable and the court decides that it ought fairly to be excused." (footnote omitted).

136. Or a *refusal* to pass an absolution-resolution, because the shareholders could certainly pass an absolution-resolution, *without* also passing a resolution approving the particular transaction.

137. *See* Companies Act, 1985, c. 6, § 108, notes (8 Halsbury's Statutes of England, 4th ed. 1991); see also PRENTICE REPORT, *supra* note 55, at 29. This section is arguably motivated by *Rolled Steel Products Ltd. v. British Steel Corp.* 1 Ch. 246 (1986). *See generally* N.E. Palmer & J.R. Murdoch, *Notes of Cases: Ultra Vires in Modern Company Law*, 46 MOD.L. REV. 204 (1983)(Trial court decision); Roger Gregory, *Notes of Cases: Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation*, 48 MOD. L. REV. 109 (1985) (C.A. decision). Of course, issues of liability of the directors *to the company*, on the one hand, and whether or not a transaction *is binding on the corporation*, on the other, are quite different. Directors may be held liable to the company, in the absence of a special resolution by the shareholders absolving such directors from liability in other situations as well. For example, where a transaction is *not* ultra vires (e.g.,

3. Section 35A

Section 35A of the 1989 Companies Act provides protection to third parties against limitations on the authority of the board,[138] and agents of the board,[139] by removing such limitations on the board's authority to delegate.[140] This was intended to protect third parties from injury incurred when transacting, in good faith, with an actual, or apparent agent of a company, who was in fact acting in contravention of the company's memorandum and articles. Section 35A(2)(a)[141] purports to deal with some interpretative problems associated with the old section 35. The language of this new subsection may be interpreted to have overruled any determination in *International Sales and Agencies Ltd. V. Marcus*,[142] that the transactions in issue in that case were *not* dealings with the company.[143] Arguably, it also substantively validates *TCB Ltd. V. Gray*.[144]

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because it falls within the express or implied powers of a company conferred by its memorandum of association), if for some reason it is a breach of duty on the part of the directors to enter into such a transaction, nevertheless, the transaction itself is binding on the company. There is no need for subsequent approval or ratification by the board of directors, or by the shareholders to make it binding on the company. However, a special resolution by the shareholders might definitely be necessary to absolve the pertinent directors from any *personal* liability to the company. Rolled Steel Prod. Ltd. v. British Steel Corp. 1 Ch. at 296. *See also* Aveling Barford Ltd. v. Period Ltd., B.C.L.C. 626 (1989).

138. "Section 35A of the Companies Act 1985. . .seems to require that the board is generally to be treated as the company. Thus it is now the case that in respect of dealings with third parties the company is bound by board action notwithstanding defects in the authority of the directors as the company's agents, *even where those defects are known to the other party*." Ross Grantham, *Illegal Transactions and the Powers of Company Directors*," 115 LAW. Q. REV. 296, 305-306 (1999) (citations omitted) (emphasis added).

139. Section 35A(1) provides that "[i]n favor of a person dealing with a company in good faith, the power of the board of directors to bind the company, or authorize others to do so, shall be deemed to be free of any limitation under the company's constitution." Companies Act, 1989, c. 40, § 108.

140. Thus, with regard to third parties in this context, limitations under the company's memorandum and articles, or from resolutions, cannot legally curtail the board's power to delegate authority to agents.

141. Section 35A(2)(a) provides that "a person 'deals with' a company if he is a party to any transaction or other act to which the company is a party." Companies Act, 1989, c. 40, § 108.

142. Int'l Sales and Agencies Ltd. v. Marcus, 2 C.M.L.R. 46 (1982) (where a company's director used company money to repay a *personal* loan obtained earlier from the defendant by the company's controlling shareholder, the court held that the repayments did not amount to "dealings" between the company and the defendant, who was the controlling shareholder's personal creditor, although a number of the repayments were made directly to the defendant by the company).

143. However, the court's conclusion that the *burden* is on the third party to establish that the transaction was indeed one of dealing with the company probably remains intact. *See id.*

144. TCB Ltd. v. Gray, 1 Ch. 621 (1986), (appeal dismissed in *TCB Ltd. v Gray*, Ch. 458 (1987), based upon findings of fact by the trial court that the defendant knew and accepted the unlimited nature of the guarantee in issue, thereby obviating any need by the Court of Appeal to

Section 35A(2) (b)[145] expressly discards any *per se* legal presumptions[146] based simply upon proof that a party knew that an act was beyond the powers of the directors under the company's constitution.[147] The knowledge that an act is beyond directors' powers, apparently does not *automatically* destroy the prospect of a finding of an individual's good faith.[148] A critical factor will clearly include a determination of whether or not the pertinent knowledge is combined with, and accompanied by, an additional, judicially-relevant element (*e.g.* a dishonest[149] act).[150]

Section 35A(1) also deals with constructive notice.[151] The Prentice Report recommended abolition of this doctrine. The Report's apparent rationale was that practical experience indicated that third parties

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consider the other issues of law dealt with by the trial court; and therefore the Court of Appeal did not deal with these issues).

145. Section 35A(2)(b) states that "a person shall not be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution." Companies Act, 1989, c. 40, § 108.

146. Rebuttable or irrebuttable.

147. The company's *constitution* is a term derived from European Union provisions, but arguably meaning - in the broadest sense - *all* internal provisions operating *collectively* (not simply the memorandum and/or articles of association) pertaining to the grant of empowerment of the company to act commercially.

148. *See, e.g.* . Griffin, *supra* note 106, at 42 ("In one respect the new Act is *more radical* than Dr. Prentice's proposals, for (unlike the Prentice Report) the new Act *does not equate actual knowledge* on the part of the third party with a *lack of good faith.*") (citations omitted) (emphasis added).

