AUTHORITY OF OFFICERS AND OBLIGATIONS OF COMPANIES TO CREDITORS

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How may a legal liability for a borrowing be imposed on an artificial legal person in the shape of a registered company?

The topic is a familiar one to many at this Conference. It would be possible to discuss it at an advanced level and to take it for granted that the audience knows the basic law about corporate capacity and agency doctrine. However, if the legislative changes made in Australia in recent years to the law on the powers of companies and the people who act for companies are to be understood, one needs to get back to basic considerations which to many may seem trite. The emphasis in the paper will be on the legislative amendments enacted in 1983 and 1985.

For the purposes of this paper it will be assumed that the borrowing company is one registered under the law of the Australian Capital Territory. That will confine the discussion to the legislation made under the co-operative companies and securities scheme operating under the Formal Agreement made between the Commonwealth and State governments on 10 December 1978. For convenience references will be made to the legislation applicable to a company incorporated in the Australian Capital Territory, principally the Companies Act 1981 (Cth) ("CA") and the Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 (Cth) ("CSIMPA"). For a borrowing company incorporated in a State or the Northern Territory as participating jurisdictions in the co-operative scheme it would be necessary to consider the legislation as it operates in that other jurisdiction.

For an Australian body corporate incorporated otherwise than under a companies statute, reference would have to be made to the relevant statute under which it is incorporated.

For a foreign body corporate not formed within a participating jurisdiction it would be necessary to consider the law of the body corporate's domicile and the rules of conflict of laws relating to principal and agent.

Full proof of a company's assumption of liability requires proof of a chain of matters, namely:

(a) the existence of the company at the time of borrowing;

(b) the legal capacity of the company to borrow at the time of borrowing;

(c) the existence in intermediaries of power under actual or deemed authority to commit the company to a transaction;

(d) that the memorandum and articles have been complied with; and

(e) the absence of any abuse of an intermediary's power known to the lender.

THE EXISTENCE OF THE BORROWING COMPANY

Under companies legislation in Australia the existence of the borrowing company can be established by production of the company's certificate of incorporation. The certificate provides "conclusive evidence" of the matters referred to in s.549. It forecloses most challenges to the validity of the company's registration.

But a lender would still have to be satisfied that the company is not a trade union, for the registration of any trade union under the Companies Act is void: s.579. A lender would also need to be satisfied that the company has not been formed for an unlawful purpose. In most cases that would have been prevented by the Corporate Affairs Commission refusing under s.31(8) to register the memorandum for containing matter contrary to law. Section 33(1) permits only persons who are associated for a lawful purpose to form an incorporated company. In the rare case where an association for unlawful purposes has been incorporated there is a possibility that the incorporation could be quashed at the instance of the Attorney-General. Under the comparable United Kingdom legislation the existence of that procedure was confirmed in R v. Registrar of Companies; Ex parte Her Majesty's Attorney-General decided in 1980 and noted in an article in (1985) 48 Mod L R 644.

The standard representation and warranty "that the borrower is a limited liability body corporate duly incorporated in the State [or Territory] of ... and validly existing under the laws of that State [or Territory]" can thus serve a useful purpose.

THE LEGAL CAPACITY OF THE BORROWING COMPANY

At common law a corporation created by, or by virtue of, a statute can have no legal capacity beyond that necessary for the purposes for which the corporation is created unless the statute shows an intention on the part of the legislature to create a corporation with a wider legal capacity: Bonanza Creek Gold Mining Co Ltd v. R [1916] 1 AC 566.

In that case Lord Haldane, speaking about the doctrine of ultra vires for the Judicial Committee (at 577) said:

> "The doctrine means simply that it is wrong, in answering the question what powers the corporation possesses when incorporated exclusively by statute, to start by assuming that the Legislature meant to create a company with a capacity resembling that of a natural person, such as a corporation created by charter would have at common law, and then to ask whether there are words in the statute which take away the incidents of such a corporation. This was held by the House of Lords to be the error into which Blackburn J and the judges who agreed with him had fallen when they decided Riche v. Ashbury Railway Carriage and Iron Co LR 9 Ex 224 in the Court below that the analogy of the status and powers of a corporation created by charter, as expounded in the Sutton's Hospital Case (1613) 10 Rep 1a, should in the first instance be looked to."

For a long time under the companies legislation in Australia the capacity of a company to perform juristic acts was limited to doing what was necessary for the attainment of its purposes as stated in the obligatory objects clause of its memorandum of association. It was not possible for a company to acquire the plenary capacity of a natural person by stating that its objects were to do all things that a natural person could do.

A person contracting with a company was liable to find that the supposed contract was void if the making of the contract could not be related to the statement of objects in the company's memorandum. The contract could not be validated by a vote of even all the members for it was not in their power to confer capacity that the state had withheld.

As the result of amendments which took effect from 1 January 1984 the Companies Act no longer requires that a memorandum state objects: s.37(1A). However, if a company is to be incorporated as a no-liability company, it must have a statement of objects and if a company wishes to obtain a licence to omit "Limited" from its name, its objects must be defined in the manner prescribed in s.66.

Following the amendments enacted in 1983 and 1985 the current legislation by s.67 expresses a legislative intention that a company is to have, both within and outside the particular State or Territory of incorporation, the legal capacity (including powers of s.66B(d)) of a natural person. Section 67 is deemed to have come into operation on 1 January 1984 (s.66A) but it relates to the capacity of any company incorporated (or deemed to be incorporated (ss.83-93)) in the particular State or Territory whether incorporated before, on or after 1 January 1984: s.66B(a).

Section 67, after declaring a company to have the legal capacity of a natural person, provides that a company has, both within and

outside the particular State or Territory, power to do certain things. They are:

(a) to issue and allot fully or partly paid shares in the company;

(b) to issue debentures of the company;

(c) to distribute any of the property of the company among the members, in kind or otherwise;

(d) to give security by charging uncalled capital;

(e) to grant a floating charge on property of the company;

(f) to procure the company to be registered or recognized as a body corporate in any place outside the Territory; and

(g) to do any other act that it is authorized to do by any other law.

That enumeration of specific powers is declared by s.67 to be "without limiting the generality" of the terms of the earlier grant of the capacity of a natural person.

Of the enumerated powers, (b), (d) and (f) are of a nature to be outside the legal capacity of a natural person.

As to item (a) while it would have been possible for natural persons to issue and allot shares in an unincorporated joint stock company, (a) is probably supplementary because "shares" can be read in the sense defined in s.5(1), namely, "share in the share capital of a corporation...". There is no reference in (a) to options over unissued shares but since an option is essentially a contract relating to the issue of shares on certain terms the power of the company to make such a contract is probably referable to the general power of contracting of a natural person.

Item (c) seems to have been inserted out of an abundance of caution.

Item (e) was probably enacted in recognition that there is a perception, right or wrong, that natural persons cannot give floating charges.

Item (g) supplements the grant in general terms to the extent that it refers to any other law that purports to confer powers on companies but not on natural persons.

Given the wide grant of legal capacity to a company, a borrowing or a creation of a charge cannot now be outside the powers of the company as a legal entity. This conclusion is reinforced by the provision in s.66C that the object of ss.67 and 68 is:

(a) to abolish the doctrine of ultra vires in its application to companies; and

(b) without affecting the validity of the dealings of a company with outsiders, to ensure that provisions of the rules (i.e. the memorandum and articles: s.66B(e)) of a company relating to objects or powers of the company are given effect to by the company's officers and members.

