CHAPTER 1

The Legal Right

1. A HISTORICAL VIEW

Wills J in a case in 1888 relating to a meeting in Trafalgar Square, London, said that the right of public meeting "has long passed out of the region of discussion or doubt."[1] The right rests on the fundamental assumption in UK law that a citizen is free to do something unless restrained by the common law, including the law of contract, or by statute.[2] The State has a positive obligation to enable lawful demonstrations to proceed in a peaceful manner.[3] The point is put as follows in Dicey's *Introduction to the Study of the Law of the Constitution*: **1–01**

> "No better instance can be found of the way in which in England the constitution is built up upon individual rights than our rules as to public assemblies. The right of assembling is nothing more than a result of the view taken by the courts as to individual liberty of a person and individual liberty of speech."[4]

On this view, the liberty to meet with others in a public place is an individual, rather than a collective right. **1–02**

In *Hirst and Agu v Chief Constable of West Yorkshire*[5] Otton J said that the rights to demonstrate and protest on matters of public concern are rights which it is in the public interest that individuals should possess and exercise without impediment, as long as no wrongful act is done, and there is no obstruction to vehicle traffic.

The White Paper, *Review of Public Order Law* (1985), used positive language:

> "The rights of peaceful protest and assembly are amongst our fundamental freedoms: they are numbered among the touchstones which distinguish a free society from a totalitarian one."[6]

The same concept finds expression in the European Convention on Human Rights 1953 art.11, to which the UK is a signatory and which has now been incorporated into domestic law by the Human Rights Act 1998 that came into force in October 2000:

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1 *Ex p. Lewis* (1888) 21 QBD 191, 196.
2 *Attorney General v Guardian Newspapers Ltd (No.2)* [1990] 1 A.C. 109; [1988] 3 All E.R. 545, 596.
3 *Halsbury's Laws* (4th edn) Vol.8(2) (Re-issue) para.160.
4 Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn (1959), p.271.
5 *Hirst v Chief Constable of West Yorkshire* [1987] Crim.L.R. 330.
6 Cmnd. 9510 (1985), para.1.7. This will be referred to below as the "White Paper".

"(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or the police, or of the administration of the State."

The right to freedom of assembly covers peaceful protests and demonstrations. Public and private meetings are protected under art.11, and may be limited mainly on the grounds of public order. The right to freedom of association guarantees the capacity of all persons to join with others to attain a particular objective.

Article 10(1)–(2) of the Convention provides that everyone has the right to freedom of expression:

> "This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers .... The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

Primary and secondary legislation, and the common law, can be made the subject of an action under the Human Rights Act 1998, in addition to the decisions and actions of public authorities. Section 6 of the Act makes it unlawful for public authorities to act in a manner that is incompatible with the rights in the Convention.

The important qualification that exists in relation to public assemblies is that the participants must not commit a breach of civil or criminal law, for example, by trespassing on private property; committing a nuisance; or infringing the provisions of the Public Order Act 1986, as amended and added to by the Criminal Justice and Public Order Act 1994.[7] These limitations are discussed in greater detail below.

[7] See *Halsbury's Statute* (4th edn) Vol.12 (Re-issue) 1060 and current *Statutes Service*.

2. ASSEMBLIES

Public Order Act 1986 s.14 (Imposing Conditions on Public Assemblies)

The Public Order Act 1986 introduced into English law a general statutory right for the police to impose conditions on public assemblies. Some statutory control had previously existed in relation to processions,[8] but static meetings had been subject to control only through the general obligation of the police to prevent disorder and to preserve the peace.[9] 1–03

An important distinction between the two types of event is that there is no requirement on the organisers of a public meeting to notify the police in advance, whereas in relation to processions, prior notice has, in certain circumstances, to be given.[10]

Section 14(1) of the Act provides as follows:

> "(1) If the senior police officer, having regard to the time or place at which and the circumstances in which any public assembly is being held or is intended to be held, reasonably believes that—
>
> (a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community; or
>
> (b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do,"

he may give directions imposing on the persons organising or taking part in the assembly such conditions as to the place at which the assembly may be (or continue to be) held, its maximum duration, or the maximum number of persons who may constitute it, as appear to him necessary to prevent such disorder, damage, disruption or intimidation.

A number of definitions should be noted. "Public assembly" means "an assembly of two or more persons in a public place which is wholly or partly open to the air."[11] It should be noted that prior to this amendment made to the Public Order Act 1986 by the Anti-social Behaviour Act 2003, public assembly meant an assembly of "20" or more persons. "Public place" in turn, is defined as, any highway or any place to which at the material time the public or any section of the public has access, on payment or otherwise, as of right by virtue of express or implied permission.[12]

"The senior police officer" for the purposes of the section means, in relation to an assembly being held, the most senior in rank of the police officers present at the scene, and in relation to an assembly intended to be held, the chief officer of police.[13] Powers of delegation exist.[14]

[8] See para.1–08.
[9] See para.2–02.
[10] See para.1–09.
[11] Public Order Act 1986 s.16, as amended by Anti-social Behaviour Act 2003 s.57.
[12] Public Order Act 1986 s.16, as amended by Anti-social Behaviour Act 2003 s.57.
[13] Public Order Act 1986 s.14(2).

Directions under s.14(1) are only valid if the time and place of the proposed assembly are sufficiently certain; it is not clear whether an offence under the section can be committed before the public assembly has actually taken place.[15]

A direction given in relation to an assembly which is intended to be held must be given in writing.[16]

1–04 From the above it will be appreciated that the powers of the police in relation to the larger, open-air type of meeting are extensive, although they are confined (under this section) to matters of: venue; duration; and number of participants. The Act does not of itself give the police any additional powers in relation to meetings in closed premises; if, however, an indoor meeting provokes a counter-demonstration outside a hall—this will itself be subject to the right of the police to impose controls under s.14.[17]

Further, it will be apparent from the reference to "serious disruption to the life of the community" in s.14(1)(a) that the powers of the police will operate in relation even to those meetings which are genuinely peaceful in intent, but which may cause, for example, severe traffic congestion.[18]

The powers exist when the senior police officer "reasonably believes" that the conditions defined in subs.(a) or (b) may be present. A case decided before the passing of the Act suggests that the courts may be reluctant to challenge the judgment of a chief officer of the police, who has had to bear the burden of dealing with events as they unfolded, particularly in cases of potential public disorder.[19] During the G20 protests in 2009 the police prevented journalists from joining the protests for the purposes of reporting on what was happening, citing s.14 of the Act, whilst in the process of dispersing the protestors—and later apologised to journalists that they were caught-up inadvertently in the dispersal.

There must, however, be relevant evidence on which the chief officer of the police forms a judgment:

> "The defendant was charged with knowingly failing to comply with a condition imposed on a public assembly. The senior officer who had imposed the condition gave evidence that he defined "intimidation" (within the meaning of s.14(1)(b)) as "putting people in fear or discomfort". Held, that the question was whether the demonstrators acted with a view to "compelling" visitors not to go into South Africa House or merely with the intention of making them feel uncomfortable; the latter was not intimidation. The officer had not claimed in evidence that he believed the organisers acted with a view to compelling. Accordingly, he had had no ground for imposing the condition and the case was dismissed."[20]

[14] Public Order Act 1986 s.15.
[15] *DPP v Baillie* [1995] Crim.L.R. 426 DC.
[16] Public Order Act 1986 s.14(3). The distinction may be important in relation to the remedy of judicial review.
[17] See also para.2–02.
[18] See, for example, White Paper, para.5.9.
[19] *Kent v Metropolitan Police Commissioner*, *The Times*, May 15, 1981 CA. See also *Thomas v NUM (South Wales Area)* [1985] I.R.L.R. 136.
[20] *Police v Reid (Lorna)* [1987] Crim.L.R. 702.

The Anti-social Behaviour Act 2003 gives improved powers to deal with public assemblies and aggravated trespass, in particular the powers to disperse groups of two or more in designated areas suffering persistent and serious anti-social behaviour (s.30).