149. *See* Royal Brunei Airlines Sdn. Bhd. v Philip Tan Kok Ming, 2 A.C. 378, 389 (1995) (per Lord Nicholls of Birkenhead:

> Honesty, indeed, does have a strong subjective element. . .Thus for the most part dishonesty is to be equated with conscious impropriety. However, [the] subjective characteristics of honesty do *not* mean individuals are free to set their own standards of honesty in particular circumstances. *The standard of what constitutes honest conduct is not subjective.* Honesty is *not* an optional scale, with higher or lower values according to the moral principles of each individual. (emphasis added)).

See also Edmunds & Lowry, *supra* note 135, at 203-7.

150. *See, e.g.*, Griffin, *supra* note 106, at 42 ("[A] third party will only act in bad faith where fraud or deceit is involved. Where the company wishes to show bad faith it will be its responsibility to prove it."). The notes to section 108 of the 1989 Companies Act state that third parties are *not* to be protected if they are acting dishonestly. Companies Act, 1989, c. 40, § 108. However, the burden of proving such bad faith or dishonesty is on the company. *See* s. 35A(2)(c). The legislative intent may be - as an evidentiary hurdle - to *not* make it too easy to show a lack of good faith. Of course, lack of honesty by a *director* doing business in the company's name, if sufficiently egregious, can lead to *personal* liability being imposed on the director upon proof of common law fraud. However, for an analysis of directorial *personal* liability in tort, see *Williams v. Natural Life Health Foods Ltd.*, 1 W.L.R. 830 (H.L. 1998). *See also* Stephen Griffin, 115 LAW. Q. REV. 36 (1999) ("The assumption of personal liability must be evidenced by an act which transgresses the director's corporate authority, *to the extent that any accountability for the tortious act becomes, in reality, the director's and his alone.*") (emphasis added).

151. *See* Companies Act, 1989, c. 40, s.142 (not yet in force), inserting s. 711A into the 1985 Companies act in Part XXIV of the Act:

dealing with a company and its agents are routinely very busy. As a result, they usually do not actually inspect the company's public documents at all.[152]

4. Section 35B

Section 35B of 1989 Companies Act eliminates the duty of third parties to inquire as to what transactions are permitted by a company's memorandum. Apparently, normative conceptions have been abandoned in favor of industry-wide, practical realities. In practice, third parties tend *not* to make such inquiries. Thus, based upon the authority of *TCB Ltd. v. Gray*,[153] lack of good faith cannot be established with temerity against a person dealing with a company. First, the courts will *not* conclude that lack of good faith is proven *per se* merely by showing that the pertinent third party *ought* to have inquired into any limits on the company's capacity or its internal rules of management.[154] Secondly, any attempt to establish lack of good faith by using as a *portal*, proof that the third party ought to have inquired

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A person shall not be taken to have notice of any matter merely because of its being disclosed in any document kept by the registrar of companies (and thus available for inspection) or made available by the company for inspection. (2) This does not affect the question whether a person is affected by notice of any matter by reason of a failure to make such inquiries as ought reasonably to be made.

This abrogation of the doctrine of constructive notice is particularly significant, because, at common law a third party dealing with a company was deemed, under prior company law, to have constructive notice of the contents of the company's public documents (the original s. 35 of the 1985 Companies Act apparently sought to repeal the doctrine of constructive notice, but it did not completely succeed in doing so).

Subsection (1) has apparently abolished the doctrine of constructive notice, while subsection (2) arguably has left intact the obligation to make reasonable inquiries, in circumstances where a third party is *put on inquiry* by specific facts in the context of any particular transaction. *See* Underwood Ltd. v. Bank of Liverpool and Martins, 1 K.B. 775 (1924) (where a bank was put on inquiry when the sole director of a company endorsed numerous checks and then deposited them in his own personal account).

152. *See* PRENTICE REPORT, *supra* note 55, at 22. Business experience in the U.S. is similar. *See, e.g.*, HAMILTON: CORPORATIONS, *supra* note 54 at 277

("One superficially plausible justification for the [ultra vires] doctrine arises from the fact that articles of incorporation are on public file; it seems reasonable to argue that one is charged with *notice* of whatever unexpected provision might appear in public documents. *From a business standpoint, that argument is unrealistic*: it assumes people will check articles of incorporation *when in fact they do not*, and that when they do check the articles, they will make business judgments based on a reading of what often is essentially boilerplate legalese. Whatever the merits of the notion of being charged with notice of public documents in different contexts, the decline and elimination of the *ultra vires* doctrine proves that it should not be applied to purposes clauses of articles of incorporation.") (emphasis added).

153. *TCB Ltd. v. Gray*, Ch. 621 (1986).

154. *Id.*

into any limits on the company's capacity, or its rules of management, will also fail.[155]

This may actually *exceed* Dr. Prentice's recommendations in certain respects.[156] Enhanced protection of third parties may not have been intended by Dr. Prentice, at least in particular instances, where actual knowledge[157] emerged from the particular third party's inquiries. Dr. Prentice's apparent reasoning may be articulated as follows.

For example, a third party with *actual*[158] knowledge that a board, or an individual director, did *not* genuinely have authority to enter into a transaction on behalf of the company should *not* be legally permitted to enforce the transaction in issue against the pertinent company.[159] Intellectually, this seems fair to all parties to the controversy. So that, although there may not currently be a statutory duty to inquire, if a third party does *in fact* inquire, judicially relevant information derived from such inquiries should *not* be disregarded. Furthermore, rationally, the possession by the third party of judicially relevant information should *not* be disregarded, even if such information was obtained other than from inquiries by the third party. Therefore, Dr. Prentice's reasoning seems to support a determination of the presence or absence of good faith based upon all relevant facts and circumstances, including inquiries and their judicially relevant product.

