

## ULTRA VIRES IN 1984

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### Introduction

The purpose of this short article is to examine the doctrine of *ultra vires* in 1984 and to ascertain whether the doctrine has been abolished by the amendments to the *Companies (Qld) Code* made by the *Companies and Securities Legislation (Miscellaneous Provisions) Act 1983 (Cth)*<sup>1</sup> and, if it has not been abolished, to ascertain the circumstances in which and the extent to which it survives. In that connection, it is necessary to state the pre-1984 law as well as the present law. However, the article is concerned only with the question — ‘Did the *company* have *capacity* to enter into a particular transaction?’ It is not concerned with the question — ‘Did the *natural person or persons* who purported to act on behalf of the company in the transaction have *authority* to do so?’ Further, it is not concerned with the question — ‘Did the *persons with authority* to act on behalf of the company *exercise their powers properly*?’ These latter questions can be dealt with in another article.

There used to be three rules which protected the shareholders of a company and persons dealing with the company against dissipation of the company’s funds in unauthorised activities. The first of these was the statutory rule that the memorandum of association of a registered company (a company incorporated on the registration of the memorandum and certain other documents by the National Companies and Securities Commission, *i.e.* the Commissioner for Corporate Affairs in Queensland) ‘shall’ state, *inter alia*, the objects of the company (former s.37(1)(b) of the *Companies (Qld) Code*). This rule was amended by the 1983 Act, s.33 of which provided that s.37 of the *Companies (Qld) Code* should be amended by the omission of subs. (1)(b) and the insertion of subs. (1A) to the effect that the memorandum of a company *may* state the objects of the company. It should be noted that the objects of a mining company must still be stated in the memorandum by reason of the new definition of such a company in s.5 of the Companies Code, as must the objects of a s.66 company, *i.e.* a charitable or other limited company with objects useful to the community which is licensed by the Commission to omit the word ‘Limited’ from its name. It is thought that objects still must not be stated in the company’s *articles* of association. The second rule referred to *ante* was the *ultra vires* rule, a rule developed by the courts and applicable to companies incorporated by Parliament, including ‘statutory companies’ incorporated by Private Act of Parliament and ‘registered companies’ incorporated on the registration of the memorandum and certain other documents by the Commission. This rule

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1. The National Companies and Securities Scheme, to which all the States and the Australian Capital Territory are parties, involves an aggregation of power of the Commonwealth and the States. Relying on its Territories power under s.122 of the Constitution, the Commonwealth enacted comprehensive corporation and securities legislation in relation to the A.C.T. and each State enacted legislation applying the Commonwealth legislation in that State. The Commonwealth legislation is the *Companies Act 1981* as amended and the Queensland legislation is the *Companies (Application of Laws) Act 1981*. The *Companies (Qld) Code* sets out the Commonwealth law as it applies in Queensland. Amendments to the legislation are decided by the Ministerial Council, which consists of the appropriate Minister for each party to the Scheme, and then placed before the Commonwealth Parliament. Once enacted by the Commonwealth Parliament, those amendments operate in each State without the need for further legislation in any State.

was to the effect that a company could only pursue the stated objects and things reasonably incidental thereto. It will be seen that the rule has been largely abolished by statute, *e.g.* by new ss.67 and 68 of the *Companies Code, post*. The third rule was that a registered company had at first no power, and later only a limited power, to alter its objects. This rule has been abolished and a company now has a wide power to alter its objects by a special resolution<sup>2</sup> passed at a general meeting under s. 73 of the *Companies Code*.

The following topics will now be dealt with — the common law doctrine of *ultra vires*, pre-1984 statutory moderation of the doctrine, the pre-1984 law with regard to a company's powers, the present position with regard to statutory moderation of the doctrine, and the present law with regard to a company's powers.

### The Common Law Doctrine of Ultra Vires

The essence of the common law doctrine of *ultra vires* was that a company had legal capacity to do only such acts as it was expressly or by reasonable implication empowered to do, *i.e.* capacity to pursue the objects stated in the memorandum or conferred by statute and the powers which were reasonably incidental to the objects. An act or transaction in excess of such capacity was *ultra vires, i.e.* beyond the powers of, the company and was void, so that it could not be ratified even if all the members wished to ratify. Thus, in *Ashbury Railway Carriage Co. Ltd. v. Riche*<sup>3</sup> the contract for the purchase of a concession for building a railway was *ultra vires* the company and void, so that not even the subsequent assent of the whole body of shareholders could ratify it.