Public Order Act 1986 s.14A (Prohibiting Trespassory Assemblies)

1–05 This section, and ss.14B–C were inserted into the Public Order Act 1986 by ss.70–71 of the Criminal Justice and Public Order Act 1994. These latter sections are contained in Pt 5 of the 1994 Act, that includes provisions aimed at squatters, participants in raves, and hunt saboteurs.

Section 14A(1) of the Act provides as follows:

> "(1) If at any time the chief officer of police reasonably believes that an assembly is intended to be held in any district on land to which the public has no right of access or only a limited right of access and that the assembly—
> (a) is likely to be held without the permission of the occupier of the land or to conduct itself in such a way as to exceed the limits of any permission of his or the limits of the public's right of access, and
> (b) may result—
> (i) in serious disruption to the life of the community, or
> (ii) where the land, or a building or monument on it, is of historical, archaeological or scientific importance, in significant damage to the land, building or monument,"

he may apply to the council of the district for an order prohibiting for a specified period the holding of all trespassory assemblies in the district or a part of it, as specified.

Again, some definitions should be noted. "Assembly" under this section means an assembly of twenty or more persons; "land" means land in the open air; "limited" relates to a right of access by the public to land; and this also infers that their use of it is restricted to use for a particular purpose (as in the case of a highway or road) or is subject to other restrictions; "occupier" means the person entitled to possession of the land by virtue of an estate or interest held by him, and includes the person reasonably believed by the authority applying for, or making the order, to be the occupier; and "public" includes a section of the public.[21]

Section 14A(1) does not apply to the City of London, or the Metropolitan Police District, but for these areas similar provisions are contained in s.14A(4).

An order prohibiting the holding of trespassory assemblies operates to prohibit any assembly which: (a) is held on land to which the public has no right of access, or only a limited right of access; and (b) takes place without the permission of the occupier of the land, or so as to exceed the limits of any permission of his, or the limits of the public's right of access.[22]

No order under the section shall prohibit the holding of assemblies for a period exceeding four days, or in an area exceeding an area represented by a circle with

[21] Public Order Act 1986 s.14A(9).
[22] Public Order Act 1986 s.14A(5).

a radius of five miles from a specified centre.[23] An order may be made either in the terms of the application or in a modified form.[24]

Public Order Act 1986 s.14C (Stopping Persons from Proceeding to Trespassory Assemblies)

1–06 This section provides that if a constable in uniform reasonably believes that a person is en route to a prohibited assembly, the constable may stop the person and direct the person not to proceed in the direction of the prohibited assembly.

Local variations

1–07 Several local and particular enactments were repealed by the Public Order Act 1986 (for example, the Seditious Meetings Act 1817, which related to meetings within a mile of Westminster Hall), but the following remain in force:

(a) Trafalgar Square: under the Trafalgar Square Regulations 1952,[25] wilfully interfering with the comfort of any person in the Square is a prohibited act; the written permission of the Department of Culture (at 2–4 Cockspur Street, London SW1Y 5DH) is required for organising, conducting or taking part in any assembly, parade or procession, for making or giving a public speech or address, and for the use of sound amplifying equipment. The Department only accepts bookings for the Square within three calendar months of the proposed meeting, so as to avoid block bookings and to allow for meetings of a topical nature. The Department has regard to such matters as the convenience of the public and the likelihood of traffic congestion. Under s.52 of the Metropolitan Police Act 1839 the commissioner of police is empowered to prevent obstruction in this area.

(b) Hyde Park: this Park also comes within the jurisdiction of the Department of Culture (at Royal Parks Agency, Old Police House, Hyde Park, London W2 2UH). There are only two places where meetings are allowed: one is at Speakers' Corner and the other, for large gatherings, is at the Reformers' Tree area. Where large numbers are involved, the Department will arrange a meeting with the organisers to which the Metropolitan Police and any other interested parties are invited. Detailed instructions governing the use of the Park for the particular meeting are then issued by the Department.

The Royal Parks and Gardens generally are governed by the Parks Regulation Acts 1872 to 1977.[26]

(c) Defence establishments: processions and demonstrations on or near such establishments may need to take account of the Official Secrets Act 1911

[23] Public Order Act 1986 s.14A(6).
[24] Public Order Act 1986 s.14A(2).
[25] Trafalgar Square Regulations 1952 SI 1952/776.
[26] See SI 1977/217 (The Royal and Other Parks and Gardens Regulations). The Department of Culture has prepared a list of the standard conditions under which organisations are allowed to assemble and/or hold a rally in Hyde Park.

(under which it is an offence, for a purpose prejudicial to the safety or interests of the State, to approach or enter a "prohibited place") and s.14 of the Military Lands Act 1892. Byelaws made in any year under the latter Act, which are local in character, are listed in the Classified List of Local Statutory Instruments (under Class 7) at the end of the annual volumes of SRO and SI since 1924.[27]

(d) Universities etc: s.43 of the Education (No.2) Act, 1986 (as amended by the Further and Higher Education Act 1992) provides that governing bodies of universities and other institutions within the higher and further education sectors are obliged to ensure freedom of speech for members, students and employees, and for visiting speakers, and have to maintain in force a code of practice to be followed in connection with the organisation of meetings. The jurisdiction of the university or other body extends to its own premises; in considering whether to allow a meeting to be held, when there is a threat of disorder, it is not entitled to take into account threats of trouble outside its own precincts—that is a matter for the police.[28] Conditions restricting publicity and admission to the meeting, and relating to a charge for the provision of security, can be imposed where considered necessary in the interests of free speech and good order.[29]

The Police Reform and Social Responsibility Act 2011 has transferred the control of police forces from police authorities to elected Police and Crime Commissioners. The Act repeals the provisions in the Serious Organised Crime and Police Act 2005 which prohibit protests near Parliament Square, and instead restricts certain "prohibited activities" in Parliament Square garden, and the adjoining footways.

3 PROCESSIONS AND MARCHES

1–08 Up to 1987 processions were regulated by a combination of the general powers of the police in relation to public order; a number of local authority enactments calling for advance notice;[30] and the general power under the Public Order Act 1936 permitting the re-routeing and banning of processions which in the view of a chief officer of police were likely to cause serious public disorder.[31]

These laws were in substance re-enacted, and new provisions were introduced by the Public Order Act 1986. These have since been extended by the Criminal Justice and Public Order Act 1994, the Crime and Disorder Act 1998 and recently amended by the Anti-social Behaviour Act 2003. Another significant statute is the Police and Criminal Evidence Act 1984 as amended by the rash of new measures post-2000, which give the police powers to arrest and detain people suspected of committing criminal offences. Even after these major pieces of recent legislation, public order law is far from unified. This is because, as well as their powers under

[27] See also *DPP v Hutchinson* [1990] 2 A.C. 783; [1990] 3 W.L.R. 196 HL.
[28] *R. v University of Liverpool, Ex p. Caesar-Gordon* [1991] 1 Q.B. 124; [1990] 3 W.L.R. 667.
[29] *R. v University of Liverpool, Ex p. Caesar-Gordon* [1991] 1 Q.B. 124; [1990] 3 W.L.R. 667.
[30] For example, the West Midlands County Council Act which required, in general, 72 hours' advance notice of processions to be given.
[31] Public Order Act 1936 s.3.

these statutes, the police retain some historic common law powers such as the power to take action to prevent a breach of the peace (discussed in Ch.2). Other legislation sometimes regulates the right to demonstrate, for instance picketing during industrial disputes is regulated by employment laws.

Set out below is a general summary of those provisions which may be most relevant where, for example, a meeting or rally is to be accompanied by a protest march.