Section 68(1A) provides that the rules of a company may contain an express restriction on, or prohibition of, the exercise by the company of a power of the company. What is meant "by the company"?

Is "the company" the artificial legal entity or is it the organs through which the artificial legal entity performs juristic acts?

The first view would impute to the Legislature a somewhat irrational intention. Section 67(1) gives a company the full legal powers of a natural person. In referring to "legal capacity", s.67(1) is referring to powers: s.66B(d). If s.68(1A) operated as a prohibition on the artificial legal entity, it would subtract from the powers given by s.67(1): a prohibition on the exercise of a power must be tantamount to a denial of power.

There are clear indications in s.67(2) and s.66C that the restrictions referred to in s.68(1A) are restrictions on the company's organs rather than the entity. Section 67(2) affirms that a restriction in the rules is not to reduce the grant of powers made in s.67(1). Not only does s.66C state the object of abolishing the doctrine of ultra vires but expresses a legislative concern that inside the company "provisions of the rules of a company relating to objects or powers of a company are given effect to by the company's officers and members".

It is now optional to include in the memorandum a statement of objects: s.37(1A). If a statement is included, it no longer goes to the legal capacity of the company. Like an express restriction or prohibition in the memorandum or the articles it limits the company's organs.

It is conceived that the result of all this is that s.68(1A) may be read as follows:

> "(1A) The rules of a company (i.e. the artificial legal entity) may contain an express restriction on, or an express prohibition of, the exercise by the company (i.e. the persons who act for it) of a power of the company (i.e. the artificial legal entity)."

Under s.68(1) exercise by "the company" of a power contrary to an express restriction or prohibition or the doing of an act by "the company" otherwise than in pursuance of any stated objects has the result that "the company contravenes" s.68(1). Under s.68(2)

an officer who is knowingly concerned in a contravention of s.68(1) by the company contravenes s.68(2). But neither contravention by the company nor contravention by the officer is an offence. Nor does the company's contravening exercise of power or act or the officer's contravening act, make the exercise of power or act invalid by reason only that there is a contravention.

An exercise by "the company" of a power will normally take place when an organ acts. The two normal organs are the members and the board of directors. A reference to the company in general meeting is normally a reference to the members in general meeting acting sometimes by ordinary resolution and at other times by special resolution.

A provision in the memorandum or articles imposing a restriction on, or prohibition of, the exercise of a power of the company is to be distinguished from a provision imposing a restriction or prohibition in respect of the powers of the board of directors.

A restriction or prohibition affecting the board's powers can be circumvented in respect of a particular transaction by the general meeting passing an ordinary resolution (in the absence of stricter requirements) in exercise of the residual power of the company in general meeting.

But a restriction or prohibition of the kind referred to in ss.68(1A) fetters the general meeting so that it is not possible for the major part or any higher proportion to lift the restriction or prohibition for the purposes of a particular transaction. Whether members acting unanimously could do so is considered later.

THE EXISTENCE IN INTERMEDIARIES OF POWER UNDER ACTUAL OR DEEMED AUTHORITY TO COMMIT THE COMPANY TO A TRANSACTION

The lender has to be satisfied that the human beings with whom its representatives deal and who purport to act for the borrowing company are linked in some way to the company so that they exercise that plenary capacity which the company enjoys.

This really involves two questions: (i) the relationship of the purported representative of the borrower to the borrower; and (ii) the power possessed by that person.

The law as it stood before the 1983 amendments came into operation

For the purposes of discussion let us assume that the lender's representatives deal with an organ of the company. Suppose they deal with the board of directors. In the unlikely event that the lender's representatives were present at a meeting of the board of directors of the borrower while the board resolved that the company should borrow and that the necessary instruments should be executed, the lender would be dealing directly with an organ.

The lender would need to be satisfied that the board had power to act. That would entail being sure that there was no restriction on the power of the board in the memorandum or articles.

Restrictions on the board could arise either because (i) the company as a legal entity lacked power or (ii) because, although the company did not lack power, the articles provided that the company's power was not to be exercised by the board of directors. A restriction of the first kind could not be lifted by the general meeting even if all the members attended and were unanimous. But the second kind of restriction could be got around if the company in general meeting authorised the board or ratified the board's decision. That could normally be done by ordinary resolution.

The person dealing with the board would have to enquire about the board's authority because unlike the position where an outsider dealt with a partnership there would be no presumption in favour of the lender that the board had any usual range of powers.

The reason why the position would be different from partnership would lie in the articles being a public document. As explained by Lord Wensleydale in Ernest v. Nicholls (1857) 6 HLC 401, 10 ER 1351 by providing in the Joint Stock Companies Registration and Regulation Act 1844 for the registration of the deeds of settlement of joint stock companies was solving the problem brought about by the application of the law of ordinary partnerships to joint stock companies.

He said (at 418, 1358):

> "It is obvious that the law as to ordinary partnerships would be inapplicable to a company consisting of a great number of individuals contributing small sums to the common stock, in which case to allow each one to bind the other by any contract which he though fit to enter into, even within the scope of the partnership business, would soon lead to the utter ruin of the contributories. On the other hand, the Crown would not be likely to give them a charter which would leave the corporate property as the only fund to satisfy creditors.
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> The legislature then devised the plan of incorporating these companies in a manner unknown to the common law, with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorised to bind all the shareholders, by requiring the copartnership deed to be registered, certified by the directors, and made accessible to all; and, besides, including some clauses as to the management, as in the Act 7 and 8 Vict. c. 110, s. 7 etc. All persons, therefore, must take notice of the deed and the provisions of the Act. If they do not choose to acquaint themselves with the powers of the directors, it is their own fault, and if they give

> credit to any unauthorised persons they must be contented to look to them only, and not to the company at large. The stipulations of the deed, which restrict and regulate their authority, are obligatory on those who deal with the company; and the directors can make no contract so as to bind the whole body of shareholders, for whose protection the rules are made, unless they are strictly complied with."

Thus, not only was the person dealing with a company denied the benefit of any doctrine of usual authority but was fixed with constructive notice of the public documents. It would not be necessary to embark upon enquiries in a particular case as to whether a lender as a reasonable person had been put on enquiry as to the existence of restrictions. Nor would it be necessary to consider whether the lender should have made the enquiries that would be made by a reasonably prudent person. At one fell swoop the act of making the articles public shifted the onus to the outsider without any need to consider whether the doctrine of constructive notice, a doctrine not universally thought suitable for commercial transactions, should be imported.

The substance of the United Kingdom's Companies Act 1862 became the law of Australian jurisdictions and the doctrine of constructive notice of the public documents became part of our law.

The 1983 changes relating to constructive notice of lodged documents

In 1983 the Australian legislatures overturned what Lord Wensleydale had said. Under s.68C a person shall not be taken to have knowledge of documents, contents of documents or particulars by reason only that documents or particulars have been lodged or that documents or particulars are referred to in any lodged document. But that does not apply in relation to a lodged document or contents of a document to the extent that the document relates to a registrable charge.

The 1983 change took the burden of uncertainty from the outsider and placed it on the company whose shareholders lost some of the protection formerly provided by the doctrine of constructive notice. Recognition that the introduction of limited liability made that protection less necessary was long delayed. There is perhaps a question whether s.68C should have been made applicable to persons dealing with unlimited companies.

