

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

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

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

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

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

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

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

3. Certificate of Incorporation

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

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

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

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

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

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

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

Trading Certificates

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

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

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

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

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

IV. CONSEQUENCES OF INCORPORATION

1. Separate Legal Personality

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

(a) Company is liable for its own debts

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

Salomon v A Salomon & Co Ltd (Case 11)

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

(b) Limited Liability

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

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

(c) Company Property

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

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

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

Macaura v Northern Assurance Co (Case 13)

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

(d) Contractual Capacity

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

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

(e) Crimes

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

Some limitations:

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

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

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

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

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

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

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

Crimes Against the Company

A company can be the victim of crime.

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

R v Philippou (Case 19)
(f) Perpetual Succession

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

(g) Borrowing

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

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

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".

3. Piercing the Corporate Veil

Sometimes the law is prepared to examine the reality which lies behind the company façade - this is described as "lifting" or "piercing" the corporate veil.

(a) Statute

Some statutory provisions have the effect of piercing the corporate veil to make directors personally liable.

Presumption is in favour of separate personality and courts will not normally infer that legislation is intended to pierce the corporate veil.

Dimbleby & Sons Ltd v NUJ (Case 20)

Situations where "veil is lifted" by Statute

(i) Companies Act 1985 s.24 - where membership of a company falls below two for more than six months. Member who knows he is the sole member but continues to trade will be jointly and severally liable with the company for company debts contracted after the six month period has elapsed. (s.24 no longer applies to private limited companies)

(ii) Companies Act 1985, s.117(8) - where public company trades without obtaining a trading certificate. If the company fails to comply with any obligations under a transaction within 21 days of being called on to do so, the directors of the company are jointly and severally liable to indemnify the third party against any loss.

(iii) Companies Act 1985, s.349 - if person acting on behalf of a company signs or authorises the signing of a bill of exchange, cheque, order for goods or similar document in which the company's name is not correctly stated, the person signing will be personally liable if the company fails to pay.

This provision is rigidly enforced:

Durham Fancy Goods v Michael Jackson (Fancy Goods) Ltd (Case 21)

(iv) Insolvency Act 1986, ss.213 & 214

s.213 applies where company is being wound up and it appears that business has been carried on with intent to defraud creditors.

s.214 applies where company is in insolvent liquidation and the director(s) should have known this, but did not take sufficient steps to minimise losses to creditors.

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)

But see: Adams v Cape Industries Ltd (Case 27)

(iii) Single Economic Unit

In the past, courts have been willing to lift the veil on the basis that a group of companies was not a group of separate persons, but a single economic unit:

DHN Food Distributors v Tower Hamlets (Case 28)

Later cases have doubted this principle:

Woolfson v Strathclyde Regional Council (Case 29)

Adams v Cape Industries Ltd (Case 27)

(iv) State of Hostility

In times of war, courts may regard a British company as an enemy alien if the company is controlled by nationals of an enemy country:

Daimler Co Ltd v Continental Tyre and Rubber Co (GB) Ltd (Case 30)

(v) Justice and Equity

Courts have sometimes been prepared to pierce the corporate veil where they feel this is in the interests of justice:

Re a Company (Case 31)

Creasey v Breachwood Motors Ltd (Case 32)

But see: Adams v Cape Industries Ltd (Case 27)

Ord v Belhaven Pubs Ltd (Case 33)

Yukong Lines Ltd v Rendsburg Investment Corp (Case 34)

V. THE CORPORATE CONSTITUTION

The constitution of a company consists of its memorandum of association and its articles of association.

1. The Memorandum of Association

For a company limited by shares, the memorandum must contain the following:

(a) Name Clause

CA 1985, s.25 - the name of a public limited company must end with the words "public limited company", the name of a private limited company must end with the word "Limited". Abbreviations may be used instead: "plc" or "Ltd".