The doctrine ceased to protect the shareholders and persons dealing with the company when, because of the *ultra vires* rule and the other rules referred to earlier, it became the practice to draft objects clauses widely and to include express powers, *e.g.* to borrow money, many of which would otherwise have been implied. Accordingly, a counter to the practice was evolved by the courts. This was the 'main objects' rule of construction, *i.e.* if the objects in an objects clause were expressed in a series of paragraphs and some paragraphs appeared to express the main object, the others were treated as being merely ancillary to the main object. However, this counter could be excluded by the inclusion of an appropriate provision in the memorandum, *e.g.* by an 'independent objects' clause stating, in effect, that each object was a main object. Thus in *Cotman v. Brougham*,<sup>4</sup> the objects clause concluded with a declaration that every sub-clause should be construed as a substantive clause and not limited or restricted by reference to or inference from any other sub-clause or by the name of the company, and that none of the sub-clauses or the objects or powers therein should be deemed subsidiary merely to the objects in the first sub-clause. In *Bell Houses Ltd. v. City Wall Properties Ltd.*<sup>5</sup> the objects clause included a provision that the company was formed 'to carry on any other . . . business whatsoever which can, in the opinion of the board of directors, be advantageously carried on by the company in connection with or as ancillary to any of the above businesses or the general business of the company'. Again, in *H.A. Stephenson & Son Ltd. v. Gillanders, Arbuthnot & Co.*<sup>6</sup> the provision was 'to carry on any other business . . . as the company<sup>7</sup> may deem expedient'.<sup>8</sup>

There was one case in which the 'main objects' rule could not be excluded and that was where the question was — is it just and equitable that the company be wound-up on the

2. *i.e.* a resolution requiring a majority of at least three fourths of the votes of the members at a general meeting, and usually at least 21 days' notice to the members: s.248.

3. (1875) L.R. 7 H.L. 653.

4. [1918] A.C. 514.

5. [1966] 2 Q.B. 656 (C.A.).

6. (1931) 45 C.L.R. 476.

7. *i.e.* a board meeting or a general meeting.

8. New s.68(4) of the Companies Code would apply if the facts of this case were to recur today.

ground that it is engaging in acts outside the general intention and common understanding of the members (a question of equity between the company and its shareholders) — and not — is the transaction *ultra vires* the company (a question of law between the company and a third party)?<sup>9</sup> It is thought that this is still true in Australia and that it is not affected by ss.67 and 68 of the *Companies Code*. In *Re Tivoli Freeholds Ltd.*<sup>10</sup> decided when ss.19 and 20 of the Victorian *Companies Act* were in force (ss.19 and 20 were in the same terms as old ss.67 and 68 of the *Companies Code, post*<sup>11</sup>), when the company sold its theatres its surplus funds were lent to its holding company and used in ‘corporate raiding’, *i.e.* in the acquisition of shares in other companies. That was *intra vires* the company but it was held to be just and equitable that the company be wound up under s.222 of the *Companies Act* (s.364 of the Code now) on the petition of a minority shareholder. The main objects of the company were to carry on the entertainment business and to acquire land on which theatres were erected and the ‘main objects’ rule of construction was not excluded by the insertion of an ‘independent objects’ clause in the memorandum.

In a rare case, where objects were not drafted widely, the *ultra vires* doctrine was a trap for a person dealing with the company if the company took the point that the transaction was *ultra vires*. (S.68(4) of the *Companies Code post* appears to prevent a company from taking such a point in Australia today.) Even if the person dealing with the company did not have actual notice of the company’s powers, he had constructive notice because a memorandum of association registered by the Companies Registry or the Corporate Affairs Commission was open to public inspection under what is now s.31(2) of the Code,<sup>12</sup> and if a person dealing with a company made a contract which to his knowledge, actual or constructive, was *ultra vires* the company, he could not enforce it. Thus, in *Re Jon Beauforte (London) Ltd.*,<sup>13</sup> where the company, authorised by its memorandum to carry on business as costumiers and gown makers, started the business of making veneered panels, that was *ultra vires* and persons such as coke merchants who sold coke to the company could not prove for their debts in the company’s liquidation. (It may be mentioned here that the doctrine that a person has constructive notice of the memorandum or articles of a company or any of their contents by reason only that they have been lodged with the Commission, was generally abolished by new s.68C of the *Companies Code*.)

