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F4

**CORPORATE AND
BUSINESS LAW
(ENGLISH)**

JUNE 2012 EXAMINATIONS



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CONTENTS

1	Structure of The Legal System	1
2	Courts	7
3	Statute Law	11
4	Contract Law	17
5	Common Law	35
6	Law of Tort	37
7	Employment Law	43
8	Agency Law	51
9	Partnership	53
10	Company Law	59
11	Company Law: Directors and Officers	77
12	Company Law: Meetings and Resolutions	91
13	Company Law: Loan Capital	99
14	Company Law: Liquidations	103
15	Company Law: Corporate Governance	109
16	Company Law: Illegalities	113
17	Capital Maintenance	121
18	Cases	127
	Practice Questions	139
	Practice Answers	141

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Chapter 1

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STRUCTURE OF THE LEGAL SYSTEM

Civil Law

- Private law
- To settle disputes between individuals
- No concept of punishment
- Objective is to compensate the wronged party
- Need to prove 'on the balance of probability'
- Sued in court
- If liable, then compensation payable
- Plaintiff and defendant
- Personal action brought by the aggrieved party
- Court may award damages or an equitable remedy if damages are inappropriate

STRUCTURE OF THE LEGAL SYSTEM

Criminal Law

- Public law
- A wrongdoer has broken the law
- A wrong done to society
- Prosecuted in court
- If guilty, then punished
- Community service, fine, imprisonment
- Prosecutor and accused
- Need to prove 'beyond reasonable doubt'
- Police decide whether to prosecute
- This decision is reviewed by the Crown Prosecution Service

STRUCTURE OF THE LEGAL SYSTEM

Common Law

- Development started with effect from 1066
- King's representatives attended local courts
- Then met in London on a regular basis to discuss
- Over a period of 200 years, law was commonised – "Common Law"
- Cornerstone of Common Law is judicial precedent
- Ratio decidendi and obiter dicta
- With commonisation came recognition of deficiencies
- Highlighted the need for alternative remedies – Equity
- Common Law remedy is 'damages' – a monetary award
- Common Law courts were separate from court of equity until the late nineteenth century

STRUCTURE OF THE LEGAL SYSTEM

Equity Law

- Grew from the recognition of deficiencies of Common Law
- If a monetary award of damages was not appropriate, there was nothing else to offer
- In fourteenth century, Aequitas
- Chancellor's court
- Early seventeenth century, Earl of Oxford's case
- Equity shall prevail
- Confirmed by 1873 – 1875 Judicature Acts
- Main remedies :
 - Specific performance
 - Injunction
 - Rescission
 - Rectification
- Remedies are given at Court's discretion
- Only given if damages is inappropriate

Ratio Decidendi

- Ratio is 'the reason for the decision'
- Ratio is binding on future judges in similar cases
- Reversing – higher court reverses lower court decision in same case
- Overruling – higher court overrules lower court decision in different case
- Distinguishing – court avoids earlier precedent by distinguishing the facts
- Ratio not binding if too obscure
- Ratio not binding if made without care (per incuriam)
- Ratio not binding if in conflict with a basic principle of law
- Ratio not binding if in conflict with European law
- Ratio not binding if too wide
- Ratio not binding if made in inferior court

STRUCTURE OF THE LEGAL SYSTEM

Human Rights Act

- Rights to:
 - life
 - free assembly
 - personal privacy
 - respect for private and family life
 - bodily integrity
 - personal liberty
 - participate in government
 - protection of the law
 - to own property
- Freedom of expression and conscience
- Freedom of association
- No arbitrary searches or seizures
- Economic and social rights
- Gender recognition
- From EU law, freedom...
 - of movement between EU member states
 - of providing services
 - of moving capital
 - of moving goods

Chapter 2

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COURTS

Hierarchy of the Courts

- European Court of Justice (ECJ)
 - Binds all English courts
 - Not bound by anyone, not even itself
- Supreme Court (judicial capacity) (SC)
 - Binds all English courts, but not itself
 - Bound by ECJ
- Court of Appeal (C of A)
 - Binds all lower courts
 - Bound by ECJ, SC and itself
 -unless
-unless
 - Two similar decisions conflict – must then decide which to follow
 - Earlier decision conflicts with a later SC decision
 - Earlier decision made per incuriam

Hierarchy of the Courts continued

- High Court (HC)
 - 3 divisions
 - Binds all lower courts
 - Bound by all higher courts
 - And itself
- Crown Court (Crown C)
 - Criminal cases
 - Binds no-one, not even itself
 - Bound by all higher courts
- County Court (County C)
 - Civil cases
 - Binds no-one, not even itself
 - Bound by all higher courts

Hierarchy of the Courts continued

- Magistrates Courts (MC)
 - Binds no-one, not even itself
 - Bound by all higher courts
- Tribunals (eg Employment Tribunal)
 - Less formal procedures
 - Quicker
 - Hears disputes between employees and employers
 - Can appeal to
- Employment Appeal Tribunal (EAT)
 - Equal status as HC
 - Can further appeal to C of A
 - But only on a point of law, not on a matter of fact



COURTS

Tracking

- 3 types of tracking :-small claims, fast, multi
- Small claims track
 - < £5,000
 - Quick
 - Informal
 - No need for legal representation
- Fast Track
 - £5,000 < £15,000
 - Trial will last < 1 day
 - Less formal court procedures
 - Claim will be determined within 30 weeks
- Multi Track
 - £15,000
 - Full court hearing, but management conference held to encourage alternative dispute resolution

Chapter 3

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STATUTE LAW

Statute Law

- Parliament passes laws (statutes), and only parliament can change / repeal those laws

- Green paper – a proposal for new law

- White paper – after comments received, a draft for the new law

- First reading – introduction to the House

- Second reading – debate about the merits of the proposed legislation

- Committee stage– all-party committee discuss and amend the draft

- Report stage – the amended draft then presented to the House for approval

- Third reading – final approval by the House

- Same procedure in the other House

- Royal Assent

Statutory Interpretation Rules

- Literal rule – ordinary everyday meaning, unless
- Golden rule.... would lead to an absurdity
 - re Sigsworth
 - Whitely v Chappell
- Mischief rule-what is the statute trying to control
 - Gardner v Sevenoaks
 - Gorris v Scott
- Eiusdem generis
 - Evans v Cross
- Expressio unius est exclusio alterius
- Noscitur a sociis
- In pari materia
- Purposive approach, for example, civil partnerships
- Cannot interpret statute which would lead to conflict with European Law

STATUTE LAW

Statutory Interpretation Presumptions

- As well as being bound by rules, judges are also bound by presumptions
- Statute is not to alter existing common law
- Where statute deprives a person of his property...
- Statute does not operate retrospectively
- Statute does not bind the Crown
- Statute is not to deprive a person of their liberty
- Statute operates throughout the UK...
- ...but not in conflict with Europe
- Unless perfectly clear, statute is not to create an offence of absolute liability
- Statute is not to conflict with existing statute

Aids to Interpretation

- 2 types : Intrinsic and extrinsic
- Intrinsic
 - The title of the statute may give an indication of its objective
 - Eg Anzac (Restriction on Trade Use of Word) Act 1916
 - The preamble – the introduction to the statute at the start of the document
 - Interpretation section within the statute
 - Margin notes
- Extrinsic
 - Reports of committees
 - Hansard
 - Dictionary
 - Books of authority
- Interpretation Act 1987

Delegated Legislation

- Statutory instruments (responsible ministers)
- Bye – laws (Burnley)
- Rules of Court (made by judiciary)
- Professional regulations (eg General Medical Council)
- Orders in Council (privy council – very rare)

• ADVANTAGES / IMPORTANCE

- Saves parliamentary time
- Greater flexibility
- Allows general principles to be written into statute, with fine detail added later by minister
- Allows very quick passing of statute in cases of eg national emergency
- Prevents parliament from being overwhelmed with excessive work-load



Chapter 4

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CONTRACT LAW

- A contract is an agreement, supported by consideration, made with intention to create legal relations.

Invitations, offers and acceptance

- An invitation must be distinguished from an offer
- An invitation is not capable of acceptance
- An invitation is inviting another person to make an offer
- Goods in a supermarket are invitations (Boots)
- Goods in a shop window are invitations (Bells)
- Adverts are normally invitations (Birds)
- Very occasionally, adverts may be taken to be offers (Balls)
- Mail catalogues are invitations (Grainger v Gough)
- The process of an auction sale constitutes the auctioneer inviting offers to be made
- An advert offering a reward is an offer, not an invitation (Williams v Carwardine, R v Clark, Carlill v Carbolic)

Termination of Offer

- May be revoked at any time before acceptance
- Revocation must be communicated to the offeree
- Postal rule does not apply
- Lapse of time (Ramsgate Victoria Hotel v Montefiori)
- Rejection (Hyde v Wrench)
- Death (personal services)
- Notification of death (non-personal services)(Bradbury v Morgan)
- Failure of a condition precedent
- Notice of revocation may be communicated through a reliable third party (Dickinson v Dodds)
- Counter offer
- Acceptance
- Refusal

Offers

- Half of the 'agreement'
- An expression of willingness to be bound on specific terms
- Must be certain (Gunthing v Lynn)
- Must still exist when 'accepted'
- Must be distinguished from invitations
- Must be distinguished from statements of intent (Harris v Nickerson)
- A response to a request for information is not an offer (Harvey v Facey)
- A request for information is not a counter offer (Stevenson v McLean)
- Revocation must actually be communicated to the offeree (Byrne v Van Tienhoven)
- May be made to the world at large (R v Clark, Williams v Carwardine, Carlill v Carbolic)

Acceptance

- The other half of the 'agreement'
- Acceptance must be complete and unconditional
- Acceptance cannot vary the original offer. That would be a counter-offer (Northland Airlines v Dennis Ferranti Meters)
- The offer must still be 'open' at the time of acceptance (Hyde v Wrench)
- Acceptance must be communicated to the offeror, but offeror may waive the right of communication (Carlill v Carbolic)
- It may be communicated by a reliable third party (Powell v Lee)
- Silence cannot be acceptance (Felthouse v Bindley)
- Acceptance may be by conduct (Brogden v Metropolitan Railways)
- Once you've started the acts of acceptance the offeror cannot revoke the offer (Errington v Errington)
- Postal rule applies (Household Fire Insurance Co v Grant)
- Acceptance must be made within a reasonable time (Ramsgate Victoria Hotel v Montefiori)

Consideration

- Every contract must be supported by consideration except specialty
- Consideration is a two-way thing in simple/parol contracts (only one way is necessary in specialty contracts/ deeds)
- Currie v Misa
- Dunlop v Selfridges
- Executed – an act in exchange for a promise
- Executory – a promise in exchange for a promise (or an act)
- Past consideration is no consideration (re McArdle), (Roscorla v Thomas)
- Consideration must be legal and possible
- Consideration must move from the promisee (privity of contract)
- Courts may imply an implied promise to pay a reasonable sum (Lampligh v Braithwait)

Consideration – Sufficient Not Necessarily Adequate

- Courts will not look at the adequacy of agreed consideration
- Consideration must have some value (sufficient)(Chappell v Nestle)
- Not sufficient if in accordance with a natural duty already owed (White v Bluett)
- Not sufficient if in accordance with a legal duty already owed (Collins v Godefroy)
- Not sufficient if in accordance with a contractual duty already owed (Stilk v Myrick)
- If over and above a natural duty, OK (Ward v Byham)
- If over and above a legal duty, OK (Glasbrook v Glamorgan)
- If over and above a contractual duty, OK (Hartley v Ponsonby)
- Williams v Roffey
- Thomas v Thomas

Privity of Contract

- Only a party to a contract may sue to enforce it, but there are exceptions
- A person entitled to benefit under third party motor insurance can sue the insurer
- A principal may sue to enforce a contract entered into by his agent
- A holder-in-due-course of a bill of exchange can sue all prior parties
- Where a special relationship exists; for example, an executor may sue to enforce a contract entered into by the deceased (Beswick v Beswick)
- A beneficiary may sue a trustee (Keech v Sandford) (Shamia v Joory)
- A manufacturer of goods may be sued by the ultimate consumer (Donohue v Stevenson)
- An employer may be sued for the negligent acts (tort, not contract) of its employees (Mersey Docks v Coggins)
- Restrictive covenants on land apply to subsequent owners (Tulk v Moxhay)
- In collateral contracts, an injured party can sue even though the other party is not a party to the contract (Shanklin Pier v Detel Products)