Section 68C, viewed in isolation, leaves the question as to when an outsider dealing with a company can be deemed to have knowledge of the contents of lodged documents for a reason other than the mere fact of their lodgment. Would it be only on being put on enquiry or would it also occur when the relevant matter is one about which a reasonably prudent person would make enquiries and such a person could reasonably be expected to know that the matter is dealt with in the articles? While it would be

reasonable to presume that a person who is put on enquiry is not intended to take comfort from s.68C, there is an issue as to the propriety of applying the doctrine of constructive notice in all its severity to commercial dealings with companies.

As will be noted later, s.68C does not have to be read in isolation: it can be read in conjunction with s.68A to be considered later. But there can be value in considering what the position would be without the help of s.68A.

Can guidance on the question of whether an outsider now has to make enquiries only when put on enquiry be obtained from the indoor management rule? A statement of the indoor management rule found in the speech of Lord Hatherley in Mahony v. East Holyford Mining Co (1875) LR 7 HL 869 at 894 may be taken as typical:

> "... when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company."

The indoor management rule was not an application of a general presumption of regularity applicable in all circumstances for the benefit of an outsider dealing with a company. If an inspection of the articles would have shown there was an irregularity, the indoor management rule could not assist the outsider.

The basis of the indoor management rules is not estoppel. Its basis as stated in Pennington, Company Law 5th ed 129 is as follows.

> "The legal basis of the rule is that such a person has no right to insist on proof by the directors that the provisions of the memorandum or articles have been complied with, and he cannot therefore be deemed to have constructive notice of some failure to comply which he has no means of discovering. Of course, a person dealing with a company will not be able to rely on the rule... if he knows that there has been some failure to comply, or if he knows facts which would lead a reasonable man to inquire further and thus to discover the failure to comply."

That statement received judicial approval in Custom Credit Holdings Ltd v. Creighton Investments Pty Ltd (1985) 3 ACLC 248 at 254 and Northside Development Pty Ltd v. Registrar-General (NSW) SCt NSW Equity Div Young J 26 February 1987.

When the indoor management rule is explained as being based on the outsider's inability to enquire into the internal workings of the company, it can be seen to be a comfort to outsiders who might otherwise feel insecure because, they could not check up

for themselves. The indoor management rule need not be read as implying that in its absence, every outsider dealing with a company would have notice of irregularities that would have been discovered if reasonable enquiries had been made even though he is not put on enquiry.

So, it may be possible to say that in the light of s.68C a lender will only be required to look at the memorandum and articles when there is something that puts the lender on enquiry.

It is instructive to refer to the changes made in the United Kingdom on the matter of notice. The European Communities Act 1972 s.9(1) introduced a new measure:

> "(1) In favour of a person dealing with a company in good faith, any transaction decided on by the directors shall be deemed to be one which is within the capacity of the company to enter into, and the power of the directors to bind the company shall be deemed to be free of any limitation under the memorandum or articles of association; and a party to a transaction so decided on shall not be bound to enquire as to the capacity of the company to enter it or as to any such limitation on the powers of the directors, and shall be presumed to have acted in good faith unless the contrary is proved." See now Companies Act 1985 (UK) s.35.

The section was interpreted by Browne-Wilkinson VC in TBC Ltd v. Gray [1986] 1 All ER 587. His interpretation confirmed that the legislation has greatly improved the position of persons who deal with companies. His Lordship said:

> "It being the obvious purpose of the section to obviate the commercial inconvenience and injustice caused by the old law, I approach the construction of the section with a great reluctance to construe it in such a way as to reintroduce, through the back door, any requirement that a third party acting in good faith must still investigate the regulating documents of a company."

All the directors had decided that the company should give a debenture but they did so informally and without meeting. A purported debenture was not signed by any director but by an attorney for a director. The execution was not in accordance with the articles. There was no power given in the articles for a director to act by attorney. Yet the debenture was held valid.

It was argued that the taker of the debenture had been put on enquiry by the unusual manner in which the debenture was executed and therefore lacked good faith. This was rejected on the basis that the last part of s.9(1) presumes good faith and that the second part provides that the third party is not bound to enquire. His Lordship said:

> "In my judgment it is impossible to establish lack of 'good faith' within the meaning of the section solely by alleging

> that inquiries ought to have been made which the second part of the subsection says need not be made."

Section 9(1) goes further than s.68C in providing that enquiries need not be made. But even though s.68C may not go so far in that respect, the combined operation of s.68C and s.68A (to be examined later) providing presumptions of regularity probably produced the same result.

The 1983 legislation providing presumptions of regularity

In the earlier discussion it has been assumed that the lender is dealing with the board of directors. In a particular company the distribution of powers between the general meeting and the board may be unusual in not confiding full powers of management to the board. The tenor of ss.66A-68D is that the outsider is not required to inspect the memorandum and articles and is not fixed with constructive notice of them by reason of their lodgment with the CAC: s.68C. Although the Companies Code does not expressly say so, it seems implicit that the Code accepts that in the generality of companies the board of directors will be the company's usual organ for dealing with outsiders rather than the general meeting. This seems confirmed by s.68(3) which deals with the question whether a contravening company as a legal entity commits any offence and whether an officer assisting the company to contravene commits an offence. There is no reference to a member of a company assisting the company to commit an offence.

It is noteworthy that the United Kingdom provision adopts a similar approach by attaching its beneficent effect to "any transaction decided on by the directors".

The person having dealings with a company is entitled to make, in relation to those dealings, the assumptions referred to in sub-section (3) and, in any proceedings in relation to those dealings, any assertion by the company that the matters that the person is so entitled to assume were not correct shall be disregarded.

Under s.68A(1) a person dealing with purported representatives of a company has to be sure that he is dealing with persons who have power to commit the company. He must be sure that they have power arising from actual authority or from ostensible authority.

Ostensible authority may arise from a representation by persons having power to commit the company that a particular person has authority. The person represented to have authority may or may not occupy some position in the company. Section 68A(3) contains no assumption that a person has been held out otherwise than as the holder of an office. Where the common law doctrine of holding out would be attracted by some representation other than one about the holding of an office, it will still be attracted. There does not appear to be anything in the legislation to exclude the ordinary doctrines of the law of agency.

Section 68A deems certain representations to have been made by the company.

It is convenient to look first at the deemed representations as to appointment to an office.

Deemed representations as to appointment of officers and their authority

Section 68A(3)(b) allows an assumption that a person who appears from a lodged Form 61 or annual return to be a director, the principal executive officer or a secretary has been duly appointed and has the usual authority of that office in a company carrying on a business of the kind carried on by the company.

It is a condition of being able to make the assumption that the person dealing with the company must have seen the Form 61 or the annual return before entering into the transaction? Does s.68A(3)(b) when it refers to "a person who appears, from returns" mean "appears to the person dealing, he having seen the return"? If s.68A(3)(b) is seen as a statutory adoption of the doctrine of estoppel, it will be required that the person dealing with the company who seeks the benefit of the assumption should have had the representation in the Form 61 or the annual return made to him. An alternative view is that the lodging of the return is a representation to the whole world and any person then dealing with the company can have the benefit of that representation. Should it not be enough that the persons having the conduct of the company's affairs have so conducted themselves as to influence all who may deal with the company? There is stated in s.68A(1) a qualification on the right to make the assumption, namely, the qualification in s.68A(4). That qualification is actual knowledge (or a relationship such that there should be knowledge) that the facts are inconsistent with the assumption: there is no qualification based solely on failure to search.