### Pre-1984 Statutory Moderation of the Doctrine of Ultra Vires

Because, as has been shown, the doctrine of *ultra vires* ceased to protect the shareholders and persons dealing with a company, and was sometimes a trap for a person dealing with the company, the doctrine had to be moderated by statute.

Accordingly, old s.68(1) of the *Companies Code* generally abolished the doctrine by providing that no act of a company (including the entering into of an agreement) and no conveyance or transfer of property to or by a company was invalid by reason only that the company lacked capacity or power. S.68(1) did not validate an *ultra vires* agreement which was not invalid by reason only that the company lacked capacity to make it but was also void for lack of consideration.<sup>14</sup>

9. Per Lord Parker of Waddington in *Cotman’s case, ante*, at 520. See also per Dixon J. in *Stephenson’s case, supra* n.6. at 48.

10. [1972] V.L.R. 445.

11. p. 34.

12. Per Lord Hatherley in *Mahony v. East Holyford Mining Co.* (1875) L.R. 7 H.L. 869 at 893.

13. [1953] Ch. 131. See also *Introductions Ltd. v. National Provincial Bank* [1970] Ch. 199 (C.A.), *post*. If the *Jon Beauforte* and *Introductions* cases were to recur in England today, the former would almost certainly, and the latter might, be decided differently because of the European Communities Act 1972, s.9(1).

14. *Re Edward Love & Co. Pty. Ltd.* [1969] V.R. 230.

Old s.67 provided that the powers of a company included —

- (a) power to make donations for patriotic or for charitable purposes;
- (b) power to transact any lawful business in aid of the Commonwealth in the prosecution of any war in which the Commonwealth was engaged;
- (c) unless expressly excluded or modified by the memorandum or the articles, the powers set out in former Schedule 2 to the Code. Section 67 meant that objects clauses need not be lengthy documents and the section reduced the chances of a transaction being *ultra vires*.

However, old s.68(2) preserved the doctrine of *ultra vires* to a considerable extent. The subsection provided that a company's lack of capacity or power could still be asserted —

- (a) in proceedings against the company by any member, or any debenture holder or the trustees for debenture holders with a floating charge over any of the company's property as security, to restrain any (*ultra vires*) act or conveyance or transfer of property to or by the company; or
- (b) in (misfeasance) proceedings by the company or any member against present or past officers of the company (to recover from them money or property of the company applied by them *ultra vires* the company); or
- (c) an application (to the Court) by the Commission to wind up the company (on the ground of an *ultra vires* act by the company).

Old s.68(3), which was appendant to s.68(2)(a), provided that if the unauthorised act, conveyance or transfer sought to be restrained in proceedings under s.68(2)(a) was being or was to be performed or made pursuant to a contract to which the company was a party the Court might, if all parties to the contract were parties to the proceedings and the Court deemed it just and equitable, set aside and restrain performance of the contract and might award the company or the other party to the contract compensation for loss sustained as a result of the action of the Court other than profits anticipated from the contract. Before old s.68(3) of the *Companies Code*, and its predecessor, s.20(3) of the *Companies Act 1961-81* (Qld), a transaction *ultra vires* a company was void and the person dealing with the company had no rights under it. After s.20(3) and s.68(3) such a person had the rights conferred by those provisions.

### The Pre-1984 Law with regard to a Company's Powers

#### *Distinction between objects and powers*

There was a distinction between the objects of a company and its powers. Objects stated the purposes which a company was authorised to pursue whereas powers were to be exercised in furtherance of those purposes. Certain powers would be implied as reasonably incidental to the purposes but sometimes powers were expressed in the memorandum, and sometimes those express powers were described as 'objects' and there was a 'separate objects' clause in the memorandum. However, despite the description of the express powers as objects and despite the inclusion of a 'separate objects' clause, such provisions were sometimes only powers, to be exercised in furtherance of the 'objects' properly so-called, and which added to, or in some circumstances limited, the powers that would otherwise have been implied.<sup>15</sup>

In *Rolled Steel Products (Holdings) Ltd. v. British Steel Corpn*<sup>16</sup> the main object of the company was to buy and sell steel. The memorandum provided that the company had power to lend money and to give guarantees, and there was a 'separate objects' clause. It was