Pinnell and its Exceptions

- General principle – part payment of a debt does not achieve full settlement (Pinnell's case)
- Illustrated by Foakes v Beer, but there are exceptions
- Receiving something different to which you were not already entitled
- Goods instead of cash
- Settlement before the due date
- Arrangement with creditors generally that collectively they agree to accept only part payment
- Payment by someone other than the debtor (Welby v Drake)
- Payment at a different location than originally agreed
- Doctrine of promissory estoppel
- Central London Property Trust v High Trees House
- Combe v Combe
- D & C Builders v Rees

Intention to Create Legal Relations

- May be express or implied
- Presumed unless rebutted
- Domestic arrangements, husband and wife, living together
 - Balfour v Balfour
 - Spellman v Spellman
- Domestic arrangements, husband and wife, living apart
 - Merritt v Merritt
- Domestic arrangements, other than husband and wife
 - Simpkin v Pays
 - Jones v Padavatton
 - Parker v Clark
- Commercial agreements
 - Rose & Frank v Crompton
 - Express exclusions – binding in honour only
 - Jones v Vernon Pools
 - Appleson v Littlewoods
- Presumptions – assumed until proved otherwise
- Rebuttal – disproving a presumption
- Carlill v Carbolic – payment of £1,000 into bank account

Representations

- Not terms of a contract
- Pre-contractual statements of some known or provable fact made with the intention of inducing another person to enter a contract
- Not a statement of law
- Not an opinion, unless...
 - ... it is clearly not a genuine opinion (Bisset v Wilkinson)
- Not a statement of intent
- if the representation is false, that's a misrepresentation

Contractual Terms

- Conditions and warranties
- A term which is a condition is fundamental to the contract
- Breach of a term which is a condition allows the injured party to treat the contract as discharged and sue for damages
- Poussard v Spiers and Pond
- A warranty is superficial to the contract
- Breach of warranty allows the injured party to claim damages
- But the contract is not discharged
- Bettini v Gye
- Innominate terms are those where it is not clear, until breached, whether they are fundamental or merely superficial
- Universal Furniture Products v Maple Flock Company

Contractual Terms

- May be express or implied
- Express terms are those agreed by the parties and may be written into the contract or simply agreed orally
- Implied terms may be judicially or statutorily implied
- Judicially implied terms -business efficacy (The Moorcock) (Express Newspapers v Silverstone)
- Judicially implied terms – trade custom (Hutton v Warren)
- Judicially implied terms – course of trade (Hillas v Arcos)
- Statutorily implied terms eg Sale of Goods legislation
 - Title
 - Satisfactory quality
 - Fit for purpose (Brown v Craiks)
 - Sample
 - Description
- Limited ability to exclude statutorily implied terms
- Term re title cannot be excluded in ANY contract
- Others from Sale of Goods legislation cannot be excluded in a consumer contract

Exclusion Clauses

- Used in contracts in an attempt to eliminate or limit the extent of a breaching party's liability
- Must be communicated to the other party at the time the contract is entered into (Olley v Marlborough Court Hotel) (Thornton v Shoe Lane Parking)
- Should be brought to the attention of the other party (Chapelton v Barry UDC) (Thompson v LMS Railway)
- Where a document apparently has a legal affect, should make sure before you sign it (L'Estrange v Graucob)
- Oral statements by an employee can destroy the effectiveness of an exclusion clause (Curtis v Chemical Cleaning Co)
- Where parties have a history of trade, other party may be deemed to be aware of the exclusion clause (Spurling v Bradshaw)
- But this course of trade should be more than 3 or 4 occasions in the previous 5 years (Hollier v Rambler Motors)
- Hardwick v Suffolk – more than 100 times in a 3 year period
- Any ambiguity will be read strictly against the party seeking to rely on it (Andrews v Singer)
- Possible to exclude liability for fundamental breach (PhotoProductions v Securicor)

Unfair Terms Legislation

- Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contract Regulations 1999
- Restrict or limit extent of liability for negligence in consumer contracts
- Some are void, others are subject to a test of reasonableness
- Cannot exclude liability for negligence resulting in death or personal injury
- Cannot exclude liability for partial or incomplete performance by the seller
- Cannot have a term which binds the consumer but allows seller to avoid the contract
- Reasonable? S11 UCTA 77 takes account of :
 - Relative bargaining power
 - Any inducement offered, or normal trade custom
 - Special ordered goods
 - Fair and equitable treatment of the consumer by the seller
 - Extent of ability to cover by insurance
- Regulations apply to terms which have not been separately negotiated
- A consumer is a 'natural person who is acting for purposes outside his business'
- An unfair term is "any term which causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer"

Breach of Contract

- May be 'during' or 'anticipatory'
- 'During' – one party refuses to continue
 - injured party may treat the contract as discharged (if a breach of condition) and sue for damages immediately
 - 'Anticipatory' - one party gives notice, before the contract start date, that they will not go ahead with their obligations
 - injured party may sue immediately (Hochster v De La Tour)
 - or ignore, go ahead with their obligations, and then sue (White and Carter Councils v MacGregor)
 - or wait, and hope the other party will change their minds
 - but if they choose to wait, they could lose their right to sue (Avery v Bowden)
- to be able to achieve full compensation, the injured party must have been in a position to complete their obligation at the date the contract was due to start
 - The Mihalis Angelos

Damages

- 2 parts to 'damages'- remoteness and measurement
- An award of damages is the main common law remedy
- Intended to be an award of monetary compensation
- It is not intended as a punishment
- Remoteness – only awarded if the damage suffered should have been in the reasonable contemplation of the ordinary man
- Loss suffered should either arise as a natural consequence of the breach or ...
- ...the breacher was aware of the special circumstances of the injured party
- Hadley v Baxendale
- Victoria Laundry v Newman Industries
- Re The Heron II

Damages – Measurement

- Courts determine how much award is necessary to put the injured party into the position they would have achieved if there had been no breach

- C & P Haulage v Middleton

- May take account of speculative loss (Thompson v Robinson)

- ...but may not (Anglia TV v Reed) (Lazenby Garages v Wright)

- may consider non-financial loss

- Jarvis v Swan Tours

- ...but may not (Alexander v Rolls Royce)

- if the cost of 'repair' far outweighs the loss suffered, courts may make an award based on loss of amenity

- Ruxley Electronics v Forsyth

- The injured party has a duty to mitigate their loss



Chapter 5

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COMMON LAW

Remedies for Breach

- Common law and equity
- Damages (CL)
- Action for price (CL)
- Quantum meruit (CL) *Hoening v Isaacs, Planche v Colborn, De Barnardy v Harding*
- Specific performance (E)
- Injunction (E)
- Rescission (E)
- Rectification (E)
- Mareva injunction (E)
- Liquidated damages – genuine attempt to quantify potential loss (*Dunlop v New Garage*) if a ‘penalty’, courts will not allow it (*Interfoto v Stiletto, Ford v Armstrong*)

Remedies – Sundry Points

- Equitable remedies are discretionary
- Cannot be claimed as of right
- Will never act in personam against the breacher (Warner Bros v Nelson)
- Delay defeats equity (Doctrine of Laches)
- Will not be awarded if the contract has been affirmed
- Rescission will not be awarded if it is not possible to restore the parties to their original pre-contractual position
- Equitable remedies will not be awarded if the injured party has not acted fairly (clean hands)
- Equitable remedies will not be awarded if some innocent third party would be adversely affected
- Limitation Act – 6 years (specialty contracts – 12 years)
- ...6 years from the date the breach could have been discovered (Lynn v Bamber)

Chapter 6

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LAW OF TORT

Types of Tort

- Trespass against the person
 - Battery – intentional bringing a material object into contact with another person
 - does not necessarily involve violence (Nash v Sheen)
 - Assault – intentional bringing another person into reasonable fear of battery
 - False imprisonment – depriving a person of their liberty
- Trespass (land) – entering, remaining or placing objects on another person's land
- Nuisance – causing distress to another by, eg noise or smell
- Defamation – libel – ridicule of another in permanent form (crime)
- Defamation – slander – ridicule of another in oral (not permanent) form (civil wrong)
- Deceit – deliberately misleading another into a detrimental position
- Passing-off – use of a similar name in a similar business such that confusion results in the minds of the public
- Negligence - carelessness or recklessness. More of this later

Negligence Generally

- 3 things to establish
 - Duty of care exists
 - Breach of that duty
 - Consequential loss, damage or injury to another party
- We all owe a duty of care to our legal neighbours
- Those people so directly affected by our acts that we should have them in mind as likely to be affected when we commit those acts (Donohue v Stevenson)
- Now developed into a 3 stage test
 - Reasonable foreseeability
 - Proximity (legal neighbour)
 - Fair, just and reasonable to impose a duty of care

LAW OF TORT

Negligence Generally continued

- 2nd thing to establish is breach of the duty
- A greater degree of care is needed if risk of injury is high
- Glasgow v Taylor
- Take into account the seriousness of the risk (Paris v Stepney)
- Take into account the practicality and cost of risk avoidance (Latimer v AEC)
- Take into account standard practice
- Take into account the social benefit eg accident caused by emergency ambulance
- Professions (e.g the medical profession) establish their own levels of care
- Res ipsa loquitar – Richley v Fould
- Mahon v Osborne

Negligence Generally continued

- 3rd thing to establish is causality and possibility of 'breaking the chain'
- The 'but for' test (Barnett v Chelsea and Kensington Hospital)(Wilsher v Essex)
- Multi-causes (Fairchild v Glenhaven)
- Novus actus interveniens
 - Acts of the injured party were unreasonable (McKew v Holland)
 - Acts of a third party increased the damage (Lamb v Camden)
 - Act of God (Carslogie v Norway)
- Remoteness of foreseeability (The Wagon Mound) (Jolley v Sutton)
- Defences
 - Contributory negligence (Sayers v Harlow)
 - Volenti non fit injuria (ICI v Shatwell)

Negligence – Accountants

- Ultramares v Touche
- Hedley Byrne v Heller
- JEB Fasteners v Marks Bloom
- Caparo v Dickman
- ADT v BDO
- NRG v EY
- Barings v Coopers
- BCCI v EY
- Incorporate
- Limited liability partnership



Chapter 7

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EMPLOYMENT LAW

Employment Law

- Necessary to distinguish between a contract of service and a contract for services

- Courts apply 3 tests

- Control test (Mersey Docks v Coggins)
- Integration test (Cassidy v Ministry of Health)
- Economic reality test (Readymix Concrete)

- Difference is important because :-

- Tax and social security contributions
- Sales tax
- Employment protection provisions
- Vicarious liability
- Liquidation

Employment Law

- Indicators that a worker is self-employed
 - Own tools and equipment
 - Ability to delegate
 - Ability to choose which hours to work
 - Ability to accept or refuse work
 - Ability to take holidays without restrictions
 - Paid for the project
 - Work for different organisations
- But no individual indicator is normally sufficient
- Courts will consider all the circumstances
- And it doesn't matter what the 'employer' / 'worker' have agreed between them – it's the economic reality which is important

Dismissal

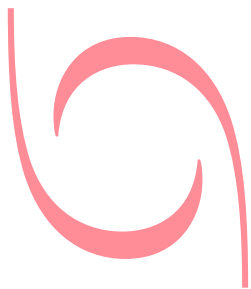
- 4 types
- Summary – serious breach of contract by employee

- Constructive

- Reduction in pay rate
- Change in the nature of the job
- Failure to follow proper disciplinary procedures
- Failure to provide appropriate working environment
- Failure to provide suitable work

- Wrongful

- Unfair



Wrongful Dismissal

- Not wrong if justified. If wrong, remedy is damages – lost earnings

- Justified if :-

- Disobedience
- Dishonesty
- Incompetence / negligence
- Immorality
- Drunkenness
- Misconduct
 - Accepting money
 - Assault
 - Disclosure of information



Unfair Dismissal

- Automatically unfair
 - Completed prison sentence
 - Dismissed on transfer of ownership
 - Exercising rights re length of working day
 - Insistence on minimum wage
 - Refusing to work on Sundays
 - Taking steps to ensure health and safety
 - Trade union membership or activities
 - Whistle blowing