Of course, on the other hand, potential justification exists for *not* equating actual knowledge with bad faith, in every instance. Proof of a third party's actual knowledge of particular facts does not irrefutably prove the third party's awareness of the legal implications of that knowledge. The presence or absence of her or his good faith depends upon the particular third party's substantive awareness of certain critical factors. The most critical factor is the third party's substantive awareness of the judicially relevant implications of the known facts. This factor plays a determinative role in any evaluation of the presence or absence of his or her good faith.

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155. *Id.*

156. *See, e.g.*, Griffin, *supra* note 148.

157. "[K]nowledge in this context will require *understanding* and it will only be knowledge of the individual entering into the particular transaction which will be relevant. . ." (emphasis added) PRENTICE REPORT, *supra* note 55 at 36.

158. "[A] third party who has actual knowledge that a board or an individual director do not possess authority to enter into a transaction on behalf of the company *should not be allowed to enforce it against the company* but the company should be free to ratify it. The same result should obtain where a third party has actual knowledge that the transaction falls outside the company's objects but in this case ratification should be by special resolution[.]" (emphasis added). *Id.*

159. *Id.*

Moreover, such a third party's substantive awareness of the pertinent legal implications is a function of other factors as well. The third party's substantive awareness depends upon his or her education, practical corporate experience, and familiarity with corporate law. Therefore, a third party may honestly, and in good faith, *not* fully understand, or appreciate the legal significance of particular provisions in the company's memorandum, even if the third party *did* inquire.

Additionally, even if the third party *did* inquire, the particular third party may not have had access to appropriate legal advice necessary to assess the legal implications of the information obtained from such inquiries. Such legal advice might be necessary to explain the legal implications of the information gleaned from the third party's inquiries. In the absence of reasonably competent legal advice, a third party untrained in corporate law is probably unaware of the legal implications, and full legal effect of the memorandum of association, and the objects clause, on a particular company's business activities.

Alternatively, even if the third party did seek competent legal advice, on which the particular third party did rely, and did act, the third party may nevertheless have been misled. In such circumstances, the third party's good faith should arguably be treated as surviving intact. All these factors merit attention.

C. *United States*[160]

In the United States, abolition of the ultra vires doctrine probably comes closest to being complete.[161] The modern American model may therefore be the most deserving of emulation elsewhere.[162] The

160. *See* Harry G. Henn & John R. Alexander, Laws of Corporations and Other Business Enterprises, 484 (3d ed. 1983). "The [MBCA] has abolished the *ultra vires* doctrine, except for shareholder injunction proceedings against the corporation, actions by the corporation or those suing in its behalf against officers or directors, or proceedings by the state to dissolve or enjoin the corporation." (citations omitted). *Id. See also* Greenfield, *supra* note 14, at 1281 ("[R]ather than being dead, the ultra vires doctrine remains vibrant in one important way. Although corporations need not enumerate a single purpose for their existence and are not constrained to exercise only specifically identified powers, modern state statutes and articles of incorporation nevertheless charter corporations only for *"lawful"* purposes.") (emphasis added). *See id.* at 1317, note 121 (where the author lists forty-seven states and the District of Columbia that limit corporations to lawful activities).

161. *See* O'NEAL & THOMPSON, *supra* note 54 at 8-45 ("The concern about possible efforts by corporations to scuttle bad contracts led to language in *most* corporations statutes that limit the use of ultra vires. . ." citing MODEL BUS. CORP. ACT § 3.04, *see infra* note 165) (emphasis added). *See also* BAINBRIDGE, *supra* note 16, at 58.

162. *See* HAMILTON: CORPORATIONS, *supra* note 54, at 277 ("[W]hen all is said and done, the [ultra vires] doctrine was an undesirable one, involving harsh and erratic consequences."). *See also* EISENBERG *supra* note 54, at 128 ("Ultra vires was always regarded by the commentators as an unsound doctrine.").

American approach renders the complexity of the English approach tortuous and unnecessary. Indeed, a corporation can do every mortal thing that it wants, provided that the particular activity is lawful for an individual to pursue.[163] Moreover, no significant problems have emerged as a result of the statutory grant of such extensive, blanket corporate powers.[164] Of Course, in the United States, the ultra vires doctrine has not been completely abolished.[165] A number of legal consequences have been retained in certain circumstances. The critical distinction is this. Both third parties,[166] as well as the corporation,[167] are statutorily prohibited from asserting the ultra vires doctrine to *invalidate* any inherently legal transaction that exceeds the corporation's powers.[168] Only the Attorney General[169] and/or a shareholder of the corporation[170] are statutorily permitted to success-

163. *See* materials cited *supra* notes 34, 35.

164. *See, e.g.*, 711 Kings Highway Corp. v. F.I.M.'S Marine Repair Serv. Inc., 273 N.Y.S.2d 299 (1966).

165. MODEL BUS. CORP. ACT § 3.04 (1969)(3rd ed. 2002) [hereinafter MBCA § 3.04].

> (a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.
>
> (b) A corporation's power to act may be challenged:
>
> (1) in a proceeding by a shareholder against the corporation to enjoin the act;
>
> (2) in a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation; or
>
> (3) in a proceeding by the Attorney General . . . .
>
> (c) In shareholder's proceeding under subsection (b)(1) to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and may award damages for loss (other than anticipated profits) suffered by the corporation or another party because of enjoining the unauthorized act." *Id.*

See EISENBERG, *supra* note 54, at 129 (stating that § 3.04 "almost (but not quite) abolish[es] the doctrine.").