15. Per Vinelott J. in *Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation* [1982] 1 Ch. 478 at 497.

16. *Ibid.* at 497. The person to whom the company gave a guarantee knew that it was not given for the company's purposes and it was set aside.

held that the power to lend was not a separate or independent object but an ancillary power to be exercised in furtherance of the substantive objects and purposes of the company. In *Introductions Ltd. v. National Provincial Bank Ltd.*<sup>17</sup> the main object was to provide entertainment and services for overseas visitors. There was an express power to borrow money and a 'separate objects' clause, and it was held that the power to borrow was merely an ancillary power. It seems that borrowing and lending money were activities capable of being pursued as independent objects only in the case of, e.g., a bank or a finance company.<sup>18</sup>

#### *Senses in which 'ultra vires' used*

The phrase '*ultra vires*' was used in a narrow and in a wider sense. It was used in a narrow sense to describe a transaction outside the scope of the powers expressed in the memorandum of association of a company or which could be implied as reasonably incidental to the furtherance of the objects set out therein. It was used in a wider sense to describe a transaction which, although it fell within the scope of the powers of a company, express or implied, was entered into in furtherance of some purpose which was not an authorised purpose.<sup>19</sup> A transaction which was *ultra vires* in either sense was incapable of being made binding on the company even by the assent of all the members. The difference between a transaction which was *ultra vires* in the narrow sense and one which was *ultra vires* in the wider sense was that the former was void and could not confer rights on other parties whereas the latter might confer rights on a party who could show that he dealt with the company in good faith and for valuable consideration and did not have notice of the fact that the transaction, while ostensibly within the powers, express or implied, of the company, was entered into in furtherance of a purpose which was not an authorised purpose.<sup>20</sup> The *Rolled Steel* case and the *Introductions* case, *ante*, were cases where the transaction was *ultra vires* in the wider sense. On the other hand, in *Charterbridge Corp'n. v. Lloyds' Bank Ltd.*<sup>21</sup> the main object of the company was to acquire land for investment, there was a provision authorising the company to secure or guarantee the performance and discharge of any contract, obligation or liability, and there was a 'separate objects' clause. It was held that the provision was an independent object.

#### *Gifts*

Former s.67(a) of the Code, set out earlier in this article, did not deal with gifts other than those for patriotic or charitable purposes. However, under the general law, a company had *implied* power to make a gift if it was —

1. reasonably incidental to the carrying on of the company's business;
2. a *bona fide* transaction;
3. made for the benefit of and to promote the prosperity of the company.

In *Hutton v. West Cork Railway Co.*<sup>22</sup> the company was being wound up and so (1.) above was not satisfied when the company in general meeting resolved to make a gratuitous payment to officials and directors. In *Re Lee Behrens & Co. Ltd.*<sup>23</sup> there was an *express* power to provide for the welfare of employees and ex-employees of the company, and their

17. [1970] Ch. 199 (C.A.). The bank which lent money to the company knew it was only carrying on the business of pig breeding. The loan was *ultra vires*.

18. *Rolled Steel* case, *supra* n.15 at 497.

19. *Ibid.*

20. *Ibid.*

21. [1970] Ch. 62.

22. (1883) 23 Ch.D. 654 (C.A.).

23. [1932] 2 Ch.46.

widows and children and other dependants, by granting money or pensions. This express power did not extend to the widow of an ex-director to whom the board of directors decided that the company should covenant to pay a pension. When, three years later, the company was being wound up, it was held, as regards an *implied* power, that the transaction was not for the benefit of the company or reasonably incidental to its business. In *Parke v. Daily News Ltd.*<sup>24</sup> where the major part of the company's business had been sold and it was proposed to distribute the purchase price amongst redundant employees, (1.) above was not satisfied.

The above-mentioned three conditions need not be satisfied in the case of an *independent express* power to make a gift. Thus, in *Re Horsley v. Weight Ltd.*<sup>25</sup> the main object was to carry on the business of shop fitters, there was an express power to grant pensions to employees and ex-employees and directors or ex-directors or other officers or ex-officers of the company, their widows, children and dependants, and there was a 'separate objects' clause. It was held that the power to pay a pension was a substantive object so that it was immaterial whether its exercise benefited and promoted the prosperity of the company.