Given doubt as to whether the assumption in s.68A(3)(b) is available to one who has not seen the Form 61 or the annual return, a cautious lender should search the latest Form 61 and annual return.

Under s.238(7) a company has one month within which to lodge a Form 61. A person purporting to represent a company may have ceased to hold a relevant office. Still s.68A(3)(b) appears to entitle the outsider to assume that the person named on the lodged form "has been appointed and has authority ..." There appears to be an implied entitlement on the part of the outsider to assume that the person named continues to occupy the office and have the authority even though in fact he may have lost office. Section 238(6) entitles an outsider to request a company to furnish him with a copy of part of its register of directors, principal executive officers and secretaries. There might be a case where it is desirable to make that request as where the

outsider knows that the latest lodged Form 61 does not represent the true position.

Even with assistance from the assumption based on the lodgment of Form 61 or the annual return there is a need in the outsider to be assured that the Form 61 relied upon was lodged with the authority of the company: Barclays Finance Holdings Ltd v. Sturgess (1985) 3 ACLC 662.

Some verification of that fact by a person with the necessary authority who is obviously held out by the borrowing company would be desirable. Form 61 itself indicates that the signing of it is within the authority of a director, principal executive officer or secretary.

The outsider would also need to be satisfied that the person with whom he is dealing is not an imposter but is an officer of the borrowing company identical with a person named in the lodged form.

Under s.68A(3)(c) any other form of representation by the company that a person is an officer or agent of the company can be the basis of an assumption that the person was duly appointed.

A deemed representation by the company by way of Form 61 or the annual return extends to a representation that the director, principal executive officer or secretary "has authority to exercise the powers and perform the duties customarily exercised or performed by" the relevant office-holder "of a company carrying on a business of the kind carried on by the company".

The common law rules as to the usual authority attached to each of the three types of office are thus relevant. They are to be applied in the light of the kind of business carried on by the company. This suggests that although a company no longer must state its objects, nevertheless it is necessary to consider the kind of business carried on by the company. The company may have unlimited powers but the usual authority of its officers will depend on its usual business. Thus the managing director of a bank might lack authority to make a contract to purchase theatre lighting equipment whereas the managing director of a theatre company would have that usual authority. The outsider may be put on enquiry by the unusual nature of the transaction. The limitation may be compared with the limitation in partnership legislation dealing with the power of partners to bind the firm by an "act for carrying on in the usual way business of the kind carried on by the firm": e.g. Partnership Act 1892 (NSW) s.5. There is no similar limitation on the power of the board of directors and if there is any doubt as to the usual authority of the relevant officer in the light of the company's business, proof of authorisation by the board should be called for.

In contrast to s.68A(3)(b), s.68A(3)(c) does not in terms relate the usual authority of the person held out to the kind of

business carried on by the company. Perhaps s.68A(3)(c) deals with the more subordinate persons in a company but it is not readily apparent why the kind of business carried on should not be relevant.

As well as the deemed representations of usual authority in ss.68A(3)(b) and 68A(3)(c), there is in s.68A(3)(d) a deemed representation of specific authority to warrant the genuineness of documents that an officer or agent of the company purports to issue on behalf of the company. This authority may be assumed where the officer or agent has authority to issue the document on behalf of the company. Authority to issue could be part of the usual authority of the officer assumed to exist by virtue of s.68A(3)(b) or s.68A(3)(c). Thus, for example, the person shown on the latest Form 61 as secretary would have usual authority to issue documents on behalf of the company. Section 68A(3)(d) overturns one of the aspects of the decision in South London Greyhound Racecourses Ltd v. Wake [1931] 1 Ch 496 that denied that a secretary of a company issuing a forged share certificate has authority to warrant that it was genuine.

Execution of company documents

Under s.68A(3)(e) an outsider is entitled to assume that a document has been duly sealed if it bears what appears to be an impression of the company's seal and the sealing is attested by 2 persons, one of whom is assumably a director by virtue of s.68A(3)(b) or (c) and the other of whom is assumably a director or a secretary by virtue of those provisions.

This relieves an outsider of the need to examine the articles to ascertain whether a purported sealing is in accordance with the articles. Even before s.68A(3)(e) came into force it had been held that an outsider faced with a document that was sealed in accordance with the articles could assume under the indoor management rule that the board of directors had authorised the sealing of the document: Gloucester County Bank v. Rudry Merthyr Steam and House Coal Colliery Co [1895] 1 Ch 629. That assumption could not be made where the outsider was put on notice of an irregularity: Custom Credit Holdings Ltd v. Creighton Investments Pty Ltd (1985) 3 ACLC 248. The width of the assumption was also reduced by the decision in South London Greyhound Racecourses Ltd v. Wake [1931] 1 Ch 496 that a share certificate bearing the company's seal and attested by a director and the secretary was a forgery not enforceable against the company because the affixing of the company's seal had not been authorised as required by the articles. Sections 68A(3)(e) and 68D now exclude the South London Greyhound case.

An outsider relying on s.68A(3)(b) would have to satisfy himself that the persons who attested were identical with persons named in a lodged return.

Section 80(8) authorises a company by a writing under its common seal to empower a person to execute deeds on its behalf. A deed

signed by such an agent and under his seal binds the company and has the same effect as if it were under the common seal of the company.

A lender dealing with a person who produces such an authorising writing under the company's common seal would have to be satisfied that the document was duly sealed. Section 68A(3)(e) could assist. But there could be old powers of attorney which pre-date the coming into operation of s.68A(3)(e). In any event, even in respect of a power of attorney executed after s.68A(3)(e) came into force, there could be a lapse of considerable time between the sealing of the power of attorney and the attorney's execution of a document. It might be necessary to relate the signatures of the persons who attested the sealing to a lodged Form 61 or annual return which was operative some time earlier.

Presumption of compliance with the memorandum and articles

The first assumption set out in s.68A(3) is that at all relevant times, the memorandum and articles have been complied with. If it is correct as argued earlier that s.68C leaves the person dealing with a company liable to be fixed with deemed knowledge only if put on enquiry, it should not matter for the purposes of s.68A(3)(a) whether that person has examined the memorandum and articles. According to the Explanatory Memorandum to the Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983 par 205 s.68A(3)(a) was intended to restate the rule in Royal British Bank v. Turquand (1856) 6 E & B 327. If that rule is understood in a narrow sense as assisting only a person who has inspected the memorandum and articles and then cannot have access to internal arrangements, the assumption could be made only by a person who had inspected the documents. The Explanatory Memorandum stated the rule as being "that an outsider dealing with the company is entitled to assume that the internal rules of a company have been complied with". This broad statement of the rule is consistent with a legislative intention to allow the assumption regardless of whether the company's documents have been inspected.

Furthermore, the only qualification on an outsider's entitlement to make an uncontestable assumption (stated in s.68A(1) by reference to s.68A(4)) for a person not connected or related to the company is that the assumption cannot be made if the outsider has "actual knowledge" that the memorandum or articles have not been complied with. While "actual knowledge" may extend to deemed knowledge where the outsider has been put on enquiry, it is unlikely to extend to knowledge obtainable by making the enquiries that a reasonably prudent person would make given the abolition of constructive notice by s.68C(1).