Advance notice

1–09 Section 11(1) of the Public Order Act 1986 requires advance written notice to be given of any proposal to hold a public procession intended:

(a) to demonstrate support for, or opposition to, the views or actions of any person or body of persons;
(b) to publicise a cause or campaign; or
(c) to mark or commemorate an event,

unless it is not reasonably practicable to give advance notice of the procession. "Public procession" means a procession in a public place.[32]

The advance notice requirement does not apply where the procession is one which is commonly or customarily held in the relevant police area.[33]

The notice must specify the date when it is intended to hold the procession, the time when it is intended to start it, its proposed route, and the name and address of the person (or one of the persons) proposing to organise it.[34]

Notice must be delivered to a police station in the police area in which it is proposed the procession will start.[35] Normally six clear[36] days' notice has to be given. The exception arises where (as noted above) it is not "reasonably practicable" to give any advance notice. This provision was inserted in the Act to cover the situation where it is likely (indeed may be desirable) that a march is arranged rapidly to deal with an urgent issue. The words "reasonably practicable" are not defined and still await the interpretation of the courts. Organisers of rallies, however, must, where notice can be given before the procession, give notice to the police as soon as delivery is reasonably practicable, and, however late it is given, the police have a power to impose conditions under s.12 (see below). Notice should normally be given by hand, but provided six clear days' notice can be given, the recorded delivery service may be used.[37]

[32] Public Order Act 1986 s.16. See also *Flockhart v Robinson* [1950] 2 K.B. 498; [1950] 1 All E.R. 1091, where it was said that a procession was more than "a mere body of persons; it is a body of persons who are moving along a route." See para.1–03 for definition of "public place".
[33] Public Order Act 1986 s.11(2).
[34] Public Order Act 1986 s.11(3).
[35] Public Order Act 1986 s.11(4)(a).
[36] See paras 5–10.
[37] Public Order Act 1986 s.11(5)–(6).

Imposing conditions on processions

Under Public Order Act 1986 s.12(1), if the senior police officer, having regard to 1–10
the time or place at which and the circumstances in which any public procession is being held, or is intended to be held, and to its route or proposed route, reasonably believes that:

(a) it may result in serious public disorder, serious damage to property or serious disruption to the life of the community; or
(b) the purpose of the persons organising it is the intimidation of others with a view to compelling them not to do an act they have a right to do, or to do an act they have a right not to do,

he may give directions imposing on the persons organising or taking part in the procession such conditions as appear to him to be necessary. The conditions can cover the route of the procession and can prohibit it from entering any public place specified in the directions.[38] It is to be noted, however, that the conditions which may be imposed are not limited to those stated, but can include, for example, a direction as to the timing of the procession, and the numbers of marchers who are permitted to go on it—provided that these directional restraints arise from the needs for public order.

Prohibiting processions

Section 13 of the Public Order Act 1986 permits the police authorities to seek to 1–11
have processions banned, if they reasonably believe that their powers under s.12 will not be sufficient to prevent serious public disorder. Application may be made to the district council for an order prohibiting for a specific period, not exceeding three months, the holding of all public processions in the area concerned. As under the previous law, there is no power to ban specific marches (as opposed to classes of marches or all marches).

The council may, with the consent of the Home Secretary, make an order either in the terms of the application, or with such modifications as may be approved by the Home Secretary.[39] In London, the relevant Police Commissioner may autonomously, with the permission of the Home Secretary, make a similar banning order.[40]

4. THE ORGANISER'S POSITION UNDER THE PUBLIC ORDER ACT

Sections 11–14 of the Public Order Act 1986 contain provisions dealing 1–12
specifically with the position of persons who organise public assemblies (s.14), trespassory assemblies (s.14A) and processions (ss.11–13). An "organiser" is not defined, but it will be noted that under s.11, an advance notice of processions has

[38] For definition of "public place", see para.1–03.
[39] Public Order Act 1986 s.13(2).
[40] Public Order Act 1986 s.13(4).

CHAPTER 11

Applicable law and other matters

Part III of this work deals with meetings of members of companies, meetings of directors, and meetings associated with insolvency and winding-up proceedings. This introductory chapter contains a brief note on the law applicable to companies and their classification and regulation, and a short explanation of two rules which are of relevance to what follows: that is the ultra vires rule and the rule in *Foss v Harbottle*. **11–01**

The ultra vires rule is not as important since the Companies Act 2006 came into force and it has already been encountered in connection with business meetings. The Companies Act 2006 also made the rule in *Foss v Harbottle,* of less relevance, but it still bears examination.

This chapter, finally, contains a description of the "elective regime" introduced by the Companies Act 1989 and describes how it is currently operated under the Companies Act 2006.

1. APPLICABLE LAW CLASSIFICATION AND REGULATION OF COMPANIES

A substantial part of the company law of the United Kingdom is contained in the Companies Act 2006. This Act has largely replaced the provisions of the Companies Act 1985 (CA 1985), that was itself a consolidating Act, but most of its provisions relating to receivers and managers and winding-up (ss.488–650 and 659–674) were reconsolidated in the Insolvency Act 1986 with further changes introduced in Enterprise Act 2002. **11–02**

The Companies Act 1989 introduced changes relating to company accounts, and a number of administrative reforms, including changes to the ultra vires rule and the introduction of the "elective regime" for private companies.

The Companies Act 2006 finished the job of replacing the Companies Act 1985 and the Companies Act 1989. (Companies Act 2006 was completely in force by October 2009.)

In the whole of Part III, the above Acts will be referred to as the "1985 Act" the "1986 Act" the "1989 Act" and the "2006 Act". "Companies Acts" and "the Acts" refer to all provisions of the four Acts: 1985, 1986, 1989 and 2006 as they are in force.

2. CLASSIFICATION

Under the Companies Act 2006, a company is any company formed under the Companies Act 2006. Companies may be registered with Companies House in a number of forms, which may be summarised as follows:

11–03 **A company limited by shares:** This is defined as a company, the liability of whose members is limited by its constitution to the amount, if any, unpaid on the shares respectively held by them."[1] The company limited by shares is the most common form of registered company and has, since at least the mid-nineteenth century, constituted the means through which much of the nation's business has been conducted. It is possible to incorporate a company with only one member and one director.

11–04 **A company limited by guarantee:** This is defined as a company, the liability of whose members is limited by its constitution to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up.[2] Companies limited by guarantee and having a share capital could be incorporated in the past, but can no longer be incorporated and no existing entity can be converted to one.[3]

Companies limited by guarantee are mostly associations formed for the protection of trade (trade associations, for example) for educational or professional purposes, or to give corporate form to voluntary associations. They are usually organisations in which it is not intended to make a profit. The use of the word 'limited' in the name of any limited company is required by s.59 of the 2006 Act. However, it is common for companies limited by guarantee to take advantage of s.60 of the 2006 Act and dispense with the word "limited" in its name.

11–05 **An unlimited company:** This is defined as a company for which there is no limit on the liability of its members.[4] There is now an obligation on unlimited companies to file their accounts with Companies House. The exemption for unlimited companies from these requirements ended on April 6, 2008, although the disclosure required is less than that required for limited companies. Unlimited companies were popular with those who did not want to put the accounts of their businesses on public record. The price for this was that the liability of the members was unlimited in the case of business failure. However, this trade-off is no longer available.

[1] Companies Act 2006, s.3(1)—(2).
[2] Companies Act 2006 s.3(1)—(2).
[3] Companies Act 2006 s.5.
[4] Companies Act 2006 s.3(4).

Community Interest Companies

The Community Interest Company[5] (CIC) was created by the Companies (Audit, Investigations and Community Enterprise) Act 2004 and has been capable of incorporation since July 2005. Such companies must have community interest as their main objective, and the assets and profits will be locked in the companies for use in pursuance of these objectives. They are mainly used for social enterprises. 11–06

Whether a company meets the community interest test, or not, will be assessed by the Office of the Regulator of Community Interest Companies.[6]

Societas Europaea

Since October 8, 2004 it has been possible to incorporate the Societas Europara (SE), which is a public company capable of operating in any European Union country, irrespective of which country it has been incorporated in.[7] These are formed in a number of ways including mergers of public limited companies, formation as a holding company, or by the conversion of an existing public limited company. 11–07

There are moves to create a form of a private company that can be used across the European Union, but this is not possible yet.