It may be mentioned that if a company with an implied power to make gifts made a gift which was not reasonably incidental to the carrying on of the company's business, old s.68(1) prevented the money from being recovered from the donee, although old s.68(2)(b) allowed it to be recovered from the directors. However, if such a company was only proposing to make such a gift, an action to restrain it could be brought under old s.68(2)(a).

### **The Present Position with regard to Statutory Moderation of the Doctrine**

It has already been noted that new s.37(1A) makes it optional for companies to have stated objects except that the objects of a mining company must be stated in its memorandum, as must the objects of a s.66 company.<sup>26</sup> Section 73 still gives a company a power to alter objects by special resolution. Further, new ss.67 and 68 generally abolish the doctrine of *ultra vires*. Section 34 of the *Companies and Securities Legislation (Miscellaneous Amendments) Act 1983* (Cth) repealed old ss.67 and 68 and substituted new ss.67 and 68, and s.125 repealed the former Schedule 2.

*Ss.67 and 68 now provide:*

- S.67(1)– Subject to the Code, a company has the powers of a natural person and also certain specified powers peculiar to companies. The specified powers include power to issue fully or partly paid shares in the company and debentures of the company, to grant a floating charge on property of the company and to distribute any property of the company among the members, in kind or otherwise. (Of course, there are certain things which a natural person may have power to do but which a company, being an artificial person, cannot do.)
- S.67(2)– However, the memorandum or articles may restrict or prohibit the exercise by the company of any of the powers referred to in subs.(1) (For example, a company's power to borrow money may be restricted to an amount equal to two-thirds of its paid-up share capital.)
- S.67(3)– A company has the capacity to exercise its powers in a place outside Queensland.
- S.67(4)– Nothing in the section affects the operation of any restriction on, or prohibition of, the exercise by a company of any of its powers, where the restriction or prohibition was included in the memorandum or articles before 1 January 1984,

24. [1962] Ch. 927.

25. [1982] 1 Ch. 442 (C.A.).

26. p.31.

when the *Companies and Securities Legislation (Miscellaneous Amendments) Act 1983* (Cth) came into operation.

- S.68(1)– Subject to the Code, a company shall not –
- (a) exercise any power that the company is prohibited, by the memorandum or articles, from exercising;
  - (b) exercise any power contrary to a restriction in the memorandum or articles; or
  - (c) where the objects are stated in the memorandum – do any act otherwise than in pursuance of those objects.
- S.68(2)– Further, an officer of a company shall not be in any way, by act or omission, directly, or indirectly, knowingly concerned in or party to a contravention by the company of subs.(1).
- S.68(3)– However, notwithstanding s.570 (General Penalty Provisions), neither a company that contravenes subs.(1) nor an officer who contravenes subs.(2) is guilty of an offence against s.68.
- S.68(4)– Further, an act of a company, including the making of an agreement and a transfer of property to or by a company, is not invalid by reason only that the doing of the act is prohibited by subs.(1) or by the memorandum or articles. (Contrast the former s.68(1), *ante*.<sup>27</sup>)
- S.68(5)– Similarly, an act of an officer of a company is not invalid by reason only that the doing of the act is prohibited by subs.(2).
- S.68(6)– Nevertheless, the fact that the doing of an act —
- (a) by a company; or
  - (b) by an officer, was or would be prohibited by subs.(1) or the memorandum or articles, or by subs.(2), respectively; may be asserted or relied on only in –
  - (c) a prosecution for an offence against the Code, *i.e.*, having regard to s.68(3), *ante*, an offence against a section other than s.68;
  - (d) an application for an order under s.227A (on application by the Commission or a prescribed person — including a liquidator, a member or a creditor — a director, secretary or executive officer of a corporation may be ordered not to manage a corporation where, *e.g.*, the corporation repeatedly breached the Code and he failed to take reasonable steps to prevent it, or he acted dishonestly or failed to exercise a reasonable degree of care and diligence in the performance of his duties as an officer of the corporation);
  - (e) an application by a member or the Commission for an order under s. 320 (Remedy in cases of Oppression or Injustice) — as Ford says, <sup>27a</sup> this is wider than the previous law, which was that even persistent *ultra vires* acts did not amount to oppression;<sup>27b</sup>
  - (f) an application for an injunction under s.574 (by the Commission or any person whose interests have been or would be affected where another person is contravening or proposing to contravene subs.(1) or subs.(2));
  - (g) proceedings by the company or by a member, against the present or former officers (*e.g.* misfeasance proceedings to recover from them money or other property of the company applied by them contrary to subs.(1) or subs.(2)); or

27. p.33.