The assumption that the memorandum and articles have been complied with is particularly important if it should turn out that either document contains a relevant express restriction on, or prohibition of, the exercise of a power of the company or that the memorandum contains a relevant statement of objects.

The assumption permitted relates to compliance with the memorandum and articles. The reference to "compliance" suggests a concern about provisions which impose a requirement upon someone in the company. In the abstract one might distinguish between a provision that imposes a duty and one that confers a power and treat compliance as appropriate only to the former. But given that the previous case law developed to the point that where an article conferred a power but subject to some conditions to be fulfilled within the company, s.68A(3)(a) can be seen to permit an assumption that those conditions have been fulfilled.

Under the United Kingdom's measure first enacted as s.9(1) of the European Communities Act 1972 the person dealing with the company in good faith has the benefit of a presumption that the power of the directors to bind the company is free of any limitation under the memorandum or articles.

Given the lack in the Australian legislation of an explicit legislative direction that the memorandum and articles need not be inspected, a cautious lender may still inspect them. The outsider who finds a restriction, prohibition or limitation in stated objects will then be put on enquiry as to whether the restriction, prohibition or limitation affects the particular transaction.

Consider the possible reaction of the outsider.

The possibilities are:

(a) the outsider proceeds with the transaction and concludes a contract with the company in disregard of the restriction, prohibition or limitation;

(b) the outsider seeks unanimous approval of the members to the transaction; or

(c) the outsider seeks removal of the restriction, prohibition or limitation from the memorandum or articles (as the case may be) before concluding the transaction.

Outsider knowing of a restriction etc proceeds with the transaction in disregard of the restriction etc

Section 68(6) provides that the fact of disregard of the restriction, prohibition or limitation may be asserted or relied on only in certain proceedings. They are:

(i) a prosecution of a person for an offence against "this Act";

(ii) an application for an order under s.227A;

(iii) an application for an order under s.320;

(iv) an application for an injunction under s.574 to restrain the company from entering into an agreement;

(v) proceedings (other than an application for an injunction) by the company, or by a member of the company, against the present or former officers of the company; or

(vi) an application by the Commission or by a member of the company for the winding up of the company.

Once the outsider has entered into the agreement with the company there is no possibility of the outsider being affected by an application for an injunction. But the outsider could still be affected by an order made for the winding up of the company. Disregard by the company's officers of a restriction, prohibition or limitation might be so serious as to merit the making of an order for the winding up of the company on:

(a) the "just and equitable" ground;

(b) the ground that the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever that appears to be unfair or unjust to other members;

(c) the oppression grounds.

Could an outsider be affected by an order made under s.320? The court may make such orders as it thinks fit. Among the examples of orders given in s.320 are:

(a) an order that the company be wound up;

(b) an order for regulating the conduct of affairs of the company in the future;

(c) an order directing proceedings to be taken by the company or by a member on behalf of the company;

(d) an order appointing a receiver;

(e) an order restraining conduct of any person; and

(f) an order requiring a person to do a specified act.

Taken literally this list includes orders that could affect a person who has entered into a contract with the company. Some provisions of the Companies Code and the Companies (Acquisition of Shares) Code qualify a legislative grant of power to the court to make orders by providing that the court is not to make an order that would unfairly prejudice any person. See, for example, Companies Code s.261A(8), Companies (Acquisition of Shares) Code s.49(1). By contrast, s.320 adverts only to unfair

prejudice to the oppressed member or members when in s.320(4) there is provision that the court is not to make an order for winding up if in its opinion the winding up would unfairly prejudice the oppressed member or members. Clearly a third person could be affected by an order for winding up made under s.320 based on disregard of a restriction, prohibition or limitation in the memorandum or articles because s.68(6) expressly allows that. But it is conceived that no other orders made under s.320 could be based on such a disregard to the prejudice of a third party. The warrant for that lies in the direction in s.66C that s.68 is to be construed in the light of the stated legislative object of not affecting the validity of dealings of a company with outsiders.

The appropriate conclusion is that a lender who knows of a restriction, prohibition or statement of limiting objects should not simply ignore it.

Lender aware of restriction etc affecting the company in the memorandum or articles seeks unanimous approval of members to the particular transaction

Suppose a lender who is aware of a restriction, prohibition or limitation is not content to run the risk that the company might be ordered to be wound up. Could the lender be reassured by having the borrower arrange for all its members to approve the transaction despite the restriction, prohibition or limitation? That, of course, would only be practicable where the company has a small number of members.

It would not be possible for less than all the members to lift the restriction, prohibition or limitation without following the procedure for alteration of the memorandum or articles. Under the doctrine of ultra vires not even a unanimous vote of all members approving a transaction beyond power was capable of taking the transaction outside the doctrine of ultra vires. That was because the limitation of the company's powers was referable to a limited grant of capacity from the state rather than some restriction imposed by the members. Under the new law any restriction, prohibition or limitation in stated objects is more clearly the result of the statutory contract represented by the memorandum and articles. If an officer acts in disregard of a restriction, prohibition or limitation in stated objects, there is a breach of the statutory contract between the company and the officer which under s.78 is constituted by the memorandum and articles. If a majority in general meeting acts without observing a restriction, prohibition or limitation, there is a breach of the statutory contract between those members and the members not in the majority as well as a breach of the statutory contract between the company and the members in the majority.

The legislation may have brought the company closer in this respect to the unincorporated association: Williams v. Hursey (1959) 103 CLR 30 at 66. But there is not complete

correspondence. There is a distinction between alteration of the memorandum or articles to remove, on the one hand, an express restriction or an express prohibition and, on the other, an alteration to the memorandum to remove a statement of objects. For the first the alteration can be made by the members in general meeting without the participation of anyone else and without the possibility of anyone else being able to frustrate their intention. But alteration of objects by the members is liable to be frustrated by debenture holders making application to the court under s.73(8). This may mean that unanimous approval of members will not be enough to authorise a transaction outside stated objects.

Quite apart from that difficulty the application of the doctrine of unanimous assent of members may be subject to another limitation.

In a company not required to appoint an auditor and which has not, in fact, appointed an auditor the reference to the members as an organ can also cover unanimous informal assent by members.

The qualification as to companies that are required to have an auditor (and, possibly, those which voluntarily have an auditor) is stated because there is an unresolved question arising from s.285(8) which gives the auditor entitlement to attend any general meeting of the company, to receive all communications relating to any general meeting that a member is entitled to receive and to be heard at any general meeting that he attends on any part of the business of the meeting that concerns the auditor in his capacity as auditor: Re U Drive Pty Ltd (1986) 10 ACLR 565 and the cases cited therein. The United Kingdom has a similar provision in s.387 of Companies Act 1985. It is derived from the Companies Act 1967 s.14(7). The question is whether a failure to give notice to the auditor of the proposed unanimous decision of the members invalidates their decision. A similar question would arise in relation to a general meeting.

If s.285(8) has the operation suggested does it have the effect that the general meeting composed only of members is not an organ of the company in relation to questions that concern the auditor in his capacity of auditor?

