

## I. FORMATION OF A COMPANY

### **1. Promoters**

Promotion of a company is concerned with taking the steps necessary for incorporation.

#### **(a) Definition**

"Promoter" is not defined in the Companies Act.

Some attempts at definition have been made by the courts:

Twycross v Grant (Case 1)

Whaley Bridge Printing Co v Green (Case 2)

Whether someone is acting as promoter of a company is a question of fact rather than a question of law.

#### **(b) Duties of Promoters**

In the 19th century, it was common for promoters to sell their own property to a newly formed company at an inflated price, or to acquire assets for the company and receive a commission from the seller.

The courts then began to impose a fiduciary duty on promoters similar to that imposed on agents. A promoter must disclose any profit or potential conflict of interest to either:

(i) an independent board of directors, or

(ii) existing or intended shareholders.

#### **(c) Remedies for Breach of Promoters Duty**

(i) Where promoter has sold his own property to the company, without disclosing this - the company can rescind the contract and recover the purchase price:

Erlanger v New Sombrero Phosphate Co (Case 3)  
Right of rescission is lost if restitutio in integrum is not possible.

(ii) The promoter may have to account to the company for any profit he has made.

Gluckstein v Barnes (Case 4)

(iii) The company may be able to sue the promoter for damages for breach of fiduciary duty.

Re Leeds & Hanley Theatre of Varieties (Case 5)

(d) Payment of Promoters

A company cannot enter into a contract before incorporation - so a promoter has no legal claim against the company for fees and expenses.

In Scotland, memorandum or articles of the company can be drawn up with a provision that the company will pay fees and expenses incurred in promoting the company.

(e) Suspension of Promoters

Company Directors Disqualification Act 1986, s.2(1)

The court can make a disqualification order against a person who has been convicted of an indictable offence in connection with the promotion, formation or management of a company.

The order can be for a maximum of 15 years - a person who is disqualified is prohibited from directly or indirectly taking part in the promotion or formation of a company.

## **2. Pre-Incorporation Contracts**

A company has no contractual capacity prior to incorporation - so contracts cannot be made on its behalf.

(a) Effect of Pre-Incorporation Contract on the Company

Company cannot be bound to the contract because it had no contractual capacity.

Company cannot ratify the contract because it was not in existence at the time the contract was made.

Company cannot sue or be sued on the contract.

(b) Effect of Pre-Incorporation Contract on Person Purporting to Contract on Behalf of the Company

At Common Law:

- if third party knew company was not yet in existence, he could make the purported agent liable on the contract. (Kelner v Baxter).
- if it appeared that the contract was with a company already in existence, the court might hold there was no contract at all, and neither the company nor the purported agent could enforce it.

Newborne v Sensolid (GB) Ltd (Case 6)

This was unsatisfactory and was first changed by legislation in 1972. Provisions are now in s.36C of the Companies Act 1985:

"A contract which purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly."

This means the "agent" will always be personally liable on the contract unless there is agreement to the contrary.

Exceptions:

(i) Companies Bought "Off the Shelf"

s.36C does not apply where promoter makes contract on behalf of existing company he later buys. The company can then ratify the contract.

(ii) Companies Struck Off the Register

s.36C does not apply where a company has been in existence but has been struck off the register. The section only applies where the company has never been in existence.

Cotronic (UK) Ltd v Dezonie (Case 7)

(c) Avoiding Personal Liability

(i) s.36C does not apply if the parties have agreed that the promoter will not be personally liable.

This requires express agreement - courts will not infer it.

Phonogram Ltd v Lane (Case 8)

(ii) Promoter and third party could make an agreement for novation. (novation = substitution of a new obligation for an old one)

Promoter could agree with third party that promoter's liability will end when the company, once formed, enters new contract on same terms.

## II. REGISTRATION OF A COMPANY

### **1. The Registrar of Companies**

A company is registered by filing certain documents with the Registrar - he is a public official appointed by the Secretary of State. Duties include registering new companies, maintaining company files and supervising compliance with the administrative and disclosure requirements of the Companies Act. The Companies Act 1985 (Electronic Communications) Order 2000 allows most documentation to be submitted in electronic form.

### **2. Documents Required for Registration**

These are listed in CA 1985, s.10:

(a) Memorandum of Association

(b) Articles of Association

These are the documents which make up the constitution of the company. The Companies (Tables A - F) Regulations 1985 give suggested forms for memoranda and articles for different kinds of company.

A public company's memorandum must be in accordance with Table F of the Regulations.

Public and Private companies limited by shares can adopt the articles in Table A of the Regulations - Table A will also apply automatically so far as not modified or excluded by the company's own articles.