27a. Supplement to the Third Edition of Principles of Company Law, p.17.

27b. *Re Tivoli Freeholds Ltd. supra* n.10.

- (h) an application by the Commission or by a member of the company for the winding up of the company (on the ground of a contravention of subs.(1) or subs. (2)). (Contrast the former s.68(2), *ante*.<sup>28</sup>)

Section 574(8) should be noted — it provides that where the court has power under the section to grant an injunction restraining a person it may, in addition to or in lieu of the grant of an injunction, order that person to pay damages to any other person. (Contrast the former s.68(3), *ante*.<sup>29</sup>) The word ‘person’ includes a body corporate as well as a natural person.<sup>30</sup>

*In theory, there are four possible situations to consider:*

- (1) Where the memorandum of a company does not state the objects of the company and neither the memorandum nor the articles restricts or prohibits the exercise by the company of any of the powers referred to in s.67(1).  
In these circumstances neither the common law doctrine of *ultra vires* nor s.68(1) can apply and it is true to say that the doctrine of *ultra vires* has been abolished. Accordingly, many companies will now be incorporated without a statement of objects in the memorandum and without the memorandum or the articles containing any restriction on or prohibition of the exercise of the s.67(1) powers. Further, many existing companies will alter their memoranda under s.73 so as to remove the statement of their objects and will alter their memoranda or articles so as to remove any restrictions on or prohibitions of the exercise of their powers contained therein. There is no need to state objects or to include express powers in a memorandum today, except in the case of mining companies and s.66 companies, but there may be companies with a statement of objects in the memorandum and/or restrictions on or prohibitions of the exercise of the s.67(1) powers in the memorandum or articles.
- (2) Where the memorandum does not state the objects but either the memorandum or the articles restricts or prohibits the exercise of any of the s.67(1) powers.  
In these circumstances traces of the doctrine of *ultra vires* are to be found in s.68. The company must not exercise a prohibited power or exercise a power contrary to a restriction,<sup>31</sup> and if a transaction contravenes subs.(1) or the memorandum or the articles, although it is not invalid,<sup>32</sup> and no offence against s.68 is committed,<sup>33</sup> the contravention can be asserted in certain specified cases.<sup>34</sup>
- (3) Where the memorandum states the objects but neither the memorandum nor the articles restricts or prohibits the exercise of any of the s.67(1) powers.  
It is thought that the ‘main objects’ rule of construction, *ante*,<sup>35</sup> will apply to the stated objects unless the memorandum includes an ‘independent objects’ clause, *i.e.* if the objects are expressed in a series of paragraphs and some paragraphs appear to express the main object, the others will be treated as merely ancillary to the main object unless there is a provision stating that each object is a main object. The new legislation preserves the distinction between objects and powers.<sup>36</sup>

28. p.34.

29. p.34.

30. *Companies and Securities (Interpretation and Miscellaneous Provisions) (Qld) Code*, s.9.

31. S.68(1)(a) and (b), *ante*.

32. S.68(4), and see s.68(5), *ante*.

33. S.68(3), *ante*.

34. S.68(6), and see s.574(8), *ante*.

35. p.32.

36. p.34.

Further, the company must not act otherwise than in pursuance of the stated objects<sup>37</sup> and, although the company has the powers of a natural person,<sup>38</sup> it is thought that s.67(1) must be read subject to s.8(1)(c). Accordingly, such powers, *e.g.* power to borrow money, must be exercised only in pursuance of the stated objects.

If a power is stated in the memorandum, it may be an independent object or an ancillary power, *i.e.* a power to be exercised only in furtherance of the 'objects' properly so called.<sup>39</sup> If there is an express statement of certain powers in the memorandum, in the absence of an appropriate saving clause in the memorandum this will amount to an implied prohibition of the exercise of the remaining s.67(1) powers.

The position with regard to s.68(3)–(6) is the same as under (2), *ante*, *i.e.* if a transaction contravenes subs.(1) it is not invalid and no offence against s.68 is committed but the contravention can be asserted in certain cases.