Unfair Dismissal

- Not all dismissals are unfair – some are fair
- Automatically fair
 - Unofficial strike action
 - Actions threatening national security
- Potentially fair
 - Incapable
 - Not competent to do the work for which employee is qualified
 - Redundancy, see later
 - Legal reasons eg losing driver's licence when employed as a chauffeur
 - Losing qualifications – eg becoming disqualified as a doctor

Redundancy

- A form of dismissal from employment caused by the employer needing to reduce the workforce
- Reasons include:-
 - new technology or a new system makes your job unnecessary
 - the job no longer exists
 - the need to reduce the labour costs means staff numbers must be reduced
 - the business is closing down or re-locating
- if 20 or fewer are to be made redundant, this requires individual consultation
 - this involves direct consultation and ...
 - ... looking at any alternative to redundancy
 - if no consultation takes place, any redundancy may be unfair dismissal
- if more than 20 are to be made redundant, this is known as collective redundancy
 - collective redundancy requires the employer to consult with employees' representative
 - if no consultation takes place, a claim to an Employment Tribunal could result in compensation of up to 90 days' pay
 - selection of redundant workers should be fair and objective
- if not fair and objective, dismissal will be automatically unfair



Chapter 8

 [Free lecture available for this chapter, click here](#)

AGENCY LAW

Formation and Authority

• Formation maybe :-

- Express (orally or in writing)
- Implied
- By subsequent ratification
- By estoppel (Freeman & Lockyer v Buckhurst Park Properties)
- By necessity (GNR v Swaffield)

• Authority maybe :-

- Express
- Implied (Watteau v Fenwick) (Hely – Hutchinson v Brayhead)
- Apparent / ostensible (Freeman & Lockyer)

Termination and Liability

- Termination of agency agreement may be by agreement or by operation of law:-
 - Principal or agent dies
 - Principal or agent becomes insane
 - Principal (or sometimes agent) becomes bankrupt
- Liability
 - So long as acting within authority, agent has no liability under contract, nor can he enforce a contract
 - But, sometimes, agent may be held personally liable
 - Where agent enters a contract without disclosing his position as an agent
 - Where agent is acting on his own behalf, even though claiming to act on behalf of the principal
 - Where usual trade custom has established liability of the agent

Chapter 9

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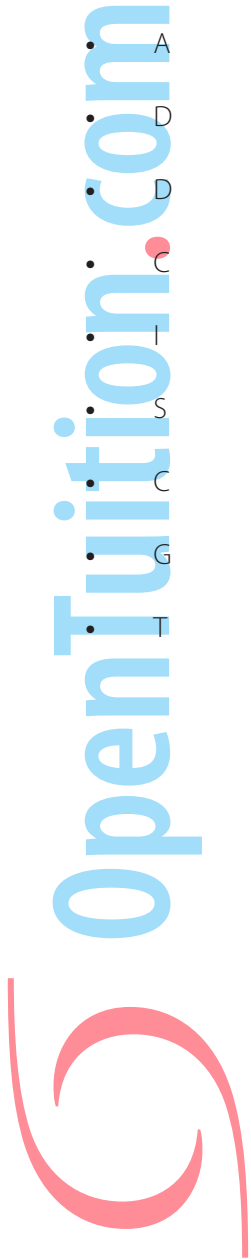
PARTNERSHIP

Partnership Law

- A partnership is defined as “the relationship which subsists between two or more people carrying on business in common with a view to profit”
- Much of present-day partnership law is contained in the Partnership Act 1890
- Partners may agree amongst themselves how their firm is to operate, so long as their arrangement is legal (Evert v Williams)
- The business must be being “carried on”. It should be more than a one-off transaction, and must be continuing
- It must be “with a view to profit” and is more than the simple sharing of gross revenues
- If a business relationship satisfies the definition, the courts may well determine that a partnership exists, regardless of any written documentation (or intention of the parties) to the contrary
- As a general rule, partners in a firm are jointly and severally liable for partnership debts
- Every partner is an agent of the firm and the other partners for the purpose of the business of the firm
- The acts of every partner done in the course of the firm’s business bind the firm and the partners unless the partner was exceeding his authority and
- ... the other party knew that fact, or was not aware that the person was a partner

The Agreement

- Partnerships are formed by agreement, and the internal arrangements are a matter for agreement amongst the partners
- Typical matters to be agreed upon include:-



PARTNERSHIP

1890 Act

In the event that partners fail to make an arrangement about some matter which is later disputed, then the 1890 Act establishes what should happen. The main provisions are :-

- M

- E

- D

- C

- S

- I

- N

- B

- E

- D

Dissolution Grounds – Automatic and By Court Order

- D

- I

- S

- S

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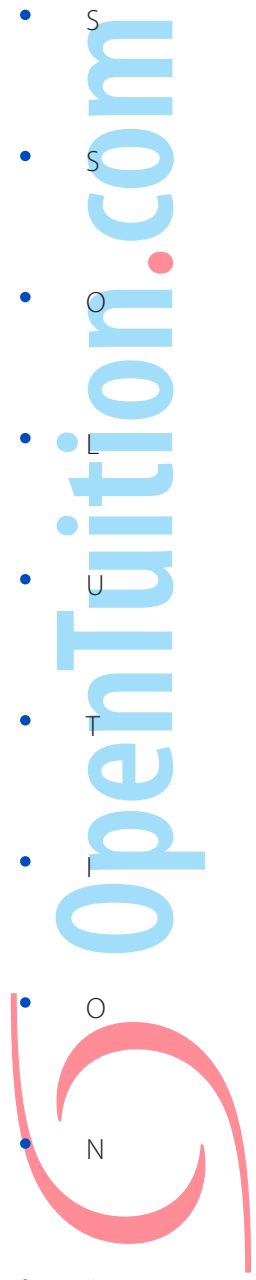
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PARTNERSHIP

LPA 1907 and LLPA 2000

- Limited Partnerships Act 1907 main features are :-
 - At least one general partner (with unlimited liability) and one limited partner (with limited liability)
 - Must be registered with the registrar of companies
 - Limited partner should take no part in the management of the firm
 - If the firm becomes bankrupt, only the general partners are liable for the firm's debts

• Limited Liability Partnerships Act 2000 main features are :-

- Combination of the advantages of a partnership with those of a limited company
- Must be registered with the registrar of companies
- Must file financial statements and be audited
- As a separate legal entity, the partners are not liable for the firm's debts, thereby protecting themselves from personal disasters. However, the provisions relating to wrongful and fraudulent trading apply.



Chapter 10

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COMPANY LAW

Types of Corporation and Ways of Formation

- Corporation sole – a public office occupied by a natural person. Death of the person does not affect the continuing survival of the corporation. The Mayor of London is a corporation sole.
- Corporation aggregate – a collection of like-minded people who combine to form an artificial person – the corporation aggregate. Death of individual members has no effect on the existence of the corporation.
- Formation may be by any of 3 ways
 - Royal Charter
 - eg East India Tea Company, many UK universities
 - Very rare in modern times
 - Statute
 - equally (if not more) rare
 - Eg British Waterways
 - Registration
 - by far the most common method
 - Eg Tesco plc, Small & Co Ltd.
- Since 2004 a new form of company, the Community Interest Company (CIC) is available for organisations created for the benefit of the community/society rather than for the pursuit of profit

Types of Company

- Public quoted
 - Share price quoted on a recognised stock exchange
 - Must be limited by shares
- Public unquoted
 - Again limited by shares, but not quoted
- Private – unlimited
- Private – limited by shares
- Private – limited by guarantee, and having a share capital
- Private – limited by guarantee but with no share capital
- Community interest companies

Public Companies

- A company is a public company if it satisfies the definition
- It is a company which is limited by shares
- Has at least 2 members
- The constitution states that it is public
- The name ends with the words “public limited company” or “plc”
- It has an allotted share capital not less than £50,000...
- ...of which not less than 25% is credited as paid up.....
- ...together with the whole of the share premium
- Any company which does not satisfy the definition is a private company
- Although a public company exists from the date on its certificate of incorporation, it cannot commence to trade until it acquires a trading certificate

Trading Certificates

- Public companies cannot commence to trade until after they have received a trading certificate
- This is issued by the registrar following an application made by the company
- The application states
 - That the nominal value of allotted shares is not less than £50,000
 - The preliminary / formation expenses
 - And to whom these have been paid (or are still payable)
- The application must be accompanied by a statement of compliance
- If a public company does in fact commence trading before the receipt of the trading certificate, an innocent third party is protected
- But the company, and any officer in default, is liable to a fine
- If a public company fails to obtain a trading certificate within 12 months of incorporation, the court on application may grant a liquidation order against the company

Advantages of Being a Company as Distinct From a Partnership

- Separate legal personality (Salomon v Salomon)(Adams v Cape Industries)

- Limited liability

- Perpetual existence

- Raising finance

- Ownership of property

- Number of members

- Transfer of interest

- **BUT there are disadvantages**

- Legal implications

- Expense

- Publicity and disclosure

Disadvantages (Expanded)

- Legal implications
 - Formation
 - Audit
 - Share issues
 - Meetings and resolutions
 - Liquidation
 - "Proper accounting records"
- Expense
- Publicity
 - Details of directors and their remuneration
 - Business details

Lifting the Veil

- The court will look behind the veil of incorporation where justice requires it to prevent fraud, illegality or oppression:-

- Gilford Motor Co v Horne
- Daimler v Continental Tyre and Rubber
- Ebrahimi v Westbourne Galleries
- R v Oll
- Re F G Films
- DHN v Tower Hamlets

- The veil will also be lifted under the provisions of statute:-

- Fraudulent trading
- Wrongful trading
- Commencing to trade without a trading certificate
- Abuse of company name

- Other situations:-

- Preparation of group accounts
- Tax law
- Personal guarantees

Formation

- Formed by promoters (see next)
- Pre incorporation contracts (Kelner v Baxter)
- Documents to be filed :-
 - Application for registration
 - Memorandum
 - Articles
 - Statement of compliance
 - Statement of capital and initial shareholders
 - Registration fee
 - Certified translation

Formation - role and duties of promoters

- Roles

- act, under instruction, to form a company
- this involves:
 - finding people who will sign the memorandum and articles of association, and act as the company's first directors
 - select a suitable name for the company
 - determine the form and amount of the company's share capital
 - determine the rights to be attached to the different classes of share capital
 - prepare the constitution of the company
 - submit all the necessary forms to the registrar of companies
 - pay all the preliminary and formation expenses of the company

- Duties

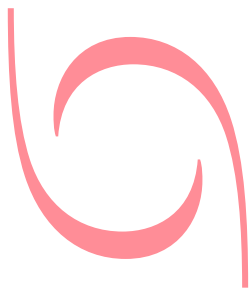
- act with reasonable skill and care
- disclose any profit or potential conflict of interest
 - either to the first independent board of directors
 - or to the company's existing or intended shareholders
- breach of duty - ie non-disclosure - allows the company to rescind the contract and recover the purchase price (Erlanger v New Sombrero Phosphate Mining Co)
- the company may require the promoter to pay over to the company any undisclosed profits (Gluckstein v Barnes) (Whaley Bridge v Green)
- the company may sue the promoter and claim damages for breach of fiduciary duty (Leeds v Harley)

Formation (continued)

- The application for registration details:-
 - Proposed name
 - Registered office (England and Wales)
 - Proposed postal address of registered office
 - Limitation of members liability (shares or guarantee)
 - Public or private
- Certificate of incorporation
 - If everything is in order, registrar will issue a certificate of incorporation
 - The date on the certificate is conclusive proof
 - Jubilee Cotton Mills v Lewes

Memorandum and the Constitution

- Historically a major document
- Since 2006, now just a matter of record
- States that the subscribers
 - Wish to form a company
 - Agree to become members
 - Agree to take at least one share each
- Company's constitution comprises
 - Articles
 - Resolutions (affecting the articles)
 - Agreements (affecting the articles)



Articles – Contractual Force

- When a person becomes a member of a company, it is as though they have separately entered a contract with the company and with all the other members individually
- The terms of that contract are contained within the articles
- The effect is to bind the members to the company
- *Hickman v Kent or Romney Marsh Sheepbreeders Association*
-and the company to the members
- *Pender v Lushington*
-and the members to the members
- *Clarke v Dunraven*
- But the articles do not create a contract between the company and third parties
- *Eley v Positive Government Life Assurance Co.*

