

(iii) When the company is registered, its memorandum must state the total nominal value of all the shares it is going to issue (called the registered capital, or nominal capital or authorised share capital).

The memorandum also states the number of shares to be issued:
e.g. 10,000 shares of £1 each = registered capital of £10,000.

(iv) Liability of a member (shareholder), when the company is wound up is limited to the amount, if any, of the nominal value of his shares which has not been paid.

(Shareholder is also contractually bound to pay any premium which has not been paid).

(v) Shares are normally partly or fully paid for when issued, so company will have a contributed capital.

Companies Limited by Shares may be Public or Private

(i) Public Companies

CA 1985, s.1(3): "a company limited by shares which has a memorandum stating that it is to be a public company and which complies with the requirements of the Act for registration as a public company."

Main requirements:

- A company cannot be registered as a public company unless it has a minimum allotted share capital of £50,000, at least one quarter of which has actually been paid.
- A public company must have at least two shareholders and at least two directors.

(ii) Private Companies

CA 1985 defines a private company as "any company that is not a public company".

Private companies have no authorised minimum share capital.

A private company is only required to have one director and, since 1992, it can be formed with only one member.

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.

2. Veil of Incorporation

Separate legal personality of company operates as a shield - the courts will not normally look beyond the façade of the company to the shareholders who comprise it.

The screen separating the company from its individual shareholders and directors is commonly referred to as "the veil of incorporation".

In either case, the court can order that those involved make a contribution to the companies assets for the benefit of creditors.

(v) Insolvency Act 1986, s.216 & 217

The director of a company which has gone into insolvent liquidation cannot become a director of another company with the same name within a five year period. If he does he can be made personally liable for all the debts of the new company.

(vi) Company Directors Disqualification Act 1986, s.15

A person will be jointly and severally liable with the company for all the company's debts if he takes part in the management of the company while he is under a disqualification order.

NB: For the purposes of these provisions, "person" includes legal as well as natural persons.

(b) Common Law

The courts are willing to pierce the veil of incorporation in some circumstances:

(i) Fraud, Façade or Sham

Courts will examine the reality behind the company where the company was set up purely to evade a legal obligation, or to allow someone to do something he would not be allowed to do as an individual:

Gilford Motor Co v Horne (Case 22)

Jones v Lipman (Case 23)

Re Bugle Press Ltd (Case 24)

(ii) Agency

Court may lift the veil on the basis that one company is merely carrying on business as the agent of another - so that transactions entered into by the subsidiary can be regarded as transactions of the holding company:

Smith, Stone & Knight v Birmingham Corporation (Case 25)

Firestone Tyre & Rubber Co v Lewellin (Case 26)

Any provision in the articles which would have the effect of making them unalterable is void.

There are certain restrictions on the company's power to alter its articles:

(i) Express Statutory Restrictions

s.16 - cannot alter articles to increase a member's liability without his consent.

s.369(1) sets out notice periods for calling meetings and states this cannot be shortened by a provision in the articles.

(ii) General Law and Public Policy

A provision in the articles which is contrary to public policy is void.

St Johnstone Football Club Ltd v SFA (Case 41)

The same would apply to any provision which was inconsistent with the companies legislation.

(iii) Court Order

Certain sections of the 1985 Act give the court power to order that no alteration be made to the articles.

(iv) Memorandum

An alteration to the articles which conflicts with the memorandum would be effectively void.

(v) Improper Use of Power to Alter Articles

The Power to alter the articles must be exercised bona fide for the benefit of the company as a whole.

A member cannot challenge an alteration carried out in good faith for the benefit of the company, even if the alteration adversely affects his own rights.

Allen v Gold Reefs of West Africa Ltd (Case 42)

Greenhalgh v Arderne Cinemas Ltd (Case 43)

Printed copy of special resolution must be sent to Registrar within 15 days of it being passed.

(b) Extraordinary Resolutions

Same requirements as for special resolution except for notice period required, which depends on type of meeting. (21 days for AGM, 14 days for EGM - shorter notice possible by agreement).

Extraordinary resolution must be used:

- for voluntary winding up when company cannot pay its debts (IA 1986 s.84(1))
- to authorise a liquidator to make an arrangement with creditors in members' voluntary winding up (IA 1986 s.165(2))

(c) Elective Resolutions

Apply only to private companies. s.379A CA 1985 lists circumstances - e.g. election to dispense with AGM.

Requires 21 days notice of meeting - resolution must be supported by all members entitled to attend and vote.

Must be filed with Registrar within 15 days of being passed.

An elective resolution can be revoked by an ordinary resolution - which must also be filed with the Registrar within 15 days.

(d) Ordinary Resolutions

Most matters can be decided by ordinary resolution and some must be (e.g. decision to remove a director).

Ordinary resolution requires simple majority - 50% + 1 vote of members present in person or by proxy.

(e) Written Resolutions

CA 1985 s.381A - allows private company to pass resolutions without holding meetings.

Director's fiduciary duties are owed only to the company, not to the individual shareholders.

Percival v Wright (Case 73)

Allan v Hyatt (Case 74)

The Fiduciary Duties are:

(i) A duty to act bona fide for the benefit of the company as a whole:
Re W & M Roith Ltd (Case 75)

(ii) A duty to use powers only for the purpose for which they were conferred:

Howard Smith v Ampol Petroleum (Case 70)

(iii) A duty to avoid a conflict between his own interests and those of the company.

Aberdeen Railway Co v Blaikie Bros (Case 76)

A director cannot vote on any matter in which he has a personal interest, and, by CA s.317 a director with any interest in a proposed contract must disclose this to the board:

Guinness plc v Saunders (Case 77)

Neptune Vehicle Washing Equipment Ltd v Fitzgerald (Case 78)

(iv) A duty not to make a personal profit out of his connection with the company.

If he does he must account for the profit to the company:

Boston Deep Sea Fishing Ltd v Ansell (Case 79)

Regal (Hastings) Ltd v Gulliver (Case 80)

IDC Ltd v Cooley (Case 81)

The shareholders can vote to permit the director to keep the profit
- unless there is a fraud on the minority:

Cook v Deeks (Case 82)

(b) Duty of Care and Skill

"Control" = voting control (50% + 1 vote) - but some suggestion that de facto control is enough:

Prudential Assurance v Newman Industries (Case 91)

"Fraud" = unconscionable use of majority power resulting in loss to or discrimination against the minority.

Negligence is not enough to amount to fraud:

Pavlides v Jensen (Case 92)

But "self-serving" negligence might be:

Daniels v Daniels (Case 93)

Oppression of the minority will be regarded as fraud:

Menier v Hooper's Telegraph Works (Case 94)

Cook v Deeks (Case 82)

Also conduct which is an abuse of majority powers:

Estmanco v GLC (Case 95)

(ii) Invasion of Personal Rights

Invasion of the shareholder's personal rights is not really an exception to the rule in Foss v Harbottle - because the shareholder would be the proper person to bring the action:

Wood v Odessa Waterworks Co (Case 47)

Salmon v Quinn & Axtens Ltd (Case 51)

(iii) Illegal or Ultra Vires Acts

Any shareholder is entitled to bring an action to restrain the company from doing something which is outside the company's objects.

(iv) Material Procedural Irregularities

General rule that the courts will not interfere with the internal management of a company when an action is brought by a shareholder does not apply if the act done by the company was one which required a special majority which was not obtained.

If this exception did not exist, the company would be able to act in breach of its own constitution.