The Memorandum must be signed (subscribed) unless submitted in electronic form, and must show the number of shares each subscriber is taking.

(c) A statement giving the address of the company's registered office and the details (name, address, nationality, occupation and date of birth) of the company's first directors and secretary.

Statement must be signed by the subscribers to the memorandum and include a written consent to act signed by those named as directors/secretary.

(d) Statutory Declaration of Compliance - a statement that all the requirements of the 1985 Act with regard to registration have been complied with.

The statutory declaration must be signed by a solicitor involved in the formation of the company or by one of the persons named as director or secretary.

(e) Registration Fee - this is presently £20.

### **3. Certificate of Incorporation**

If Registrar is satisfied that requirements of the Act have been met, he registers the documents and issues a certificate of incorporation. This is the company's "birth certificate".

The Registrar publishes the issue of the certificate in the London or Edinburgh Gazette.

Certificate is conclusive evidence that registration requirements have been met. It is also conclusive evidence as to the date of incorporation.

Registrar is entitled to refuse to register a company where it has been formed for an unlawful purpose:

R v Registrar of Joint Stock Companies, ex p Moore (Case 9)

The court may also be petitioned to cancel a registration if it appears that the company has been registered for purposes which are unlawful or contrary to public policy:

R v Registrar of Companies, ex p Attorney-General (Case 10)

### Trading Certificates

Private companies can begin to trade as soon as the certificate of incorporation has been issued.

Public companies require a further certificate - called a s.117 certificate or trading certificate.

Registrar will only issue s.117 certificate if satisfied that minimum capital requirements for a public company have been met.

A public company which begins to trade without a trading certificate commits a criminal offence - the company and any director responsible for the default can be convicted.

(This does not affect the validity of any contracts entered into by the company).

## III. CONSEQUENCES OF INCORPORATION

### **1. Separate Legal Personality**

A company is a separate person in law from its members. This has several important consequences:

#### (a) Company is liable for its own debts

The shareholders are not liable for the debts and liabilities of the company and cannot be sued by the company's creditors. A shareholder can be a debtor or creditor of the company and can sue or be sued by the company.

Salomon v A Salomon & Co Ltd (Case 11)

Lee v Lee's Air Farming Ltd (Case 12)

#### (b) Limited Liability

The fact that the company is a separate person from its shareholders makes limited liability possible.

(Remember: the company's liability is always unlimited - it is the members' liability that is limited and that liability is to the company, not to the individual creditors.)

### (c) Company Property

A company owns its own property - the shareholders have no direct right to this or any share of it.

Person who no longer wishes to be a member is only entitled to whatever price he can get for his shares.

A shareholder has no legal interest in the company's property and cannot insure it against theft, damage, etc.

Macaura v Northern Assurance Co (Case 13)

(This may not apply to someone who is a secured debenture holder.)

### (d) Contractual Capacity

A company has full contractual capacity - and only the company can enforce its contracts.

(Companies may also be liable in negligence - shareholder cannot be made liable for the negligence of the company, unless he was also personally negligent).

### (e) Crimes

A company can be convicted of a crime, regardless of whether its directors are also convicted.

Some limitations:

- it has been held that a company cannot be convicted of a crime which requires the physical act of driving a vehicle:

Richmond on Thames Borough Council v Pinn & Wheeler (Case 14)

- a company cannot be convicted of any crime for which the only available sentence is imprisonment.

There are particular problems with crimes which require *mens rea* ("a guilty mind") - most common law crimes require *mens rea*, while many statutory offences involve strict criminal liability.

In order to convict companies of common law crimes, courts may regard the *mens rea* of those individuals who control the company to be the *mens rea* of the company.

However, the courts have been very restrictive in their use of this approach:

Tesco Supermarkets v Nattrass (Case 15)  
R v P&O European Ferries (Dover) Ltd (Case 16)  
R v Kite and OLL Ltd (Case 17)  
Transco plc v HM Advocate (No 1) (Case 18)

### Crimes Against the Company

A company can be the victim of crime.

It is theft to steal from a company, even if those accused of the theft are also the company's only shareholders:

R v Philippou (Case 19)

#### (f) Perpetual Succession

Separate personality means that the existence of a company does not depend on the existence of its members. Membership may change or members may die - the company continues in existence until wound up.

#### (g) Borrowing

A company can borrow money and grant a security for a debt. Only a company can create a floating charge.

Floating charge = a kind of security for a loan. The charge "floats" because it does not attach to any particular asset, but floats over the company's assets as they exist from time to time. Certain events cause the charge to "crystallise" and attach to whatever assets the company has at the time.