Articles – Alterability

- Basic rule – can only alter if for the benefit of the company as a whole
- Individual hypothetical member of the future
- Greenhalgh v Arderne Cinemas
- No outside contract shall prevent a change, but company may become liable for breach of that contract (Southern Foundries v Shirlaw)
- Even if proposed alteration adversely affects only one member, it may still be valid (Allen v Gold Reefs of West Africa)
- Alterations allowing compulsory purchase of minority's shares will be (normally) disallowed (Dafen Tinplate v Llanelli Steel)
- Allowing expulsion of defrauding director – OK (Shuttleworth v Cox Brothers)
- Allowing expulsion of competing members – OK (Sidebottom v Kershaw Leese)
- Possible to prevent alteration by weighted voting rights
- Bushell v Faith

Articles – Procedure for Alteration

- Special resolution
- 75% majority
- 14 days notice
- copy of resolution to registrar within 15 days
- copy of amended articles to registrar
- alteration is binding on all members
- articles may say that, for a meeting proposing an alteration, the affected member must be present
- so affected member can prevent alteration by not attending
- articles may require a greater majority than 75%
- ...but can never be drafted to prevent amendment

Company Names

- Basic rule – company can have any name selected by promoters
- But there are restrictions
- Registrar may refuse to register a company with a name which is misleading or offensive
- Connection with royalty, banks....
- Name may be restricted by statute
- ANZAC
- Name will not be allowed if the same as an existing company
- Name may be disallowed as a tort (passing-off)
- Ewing v Buttercup Margarine
- The word 'limited' (or plc) shall not appear anywhere except at the end of the name

Name Change

- Compulsory or voluntary
- May be required to change by order from the registrar
- ...within 12 months if the company has been, by mistake, registered with a name too similar to an existing company
- ...within 5 years if misleading information was supplied
- At any time if the use of the name is likely to cause harm to the public
- Special resolution
- 75% majority
- 14 days notice
- Copy of resolution and amended constitution to registrar within 15 days
- Registrar issues new certificate of incorporation

Objects

- Company can do anything so long as it is legal
- So since 2006, only reason to mention objects in the articles is restrictively
- If company tries to ignore the restriction, ultra vires
- Member can object (Ashbury Railway v Riche)
- “The validity of a transaction shall not be called into question on the grounds of lack of capacity”
- “In favour of a third party acting in good faith, the power of the directors to bind the company shall be deemed to be free of any limitation under the company’s constitution”
- These apply only to third parties, not to members
- Good faith – but this is presumed unless shown otherwise
- No requirement for third party to make enquiries
- So third parties are protected, but company cannot sue to enforce an ultra vires transaction



Chapter 11

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COMPANY LAW: DIRECTORS AND OFFICERS

General Points

- A director is anyone who occupies the position of ...
- A shadow director is a person in accordance with whose instructions the directors are accustomed to act
- De facto director – a person who purports to act as though they were a director
- Alternate director – a person appointed by a director who is unable to attend a board meeting
- Executive directors – more on these next
- Non – executive directors
 - Integral element of corporate governance
 - Bring an independent view
 - Help in providing effective leadership
 - Help to establish and maintain financial probity
 - Keep a watchful eye on the effectiveness of the executive directors

Number and Eligibility

- Private company – at least one
- Public company – at least two
- Anyone may be a director (but some restrictions)
- Must be over 16
- May be a non-natural person
- Must not be disqualified under CDDA (see later)
- Must not be bankrupt
- Must not be of unsound mind
- Should not be absent, without permission, from board meetings for a period in excess of 6 months

Company Directors Disqualification Act

- On application to the Court, a director may be disqualified by court order on a number of grounds:
 - for an offence committed in the promotion, formation, management, liquidation or striking off a company
 - where persistently in default (3 offences in 5 years) of filing returns
 - when found guilty of fraudulent or wrongful trading
 - when involved in a company insolvent liquidation
 - following a Department of Trade investigation
 - in general, the disqualification period is "up to 15 years"
 - breaking the disqualification order → up to 2 years in prison

COMPANY LAW: DIRECTORS AND OFFICERS

Directors Appointment

- First directors – named in documents sent to registrar before incorporation
- Subsequent directors may be appointed by :-
 - Members in general meeting
 - Other directors – to fill a casual vacancy
 - The court (rare)
 - A lender (if part of the loan agreement)
 - Administrator – under an administration order
- 1/3 rotation procedure
- FTSE top 350 company? All directors retire every year
- Appointed by ordinary resolution
- Registrar notified

Directors Removal

- Ordinary resolution
- Special notice
 - 28 days notice to company
 - 21 days notice to members
 - Opportunity to make written representations of reasonable length and not defamatory in nature
 - Reasonable length
 - Must also satisfy legal restrictions – 100 members holding \geq £100 share capital on average
 - Notice to registrar
 - Weighted voting rights can make removal impossible
 - Bushell v Faith
 - Company may have to pay substantial compensation to a removed director (Southern Foundries v Shirlaw)

Directors - Statutory Duties

- 2006 Act put into statute many of the established common law principles
- 7 duties
 - Act within their powers
 - Perform their duties with reasonable skill, care and diligence
 - Promote success of company (see next)
 - Independent judgement
 - Avoid conflicts of interest
 - No benefits from third parties
 - Declare interest in transactions/contracts
- Common law cases which the courts will follow in interpreting these statutory duties follow

COMPANY LAW: DIRECTORS AND OFFICERS

Directors' Duties – Common Law Cases

- Re City Equitable Fire Insurance

- Re Brazilian Rubber Plantations and Estates

• Dorchester Finance Co v Stebbing

• Cook v Deeks

• IDC v Cooley

• Regal (Hastings) v Gulliver

• Peso Silver Mines v Cropper

• Howard Smith v Ampol Petroleum

• Bamford v Bamford

• Hogg v Cramphorn

• Clemens v Clemens

Directors – Promoting Success

- Statute trying to encourage long-term approach by directors
- Directors to have regard for all stake-holders
- Non-exhaustive list of matters for directors to consider:
 - Long-term consequences of their decisions
 - Employees' interests
 - Good relationships with customers and suppliers
 - Local community and environmental impact
 - High standards of business conduct
 - Good reputation
 - Fair treatment for all members

COMPANY LAW: DIRECTORS AND OFFICERS

Directors – Controls

- Service contracts ≥ 2 years require approval by members
- Acquisition of non-cash assets need members' approval if $\geq 10\%$ of company's assets
- ...but not less than £5,000
- ...and always if $> £100,000$
- No company may lend money, provide security nor guarantee a loan to a director of itself, nor of its holding company unless approved by members
- Relevant companies cannot quasi-lend (unless $< £5,000$)
- ... relevant companies cannot approve credit transactions (unless $< £10,000$) unless approved by members
- Any company may lend up to £5,000
- Loans by money lending companies allowed for purchase or improvement of main or only residence up to £100,000
- Relevant company restrictions apply also to connected persons

Directors – Remedies

- Make them account for personal gain (Regal (Hastings) v Gulliver)
- Make them indemnify the company against loss caused by their negligence (see below)
- Rescind the contract where director has a conflict of interest
- Ask the court to declare a transaction is ultra vires
- Directors are not liable for the acts of other directors
- May be held liable by the court looking behind the veil of incorporation
- May be held liable by the court for fraudulent or wrongful trading
- Liable for negligence?
- Not if honest (Pavlides v Jensen)
- But if negligence results in personal benefit? (Daniels v Daniels)

COMPANY LAW: DIRECTORS AND OFFICERS

Company Secretary

- Every public company must have one

- Should be appropriately qualified

- Duties, determined by the directors, are administrative in nature (*Panorama Developments v Fidelis Furnishing Fabrics*)
 - Maintaining company's statutory records (see later)
 - Filing returns with the registrar
 - Taking minutes of meetings
 - Ensuring the company complies with statutory requirements
 - Signing documents as required by law

- Under principles of corporate governance should also:-
 - Advise the board on governance matters
 - Arrange the induction process for new neds
 - Enable effective communication between board and its various sub-committees

Company Secretary: Statutory books

- every company must maintain certain records required by statute – “the statutory books”
- these records must be kept at the company’s registered office, unless ...
- ... the register of members is maintained by an independent organisation – the company’s registrars
- in this situation, certain other books may be kept also at the offices of the company’s registrars
- registers include:
 - members
 - directors
 - secretary
 - mortgages and charges
 - debenture holders
 - directors’ interests
 - substantial shareholders

Auditors

- Required (unless 'small')

- Appointed by:-
 - Directors (first and casual vacancies)
 - Members (subsequent and casual vacancies)
 - Secretary of state (if no-one else does)
- Must be appropriately qualified
- Cannot be :-
 - Director or employee of the company
 - Partner or employee of the above
 - Undischarged bankrupt
- Professionally prevented from
 - Owning beneficial interest
 - Being close relative of company officers or employees

Auditors – Rights and Duties

- Rights
 - Access to company records
 - Information and explanations
 - Notice of and attendance at company general meetings
 - Written representations (when proposed for removal)
 - Receive copies of proposed written resolutions
- Duties
 - Express an opinion on truth and fairness (and proper preparation)
 - Report if directors' report is inconsistent or misleading
 - (For quoted companies) report on certain elements of the directors' remuneration report
- Auditors should sign and date the audit report
- Report, by exception, if proper accounting records not kept

Chapter 12

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COMPANY LAW: MEETINGS AND RESOLUTIONS

Annual General Meeting

- Public companies must hold an AGM
 - ...every calendar year (Gibson v Barton)
- First no more than 18 months after incorporation
- Subsequent, no more than 15 months after previous
- Private company members can request an AGM
 - 21 days notice
- Ordinary business:-
 - Formal presentation of the financial statements
 - Reappointment of directors
 - Reappointment of auditors
 - Approval of dividend proposed by directors

COMPANY LAW: MEETINGS AND RESOLUTIONS

Resolutions

- Ordinary
 - simple majority
 - ordinary business and (some) special business
 - 14 days notice
- Special
 - 75%
 - 14 days notice
- Written
 - private companies only
 - any resolution (ordinary or special)
 - ...except for removal of auditor or director
 - auditor needs to approve the wording
 - resolution passed on the date required majority is reached

COMPANY LAW: MEETINGS AND RESOLUTIONS

Resolutions – Special Notice

- Special notice applies only to some ordinary resolutions

- 28 days notice is given to the company

- The company gives 21 days notice to the members

- Resolutions requiring special notice :-

- to remove a director
- to remove an auditor
- to appoint a new auditor other than the retiring auditor
- to fill a casual vacancy in the office of auditor
- to confirm in appointment an auditor appointed by the directors in the mid-term to fill a casual vacancy
- overage director for a plc

- Director / auditor may write written representations of reasonable length and not defamatory in nature

COMPANY LAW: MEETINGS AND RESOLUTIONS

Resolutions

- Normally the directors will determine the agenda for a meeting
- But sometimes members may require a resolution
- Members must hold at least 5% of the total voting rights, or ...
- ... not less than 5% in number of the members, or ...
- ... be not less than 100 members holding on average not less than £100 each in paid up share capital
- The request should be in hard copy form, or electronic form
- The request must be delivered not less than 6 weeks before the general meeting
- The requisitionists may request that a statement of reasonable length be circulated together with the notice of the meeting
- Reasonable length is, as usual, not more than 1,000 words
- The requisitionists will bear the incidental costs unless....
-the company resolves otherwise

COMPANY LAW: MEETINGS AND RESOLUTIONS

Proxies

- A proxy is 'a written statement authorising another person to vote on behalf of an absent shareholder'
- The person appointed need not be a member of the company – it can be anyone
- The word 'proxy' is used to describe both the form and the person appointed by the form
- Proxies may speak at the meeting
- They may vote on a poll and on a show of hands
- They may demand a poll
- Companies will provide 'two-way' proxy forms so that the absent member can indicate which way the proxy should vote – 'for' or 'against' each resolution
- Proxy forms should be delivered to the company not less than 48 hours before the meeting
- A proxy appointed by a member which is a company is called a 'representative'
- A person may be appointed by more than one member as their proxy

