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Jersey Law Course 2011-12

Company Law

Dr Paul Omar

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The authors of all the editions, including the 3rd (2011) edition are Dr Paul Omar and Jonathan Walker.

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CONTENTS

0. Preface

Preface

This study guide is written for students taking the Jersey Law Course in 2011-2012. It covers the Company Law module.

It is also made available to legal practitioners and members of the public via the Institute of Law's website. Anybody using this guide is warned that it is written for educational purposes only. Nothing in the guide constitutes legal advice and users should not rely on anything said in the guide for any purpose other than gaining a general understanding of the areas of law it covers. While the Institute of Law, the authors and the Board of Examiners have taken reasonable care to ensure the accuracy of the guide, they accept no responsibility for any loss that may be incurred by anybody using this guide.

Official syllabus

The syllabus for the Company Law module and an official bibliography is issued by the Bailiff and published on www.jerseylaw.je:

Candidates may be examined on any Part of the Companies (Jersey) Law 1991, as amended, except for Part 18C (Continuance) and Part 18D (Cell Companies). Candidates may also be examined on the provisions of the Companies (General Provisions) (Jersey) Order 2002.

In addition to being familiar with the relevant Parts of the Companies (Jersey) Law 1991 and relevant decisions of the Jersey courts, candidates are expected to have a general understanding of principles company law in so far as relevant to the examination syllabus.

Permissible materials

Candidates sitting this paper will be supplied with copies of the following materials which they may refer to during the course of the examination:-

(a) Companies (Jersey) Law 1991, as amended;

(b) Companies (General Provisions) (Jersey) Order 2002; and

(c) Companies (Standard Table) (Jersey) Order 1992.

Bibliography

As referred to in the sections headed Syllabus and Materials above.

1. Introduction

History and Introduction to the Companies (Jersey) Law 1991

1.1. The purpose of the Companies (Jersey) Law 1991 was to replace the prior legal regime, composed of

- the Loi (1861) sur les sociétés à responsabilitée limitée and
- the Companies (Supplementary Provisions) (Jersey) Law 1968

collectively known as the Companies (Jersey) Laws 1861 to 1968. The later legislation made quite important changes to the former law in relation to reductions of capital, the liability of holders of partly-paid shares, the introduction of redeemable preference shares, alterations in the rights of holders of certain classes of share capital as well as to outline the permitted uses of the share premium account. Although important amendments were made in the insurance sector as a result of the Insurance Business (Jersey) Law 1983, the framework for company law was felt not to have kept up with progress elsewhere. Furthermore, the fact that the statutes were written in two languages was considered unsatisfactory as a framework for modern commerce. The Finance and Economics Committee of the States of Jersey commissioned a report in 1985 with terms of reference that included the review of the (then) present statutes relating to limited liability companies and to make recommendations, following consultation with appropriate local bodies, the introduction of a company law that was to be appropriate to requirements arising from local trade and the Island's position as an international financial centre, which had undergone considerable expansion in the 1970s and 1980s. A consultative document released in the wake of the report in 1986 formed the basis of the draft law that eventually became the Companies (Jersey) Law 1991.

1.2. The Companies (Jersey) Law 1991 is primarily based on the United Kingdom Companies Act 1985 with some provisions being derived from its legislative predecessor, the Companies Act 1948. Furthermore, there are influences from the Ontario Business Corporations Act 1982 and the Australian Companies Act 1961 model. Major changes introduced by this legislation included the concepts of holding and subsidiary companies, simplification of incorporation conditions and the use of a Standard Table (equivalent to Table A in the United Kingdom), new requirements for changes of name, the introduction of the distinction between private and public companies and the abolition of *ultra vires*. New provisions also introduced rules on the circulation of prospectuses in Jersey, the transfer of shares and corporate securities, the issue of fractional shares and whether share certificates need be issued in the case of certain companies or share classes, although particulars of the rights attached to share classes in public companies would still be required. Redeemable preference shares, the right for a company to reduce its share capital and provisions on distributions as well as amalgamation and arrangements were also novelties introduced by the law. Administration of the company was also a focus of the law with new rules on the filing of company documents, the indemnification of directors against liability, the disqualification and personal liability of directors, particulars of corporate officers for the purposes of enforcement as well as new rules on accounts and audit. A new facility to hold meetings other than by means of physical presence was introduced, while unfair prejudice against shareholders was given a statutory recourse in the law. Finally, an extensive regime was introduced for the winding up of companies. The Companies (Jersey) Law 1991 has also been amended on a number of occasions since it came into effect to update and refine its provisions.

Definitions and Interpretation

1.3. The following definitions are included in Art 1(1):

"annual return" means the return to be made by a company under Art 71;

"allotment", in relation to shares, means a transaction by which a person acquires the unconditional right to be included in a company's register of members in respect of the shares;

"arrangement", in Arts 125 and 126, includes a reorganisation of a company' share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods;

"articles", in relation to a company, means its articles of association as originally framed or as altered;

"capital accounts" means: (a) in relation to a par value company, its share capital accounts and any share premium accounts and capital redemption reserves; and (b) in relation to a no par value company, its stated capital accounts;

"cause" has the meaning assigned to it by the customary law of Jersey;

"Commission" means the Jersey Financial Services Commission established by the Financial Services Commission (Jersey) Law 1998;

"company" means a company registered under this Law, or an existing company;

"contributory" means a person liable to contribute to the assets of a company pursuant to Art 192;

"court" means the Royal Court;

"currency" includes foreign currency and any other means of exchange that may be prescribed;

"delivered", in Arts 200 and 201, includes (in the case of a document which is a notice) given;

“Désastre Law” means the Bankruptcy (Désastre) (Jersey) Law 1990;

“director” means a person occupying the position of director, by whatever name called;

“dissolved”, in relation to a company, means dissolved under this Law or any other law of Jersey;

“document” includes summons, notice, statement, return, account, order, and other legal process, and registers;

“existing company” means a company registered under the Laws repealed by Art 223 (the legislative predecessors to the Companies Law 1991);

“external company” means a body corporate which is incorporated outside Jersey and which carries on business in Jersey or which has an address in Jersey which is used regularly for the purposes of its business;

“financial period” means a period for which a profit and loss account of a company is made up in accordance with this Law;

“fixed period of time”, in Arts 3H, 144 and 144A, means a period of time which is ascertainable without reference to any event which is (a) contingent; or (b) otherwise uncertain;

“former forenames or surname” does not include: (a) in the case of a peer or a person usually known by a British title which differs from his or her surname, the name by which he or she was known before the adoption of the title or his or her succession to it; or (b) in the case of any person, a former forename or surname which was changed or disused before the person attained the age of 20, or which has been changed or disused for a period of not less than 20 years;

“guarantee company” means a guarantee company as defined in Art 3G;

“guarantor member” means a member of a company (whether or not it is a guarantee company) whose liability in his or her capacity as such a member is limited by guarantee, that is to say limited by the memorandum to the amount which the member thereby undertakes (by way of guarantee and not by reason of holding any share) to contribute to the assets of the company in the event of its being wound up;

“incorporated limited partnership” means an incorporated limited partnership as defined in Article 1 of the Incorporated Limited Partnerships (Jersey) Law 2011;

“insolvent” means unable to pay debts as they fall due;

“interdict” means a person in respect of whom a curator has been appointed in pursuance of Art 43 of the Mental Health (Jersey) Law 1969, or a corresponding provision of the law of a place outside Jersey;

“liabilities” includes any amount reasonably necessary to be retained for the purpose of providing for any liability or loss which is either likely to be incurred or certain to be incurred but uncertain as to amount or as to the date on which it will arise;

"limited company" means a limited company as defined in Art 3C;

"limited life company" means a limited life company as defined in Art 3H;

"limited share" means a share in respect of which liability is limited to the amount unpaid on it;

"memorandum", in relation to a company, means its memorandum of association as originally framed or as altered;

"Minister" means the Minister for Economic Development;

"net asset value", in relation to the shares of an open-ended investment company, means net asset value as defined in the company's articles;

"no par value company" means a no par value company as defined in Art 3F;

"no par value share" means a share which is not expressed as having nominal value;

"number", in relation to shares, includes amount, where the context admits of the reference to shares being construed to include stock;

"officer", in relation to a body corporate, means a director or liquidator;

"open-ended investment company" means a company: (a) the sole business of which is to invest in securities or other property of any description; and (b) the articles of which provide that its shares, or substantially all its shares, are to be redeemed or purchased at the request of the holders at a price or prices not exceeding the net asset value of those shares;

"paid up" includes credited as paid up;

"par value company" means a par value company as defined in Art 3E;

"par value share" means a share which is expressed as having nominal value;

"personal representative" means the executor or administrator for the time being of a deceased person;

"prescribed" means prescribed by Order made by the Minister;

"printed" includes typewritten and a photocopy of a printed or typewritten document;

"private company" means a private company as defined in Art 3B;

"prospectus" means an invitation to the public to become a member of a company or to acquire or apply for any securities, for which purposes: (a) an invitation is made to the public where it is not addressed exclusively to a restricted circle of persons; and (b) an invitation shall not be considered to be addressed to a restricted circle of persons unless: (i) the invitation is addressed to an identifiable category of persons to whom it is directly communicated by the inviter or the inviter's agent, (ii) the members of that category are the only persons who may accept the offer and they are in possession of sufficient information to be able to make a reasonable evaluation of the invitation, and (iii) the number of persons in Jersey or elsewhere to whom the invitation is so communicated does not exceed 50;

"public company" means a public company as defined in Art 3A;

"published" means: (a) in respect of a fee payable by virtue of this Law, published by the Commission in accordance with Art 15(5) of the Financial Services Commission (Jersey) Law 1998; and (b) in any other case, published by the Commission in a manner likely to bring it to the attention of those affected,

"records" means documents and other records however stored;

"registrar" means the registrar of companies appointed pursuant to Art 196 and "registrar's seal", in relation to the registrar, means a seal prepared under Art 197;

"securities": (a) in Art 51A, has the meaning assigned to it by paragraph (4) of that Art and (b) except as provided in sub-paragraph (a) of this definition, means: (i) shares in or debentures of a body corporate, (ii) interests in any such shares or debentures, or (iii) rights to acquire any of the foregoing;

"separate limited partnership" means an separate limited partnership as defined in Article 1 of the Separate Limited Partnerships (Jersey) Law 2011;

"share": (a) means a share in a body corporate… and, unless a distinction between shares and stock is expressed or implied, also means stock; and (b) in Art 36, also has the meaning assigned to it by paragraph (2A) of that Art except that in Art 116(1), it means a share, as defined in sub-paragraph (a) of this definition, to which Art 116(2) refers;

"special resolution" has the meaning given to that expression by Art 90;

"surname", in the case of a peer or a person usually known by a title which differs from his or her surname, means that title;

"treasury share" means a share held as a treasury share under Art 58A(1);

"unlimited share" means a share in respect of which liability is not limited to the amount unpaid on it;

"variation", in Arts 52 and 53, includes abrogation;

"year" means a calendar year.

1.4. Definitions of holding and subsidiary companies are contained in Art 2.

a) Under Art 2(1), a body corporate is deemed to be a subsidiary of another body corporate if the second body: (a) holds a majority of the voting rights in the first body; (b) is a member of the first body and has the right to appoint or remove a majority of the board of directors of the first body; or (c) is a member of the first body and controls alone, pursuant to an agreement with other shareholders or members, a majority of the voting rights in the first body. The same applies if the first body is a subsidiary of a body corporate which is itself a subsidiary of the second body. Art 2(2) deems a body corporate to be a wholly-owned subsidiary of another body corporate if the first body has no members except: (a) the second body; and (b) wholly-owned subsidiaries of or persons acting on behalf of the second body or the second body's wholly-owned subsidiaries.

b) The law also provides a definition of what is a holding company. Under the law, Art 2(3) states a body corporate is the holding body of another body corporate if the second body is a subsidiary of the first body. Furthermore, a holding company is deemed to include any body corporate that is a holding body.

c) Art 2A makes further provision relating to subsidiaries and holding bodies and explains expressions used in Art 2 and otherwise supplements that Art. Art 2A(2) states that, for the purposes of Art 2(1)(a) and (c), references to the voting rights in a body corporate are to the rights conferred on shareholders in respect of their shares, or (in the case of a body not having a share capital) on members, to vote at general meetings of the body on all or substantially all matters.

d) In Art 2(1)(b), the reference to the right to appoint or remove a majority of a board of directors is to the right to appoint or remove directors holding a majority of the voting rights at meetings of the board on all or substantially all matters; and for the purposes of Art 2(1)(b): (a) a body corporate shall be treated as having the right to appoint to a directorship if: (i) a person's appointment to it follows necessarily from the person's appointment as director of the body, or (ii) the directorship is held by the body itself; and (b) a right to appoint or remove which is exercisable only with the consent or concurrence of another person shall be left out of account unless no other person has a right to appoint or, as the case may be, remove in relation to that directorship.

e) Art 2A(4) states that, for the purposes of the references above, rights which are exercisable only in certain circumstances shall be taken into account only: (a) when the circumstances have arisen, and for so long as they continue to obtain; or (b) when the circumstances are within the control of the person having the rights, and rights which are normally exercisable but are temporarily incapable of exercise shall continue to be taken into account.

f) Art 2A(5) deals with the issue of rights held by a person in a fiduciary capacity and deems these not to be treated as held by that person. Nominee rights, under Art 2A(6), where one person holds rights for another, are treated as held by the other person; and rights shall be regarded as held as nominee for another if they are exercisable only on his or her instructions or with his or her consent or concurrence.

g) Art 2A(7) states that rights attached to shares held by way of security shall be treated as held by the person providing the security: (a) where, apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in accordance with the person's instructions; and (b) where the shares are held in connection with the granting of loans as part of normal business activities and apart from the right to exercise them for the purpose of preserving the value of the security, or of realising it, the rights are exercisable only in the person's interests. Art 2A(9) states that, for these purposes, rights shall be treated as being exercisable in accordance with the instructions or in the interests of a body corporate if they are exercisable in accordance with the instructions of or, as the case may be, in the interests of: (a) any subsidiary or holding body of the first body; or (b) any subsidiary of a holding body of the first body.

h) In relation to rights held by subsidiaries, Art 2A(8) states that rights shall be treated as held by a body corporate if they are held by any of its subsidiaries; and nothing in paragraph (6) or (7), on nominee or security-related rights, shall be construed as requiring rights held by a body corporate to be treated as held by any of its subsidiaries.

i) For the purposes of calculating voting rights, Art 2A(10) stipulates that voting rights in a body corporate shall be reduced by any rights held by the body itself. Finally, Art 2A(11) states that for rights under paragraph (5) to (10), references to any rights held by a person will include rights that are treated as held by the person by virtue of any other paragraphs, thus permitting cumulative application of the rules, unless the provisions themselves treat the rights as not being held by the person in question.

Types of Company

1.5. As noted above, and elaborated further below in Chapter 4, Jersey law since 1991 distinguishes between private and public companies and between companies protected by limited liability and those whose liability is unlimited. In addition, a number of different types of company are provided for by the legislation.

1.6. Art 3A states that a company is a public company if (a) its memorandum states that it is a public company; or (b) it is an existing company which became a public company on 30 March 1992 (the date the law came into force) by the operation of Art 16(2), and it has not subsequently become a private company.

1.7. Similarly, Art 3B states that a company is a private company if (a) its memorandum states that it is a private company; or (b) it is a company which immediately before the commencement of this provision was a private company, and it has not subsequently become a public company.

1.8. Distinguishing between limited and unlimited companies, Art 3C(1) states that both par value companies and no par value companies are limited companies if: (a) any person is a member of the company by reason of holding a limited share; or (b) any person is a guarantor member of the company, whether or not it also has members whose liability is unlimited. Art 3C(2) also deems a guarantee company to be a limited company. Art 3D(1) defines a company as an unlimited company if: (a) it is a par value company or a no par value company; (b) no person is a member of the company by reason of holding a limited share; and (c) no person is a guarantor member of the company. Nonetheless, Art 3D(2) states that nothing in the law shall be taken as prohibiting a company from changing any unlimited shares in the company to limited shares in the company or vice versa. Historically unlimited companies were allowed to be formed under English law because of the restrictions that English law used to place on the formation of large partnerships (more than 20 persons). That restriction no longer applies but the ability to incorporate unlimited companies has not been removed although the original justification for them appears to have somewhat faded. There are important distinctions between partnerships and unlimited companies (or unlimited members of a limited company) because even though their liability is unlimited, the members are not directly liable to the creditors. The creditors must first seek payment from the company and if they are unsuccessful, may commence insolvency proceedings (usually under the Désastre Law as winding up under the law, including creditors' winding up, can be commenced only by the members of a company). The insolvency official conducting those proceedings may seek contributions from the members to payment of the debts and the cost of the winding up and (unlike members with limited liability) a holder of unlimited shares is liable without limit. In practice unlimited companies are unusual. They may be used where a creditor does not wish to take a guarantee from shareholders or shareholders are unable to give a guarantee or an unlimited guarantee but accept the unlimited liability. They are also used in connection with reductions of capital because extinguishing or reducing a capital account maintained in respect of unlimited shares does not need to be confirmed by the court (see Art 61). Consequently, the reduction is effective as soon as the relevant special resolution is passed which is both a time and cost effective way of reducing share capital. They are also used in circumstances where the distinction between payments of capital and income is material. Unlimited shares enable a reduction of capital to be achieved more simply and cheaply, as above, and the amount of the reduction may be transferred to profit and loss so that a distribution of it is clearly not a distribution of capital.

1.9. The distinction between par value and no par value companies is thus stated in the law. Art 3E provides that a company is a par value company if (a) it is registered with share capital; (b) its shares are expressed as having nominal value; and (c) either (i) its memorandum states that it is a par value company, or (ii) it is a company which was registered under the law before the commencement of this provision, irrespective of whether it also has guarantor members. Conversely, Art 3F states that a company is a no par value company if (a) it is registered with shares which are not expressed as having nominal value; and (b) its memorandum states that it is a no par value company, whether or not it also has guarantor members.