The auditor is not given a right to vote: he has merely a right to be heard. In cases that have approved the principle that informal unanimous assent of members can bind a company, that result has been accepted even though members may not have had the advantage of hearing the views of their fellow members. Moreover, many important decisions about the affairs of a company can be made by the board of directors without reference to the general meeting. The auditor has no right to be heard at board meetings. Does the withholding from auditors of a right to vote and a right to be heard at board meetings suggest a lack of legislative intention to make the auditor part of a company's organs? Does the provision in s.244(6) providing that the will

of a wholly-owned subsidiary can be expressed by a minute signed by the parent's representative suggest a similar conclusion? Similarly is that conclusion pointed to by s.250 under which all members of an exempt proprietary company can in effect arrive at a resolution without having a general meeting?

There is a further doubt as to whether a person who joins the company after the giving of the unanimous assent would be able to take proceedings to restrain a transaction in disregard of the restriction etc. If the restriction operates only as part of a contract of association, that member, when becoming a deemed party to the statutory contract, would take subject to what had already been done. But one cannot be sure that the matter will be analysed in terms of contract.

There is enough uncertainty on various counts to suggest that the proper conclusion from a lender's viewpoint is that a transaction in disregard of a known restriction, prohibition or limitation implicit in stated objects should not be regarded as being legitimated by the unanimous assent of all the members.

The absence of any abuse of power on the part of an intermediary

Officers and agents of the company must not only avoid exceeding their powers but also refrain from abusing their powers. If a power is exercised in bad faith, the act of the officer or agent may not completely commit the company. The company may have a right to avoid the transaction. Where the transaction is with a third person, the company's right to avoid will be available only if the third person knew of the abuse of power. What is meant by "knew" will be discussed later.

Even before the changes made in 1983 an outsider did not have to make enquiries to ensure that officers and agents were exercising their powers properly. This is subject to the qualification that there was nothing in the memorandum or articles that indicated that an officer or agent enjoyed a power for only a limited purpose. If there were any such indication, the outsider would have been fixed with constructive notice of it and that deemed knowledge combined with some circumstance apparent to the outsider may have been enough to put him on enquiry. But the mere statement in the memorandum or articles that power was given for a certain purpose should not have affected the outsider because under the indoor management rule he could assume that there was no improper use of the power unless put on enquiry.

In England, in a number of cases in which transactions were entered for an extraneous purpose the result was a decision that the transaction was void as being ultra vires the company. Those cases have come to be better understood as cases of abuse of power by directors making the transaction merely voidable.

Australian cases did not take that view. In any event, s.67(3) now provides that the fact that the doing of an act by the

company would not be, or is not, in the best interests of the company does not affect the legal capacity of the company to do the act.

That seems to have the effect that that act does not make the transaction void but only voidable. Hence the transaction is capable of being ratified by the company in general meeting.

In any event, s.68(3)(f) established a permitted assumption that the directors, the principal executive officer, the secretaries, the employees and the agents of the company properly perform or performed their duties to the company. Thus, the outsider can assume that the company's agents have acted in good faith in relation to the company.

It needs to be remembered that under s.68(1A) a restriction could be imposed by the memorandum or articles on the exercise of a power of the company rather than the board of directors and that restriction could be in terms that a power of the company shall be used only for certain stated purposes. A contravention of that restriction would raise the questions discussed earlier and would not be capable of being validated by an ordinary resolution. Whether it could be validated by a unanimous resolution of all members may be doubtful for the reasons stated earlier.

Conditions for making statutory assumptions

What are the conditions for a person being able to make the assumptions? They are stated in s.68A(1). First, the person must have been "a person having dealings with a company". Secondly, s.68A(4) should not be applicable. Section 68A(4) applies where the person has actual knowledge of certain matters or where he is connected with the company.

Persons seeking to rely on statutory assumptions must be "a person having dealings with a company"

There is a question that affects all the assumptions in s.68A(3) posed by s.68A when it entitles "a person having dealings with a company" to make the assumptions. Does that expression imply that the outsider must already be in some relationship with the particular company before he can be within s.68A? This phrase may be thought to cause problems on the basis that a person cannot be dealing with a company until it has been shown that the persons with whom he is dealing in fact represent the company. Since s.68A is directed (amongst other things) to questions of agency upon which the establishment of a legal relationship with a company can depend, it would be odd if the conferment of the benefits in s.68A depended on the existence of some antecedent legal relationship.

That impression is strengthened by a reading of s.68A(2). It is concerned with "a person [X] having dealings with a person [Y]

who has acquired or purports to have acquired title to property from a company (whether directly or indirectly)". X is entitled to make assumptions about the acquisition or purported acquisition. To be able to make the assumptions he need only be negotiating with the purported transferee from the company: he need not have dealings with the company. If, for example, it should occur to the sub-purchaser that the memorandum or articles may have contained some restriction, he is entitled to dismiss the thought because he can assume that those documents were complied with when the seller to him purported to acquire title from the company.

A similar question was discussed in relation to the United Kingdom legislation in TCB Ltd v. Gray [1986] 1 All ER 587 but was rejected. Browne-Wilkinson VC said:

> "If this argument is right, it drives a coach and horses through the section: in every dealing with the company the third person would have to look at the articles to ensure that the company was binding itself in an authorised manner."

Hence, it would seem that the phrase "a person having dealings with a company" must be read as "a person who thinks he is having dealings with a company".

Actual knowledge or connection with company bars right to make assumptions

Under s.68A(4) a person having dealings with a company will not be entitled to make a statutory assumption if:

(a) he has "actual knowledge" that the matter that, but for s.68A(4), he would be entitled to assume is not correct; or

(b) his connection or relationship with the company is such that he ought to know that the matter that, but for s.68A(4), he would be entitled to assume is not correct.

The critical time would be the time of entry into a transaction with the company: cf Kanssen v. Rilato (West End) Ltd [1944] Ch 346, [1944] 1 All ER 751. When s.68(1) uses the word "dealing" it refers to a transaction which is the source of rights and duties rather than the steps taken in the course of, or pursuant to, a transaction. Thus it refers to the making of a contract rather than each step in performance of the contract. Any other view would fail to give effect to the stated object of the legislation to protect outsiders: Barclays Finance Holdings Ltd v. Sturgess (1985) 3 ACLC 662.

Persons related to the company

Taking limb (b) first. Limb (b) unlike limb (a) is not confined to persons who have actual knowledge but extends to persons whose relationship to the company is such that they ought to have

certain knowledge. The test of what they should know is not a general one but arises in relation to a particular fact. Thus if the validity of a transaction could be affected by the presence in the articles of a restriction on the power of the board, the question is whether the particular person's relationship to the company is such that the person should have known the contents of the articles. This would affect some persons inside the company, namely the directors, the principal executive officer if he is a director, the company's secretary and possibly an outsider, the company's solicitor. But it could hardly operate in relation to persons not concerned with the constitutional affairs of the company such as managers. On the other hand, if the validity of a transaction turns on whether a person was held out by the company with a usual authority attached to an office, and a manager in the company dealing with that person should have known that the person had a narrower authority, the manager cannot assume the usual authority.