Charitable Incorporated Organisation

The Charities Act 2006 provided for a new type of corporate entity, the Charitable Incorporated Organisation (CIO). This type of corporate entity is only available for incorporation for entities with a charitable purpose and must have met the public benefit requirement as set out by the Charity Commission.[8] It is a simpler entity to organise than the older form of company. 11–08

Unlike other forms of companies, registration of a CIO is done through one body—the Charity Commission.

This type of entity has been available for incorporation since 2012 following the enactment of the Charitable Incorporated Organisations (General) Regulations 2012.[9] Existing unincorporated entities or charitable trusts can register as CICs as long as their income exceeds £5000 annually, and that they meet the public benefit requirement. However, it is not possible as yet for charitable companies to convert to CIOs, despite the provisions in the Charities Act 2006.

[5] Companies Act 2006 s.6.
[6] Further information about the Office of the Regulator of Community Interest Companies may be found on *http://www.gov.uk* [Accessed August 27, 2014].
[7] European Public Limited-Liability Company Regulations 2004 (SI 2004/2326).
[8] *http://www.charitycommission.gov.uk* [Accessed July 7, 2014].
[9] Charitable Incorporated Organisations (General) Regulations 2012 (SI 2012/3012)

Public and Private Companies

11–09 A further classification is between public and private companies. "Public company" means a company the memorandum of which states that the company is to be a public company, and in relation to which the provisions of the Acts (as to the registration or re-registration of a company as a public company) have been complied with. "Private company" means a company that is not a public company.[10] A public company has to have a minimum share capital of £50,000 or the prescribed Euro equivelent.[11] A private company commits an offence if it offers its shares or debentures to the public.[12]

All private companies limited by shares may be private or public companies. CICs may also be incorporated as private or public companies. Companies limited by guarantee cannot operate as public companies.

It was the case under the 1985 Act that the minimum number of members for a public company was two. It was possible to lose limited liability status if a public company carried on business for more than six months with only one member. However, this is no longer the case and the requirements of s.24 of the 1985 Act were not carried over to the 2006 Act.

3. REGULATION

11–10 The internal government of a company is regulated by its constitution[13] or articles of association, or in the case of an SE, its statute. It is to these that reference must be made for the provisions applicable to meetings of shareholders and directors. The articles will usually incorporate those sections of the Acts that are mandatory in relation to company procedure, and must be read subject to numerous decided cases and the applicable law. It is the purpose of the succeeding chapters to examine the interrelationship between these three elements: the articles, the Acts and case law.

It will be necessary, too, to mention the Registrar of Companies. The work of this official body (referred to as "the Registrar") has grown considerably in recent years and few formal steps can be carried out without seeking a certificate from or sending a return to the Registrar.[14] His main responsibilities are to incorporate and dissolve companies, to examine and record documents submitted to the Registry, and to make this information available for public inspection.

Section 8 of the 1985 Act provided for the making of regulations prescribing specimen sets of articles of association. These regulations are the Companies (Tables A–F) Regulations 1985[15] (as amended) and they provided specimen

[10] Companies Act 2006, s.4(1).
[11] Companies Act 2006, s.761 and s.763
[12] Companies Act 2006 s.755.
[13] Companies Act 2006, Pt 3.
[14] At Companies House, which is now an executive agency of the Department of Business, Innovation and Skills. Companies House has three main offices: in Cardiff, London and Edinburgh. These offices receive documents for registration. The address of the main office at Cardiff is: Crown Way, Cardiff, CF4 3UZ (website: *http://www.companies-house.gov.uk* [Accessed August 27, 2014]; telephone for central enquires: 0303 1234 500; Email address: enquiries@companies-house.gov.uk).
[15] Companies (Tables A–F) (Amendment) Regulations 1985 (SI 1985/1052).

articles for the range of companies that were available for incorporation. The Tables are the successors to those which first saw the light of day in the Companies Act 1862 (described by Sir Francis Palmer as the "*magna carta* of co-operative enterprise"). The most important, and most widely used set is Table A, the Regulations for Management of a Company Limited by Shares. Table A was, by the Acts, the default articles if no other articles are filed, but companies were given freedom in the matter and often adopted articles departing widely from Table A. However, where the articles are silent on any given matter, the provisions of Table A provided a default unless they were specifically disapplied. It should be noted that companies registered under earlier statutes and adopting the Table A of that statute continue to be regulated thereby; they do not automatically adopt the Table A of a later statute. Thus a large number of companies continue to be governed by Table A of the Companies Act 1948 (as amended), and of earlier statutes.

Some companies have adopted updated articles, but many have not. Many companies are still reliant on articles based on Table A, but these articles are no longer in use for newly incorporated companies. The Companies (Model Articles) Regulations 2008,[16] made under Companies Act 2006, set out the model articles which have been in use for all companies incorporated since October 1, 2009.

In the case of an SE, no format for the statutes has been set out, and in the few SEs that have been incorporated to date, the memorandum and articles of association of a limited company have been used as the basis of the statutes.

In the case of a CIC, no default memorandum and articles is provided for and a full set must be provided on incorporation. The required contents of the M&A are set out in the schedules to the Community Interest Company Regulations 2005.[17]

The Charity Commission provides model constitutions for CIOs. It is not a requirement that these be used, but even where a bespoke constitution is to be used, they provide a useful framework for drafting the constitution. Where the model constitution is not used, then a copy of the new constitution showing where it has deviated from the model constitution must be provided.

11–11 In the succeeding chapters, where the relevant articles of Table A (the 1985 version) or the new model articles are quoted, they are quoted in full; these extracts are indented in the text. Elsewhere, a certain amount of paraphrasing of the Acts and provisions of the articles has been employed to avoid too turgid a narrative. There, the footnotes will enable the reader to refer to the statute for the detailed wording.

Finally, it should be borne in mind that those companies whose securities are listed on a recognised investment exchange, such as the London Stock Exchange (LSE), must comply with the Listing Rules made under Pt VI of the Financial Services and Markets Act 2000, and which form part of the *Handbook of Rules and Guidance* published by the Financial Conduct Authority (FCA).[18]

[16] Companies (Model Articles) Regulations 2008 (SI 2008/3229).
[17] Community Interest Company Regulations 2005 (SI 2005/1788).
[18] The up-to-date version of the *Handbook of Rules and Guidance* can be found on the FCA website: http://www.fca.org.uk [Accessed July 7, 2014].

4. THE ULTRA VIRES RULE

11–12 The problem of directors acting outside of the scope of the objects clause, as set out in the company's constitution, has largely been eradicated over the past 100 years, and was dealt its last largely fatal blow, by the Companies Act 2006. Companies have long been able to use an all-encompassing objects clause that covers all possible activity. The model articles introduced under the 2006 Act do not have any clause setting out the purpose for which the company was incorporated, and therefore the companies have unrestricted objects. However, this does not mean that the problem of directors acting outside of the powers of the company has been eliminated, and a discussion of the ultra vires rule remains relevant.[19]

The basic rule (now subject to the statutory qualifications referred to below) is that the powers of a company are set out in its memorandum. To the extent that a purported action is outside the scope of the objects of the company as set forth in the objects clause of its memorandum, or is not incidental to the attainment of those objects, or capable of being so incidental, it is null and void. An act of the board which is ultra vires the company is not capable of being ratified by shareholders in general meeting, even if their vote is unanimous.[20]

If a contract is ultra vires, neither the company nor any third party can sue on it; this, however, is subject to s.40 of the 2006 Act. This section provides that in favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of limitation under the company's constitution. It also provides that a party to a transaction with a company is not bound to enquire as to whether it is permitted by the company's memorandum, or as to any such limitation on the powers of the directors to bind the company or authorise others to do so.