1.10. Two other types of company are also mentioned in the law. Art 3G notes that a company is a guarantee company if (a) it consists only of guarantor members; and (b) its memorandum states that it is a guarantee company.

1.11. In common with many civil jurisdictions, Jersey law provides in Art 3H for limited life companies of two types. Broadly speaking, companies may continue indefinitely until they are wound up and dissolved by their shareholders passing a resolution (ordinary companies) or continue only until the occurrence of some specified event that is not a decision of the shareholders to wind up the company (a **specified external event**) (companies of limited duration). Specific provision in relation to the winding up of such companies is also made in Part 21 of the law. The general term used in the Companies Law to cover any company, where winding up and dissolution is triggered by a specified external event, is a company of limited duration. This term is used in a number of places in the law but is not specifically defined other than by reference to matters that must appear in the constitution of a limited duration company (Article 4C). Some companies of limited duration are, however, also described in the law as limited life companies. The term "limited life company" is defined in Article 3H.

1.12. Par value companies, no par value companies and guarantee companies may be limited life companies if the memorandum or articles include a provision that the company shall be wound up and dissolved upon (a) the bankruptcy, death, expulsion, insanity, resignation or retirement of any member of the company; or (b) the happening of some other event which is not the expiration of a fixed period of time. A limited life company may also include in its memorandum or articles a provision for its winding up and dissolution on the expiration of a fixed period of time. Thus, a company of limited duration is a company whose life may be terminated by an event that is not a decision of the shareholders, whether it is a contingency or the expiration of a fixed period of time (see Art 4C). If its life may be terminated by a contingency (whether or not it may also be terminated by the expiration of a fixed period of time, see Art 3H(2)), it is a particular type of company of limited duration: it is a limited life company (see Art 3H). If its life may be terminated on the expiration of a fixed period of time, but not upon some other contingency, it is still a company of limited duration (see Art 4C), but it is not a limited life company for the purposes of Art 3H.

1.13. For the purposes of identifying whether a company is a limited life company or a company of limited duration, it may help to approach the issue by thinking of the type of event by which the life of a company may be terminated. As stated above, the law contemplates different types of specified external event. These may be specified external events of which the timing is uncertain (Article 3H(1) and Article 4C(b)). Where a company is wound up and dissolved upon the occurrence of a specified external event of this type (a **contingency**), it may be thought of as **contingency limited**. The life of a company which is contingency limited may be limited by a specified external event which relates to the circumstances of a member (Article 3H(1)(a)) or by any other event which is not the expiration of a fixed period of time (Article 3H(1)(b)). The specified external events may also be those which happen at a time specified in advance - the expiration of a fixed period of time - for example, "on the fifth anniversary of incorporation" (Article 3H(2) and Article 4C(a)). The term "fixed period of time" is defined for these purposes in Article 1 as being a period of time which is ascertainable without reference to any event which is either contingent or otherwise uncertain. Where a company is wound up and dissolved upon the occurrence of a specified external event of this type, it may be thought of as **time limited**.

1.14. The definition of a limited life company is set out in Article 3H and it is a company which is contingency limited (Article 3H(1)). The constitution of a limited life company may also include a provision for it to be time limited (Article 3H(2)) but it is not a limited life company unless it is also contingency limited: a company that is time limited only is a company of limited duration for the purposes of Article 4C and Article 144A but is not a limited life company for the purposes of Article 3H. On a practical level if a provision were included in the memorandum or articles of association of a limited life company for its winding up and dissolution on the expiration of a fixed period of time as contemplated by Article 3H(2), it would have to be on the basis that the winding up is commenced on the first to occur of the contingency and the time limit. The effect of this is that the winding up and dissolution of a limited life company may, in fact, be triggered either by a contingency or by expiry of a time limit, whichever occurs first.

1.15. As noted, a limited life company may be time limited but must be contingency limited. This leaves the possibility of a company that is time limited but is not contingency limited because its constitution includes only a time limit and no contingency. The life of such a company is still limited by a specified external event and so it is a company of limited duration but it does not satisfy the requirements in Article 3H(1) for it to be a limited life company.

1.16. The requirements for the constitution of a company of limited duration are that the specified external event must be set out in the memorandum or articles of association of the company (Article 4C). Correspondingly, if the memorandum or articles of association of a company do include a specified external event, it is a company of limited duration. Article 4C refers to contingencies (Article 4C(b)) and also to time limits (Article 4C(a)) but does not does not distinguish between them because it deals with any company of limited duration. If a contingency is included as a specified external event, as noted, the company is a limited life company pursuant to Article 3H (but, as noted, that does not mean that it is not a company of limited duration, it is just a type of company of limited duration).

Companies of limited duration and limited life companies

Companies of limited duration

- constitution includes a specified external event (Art 4C)
- if specified external event is a contingency, the company will be a limited life company (Art 3H)
- if specified external event is only a fixed period of time (Article 1), the company is a company of limited duration but not a limited life company (Art 144A)

Winding up companies of limited duration

- if constitution includes a contingency specified external event - wind up as a limited life company under Art 144
- if the constitution includes only a time limit specified external event - wind up under Art 144A
- Art 144A - Notice to registrar within 21 days of the expiry and date of expiry of time limit (Art 144A(1) or (2) (in which case also deliver notice to company))
- to proceed as summary winding up - solvency statement to registrar within 28 days of time expiry notice (Art 144A(4))
- if no solvency statement - proceed as creditors' winding up (Art 144A(5))
- deemed special resolution to proceed as creditors' winding up (Art 144A(5))
- summary winding up commences in accordance with Article 147(b)
- creditors' winding up commences in accordance with Article 159(1)(a)

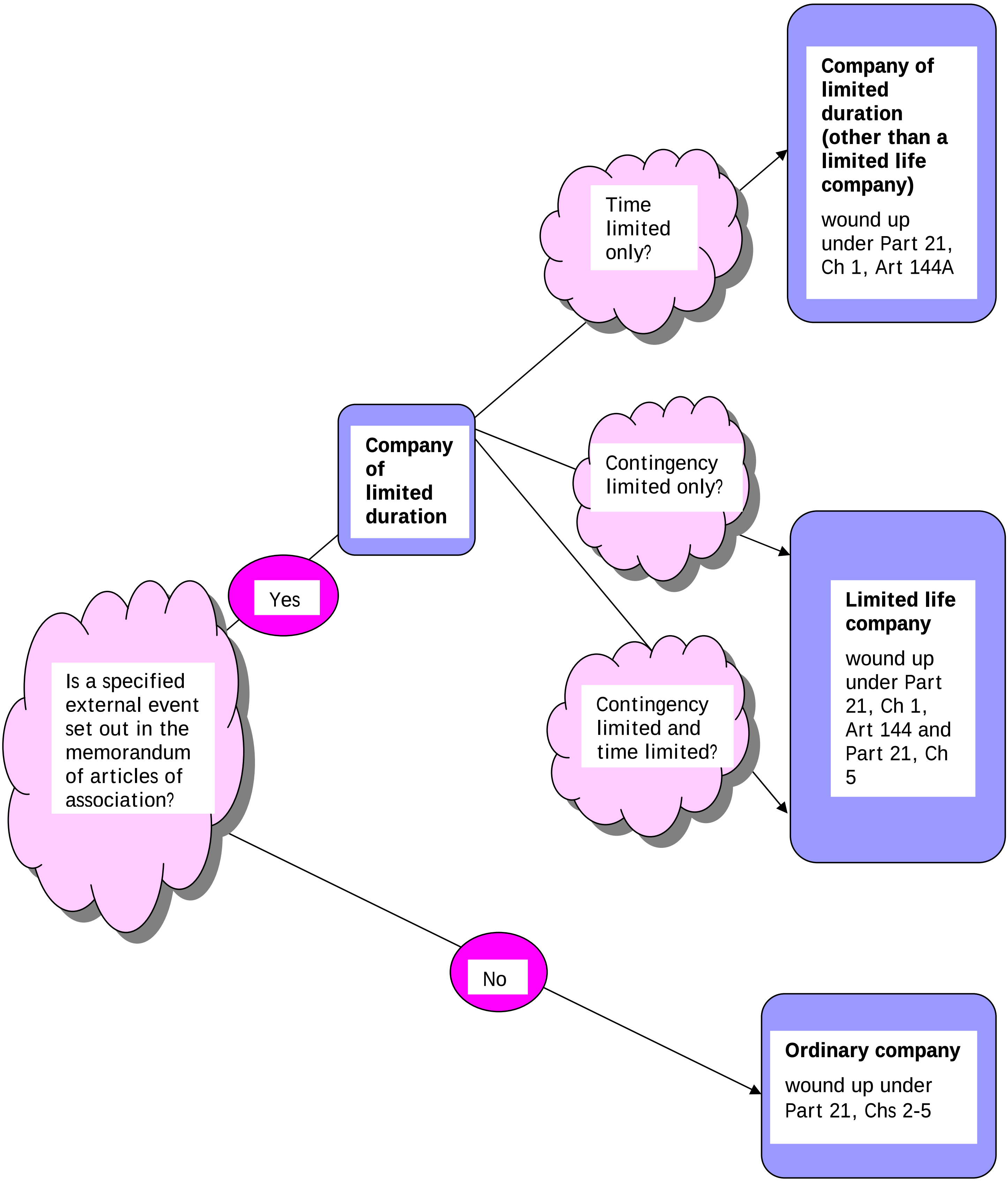
Limited life companies

- a type of company of limited duration (Article 3H)
- constitution must include a specified external event that is a contingency (Art 3H)(1))
- may also include a specified external event that is a time limit (Art 3H(2))

Winding up limited life companies

- contingency (or, if applicable, time limit) has happened
- Special resolution deemed passed (Art 144(1))
- Notice of the resolution to the registrar within 21 days (Art 144(2))
- to proceed as summary winding up - solvency statement to registrar within 28 days of specified external event (Art 144(3))
- if no solvency statement - proceed as creditors' winding up (Art 144(4))
- summary winding up commences in accordance with Article 147(a)
- creditors' winding up commences in accordance with Article 159(1)(a)

Ordinary company or company of limited duration or limited life company?



Application of Law/Regulations to Domestic/Foreign Companies

1.17. It goes without saying that the Companies Law 1991 applies to all bodies incorporated under the law and its legislative predecessors in Jersey.

1.18. Art 1(2) also stipulates that references in the Companies Law 1991 to a body corporate (a) include a body corporate incorporated outside Jersey but do not include a corporation sole; (b) except for the purposes of Art 2 and 2A, do not include an association incorporated under the Loi (1862) sur les teneures en fidéicommis et l'incorporation d'associations; (c) do not include a Scottish firm; (d) do not include a limited liability partnership registered under the Limited Liability Partnerships (Jersey) Law 1997; and (e) do not include an incorporated limited partnership. For that reason, in relation to some provisions, the law potentially applies to all bodies corporate incorporated under the laws of jurisdictions other than Jersey.

1.19. Art 1 defines an "external company" as a body corporate which is incorporated outside the island and which carries on business in the Island or has an address in the island used regularly for the purposes of its business.

1.20. Art 140 applies Part 19 (Arts 128-140) on company investigations to external companies and to bodies corporate which have at any time been external companies as if they were companies under this law, but subject to such adaptations and modifications as may be specified in regulations.

Morgan & Chase Bank Corporation Inc (a Liberian Co.) v F&E Minister 1997 JLR Notes-4a: Passing off or representing an external company as incorporated in the Island is an offence. Where a Liberian company with Jersey directors set up Guernsey bank accounts, and confirmed instructions on the telephone to that bank; in receiving eight cheques and passing them onto Guernsey, the company was deemed to be carrying on a business in Jersey such as to enable the minister to appoint an inspector under Art 128. Held: it was not necessary for the directors, who were acting on instructions from beneficial owners outside island, to know the fraudulent uses to which the funds were put. However, it may be queried whether this conclusion could stand in light of the obligations under the Money Laundering (Jersey) Order 2008 which impose obligations for due diligence in relation to customers to include identification of the purpose and intended nature of the business relationship and also on-going monitoring to scrutinise transactions undertaken throughout that business relationship.

1.21. Art 213A provides rules on the recognition of the status of foreign corporations by stipulating that if at any time (a) any question arises whether a body which purports to have corporate status under or, as the case may be, which appears to have lost corporate status under the laws of a territory which is not at that time a recognized State should or should not be regarded as having legal personality as a body corporate under the law of Jersey; and (b) it appears that the laws of that territory are at that time applied by a settled court system in that territory, that question and any other material question relating to the body shall be determined (and account shall be taken of those laws) as if that territory were a recognized state. For these purposes, a recognized state is a territory which is recognized by Her Majesty's Government in the United Kingdom as a State; (b) the laws of a territory which is so recognized shall be taken to include the laws of any part of the territory which are acknowledged by the federal or other central government of the territory as a whole; and (c) a material question is a question (whether as to capacity, constitution or otherwise) which, in the case of a body corporate, falls to be determined by reference to the laws of the territory under which the body is incorporated.

1.22. Finally, Art 195 gives the States power to make regulations in relation to the registration and regulation of external company. To date, no registrations have yet been made.

2. Legal Personality/Members' Liability

Separate Legal Personality

2.1. At law, the company is treated as an artificial person, an entity created by law to fulfil a certain function. As such, the entity has a personality at law and acquires juridical status. It may therefore do all things that a human being (an individual) may do, subject to disabilities resulting from its artificiality (get married, write a will) or that are impossible for it to do (commit certain crimes). Generally, companies are formed to carry out commercial activities. The entity is considered separate from its members, even if it is those members that have incorporated or registered the company, i.e. if A, B and C have incorporated a company, there are four persons recognised by law that result, i.e. the same three promoters and the company. The separate legal entity theory is sometimes known as the "corporate veil" or "veil of incorporation", i.e. a veil that hides or obscures those lying behind the company from the company's self, chiefly from the creditors' viewpoint.

2.2. The classic case is *Salomon v Salomon & Co* [1897] AC 22 (England and Wales). Salomon sold his business to a company he formed, in which he received the majority shares. When the business failed, he sold a debenture he had received from the company as part payment of the purchase price of his business. Held: on a petition by the unsecured creditors to declare the debenture void as a sham or fraud, the company was validly formed in accordance with the law and was at law a separate legal entity from its incorporators. In Jersey, the following cases clearly confirm the principle:

In re Esteem Settlement 2003 JLR 188: The plaintiffs brought an action seeking to recover the "clean assets" left in the Esteem Settlement. The plaintiff company was owned by the Kuwait Investment Office ("KIO") in London. The first defendant was the chairman of both the plaintiff company and KIO. Between October 1988 and May 1990, he defrauded the plaintiff of USD 430 million, of which his personal share was USD 120 million, which he paid into his bank accounts. Criminal proceedings were commenced against him in Kuwait on 26 October 1992 and in England on 14 April 1993. On 24 June 1999, the plaintiff obtained judgment against him in the English High Court in respect of the fraud for USD 687 million, with interest accruing at a rate of USD 55 million per annum. Prior to the fraud, the first defendant had established the Esteem Settlement, a discretionary settlement governed by Jersey law, of which Abacus (C.I.) Ltd. was the trustee and the defendants were the main beneficiaries as well as Ceyla, a Liechtenstein Anstalt administered by Abacus, the founder rights of which were held for the first defendant. The Settlement incorporated a wholly-owned company in Jersey known as Esteem Ltd. The income earned by these structures was periodically distributed to the first defendant and then resettled by him as capital. The bodies and the resettlement procedure were legitimately designed to avoid the Kuwaiti laws of forced inheritance and to shield the first defendant's substantial assets from the impact of UK taxation. Between 1988 and 1992, after he had begun to defraud Grupo Torras (GT), the first defendant contributed further of his own funds to the Esteem Settlement. In April 1992, he contributed GBP 4.4 million, stolen from GT, to the Esteem Settlement. In August 1992, he contributed GBP 4 million of his own funds to the No. 52 Trust. In September 1992, he contributed ownership of Ceyla to the Esteem Settlement. In an earlier action, the plaintiff company had sought to recover the proceeds of the first defendant's fraud, and pursuant to the judgment of the Royal Court, allowing the plaintiff company to trace the proceeds of the fraud into various assets administered by the trustee and allowing its Pauline claim in part, the Settlement was stripped of all assets resulting from that fraud. The "clean" assets left in the Settlement were a property known as 97 Dulwich Village, and some cash contingent on the recovery of legal fees expended by the trustee. In the present proceedings the plaintiffs sought to recover the clean assets, and submitted that the Esteem Settlement had never been validly constituted since (a) it was a sham, and the assets had always been held on bare trust for the first defendant; or (b) its structure infringed the maxim *donner et retenir ne vaut*; alternatively, if it were initially valid, it should now be declared invalid or not enforced because the first defendant's substantial or effective control of the Settlement coupled with his misuse of it (c) allowed the veil of the Settlement and/or Esteem Ltd. to be lifted and the assets treated as the first defendant's in order to allow GT to enforce its judgment in the English action, or, alternatively, to allow the second plaintiff (the trustee in bankruptcy) to administer them.

Held: (paragraphs 6-7, 10) (6) Although the court could pierce the veil of a company where the controlling shareholder used the company to conceal the true facts of his own impropriety, the principle did not apply to allow the piercing of the veil of a trust where the settlor had managed to assume substantial and effective control of the trust and had dominated the trustees improperly. The beneficiaries' interests could not be affected by such a breach of the trustees' fiduciary duties which permitted the settlor to control and misuse the trust. The appropriate proprietary remedies could be used to remove any benefit the trust had derived from such misuse but there was then no residuary procedure which allowed the court to ignore the terms of the trust and transfer the remaining assets from the beneficiaries back to the settlor (for the ultimate benefit of his creditors).