166. *See* 711 Kings Highway Corp. v. F.I.M.'s Marine Repair Serv., Inc., 273 N.Y.S.2d 299 (1966) (interpreting McKinney's Business Corporation Law § 203 (1986), which is substantively similar to MBCA § 3.04).

167. *See* Fidelity & Deposit Co. v. McClure Quarries, Inc., 376 F.Supp. 293, 297 (1974) (interpreting Ill. Rev. Stat. 1973, c.32, § 157.8. which is substantive similar to M.B.C.A. § 3.04 ("The pleas of ultra vires are insufficient as a matter of law.")). *See also* Rio Refrigeration Co. v. Thermal Supply of Harlingen, 368 S.W.2d 128 (1963) (interpreting Texas Business Corporation Act, art. 2.04 (Vernon's Ann. Civ. St. 1955) which is substantive similar to MBCA § 3.04).

168. As such powers are enumerated or prohibited within the corporation's purposes clause(s), or rationally encompassed within any enumerated or prohibited purposes.

169. *See* MBCA§3.04, *supra* note 165. *See also* Greenfield, *supra* note 14, at 1359 ("Forty-nine states. . .retain a provision in their state incorporation statutes that allows the state to dissolve a corporation or enjoin it from engaging in ultra vires activities.").

170. *See* MBCA § 3.04, *supra* note 165. *See also* O'NEAL & THOMPSON, *supra* note 54, at 8-45 ("[S]hareholders can assert ultra vires but this exception has been rarely applied." citing *Inter-Continental Corp. v. Moody*, 411 S.W.2d 578 (Tex. App. 1966) where a minority stockholder was permitted by the Court of Civil Appeals of Houston, Texas, to intervene in order to enjoin payment by the corporation of a note. The minority shareholder had asserted that the promis-

fully challenge corporate ultra vires acts.[171] This solution is realistic and meaningful.

1. Retained Legal Consequences

First, the Attorney General may seek judicial dissolution of a corporation that engages in ultra vires acts.[172] Secondly, shareholders[173] may seek an injunction to restrain the corporation in which they own shares from engaging in an ultra vires act or acts.[174] In addition, quite sensibly,[175] liability of a corporation's directors, officers or other agents responsible for an ultra vires act, or acts, is statutorily re-

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sory note - in the principal amount of $80,000.00 - was ultra vires, because it had been executed in the name of the corporation by its president and attested by its secretary in satisfaction of a *personal* obligation of the corporation's president). *See also* Real Estate Capital Corp. v. Thunder Corp., 287 N.E.2d 838 (Ohio Ct. Com. Pl. 1972) (holding that a minority stockholder allowed to invalidate a corporate mortgage and rent assignment, because they were executed by the corporation gratuitously). Of course, *not all* gratuitous disbursements by corporations have been held to be ultra vires when challenged by a stockholder. A stockholder's challenge of a charitable gift was unsuccessful in *Theodora Holding Corp. v. Henderson*, 257 A.2d 398, 405 (Del. Ct. Ch.1969) ("I conclude that the test to be applied in passing on the validity of a gift such as the one here in issue is that of *reasonableness*, a test in which the provisions of the Internal Revenue Code pertaining to charitable gifts by corporations furnish a helpful guide.") (emphasis added). In a later case where stockholders unsuccessfully challenged certain charitable gifts as corporate waste, the Delaware Supreme Court cited the *Theodora Holding Corp. v. Henderson* reasoning with approval in *Kahn v. Sullivan*, 594 A.2d 48, 61 (Del.1991). *See, e.g.*, R. Franklin Balotti & James J. Hanks, Jr., *Giving at the Office: A Reappraisal of Charitable Contributions by Corporations*, 54 BUS. LAW. 965, 970, 975-6 (1999) ("Currently, every state and the District of Columbia has a statute enabling its corporations to make charitable donations."). *See also* Nell Minow, *Corporate Charity: An Oxymoron?* 54 BUS. LAW. 997, 1001-3 (1999). *See also* MODEL BUS. CORP. ACT, § 3.02(13) ("Unless its articles provide otherwise, every corporation. . .has the same powers as an individual. . .(13) to make donations for the public welfare or for charitable, scientific, or educational purposes. . .").

171. *See* MBCA §3.04, *supra* note 165. The MBCA § 3.04 applies to corporate action that is beyond the purposes of its purposes clause. It is acknowledged that the term ultra vires is routinely used to refer to corporate activity that is beyond a corporation's powers on other bases. *See* CHOPER, *supra* note 15. *See also* Rajak, *supra* note 15.

172. Presumably, the repeated conduct of ultra vires activity might trigger Attorney-General action in this regard, rather than a single isolated act, or even sporadic acts.

173. Non-shareholder employees, however, have *no* such right in their role as *employee*. *See* Cucchi v. New York City Off-Track Betting Corp., 818 F.Supp. 647, 657-58 (S.D.N.Y. 1993) ("Because plaintiff is *not* a shareholder [of the corporation], is *not* suing on behalf of [the corporation], and is *not* the Attorney-General, plaintiff's ultra vires claim must fail.") (emphasis added). Creditors of the corporation, in their role as *creditors*, have *no* such right either. *See* Lurie v. Arizona Fertilizer & Chemical Co., 421 P.2d 330, 333 (Ariz. 1966)("The claim of ultra vires is not being brought on behalf of the shareholders. . .but by a *creditor*. . .The doctrine of ultra vires, and its resultant legal effect, should *not* be applied on this ground.") (emphasis added).

174. *See Inter-Continental Corp.*, *supra* note 170.