Quorum

- A quorum is the minimum number of members who shall be present at a meeting before the meeting may validly pass resolutions
- The minimum number is normally contained within the constitution
- Typically, the minimum number is 2 members present, in person or by proxy
- But the word 'meeting' implies that there should be at least 2 persons
- So one member in person who also holds a proxy for another member cannot, normally, be a quorum
- It is, however, possible!
 - In the situation of a class meeting, where all the shares of that class are owned by a single person
 - If the company is a private company with only one member
 - If the court directs that a quorum shall be a single person
- If a meeting is inquorate at the scheduled start time it will normally be adjourned to 'same time, same place, next week'

COMPANY LAW: MEETINGS AND RESOLUTIONS

Voting

- Following discussion about a resolution, the chair will call for a vote
- Initially, this will be by 'show of hands'
- Each member, no matter how many shares they hold, therefore has only one vote
- But members holding many shares may ask, following a show of hands, for a vote count – a poll
- Polls may be demanded by
 - Not less than 5 members
 - Members holding not less than 10% of the total voting rights
 - Members holding not less than 10% of paid-up capital
 - The chair
- Votes are counted, whether by show of hands or by poll
- Abstentions are not counted, neither 'for' nor 'against'
- The chair's decision about the result of the vote is final





Chapter 13

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COMPANY LAW: LOAN CAPITAL

Loan Capital

- A debenture is 'the written acknowledgement of a debt by a company'
- May be secured or unsecured
- May be a single debenture or a series of debentures
- If issued as a series, debenture holders rank 'pari passu inter se'
- Security / the charge may be fixed or floating
- To be valid, the charge must be registered within 21 days of its creation
- If there are 2 charges over the same property, a fixed charge will take precedence over a floating charge
- If there are 2 fixed charges (or 2 floating charges) over the same property, the earlier one will take precedence
- The earlier one is the one which is registered first!
- Debenture holders are creditors of the company, not members

Fixed Charges

- Attaches to specific assets
- Company is not free to deal / dispose of those charged assets
- Fixed charge created within the 6 months immediately prior to a company commencing liquidation may be invalid
- A liquidator will try to prove invalidity
- A receiver may prove validity if
 - The charge was granted in exchange for new 'money' or
 - The company was solvent at the date of creation of the charge
- In the event of a liquidation, the fixed charge debenture holder ranks number one in the sequence of asset distribution
- Where a floating charge exists over an asset, there may be a negative pledge clause
- The effect is to ensure that a floating charge debenture holder has to be notified of any proposed fixed charge over the same asset

Floating Charges

- Unlike fixed charges, floating charges do not attach to specific assets
- Defined in the case re Yorkshire Woolcombers as:-
 - A charge on a class of assets of a company, present and future
 - Where the class changes from time to time in the ordinary course of business
 - And the company may deal with these assets until the charge crystallises
- Typically applies to the current assets of inventory and accounts receivable
- Whether a charge is fixed or floating is a matter of commercial reality rather than how it has been named
- In re Tunbridge a 'fixed' charge was held by the court to be floating because all three Yorkshire criteria were met
- In re Cimex a 'floating' charge was held to be fixed because the assets did not change from time to time in the ordinary course of business
- A floating charge will be invalid if created within the 12 months immediately prior to the commencement of a liquidation

Debentures Compared with Shares

- Fixed rate of interest
- Payable even though no profits
- No votes
- Security (not always)
- Preferential entitlement to return of money
- Possession of the charged asset
- Rights when company defaults
 - Apply to court for liquidation order
 - Apply to court for administration order
 - Appoint a receiver (provided no administration order is in effect)



Chapter 14

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COMPANY LAW: LIQUIDATIONS

Liquidation

- Compulsory or voluntary
- Voluntary may be members' or creditors'
- Essential difference is solvency
- Court may order liquidation if:-
 - Special resolution
 - Number of members falls below 2 (plcs only)
 - Failure to obtain a trading certificate within 12 months of incorporation (plcs only)
 - Suspension of business for 12 months (or failure to commence business within 12 months)
 - Unable to pay its debts as they fall due
 - Just and equitable

Compulsory Liquidation

- Unable to pay its debts as they fall due
 - Need to show the court that the company has owed the petitioning creditor more than £750 for more than 21 days
 - The debt should not be in dispute
- Just and equitable
 - Failure of substratum
 - Re German Date Coffee Co.
 - Deadlock on the board
 - Re Yenidji Tobacco
 - Quasi-partnership situation
 - Ebrahimi v Westbourne Galleries
- But just and equitable only given in the absence of alternative remedy (re A Company)

Administrator Appointed by the Court

- Application to the court by :-
 - Members ordinary resolution, directors or by creditors
- Court may grant if:-
 - Company is unable to pay its debts
 - The order, if granted, is likely to achieve the desired result
- Effect of an order
 - Moratorium on company's debts
 - Powers of management passed to administrator
 - Petitions for winding-up are dismissed
 - Any administrative receiver already in office must step aside

Duties of an Administrator

- Agent of the company and the creditors
- So has fiduciary duties as well as legal
- Must send notice of appointment to creditors
- Must obtain a list of creditors
- Must send notice of appointment to registrar within 7 days
- Must require a statement of affairs
- Must identify appointment on all company business letters / correspondence
- Must prepare proposals for achievement of administration objectives
- Must manage the affairs of the company

COMPANY LAW: LIQUIDATIONS

Advantages of Administration Compared with Liquidation

- Company may continue after the process is completed
- Company is sheltered from creditors allowing time to design acceptable proposals
- Creditors are therefore prevented from applying for a liquidation
- Administrator can challenge previous transactions
- Creditors more likely to get some money back
- Members will hold shares in a viable company (possibly)
- Any creditor can apply to the court
- Floating charge debenture holders can appoint without reference to the court
- Creditors (potentially) will have a continuing customer
- Directors could avoid acquiring the reputation of having been involved in an insolvent company

End of Administration Period

- Automatically ends:-
 - When successfully completed
 - 12 months after appointment
 - Application to court by administrator
 - Application to court by a creditor
 - When original applicant is discovered to have had an inappropriate motive
- Administrator can apply to court
 - On determining that administration cannot be effective
 - The company should never have been in administration
 - (if appointed by the court) the administration has been successful

Chapter 15



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COMPANY LAW: CORPORATE GOVERNANCE

Corporate Governance

- Corporate governance is the system by which companies are directed and controlled
- Important because (often) companies are controlled by people (directors) who are not the owners (shareholders)
- But there are other people also interested in the continuing health of a company – the stakeholders
- For example:
 - Employees – wish to continue to have the opportunity of earning a salary
 - Taxman – wishes to continue to receive share of profits
 - Customers – wish for continuity of supply of goods
 - Suppliers – wish for the opportunity to continue to supply
 - Society – the ultimate consumers, but also affected by company's environmental footprint
 - Planet earth – we are all affected, directly or indirectly, by the activities of everyone else!

Corporate Governance – Auditors

- The shareholders of a company need reassurance
- This may be reassurance concerning the reliability of financial information or
- ...concerning the legality of a company's activities or.....
-the appropriateness of the internal control systems being followed within the company
- Auditors have a statutory duty to report on the truth and fairness of the view shown by the financial statements
- This is primarily for the benefit of the shareholders
- But other stakeholders also gain reassurance
- Therefore important that auditors take active steps to ensure their continuing independence
- Protect themselves against any matter which could threaten that independence or...
-be perceived by others to threaten it

Corporate Governance – Directors

- The owners of a company will typically not also be in control
- Directors are appointed as agents of the company to run the entity in an orderly and efficient manner

- May be executive directors

- Involved in the day-to-day running activities

- Or non-executive

- Their role is more supervisory in nature

- They bring an independent view to the board meetings

- They help the board to provide effective leadership

- They assist in the development of the good reputation of the company

- They comprise the majority or all of the governance sub-committees of the board



Corporate Governance – Stakeholders

- Obvious stakeholders are directors, employees, customers etc
- But academic research has identified a number of different ways of categorising stakeholders:-
 - Legitimate/illegitimate
 - Internal/external
 - Active/passive
 - Recognised/unrecognised
 - Known/unknown
 - Primary/secondary
 - Voluntary/involuntary
 - Narrow/wide

Chapter 16

 [Free lecture available for this chapter, click here](#)

COMPANY LAW: ILLEGALITIES

Wrongful Trading

- Previous law extended by Insolvency Act 1986
- Previously, directors could only be liable for company's debts where they were guilty of fraudulent trading – difficult to prove
- I.A. 1986 designed to give creditors increased protection
- An example of lifting the veil
- Directors (and sometimes others too) may be held liable when:-
 - Company has commenced insolvent liquidation
 - They knew, or should have known, that this was probable
 - They held a position of power (director)
- Court may allocate financial penalty on the liquidator's application
- Directors may escape liability if they can show the court that they took every step necessary to mitigate / minimise the creditors' potential loss

Money Laundering

- A process whereby the proceeds of criminal activity are converted into assets appearing to have a legitimate origin
- Usually involves 3 distinct phases
 - Placement of the funds into legitimate business activity
 - Transfer of money from business to business (or place to place) to conceal its original source
 - Integration – the money takes on the appearance of having come from a legitimate source
- Proceeds of Crime Act 2002 seeks to control money laundering by the creation of 3 categories of criminal activity
 - Laundering (maximum 14 years prison and / or fine)
 - Failure to report (maximum 5 years prison and / or fine)
 - Tipping-off (maximum 5 years prison and / or fine)
- The offence of failure to report relates only to individuals acting in the course of business – for example, accountants

COMPANY LAW: ILLEGALITIES

Insider Dealing

- Insider – a person who has a business connection with a company as a result of which they may acquire relevant information
- Dealing – buying or selling shares or securities in a company
- Unpublished price – sensitive information is information about the company which is not in the public domain.....
- ...is less than 6 months old, and.....
- ...is, on publication, likely to have a material impact on the market price of the company's shares
- An insider in possession of unpublished price – sensitive information should not deal
- An offence is also committed if the insider encourages another person to deal
- A person dealing as a result of that encouragement, and believing the source to be an insider, is also committing an offence
- Disclosure of inside information, other than in the proper course of employment to an authorised person, is also an offence
- Some defences are available to be claimed

Bribery

- Bribery Act 2010 targets both bribery and corruption
- 4 offences
 - bribing another person
 - receiving a bribe
 - bribing a foreign public official (FPO) (see next page)
 - commercial organisation failing to prevent bribery (see next)
- bribing = offering financial or other advantage to perform a relevant function or activity improperly
- relevant function or activity:
 - any function of a public nature
 - any activity connected with a business
 - any activity performed in the course of a person's employment
 - any activity performed by, or on behalf of, a group of persons
- these "relevant functions or activities" may be anywhere in the world

Bribing an FPO

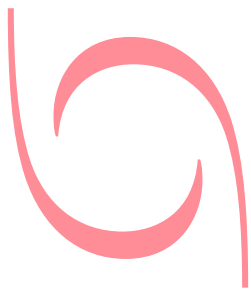
- offence to offer, directly or indirectly, a financial or other advantage to an FPO intending to influence them in gaining business or an advantage in connection with business
- an FPO holds an administrative, legislative or judicial position outside the UK

- commercial organisation failing...

- a company or partnership is liable if an agent, employee or subsidiary bribes another person intending to gain a business advantage

- Defence - if a company can show that it had adequate procedures in place, appropriate to the level of risk

- "adequate procedures" based on six guidance principles



The Six principles

- proportionate procedures
 - proportionate to risks faced and size of company
- commitment by management
 - management should assess the nature and extent of risks faced and develop appropriate procedures to manage that risk
- due diligence
 - the company should apply due diligence procedures in respect of company personnel who are at greater risk of offering bribes
- communication
 - to ensure all employees / connected persons are aware of the company's culture and attitude
 - includes training and education procedures
- monitoring and review
 - procedures should be regularly reviewed and improved as necessary
- "adequacy of procedures" is a matter for a court to decide
- NB "hospitality" that is reasonable and proportionate is acceptable, ie is it not prohibited by the Act.

Penalties

- an individual who is found guilty faces imprisonment up to 10 years
- a guilty company is liable to an unlimited fine

- but, in addition, there is reputation loss...