(7) The absence of any such principle in trust law could be explained by the differences between the position under a trust and that in respect of a company, not only in terms of the legal

basis on which assets were held but also the degree of legal control that needed to be exercised. Under company law, a shareholder had lawful control over the company, whereas under a trust the settlor had no power to give any directions to the trustee unless the power was conferred by the trust deed. Moreover, when piercing the corporate veil, the necessary level of control was that of a controlling shareholder, and not a lower threshold (such as might, for example, be appropriate at an interlocutory stage). This level of control could only be attained by the settlor over the trustee where he had abdicated his fiduciary duties, as such control would be improper….

(10) Nor was it practicable to consider piercing the veil of Esteem Ltd. rather than that of the Settlement in order to recover the assets. Even if the company's veil were pierced, the only outcome would be to treat its assets as those of the shareholder, which was the Settlement. It was not possible to pierce its veil so as to treat the assets as belonging to someone other than the shareholder, and so unless the plaintiffs were able to pierce the veil of the trust, piercing the veil of Esteem Ltd. would not assist them.

Attorney General v Lido Bay Hotel Ltd 1995 JLR Notes-17a: the prohibition on a "person" keeping a lodging house unless registered also applies to a company.

2.3. Advantages of having a separate status:

a) Holding and securing property is possible (the property thus owned is the company's and does not belong to its managers or members).

b) The company's affairs are its own and, so too, those of its members or managers are their own concern; neither the company nor the members/managers are responsible for the others' activities and they not liable for any claims on the others' assets.

c) Litigation is carried out in the company's name and the benefits/burdens accordingly accrue to the company.

d) The company endures forever (subject to fulfilling its legal obligations) and survives the change, death or destruction of its members.

Re: Noel Tedman Holding Property Ltd (1967) Qd R 561 (Queensland, Australia): a Queensland company had two directors, who were also the only shareholders, who were both killed in an accident. Held: the company continued its existence and the court would allow the personal representatives of the estates of the deceased to nominate new directors to transact the company's business.

Re Glendale Holdings Limited (1989): Repeated infractions of housing law were committed by previous owners of the company. Held: A company had a continuous and successive life and the court refused to reduce fines on the basis that the beneficial ownership of the company had changed and despite the existing owner being unaware of infractions and liability to potential prosecution.

e) The separate legal entity status allows for the organisation of assets and thus the introduction of the limited liability principle.

2.4. There are, nonetheless, some disadvantages to the theory. The separate legal entity appears in and is confusingly applied in the area of liability for the purposes of finding tortious, contractual and criminal liability. The theory prevents pre-incorporation contracts (i.e. contracts that occur before incorporation) from being automatically adopted by the company even if they are for the company's benefit, although in Jersey Art 21(2) intervenes to provide a procedure by which a company may signify its consent to be bound by these transactions. Lastly, the separate legal entity theory does not deal adequately with the position of corporate groups (i.e. companies owned/managed conjointly). Moreover, the separate legal entity may be disregarded. "Piercing" or "lifting" the veil occurs so that the courts can see behind the veil of incorporation. This allows the courts to ascertain the true ownership or control of the company. There are two principal consequences of this: (a) the separate legal identity of the company is ignored; and (b) the principle of limited liability can be ignored so as to make members or directors liable. The leading Jersey case on the point is *In re Esteem Settlement* 2003 JLR 188. The findings of the Royal Court on the point were *obiter* because the issue related to whether it was possible to lift the veil of a trust, but they were, nevertheless, necessary to reach a conclusion on that issue. The court distinguished between piercing and lifting the veil in the following terms (derived from *Atlas Maritime Co. S.A. v Avalon Maritime Limited* [1991] 4 All ER 779 (England and Wales):

"to pierce the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of the shareholders. To lift the corporate veil or look behind it on the other hand should mean to have regard to the shareholding in a company for some legal purpose".

2.5. Common law reasons for lifting the veil. There is no logical or systematic principle here, only rulings from a number of different cases, which have been classified under three headings by the commentators. In *In re Esteem Settlement* 2003 JLR 188, the court did, however, observe:

"in order to justify piercing the veil, two elements must be demonstrated - (i) control over the company such that the controller is able to cause the company to act in the manner complained of; and (ii) that the act complained of involved some illegality or impropriety - the combined result being that the company's action operates to mask or conceal an action which in substance is the act of the controller and, if so treated, produces a course of action against the controller and/or the company."

The effect of piercing the veil may be to impose a liability of a company on its shareholder or *vice versa*. In *In re Esteem Settlement* 2003 JLR 188, the court gave a number of examples on the basis of English cases but did not set out a comprehensive definition.

Interests of Justice?

2.6. Doubts exist that this is a valid reason for lifting the veil. In *Adams v Cape Industries* [1990] Ch 433 (England and Wales): it was stated that "the court is not free to disregard the principle of [Salomon] merely because it considers that justice so requires", while in *Yukong Lines Ltd v Rendsberg Investment Corporation* [1998] WLR 294 (England and Wales), lifting the corporate veil was held not possible merely because interests of justice required it. In *In re Esteem Settlement* 2003 JLR 188, the Royal Court approved the findings in *Trustor AB v Smallbone (No.2)* [2001] 1 WLR 1177 (England and Wales) that the corporate veil cannot be lifted:

"…merely because it is necessary to achieve justice. That would be quite inconsistent with the recognition of the company as a separate legal entity and the long established principle laid down in *Salomon*…"

Equally, impropriety by the company is not, on its own, a sufficient justification to lift the veil. The behaviour must satisfy the criteria set out in 2.5. above.

Nonetheless, justice has been used as an excuse in a limited number of cases, including *Gilford Motor Co Ltd v Horne* [1933] Ch 935 (England and Wales): Horne's contract with the company contained a non-competition clause. After Horne left work, he had his wife set up a company and used it to solicit his former employer's customers. Held: an injunction could be obtained as the company was a device or sham. Also, in *Jones v Lipman* [1962] 1 WLR 832 (England and Wales): Lipman agreed to sell land to Jones, but changed his mind; he formed a company of which he was principal shareholder and director and conveyed the land to this company. Held: order to convey to Jones granted as the company was a sham.

Public Policy

2.7. Public policy has often been used as a reason. In *Re FG (Films) Ltd* [1953] 1 WLR 483 (England and Wales): a film company, incorporated in the United Kingdom, but otherwise American owned and operated, was held merely an agent and hence should not be permitted to claim a tax incentive for film production. Similarly, *Unit Construction Company Ltd v Bullock (Inspector of Taxes)* [1960] AC 351 (England and Wales): Three Kenyan companies assessed for tax in the United Kingdom were held to be British because their central management (place where business decisions were made) was in the United Kingdom. In *Buchan v Secretary of State for Employment* [1997] IRLR 80 (England and Wales), the Employment Appeals Tribunal did not follow *Lee v Lee's Air Farming* [1961] AC 12 (Privy Council, New Zealand) (in which the widow of the sole shareholder/employee killed in an air accident was held entitled to claim benefits from an insurance scheme taken out by the company) because to follow Lee and allow the sole employee, who was also the controlling shareholder, to benefit from a claim for redundancy, would undermine the legislation. Held: the determining factor here was the fact that the controlling shareholder had the ability to determine when the employees (including himself) would be dismissed and thus when the maximum benefit could accrue under social legislation.

Economic Entity Theory

2.8. Unlike some civilian systems, especially the German, the common law has considerable difficulties coping with the concept of the group of companies. Although tax and accounting provisions allow companies to effectively act as one economic entity and present one set of accounts and publish a consolidated financial statement, *Salomon* still affects the judicial mindset, as witness *DHN Food Distributors Ltd v Tower Hamlets BC* [1976] 3 All ER 462 (England and Wales): DHN and subsidiaries ran a food business. THBC wanted to acquire the land on which the businesses operated which was owned by one of the subsidiaries. THBC offered the value of the land alone, but if it were also trading from there, it would qualify for compensation for disruption of its business. DHN, curiously, did not have a claim according to the Lands Tribunal. Held: all companies could be treated as one economic entity and claim for the value of land and loss of the business. In *Woolfson v Strathclyde RC* (1978) SC (HL) 90 (Scotland): Campbell Ltd leased 5 shops (3 owned by Woolfson and 2 owned by Solfred Ltd). W and wife were shareholders in both companies. Campbell Ltd was registered as occupier of the premises, which were taken over by Strathclyde, who offered compensation to it alone. Woolfson and Solfred Ltd also wanted compensation but were treated as non-occupying owners and thus excluded. Held: the companies and Woolfson were not to be treated as a single economic entity since the wife's share in the two companies did not make these companies wholly-owned subsidiaries (like in DHN).

In the matter of the désastre of Royco Investment Company Limited [1994] JLR 236: the Royal Court approved a scheme which had the effect of consolidating the assets of a group but the circumstances were particular and the determining requirement was the interests of the creditors in the context of the insolvency of the Jersey company. Factors which weighed with the Royal Court included: fraud; very close involvement by the shareholders with the management and control of the activities of the company; the affairs of the group being run in such a way that the affairs of the various entities were inextricably intermingled with those of other entities and the inter-company arrangements were obscure; and the likelihood that pursuing further enquiries in relation to individual entities would not yield further material assets so that funds which would otherwise be available to creditors would be wasted.

Holland v HMRC [2010] UKSC 51 (England and Wales): Holland and his wife were alleged to have been de facto directors of a group of companies during which time unlawful distributions were made and were charged with misfeasance under section 212 of the Insolvency Act 1986 (United Kingdom). The structure of the scheme was designed to minimise tax for contractors working in the building and IT sectors. Separate companies were created which employed the contractors individually and in which each had a share. This enabled the payment of wages and dividends to the contractors and minimised the level at which tax was paid by the separate companies. However, Holland, as the settler of the one share in each company that had voting rights fell to be treated as being in control of each of the companies, with the consequent classification of all the companies as being associated companies and subject to a higher tax burden. A majority of the Supreme Court held that Holland was not liable for making the unlawful distributions on the basis that he was not acting as a director under the principle in *Salomon*. From a company law perspective, however, the Hollands' arrangements did demonstrate the principle of the separate legal personality of companies. Each of the group companies had a corporate director of which Mr Holland was an owner and also a director. Whilst acting within his duties as a director of the corporate director of the underlying companies, a majority of the Supreme Court concluded that he was not acting personally as a director of the underlying companies. To look through the corporate director and conclude that Mr Holland was himself acting as a director of the underlying companies would, in the words of Lord Saville, involve "substantial inroads into the long established legal principle that... a company... is to be treated as a legal personality separate and distinct from the directors and members".

Limited Liability

2.9. Limited liability is the principle that protects shareholders from claims over assets other than those invested in business. It also shifts the risk of business from shareholders to creditors. Limited liability was first made available in the United Kingdom by the Limited Liability Act 1855 despite major concerns about the "immorality" of "allowing" people to avoid payment of debts. The trade-off in exchange of the protection the principle was transparency with the supply of financial information and details of management and shareholdings for public inspection. Concerns exist over limited liability, including: (a) the lack of personal liability becoming a greater incentive for directors/shareholders to gamble with other people's money; and (b) distribution of losses in limited liability companies, when creditors end up supporting them, disfavours unsecured creditors (those least able to bear losses).

2.10. Advantages of retaining the system include that limited liability enhances business; enables allocation of risks and limitation of investments; ensures that risk is borne by those able to meet it. Capital is easier to obtain from a larger group (even if individually, its members may have smaller disposable incomes). Limited liability also means that creditors only have to deal with one entity (the company); they do not have to contract with each and every shareholder. Creditors can also contract to minimise the impact of risk through security. Security will reflect importance of credit arrangement. There are also some strategies which reduce or obviate the effect of the limitation on liability: personal guarantees from directors; supply of information (beyond statutory obligation); preventing debtor from carrying out certain risky transactions without creditor approval (e.g. altering/substituting assets subject to security).

2.11. Disadvantages of the principle include the misuse of corporate form (phoenix companies, façades and shams): investors are potentially misled. Fraud is always a possibility through false information misleading or inaccurate accounts etc. It may also have harsh consequences for creditors, not all creditors are able to absorb the risk with the smaller and/or unsecured creditors most at risk. In particular, tort creditors cannot recover if assets insufficient: this may be a disincentive for responsible behaviour. Limited liability may also reduce the disincentive to gamble and create a moral hazard. Wrongful trading (i.e. trading while at risk of insolvency) by managers is a major concern here although directors face personal liability if wrongful trading is proved and any person involved may face personal liability if fraudulent trading is proved (Arts 177 and 178).

2.12. Art 9(3) states that from the date of incorporation mentioned in the certificate the subscribers of the memorandum and any other persons who become members of the company are a body corporate with only such liability on the part of its members to contribute to its assets as is provided by the law or any other enactment in the event of its being wound up.

Members' Liability

2.13. As exceptions to the principle of limited liability, Art 27 also provides that if a public company carries on business without having at least 2 members and does so for more than 6 consecutive months, a person who, for the whole or any part of the period that it so carries on business after those 6 months, is a member of the company and knows that it is carrying on business with only one member is liable (jointly and severally with the company) for the payment of the company's debts contracted during the period or any part of it.

2.14. Arts 177 and 178 provide for liability for wrongful and fraudulent trading respectively. Under these provisions, wrongful trading (further discussed below) will engender liability for any person who acted as a director of the company, while fraudulent trading (also discussed below) will result in liability for any person who was knowingly a party to the carrying on of the business with the intent to defraud creditors of the company or of another person. This could result in the liability of members if they are too closely involved in directing the management of the company to the extent that they may be treated as shadow or de facto directors.

2.15. Art 181 states that where a company (other than an open-ended investment company) is being wound up in a creditors' winding up and (a) it has within 12 months before the commencement of the winding up made a payment under Arts 55, 57 or 59 in respect of the redemption or purchase of its own shares; (b) the payment was not made lawfully*;* and (c) the aggregate realisable value of the company's assets and the amount paid by way of contribution to its assets (apart from under this provision) is not sufficient for the payment of its liabilities and the expenses of the winding up, the court may, on the application of the liquidator, order a person from whom the shares were redeemed or purchased or a director to contribute in accordance with this Art to the company's assets so as to enable the insufficiency to be met. A person from whom any shares were redeemed or purchased may be ordered to contribute an amount not exceeding so much of the payment as was made in respect of his or her shares. However, a person from whom shares were redeemed or purchased shall not be ordered to contribute under this Art unless the court is satisfied that, when he or she received payment for his or her shares, he or she knew or ought to have concluded from the facts known to him or her, that, immediately after the payment was made, the company would be unable to discharge its liabilities as they fell due, and that the realisable value of the company's assets would be less than the aggregate of its liabilities. Where a contribution has been made under Art 181, the court may also direct any other person who is jointly and severally liable to contribute under this provision to pay to the contributory such amount as the court thinks just and reasonable. Liability under this provision is treated as separate from that in Art 192 (below).

2.16. Art 192(1) provides that where a company is wound up, each present and past member of the company is liable to contribute to its assets to an amount sufficient for payment of its liabilities, the expenses of the winding up, and for the adjustment of the rights of the contributories among themselves. However, a past member of a particular class is not, as a member of that class, liable to contribute (a) unless it appears to the court that the present members of that class are unable to satisfy the contributions required to be made by them as such members; (b) if he or she ceased to be a member of that class for 12 months or more before the commencement of the winding up; or (c) in respect of a liability of the company contracted after he or she ceased to be a member of that class. Similarly, a past or present guarantor member is not liable in that capacity to contribute unless it appears to the court that the past and present members in their capacity as the holders of limited shares are unable to satisfy the contributions required to be made by them as such members. Furthermore, a past or present member in his or her capacity as the holder of an unlimited share is not liable to contribute unless it appears to the court that the past and present members in their capacities as the holders of limited shares or as guarantor members are unable to satisfy the contributions required to be made by them as such members. A limitation exists on the contribution in that it is not to exceed (a) any amount unpaid on any limited shares in respect of which he or she is liable; or (b) the amount undertaken to be contributed by him or her to the assets of the company if it should be wound up. Set off is limitedly available in that a sum due to a member of the company, in his or her capacity as a member, by way of dividends, profits or otherwise is not in a case of competition between himself or herself and any other creditor who is not a member of the company, a liability of the company payable to that member, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributors among themselves.

2.17. Creditors who are not disclosed in a reduction of capital and who do not know about it may have a right under Art 65(4) against contributories if the company is wound up or its property is *en désastre*.

2.18. Guarantors may also be called on to pay up the amount of their guarantee whilst a member or within 12 months of having been a member. The payment is required to meet debts and liabilities of the company incurred before the guarantor ceased to be a member, payment of the costs and expenses of winding up and adjustment of the rights of other contributories (Art 4B).