175. "[P]eople who are offered blanket protections or indemnities will take foolish risks, thus inflaming the very perils that the protections were meant to avoid." ROBERT E. LITAN & JONATHAN RAUCH, AMERICAN FINANCE FOR THE 21ST CENTURY, 35 (1998).

tained.[176] The corporation is statutorily empowered to seek recovery from them by suing them for involving it in the ultra vires business activity in the first place.[177] The American solution therefore empowers those whose financial motivation would tend to promote vigilance. They are motivated to act as guardians[178] of the corporation and its assets. These sentinels can protect the corporation from the negative consequences of ultra vires activities. They do.[179]

D. *Reform of the Ultra Vires Doctrine in the Commonwealth Caribbean: A Useful Example*

In the Commonwealth Caribbean, the Caribbean Law Institute[180] urged the Commonwealth Caribbean territories to reform their corporate law statutes.[181] Barbados did. Barbados took the plunge and reformed the ultra vires doctrine in its Companies Act 1991.[182] The Barbados solution is substantively based upon the corporate law philosophy of the modern American model.[183] However, although Barbados' corporate law position, with regard to the ultra vires doctrine, now more closely resembles the U.S. position, it is not identical. In Barbados, "[a] company has the capacity . . . rights, powers and privileges of an individual."[184] However, this legal equation with an indi-

176. *See* MBCA § 3.04, *supra* note 165, § 3.04(b)-(c). In the context of an ultra vires contract purported to have been entered into by a corporation and a third party, the third party may also be able to successfully impose liability on directors *personally* based upon the doctrine of piercing the corporate veil. *See, e.g.*, Lurie v. Arizona Fertilizer & Chemical Co., 421 P.2d 330 (Ariz. 1966).

177. *See* § 3.04(c).

178. *Shareholders* of the corporation are in the class of guardians statutorily empowered to bring suit, but *third parties* and other *non-shareholders* are *not*. *See, e.g.*, Di Cristofaro v. Laurel Grove Mem'l Park, Inc., 128 A.2d 281, at 286 (N.J. Super. Ct. App. Div. 1957) ("[W]e have rejected the approach from a standpoint of a *competitor* complaining of the ultra vires acts of a corporation.") (emphasis added). This is *in spite of the fact that* a competitor may conclude that attaining a reduction in competition with itself - by successfully bringing suit to restrict other corporations to their intra vires activities - is *a legitimate goal.*

179. *See* MBCA § 3.04, *supra* note 165, § 3.04(b)-(c)

180. The Caribbean Law Institute (CLI) is a joint project between Florida State University (FSU) and the University of the West Indies (UWI). Founded in 1988, it has promoted law reform in the Commonwealth Caribbean under grants from the United States Agency for International Development.

181. *See* Caribbean Law Institute Companies Bill of 1991, Explanatory Memorandum 2 (1991) [hereinafter "CLI Bill 1991: Explanatory Memorandum"] (stating that the CLI has prepared and promulgated a companies bill which explicitly addresses ultra vires doctrine issues). *See* Companies Act, cap. 308 § 17-24 (Barb. 1991).

182. Companies Act, cap. 308 § 17-24 (Barb. 1991).

183. *See* CLI Bill 1991: Explanatory Memorandum, *supra* note 181, at 2 (stating that the Barbados Companies Act "was influenced . . . by the Dickerson Report of 1971 from Canada, which Report had itself received a *substantial input* from North American sources.") (emphasis added).

184. Companies Act, cap. 308 § 17 (Barb. 1991).

vidual is statutorily qualified. The Barbados corporate statute expressly prohibits a corporation from conducting any business that the particular company is restricted by its articles from carrying on.[185] It can therefore be argued that, under this section, any business activity that is explicitly prohibited by the articles would be ultra vires for the company to pursue. This approach has unavoidably created the following potential danger. The ultra vires doctrine *may* be reincarnated by this approach. Conceivably, therefore, when drafting objects clauses, a long list of *prohibitions* may develop. The length of such a list could rival, or exceed the long list of independent objects previously used, when drafting corporate objects clauses. The emergence of such a practice would indeed be unfortunate. It would also be counterproductive.

The Barbados Legislature has made an effort to avert this danger. The Barbados statute states that violation of a company's articles does not invalidate the legal efficacy of the particular business transaction that contravenes the articles.[186] Moreover, the company is statutorily prohibited from asserting any non-compliance with its articles against anyone dealing with it.[187] However, the corporate statutes in the individual states in the United States have not been fully emulated. The Barbados statute does not include the express *statutory* empowerment of the Attorney General to seek dissolution of the corporation, if it engages in an ultra vires act, or acts.[188] Nor does the Barbados statute enact any explicit *statutory* empowerment of shareholders to seek an injunction[189] to restrain the corporation from engaging in any ultra vires act, or acts.[190] As a result, judicial assistance in furthering the legislature's goal in this regard has become paramount.[191] The courts will need to enforce such prohibitions by necessary implication. Such action will not stifle business at all.

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185. *Id.* § 18. Without explicitly so stating, this presumably empowers shareholders (or the Attorney-General) impliedly, to take action - conceivably by injunction - to curtail violations of the company's articles of incorporation.

186. *Id.* § 19. *See also id.* § 22. Third parties can therefore legally proceed against the company with respect to such matters.

187. *Id.* § 21. Thereby converting any ultra vires controversies from external to internal resolution, in the sense that: whereas, the validity of the transaction *vis-a-vis* action by and/or against the company by third parties will be fully valid, nevertheless, shareholders (or the Attorney-General) could take action to halt continuance of any ultra vires activity.

188. To seek judicial dissolution of the corporation in these circumstances. *See* MBCA § 3.04, *supra* note 165, § 3.04(b)(3).