- ... and potentially, civil claims against the directors for failing to implement adequate procedures

First conviction

- Munir Patel found guilty of accepting £500 to suppress a driving conviction from court records. Serving a 3 year prison sentence



Chapter 17

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CAPITAL MAINTENANCE

Capital Maintenance

- The members contribute capital to the company
- This should be maintained within the company by way of net assets
- Known as the buffer fund
- Called “shareholders’ equity” and comprises share capital plus undistributable reserves
- Undistributable reserves are :-
 - Share premium account
 - Capital redemption reserve
 - Accumulated unrealised profits less accumulated unrealised losses
 - Any other reserve identified by the company’s constitution as undistributable
- Development of the principle of capital maintenance addresses three areas:-
 - Restrictions on the payment of dividends
 - Restrictions on the reduction of capital
 - Assistance given to outsiders to acquire the company’s shares

Capital Maintenance – Payment of Dividends

- Power to declare dividends is given to the directors by the company's constitution
- Members do not have an automatic right to receive a dividend (they approve one at the company's general meeting but cannot vote to increase the dividend proposed by the directors)
- Dividends are normally paid based on the paid-up capital of the company
- Dividends may be in the form of a cash payment (normal) or in another form (for example, a scrip dividend)
- A dividend is a company debt only from the date it is declared and due for payment
- If it is declared and unpaid, it is a deferred debt
- Unclaimed dividends become statute barred after 6 years
- Dividends may only be declared out of profits available for the purpose
- This is defined as 'accumulated realised profits less accumulated realised profits'
- There is no distinction drawn between capital profits and revenue profits

CAPITAL MAINTENANCE

Capital Maintenance – Reduction of Capital

- A company may reduce its capital, but only under the strictest control
- 3 authorities are required
 - Special resolution
 - Power in the constitution
 - Consent of the court
- And for only 3 reasons/situations
 - The company's capital is no longer represented by available assets (it has been suffering losses)
 - The company wishes to extinguish / cancel the liability of a class of share - for example a £1 share, 70p paid could become a 70p share fully paid
 - The company wishes to restructure its capital funding and may, for instance, now wish to replace some of its shares by way of loan capital
- The court is involved because creditors' rights could be adversely affected

Share Capital

- It is illegal to issue shares for an amount which is lower than the nominal value of the share
- Where shares are issued, whether for cash or otherwise, for an amount in excess of their nominal value, an amount equal to that excess shall be credited to the Share Premium Account
- The share premium account is an undistributable reserve and has very limited uses:-
 - Finance the issue of fully paid bonus shares to existing members
 - Write off preliminary and formation expenses
 - Provide for the premium payable on the redemption of shares or debentures
 - Write off the expenses of, discounts allowed on or commissions paid on any issue of shares or debentures
- But the combination of 'discounts allowed on' and 'issue of shares' is an illegal combination
- Despite the principle that shares may not be issued at a discount, private companies are able to issue shares in consideration for non-cash goods or services received
- The true / fair value of these goods or services could be lower than the nominal value of the shares issued. This is not illegal – but only applies to private companies

Share Capital

- Variation of class rights
 - Rights attach to a particular class of share and typically refer to:-
 - voting rights
 - entitlement to dividends
 - return of capital in a liquidation
 - If the variation of rights is specified by the constitution, then follow the constitution
 - If not specified by the constitution, then special resolution is needed
 - Note, if constitution provides for the variation, it could require merely an ordinary resolution or could even require some greater majority than 75%
 - These provisions apply even for companies without a share capital, for example a company limited by guarantee



Chapter 18



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CASES

Cases – Same Names

Case name	Area of law	Principle
Errington v Errington		
Thomas v Thomas		
Beswick v Beswick		
Combe v Combe		
Balfour v Balfour		
Merritt v Merritt		
Spellman v Spellman		
Salomon v Salomon		
Bamford v Bamford		
Daniels v Daniels		
Clemens v Clemens		

Cases – Horses

Case name	Area of law	Principle
Gunthing v Lynn		
Felthouse v Bindley		
Roscorla v Thomas		
Lampleigh v Braithwait		

Cases – Directions

Case name	Area of law	Principle
Northland Airlines v Dennis Ferranti Meters		
Central London Property Trust v High Trees House		
Universal Furniture Products v Maple Flock Company		
C & P Haulage v Middleton		
Southern Foundries v Shirlaw		
Allen v Gold Reefs of West Africa		
Ebrahimi v Westbourne Galleries		

CASES

Cases – Colours

Case name	Area of law	Principle
Whitely v Chappell		
White v Bluett		
Rose & Frank v Crompton		
Express Newspapers v Silverstone		
White & Carter Councils v MacGregor		
Whaley Bridge v Green		
Greenhalgh v Arderne Cinemas		
Allen v Gold Reefs of West Africa		
Peso Silver Mines v Cropper		

Cases – Ships

Case name	Area of law	Principle
Stilk v Myrick		
Hartley v Ponsonby		
The Moorcock		
Avery v Bowden		
The Mikalis Angelos		
The Wagon Mound		
Mersey Docks v Coggins		
R v Oll		

CASES

Cases – Cars

Case name	Area of law	Principle
Carlill v Carbolic Smokeball		
Williams v Carwardine		
Thornton v Shoe Lane Parking		
Hollier v Rambler Motors		
Andrews v Singer		
Lazenby Garages v Wright		
Alexander v Rolls Royce		
Dunlop v Selfridges		
Dunlop v New Garage		
Ford v Armstrong		
Richley v Fould		
Carslogie v Norway		
Gilford Motor Co v Horne		
Daimler v Continental Tyre and Rubber		

Case name	Area of law	Principle
Pavlides v Jensen		
Merritt v Merritt		
Evans v Cross		

CASES

Cases – Forenames

Case name	Area of law	Principle
Gorris v Scott		
Evans v Cross		
R v Clark		
Williams v Carwardine		
Grainger v Gough		
Ramsgate Victoria Hotel v Montefiori		
Bradbury v Morgan		
Dickinson v Dodds		
Gunthing v Lynn		
Harris v Nickerson		
Harvey v Facey		
Stevenson v McLean		
Northland Airlines v Dennis Ferranti Meters		
Powell v Lee		

Case name	Area of law	Principle
Household Fire Insurance Co v Grant		
Roscorla v Thomas		
Collins v Godefroy		
Williams v Roffey		
Ward v Byham		
Thomas v Thomas		
Donohue v Stevenson		
Shanklin Pier v Detel Products		
D & C Builders v Rees		
Parker v Clark		
Rose & Frank v Crompton		
Jones v Vernon Pools		
Bettini v Gye		
Hutton v Warren		
Olley v Marlborough Court Hotel		

CASES

Case name	Area of law	Principle
Chapeltown v Barry		
Curtis v Chemical Cleaning Company		
Andrews v Singer		
Victoria Laundry v Newman Industries		
Hadley v Baxendale		
Lazenby Garages v Wright		
Jarvis v Swan Tours		
Alexander v Rolls Royce		
Hoening v Isaacs		
Warner Bros v Nelson		
Lynn v Bamber		
Latimer v AEC		
Hedley Byrne v Heller		
Jeb Fasteners v Marks Bloom		
Caparo v Dickman		

Case name	Area of law	Principle
Evert v Williams		
Adams v Cape Industries		
Jubilee Cotton Mills v Lewes		
Clarke v Dunraven		
Allen v Gold Reefs of West Africa		
Bushel v Faith		
Regal (Hastings) v Gulliver		
Howard Smith v Ampol Petroleum		
Daniels v Daniels		

Cases – Builders and Hotels

Case name	Area of law	Principle
Ramsgate Victoria Hotel v Montefiori		
Williams v Roffey		
D & C Builders v Rees		
Olley v Marlborough Court Hotel		

CASES

Cases – Superman List

Case name	Area of law	Principle
R v Clark		
Parker v Clark		
Rescission		
Hickman v Kent or Romney Marsh Sheepbreeders Association		
Clarke v Dunraven		
Household Fire Insurance Co v Grant		

Cases – Weapons List

Case name	Area of law	Principle
Gunthing v Lynn		
Central London Property Trust v High Trees House		
Poussard v Spiers and Pond		
Express Newspapers v Silverstone		
Avery v Bowden		
Thompson v Robinson		
Planche v Colburn		

Cases – Films List

Case name	Area of law	Principle
Gardner v Sevenoaks		
Anglia TV v Reed		
Warner Bros v Nelson		
Photoproductions v Securicor		
re F G Films		
Greenhalgh v Arderne Cinemas		
Regal (Hastings) v Gulliver		



PRACTICE QUESTIONS

1 Legal terms

Explain the distinction between the following terms in relation to the doctrine of precedent in the English legal system:

- (a) Ratio decendi and obiter dictum;
- (b) Reversing, overruling and distinguishing

2 Adam

Adam is a secondhand car dealer. He places an advertisement in the Saturday edition of his local paper stating:

'Once in a lifetime opportunity: a one year old, low mileage, Mota Special: £5,000 cash. This is a serious offer - the car will go to the first person who accepts it - valid for one day only.'

When Ben sees the advert he immediately posts a letter of acceptance of Adam's offer.

Carol also sees the advert and after inspecting the car offers Adam a cheque for £5,000, but he refuses to accept the cheque and tells her she cannot have the car.

On Monday morning Ben's letter arrives, but Adam now decides to keep his car and ignores it.

Consider the above situation with respect to the rules governing the creation of contracts.

In particular consider:

- (a) The precise nature of Adam's advertisement
- (b) Whether Ben has entered into a binding contract with Adam.
- (c) Whether Carol has any right of action against Adam.

3 Emma and Sidney

Emma, an accountant, agreed with Sidney that Sidney would redecorate Emma's business premises for £2,000. The written contract provided that:

- (a) All woodwork would be properly prepared for painting prior to the application of paint.
- (a) No paint containing lead or lead compounds would be used. (Note that in this context it is not illegal for paint to contain lead.)

The work was completed but, contrary to the terms of the contract, Sidney used paint containing lead in one of Emma's offices. As a consequence Emma suffers a serious allergic reaction and is off work for three months, during which she loses £6,000 in income. Emma knew of her allergy to lead, and that was the reason she had specified that no paint containing lead or lead compounds was to be used. She had not mentioned this reason to Sidney.

Emma has also discovered that in three of her offices the woodwork was not prepared for painting before paint was applied.

Emma now seeks your advice as to whether she is able to:

- (a) Sue successfully for damages for breach of contract in respect of her loss of earnings.
- (b) Obtain an order for specific performance to compel Sidney to prepare and repaint the woodwork as agreed in the contract.

Advise Emma.

Practice Questions

4 Employment

- (a) Why is it important to distinguish between contracts of service and contracts for services?
- (b) How do the courts decide whether someone is self employed or is an employee?

5 Company names

Explain the legal limitations there are on the names that may be adopted by companies, paying particular regard to the tort of "passing off".

6 Debentures and charges

In relation to companies' loan capital explain the following terms.

- (a) Debenture
- (b) Fixed charge
- (c) Floating charge

7 Ken and Doris

Ken and Doris, a husband and wife, have traded as a private registered company, Kendor Ltd, of which they were the sole shareholders and directors. The company has adopted model articles of association. Doris has also acted as company secretary. Ken has died leaving all his estate to Doris. Although the company has always been and still is profitable, Doris has decided that she no longer wishes to carry on the business or sell it as a going concern but wishes to wind the company up.

As her accountant, advise Doris on the steps she must take and the procedures she must follow to wind up the company as far as and including the appointment of a liquidator. Your attention is particularly drawn to the fact that at the present moment she is the sole shareholder, director and secretary of the company.

8 Money laundering

- (a) Explain the term 'money laundering' and how such activity is conducted.
- (b) Explain how the Proceeds of Crime Act 2002 seeks to control money laundering.

PRACTICE ANSWERS

1 Legal terms

(a) The doctrine of binding precedent, or *stare decisis*, provides that in determining any case, where the facts of the case are materially the same as in a previous case heard by a superior (or sometimes equal) court, then the court will be bound by any proposition of law which formed part of the *ratio decidendi* of that previous case. For example, decisions of the Magistrates' Courts and County Courts are not binding on anyone but the courts are bound by decisions of the High Court, Court of Appeal and Supreme Court. The purpose of the doctrine is to provide coherency, consistency and, therefore, predictability and fairness in the development of case law. A comprehensive, consistent and objective system of reporting of cases is necessary for the doctrine to operate, as this enables lawyers to have access to previous relevant cases.