3. Corporate and Contractual Capacity

Powers and Civil Capacity of a Company

3.1. Introduction of the registered company in 1844, in the wake of the Gladstone Commission of 1841, did not at first raise the issue of capacity. The assumption was made that this type of company, related in form to the partnership model, enjoyed the contractual capacity of the business partnership. This capacity was co-extensive with that of its members and ratification by unanimity of any contractual act was said to be possible. In *Ashbury Carriage Company v Riche* (1875) LR 7 HL 653 (England and Wales): the company, having obtained a concession granted by the Belgian Government, contracted with Riche to build a railway between Anvers and Tournai. Following part performance of the contract, the company experienced financial difficulty and sought to palliate this by allowing some of the directors to take over the contract in a personal capacity. When the company wanted to disclaim the contract, Riche sued for breach of contract, in response to which the company pleaded lack of capacity rendering the contract void *ab initio*, pointing to the terms of its own memorandum. Held: the contract was indeed void as being *ultra vires* the company and that the ratification, if indeed it could take place, was ineffective. The immediate consequence of Ashbury, which applied the public law doctrine of *ultra vires* to companies, was careful consideration in respect of the drafting of objects clauses. The succinct models provided in the Tables annexed to various Companies Acts were eschewed and there instead grew the practice of specifying "a profusion of all the objects and powers that the ingenuity of [company] advisers could dream up." In response, however, the courts would use two techniques to set limits on the proliferation of clauses. The first was to distinguish between objects and powers and to state that powers could only be used in furtherance of the objects. The second was to locate, even where only objects were concerned, the paragraph which appeared to the courts to contain the main or dominant object and to construe all others as ancillary to this main purpose. As a direct result of this, the draftsmen of companies objects developed the "Cotman" or "independent objects" clause, named after the case of *Cotman v Brougham* [1918] AC 514 (England and Wales), where the court sanctioned the Registrar's acceptance of a clause at the end of the memorandum specifying that each objects clause was to be construed as a separate and independent object and that clauses were expressly stated as not to be treated as ancillary to each other. Similarly, "subjective objects" clauses, which provided, usually by a sub-clause at the end of the recital, that the carrying on of any business which in the view of the directors was beneficial to the company would be authorised, were sanctioned in *Bell Houses Limited v City Wall Properties*

Limited [1966] 2 All ER 674 (England and Wales), where it was held that, provided that the directors honestly form the view that the advantage in pursuing the transaction is in connexion with and ancillary to the main business of the company, it would be authorised.

3.2. Reforms have occurred in many common law countries subject to the rule. In Jersey, Art 18 stipulates in relation to the capacity of a company that the doctrine of *ultra vires* in its application to companies is abolished. Accordingly, the capacity of a company is not limited by anything in its memorandum or articles or by any act of its members. However, limitatively, Art 18 does not affect the capacity of an existing company in relation to anything done by it before the Companies Law came into force. Furthermore, although abolishing *ultra vires*, Art 18 does not confer on the directors of an existing company the authority to exercise any power that the company did not have when the law came into force until the company resolved otherwise by special resolution. Nonetheless, provisions in the articles may be used to limit the authority of directors (as opposed to that of the company) by stipulating procedural limitations or restrictions and the directors will lack transactional authority to act on behalf of the company in these cases. In relation to the former impact of *ultra vires* on third parties through the doctrine of implied notice, Art 19 stipulates that no person is deemed to have notice of any records (including company constitutional documents) by reason only that they are made available by the registrar or by the company for inspection. If, however, a person contracting with a company does, in fact, have notice, of restrictions in the memorandum it may be arguable that they are assisting in a breach of fiduciary duty by the directors and that any benefit from the contract is held on constructive trust for the members (*In re Esteem Settlement* 2003 JLR 188).

3.3. In relation to civil capacity, and especially the form of company contracts, Art 20 provides that a person acting under the express or implied authority of a company may make, vary or discharge a contract or sign an instrument on behalf of the company in exactly the same manner as if the contract were made, varied or discharged or the instrument signed by a natural person, thus harmonising the formalities for all parties natural or corporate. Nonetheless, where the law provides that a contract must be passed before the court, this applies also to corporate contracts.

Pre-Incorporation Transactions

3.4. The issue of how the benefit of contracts entered into by promoters of the company before incorporation of the company is to be treated is more than just a formalistic concern of the founders of the company. Where the benefit is revealed as a burden, there is an argument that the company should be protected against an arrangement that will lie to its detriment. Where the benefit inures, the promoter or entrepreneur will need to know that the company will adopt and perform the contract, thus freeing them from liability on an arrangement they have entered into while the company remains without existence. In the case of third parties, they will need to know with some certainty the identity of the parties to perform the contract and how liability will attach to themselves and to their contracting partners. These are not issues of abstract legal thought but of pragmatism. Nevertheless, the law evinces some difficulty in describing the process by which the contract transits from one state, that prior to the company's formation, to the second state, following its incorporation, and how the contract effectively alters form with the change in the parties to its performance, especially since the standard forms of contract renewal known to common and civil law (such as subrogation, agency, novation, substitution, ratification, adoption, assignment, trust etc) cannot really be used to describe the situation of pre-incorporation contracts. The normal analysis of what happens is that the company in effect makes a new contract with the third party, as stated in *Natal Land Co & Colonization Ltd v Pauline Colliery and Development Syndicate Ltd* [1904] AC 120 (Privy Council, South Africa). The common law attempts to distinguish two situations: firstly, where the intention is that the third party contracts with a promoter, in anticipation of the formation of the company, in which case the promoter is normally liable (as 'agent' for non-existent principal), as found in *Kelner v Baxter* (1866) LR 2 CP 174 (England and Wales): K offered to sell wine to promoters of company formed to run an hotel; hotel business being carried out, wine delivered and used; incorporation conducted and directors ratified purchase (albeit before incorporation); company failed; K sued promoters in personal capacity. Held: person purporting to make contract for non-existent company will be personally liable. The second situation is where the intention is that the third party contracts with company, but, the company being non-existent, no contract is created as in *Newborne v Sensolid (GB) Ltd* [1954] 1 QB 45 (England and Wales): where the sale to S of 200 cases of spam occurred prior to the market falling, when S refused to take delivery. On being sued, S pleaded that when contract was made, N had not been incorporated and neither N nor the promoter could enforce it. Court agreed because contract supposed to be with non-existent company.

3.5. In Jersey, the law intervenes in the shape of Art 21(1), which stipulates that where a transaction purports to be entered into by a company, or by a person as agent for a company, at a time when the company was not been formed, then the transaction has effect as one entered into by that person, who is personally bound by the transaction and entitled to its benefits, unless otherwise agreed by the parties concerned. As far as adoption by the company is concerned, Art 21(2) provides that a company may, within the period specified in the terms of the transaction or, in the absence of such a stipulation, a reasonable time after it is formed, adopt the transaction and be bound by it and entitled to its benefits. The company may do this by any act or conduct signifying its intention. Once this is done, the person who entered into the transaction shall cease to be bound and entitled. A comparison may be made here with Art 1843 of the French Civil Code, which states:

"those persons who have acted on behalf of a company being formed before its incorporation are bound by obligations, arising from any acts which have been accomplished, jointly and severally in the case of commercial companies... The company which has been lawfully incorporated may take up the agreements which were subscribed [to by those persons], these [agreements] being deemed to have been entered into [by the company] *ab initio*."

Setting Aside Transactions

3.6. Jersey law provides a number of instances in which corporate transactions may be set aside, for example in the case of an improper purpose, as in *Re Zaki* (1987-1988) where the court indicated that even an otherwise intra vires act, such as the giving of a guarantee, might be set aside if it was shown that the directors exercised powers for improper purposes with the actual or constructive knowledge of the other party, albeit it is necessary that insufficient cause for exercising those powers in good faith and in the best interests of the company be shown. Similarly, a Pauline action may be available, as in *Golder v Société des Magasins Concorde Ltd* (1967) JJ 721, where the business of a Jersey company was sold to a Guernsey company with the knowledge of the latter of the intention of avoiding an employee's wrongful dismissal claim. When the subsequent bona fide purchaser of the company discovered this, the Pauline action was brought to set aside the transaction. Held: the Guernsey company was ordered to pay the claim.

3.7. In insolvency proceedings, a number of provisions exist, with powers being available to the Viscount (in a désastre) or liquidator (in a creditors' winding up) to set aside:

a) Transactions at an undervalue: the Liquidator (Art 176) or the Viscount (Art 17, Désastre Law) may apply to court for an order restoring position to what it would have been had the insolvent company not entered into a transaction at an undervalue within 5 years of the declaration or commencement of the winding up, subject to the proviso that at the time the company was unable to pay debts as they fell due or became unable to pay its debts in consequence of the transaction at an undervalue;

b) Preferences: the Liquidator (Art 176) or the Viscount (Art 17A, Désastre Law), where a company gives a preference within 12 months of the declaration or commencement of the winding up, may apply to court for an order to restore the position to what it would have been if the preference had not been given.

In re PSD Enterprises 1998 JLR 321 is authority for the proposition that the test for whether the company is insolvent is made on a cash flow basis.

c) Extortionate credit transaction: the Liquidator (Art 179) or the Viscount (Art 17C, Désastre Law), where a company has entered into an extortionate credit transaction within 3 years of the declaration or commencement of a winding up, may apply for a court order setting aside the whole/part of the obligation created by the transaction, or varying the terms of the transaction or terms on which security for the purposes of the transaction is held, or requiring a party to the transaction to repay to the liquidator or Viscount sums paid by the company to that person, by virtue of the transaction, or requiring a person to surrender to the liquidator or Viscount property held by him as security for the purposes of the transaction, or ordering that an account be taken.

d) Onerous property: the Liquidator (Art 171) or the Viscount (Art 15, Désastre Law) may within 6 months of declaration or commencement of proceedings disclaim onerous property by notice to each person interested in or under any liability in respect of the disclaimed property. The disclaimer operates from its date to determine the rights, interests and liabilities of the company and the company is discharged from liability for the disclaimed property from the date of the disclaimer.

Corporate Seal/Document Authentication

3.8. Companies in Jersey are no longer required to have a corporate seal. Accordingly, the provisions of Arts 22 (company seals), 23 (official seal for use abroad) and 24 (official seal for securities) have no further application, unless the company has in fact elected to have a seal or seals (see paragraphs 11.6.-11.11. below). Art 92 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 stipulates that the seal or seals may only be used on the authority of the directors (or of a committee appointed for that purpose). In default of any determination, an instrument to which the seal is affixed is to be signed by 2 directors or by a director and the secretary.

3.9. Nonetheless, Art 20 on the form of contracts is still of relevance. This states that a person acting under the express or implied authority of a company may make, vary or discharge a contract or sign an instrument on behalf of the company in the same manner as if the contract were made, varied or discharged or the instrument signed by a natural person, but that nothing in the Art shall affect any requirement of law that a contract be passed before the court.

Corporate Criminal Capacity

3.10. Development of criminal responsibility in the common law has been problematic. Criminal prosecutions were difficult because of rule that corporations not indictable but its members were (1701, per Lord Holt CJ). The Roman Law principle that fictional entities could not form *mens rea* was adopted. The problem was further complicated by the rule that even if legal fiction could be stretched to cover a legal will, criminal acts were necessarily *ultra vires*. However, a need arose to find a formula for corporate liability because: companies became more numerous and potentially more harmful.

3.11. Early cases inched towards corporate liability: companies could be guilty of nonfeasance (breach of statutory duties). There was no real need to find mens rea since many such offences of strict liability type, as stated in *R v Birmingham and Gloucester Railway Company* [1842] 3 QB 223 (England and Wales). Similarly, companies could be guilty of misfeasance (performing duties badly) as in *R v Great North of England Railway Company* (1846) 9 QB 315 (England and Wales). This hints at negligence and the possibility of some mental state. Courts were also prepared to state that companies could be suitably found guilty for any crime that statute provided, as in *The Pharmaceutical Society v London and Provincial Supply Association* [1880] 5 AC 857 (England and Wales). However, courts still had difficulty where offences required intent as in *R v Cory Bros* [1927] 1 KB 810 (England and Wales), where the company electrified a fence to prevent pilferage of coal. Held: charge of manslaughter for death of unemployed collier could not lie.

3.12. Not till World War II did the courts in England and Wales revolutionise matters with *DPP v Kent & Sussex Contractors* [1944] KB 146 (England and Wales), where the company could be convicted of a breach of motor fuel rationing rules, an offence requiring intent to deceive. Similarly, *R v ICR Haulage* [1944] KB 551 (England and Wales), in which an indictment for common law offence of conspiracy to defraud would lie and *R v Cory* was doubted. Also, in *Moore v Bresler Ltd* [1944] 2 All ER 515 (England and Wales), a company was convicted of using a document with intent to defraud. In these cases, the mens rea was found by treating the mens rea of certain employees as that of the company itself. Using the 'identification principle', it is necessary to find out whose mind(s) to identify with the company. In *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 (England and Wales), this was identified as being "someone who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties…" (per Viscount Dilhorne).

3.13. In *HJ Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 (England and Wales), Lord Denning said that: "a company may in many ways be likened to a human body. It has a brain and a nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such." In fact, the phrase "directing mind" comes from *Lennard's Carrying Co. Ltd. v Asiatic Petroleum* [1915] AC 705 (England and Wales): "a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing mind must consequently be sought in the person of somebody who may for some purposes be called an agent, but who is in reality the directing mind and will of the corporation, the very ego and centre of personality of the corporation." (per Viscount Haldane LC). In effect, this narrows the 1944 test by seeking to identify only the "controlling officer". However, a consequence of this narrow doctrine is to make prosecutions difficult.

3.14. One particular problem is the diffuse nature of decision-making in large companies: many layers of management and many participants in the process of turning policy into action. An example of this is *R v HM Coroner for East Kent ex parte Spooner* (1989) 88 Cr App R 10 (England and Wales), in which manslaughter charges arising out of the sinking of Herald of Free Enterprise in 1987 failed because charges against senior officers could not be proved. The court expressly disavowed the idea of "aggregation" of states of mind of several employees stating, per Bingham LJ: "A case against a defendant cannot be fortified by evidence against another defendant." Nonetheless, in *R v Kite & Another* (8 December 1994, unreported) (England and Wales): Kite, the directing mind of OLL Ltd, had overall management and control which resulted in inadequate preparation and lack of safety for a canoe trip on which 4 teenagers drowned in Lyme Bay. The company was convicted of involuntary manslaughter and fined GBP 60,000, while Kite received a term of 3 years' imprisonment.

3.15. There are, however, some cases that cause problems with the theory. *Re: Supply of Ready-Mixed Concrete (No 2)* [1995] 1 AC 456 (England and Wales), in which local managers of four companies entered into price fixing arrangements for concrete contrary to s 35 of the Restrictive Trade Practices Act 1976 (UK). The court held that the corporations were liable despite forbidding its employees from carrying out such practices. Lord Templeman said it was not acceptable that a company could shield behind its instructions where its employees, who were competent representatives of the company and acted ostensibly under its authority, nevertheless acted within scope of employment). Similarly, *Meridian Global Funds Management Asia Ltd v Securities Commission* (1995) 2 AC 500 (Privy Council, New Zealand), in which share purchases by the 2nd and 3rd defendants were not communicated to 1st defendant, the company, in contravention of its rules. As no notice was filed by the company with the Securities Commission, proceedings for breach of rules were brought. The Privy Council stated that, irrespective of notice not being given to senior management of company, company still liable on grounds that otherwise company could have benefit of illegal act without liability merely by raising defence of lack of knowledge. So, knowledge of other defendants was imputed to the company, notwithstanding that the defendants were not part of the management of company.

Safeway Stores and Others v Twigger and Others [2010] EWCA Civ 1473 (England and Wales): The claimants sought to recover penalties levied by the Office of Fair Trading for breaches of competition law occasioned by the defendants' behaviour while acting as directors/employees of the claimant. Held: Normally, acts of an agent are not to be regarded as attributable to his principal if the acts of the agent were deliberately intended to be in fraud of and cause loss to his principal. However, the principle gives the claimants no defence to the OFT's claim for the penalties as it is personally liable to pay those penalties and it would be inconsistent with that liability for the company to be able to recover those penalties in the civil courts from the defendants. This is because the statutory scheme in competition law has attributed responsibility to the claimant companies.

3.16. In Jersey, Art 2 of the Criminal Offences (Jersey) Law 2009, in force 31 July 2009, applies to the case of statutory offences by bodies corporate and limited liability partnerships. Art 2(1) states that if a statutory offence committed by a body corporate or by a limited liability partnership is proved to have been committed with the consent or connivance of, or is attributable to neglect on the part of a person who is a director, manager, secretary or other similar officer of the body corporate, or a partner of the partnership, or any person purporting to act in any such capacity, then, under Art 2(2), that person is also guilty of the offence and is liable in the same manner as the body corporate or the partnership to the penalty provided for the offence. Art 2(3) applies the same rule to cases where the affairs of a company are managed by its members as if the member or members concerned were directors of the corporate body.

4. Types of Company

Distinction between Private/Public Companies

4.1. The distinction between private and public companies is established by law. Art 3A states that a company is deemed to be a public company if (a) its memorandum states that it is a public company; or (b) it was an existing company prior to the law coming into force (30 March 1992) by the operation of Art 16(2) as enacted and has not subsequently become a private company. Similarly, Art 3B provides that a company is a private company if (a) its memorandum states that it is a private company; or (b) it is a company which immediately before the commencement of the law was a private company and has not subsequently become a public company.

4.2. As detailed below, a critical threshold for distinguishing between private and public companies is membership of less/more than 30 persons. Art 17C in fact allows the Minister by order to increase/reduce the threshold requirement for the distinction between public and private companies. Thus far, no order has been made.

General Requirements for all Companies and Service of Documents

4.3. Compliance with general law requirements is a must for all companies. There are common stipulations in relation to management, the conduct of meetings, winding up etc. that will be detailed below.

4.4. In relation to the service of documents, Art 72 provides that a document may be served on a company: (a) by leaving it at, or sending it by post to, the registered office of the company; (b) in accordance with Art 67(4) (service on a company at its previous registered office) NB. This reference should now be read as referring to Art 67(7). Furthermore, paragraph (c) states that, in the case of an existing company if no office is registered, service may be effected by sending it by post, in the case of a public company, to any person who is shown on the register kept in compliance with Art 83 as a director or secretary of the company at the address entered in that register and, in any other case, to any person shown as a member of the company in the register of members or in the latest annual return delivered to the registrar under Art 71 at the address entered in the register or return, although, where no annual return has been delivered to the registrar in compliance with Art 71, service by post to any person whose name appears as a subscriber in the company's memorandum at the person's address shown in the memorandum is effective.

Barra Hotel Ltd v AG 2000 JLR 370. Held: the use of the word "may" is permissive; documents received by a company and held at its office and known to be held by the manager was evidence of service. There was no need for the sole director to have seen the documents.