When is a relationship such that a person "ought to know"? Is the test the existence of a duty to know by reason of the relationship or is it enough that the person has an opportunity to know? It is conceived that it is the existence of a duty to know that is critical. Adoption of the test of opportunity to know is hardly intended since everybody has an opportunity to know the contents of the public documents by making searches and s.68C cuts down the doctrine of notice based on opportunity to know. In Morris v. Kanssen [1946] AC 459 the critical thing was the duty of the director: to allow him to have the benefit of the indoor management rule would be "to encourage ignorance and condone dereliction from duty".

Section 68A(4) does not preserve the availability of the indoor management rule to directors acting in a private capacity in circumstances such as those considered by Roskill J in Hely-Hutchinson v. Brayhead Ltd. [1967] 2 WLR 1312 aff'd on other grounds [1968] 1 QB 549.

"Actual knowledge"

Turning to limb (a) dealing with unrelated persons, there is a primary question as to who bears the onus of proof as to whether the outsider had actual knowledge. Where the question is whether officers of a company have used their powers for an improper purpose, the onus of showing the abuse of power rests on the person who alleges impropriety: Richard Brady Franks Ltd v. Price (1937) 58 CLR 112. Latham CJ said: "A Court, however, does not presume impropriety." Given that it could be proved that officers acted improperly, the onus of proving knowledge on the part of a third party of a breach of duty would, according to an analogous case Re Dover Pty Ltd (1981) 6 ACLR 307 rest on the company: see at 310. There are some other cases referred to in Meagher, Gummow and Lehane on Equity par 859, which hold that in the similar situation where a third party claims to be a bona fide purchaser for value without notice taking the legal estate,

the third party has the onus of proving lack of notice but there are also some decisions the other way.

In view of the uncertainty, it would be best for lenders to proceed on the basis that a lender would have the onus of proving lack of knowledge for the purposes of s.68A.

The knowledge that will preclude a lender getting a fully effective transaction is described in s.68A(4) as "actual knowledge". In Stroud's Judicial Dictionary (4th ed 1971) vol 1 page 49 it is said that "the word 'actual' does not usually advance the meaning. Speaking generally, a thing is not more itself because it is spoken of as 'actual'... Gladstone v. Padwick (1871) LR 6 Ex 203. ... But where a word has a constructive legal meaning not completely corresponding to the fact it indicates, then the addition of 'actual' will intensify that word, so that it will not be fully satisfied by such legal meaning (R v. StNicholas, Rochester (1834) 3 LJMC 45)."

It seems then that whereas "knowledge" can ordinarily in some contexts include constructive knowledge, the addition of the word "actual" may exclude some or all of the types of constructive knowledge.

The contrast between "actual knowledge" in sub-para (a) as against what a person "ought to know" as expressed in sub-para (b) also leads to the same conclusion.

In the first instance it is probably enough to distinguish between two types of constructive knowledge, namely, knowledge of facts that would have been discovered by a person who was put upon enquiry and knowledge of facts that a person would have discovered by making the enquiries that would be made by a reasonably prudent person. Earlier in this paper it has been submitted that s.68C amounts to a legislative direction that an outsider is not to be prejudiced merely because he failed to make the enquiries that would have been made by a reasonably prudent person. If this is correct, it is possible to give force to the word "actual" in s.68A(4) as excluding that type of constructive notice but as not excluding deemed notice arising from being put upon enquiry. That result would be consonant with the legislative intention of enacting the indoor management rule. The Explanatory Memorandum to the Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983 par 188 refers to a legislative purpose of ensuring that "a person who deals in good faith" should be protected. See also par 207 stating that the purpose of ss.68A(4) and (5) as being "to make it clear that the protection afforded by the 'indoor management' rule is only available to 'innocent' parties".

The indoor management rule could not be availed of by a person who was put on enquiry: A L Underwood Ltd v. Bank of Liverpool [1924] 1 KB 775; B Liggett (Liverpool) Ltd v. Barclays Bank Ltd [1928] 1 KB 48. In Kanssen v. Rialto (West End) Ltd [1944] Ch

346 aff'd [1946] AC 459 Lord Greene MR (at 358) interpreted an earlier partial legislative adoption of the indoor management rule in s.143 of the Companies Act 1929 (UK) (corresponding to s.224 of the Companies Act 1981) as importing also that s.143 was not available to a person who was put on enquiry. When will a person be put on enquiry for the purposes of s.68A(4)?

The statements of legislative intention in the Explanatory Memorandum suggest an equating of lack of "actual knowledge" with good faith. If so, it is not just a question of the effect of certain information on the mind of a reasonable person. It would be open to ask whether in the circumstances it can be inferred that the person concerned was morally obtuse in not perceiving that all might not be well. Where that person is professionally qualified and better able to draw inferences that others, he or she is more likely to be taken to have been put on enquiry.

That could be important in cases where the outsider has knowledge of facts that lead in law to a particular conclusion but the outsider does not draw the conclusion: A M Spicer & Son Pty Ltd (in Liq) v. Spicer and Howie (1931) 47 CLR 151 at 176; Albert Gardens (Manly) Pty Ltd v. Mercantile Credits Ltd (1973) 131 CLR 60, 1 ACLR 482.

There are two types of company in respect of which an outsider could be put on enquiry. Lending to a no liability company involves lending to a company known to informed people to have stated objects confined to mining purposes. If the lender has any reason to believe that the loan is for any other purpose than mining purposes as defined in the Companies Code s.5(1), the lender will not be able to assume that the memorandum is being complied with and that the officers are performing their duty to the company. Although the company will have the capacity to enter into the transaction, the transaction could be voidable as being an abuse of power on the part of the officers. Similar considerations could apply where the borrower is a company that has received a licence to omit the word "Limited" from its name. Such a company is required to have limited objects.

"Actual knowledge" appearing in s.68A(4) includes knowledge acquired by agents

The expression "actual knowledge" would probably be interpreted to include what is known as "imputed notice". Imputed notice is notice imputed to a principal on the basis that his agent has notice: Sargent v. ASL Developments Ltd (1974) 131 CLR 634 per Mason J at 658-9:

> "As against a third party the law imputes to a principal knowledge gained by his agent in the course of, and which is material to, a transaction in which the agent is employed on behalf of the principal, under such circumstances that it is the duty of the agent to communicate it to the principal. In the words of James LJ in Vane v. Vane ((1873) 8 Ch App

> 383 at 399), 'the actual knowledge of the agent through whom an estate is acquired is ... equivalent to the actual personal knowledge of the principal'. In my view this principle applies to information acquired by a solicitor in the course of acting for his client in a conveyancing matter (Dixon v. Winch [1900] 1 Ch 736)."

It is inconceivable that persons dealing with companies would not be held to have knowledge of their agents imputed to them. Otherwise, a person dealing with a company himself would be worse off than one who employed agents to deal with the company: the legislature cannot be taken to have intended that persons dealing with companies should be protected according as to whether they acted personally or acted by agents.

In a sense the knowledge of a lender company will always be imputed knowledge. At least the actual knowledge of one of its organs, the board of directors, will be imputed to it. There seems to be no good reason why a company should be different from any other principal so that actual knowledge acquired by persons other than the board of directors may be imputed to the company.

For a corporate lender to be fixed with the actual material knowledge of an agent the agent would have had to acquire the knowledge in such circumstances that it was the duty of the agent to communicate it to the principal. The knowledge must have been acquired by the agent within the "ambit of his authority" from the principal: 131 CLR at 659.