The third party shall be presumed to have acted in good faith unless the contrary is proved.[21] Simply knowing that an act is beyond the powers of the directors under the company's constitution is not sufficient grounds for a charge of bad faith.

Under s.39 of the 2006 Act, the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum.

11–13 While these provisions help third parties, directors will remain liable to shareholders if they act, or attempt to act, in a way that exceeds either the powers of the company or their own capacity as directors. In the case of a breach of the objects clauses in the memorandum, the transgression can be restrained by injunction before any legal commitment to a third party is entered into. If the directors act outside their powers as defined in the company's memorandum, and then seek to have the matter ratified by the company in general meeting: a

[19] See, for example, the case of *Gibb v Maidstone and Tunbridge Wells NHS Trust* [2010] EWCA Civ 678; [2010] I.R.L.R. 786 in which the NHS trust made an agreement with the outgoing chief executive that was determined to be ultra vires.

[20] *Ashbury Carriage Company v Riche* (1874–75) L.R. 7 H.L. 653; and see *Precision Dippings v Precision Dippings Marketing* [1986] Ch. 447; [1985] 3 W.L.R. 812, C.A.

[21] *T.C.B. Ltd v Gray* [1986] Ch. 621; [1986] 1 All E.R 587.

resolution of the members will be required but it may be a written resolution. In this case, neither the director nor any member connected with him, can vote on the resolution.[22]

5. THE RULES IN *FOSS V HARBOTTLE*

11–14 The court will not interfere in the internal affairs of a company when the irregularity complained of can be rectified by the company itself:

> "In the leading case of *Foss v. Harbottle*, the directors had been charged with transactions whereby the property of the company had been misapplied, but when the matter was discussed at a general meeting, the majority decided to take no action. An application by a dissentient shareholder was made to the court for the appointment of a receiver to take over the property of the company. It was held that, as the acts of the board were capable of confirmation by the members, the court would not interfere; there was nothing to prevent the company from obtaining redress, in its corporate capacity, for the wrongs done to it."[23]

The matter is one of procedure and jurisdiction; the court will not do what it is for the company itself to do according to the provisions of its articles. If a general meeting is wanted, the directors have power to call it, but the court cannot, in general, compel directors to do something they determine is not in the interests of the company. If the directors do not call a meeting, it is left for the shareholders to call it as provided in the articles. If the shareholders do not wish to do so the court has no power to take the management out of the hands of the directors.[24]

There are a number of exceptions to the rule in *Foss v Harbottle* in which a minority of shareholders or an individual shareholder may bring an action against the company. These are:

1. Where the right alleged to have been infringed is a personal right vested in the individual shareholder.
2. Where the act complained of is illegal.[25]
3. Where there has been a fraud on the company and those against whom fraud is alleged either control the company, or are in a position to manipulate matters so that the majority do not allow a claim to be brought for the alleged wrong.[26]

[22] Companies Act 2006, s.239.

[23] *Foss v Harbottle* 67 E.R. 189; (1843) 2 Hare 461. See also *Pavlides v Jensen* [1956] Ch. 565; [1956] 3 W.L.R. 224.

[24] *MacDougall v Gardiner* (1875) 1 Ch.D. 13.

[25] *Flitcroft's Case* (1982) 21 Ch.D. 519 CA.

[26] *Prudential Assurance Co. v Newman Industries (No. 2)* [1982] Ch. 204; [1982] 2 W.L.R. 31. B and L were directors of two companies, Newman and TPG. B and TPG were shareholders in Newman, but did not hold a majority of the shares. B and L also held all the shares of a company that held a substantial shareholding in TPG. TPG was in serious financial difficulties and B drew up a plan to sell, inter alia, TPG's assets to Newman. Valuation of assets in the plan was based on deliberately misleading information, and by deceit B and L induced the Newman board to accept it. There followed a general meeting at which a resolution approving the plan was passed. The plaintiff, a minority shareholder in Newman, brought an action claiming damages on behalf of all shareholders.

4. Where a specified majority is required (e.g. for a special resolution) and this has not been obtained.

11–15 As stated, the rule in *Foss v Harbottle* applies to corporate membership rights and does not apply where the right being infringed is that of an individual shareholder. For example, an individual shareholder has a right not to be forced to subscribe for shares in the company or to have his liability increased. He has the right to petition for a compulsory winding-up, and to require the directors to hold a general meeting, and to apply to court where there has been default in holding a requested general meeting.[27] A further example would be a shareholder's right under the company's articles to have his vote accepted at a general meeting of the company.[28] In general, he has individual rights where his position as a shareholder is affected and where he has not, by the contract between himself, the company and the other shareholders arising from his status as a shareholder, impliedly left the matter to the decision of the majority of shareholders in general meeting—when he has corporate membership rights as opposed to individual membership rights.

The application of the rule in *Foss v Harbottle* has not been consistent. In some cases, the court has chosen not to intervene (usually on the ground that it would serve no useful purpose to do so) where the rule has not been cited. In others, relief has been granted but the rule has not been raised in defence.[29] While, therefore, the rule should be noted by those who seek to defend the propriety of procedure followed at a meeting from attacks by members, there is no certainty that it will be applied.

In addition, s.994 of the 2006 Act strengthens the hand of a shareholder who can prove that the affairs of the company are being, or have been conducted, in a manner which is unfairly prejudicial to the interests of its members generally or of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. This includes the removal of the auditor of the company where the removal is done on improper grounds or on the grounds of divergence of opinions on accounting or auditing procedures.[30] Among other things, the court may authorise civil proceedings to be brought in the name of the company (the procedural mechanism which *Foss v Harbottle* requires).[31]

B contended that the court had no jurisdiction, as the defendants did not have voting control of Newman. It was held that the action should be allowed, since otherwise the interests of justice would be defeated.

[27] Companies Act 2006 ss.303 and 306.

[28] *Pender v Lushington* (1877) 6 Ch.D. 70.

[29] See *Baxter* [1976] J.B.L. 323.

[30] Companies Act 2006 s.994(1a).

[31] Companies Act 2006 Act s.996. For examples of s.996 (formerly Companies Act 1985, s.459) in practice, see *Re London School of Electronics* [1986] 1 Ch. 211; *Re Cumana Ltd* [1986] B.C.L.C. 430, C.A (also [1986] BCC 99]; and *Lowe v Fahey* [1996] B.C.C. 320; [1996] 1 B.C.L.C. 262. On the other hand, in *Re Saul D. Harrison Sons plc* [1994] B.C.C. 475; [1995] 1 B.C.L.C. 14, the s.994 (s.459 of the 1985 Act) remedy was refused, considerable importance being attached in that case to the contract between the company and its shareholders, which is constituted by the company's articles of association.

6. GENERAL MEETINGS AND ACCOUNTS

11–16 The arrangements for elective resolutions were embodied in s.379A of the 1985 Act under which private companies were able, by means of an elective resolution:

1. to extend the authority of directors to allot shares without the approval of a general meeting (1985 Act s.80A);
2. to dispense with the holding of an annual general meeting (AGM) (1985 Act s.366A);
3. to reduce the existing level of percentage consent required for holding a shareholders' meeting at short notice (1985 Act ss.369(4) or 378(3));
4. to dispense with the laying of accounts and reports before a general meeting (1985 Act s.252); and
5. to avoid the need for the annual appointment of auditors (1985 Act s.386).

However, since the implementation of the 2006 Act in relation to AGMs in April 2008, only the elective regime in respect of the allotment of shares ((1) above) remains in force.[32]

Private limited companies are no longer required to hold an AGM, or to place the accounts before a general meeting. Accounting records must be kept and accounts prepared.[33] They are obliged to give copies of the accounts to the members, any debenture holders and anyone entitled to receive notice of general meetings.[34] There is only a requirement for the appointment of an auditor where it is felt by the directors that an audit will be required at the end of the accounting period.[35]

[32] Companies Act 2006 s.551.

[33] Companies Act 2006 s.386, and generally Pt 15 of the Companies Act 2006.