It is an offence to carry on business under a name which uses these words or abbreviations when not entitled to do so - the penalty is a fine.

Under CA s.26, it is not possible to register a company name which includes the words "public limited company", "limited", "unlimited" or their abbreviations anywhere except at the end of the name.

There are also other restrictions on the use of names:

(i) Under s.26, a company cannot be registered under a name which is identical to a name already registered.

(ii) A company cannot be registered under a name which is regarded as offensive or where the use of the name would constitute a criminal offence.

(iii) A company cannot be registered under a name which suggests that the company is connected with the government or a local authority - or under any name including a word listed in the Company and Business Names Regulations 1981 - unless the Secretary of State gives permission for the name to be used.

(iv) s.26 does not prevent the registration of a name very similar to that of another company - but if the similarity is deceptive and likely to lead to confusion, the established business may bring an action to restrain the new company from using the name. This is called a "passing-off" action.

Court will take into account:

- scope of pursuer's reputation
- similarity of kind of business

Ewing v Buttercup Margarine Co Ltd (Case 35)

Dunlop Pneumatic Tyre v Dunlop Motor Co (Case 36)

Aerators Ltd v Tollitt (Case 37)

Exxon Corp'n v Exxon Insurance (Case 38)

(v) A company must have its name printed on all business documents and it must be displayed at the registered office and all business premises.

A company which wishes to trade under a name other than its registered name comes within the provisions of the Business Names Act 1985.

(vi) Insolvency Act 1986, s.216 prevents the director of a company which has gone into insolvent liquidation from taking part in the management of any business trading under the same name as the insolvent company.

(vii) A company can change its name by special resolution (requires approval of holders of 75% of the company's shares).

The Secretary of State can order a compulsory name change within 12 months of registration if he discovers the name is the same as or too like one previously registered.

The Secretary of State can order a compulsory name change at any time if he discovers that the name gives a misleading impression of the activities of the company.

(b) Registered Office Clause

CA 1985 s.2 - the memorandum states whether registered office is to be in England and Wales or in Scotland.

This establishes company's nationality and its domicile, but not its residence. Registered office is important because:

- it determines the jurisdiction in which the company can be sued.
- it is the address at which notices and documents must be served on the company.
- it is the address at which the company's registers and records must be kept and made available for inspection by the public.

Address of registered office can be changed by ordinary resolution (simple majority vote of shareholders), provided this does not also change the domicile.

(c) Objects Clause

Company's memorandum must contain an objects clause - a clause which states the purpose or purposes for which the company was incorporated.

(i) The *Ultra Vires* Rule

If the company does something beyond the scope of its objects clause, this is said to be *ultra vires* (beyond the powers of the company).

Previously this was of great importance - transaction entered into beyond the company's powers was void and could not be enforced by or against the company, and it could not be ratified. This was called the *ultra vires* rule.

Ashbury Carriage and Iron Co v Riche (Case 39)

(ii) Abolition of the Rule

The Rule has been abolished by statute as far as third parties are concerned.

s.35(1) CA 1985 - the validity of an act done by a company shall not be called into question on the grounds of lack of capacity by anything in the company's memorandum.

The rule still operates internally of the company - a shareholder can bring an action to restrain the company from carrying out an *ultra vires* act.

(The court will not restrain the company from doing anything it is already under a legal obligation to do)

A director may be liable to the company for any costs incurred by the company on an *ultra vires* transaction.

Potential problems can be avoided: CA 1985 s.3A allows a company to state in its memorandum that its object is to carry on business as a general commercial company. It can then carry on any trade or business whatsoever.

(iii) Change of Objects Clause

Under CA 1985, s.4 a company can change its objects clause by special resolution.

Members (holding at least 15% of the nominal issued share capital) who did not consent to the change can apply to the court to have the alteration set aside. (s.5)

Application must be made within 21 days of the resolution being passed. The alteration will not then come into effect unless it is confirmed by the court.