Private Companies: Status

4.5. Art 3(2) stipulates that the method of formation of a private company occurs by means of a person or 2 or more persons associated for a lawful purpose applying for the formation of an incorporated private company, with or without limited liability, by signing and delivering to the registrar a memorandum of association that states that the company is to be a private company. Under Art 3(3), the registrar is not bound to grant an application made by more than 30 persons unless the Commission notifies the registrar that, subsequent to an application made to it, it has satisfied itself that, by reason of the nature of the company's intended activities, its affairs may properly be regarded as the domestic concern of its members. Otherwise, a company intending to have 30 or more subscribers may only be registered as a public company.

4.6. Under Art 9(4) on the effect of registration, if the memorandum states that the company is a public company or a private company, the certificate shall also state the same fact. In fact, under Art 9(5), a certificate of incorporation issued under the law is conclusive evidence: (a) that the company is incorporated under the law; (b) that the requirements of this Law have been complied with in respect of the company's registration as well as all matters precedent and incidental to its registration; and (c) if the certificate states that it is a public company or a private company, that it is in fact such a company.

4.7. Under Art 17(1), a private company which has at least 2 members may become a public company by altering its memorandum to state that it is a public company. Similarly, under Art 17(2), if a private company, otherwise than in accordance with a direction under Art 16(2) (where the Commission permits a public company to become private), enters the name of any person in its register of members so as to increase the number of its members beyond 30 and the number of members remains for the time being above that threshold, circulates a prospectus relating to its own securities or its securities are admitted to trading on a regulated market (as defined in Art 102(1)), that company shall be subject to the law as though it were a public company. Under Art 17(3), written notice must be given to the registrar within 14 days of a private company entering the name of any person in its register of members so as to increase the number of its members beyond 30.

Private Companies: Status and General Exemptions from Compliance/Restrictions

4.8. As stated in paragraph 4.7 above, a company may enjoy the status of a private company unless it increases the number of its members to beyond 30 and the number remains beyond the threshold for the time being, circulates a prospectus relating to its own securities or its securities are admitted to trade on a regulated market (as defined in Art 102(1)), in which case it will be treated by the law as though it were a public company. In fact, under Art 17(5), a contravention of the requirement to notify the registrar of a change in membership which has the effect of increasing numbers to beyond 30 is sanctioned as an offence. However, under Art 17(6), a company which has increased the number of its members or other interested party may apply to court for an order to relieve the company from all or any of the consequences of the action and the court may grant relief on any terms that seem expedient. Furthermore, Art 17(7) allows the Commission by written notice to the company to direct that Art 17(2) shall apply to the company with such modifications as are specified if it is satisfied that by reason of the nature of the company's activities its affairs may properly be regarded as the domestic concern of its members. In this instance, the Commission may at any time withdraw or amend the terms of any direction. A copy of the Act of court (in the case of an order under Art 17(6)) or notice (under Art 17(7)) must be delivered to the Registrar within 14 days (Art 17(8)). Within 28 days after the service of a notice of a direction or amendment to the terms of a direction on the company under Art 17(7), a member may appeal to court on the ground that the direction was unreasonable having regard to all the circumstances of the case. Similarly, the company or a member of the company may appeal on the ground that a term imposed by the direction or an amendment to the term was unreasonable having regard to all the circumstances of the case (Art 17(9)). On hearing any appeal, the court may confirm or reverse the direction, where the appeal is against a direction, or confirm, vary or revoke a term, where the appeal is against a term. The court may also add a new term to those specified in the direction (Art 17(10)). The court may make any order it sees fit in relation to the costs of the appeal (Art 17(11)).

4.9. Art 73(1) requires all private companies to have at least one director.

Public Companies: Status

4.10. Art 3(1) on the formation of a company states that any 2 or more persons associated for a lawful purpose may apply for the formation of an incorporated public company by signing and delivering to the registrar a memorandum of association that states that the company is to be a public company. This is irrespective of whether the company is to be incorporated with or without limited liability.

4.11. Under Art 9(4) on the effect of registration, if the memorandum states that the company is a public company or a private company, the certificate shall also state the same fact. In fact, under Art 9(5), a certificate of incorporation issued under the law is conclusive evidence: (a) that the company is incorporated under the law; (b) that the requirements of this Law have been complied with in respect of the company's registration as well as all matters precedent and incidental to its registration; and (c) if the certificate states that it is a public company or a private company, that it is in fact such a company.

4.12. Art 16(1) stipulates that a public company with not more than 30 members may become a private company by altering its memorandum to state that it is a private company. Where the public company in fact has more than 30 members, under Art 16(2), the Commission may in its discretion by written notice to the company direct that it becomes a private company by altering its memorandum to state that it is a private company. In this instance, the application may only be successful if the Commission is satisfied that by reason of the nature of the company's activities its affairs may properly be regarded as the domestic concern of its members. The Commission may attach such conditions as it sees fit to the direction and, under Art 16(3), may withdraw or amend the terms of any such condition at any time by written notice.

4.13. Art 16(4) states that, where a public company that has become a private company as a result of a direction given by the Commission fails to comply with any condition attached to the direction or the Commission is no longer satisfied that its affairs may properly be regarded as the domestic concern of its members, the Commission may serve written notice that the company is no longer to be treated as a private company as long as, at that time, it has more than 30 members. The notice may stipulate a date no earlier than 28 days after service of the notice, from which point the company is treated as a public company.

4.14. A copy of any notice served under Arts 16(2)-(4) must also, according to Art 16(5), be served on the registrar. Failure to comply with this service requirement or a condition attached to any direction given by the Commission renders the company liable to conviction for an offence. Within 28 days after the service of a notice on the company under Art 16(2), a member may appeal to court on the ground that the direction was unreasonable having regard to all the circumstances of the case. Similarly, the company or a member of the company may appeal on the ground that a condition imposed by the direction was unreasonable having regard to all the circumstances of the case (Art 16(7)). In the case of a notice served under Art 16(4), the company or a member of the company may also appeal within 28 days on the ground that the direction was unreasonable having regard to the circumstances of the case (Art 16(8)). On hearing any appeal, the court may confirm or reverse the direction, where the appeal is against a direction, or confirm, vary or revoke a condition, where the appeal is against a condition. The court may also add a new condition to those specified in the direction (Art 16(9)). The court may make any order it sees fit in relation to the costs of the appeal (Art 16(10)).

4.15. As stated in paragraph 4.7. above, a company may enjoy the status of a private company unless it increases the number of its members to beyond 30, circulates a prospectus relating to its own securities or its securities are admitted to trading on a regulated market (as defined in Art 102(1)), in which case it will be treated by the law as though it were a public company.

Public Companies: Additional Duties

4.16. The memorandum of association must state that the company is a public company (Art 3A).

4.17. The certificate of incorporation must state that the company is a public company (Art 9).

4.18. A public company must have at least two shareholders unless it is a wholly owned subsidiary of a holding company, in which case it may have a single shareholder (Art 27).

4.19. A public company is subject to extra disclosure requirements in relation to Art 36 on the payment of commissions. Art 3 of the Schedule to the Companies (Standard Table) Order 1992 states that commissions may be payable in cash or by the allotment of shares (whether partly or fully paid) or by a combination of these. Under Art 36(1), a company may pay a commission to a person in return for the person subscribing or agreeing to subscribe, whether absolutely or conditionally, for shares in the company. Similarly, payments made be made to any person for procuring or agreeing to procure subscriptions (whether absolute or conditional) for shares in the company, in both cases, if the following conditions are satisfied: (a) the payment of the commission is authorized by the company's articles; (b) the commission does not exceed 10% of the price at which the shares are allotted or the amount or rate authorized by the articles, whichever is the less; and (c) in the case of a public company, the amount or rate per cent of commission, and the number of shares which persons have agreed for a commission to subscribe absolutely are disclosed in a prospectus, where shares are offered for subscription in a document of that type. In the absence of a prospectus, a statement of the commission payable signed by every director of the company or by the director's agent, duly authorized in writing, must be delivered to the registrar before any commission may be paid. Failure to supply the registrar with this statement exposes the company and any of its defaulting officers to liability for an offence.

4.20. The shareholders' register of a public company may be inspected by anyone on payment of a prescribed sum but copies may only be taken in certain limited circumstances and for certain purposes (this applies also to a subsidiary of a public company) (Art 45).

4.21. Art 54(1) on the registration of particulars of special rights requires a public company, which admits a member or allots shares with rights which are not stated in its existing memorandum or articles, or which by a resolution or agreement of which a copy is required by Art 100 to be delivered to the registrar confers the same rights on a member, must deliver to the registrar a statement containing particulars of those rights within one month of the admission or allotment. Art 54(2) states that the rule does not apply if the rights are in all respects uniform with the rights of existing members. For this purpose, any distinction in the right to receive a dividend from the rights of previously admitted members within the 12 months prior to the admission or allotment is to be disregarded. This obligation applies also to subsidiaries of public companies.

4.22. A variation under Art 54(3) of the rights of members of a public company made otherwise than through an amendment of the company's memorandum or articles or by a resolution or agreement subject to Art 100 must be the subject of a statement containing particulars of the variation to be delivered to the registrar within one month from the date the variation is made. Similarly, the assignment of a name or designation under Art 54(4) or a change to an existing name or designation in the case of a class of membership rights must be notified to the registrar in a statement containing particulars of the name or designation. Failure to comply with any of the provisions of Art 54 is an offence.

4.23. Certain conditions relating to the delivery of the annual return apply to public companies. Under Art 71(1)(e), every company (other than a company in a creditors' winding up or which is the subject of a declaration under the Désastre Law) shall deliver to the registrar a return stating the particulars required by Art 84 to be kept in the register of the directors and secretary of the company to which the return relates, in respect of the persons who are at that date directors of either a public company or the subsidiary of a public company. The date at which the status of the company falls to be determined is at 1 January in the year of the return, while the return must be supplied before the end of February in every year after the year in which the company concerned is incorporated.

4.24. Every public company must, under Art 73(2), have at least 2 directors. The obligation in respect of inspection of the register applies also to subsidiaries of public companies (Art 83).

4.25. Art 82 applies to the qualifications of secretary of a public company. Art 82(1) stipulates that it is the duty of the directors of a public company to take all reasonable steps to secure that the secretary (or each of joint secretaries) of the company is a person who appears to them to have the requisite knowledge and experience to discharge the functions of secretary of the company. The qualification for secretary includes any person who when the law came into force was already the secretary or assistant or deputy secretary of the company, an advocate or solicitor of the Royal Court or a person who, by virtue of holding or having held any other position or being a member of any professional body, appears to the directors to be capable of discharging the functions of a secretary. Particular mention is made in Art 82(2) of 7 professional bodies, whose members are treated as being qualified to be secretaries. These are (a) the Institute of

Chartered Accountants in England and Wales; (b) the Institute of Chartered Accountants of Scotland; (c) the Association of Chartered Certified Accountants; (d) the Institute of Chartered Accountants in Ireland; (e) the Institute of Chartered Secretaries and Administrators; (f) the Chartered Institute of Management Accountants; and (g) the Chartered Institute of Public Finance and Accountancy. Amendments may be made under Art 82(3) to this list by the Minister concerned.

4.26. Art 83 requiring the maintenance of a register of directors and secretaries imposes a duty on a public company or a company which is a subsidiary of a public company to open to the inspection of the registrar and of a member or director of the company without charge and to any person on payment of a sum set out by law during business hours subject to reasonable restrictions as the company may impose by its articles or in general meeting, with the proviso that inspection is available for not less than 2 hours in each business day. The obligation in respect of inspection of the register applies also to subsidiaries of public companies (Art 83).

4.27. Unless the company has dispensed with the requirement, an annual general meeting must be held by a public company within 18 months of the last annual general meeting (the period for a private company is 22 months) (Art 87);

4.28. Generally, accounting requirements are also stricter for a public company. For example, a public company must appoint auditors qualified in accordance with the law and have its accounts audited. This is not required for private companies (although they may appoint auditors if they choose to do so) (Art 109) (See Chapter 15 below).

4.29. The liquidator of a public company must be qualified in accordance with part 5 of the Companies (General Provisions) (Jersey) Order 1992.

Calculation of and Minimum Membership Requirements

4.30. As stated in paragraph 4.2 above, a critical threshold for distinguishing between private and public companies is membership of less/more than 30 persons. Art 17A on the calculation of the number of members stipulates that for the purposes of determining the number of members, no account is to be taken of a member (a) who is a director or is in the employment of the company; or (b) who, although having been a director or in the employment of the company was at the same time a member and has not ceased to be a member since leaving the position of director or employment by the company. Joint ownership of shares by 2 or more persons is, under Art 17A(2), treated as a single membership for the purposes of calculating the threshold.

4.31. For the purposes of determining who is a member of the company, Art 25(1) provides that subscribers to a company's memorandum are deemed to have agreed to become members of the company. On registration of the company, these persons shall be entered as members in the company's register.

4.32. Art 27 on the minimum membership for carrying on business applies to public companies. Under Art 27(1), if a public company carries on business without having at least 2 members and does so for more than 6 consecutive months, any person who, for the whole or any part of the period that it so carries on business after those 6 months (a) is a member of the company and (b) knows that it is carrying on business with only one member becomes liable, jointly and severally with the company, for the payment of the company's debts contracted during the whole or part of the period. The rule does not apply to a public company whose issued shares are held by a holding body or a nominee on its behalf.

5. Company Formation

Persons Authorised to form a Company and Forms of Company

5.1. Art 3 sets out the authority to form a company. In the case of a private company, Art 3(2) provides that any single person or 2 or more persons associated for a lawful purpose may apply for the formation of an incorporated private company by signing and delivering to the Registrar a memorandum of association that states that the company is to be a private company. This is regardless of whether the company is to be formed with or without limited liability.

5.2. In the case of a public company, any 2 or more persons associated for a lawful purpose may apply for the formation of an incorporated public company by signing and delivering to the Registrar a memorandum of association that states that the company is to be a public company. Similar to the position of a private company, the application is the same regardless of whether the company is to be incorporated with or without limited liability.

5.3. In line with the threshold requirements mentioned in paragraph 4.7 above, applications made to form a private company will not be granted by the Registrar where the number of applicants is more than 30. This is subject to the proviso in Art 3(3) that the Commission may satisfy itself that by reason of the nature of the company's intended activities its affairs may properly be regarded as the domestic concern of its members and duly notify the Registrar of the same. The notification may be given subject to conditions, as set out in Art 3(4) and the terms of Art 16 apply to the notification as they do to the written notice procedure under that Art.

5.4. One caveat applies to the qualification of persons entitled to apply for the formation of a company in that, according to Art 3(6), they must neither be a minor nor subject to an interdict. In Jersey, when individuals apply to incorporate a company (as distinct from when it is done by a registered person/legal entity), they are required to attend at the Companies' Registry and to produce passport and/or identification documents (utility bills etc), so that individuals are seen by the registry and their capacity can be confirmed.

5.5. In relation to liabilities of both public and private companies, Art 3(7) stipulates that both types of company may be formed with:

a) Liability of all or any of its members limited by shares, in other words limited by its memorandum to the amounts (if any) unpaid on the shares held by each member: "companies limited by shares".

b) Liability of all or any of its members limited by guarantee, in other words limited by its memorandum to such amounts as each of the members undertake in the memorandum by way of guarantee to contribute to the assets of the company if it is wound up: "companies limited by guarantee". This is subject to the proviso that such members do not also have shares in the company.

c) There is no limit on the liability of any of the members of "unlimited companies". A company may have both limited and unlimited shares, but it is only an unlimited company if none of the members have limited liability, whether by holding limited shares or by being a guarantor member of the company. As a guarantee company consists only of guarantor members (see Art 3G), a company would not consequently be a guarantee company if any member were to hold shares in the company. To that extent, because there cannot be any shares in a guarantee company, a member of a guarantee company cannot also have shares in that company. However, a par value company or a no par value company can also have guarantee members (see Arts 3E and 3F). There does not appear to be any prohibition on members of a limited company (that is not a guarantee company) who are guarantee members not also holding shares in that limited company.

5.6. Furthermore, Art 3(8) states that both public and private companies may be formed as (a) par value companies; (b) no par value companies; or (c) guarantee companies. This is subject to the rule in Art 3(9) that companies may not be formed with a share capital with both par value shares and no par value shares.

Lawful Purpose

5.7. The Registrar has to satisfy himself that the requirements of the law have been complied with before proceeding to issue a certificate. If the Registrar forms the view that incorporation of the company would not be in the public interest he must refer the application to the court (Art 8). The court may also call for an application to be referred to it. If an application is before the court it has power to refuse the application if it considers that it would not be in the public interest. If the Registrar is satisfied that all of the requirements of the law have been complied with and if the court has authorised the registration (if it has been referred to the court) the registrar must register the memorandum and any articles of association delivered to him. There is a list of sensitive activities on the website of the Jersey Financial Services Commission which will invite greater scrutiny and possible rejection of incorporation applications.

5.8. As detailed below, Art 9(5) provides that the issue of a certificate of incorporation is conclusive evidence of compliance with all matters prior and incidental to registration, which of necessity includes the association for lawful purpose. Note also that Art 8(a) of the Companies (Guernsey) Law 1994, which states that the Greffier is responsible for issuing the certificate of incorporation, which is also deemed conclusive, but may himself rely under Art 120 of the same law on the conclusiveness of an Act of Court in order to issue the certificate.

Documentation Requirements

The Memorandum

5.9. Together with the application, a number of documents are required to be provided. Art 4(1) stipulates that a memorandum of association in printed form in either the French or English language shall be provided. Although nothing in the law obliged companies to have objects, Art 4(2) details the contents of the memorandum that are required, including the following information:

a) The name of the company.

b) Whether the company is private or public in form.

c) Whether it is a par value company, a no par value company or a guarantee company.

d) In the case of subscribers who are natural persons, the full name and address of each person.

e) The name and address of the registered office or principal office of each subscriber which is a person other than a natural person. This encompasses companies as well as entities introduced by the Separate Limited Partnerships (Jersey) Law 2011.