- (4) Where the memorandum states the objects and either the memorandum or the articles restricts or prohibits the exercise of any of the s.67(1) powers.

What it said in (3), *ante*, is also true in this case and, in addition, the company must not exercise a prohibited power or exercise a power contrary to a restriction.<sup>40</sup>

### The Present Law with regard to a Company's Powers

It may be helpful to consider the present position with regard to a company's power to do such things as make a gift, pay a pension to a former employee or lend money.

1. Where the memorandum does not state the objects of the company and neither the memorandum nor the articles restricts or prohibits the exercise by the company of any of the powers referred to in s.67(1).

In such circumstances the doctrine of *ultra vires* has been abolished and the company has full power to make a gift, to pay a pension, to lend money or to secure a loan to a third person, subject to the rule that its issued share capital must be maintained. The company also has full power to borrow money.

2. Where there are no stated objects but certain of the s.67(1) powers are restricted or prohibited.

If the exercise of the power to make a gift, to pay a pension, to lend money, to secure a loan to a third person or to borrow money is restricted or prohibited, the company must not exercise the power contrary to the restriction or prohibition<sup>41</sup> and, if a transaction contravenes s.68(1) or the memorandum or articles, although it is not invalid<sup>42</sup> and no offence against s.68 is committed,<sup>43</sup> the contravention can be asserted in certain specified cases.<sup>44</sup>

3. Where there are stated objects but no restricted or prohibited powers.

The company must not act otherwise than in pursuance of the stated objects<sup>45</sup> and, although the company has the powers of a natural person,<sup>46</sup> it is thought that s.67(1) must be read subject to s.68(1)(c). Accordingly, a power to make a gift, pay a pension, lend money, secure a loan or borrow money, must be exercised only in pursuance of

37. S.68(1)(c), *ante*.

38. S.67(1), *ante*.

39. As to which, see *ante*, p. 34.

40. S.68(1)(a) and (b), *ante*.

41. S.68(1)(a) and (b).

42. S.68(4) and (5), *ante*.

43. S.8(3), *ante*.

44. Ss.68(6) and 574(8), *ante*.

45. S.68(1)(c), *ante*.

46. S.67(1), *ante*.

the stated objects, and the principles in cases such as *Hutton v. West Cork Railway Co.*, *Re Lee, Behrens & Co.*, and *Parke v. Daily New Ltd.*, *ante*,<sup>47</sup> are still relevant.

If such a power is stated in the memorandum, it may be an independent object or an ancillary power and the principles in cases such as *Rolled Steel Products (Holdings) Ltd. v. British Steel Corpn*, *Introductions Ltd. v. National Provincial Bank Ltd.*, *Charterbridge Corpn v. Lloyds' Bank Ltd.* and *Re Horsley v. Weight Ltd.*, *ante*,<sup>48</sup> are still relevant. Borrowing and lending money are activities which can be pursued as independent objects only in the case of a company such as a bank or a finance company.

The position with regard to s.68(3)–(6) is the same as under (2), *ante*.

4. Where there are stated objects and restricted or prohibited powers

If the exercise of the power to make a gift, etc., is restricted or prohibited, the company must not exercise the prohibited power or exercise the power contrary to the restriction.<sup>49</sup> The position with regard to s.68(3)–(6) is the same as under (2), *ante*.

### Conclusion

The doctrine of *ultra vires* has been abolished where the memorandum of a company does not state the objects of the company and neither the memorandum nor the articles restricts or prohibits the exercise by the company of any of the powers referred to in s.67(1). If there is either or both a statement of objects in the memorandum or a restriction on or a prohibition of the exercise of the s.67(1) powers in the memorandum or the articles, the doctrine survives to some extent.

Accordingly, unless a mining company or a s.66 company, a new company should be incorporated without such a statement of objects or such a restriction or prohibition with regard to the s.7(1) powers, and an existing company should remove such a statement from its memorandum or remove any such restriction or prohibition from its memorandum or articles.

If, in a rare case, there is a good reason for objects being stated in the memorandum, an 'independent objects' clause should be included in the memorandum. Further, if powers are to be stated in the memorandum, it should be remembered that this may amount to an implied prohibition of the remaining s.67(1) powers.\*

\* *This article was written in September 1984.*

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47. pp.35 and 36.

48. pp.34 and 35.

49. S.68(1)(a) and (b), *ante*.