Only a **proposition of law**, as opposed to a statement of fact, will be binding. The *ratio decidendi* of a case has been defined as 'any rule of law, express or implied, treated by a judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury' (Cross). The *ratio decidendi* is often difficult to identify and should be contrasted with *obiter dicta* which might be propositions of law which do not form part of the basis for the decision or statements based on hypothetical facts rather than the actual facts before the court. *Obiter dicta* are of **persuasive authority** only and do not bind later courts. This means that they may be taken into account, but need not necessarily be followed.

It is not always easy to **distinguish** between the *ratio decidendi* and the *obiter dicta*. Judges do not always make clear in their comments whether a particular statement or conclusion is 'ratio' or 'obiter'. Indeed, in a case heard by more than one judge, each judge may provide a different *ratio decidendi* in support of a common decision.

(b) When a case is decided, the principle underlying that decision becomes a precedent. In later cases judges will look to that precedent and may be bound to make their decisions in accordance with the doctrine of judicial precedent. In certain circumstances, however, a judge may not wish to follow an earlier decision and it may be open to him to reverse, overrule or distinguish the precedent.

(i) Once a decision has been reached in a case by the court of first instance (the court where the case was originally heard), the party against whom the court's finding is reached may decide, or be given leave, to appeal against the decision. If the appellate court decides that the original decision was incorrect, it is said to '**reverse**' the original decision. The original decision cannot subsequently form a precedent. For example, where the Court of Appeal reverses a decision of the High Court, the first decision cannot be a precedent but the reversed decision becomes a precedent.

(ii) Following the example given above, if the first decision (that reached in the High Court) had been reached by following precedent, then in reversing that decision, the Court of Appeal also '**overrules**' that earlier precedent which formed the *ratio decidendi*. It can be seen that overruling involves an earlier case, rather than a case which is the subject of an appeal. Higher courts may overrule the decisions of lower courts, depriving those earlier decisions of their precedent status.

When a decision is overruled, the **law is changed with retrospective effect**. Judges are usually cautious before overruling a long-standing precedent, but this is sometimes necessary, for example where what is acceptable within a particular society changes.

For a precedent to be followed, the facts of the previous case and the case under consideration must be materially the same. To the extent that there are significant differences in the material facts between the two cases, the previous case may be '**distinguished**' and therefore not followed.

PRACTICE ANSWERS

2 Adam

- (a) Advertisement. In the law of contract an offer is a definite promise to another to be bound on specific terms. Only an offer made with the intention that it shall become binding when accepted may be converted into a contract by acceptance. An offer can be made to a particular person or persons or to the public at large. An invitation to treat, by contrast, is an indication that someone is prepared to receive offers with the view to forming a binding contract. An invitation to treat is not capable of being accepted so as to form a legally binding contract.

Case law has established a number of accepted principles which apply to determine whether something is an offer or merely an invitation to treat. As a general rule, an **advertisement** is not of itself an offer capable of acceptance but is usually regarded as an attempt to induce offers and therefore is an invitation to treat (*Partridge v Crittenden*). Similarly, the circulation of a price list also constitutes an invitation to treat. In limited circumstances, an advertisement may constitute an offer as in *Carlill v Carbolic Smoke Ball Co*, where the words of the advertisement were very clear and precise and were held to be an offer to the world at large, capable of being accepted by anyone fulfilling the necessary conditions.

Adam's advertisement may be regarded as an offer rather than an invitation to treat, owing to the very clear and categorical language used (following *Carlill's case*). His advertisement is 'a serious offer', clearly stating the price and open to acceptance by the first person to respond.

- (b) There is a general rule in the law of contract that acceptance must be express (oral or written) or implied and must be communicated to the offeror before it can be effective, unless the offeror expressly waives the need for communication (*Carlill's case*). The offeror may stipulate the exact means of communication in which case only compliance with his or her terms will suffice.

The **postal rule** provides an exception to this. The postal rule provides that where the use of the post is in the contemplation of both parties and the acceptance is correctly put in the post, then acceptance will be valid once posted, whether or not the offeror actually receives the letter: *Adams v Lindsell*. Whether the use of post was in the contemplation of the parties may be deduced from the circumstances, for example if the offer was itself made by post (*Household Fire and Carriage Accident Insurance Co v Grant*).

In this case it is clearly not appropriate for acceptance to be made by post. The offer is valid for one day only and the car will be sold to the 'first person who accepts it'. It is implicit that a more immediate communication of acceptance was required. Ben has not entered into a binding contract with Adam.

- (c) Acceptance must be unqualified agreement to the terms of the offer. Where the 'acceptance' actually introduces some new term it constitutes a counter-offer. A counter-offer operates to reject the original offer and is itself open to acceptance or rejection by the original offeror (*Hyde v Wrench*).

In purporting to accept Adam's offer contained in the advertisement, Carol is altering the terms by seeking to pay by cheque rather than cash. The offer clearly requires payment in cash therefore Carol has made a counter-offer that Adam is free to accept or reject.

PRACTICE ANSWERS

3 Emma and Sidney

- (a) There is a clear breach of contract by Sidney in his use of paint containing lead in some of Emma's offices. As a result, Emma may sue for and recover damages for breach from Sidney.

The type and **measure of damages** awarded by the court will be such as are intended to restore the party who has suffered loss to the same position as he or she would have been in if the contract had been properly performed and no breach had occurred. Damages will not be punitive nor put the injured party in a better position than he or she would have been in the event of there being no breach.

It is a fundamental principle in the law relating to damages that damage or loss which is considered to be too **remote** cannot be recovered. Furthermore, the court will also assess the **measure** of damages.

With regard to remoteness of damage, the case of *Hadley v Baxendale* established that damages may only be awarded in respect of losses which arise naturally, in the usual course of things, from the breach and/or losses which arise in a manner which would have been in the reasonable contemplation of the parties at the time the contract was made as a probable consequence of the breach. In that case, the claimant was not entitled to damages for loss of profits which arose as a result of a delay in the repair of some equipment needed to operate his business.

In *Victoria Laundry (Windsor) v Newman Industries*, failure to deliver certain goods to the claimant meant that he lost ordinary business profits and additional profits from another contract which, as a result, he was prevented from entering into. The defendant was not aware of the second contract. The claimant was entitled to recover for loss of normal earnings, but not the additional profits.

It follows that a loss **outside** the normal course of events may only be recovered if the exceptional circumstances surrounding the loss are within the defaulting party's **actual or constructive knowledge**.

Sidney and Emma

Emma is claiming financial loss, ie loss of earnings arising as a result of her illness caused by an allergic reaction to lead. Sidney was not aware of her allergy, nor can it be said to be a probable consequence of the breach which ought reasonably to have been in the contemplation of both parties at the time of the contract was made. Clearly it was not something which would arise in the normal course of events either. As a result, a court is liable to consider that Emma's loss of earnings is too remote (for an award of damages to be made in respect of it).

- (b) Specific performance is an equitable remedy, entirely within the discretion of the court, which may be awarded where the common law remedy of damages is inadequate or inappropriate (such as where there has been a breach of a contract to supply land or goods which are unique).

The court is unlikely to grant an order of specific performance where **performance** is required to be made over a period of time and the court is unable to supervise or ensure that the defendant complies fully with the order. A court is, therefore, unlikely to order specific performance of a contract of employment or personal services or a contract for services such as building works. The court will make exceptions in this latter instance where, for example, the redecoration work required is clearly defined, the claimant is in possession of the relevant land and where damages would be inadequate.

Sidney and Emma

In this case there has been a clear breach of contract in Sidney's failure to prepare the woodwork properly, and Emma is entitled to claim for damages as a result of that breach. It does not appear that this remedy of damages is in any way inappropriate or inadequate, those criteria applied by the courts. The court would be unlikely to order specific performance because of its inability to supervise due performance. Consequently, Emma would appear to be restricted to her remedy in damages which could include a sum in respect of her losses in needing to contract with another decorator to re-do the work.

PRACTICE ANSWERS

4 Employment

- (a) An employee is someone employed by his or her employer under the terms of a formal contract of service (or 'employment contract'). An 'independent contractor' is a self-employed person who contracts to provide services for another party but who does not enter into a contract of employment as an employee of that other party. Sometimes the distinction between the two is very obvious, but not always. A number of tests may be applied in order to distinguish between the two types of worker.

There are several reasons why the distinction between a contract of service and a contract for services is important:

- (i) Legislation may offer **employment protection** to employees under a contract of service. This provides for minimum periods of notice, remedies for unfair dismissal and for redundancy payments and health and safety protection;
 - (ii) The contribution rates payable under **social security legislation** differ as between the employed and the self-employed, and there are also differences in entitlement to **benefits and statutory sick pay**;
 - (iii) Deductions must be made by an employer for **income tax** under Schedule E from salary paid to employees under a contract of service, whereas the self-employed are taxed under Schedule D and are directly responsible to HM Revenue and Customs for all tax due;
 - (iv) The employer may be **vicariously liable for tortious acts** committed by his employees during the course of their employment, but such liability is severely restricted in the case of a contract for services;
 - (v) Should the employer go into liquidation or become bankrupt, the employee under a contract of service has **preferential rights as a creditor for payment of outstanding salary and redundancy payments**, up to certain limits; and
 - (vi) The **implied rights and duties** which apply in the employer/employee relationship under a contract of service would not apply to the same degree to a contract for services.
- (b) In determining the nature of the employment relationship, the expressed intentions of the parties will not necessarily be conclusive (*Ferguson v John Dawson & Partners 1976*). The courts will look at the reality of the situation rather than at the expressed intentions of the parties. The courts have generally applied one or more of three tests - of control, integration and economic reality.

The **control test** asks whether the employer has control over the way in which the employee performs his duties. In *Mersey Docks & Harbour Board v Coggins & Griffiths (Liverpool) Ltd*, a driver of a crane could be instructed by the employer what to do but not how to do his work and it was held that he was an independent contractor since (inter alia) the 'employer' lacked sufficient control properly to be called an employer.

The **integration test** applies where the employee has such a degree of skill that he cannot be 'controlled' in the performance of his duties and considers whether he was appointed and assigned to his duties by the employer, ie did he become an integral part of the employer's business organisation or did his work remain outside of and merely accessory to it? Thus in *Cassidy v Ministry of Health*, it was held that a skilled surgeon was the employee of the Ministry of Health since, although the Ministry could not possibly control the doctor in his medical work, it (and not the patient) had selected him and integrated him into the organisation.

The **economic reality or 'multiple' test** asks whether the employee is working on his own account. Here the court will consider all relevant factors including the employer's right to appoint and dismiss, the basis on which payment is made, whether tax and social security contributions are deducted, who provides the tools and equipment and the number of 'employers' (*RMC (S.E.) v Ministry of Pensions and NI 1968*). The courts will also consider whether the employee is entitled to delegate his obligations (in which case there is no contract of employment), whether he is restricted in his place of work, obliged to work and whether holidays and hours of work are agreed (*O'Kelly v Trusthouse Forte pic 1983*).

PRACTICE ANSWERS

5 Company names

The name of a company must be specified in the company's **constitution** and serves to identify the company, distinguishing it from any other company. The registrar of companies has statutory powers of control over the choice of names in order to ensure that they comply with both statutory and common law restrictions and requirements. These apply both on the initial registration of a company by its promoters and on any subsequent change of name by the company.

If the company is a **public company**, the name must end with the words 'public limited company' or 'plc'. If it is a **private limited company**, it must end with the word 'limited' or 'ltd' (except in the case of private companies limited by guarantee and companies licensed to do so before 25 February 1982 where the word 'limited' may be omitted if certain conditions are satisfied). Appropriate Welsh wording may be used by companies having a registered office in Wales.

A company cannot share the name of any existing company which appears in the statutory index at the Companies Registry. Nor can a company bear a name which, in the registrar's opinion, is **offensive, sensitive** or if it constitutes a **criminal offence** or if it suggests a connection with the government or a local authority. Words such as 'British' or 'National' will only be permitted if the nature and size of the company is appropriate. A name which suggests some **professional expertise** will be permitted only if that expertise is in the company and appropriate professional bodies have no objection.