5.10. In Art 4(3), the formality requirements for subscription are stated in that the memorandum must be signed by or on behalf of each subscriber, in the presence of at least one witness, whose purpose is to attest the signature and who must also insert his or her own name and address as proof of the attestation being made. It is usual in Jersey for the witness to be independent, i.e. not one of the other participants in the incorporation process. By way of exception, Art 4(4) provides that, where the Electronic Communications (Jersey) Law 2000 permits the delivery of a memorandum by way of electronic communication, any memorandum delivered in this fashion does not require printing or signatures in the presence of a witness. This facility is, however, not generally used because of confidentiality concerns in relation to the requirements for disclosure of beneficial owners in connection with consent for the issue of shares under the Control of Borrowing Order 1958. It is anticipated that, in due course, it may become feasible in relation to reserved companies.

5.11. Differences exist in the cases of memoranda for companies with shares and companies with guarantor members.

The Memorandum of a Company with Shares

5.12. Art 4A(1) stipulates that the memoranda of companies with shares must state:

a) In the case of a par value company, the amount of share capital with which it is to be registered, and any fixed amounts into which the shares of each class are divided.

b) In the case of a no par value company, any limit on the number of shares of each class which the company is authorized to issue.

c) If the company is to have any limited shares, that the liability of a member arising from the member's holding of such a share is limited to any amount unpaid on that share.

d) If the company is to have any unlimited shares, that the liability of a member arising from the member's holding of such a share is unlimited.

e) In all memoranda, irrespective of any par values or limitations, the number of any limited shares and/or unlimited shares (separately stated) of each class which the person takes against the name of each subscriber.

5.13. Art 4A(2) permits the nominal value of any par value share to be stated in any unit or part of a unit of any currency, although Art 4A(3) states that no person may subscribe for less than one share in a company whose capital is divided into shares.

The Memorandum of Companies with Guarantor Members

5.14. Art 4B(1) stipulates that the memoranda of companies with guarantor members must state that each guarantor member undertakes to contribute to the assets of the company, if it should be wound up while he or she is a member or within 12 months after he or she ceases to be a member. The memorandum must also state a maximum amount to be specified in the memorandum in relation to that member to be put towards the purposes in Art 4B(2).

5.15. Art 4B(2) states that the purposes of the amount payable under the guarantee are to (a) pay the debts and liabilities of the company contracted before he or she ceases to be a member; (b) pay the costs, charges and expenses of winding up; and (c) adjust the rights of the contributories among themselves.

5.16. The memorandum of such a company must also state, against the name of each person who subscribes as a guarantor member (a) that he or she does so as such a member; and (b) the maximum amount specified in relation to the guarantee he or she provides.

The Memorandum of Companies of Limited Duration

5.17. Where the company is to be wound up and dissolved on the expiry of a period of time or the happening of an event, the memorandum or articles of a company of limited duration must state the period or event concerned.

Arts of Association for all Companies

5.18. Together with the memorandum for any company, Art 5(1) also requires articles of association to be delivered to the Registrar. Art 5(2) states that the articles may be in either the French or English language and must be printed with its text divided into consecutively numbered paragraphs. This is subject to the proviso contained in Art 5(4) permitting the use of the Standard Table as authorised in Art 6.

5.19. The same formality requirements for the memorandum are required for the articles of association in that they must, under Art 5(3), be signed by or on behalf of each subscriber of the memorandum and in the presence of at least one witness to attest the signature, who is also to insert his or her own name and address. This requirement is subject to the proviso in Art 5(5) that, where the Electronic Communications (Jersey) Law 2000 permits the delivery of articles of association by way of electronic communication, any articles of association delivered in this fashion does not require printing or signatures in the presence of a witness. As stated in paragraph 5.10. above, this facility is, however, not generally used because of confidentiality concerns.

Other Documents to be Delivered

5.20. Art 7(1) requires that a statement containing the intended address of the company's registered office on incorporation and any other published particulars is to be delivered to the Registrar together with the memorandum. The statement must also be signed by or on behalf of the subscribers of the memorandum. If any person delivers the memorandum as an agent for the subscribers, Art 7(2) requires the statement to specify that fact and state the agent's name and address. Art 7(4) also requires the statement to specify the extent to which the company adopts (if it does) the Standard Table prescribed under Art 6.

5.21. Art 7(3) requires additional disclosure of directors' particulars in the statement, which must include:

a) The director's present forenames and surname.

b) Any former forenames or surname by which the director was known.

c) The director's business or usual residential address.

d) The director's nationality.

e) The director's business occupation (if any).

f) The director's date of birth.

The Use of the Standard Table and Permitted Variations

5.22. Art 6(1) permits the Minister to prescribe a set of model articles, to be known as the Standard Table. It is to apply uniquely to the situation of a par value company which does not have unlimited shares and does not provide for guarantor members. That said, Art 6(1A) authorises any company, even one not within the contemplation of the rule, to adopt the Standard Table to the extent that it is appropriate to do so.

5.23. In fact, model articles have been prescribed in the form of a Schedule appended to The Companies (Standard Table) (Jersey) Order 1992 (commencement date 30 March 1992). Art 6(2) provides that where a company within the contemplation of the rule is registered after this date, the Standard Table will apply if articles of association have not been registered. Even if registration of articles of association has taken place, the Standard Table will still apply to the extent that the articles of association do not modify or exclude the Standard Table. Nonetheless, alterations to the Standard Table post-dating the registration of articles of association do not affect a company registered before the changes take effect and do not alter any portion of the Standard Table as adopted or deemed to be adopted by the company.

Permitted Names

5.24. Art 13 sets out strict requirements as to the use of names. Where, in the Registrar's opinion, a proposed name or change of name is in any way misleading or otherwise undesirable, Art 13(1) permits the Registrar to refuse to register the memorandum or special resolution changing the name of a company. Where names may be similar, as would be the case with incorporations of companies intended to form part of a group or that may be associated for some other reasons, it is usual to obtain a Letter of Consent for the use of that name. Furthermore, there is a practice in Jersey of "reserving" names prior to incorporation taking place, during which the proposed use of any unsuitable names may be vetted. Where the incorporation may lead to an unconnected company having a similar name to an already established company, the issue of possible passing off may arise and will probably be dealt with by an instruction to change the name of the proposed incorporation.

5.25. Art 13(2) requires the names of limited companies to end with the word "Limited" or its abbreviation "Ltd.". The equivalent in French: "avec responsabilité limitée" or "a.r.l." may also be used. Art 13(3) authorises a company to choose whether to use the full or abbreviated forms for any purpose under the law as it prefers.

5.26. In the case of public companies that are also limited, the equivalent words that may be used, per Art 13(3A), are "public limited company" and "PLC" (or "plc"). Art 13(3B) goes on to state that any such company is permitted to choose, for any purpose set out by the law, the use of either full or abbreviated forms and any combination of capital or lower case characters in setting these out.

5.27. The Registrar may, under Art 13(4), refer to a company in any document issued under the law by means of an abbreviation permitted in this Art if he considers it convenient to do so.

Change of Name

5.28. Subject to the terms of Art 13 (see paragraph 5.24. above), a company may, under Art 14(1) change its name. According to Art 14(5), any change of name by a company does not affect any rights or obligations of the company or render defective any legal proceedings by or against it. Similarly, any legal proceedings that might have been continued or commenced against the company in its former name may be continued or commenced against it in its new name.

5.29. Art 14(2) stipulates that, where a company changes its name, the Registrar shall enter the new name on the register in place of the former name. The Registrar will also issue a certificate of incorporation under Art 9 which has been altered to meet the circumstances of the case. The change of name is deemed to have effect from the date on which the altered certificate is issued.

5.30. Insofar as the company is the holder of immovable property or has an interest in the same in Jersey and its name is inscribed in the Public Registry as a holder, a copy of the altered certificate of incorporation under Art 9 must, according to Art 14(3) be delivered to the Judicial Greffier within 14 days after it is issued for the new name to be registered in the Public Registry. Failure to comply with this provision exposes the company to liability for an offence.

Power to Require Change of Name

5.31. In common with the restrictions on the use of names (see paragraph 5.24. above), if the name by which a company has been registered is misleading or otherwise undesirable, the Registrar may direct the company to change it under Art 15(1). Compliance with the direction is required, by virtue of Art 15(2) within 3 months from the date of the direction or any longer period that the Registrar may allow. Failure to comply with the direction is an offence.

5.32. A challenge may be brought under the terms of Art 15(3) to the direction within 21 days of the date on which it is made, with the court being authorised to set the direction aside or confirm it. Where the court, in accordance with Art 15(4) confirms the direction, it may specify a period of not less than 28 days within which the company is to comply with the direction, but may also order the Registrar to pay the company a sum (if at all) as the court thinks fit to defray the expenses of complying with the direction.

Registration of the Company

5.33. Art 8(3) permits the Registrar to register the memorandum and any articles of the company delivered to the Registrar under Art 5, provided that the Registrar is satisfied that all the requirements of the law in respect of the registration of a company have been complied with. Similarly, if the application for the formation of the company has been considered by a court, the Registrar may proceed to registration if he has received an Act of the court authorizing the registration. Same day incorporation is possible, including the reservation of intended names by e-mail.

5.34. Consideration by the court tends to happen where, on an application for the formation of a company, the Registrar is of the opinion that the formation of the company would not be in the public interest and refers the application to the court under Art 8(1). On a reference, a court may, as set out in Art 8(2) either (a) authorize the registration of the memorandum and any articles of the company; or (b) refuse to authorize the registration of its memorandum and any articles, if the court considers that the formation of the company would not be in the public interest.

The Effect of Registration

5.35. Art 9(1) stipulates that the Registrar will issue a certificate stating that a company is incorporated once the company's memorandum is registered. Art 9(2) requires that the certificate be signed by the Registrar and sealed with the Registrar's seal. Art 9(4) requires the certificate to state, in line with the memorandum, whether the company is a public company or a private company.

5.36. The effect of the issue of the certificate, under Art 9(3), is that, from the date of incorporation mentioned in it, the subscribers of the memorandum, together with any other persons who may from time to time become members of the company, are deemed to be a body corporate under the name contained in the memorandum. The company is from that moment capable of exercising all the functions of an incorporated company with liability on the part of its members to contribute to its assets as provided by the law or any other enactment in the event of the company being wound up.

5.37. According to Art 9(5), a certificate of incorporation is conclusive evidence: (a) that the company is incorporated under the law; (b) that the requirements of this Law have been complied with in respect of the registration of the company and all matters precedent and incidental to its registration; and (c) if the certificate states that it is a public company or a private company, that it is in fact such a company.

5.38. Preserving the status of registrations prior to the law entering into force, Art 9(6) provides that the Act of Incorporation of an existing company issued by the court, which orders the registration of its memorandum and articles of association in accordance with the law's legislative predecessors, is conclusive evidence: (a) that the company is incorporated; and (b) that the requirements of those laws have been complied with in respect of the registration of the company and all matters precedent and incidental to its registration.

5.39. If a company changes its status under Art 16 (public to private) or Art 17(1) (private to public), once the company has delivered to the Registrar a copy of the special resolution altering the memorandum, the Registrar will, under Art 17B, issue a certificate of incorporation under Art 9 appropriate to the altered status.

Consent to issue Shares

5.40. Art 2 of the Control of Borrowing (Jersey) Order 1958 requires a company to obtain consent from the Financial Services Commission to an issue of shares for any purpose. Art 4 also deals with the issue of securities other than shares. Application for the first issue is generally dealt with through the Registrar at the time of incorporation and as part of the same process and also covers the position of guarantor members who are "person[s] admitted to membership otherwise than by [the] transfer or issue of shares".

6. Memorandum and Arts

Effect of Memorandum and Arts

6.1. Art 10 sets out the effect of the memorandum and articles of association. It states in Art 10(1) that the memorandum and articles, when registered, bind the company and its members to the same extent as if they respectively had been signed and sealed by the company and by each member, and contained covenants on the part of the company and each member to observe all the provisions of the memorandum and articles. This is subject to the general provisions of the law. Furthermore, Art 10(2) stipulates that money payable by a member to the company under the memorandum or articles is treated as a debt due from the member to the company.

6.2. Under the law, Art 12 authorises a member to require the company to send to the member a copy of the memorandum and of the articles subject to payment of a sum to the company (if any is required), not to exceed the published maximum. Failure to comply with this article is an offence.

6.3. To understand what the effect of the memorandum and articles of association is on membership, it is necessary to refer to the three propositions laid down by Mr Justice Astbury in *Hickman v Kent or Romney Marsh Sheep-Breeders' Association* [1915] 1 Ch 881 (England and Wales), in which a member brought proceedings to restrain the association from expelling him following a dispute about financial irregularities. The court held that the articles contained an arbitration clause binding members and laid down three statements:

a) The articles bind the company and the members. The articles bind members qua members. No article can constitute a contract between the company and a third person.

   Hickman v. Kent or Romney Marsh etc [1915] 1 Ch 881 (England and Wales): Held: articles only bind the membership provided not overridden by statute/case law.

   Beattie v EF Beattie Ltd [1938] 3 All ER 214 (England and Wales). Held: an arbitration clause contained in the articles and binding on the membership was held not to avail a director sued in the capacity of director over allegedly improper payments.

   Borland's Trustee v Steel Brothers [1901] 1 Ch. 279 (England and Wales): the articles provided for transferability at fair price on occurrence of bankruptcy. The trustee-in-bankruptcy objected in line with the principle of maximising value for creditors. Held: the articles were not repugnant to general law.

b) No right purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, e.g. as solicitor, promoter, director can be enforced against the company.

Eley v Positive Government Life Assurance Co (1876) 1 Ex D 88 (England and Wales): Eley was appointed solicitor for all company's business. Held: E could not bring suit for breach of contract to challenge his removal by invoking his rights as member.

c) Arts regulating the rights and obligations of the members generally as such create rights and obligations between them and the company respectively. A shareholder can enforce the statutory contract against another shareholder without joining the company as a party to the action.

Rayfield v Hands [1960] Ch 1 (England and Wales). Held: a shareholder can use the articles to compel the directors directly to purchase his shares.

Wood v Odessa Waterworks (1889) 42 Ch D 636 (England and Wales): articles permitted directors to declare dividend with concurrence of the General Meeting. Directors enforced debenture issue instead as a long-term loan back to the company. Held: directors' action inconsistent with articles.

Alteration of Memorandum and Arts

6.4. Art 11(1) on the alteration of the memorandum and articles of association stipulates that a company may, subject to the provisions of the law, by special resolution alter its memorandum or articles.

6.5. The alteration, including deletion, may be to any provision in the memorandum or articles of association and may additionally effect an alteration so as to provide, under Art 11(2) that the company is to be wound up and dissolved on the expiration of a period of time or the happening of some other event. However, Art 11(4) limits this facility in the case of existing companies, in that the power to alter the memorandum or articles cannot be exercisable: (a) so as to shorten a period of time by which the company's existence is limited, or to provide for its winding up and dissolution on the happening of an event other than the expiration of a period of time; or (b) so as to alter rights attached to a class of shares which could not have been altered under previous legislation repealed by Art 223. This limitation is subject to the proviso that if all the members agree or the court sanctions it, such an alteration may still proceed.

6.6. Art 11(3) provides that a member of a company is not bound by an alteration made in the memorandum or articles after the date on which the member became a member, notwithstanding anything that may be stated in the memorandum or articles, if the effect of the alteration is to: (a) require the member to take or subscribe for more shares than the number held by the member at the date on which the alteration is made; or (b) in any way increase the member's liability as at that date to contribute to the company's share capital or otherwise to pay money to the company. This is subject to the possibility for the member to agree in writing to be bound by it, which agreement may be signified either before or after the alteration is made.

6.7. Art 38(4) authorises alterations in the capital of par value companies by means of special resolution. By altering the memorandum, a par value company may, under Art 38(1):

a) Increase its share capital by creating new shares of such amount and in such currency or currencies as it thinks expedient.

b) Consolidate and divide all or any of its shares (whether issued or not) into shares of larger amount than its existing shares.

c) Convert all or any of its fully paid shares into stock, and reconvert that stock into fully paid shares of any denomination.

d) Subdivide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum. In this instance, according to Art 38(2), the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived.

e) Convert any of its fully paid shares the nominal value of which is expressed in one currency into fully paid shares of a nominal value of another currency. This is subject to the requirements of Art 38B, which requires the currency rate to be determined within a period not more than 40 days prior to the conversion taking place.

f) Denominate the nominal value of its issued or unissued shares in units of the currency into which they have been converted. Under Art 38(1A), this can occur where the nominal value of the shares is expressed in one currency and the shares are subsequently converted into shares of a nominal value of another currency, although they remain denominated in the former currency.

g) Cancel shares which, at the date of the passing of the resolution to cancel them, have not been taken or agreed to be taken by any person, and diminish the amount of the company's share capital by the amount of the shares so cancelled. Art 38(5) provides, nonetheless, that a cancellation of shares under this Art does not for the purposes of the law constitute a reduction of share capital.

6.8. In the case of no par value companies, Art 38A authorises a no par value company to alter its memorandum by special resolution to:

a) Increase or reduce the number of shares that it is authorized to issue.

b) Consolidate all or any of its shares (whether issued or not) into fewer shares.

c) Divide all or any of its shares (whether issued or not) into more shares.

6.9. The alteration of articles is subject to general principles of law and equity. The general test was formulated by Lord Lindley M.R. in *Allen v Gold Reefs of West Africa Ltd* [1900] Ch 656 (England and Wales): article gave company lien over unpaid shares. A resolution extended this to all shares (paid or unpaid), although one shareholder only was affected. The company attempted to assert the lien for unpaid shares over paid shares already paid for. Held: the extension was valid, although rules of law and equity relating to exercise of power by majority to bind minority will apply as will requirement of exercise bona fide in interests of company as a whole.