[34] Companies Act 2006 s.423.

[35] Companies Act 2006 s.485.

held that a director vacated office automatically, and the board had no power to waive the event or condone the offence.[34]

Involuntary absence caused, for example, by cogent medical reasons, might not be enough to disqualify a director under this type of provision; further, it is not clear whether the words "without permission" imply a board resolution or whether informal consent would suffice.[35] However, art.18 of the model articles provide for vacation of the directors post on medical grounds.

Resignation

21–14 The proper course for a director who wishes to resign is to serve notice on the company in accordance with art.8(f). As a matter of best practice the notice should be in writing. Section 725 of the 1985 Act provides that a document may be served on a company by leaving it at or sending it by post to, the registered office. It has however been held that an oral resignation is effective if given and accepted at a general meeting, even though the articles provide that a director shall vacate office if he resigns by notice in writing.[36] In another case, an oral resignation was accepted at a board meeting when the facts were such as to show that the resigning director had clearly intended to resign.[37] The important point in these two cases is that the resignation was accepted. In instances where the articles do not specifically provide for the resignation of a director, a director may resign by notice to the company.[38]

Once a notice in writing of resignation has been given it cannot be withdrawn without the consent of the company.[39]

Removal

21–15 Some articles provide that a director can be removed from office by the other board members. There exists an institutional shareholders' recommendation that such a power should only be exercised by a written resolution of at least 75 per cent of the director's co-directors, for failure to attend a specified number of board meetings or board meetings held during a specified period.[40]

Suspension

21–16 A board member guilty of obstruction or disorderly conduct during the continuance of any meeting may be suspended for at least the remainder of the meeting.[41]

[34] *Re Bodega Co Ltd* [1904] 1 Ch. 276, *Glossop v Glossop* [1907] 2 Ch. 370.
[35] *Mack's Claim* [1900] W.N. 114, *Willsmore v Willsmore Tibbenham Ltd* [1965] 2 Lloyd's Rep. 363; (1965) 109 S.J. 699.
[36] *Latchford Premier Cinema v Ermion* [1931] 2 Ch. 409.
[37] *Sawyer v. Mann (Financiers) Ltd* (1937) 184 L.T.J. 42.
[38] *Transport Ltd v Schonberg* (1905) 21 T.L.R. 305.
[39] *Glossop v Glossop* [1907] 2 Ch. 370.
[40] Institutional Shareholders' Committee: The Role and Duties of Directors (August 1993).
[41] *Barton v Taylor* [1886] 11 App. Cas. 197 at 204.

CHAPTER 22

Constitution and Conduct of Directors' Meetings

1. DIRECTORS MUST ACT AS A BODY

22–01 Since the board of directors is entrusted with the management and administration of the company, its affairs must be conducted with reasonable formality. Decisions of the board will govern internal matters such as capital expenditure and personnel policy, and board resolutions constitute the authority for dealings with third parties.

In relation to how the board shall conduct its business, Table A stated:

> "**88.** Subject to the provisions of the articles, the directors may regulate their proceedings, as they think fit …"

In the words of Fry LJ: "As they think fit. Must they not meet in order to think?" The learned judge made his remark in a case in which the facts were as follows:

An application was made for shares in a company and on the same day there was a meeting of two out of four directors, the other two not having been given sufficient notice. The meeting resolved that two should form a quorum, and allotted shares. They adjourned the meeting until the next day. On that day the allottee withdraw his application and the meeting was again adjourned to the following day. On this third occasion three directors were present; one of those who had previously been absent approved the resolution relating to the quorum and the meeting confirmed the allotment. The fourth director on the same day wrote approving the quorum and his letter was received on the next day. The Court of Appeal held that as there had been no notice of the original meeting none of the subsequent meetings was valid and the allotment was therefore bad.[1]

The case is authority for the rule that, in general, the only way in which directors can exercise their constitutional powers is at or under the authority of a meeting of which proper notice has been given to all the directors entitled to attend.

Although Table A no longer applies to companies incorporated since October 1, 2009, this rule is still valid. The model articles,[2] which apply to companies incorporated since October 1, 2009 state that:

[1] *Re Portuguese Consolidated Mines Ltd* (1889) 42 Ch.D. 160.
[2] Companies (Model Articles) Regulations 2008 (SI 2008/3229).

> **88.**Subject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company." [NEW FN Model Articles for Private Limited Company; Companies (Model Articles) Regulations 2008 Schedule 1]

Such management is surely best conducted at a meeting. However the model articles go further by stating that:

> "the general rule about decision-making by directors is that any decision of the directors must be either a majority decision at a meeting or a decision taken in accordance with article 8.[3] This makes it clear that the decision-making, except where unanimous, should be carried out at a meeting."

22–02 A board meeting can be held in informal circumstances:

> "There was a vacancy on the board. A board meeting had been properly summoned for the purpose of filling it. S intimated to B (they were both directors) that he would see B in his (S's) office at 2.30pm B went there and saw S outside the office door, in a passage. B explained the purpose of the meeting and a vote was taken; B exercised his casting vote and the records were written up. Held, it was a valid board meeting.[4]"

However, the casual meeting of two directors even at the office of the company cannot be treated as a board meeting at the option of one against the will and intention of the other:

> "A company consisted of two directors, Canon Barron and Mr. W. J. Potter, and not being able to agree as to the conduct of the business they refused to meet each other in board meeting. Canon Barron requisitioned a general meeting for the purpose of approving resolutions removing Mr. Potter from the board and for appointing an additional director. The day before the general meeting, Mr. Potter met Canon Barron coming off his train at Paddington Station and proposed that certain persons be elected directors of the company. The Canon replied that he had nothing to say and continued towards his taxi, but Mr. Potter as chairman of the company gave his casting vote and declared the resolution carried. Realising that this might not have been good enough, Mr. Potter went up to the Canon in the office before the general meeting and proposed certain additional directors. Canon Barron made a non-committal answer, but Mr. Potter again exercised his casting vote and declared them elected. these were not board meetings.[5]"

The importance of the act to the company will have some bearing on whether or not the meeting will be vitiated by a technical irregularity. For example, a matter such as a winding-up would require a greater observance of strict formality than minor matters of administration.[6]

However, it is not necessary for the directors to state that a meeting is a board meeting for it to be one. In the case of *Hunter v Senate Support Services Limited*[7]

[3] Model Articles for Private Limited Company; Companies (Model Articles) Regulations 2008 Sch.1.
[4] *Smith v Paringa Mines* [1906] 2 Ch. 193.
[5] *Barron v Potter* [1914] 1 Ch. 895.
[6] *Re Haycraft Gold Reduction and Mining Co* [1900] 2 Ch. 230.
[7] *Hunter v Senate Support Services Limited* [2004] WL 10744336.

the directors, who were all present, did not decide to treat their meeting as a formal board meeting, but the judge stated that it would be unrealistic not to treat it as such.

It is not essential to the validity of an act of the board that the directors shall, at the time of reaching a binding decision, have been all assembled together in one place under one roof.[8] In today's conditions, for example, directors situated in several different places can be connected for a conference by telephone or video conferencing, or by webcast; provided it had been duly convened as such, this can constitute a valid board meeting.

The model articles for private companies which apply to all companies incorporated since 1 October 2009 make the provision for meetings otherwise than in person as follows:

> "1. **10.**Subject to the articles, directors participate in a directors' meeting, or part of a directors' meeting, when—
> (a) the meeting has been called and takes place in accordance with the articles, and
> (b) they can each communicate to the others any information or opinions they have on any particular item of the business of the meeting.
> 2. In determining whether directors are participating in a directors' meeting, it is irrelevant where any director is or how they communicate with each other.
> 3. If all the directors participating in a meeting are not in the same place, they may decide that the meeting is to be treated as taking place wherever any of them is.[9]"

The model article has the advantage of being simple, practical and flexible. Where the model articles are not being used, an alternative example of a model form of article[10] providing for a meeting to be held by telephone or video conference is as follows:

> "Any or all of the directors, or members of a committee of directors, can take part in a meeting of the directors or of a committee of directors:
>
> (a) by way of a conference telephone, video, or webcast or similar equipment, designed to allow everybody to take part in the meeting; or
> (b) by a series of telephone calls from the chairman of the meeting.
>
> Taking part in this way will be counted as being present at the meeting. A meeting which takes place by a series of calls from the chairman will be treated as taking place where the chairman is calling from. Otherwise meetings will be treated as taking place where most of the participants are."