Written application can be made to the Secretary of State to approve proposed names in advance. The Secretary of State can compel a company to **change its name** if it is the same as or, in the registrar's opinion, too like the name of another company which is or should have been on the register at the time or if misleading information was given to secure registration. Likewise he can require a change of name where the name gives so **misleading** an indication of the company's activities as to be likely to cause harm to the public. A company can elect to **change its name** by passing a **special resolution** to that effect.

Under the Companies Act 2006, companies have the right to appeal to the **Company Names Adjudicators** if they feel that another company's name is too similar. The Adjudicators will look into the case and make a decision which is binding on both parties. This decision may be to compel a name change (including in some cases the determination of what the new name will be) or to do nothing. If a party is unhappy with the decision they may appeal it in court.

At common law, a company can be prevented from using its registered name if the use of that name causes the company's goods or services to be confused with those of another company. The court may grant an injunction in a **'passing-off'** action brought by that other company and may also force the defendant company to change its name (*Ewing v Buttercup Margarine Co Ltd*). In this case, a sole trader was prevented from using the business name 'The Buttercup Dairy Co' in the north of England because of confusion with the business in the London area of Buttercup Margarine Co Ltd. Similarity of name is not sufficient. There must be the likelihood of confusion based on the company's similar businesses.

PRACTICE ANSWERS

6 Debentures and charges

- (a) A **debenture** is a written acknowledgement of debt, which may be any document which states the terms on which a company has borrowed money. A debenture may create a **charge** over the company's assets as security for the loan.

A debenture is usually a formal printed legal document. A single debenture is issued to a single lender but debentures may be issued as a series to different lenders. In this case each lender receives a debenture in identical form in respect of his loan and the lenders' rights rank *pari passu* in their right to repayment and in any security given to them. Public companies only may issue debenture stock to members of the public by means of a prospectus.

Secured debenture holders may enforce their security by taking possession of the charged assets and selling them (in the case of a legal charge) or appointing a **receiver**. These rights will normally arise from the express provisions of the relevant charge or, in certain circumstances, may be awarded by court order.

- (b) A **fixed** or specific charge **attaches** to the relevant asset as soon as the charge is **created**, for example a charge over named property given as security for a loan to the owner of the property. If the company does need to dispose of the charged asset, it will repay the secured debt out of the sale proceeds so that the charge is discharged.

Any type of charge gives to the holder a **priority claim** to payment of what is owing to him out of the value of the property which is subject to that charge. The ranking of that priority will depend on the types and times of creation of all relevant charges.

- A **fixed charge** may be legal or equitable and over land or other company assets, from buildings and chattels to book debts. It is not appropriate to give a fixed charge against inventory in trade as the company would then be legally prevented from dealing with it without approval. In the event of default, the lender can appoint a receiver who may sell the asset charged in order to recover the debt. If the proceeds of sale exceed the debt, the excess goes towards paying off other debts. If they are less, then the debenture holder becomes an unsecured creditor in respect of the excess amount of debt outstanding.

The main advantage enjoyed by a holder of a fixed charge as opposed to a floating charge is that a fixed charge confers **immediate rights over identified assets**. It is therefore more certain as to which of the charged assets are subject to the charge and gives an immediate right of sale over them. A fixed charge will rank in priority over the floating charge even if it was created after the floating charge since it attaches to the property at the time of creation rather than at the time of crystallisation. (Once a floating charge has crystallised it becomes a fixed charge and a fixed charge created subsequently will not rank in priority to it.) The one exception to this general rule is where a floating charge contains an express prohibition on the creation of subsequent fixed charges (**a negative pledge clause**) and a subsequent lender has actual notice of such prohibition.

- (c) No particular form of wording is required to create a floating charge. Where a charge is created over certain assets but the company retains the right to deal with those assets during the ordinary course of business until the charge crystallises, then that charge is a floating charge. On crystallisation, a floating charge is converted into a fixed charge on the assets owned by the company at the time of crystallisation.

Crystallisation will occur on the happening of any of the events specified in the charge, such as the **liquidation of the company** or the **cessation of its business**

Whether or not the parties label a charge as 'fixed' or 'floating' will not be conclusive but the general rule will be applied. For example a charge which covers present and future **book debts**, whatever it is called by the parties, will be floating if the company is allowed to deal with money collected from accounts receivable without notifying the lender and fixed if the money must be paid to the lender, for example in reduction of an overdraft (*Siebe Gorman & Co Ltd v Barclays Bank Ltd 1979*).

PRACTICE ANSWERS

7 Ken and Doris

The company will be put into liquidation as a **members' voluntary winding up**, since it is apparently still solvent. The procedure for this is outlined below, but before it can be adopted there are two specific issues which must be dealt with.

Doris' position in the company

Doris is currently the sole shareholder of the company. The company has become a single member private company. The company does not need to re-register as a result of this, but the register of members should be amended to just show her as the sole shareholder.

All private companies must have at least one director, and may have a company secretary. If there is one, that person cannot also be the sole director. This is the position in which Doris finds herself after the death of her husband. The solution, however, is relatively straightforward.

Doris must resign her post as secretary and either appoint another person to that position or, as private companies are not required by law to have a company secretary, operate the company without one. She would thus become a sole director who is not secretary, which is permissible.

Procedure for winding up

After these problems have been rectified, the procedure is as follows.

The company must either hold a **general meeting** at which a **special resolution** is passed resolving that it should be wound up voluntarily, or pass a written resolution to the same effect.

Once the resolution to wind up has been passed, the company must, within 15 days, give notice of the resolution to the registrar. The winding up is deemed to have commenced at the time of the passing of the resolution for voluntary winding up.

In the five weeks before the passing of the resolution mentioned, the directors, or a majority of them, must make a **statutory declaration of solvency** at a meeting of the directors.

The declaration is to the effect that they have made full inquiry into the company's affairs and have formed the opinion that the company will be able to pay its debts in full (together with interest) within a period of 12 months from the commencement of winding up.

The declaration must be **delivered to the registrar of companies** within 15 days of the passing of the resolution. If the declaration is not delivered within 15 days, the company and every officer in default are liable to a fine.

If a director makes a declaration without having reasonable grounds for his opinion that the company will be able to pay its debts, he will be liable to imprisonment or a fine or both. If the company does not in fact pay its debts within the period specified in the declaration it will be presumed that the declaration was made without reasonable grounds.

In a members' voluntary winding up, the **company** in general meeting **can appoint one or more liquidators**.

PRACTICE ANSWERS

8 Money laundering

- (a) Money laundering is the term given to attempts to make the proceeds of crime appear respectable. It can refer to any process by which criminals seek to hide the source and ownership of the proceeds of criminal activities, enabling them to keep control over such proceeds and, ultimately, to provide an apparently legitimate cover for their sources of income.

The money laundering process aims to disguise the source of the proceeds so that the criminal can remain free from suspicion as to its source. The process usually involves three phases:

- (i) **Placement:** this is the actual disposal of the proceeds of the initial illegal activity, usually into an apparently legitimate activity;
- (ii) **Layering:** this involves the transfer of money from business to business, or one geographical location to another, in order to conceal the original source;
- (iii) **Integration:** having been layered, the money takes on the appearance of coming from a legitimate source and, therefore, of being legitimate funds.

Money laundering was recognised as a criminal offence in the United Kingdom under the Drug Trafficking Offences Act 1986. It is now regulated by the Proceeds of Crime Act 2002. Other relevant legislation includes certain anti-terrorist legislation, in particular the Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001.

- (b) The Proceeds of Crime Act 2002 identifies three categories of criminal offence: laundering, failure to report, and tipping off.

- (i) **Laundering:** this involves the acquisition, possession or use of the proceeds of criminal conduct, or assisting another to retain the proceeds of criminal conduct, and concealing the proceeds of criminal activity. Under the Act, it is an offence to conceal, disguise, convert, transfer or remove criminal property from the United Kingdom. 'Concealing or disguising criminal property includes concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it.'

Criminal property is defined as property which the alleged offender knows (or suspects) to constitute or represent benefit from any criminal conduct. It includes, by way of example, proceeds of tax evasion, any benefit obtained through bribery and corruption and benefits obtained through the operation of a criminal cartel.

The offence of knowingly assisting in the laundering of criminal funds is punishable by imprisonment up to a maximum of fourteen years and/or a fine.

- (ii) **Failure to report:** this is failure to disclose knowledge or suspicion of money laundering. Under the Act it is an offence for a person who 'knows or suspects ... that another person is engaged in money laundering, where the information or other matter on which his knowledge or suspicion is based ... came to him in the course of a business in the regulated sector' not to report the fact to the appropriate authority. The offence only relates to individuals, such as accountants, who are acting in the course of business. Any individual who is covered by the section is required to make disclosure to the nominated money laundering reporting officer within their organisation. Alternatively, disclosure may be made directly to the Serious Organised Crime Agency (SOCA).

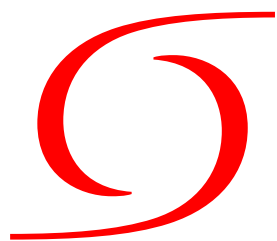
The offence of failure to report is punishable by imprisonment up to a maximum of five years and/or a fine.

- (iii) **Tipping off:** This involves disclosing information to any person if disclosure may prejudice an investigation into drug trafficking, drug money laundering, terrorist-related activities or laundering the proceeds of criminal conduct. It therefore covers the situation where an accountant informs a client that a report has been submitted to the SOCA.

The offence of tipping off is punishable by imprisonment up to a maximum of five years and/or a fine.

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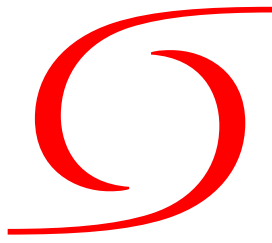
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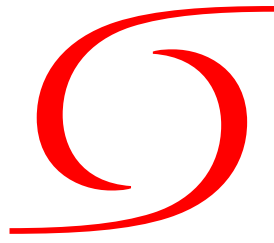
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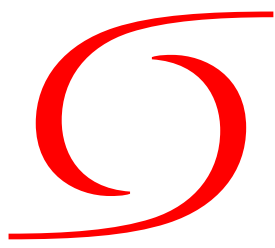
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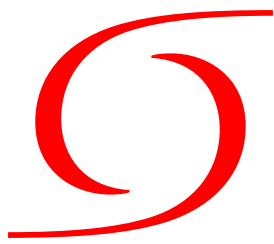
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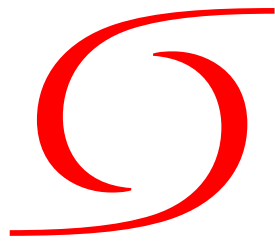


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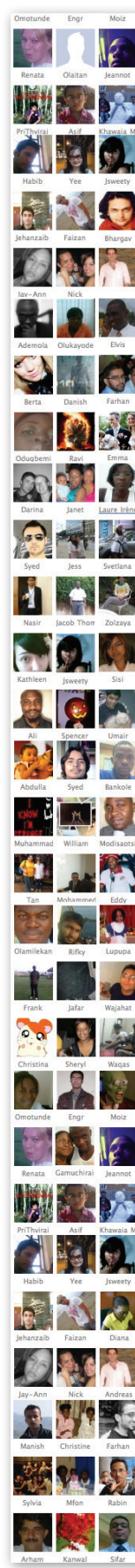
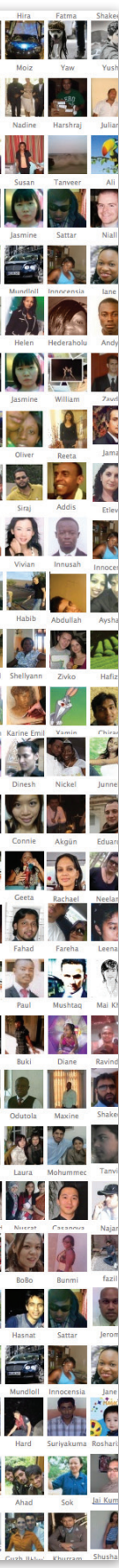
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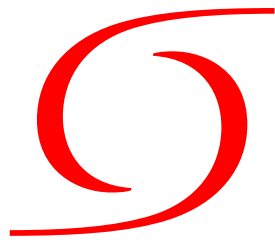
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