6.10. The alteration of articles was held invalid in two cases: *Brown v British Abrasive Wheel Company* [1919] 1 Ch 290 (England and Wales): majority (98%) would only refinance company if minority (2%) bought out. A resolution was passed to this effect. Held: an injunction would lie because benefit not for company, but for majority alone. Similarly, *Dafen Tinplate Co Ltd v Llanelly Steel Co* [1920] 2 Ch 124 (England and Wales): power to allow majority to force minority (here P who had transferred custom to rival company) to sell to approved third party held wider than necessary to achieve benefit. But these decisions are difficult to reconcile with two Court of Appeal decisions: *Sidebottom v Kershaw Leese* [1920] 1 Ch 154 (England and Wales). Held: article inserted which permitted buy-out of any shareholder who competed with cloth-manufacturing company valid. Also, *Shuttleworth v Cox* [1927] 2 KB 9 (England and Wales): P and 4 others were directors of D, being entitled to remain directors for life unless one of six determining events happened. In the wake of certain irregularities alleged to have committed by P, an EGM was held to pass a special resolution to add a seventh proviso, that a director was to resign if all the other directors made a request in writing. P alleged breach of contract and sought a declaration that he remained a director of the company. Held: a valid action for company. Any alteration of the company's articles was a matter for shareholders in general meeting, who must decide whether it is for the benefit of the company. Provided it was reasonable and exercised bona fide, a court should be reluctant to question the decisions of shareholders. The court went on to say that the only question is whether or not the shareholders, in voting for the alteration, honestly intended to exercise their powers for the benefit of the company. It was not a matter for the court whether or not a particular alteration was for the benefit of the company, nor was it the business of a judge to review the decision of every company in the country on these questions.

6.11. In *Greenhalgh v Arderne Cinemas* [1951] Ch 286 (England and Wales): M negotiated a deal with another to take over the company. G, despite losing control of the company and his seat on the board, nevertheless still had certain pre-emptive rights over the sale of shares. M proposed a special resolution to amend the articles authorising the directors to effect a transfer, despite the pre-emptive rights, to any party an ordinary resolution passed by general meeting would name, which was duly done naming the entrepreneur. G claimed the resolutions were invalid as a fraud on the minority and not bona fide in the interests of the company. Held: The resolutions were not a fraud on the minority. Whether they were bona fide or not was a separate consideration to which each shareholder ought to address himself in voting. Here, Evershed M.R. suggested that "bona fide for the benefit of the company as a whole" means not two things but one thing. It means that the shareholder must proceed upon what in his honest opinion, is for the benefit of the company as a whole. The phrase "the company as a whole" does not (at any rate in such a case as the present) mean the company as a commercial entity distinct from the corporators: it means the corporators as a general body. That is to say, the case may be taken of an individual hypothetical member and it may be asked whether what is proposed was, in the honest opinion of those who voted in its favour, for that person's benefit. One might say that a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders, so as to give the former an advantage of which the latter were deprived." However, see *Peters American Delicacy Co Ltd v Heath* (1939) 61 CLR 457 (Australia), where inconsistent drafting for the purposes of dividend distribution raised the question of whether the dividend was payable on only paid up shares or the entire value of capital held by particular shareholders. The court held that alteration of the articles often involves adjustment of the rights of shareholders inter se; to put forward a test of "bona fide for the benefit of the company as a whole" in these situations seems meaningless as there could not be a hypothetical shareholder (i.e. all shareholders fell into one or other group with or without unpaid shares).

6.12. The possibility of using the unfair prejudice remedy under Art 141 to restrain alterations is considered in detail later (see Chapter 13 below).

6.13. An injunction will not be granted to enforce a contract by a company not to alter its articles, for which see *Punt v Symons* [1902] 2 Ch 506 (England and Wales): S given power to hire/fire directors in articles, while collateral contract promised articles would not be altered; company fell out with executors purporting to exercise same powers, proposed altering articles. Executors sued to enforce collateral contract. Held: a contract cannot operate to prevent a subsequent alteration to the articles. However, a company, by altering its articles, cannot justify a breach of contract: *Southern*

Foundries (1926) Ltd v Shirlaw [1940] AC 701 (England and Wales), where the articles were altered to permit a new holding company in a takeover to remove a director. Held: a valid action under the articles may still engender a breach of contract that must be paid for. But a company also cannot be precluded from altering its articles and thereby giving itself power to act upon the provisions of the articles as altered. However, in so acting, the company may nevertheless be in breach of the contract if it is contrary to a stipulation in a contract validly made before the alteration. In fact, an injunction will not be granted to enforce a contract by a company not to alter its articles. Compare the contrary views expressed in *Baily v. British Equitable Assurance Co* [1904] 1 Ch 734 (England and Wales) where a life policy contained whole-distribution clause. A company was incorporated to take over insurance business and wished to transfer part of the distribution moneys to a reserve. Held: an injunction to restrain company would issue.

6.14. In certain instances, a shareholders' agreement may prevent signatories of the agreement from voting for the alteration of articles. *Russell v Northern Bank* [1992] 1 WLR 588 (Privy Council, Northern Ireland): shareholders' agreement not to increase company capital was binding on the shareholders who were party to the agreement, although not on company which had a statutory power to increase its capital and not on future shareholders who were not party to the agreement, so shareholders could be restrained from voting for share issue in general meeting. In *Hawkes v Cuddy* [2009] EWCA Civ 291 (England and Wales), it was held that a director may have obligations under shareholder agreements or by virtue of being an employee or otherwise. It is not necessarily inconsistent with the duties of a director to have such collateral obligations, but they cannot detract from the director's duties to the company of which he is a director while he is acting as such. See further, *Ebrahimi v Westbourne Galleries* [1972] 2 All ER 501 (England and Wales): the fact of quasi-partnership may invalidate certain decisions taken, even though in compliance with articles as written. Held: courts will consider the provisions of a shareholders' agreement in deciding whether one of the proprietors of a business has reneged on his equitable obligation. See also *Thorby v. Goldberg* (1964) 112 CLR 597 (Australia): If a contract is entered into on behalf of the company which the directors think is bona fide in the interests of the company as a whole, then they may bind themselves to take further steps to implement that contract.

Cosmic Insurance v Khoo [1981] 1 MLJ 61 (Privy Council, Singapore): a letter offering the position of managing director for life was held to be a pre-incorporation contract that had been ratified by the company.

6.15. The terms of the articles may be incorporated into a contract between the company and a third person (outsider agreements): *New British Iron Co ex. p. Beckwith* [1898] 1 Ch 324 (England and Wales): on company's liquidation, the directors claimed to benefit from article stipulating remuneration of board to be £1000 per annum. Held: a contract was to be implied containing article as term. Nonetheless, a contract which incorporates the company's articles must be taken as acknowledging that the articles are alterable in the normal way. But alteration of the articles does not affect the contract retrospectively: *Swabey v. Port Darwin Gold Mining Co* (1889) 1 Meg. 385 (England and Wales): articles provided directors to be paid £200 per annum. resolution passed reducing this to £5. director sued for 3 years back pay. Held: change can only operate prospectively. The issue of whether the articles are in fact incorporated in an outsider agreement tends to arise most often in connection with the relationship between the company and its directors and, in particular, where the company dismisses a director.

Evidencing Constitutional Changes/Filing Special Resolutions

6.16. Art 100(1) states that a printed copy of every resolution or agreement to which the law applies must be forwarded to the Registrar within 21 days after it is passed or made to be recorded by the Registrar. Failure to send a copy to the registrar within the stipulated deadline will subject the company under Art 100(4) to a late filing fee. Nonetheless, according to Art 100(6), notwithstanding any failure to deliver a copy to the Registrar, a resolution or agreement to which this Art applies has effect on the company and its members.

6.17. Furthermore, under Art 100(2), a printed copy of every such resolution or agreement for the time being in force shall be embodied in or annexed to every copy of the memorandum or articles issued after the passing of the resolution or the making of the agreement. A printed copy of every such resolution or agreement must be forwarded to any member at his request, subject to payment to the company of any sum required, not to exceed the published maximum. Failure to comply with the request is an offence.

6.18. Art 100(3) subjects to the terms of Art 100 all: (a) special resolutions; (b) resolutions or agreements which have been agreed to by all the members of a company but which, if not so agreed to, would not have been effective for their purpose unless they had been passed as special resolutions; and (c) resolutions or agreements which have been agreed to by all the members of any class but which, if not so agreed to, would not have been effective for their purpose unless they had been passed or agreed to by some particular majority or otherwise in some particular manner, and all resolutions or agreements which effectively bind all of the members of any class though not agreed to by all those members.

7. Shares/Securities

Definition of Par Value/No Par Value/Shares/Share Fractions

7.1. The following definitions are contained in the law:

a) “no par value share” means a share which is not expressed as having nominal value.

b) “par value share” means a share which is expressed as having nominal value.

c) “share”: (a) means a share in a body corporate… and, unless a distinction between shares and stock is expressed or implied, also means stock; and (b) in Art 36, also has the meaning assigned to it by paragraph (2A) of that Art (securities/options to purchase shares) except that in Art 116(1), it means a share, as defined in sub-paragraph (a) of this definition, to which Art 116(2) refers (shares allotted as at the date of an offer).

7.2. Art 40 authorises the issue of fractions of shares. Although Art 4A(3) normally prevents the subscription for less than one share, Art 40(1) provides that a company registered with shares may issue a fraction of a share if it is authorized to do so by its articles. Art 40(3) states that the rights of a member in respect of the holding of a fraction of a share in a company is as provided in the articles of association, while Art 40(4) provides that the law applies to a fraction of a share in the company as it does to a whole share in the company, unless the articles of association state otherwise. If the holder of a fraction of a share acquires a further fraction of a share of the same class, Art 40(2) requires the fractions to be treated as consolidated. Art 31 of the Schedule to the Companies (Standard Table) Order 1992 states, however, that, where on a consolidation taking place, members become entitled to fractions of a share, the directors may proceed to a sale of those fractions at the best price obtainable and may require the execution of an instrument of transfer at the direction of the purchaser. The proceeds of a sale will be distributed in due proportion amongst the members so entitled, but the purchaser is not liable for the conduct of the distribution, nor is the purchaser’s title impugnable for any defect in the sales process.

Nature and Numbering of Shares/Share Certificates

7.3. Art 34(1) provides that the shares or other interests of a member of a company are transferable in the manner provided by the company’s articles of association, subject to the requirements contained in Art 42 on the transfer and registration of shares (see paragraphs 7.62 to 7.65 below).

Taylor v Fitzpatrick 1979 JLR 1 and *In re Level One Holding (Jersey) Limited* 2007) JLR Note 39 hold that the transferee must agree to become a member for the transfer to be effective. See also Art 25(1) which states that registration is a pre-requisite to enjoying the status of "member".

7.4. Each share in a company is, according to Art 34(2), to be distinguished by number appropriate to it. An exception is provided in that if all the issued shares in a company or a particular class (a) are fully paid and carry the same rights in all respects; or (b) are evidenced by certificates issued in accordance with Art 50, each certificate being distinguished by a number recorded in the register of members, then none of the shares need be distinguished by a number. Art 5 of the Schedule to the Companies (Standard Table) Order 1992 confirms the member's entitlement to a free first original of any share certificate (a reasonable payment being authorised for any others after the first), which may be sealed or signed (by either 2 directors or a director and the secretary). If a share certificate is worn out, lost, defaced or destroyed, Art 6 of the Schedule to the Companies (Standard Table) Order 1992 permits its replacement free of charge or subject to any expenses reasonably incurred by the company in investigating the loss.

Baker v Falle 1991 JLR 284. Held: shares are freely transferable in the absence of an express veto on transfer exercisable by the directors contained in the articles. In this case, the articles contained pre-emption provisions, followed by rights of the transferor shareholder to freely sell shares if no other shareholder wanted to buy. The article containing the directors' veto on transfer preceded the article containing the right to sell if no other shareholder wanted to buy. The court stated, however, that restrictions on transfer must be strictly construed. When the right of free sale was engaged, this ended the power of veto. The court said that the contrary could have been the case had the veto article appeared after the "right of free sale" article. Furthermore, the right of veto is a fiduciary power and must be exercised for the benefit of the company and with due regard to the rights of the transferee. In this case, the power of veto was not exercised bona fide in interests of the company, but for Falle's personal advantage as he wished to lock Baker into the company until such time as he could obtain Baker's shares at a price advantageous to him.

7.5. Art 50(1) requires all companies to complete and have ready for delivery the certificates of all shares allotted or transferred unless the conditions of allotment of the shares otherwise provide within 2 months after the allotment of any of its shares or date on which a transfer of any of its shares is lodged with the company. A failure to comply with this requirement is an offence. This requirement does not apply to:

a) An allotment or transfer of shares to a nominee of a stock exchange on which those shares are or are to be listed.

b) A transfer of shares which the company is for any reason entitled to refuse to register and does not in fact register.

c) An open-ended investment company whose articles do not require a certificate to be delivered on every occasion when shares of the company are allotted or transferred.

7.6. In the event that a company has failed to comply with the provisions of Art 50(1), Art 50(6) permits any person entitled to have the certificates delivered to the person to serve notice on the company to make good the failure within 10 days after the service of the notice. If this remains without response by the company, the court may make an order directing the company and any officer of it to make good the failure within a time specified in the order; and for all costs of and incidental to the application to be borne by the company or by the officer responsible for the failure.

7.7. Art 51(1) states that a certificate is evidence of title to the relevant shares. Any certificate sealed by the company, or signed either by two of its directors or by one of its directors and its secretary, specifying any shares held by a member is to be treated as prima facie evidence of the member's entitlement to the shares. Art 51(2) states this to be the case despite any subsequent change of the currency in which the nominal amount of the shares to which the certificate relates is expressed.

7.8. A further exception to the requirements of Art 50 is provided in Art 51A dealing with uncertificated securities in that title to securities or to any specified class or description of securities may be evidenced and transferred without a written instrument subject to an order being made by the Minister to that effect. In fact, the Companies (Uncertificated Securities) (Jersey) Order 1999 (as amended) provides for shares in a Jersey company to be held in uncertificated form to permit trading on the CREST system.

Share Capital Statement in Memorandum

7.9. The law requires a statement of the share capital to be contained in the memorandum. Art 4A(1) provides that the memorandum should state:

a) In the case of a par value company, the amount of share capital with which the company is to be registered, and the fixed amounts into which the shares of each class are divided.

b) In the case of a no par value company, any limit on the number of shares of each class which the company is authorized to issue.

c) In the case of a company to be registered with any limited share, that the liability of a member arising from holding a share is limited to the amount (if any) unpaid on it.

d) In the case of a company to be registered with any unlimited share, that the liability of a member arising from the holding a share is unlimited.

7.10. The memorandum must also state separately, in relation to each subscriber, the number of limited and unlimited shares (if any) of each class which the person takes.

7.11. The alteration of the capital amounts stated in the memorandum is permitted in certain circumstances (see paragraphs 6.7.-6.8. above).

Rights in Relation to Shares

7.12. Art 2 of the Schedule to the Companies (Standard Table) Order 1992 provides in relation to share capital that any share may be issued with such rights or restrictions as the company may by special resolution determine, without prejudice to any rights attached to any issued shares.

7.13. The company may (i) issue, or (ii) convert any existing non-redeemable shares, whether issued or not, into shares which are to be redeemed, or liable to be redeemed at the option of the company or the shareholder, on any terms and in any manner determined by special resolution.

7.14. Any unissued shares are at the disposal of the directors who may allot, grant options over or otherwise dispose of them to such persons and on such terms as the directors think fit.

7.15. Art 54 on the registration of particulars of special rights applies to the situation of public companies issuing certain shares (see paragraphs 4.21.-4.22. above).

Issue and Allotment of Shares

7.16. The words "issue" and "allotment" are commonly used interchangeably regarding corporate securities. Issue being perhaps the most commonly used. They are however different things. Broadly, the allotment of shares refers to a particular part of the process of issuing shares. This distinction can prove to be important, as was seen in *National Westminster Bank v Inland Revenue Commissioners* [1995] 1 AC 199 (England and Wales), where a tax advantage would accrue if certain shares had been "issued" before 16 March 1993. The shares had been allotted before that date although it was not certain that they were issued prior to the holders of those shares being entered on the register of members on 2 April. The House of Lords held that the shares were not issued until they were entered on the register. Thus the process of issuing cannot be completed without entry on the register.

7.17. Allotment however does not depend on registration. An application by a person to become the holder of shares or other securities in a company is, in law, an offer: *Nicol's Case* (1885) 29 Ch D 421 (England and Wales); the company's acceptance of this offer is known as the allotment" of the securities and may be made by sending the applicant a formal "letter of allotment". Allotment is completed when following an application for shares, the board of directors has determined to allot the shares in question to the applicant and notice of the allotment has been given to the applicant – in other words, when there is a binding contract between the applicant and the company for the issue of the shares.

7.18. The principles behind the rules on allotment and issue of shares are twofold; a) directors should seek authority to allot and b) existing shareholders should have pre-emptive rights i.e. the option to purchase shares in proportion to their existing equity.

7.19. Why, however, do shareholders have to be protected? In essence, from directors who may use their power to allot to resist takeovers, entrench their own internal voting position at general meetings and conduct share watering and vote watering, which is where the ratio of shares to votes is reduced, thus diluting existing voting strength to the point where elements of the balance of control may be affected i.e. special resolution and ordinary resolution power may be lost. Or just quite simply a shareholder may be unhappy because it no longer controls the same number of votes. In listed companies this really only affects large institutional shareholders. In private companies it may be of greater concern and can give rise to unfair prejudice actions (under Art 141) and actions for breach of duty.