189. To restrain the corporation from engaging in the particular act or acts that violate the articles. *See* MBCA § 3.04, *supra* note 165, § 3.04(b)(1)

190. The Barbados courts will need to declare these powers by necessary implication.

191. In Barbados, liability of the corporation's directors, officers or other agents responsible for pertinent actions that violate the articles, will need to be implied by the courts.

E. *Other Common Law Jurisdictions*

Rather than emulating the English incremental approach, a number of common law jurisdictions have embraced American corporate law philosophy, with regard to the ultra vires doctrine. In those jurisdictions, the ultra vires doctrine has been abolished, essentially completely. Abolition of the doctrine has been accomplished, by granting companies, all the powers of a biological person.[192] For example, Canada's approach is instructive.

1. Canada[193]

Canadian corporate law has historically been significantly influenced by English company law concepts.[194] Over the last three decades or so, however, Canadian company law has tended to diverge from its English roots. This has happened partially as a result of increasing American business connections.[195] Section 15(1) of the Canadian Business Corporations Act 1974-75 provides: "A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person."[196]

Canada has therefore chosen abolition of the ultra vires doctrine,[197] congruent with the American approach. In corporate ultra vires transactions, the Canadian Business Corporation Act protects the rights of third parties. First, section 16[198] statutorily enunciates the

192. Thereby rendering objects clauses redundant.

193. "Canadian corporation laws owe much to English company law concepts . . . ." J. H. Farrar, *Commentary: The United Kingdom Companies Act 1989*, 17 CAN. BUS. L.J., 150 (1990).

194. *Id.*

195. *Id.*

196. Canada Business Corporations Act, S.C. 1974-75 c.33 [hereinafter "CBCA"]. The Canadian Constitution Act 1867 enunciates the separation of powers between the Canadian Federal and Provincial Governments, and empowers *both* the Federal Parliament *and* the Provincial legislatures to legally permit the incorporation of companies. *Id.* A corporation that is incorporated under the Federal provisions has the legal powers of a natural person to function throughout Canada, *id.* § 15(1), as well as in any jurisdiction outside Canada to such extent as the laws of such jurisdictions permit , *id.* § 15(2). Federally incorporated companies are subject to generally applicable Provincial laws, and must register in those Provinces where Provincial statutes mandate registration as a condition precedent to carrying on business there. *Id.* Companies incorporated under Provincial statutes are empowered to function in the Province of incorporation, but must comply with all mandatory licencing requirements of other Provinces. *Id.*

197. *See* Can. Mortgage & Hous. Corp. v. Hong Kong Bank of Can, (1993) 1 S.C.R. 167, 190 (Can.) ("In Canada . . . the ultra vires doctrine has been abolished in most Canadian jurisdictions. . .It would be anachronistic for the courts to interpret corporate powers narrowly when most Canadian legislatures have indicated that companies should have *all the legal powers of natural persons*.") (emphasis added).

198. *See* CBCA, *supra* note 196, § 16(3) ("No act of a corporation, including any transfer of property to or by a corporation, is invalid by reason only that the act or transfer is contrary to its articles or this Act.").

validity of the transaction, unimpaired by its ultra vires character. Second, section 17[199] reinforces this substantive legal effect by statutorily eliminating the doctrine of constructive notice.

Working together synergistically, these sections exceed the substantive legal effect of the revised 1989 Companies Act of England. This nullification of the doctrine of constructive notice with regard to third parties obviates any *per se* ultra vires effect in circumstances where the companies' articles are contravened.

2. *Australia*

Australia has reformed its Company Laws in a manner similar to the Canadian reforms.[200] The Australian corporate statute imbues the company with all the legal powers and capacity of an individual.[201] Additionally, the doctrine of constructive notice has been abolished and replaced by its antithesis.[202] However, the Australian Act does not purport to protect a third party who has actual knowledge that the company is acting beyond its objects.[203]

The substantive interpretation of the provisions abolishing the ultra vires doctrine has not been unambiguous. Similar to the courts elsewhere in common law jurisdictions, the Australian courts are grappling with these provisions as effectively as they can. For example,

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199. *See* CBCA *supra* note 196, § 17 ("No person is affected by or is deemed to have notice or knowledge of the contents of a document concerning a corporation by reason only that the document has been filed by the Director or is available for inspection at an office of the corporation.").

200. It has abolished the ultra vires doctrine, as well as the doctrine of constructive notice of the contents of a corporation's publicly registered documents.

201. *See* Corporations Act § 124(1) (Austl. 2001) ("A company has the legal capacity and powers of an individual both in and outside this jurisdiction. A company also has all the powers of a body corporate. . ."). *See also* Corporations Act § 125(2) (Austl. 2001) ("An act of [a] company is not invalid merely because it is contrary to or beyond any objects in the company's constitution."). *See generally* Ian Ramsey et al., *Political Donations by Australia Companies*, 29 FED. L. REV. 177 (2001), *citing* Corporations Act, §§ 124-25 ("[T]he doctrine of ultra vires has been abolished in Australia. . ."). *See also* ANZ Ex'r and Tr. Co. Ltd. v. Qintex Austl. Ltd. (1991) 2 A.C.S.R 676 (Austl.); J. H. Farrar, *The United Kingdom Companies Act of 1989*, 17 CAN. BUS. L.J., 150, 152 (1990).

202. A set of statutory *assumptions of validity* enunciated in section 129 of the 2001 Australian Corporations Act that a person is entitled to make when dealing with a company. *See* Corporations Act § 128 (Austl. 2001).

> (1) A person is entitled to make the assumptions in section 129 in relation to dealings with a company. The company is not entitled to assert in proceedings in relation to the dealings that any of the assumptions are incorrect. (2). . . (3) The assumptions may be made even if an officer or agent of the company acts fraudulently, or forges a document, in connection with the dealings. (4). . .