It should be noted that proper notice of the meeting still has to be given. In the model article quoted, the first bullet point is declaratory of the existing position; the second bullet point breaks new ground in that without it such a series of calls would not constitute a meeting. In view of the unusual nature of the provision, it

[8] See for example, *Re Bonelli's Telegraph Co* (1871) L.R.12 Eq.246. For further discussion of some of the above cases, see 83 S.J. 577.
[9] Companies (Model Articles) Regulations 2008 Sch.1.
[10] It is largely taken from the Plain English articles adopted by National Westminster Bank Plc in May 1996 although slightly amended.

is preferable to use it only where the matters to be discussed are formal and uncontroversial or in cases of urgency. Otherwise, the chairman would be wise to set up a more conventional meeting or arrange for a resolution to be circulated for signature.[11]

The articles should be drafted to suit the circumstances of the directors and the practicalities of decision-making amongst them. However, the maximum flexibility should be allowed for as there is rarely any practical reason not to allow such flexibility.

In the light of the importance of the principle that directors must act as a body, the courts will intervene where a director is improperly excluded from board meetings by his fellow directors, by granting an injunction restraining the exclusion.[12] The injunction will however be refused if a general meeting of shareholders resolves that it does not wish the excluded director to act as a member of the board.[13] In addition, where meetings are not properly constituted, the minutes will not be considered to have been approved by subsequent meetings nor will there be any implicit ratification of the business conducted at such meetings.[14]

2. MEETINGS OF A SOLE DIRECTOR

22–03 It is clear that there can be a directors' meeting when there is only one director of a company. The meeting is all the more important where there are no other directors to control the sole director's actions, and it could be held in the presence of the company secretary. If the director, however, holds the meeting by himself he must deliberate carefully (a "statutory pause for thought") and pay special regard to the wording of the minutes.[15]

3. NOTICE OF BOARD MEETINGS

22–04 It should be noted that proper notice of the meeting still has to be given. In general, notice of a board meeting should be given to each member.

The model articles for private companies state that:

> **"9.**—(1) Any director may call a directors' meeting by giving notice of the meeting to the directors or by authorising the company secretary (if any) to give such notice.
>
> (2) Notice of any directors' meeting must indicate—
> (a) its proposed date and time;
> (b) where it is to take place; and
> (c) if it is anticipated that directors participating in the meeting will not be in the same place, how it is proposed that they should communicate with each other during the meeting.

[11] For a general review of recent practice, see PLC, May 1997, at 31.
[12] *Pulbrook v Richmond Consolidated Mining Co* (1878) 9 Ch.D. 610, and see *Hayes v Bristol Plant Hire Ltd* [1957] 1 W.L.R. 499; [1957] 1 All E.R. 685.
[13] *Bainbridge v Smith* (1889) 41 Ch.D. 462.
[14] *Sneddon v McCallum* [2011] CSOH 59; 2011 G.W.D. 13-292.
[15] *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald* [1996] Ch.274; [1995] 1B.C.L.C. 352.

> (3) Notice of a directors' meeting must be given to each director, but need not be in writing.
>
> (4) Notice of a directors' meeting need not be given to directors who waive their entitlement to notice of that meeting, by giving notice to that effect to the company not more than 7 days after the date on which the meeting is held. Where such notice is given after the meeting has been held, that does not affect the validity of the meeting, or of any business conducted at it."[16]

Table A contains the following provision:

> "**88.** A director may, and the secretary at the request of a director shall, call a meeting of the directors. It shall not be necessary to give notice of a meeting to a director who is absent from the United Kingdom.."

It will be observed that both articles are silent as to the length of notice. Reasonable notice is all that is required, and if a directors' meeting is being convened in an emergency (for example, if a take-over bid for the company has been announced) notice could be extremely short. It need not be given in writing. The contents and style of the notice are generally left to the discretion of the board, which will make its own rules of conduct.

Each director should receive notice of a board meeting, because otherwise it would be possible for some members of the board to meet and transact business which may not receive the concurrence of other members:

> "A board consisted of five directors. Two directors called a meeting for two o'clock in the afternoon of the same day, knowing that the third director could not attend until three o'clock, and not knowing whether the fourth director could attend or not; no notice was sent to the fifth director who was abroad. No intimation of any special business was set out in the notice. The two directors (who constituted a quorum) then met at the time appointed, but their acts were declared irregular as "what was done on that occasion was not the act of the board, and did not bind the company."[17]

Where a director is absent from the United Kingdom, the articles usually excuse the sending to him of a notice of meeting. Article 88 of Table A made a specific provision for this but the model articles in use since October 1, 2009 do not, drafted articles often add back in this provision. But even without this provision, notice need not be given to a director who is abroad unless he is within easy reach[18]—a situation which has become progressively more likely to arise with the development of modern communication systems. In practice, because of the ease of electronic communications, notice will be given to all directors and can be sent by email or text and rarely is it impossible or impractical to contact a director. If the matter for which the meeting is being convened is important and urgent, it is even more vital that an attempt is made to contact all the directors (even those who are abroad) so that those who are necessarily absent can at least have their views reported to the meeting. It might be sensible to amend articles based on Table A to provide that notice of a board meeting shall be sent to a director who is outside the United Kingdom at the relevant time, and that it shall

[16] Companies (Model Article) Regulations 2008 Sch.1.
[17] *Re Homer District Consolidated Gold Mines* (1888) 39 Ch.D. 546.
[18] *Halifax Sugar Refining Co v Francklyn* (1890) 62 L.T. 563.

be the responsibility of the director concerned to notify the company of an address (electronic or physical) where he can be contacted. The model articles do not specifically mention the location of the directors but provide for notice to be given to all directors. It specifies that the notice need not be in writing, opening the way for the use of phone calls, and text messages.

If the board has decided to meet on fixed dates at the same place, the distribution of a formal notice can be waived. Otherwise, notice must be sent to a director even if he has stated that he will not be able to attend.[19] The model articles provide that the requirement for notice can be waived up to seven days after the date of the meeting and the fact that the waiver of the requirement comes in after the meeting does not invalidate what happens at the meeting.

In principle, unless the articles otherwise provide, the notice does not have to specify the nature of the business to be transacted.[20]

However, the failure to give notice of a meeting or the use of an improper procedure for doing so does not invalidate any contract or agreement made with a third party. This was a decision in *Ford v Polymer Vision Ltd*[21] where instruments signed at two meetings which were held to be invalidly convened were still binding on the company.

4. CHAIRMAN

22–05 The model articles which are the default articles for companies incorporated since October 2009 provide as follows for the chairman of a directors meeting:

> "**12** — Chairing of directors' meetings
>
> (1) The directors may appoint a director to chair their meetings.
> (2) The person so appointed for the time being is known as the chairman.
> (3) The directors may terminate the chairman's appointment at any time.
> (4) If the chairman is not participating in a directors' meeting within ten minutes of the time at which it was to start, the participating directors must appoint one of themselves to chair it.[22]"

Under Table A the following provision is made:

> **"91.** The directors may appoint one of their number to be the chairman of the board of directors and may at any time remove him from that office. Unless he is unwilling to do so the director so appointed shall preside at every meeting of directors at which he is present. But if there is no director holding that office, or if the director holding it is unwilling to preside or is not present within five minutes after the time appointed for the meeting, the directors present may appoint one of their number to be the chairman of the meeting."