Thus knowledge acquired by a person as an officer of company X will not be considered knowledge acquired by him as officer of company Y unless it was his duty to company X to communicate his knowledge to company Y and his duty to company Y to receive that knowledge: Re Hampshire Land Co [1896] 2 Ch 743 at 748; Re Fenwick Stobart & Co Ltd [1902] 1 Ch 507. One can imagine difficult cases where a director common to two companies which are transacting business has a duty of confidentiality in respect of one company and a duty to warn the other company.

A corporate lender could not artificially restrict the authority of the individuals who transact loans with borrowers so as to exclude authority to acquire knowledge. But the ambit of authority is relevant to the matter of the instructions to agents employed to conduct a search at the Corporate Affairs office. The Victorian Full Court in R v. Biggin [1955] VLR 36 applied the ambit-of-authority test where solicitors for proposed adopters of a child employed a solicitor to obtain the signature of the mother to a form of consent to adoption and to return the form. The solicitor did that. Later the mother informed the solicitor that she wished to withdraw her consent. The solicitor refused to give her any information and did not tell his principals about the mother's change of mind. It was held that the solicitor's knowledge was not to be imputed to his principals. He was employed for a merely ministerial task of having a form signed and returning it.

Thus, if a lender is dealing with a company for the first time and has no knowledge about its internal arrangements but is relying on s.68A, a search agent could be instructed to obtain the relevant Form 61 or annual return for the principal. If he is told that the principal is not employing him to obtain the memorandum or articles, the agent's knowledge of those documents should not be imputed to the principal. The principal would have to make it clear that the principal did not even want to know whether the company had lodged articles. If the principal were to acquire knowledge that articles had not been registered, that could amount to knowledge that the company was governed by Table A. Section 75 contemplates that only a provision in the articles can exclude a provision in Table A. Although s.73(2) recognises that the memorandum may contain a provision that could lawfully have been contained in the articles, it may not rebut the impression that only articles rather than provisions in the memorandum can oust the provisions of Table A. It seems appropriate to assume that knowledge that a company limited by shares has not registered articles is equal to notice that its affairs are governed by Table A.

For a principal to be fixed with the knowledge of the agent it can be enough if the agent receives reasonably explicit information even from a third party not involved in the transaction: Lloyd v. Banks (1868) 3 Ch App 488. For example, it would seem that if a sufficiently senior officer of a prospective lender (whose duties extended to the transaction of loans to Company X) read a report in a financial journal that certain directors of Company X had been replaced that would fix the lender with actual knowledge of the change of directors. Whether the officer received notice is a question of fact: Sunny West Co-operative Dairies Ltd v. W O Johnston & Sons [1965] WAR 232.

Does "actual knowledge" in s.68A(4) include knowledge acquired by an agent in the past?

Actual knowledge of either a principal or an agent means personal knowledge present to the mind of that person. There is no rule of law that one is deemed to have notice of all facts brought to one's attention in past transactions: Meagher, Gummow and Lehane, Equity par 851. If the person alleged to have had knowledge at the time he entered the transaction says that he once had notice but forgot by the time of the transaction, his evidence to that effect will be closely scrutinized: Brennan v. Pitt Son and Badgery Ltd (1899) 20 LR (NSW) Eq at 184 per Simpson CJ in Eq; Williamson v. Bors (1900) 21 LR (NSW) Eq 302.

Knowledge acquired by an agent before he became the principal's agent does not affect the principal except where (i) the principal has purchased the previously obtained knowledge of the agent; or (ii) the agent is an agent to "know and inquire": Taylor v. Yorkshire Insurance Co [1913] 2 IR 1.

Does "actual knowledge" in s.68A(4) include knowledge acquired by an agent in another transaction?

Where a lender is taking a charge and can be described as a "purchaser" within the statutory definition of that term in various conveyancing statutes there are statutory limitations on the doctrine of imputed notice that could possibly be applicable. The Conveyancing Act 1919 (NSW) s.164, if applicable, would limit a lender's imputed notice to knowledge acquired by an agent in his capacity as agent in the same transaction with respect to which the question of notice arises. (See also Property Law Act 1958 (Vic) s.199, Property Law Act 1974 (Qld) s.256(1)(b), Law of Property Act 1936 (SA) s.117, Conveyancing and Law of Property Act 1884 (Tas) s.5.)

Section 164 is derived from the English Conveyancing Act 1882 (see now Law of Property Act 1925 s.199). The limitation by statute to knowledge arising in the same transaction is said in Halsbury (4th ed) vol 16 Title Equity par 1329 n 15 to restore "the rule laid down by Lord Hardwicke LC in Warwick v. Warwick (1745) 3 Atk 291 for the reason that 'otherwise it would make purchasers' and mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions': see Worsley v. Earl of Scarborough (1746) 3 Atk 392."

Section 164 is not confined to land transactions. It applies for the general principle of "bona fide purchaser without notice": Helmore, The Law of Real Property in New South Wales (1961) 311-312. In Lindley on Partnership (15th ed 1984) 293 the English equivalent of s.164, the Law of Property Act 1925 s.199, is treated as being relevant to partnership law, namely, s.16 of the Partnership Act 1890 (UK) under which notice to one partner is notice to all partners.

Nor is s.164 limited to any particular category of agent such as solicitors. Halsbury (4th ed) vol 16 Title Equity pars 1324-1329 treats s.199 of the Law of Property Act as applying to agents generally.

Section 164 applies in respect of all forms of actual and constructive notice acquired by an agent. Section 68A(4) is concerned with a narrower range of knowledge but that should not prevent s.164 applying to cases otherwise within s.68A(4).

In a credit facility the transaction would usually be the particular credit facility as a whole including all action taken under it: each particular advance would not be a separate transaction.

CONCLUSIONS

The first consideration for a lender is whether it has such an existing connection of the kind referred to in s.68A(4) with the proposed corporate borrower that it could be taken to know the internal arrangements of the borrowing company. In such a

situation it would be best for the lender to proceed on the basis that it can take nothing for granted and does not have the benefit of a relevant presumption of regularity. In deciding whether there is a connection, the test that it is advisable to apply is whether the lender has a greater opportunity to know the borrower's internal arrangements than other persons. That may turn out to be too strict a test but until uncertainty is removed it would be prudent to adopt it.

Where there is no such existing connection between the lender and the borrower it is suggested that a distinction exists between a borrower which is newly registered and one that has been in existence for some time. Where the lender is dealing with a newly registered company with which neither the lender nor any of its agents has dealt, the lender could rely on the new provisions in the Companies Act and need not call for the memorandum and articles. But the latest lodged Form 61 should be searched so that a minute of a board resolution authorising entry into the transaction and the execution of documents under the common seal will be seen to be made by persons held out by the company. In assessing the usual authority of the persons held out by the borrower as its appointees, the lender will need to consider the business carried on or to be carried on by the company.

But if the company is not newly registered, there is some risk that some agent of the lender, if not the lender, has dealt with the company in the past and has received knowledge of some relevant fact affecting the exercise of the company's powers or the authority of its officers. For such a company it seems best to continue to follow the old procedure including obtaining the constituent documents and inspecting them. There is some risk that in doing so the lender will learn something which the new provisions would have spared the lender from learning, but that seems a lesser risk. If inspection of the documents shows that there is some restriction, prohibition or limitation in stated objects that affects the proposed transaction, the company should be asked to amend its constituent documents to remove it.