Id.

203. *See* id. § 128(4) ("(4) A person is not entitled to make an assumption in section 129 if at the time of the dealings they knew or suspected that the assumption was incorrect.").

McPherson J.'s comments[204] in *ANZ Executors and Trustee Co. Ltd. v. Qintex Australia Ltd.*[205] may be treated as going too far, and as being *obiter dicta.* Essentially, in *ANZ Executors and Trustee Co. Ltd. v. Qintex Australia Ltd.*, the court was simply exercising its own discretion, as it is perfectly empowered to do in such circumstances. The court was sitting as a court of equity. The court's refusal to grant the equitable remedy of specific performance with regard to the particular transaction in issue was certainly viable. However, it can be feasibly argued that the statutory provisions abolishing the ultra vires doctrine were *unmistakably intended to protect third parties.* These provisions deem *some* transactions *to be valid.* The statutory intention is to *validate* such transactions. This validity is intended to be effective in the face of *some* actions by directors, and/or shareholders, even where those actions *contravene some* restrictions, or limitations on such directors' or shareholders' powers.[206] Each case is fact-determinative.

In *Darvall v. North Sydney Brick & Tile Co. Ltd.*,[207] Bryson J. very effectively articulated the pertinent issues in the following terms:

> The distribution of powers and functions *among* the organs of the company and the maintenance of the effectiveness of that distribution is to my mind an entirely different subject to the question *whether a particular act in the law is within the powers of a company.*[208]

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204. ANZ Ex'r and Tr. Co. Ltd. v. Qintex Austl. Ltd. (1991) 2 A.C.S.R 676 (Austl.) ("The purposes [of abolition of the ultra vires doctrine] are sufficiently achieved if, despite deficiencies in corporate capacity, the validity of corporate dealings with outsiders is made unimpeachable. *Beyond that point the legislation does not affect to abrogate restrictions, explicit or implicit, on the exercise of directors' or shareholders' powers. . .*") (emphasis added).

205. *Id.*

206. *See* Claire Howell, *Companies Act 1985, s.35A and 322A: Smith v. Henniker-Major and the Proposed Reforms*, 24(9) COMP. LAW., 264, 265 (2003) (discussing substantively similar issues in the context of s.35A Companies Act 1985, added by the Companies Act 1989 of English Companies legislation purporting to abolish the ultra vires doctrine in England). "Section 35A could be used where there has been a resolution of the company in general meeting, a meeting of any class of shareholders or shareholders agreement that, for example, the directors of Company A may *not* borrow in excess of £50,000 without the approval of the shareholders in general meeting. Bank B, which we presume to be acting in good faith, then enters into a transaction to lend the company £60,000. However, the shareholders have *not* approved the borrowing. The bank here is a party to the loan transaction beyond the limitation set in the company's constitution. As the bank is a third party acting in good faith, *it is entitled to the protection of s.35A, which deems the powers of the directors to be free from constitutional limitations.*" (emphasis added). *Id.*

207. Darvall v. N. Sydney Brick & Tile Co. Ltd. (1988) 14 A.C.L.R. 717 (Austl.).

208. *Id.* Articulated in human biological terms, the issue of the powers and functions among the internal organs of a human organism (*e.g.* the heart pumps blood throughout the human body, and the lungs do not; whereas, the lungs remove carbon dioxide from the blood in the human body and the heart does not. *Id.* These functions are *not* interchangeable between the heart and the lungs), is an entirely different subject to the question whether a human organism can run a 100 meters in two seconds. *Id.*; *see also* Ian Ramsey et al., *supra* note 201 at n.99

These conclusions are particularly convincing because they make business sense. Bryson J.'s reasoning in this regard is preferred, rather than McPherson J.'s more inflexible conclusions expressed in his *obiter* statements in *ANZ Executors and Trustee Co. Ltd. v. Qintex Australia Ltd.*[209] Provided that the distinctions demarcated by Bryson J. are adhered to in interpreting and applying these statutory provisions, the task of refinement will not be insuperable, as the Australian courts continue their future interpretive tasks.

3. New Zealand

New Zealand's reforms are similar to the Canadian and Australian reforms, with companies statutorily equated with individuals.[210] In addition to abolishing the doctrine of constructive notice of a company's registered documents,[211] the reforms also statutorily target the issue of the corporation's lack of capacity. The reforms prohibit the issue of lack of capacity from being raised to invalidate actions taken by the company.[212] They also embrace the U.S. solution selected in the MBCA.[213] Thus, in proceedings by the company itself,[214] its members,[215] or the Registrar of Companies,[216] the ultra vires issue can be validly raised. The company or its members are empowered to proceed against the company's officers[217] with respect to such transactions. Moreover, acting preemptively, members of the company may

("Although the expression ultra vires is sometime used in respect of acts of both individuals or corporations who act beyond their powers, in the context of corporate law, the expression should be used in the narrow sense of being confined to acts by a company with limited capacity beyond its corporate power. With the abolition of the doctrine of ultra vires in Australia, *an act of a director in disregard of the interests of the company only affects the validity of the director's acts and does not affect the validity of the corporate action.* Directors are under an obligation to ensure that company powers and funds are used only for company purposes.") (emphasis added) (citations omitted).

209. *See ANZ Ex'r and Tr. Co. Ltd., supra* note 204.

210. *See* THE LAWS OF NEW ZEALAND (LexisNexis 2003); Companies Act 1993, 1993 S.R. No. 105 (N.Z.) [hereinafter NZCA] (amending the Companies Act 1955 and adding a general provision in § 15A(1), which created for companies the same rights, powers, and privileges as those of a natural person). Additional enunciated statutory powers were conferred on companies under § 15A(2). *Id. See also* Farrar, *supra* note 193, at 152.