[19] *Re Portuguese Consolidated Mines Ltd* (1894) 42 Ch.D.160. See para.22–01(no.1).
[20] *Compagnie de Mayville v Whitley* [1896] 1 Ch. 788.
[21] *Ford v Polymer Vision Ltd* [2001] EWHC 945.
[22] Companies (Model Articles) Regulations 2008 Sch.1.

Even in the absence of a specific provision, the appointment of a chairman does not entitle him to fill the office for as long as he retains his directorship, and the directors have power at any time to substitute another chairman in his place.[23]

The chairman should make himself familiar with the regulations of the company, although in practice the secretary is usually the person who brings to his notice such matters as absence of quorum, qualification of directors, disclosure of interests in contracts and other matters that must be observed in order to make the proceedings valid.

Beyond these practical details, the chairman is responsible for seeing that the business of the directors is conducted efficiently. Some practical aspects are discussed below, in Ch.23.

The chairman of the board normally takes the chair at general meetings.[24]

5. QUORUM

If a quorum is not present, the meeting cannot transact business. In practice, no business can be done, even if all the directors are present, if their number is less than the prescribed quorum,[25] unless the articles provide that they may act notwithstanding any vacancies.[26] 22–06

The articles usually fix whatever quorum is deemed necessary. Exceptionally, the number required for a quorum can be established by usual practice.[27] It is possible for there to be a quorum of one director.[28] In practice, however, articles of association are unlikely to provide for a quorum of one, and in fact the model articles provide for a quorum of two as a default. This is despite the fact that under s.154 of Companies Act 2006, a private company need have only one director.

The model articles provide the following:

> "**11.**— Quorum for directors' meetings
>
> (1) At a directors' meeting, unless a quorum is participating, no proposal is to be voted on, except a proposal to call another meeting.
> (2) The quorum for directors' meetings may be fixed from time to time by a decision of the directors, but it must never be less than two, and unless otherwise fixed it is two.
> (3) If the total number of directors for the time being is less than the quorum required, the directors must not take any decision other than a decision—
> (a) to appoint further directors, or
> (b) to call a general meeting so as to enable the shareholders to appoint further directors.[29]"

Table A provides that:

[23] *Foster v Foster* [1916] 1 Ch.352. and Article 12 of the Model Articles for Private Companies.
[24] See para.13–31.
[25] *Faure Electric, etc. Co v Phillipart* [1888] 58 L.T. 525.
[26] *Re Bank of Syria* [1900] 2 Ch. 272.
[27] *Lyster's Case* (1867) L.R.4 Eq.233.
[28] *Re Fireproof Doors Ltd* [1916] 2 Ch. 142.
[29] Companies (Model Articles) Regulations 2008 Sch.1.

> "**89** The quorum for the transaction of the business of the directors may be fixed by the directors and unless so fixed at any other number shall be two. A person who holds office only as an alternate director shall, if his appointor is not present, be counted in the quorum."

If no quorum is established by the articles, the board must act by a majority of directors,[30] or a majority of the directors may fix a quorum. A director prohibited from voting, for example, by reason of his interest in a contract, cannot be taken into account for the purpose of ascertaining whether a quorum of directors is present.[31] Where two or more directors are interested in a contract, any arrangement by which the resolution is split to enable a director to abstain from voting on the part in which he is interested would not be permissible:

> "The articles of a company provided that a director should not be disqualified from contracting with the company, but that he could not vote in respect of such contract; the quorum fixed by the directors was three. At a board meeting at which four directors were present, including X and Y, a debenture was issued to X pursuant to a resolution on which X did not vote, and another to Y pursuant to another resolution on which Y did not vote. The issue of the two debentures was held to be invalid because the two debentures formed part of the same transaction and the two resolutions were invalid for want of a disinterested quorum. At a subsequent meeting a resolution was passed reducing the quorum to two to enable a resolution for another debenture to be passed. Held, that the resolution relating to the debenture was invalid for want of a disinterested quorum, and the resolution relating to the reduction of the quorum was not passed in the interest of the company but only for the purpose of enabling X and Y to obtain an interest in the company's property."[32]

Similarly, art.14 of the model articles, and art.95 of Table A, provide that a director shall not be counted in the quorum present at a meeting in relation to a resolution on which he is not entitled to vote.

Where articles based on Table A are in use and there is difficulty in obtaining a disinterested quorum, or where a director refuses to attend board meetings and his absence makes it impossible to secure a quorum, there must be recourse either to the shareholders in general meeting, for example, by the use of the procedure laid down by s.303 of Companies Act 2006, or to the court:

> "The whole of the issued share capital of the company was held by two persons who were also its directors. The quorum for the board meeting was two. One director refused to attend a board meeting to consider the registration of share transfers executed by the other director. It was held that the right of a shareholder to dispose of his shares can only be restricted subject to an express provision in the articles, and the court ordered the transfers to be registered."[33]

[30] *York Tramways Co v Willows* (1882) 8 Q.B.D. 685. See also para.6.04, no.17.

[31] *Re Greymouth Point Elizabeth Ry.*[1904] 1 Ch.32. See below for a fuller discussion of the matter of conflict of interest.

[32] *Re North Eastern Insurance Co* [1919] 1 Ch. 198.

[33] *Re Copal Varnish Co* [1917] 2 Ch. 349. See also *Re Opera Photographic* [1989] 1 W.L.R. 634; (1989) 5 B.C.C. 601. Note, however, *Hood Sailmakers Ltd v Axford* [1997] 1 W.L.R. 1535; [1997] 4 All E.R. 830, where it was held that are solution passed by a single director, where the quorum for board meetings was fixed at two, was invalid notwithstanding the fact that the absent director was not entitled to receive notice of the board meeting in question because he was out of the jurisdiction.

Section 306 of Companies Act 2006 provides that if for any reason it is impracticable to call a meeting of the company, the court may requisition one, either of its own motion or on the application of any director of the company or of any member of the company who would be entitled to vote at the meeting.

The model articles provide a slightly more flexible model. A director can count as forming part of a quorum if the directors' interest is not likely to give rise to a conflict of interest for the purpose of what has to be discussed at the meeting. The company may also resolve by ordinary resolution that the provision in the article preventing him for forming part of a quorum be disapplied. In addition, some conflicts of interest can be ignored as permitted causes of a conflict of interest. These include guarantees given to a director, or on behalf of the company, subscriptions for shares or agreements to subscribe for shares or general arrangements for the benefit of employees which do not especially benefit the directors or former directors.

In accordance with this art.14 of the model articles, the decision as to whether a director can form part of the quorum is at the behest of the chairman whose decision is conclusive.

6. CONFLICT OF INTEREST

22–07 It is the duty of directors to avoid conflicts of interest. This duty was established by common law and given statutory effect in the Companies Act 2006 s.175. However, in the event that a conflict of interest arises ss.177 and 182 provide for dealing with them.

Under the Companies Act 2006 s.182, it is the duty of a director of a company who is in any way, whether directly or indirectly, interested in a transaction or arrangement which has been entered into by the company to declare the nature and extent of his interest to the other directors. This can be done at a meeting or by a notice in writing or by a general notice. In the case of a proposed contract, the declaration shall be made at the meeting at which the question of entering into the contract is first taken into consideration, or, by notice in writing or by general notice.[34] In this latter case where a director then becomes aware that the conflict of interest is not to materialise, or his original declaration was incomplete or inaccurate, then a further declaration must be made.[35] Where the director is unaware of the conflict of interest then clearly no declaration needs to be made, as no declaration can be made.

In accordance with these provisions where a director has any conflict of interest (for example he is also a director of a company in a competing field of activity), that should be declared. An interest should be declared even if it is patently obvious. The declaration should be full and frank, and cover the precise nature of the interest held.

Disclosure had to be made to a meeting of the full board of directors, not to a committee of directors; it makes no difference that all the board members knew of the interest in question, if there was no disclosure to a duly convened meeting

[34] Companies Act 2006, s.172(2).

[35] Companies Act 2006 s.172(3).