211. NZCA §18B.

212. NZCA § 18A(1).

213. *See* MBCA § 3.04, *supra* note 165.

214. *See* NZCA § 18A(2)(a)(b). Proceedings by the company against its officers responsible for embroiling it in the ultra vires transaction(s).

215. *Id.*

216. *See* Companies Act § 18A(2)(c). The Registrar's action would take the form of a winding-up application.

217. *See, e.g.*, MBCA § 3.04, *supra* note 165, § 3.04(b)(2).

file suit to prevent the ultra vires transaction[218] or may seek other relief in this regard.[219]

In addition, a third party's actual knowledge of a company's lack of capacity is not irrelevant.[220] The Act clearly acknowledges a distinction between concepts of constructive notice and *actual knowledge.* With respect to persons who knew, or ought to have known of the company's lack of capacity, the company, or a guarantor of its obligations *may* be able to assert the company's lack of capacity in some actions based on such transactions.[221] This can be used by the corporation or its guarantor in appropriate circumstances to prevent third parties from exploiting, conceivably through cunning and deliberation, the abolition of the ultra vires doctrine in particular transactions.

The later New Zealand Companies Act 1993 reenacts a company's legal power to exercise all the rights of an individual.[222] Certainly, provisions can be included in a company's constitution that are *restrictive* rather than *empowering.*[223] However, since under this Act, the articulation of objects is not required,[224] incorporators have flexibility. Thus, virtually complete abolition of the ultra vires doctrine, as has been accomplished in the United States.[225] is also attainable in New

218. NZCA § 18A(2)(a). In addition to members of the company, its debenture holders, or the trustee(s) for debenture holders are similarly statutorily empowered to take similar action under this provision. *Id.* Under § 18A(3), in any such actions for an injunction to prevent the company from performing any contract(s) to which the corporation is a party, provisions similar to the MBCA §3.04(c) apply. *Compare* NZCA § 18A *and* MBCA § 3.04, *supra* note 165, § 3.04(c). In these actions, the court is empowered to provide relief relating to any losses that arise from its decision in favor of granting the injunction. *Id.* However, by analogy to the MBCA §3.04, NZCA § 18A(4) prohibits the court from including loss of profits in any relief that it decides to grant. *Id.*

219. NZCA § 18A(2)(a)

220. This is in harmony with Professor Prentice's conclusions. *See* PRENTICE REPORT, *supra* note 55 at 36,.

221. NZCA § 18C(1); NZCA § 18(1). *See also* Equiticorp Indus. Group Ltd. v. The Crown (No 47) (1996) 3 N.Z.L.R. 586 (summary of the Equiticorp judgment) (The proviso to § 18C(1) prevents a party relying on the section if "that person knows or by reason of his position with or relationship to the company ought to know" of the lack of authority. The proviso has not been the subject of any detailed examination in the cases in this jurisdiction so far. The meaning to be given to the phrase "position with or relationship to" is not limited to an inside relationship with the company, but requires an ongoing relationship. The meaning of the words "ought to know" . . . differs from the common law concept of being "put on inquiry" and requires *something more* . . . . Therefore information acquired is only relevant *if it forms part of the relationship between the person and company. Id.*

222. NZCA § 16(1).

223. NZCA § 16(2).

224. This emulates the MODEL BUS. CORP. ACT §2.02(b)(2)(I) which makes the articulation of objects (purposes) for which the company is created permissive only.

225. *See* MBCA §3.04, *supra* note 165.

Zealand by declining to include objects in the company's registered documents.

4. Northern Ireland

Legislation modifying and reforming the ultra vires doctrine in Northern Ireland corporate law,[226] in terms substantively equivalent to the English Companies Act 1989, was enacted in 1990.[227] Since these Northern Ireland corporate law provisions parallel those in the English Companies Act 1989,[228] issues similar to those discussed in this paper pertaining to interpretation are equally applicable in both jurisdictions.

IV. CONCLUSION

Business efficiency is elusive. However, with respect to the elimination of the ultra vires doctrine in the corporate law of common law jurisdictions, experience has taught significant lessons. Enforcement of transactions that persons can legally execute should, on principle, be treated similarly. After all, companies are persons too.[229] Similar enforcement is therefore equally tenable. Legally valid transactions entered into by artificial persons should be fully enforced, whether they are companies formed under the companies Acts of England, the United States, territories of the Commonwealth Caribbean or other Commonwealth common law jurisdictions. The best progress has been made in the United States and in those countries that have emulated the American model of abrogation of the ultra vires doctrine. Since joining the European Common Market, later the European Union, the English legislature has also enacted significant reforms. The lesson from experience is clear. The eradication of any negative, tenacious relics of the corporate ultra vires doctrine will effectively assist in the unenviable task of corporate modernization.

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226. "[F]ollowing the enactment of the 1963 Companies Act, . . . Irish company law was largely based on the English model. However, . . . since 1990 a number of pieces of legislation have been enacted specifically to address issues arising in the context of the continued development and expansion of the Irish economy, and the consequent growth in corporate and commercial activity. . . .[L]egislation enacted in 1990 does not represent a complete overhaul of the basic principles of company law. Instead particular issues are addressed. . . . " Irene Lynch-Fannon, *Enforcement and Compliance in Irish Company Law: All Law and No Enforcement or The Dawn of A New Era,"* 2002 THE INSOLVENCY LAW. 14.

227. In the Companies (No. 2) (N.I.) Order 1990, which amended a number of provisions in the Companies (NI) Order 1986. *See* Griffin, *supra* note 106, at 39.

228. *Id.*

229. Albeit artificial ones.