7.20. Share watering is possibly of more concern given that it occurs even where the shares allotted are non-voting. Quite simply, this means that the ratio of shares to dividends reduces, i.e. if there are more shareholders there will be more shareholders to divide the existing and future earnings of the company between. Even though the company will have raised more money it usually takes some years for the earnings per share ratio to return to its previous level. The effect of this on the value of the shares in the market place is obvious. In a large issue of new shares there is likely to be an incentive to take up the new shares i.e. a discount on the market value, which is not the same as a discount on the par value, which is prohibited (see paragraph 7.21. below). After the shares have been allocated, all the shares new and old will trade at a price somewhere between the discount price and the previous price. Where the price falls in that range will depend on the size of the discount and the market's confidence in the directors' plans for the new funds. If the shares are not taken up, then unless the market is hugely confident in the company's plans, losses are likely.

Pricing of Share Issues and Prohibition of Commissions/Discounts

7.21. Art 35 contains a prohibition on commission and discounts except as authorised by Art 36 as well as Art 3 of the Schedule to the Companies (Standard Table) Order 1992 (see paragraph 4.19. above setting out the substance of the rule applicable to both private and public companies and noting the extra disclosure requirements in relation to public companies).

Under Art 35(1), (a) a par value company shall not issue shares at a discount; and (b) a company shall not apply its shares or capital money either directly or indirectly in payment of a commission, discount or allowance to a person. This applies where that person subscribes or agrees to subscribe (whether absolutely or conditionally) for shares in the company, or procures or agrees to procure subscriptions (whether absolute or conditional) for shares in the company.

Ooregum Gold Mining Co of India v Roper [1892] AC 125 (England and Wales): Shares cannot be issued at a discount.

7.22. The principle applies, by virtue of Art 35(2), to the situation, irrespective of whether the shares or money so applied is added to the purchase money of property acquired by the company or to the contract price of work executed for the company or where the money is paid out of the nominal purchase money or contract price.

7.23. The rule does not prevent, according to Art 35(3), payments made or remuneration given by a company to a broker for the broker's usual charges for services rendered to the company. Similarly, a vendor to, promoter of or other person receiving payment in money or shares from a company is deemed to have the power to apply any part of the money or shares so received in payment of a commission that would be lawful under Arts 35 and 36.

7.24. The prohibition on issues at a discount does not affect the ability of a company to issue shares at different prices as provided by Art 37. If authorised by the articles, a company may (a) make arrangements on the allotment of shares for a difference between the shareholders in the amounts and times of payments of calls or instalments payable on their shares; (b) accept from a member the whole or a part of the amount remaining unpaid on shares held by the member, although no part of that amount has been called up or become payable; and (c) pay dividends in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others.

7.25. A company issues shares at a premium if the consideration which it receives for them exceeds in value the nominal amount of the issued shares. The company may so issue shares freely; the law does not impose any restriction on it. However, par value companies are required to maintain share premium accounts. Art 39(1) states that if a par value company allots shares at a premium (whether for cash or otherwise):

a) A sum equal to the aggregate amount or value of those premiums shall be transferred, as and when the premiums are paid up, to a share premium account for that class, where the premiums arise as a result of the issue of a class of limited shares.

b) A sum equal to the aggregate amount or value of those premiums shall be transferred, as and when those premiums are paid up, to a separate share premium account for that class, where the premiums arise as a result of the issue of a class of unlimited shares.

c) Art 39(2) permits share premium accounts to be expressed in any currency.

d) Share premium accounts, according to Art 39(3), may be applied by the company for (a) paying up unissued shares to be allotted to members as fully paid bonus shares; (b) writing off the company's preliminary expenses; (c) writing off the expenses of and any commission paid on any issue of shares of the company; (d) in the redemption or purchase of shares under Part 11 of the law (see Chapter 9 below); and (e) in the making of a distribution in accordance with Part 17 of the law (see Chapter 10 below).

7.26. The equivalent for no par value companies is the stated capital account. Art 39A(1) requires every no par value company to maintain a separate account for each class of issued share, to be called the stated capital account. The stated capital account may be applied by the company for any purpose for which a share premium account may be applied in the case of a par value company (Art 39A(4)). Art 39A(3) requires the company to transfer to the stated capital account:

a) The amount of cash received by the company for the issue of shares of that class.

b) The value of the "cause" received by the company, otherwise than in cash, for the issue of shares of that class, to be determined by the directors.

c) Any amount which the company, by special resolution, resolves to transfer into the account from a profit and loss account or from any capital or revenue reserve.

d) Art 39A(2) permits the stated capital account to be expressed in any currency.

7.27. The law provides relief from the obligation to effect transfers to share premium accounts and stated capital accounts. Art 39B provides relief in the situation where an issuing company is a wholly-owned subsidiary of any body corporate and issues shares to its holding body or to any other company which is a wholly-owned subsidiary of the same holding body in return for the transfer to the issuing company of assets other than cash.

a) Where the issuing company is a par value company, Art 39B(2) states that any amount in excess of the minimum premium value need not be transferred to the share premium account. The minimum premium value is defined in Art 39B(4) to mean the amount (if any) by which the base value of that for which the shares are allotted exceeds the aggregate nominal value of those shares.

b) Where the issuing company is a no par value company, any amount in excess of the base value of that for which the shares are allotted need not be transferred to the stated capital account.

c) In both instances, the base value is defined in Art 39B(5) as the amount by which the base value of the assets transferred exceeds the base value of the liabilities (if any) of the transferor assumed by the issuing company as part of the terms of transfer of the assets. In turn, the base value of the assets transferred is defined to mean (i) the cost of those assets to the transferor, or (ii) the amount at which those assets are stated in the transferor's accounting records immediately before the transfer (whichever is the less), while the base value of the liabilities assumed is the amount at which they are stated in the transferor's accounting records immediately before the transfer. This is usually taken to mean that the calculation is based on the lowest possible value of the asset, from which the highest possible liability is subtracted.

In summary, the base value is composed of 2 elements: the nominal capital (which is posted to the capital account) and the minimum premium (which is posted to the share premium account). Any sums received over and above the base value are a surplus that the company is free to use.

"Fully" or "Partly" Paid Shares, Company Liens and Calls

7.28. The law generally refers to shares being fully paid and limits liability to amounts unpaid on shares. However, the law does not specify when a share is fully paid or what constitutes an unpaid amount. The issue arises therefore whether shares are fully paid upon payment of the nominal value or upon payment of the nominal amount and any payment agreed by way of premium. Art 11 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 does specify that unpaid moneys, for which a company may make a call from shareholders, may be in respect of nominal value or premium. On the basis that sums payable in respect of premium on a par value share may be called by a company and a shareholder remains liable in respect of sums payable by way of premium until they have been paid, a share is not fully paid until amounts payable by way of premium as well as nominal value have been paid. This is also consistent with the position under English law. The position in relation to no par value shares is different because the amount payable on them is the agreed issue price and there is no concept of premium applicable to no par value shares. It is, however, consistent with the position for par value shares in that a share is not fully paid until all sums agreed to be paid in respect of it, have been paid.

7.29. Note also that Art 7 of the Schedule to the Companies (Standard Table) Order 1992 provides a company with a lien over any moneys payable on a share (other than one that is fully paid) as well as the share itself unless the directors exempt it (whether partly or wholly). If a call or other sum due on a share remains unpaid 14 days after notice has issued in respect of the call/sums due, then the directors are authorised to sell the share and to require a person to execute an instrument of transfer at the direction of the purchaser. Any residue left after the sums covered by the lien have been discharged is payable to the former holder of those shares (Arts 8-10 of the Schedule to the Companies (Standard Table) Order 1992).

7.30. Arts 11-16 of the Schedule to the Companies (Standard Table) Order 1992 deal with the mechanism for calls. Art 11 permits directors to make calls and to require payments, including by instalment, on 14 days' notice being supplied. Calls may be revoked or postponed (in whole or in part). A person against whom a call is made remains liable irrespective of any subsequent transfer of those shares. Art 12 stipulates that the effective date of the call is at the time the resolution authorising it is passed. Art 13 imposes liability for a call in the case of joint holders on a joint and several basis. Unpaid calls, following expiry of the notice, attract interest at the rate stated by the terms of the allotment or of the notice or as determined by the directors (none of which may exceed 10% per annum) from the moment the call is due until it is paid. The directors may, however, waive the interest wholly or partly (Art 14). Art 15 goes on to state that amounts that are payable on allotment or by virtue of being an instalment of a call are treated as if the sums had been demanded under a call, irrespective of whether the sums due are in respect of the nominal value of the share, a premium or a combination of both. Sums that are unpaid but that have not been the subject of a call may be extinguished by the person liable delivering payment to the company. Subject to the terms of the allotment, Art 16 states that holders may be the subject of calls for different periods and sums, depending on the terms of the allotment. Forfeiture for non-payment of calls is dealt with below in Chapter 9.

Liability for Defects in Issue/Allotment Process

7.31. The possibility of abuse of the power to allot exists. It is not so much the directors ignoring the law that causes the problem but the directors using their allotment power for prejudice the interests of a minority shareholder. The duty of the directors as to allotment, as in all matters, is that they are bound to act in good faith in the best interests of the company: *Percival v Wright* [1902] 2 Ch.421 (England and Wales).

7.32. The law allows the director only one legitimate interest to consider when making a decision, he or she must act "bona fide ... in the interests of the company". The delegation of the control power from the shareholders to the board carries with it a duty to act in the "interests of the company". The classic statement of the duty is found in *Re Smith & Fawcett* [1942] Ch. 304 (England and Wales), where Lord Green MR considered that directors must exercise their powers "bona fide in what they considered - not what a court may consider - is in the interests of the company and not for any collateral purpose". The duty operates to constrain the illegitimate exercise of the directors' power. There are two parts to the duty, the first, "what they consider is in the interests of the company" represents the legitimate motive behind the exercise of the power. Thus the directors must believe that the exercise of their power is in the interests of the company before moving to the second part of the duty. The second part of the duty "not for any collateral purpose" relates to the purpose the power was conferred for. Thus if the exercise of a power contained in the articles is not for the purpose it was conferred, it will breach the duty. A substantial body of case law has built up regarding the "collateral purpose" aspect of the duty, e.g. *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (England and Wales).

7.33. For example, the collateral purpose aspect will not be fulfilled where directors allot shares, not for the purpose of capital raising, which is the purpose for which it was given, but to gain voting control for themselves at the general meeting: *Re Jermyn St Turkish Baths Ltd* [1970] 3 All ER 57, [1970] 1 WLR 1194 (England and Wales), or to deprive others of their present control: *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (England and Wales), or to defeat a take-over bid: *Bamford v Bamford* [1969] 1 All ER 969 (England and Wales). Thus if the directors are exercising a specific power granted to them in the articles of association their motive for exercising it must be pure and the purpose must be the right one.

7.34. In Jersey, the same statement of principle is found in *Baker v Falle* 1991 JLR 284 where the court held: the right of veto is a fiduciary power and must be exercised for the benefit of the company and with due regard to the rights of the transferee. In this case, the power of veto was not exercised bona fide in interests of the company, but for Falle's personal advantage as he wished to lock Baker into the company until such time as he could obtain Baker's shares at a price advantageous to him.

7.35. While the collateral purpose doctrine appears clear, the other aspect of the duty causes more uncertainty. The directors may sometimes be challenged as not acting in "the interests of the company". This might happen where the directors decide to allot shares to a particular shareholder for non-cash consideration. There would be no question as to the collateral purpose doctrine as the power exercised by directors in the day to day management of the company is the general management power conferred on them in the Standard Table. Thus the purpose for which it is given is wide. In considering how the law treats the exercise of the general discretion, the focus is not usually on the purpose aspect of the duty but rather on the director's motive in exercising their power. Did the directors exercise the power "bona fide in what they considered - not what a court may consider - is in the interests of the company?": *Bishopsgate Investment Management Ltd.*

(In Liquidation) v Maxwell (No. 2) [1994] 1 All ER 261 (England and Wales).

7.36. In defining the interest of the corporate entity, the judiciary have been consistent in defining the "interests of the company" in terms of one particular interest, namely the shareholders both present and future: *Fulham Football Club v Cabra Estates plc* (1992) BCC 863 (England and Wales). This definition appears to be based on the prevalence of the shareholders proprietary rights and has been used since the 19th Century. The basis for this is that the duty is not confined to the existing body of shareholders, but rather even future shareholders must be considered: *Percival v Wright* [1902] 2 Ch.421 (England and Wales). The long-term view must be 'balanced' against the short-term interests of the present members. The only question at issue is how to balance the long term and short-term interests of the shareholders. The extent to which the judicial definition has remained restricted to the shareholders can be illustrated by the progression of the case law. In *Multinational Gas And Petrochemical Co. v Multinational Gas And Petrochemical Services Ltd. and Others* [1983] 2 Ch. 258 (England and Wales), Lord Justice Dillon stated "[i]ndeed, so long as the company is solvent the shareholders are in substance the company". In *Nicholas v Soundcraft Electronics Ltd. and Another* [1993] BCLC 360 (England and Wales), the interests of a parent company, which was the majority shareholder in the subsidiary, was held to be in the interests of that subsidiary. Note that even where there is a breach of duty even of the collateral purpose doctrine the general meeting can ratify the breach *Bamford v Bamford* [1969] 1 All ER 969 (England and Wales).

7.37. The subjective nature of the duty means that the belief of a particular director must be ascertained. This became a problem for the judiciary as when individuals are questioned regarding their subjective belief at a particular time, the reply tended to be self-serving. In attempting to ascertain the subjective belief of directors the judiciary have introduced objective criteria. The basis for introducing an objective test can be seen in the words of Bowen L.J. in *Hutton v West Cork Railway Co.* (1883) 23 Ch D 654 (England and Wales), where he states: "[b]ona fides cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly bona fide yet perfectly irrational". In Jersey, the point is specifically addressed in Art 74 which requires both that the person should act honestly and in good faith with a view to the best interests of the company but also that the director should exercise the care, diligence and skill that a reasonably prudent person would exercise in similar circumstances.

7.38. Essentially, the courts are testing the assertions of the directors against the reality of the decision they made. A definitive statement on this method of examining the director's intention is found in *Hindle v John Cotton Ltd.* (1919) SLR 625 at 630 (Scotland): "[w]here the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in the discharge of their powers in the interest of the company or were acting from some bye-motive, possibly of personal advantage, or for another reason". The element of objectivity, which has been developed by the judiciary as a means of ascertaining the directors' belief impacts on how widely judges define the director's discretion to make business decisions: *Charterbridge Corporation v Lloyds Bank* [1970] Ch. 62 (England and Wales) and *Re BSB Holdings (No 2)* [1996] 1 BCLC 155.

7.39. The consequences of and remedies for a breach of duty by a director are considered in Chapter 12 below.

7.40. Similarly, Art 141, which is the minority protection section contained in the law designed to get round the procedural difficulties arising for the exceptions to *Foss v Harbottle* (1843) 2 Hare 461 (England and Wales), may avail the shareholder who complains that the issue of shares has the effect of causing unfairness and prejudice to him or her. A detailed examination of the unfair prejudice action is set out in Chapter 13 below.

Re Sunrise Radio (Kohli v Lit) [2009] EWHC 2893 (England and Wales): a question of dilution of power arose in the case, although the rights issue planned was to all shareholders and was deemed by the directors to be in the best interests of the company. Kohli argued that the company was in essence a quasi-partnership and that the rights issue was unnecessary and to her prejudice in acting effectively to dilute the portion of control she had, although she had notice and would have been able to subscribe had she wished to. Held: the issue was prejudicial to her interests and a buy-out would be ordered.

Conversion between Types of Shares

7.41. The law authorises conversion between types of shares. In the case of par value companies, shares may be converted into no par value shares by an alteration of the memorandum in accordance with Art 40A(1). Restrictions on the exercise of this power are set out in Art 40A(2), which stipulates that the power may only be exercised by:

a) Converting all of the company's shares into no par value shares.

b) A special resolution of the company and, if there is more than one class of issued shares, with the approval of a special resolution passed at a separate meeting of the holders of each class of shares.

c) Whether or not the issued shares of the company are fully paid.

7.42. According to Art 40A(3), the special resolution of the company should specify: (a) the number of no par value shares into which each class of issued shares is to be divided; (b) any number of additional no par value shares which the company may issue; and (c) any other alterations to the memorandum and articles as may be required.

7.43. Once conversion takes place, the company is required by Art 40A(4) to transfer (a) from the share capital account for each class of shares to the stated capital account for that class, the total amount that has been paid up on the shares of that class; and (b) any amount standing to the credit of a share premium account or capital redemption reserve to the stated capital account for the class of share which would have been issued if the amount in credit had been applied to paying up unissued shares to be allotted to members as fully paid bonus shares.

7.44. A similar process is provided for the conversion of shares in no par value companies in Art 40B. Shares may be converted into par value shares by an alteration of the memorandum in accordance with Art 40B(1) with restrictions contained in Art 40B(2), which stipulates that the power may only be used by:

a) Converting all of the company's shares into par value shares.

b) A special resolution of the company and, if there is more than one class of issued shares, with the approval of a special resolution passed at a separate meeting of the holders of each class of shares. According to Art 40B(4), the special resolution is also used to make any alterations to the memorandum and articles of association that may be required.

c) Whether or not the issued shares of the company are fully paid.

7.45. Under Art 40B(3), the conversion must have the effect of (a) conferring upon the holder, as nearly as possible, the same rights as were conferred by it before the conversion; and (b) stating a nominal value to be specified in the special resolution of the company, which must be a value not exceeding the amount standing to the credit of the stated capital account for that class divided by the number of shares of that class in issue. For example, a conversion cannot result in the creation of partly-paid shares (on which a further liability would arise) or create an additional burden on the shareholders.

7.46. Once conversion has taken place, the company is required by Art 40B(5) to transfer (a) to the share capital account the amount standing to the credit of the stated capital account for each class of shares, provided this equals the total nominal amount of the shares of the class into which those shares are converted; and (b) to the extent (if any) that the amount exceeds the total nominal amount, transfer it to the share premium account for that class.

7.47. In both cases, conversions of par value to no par value shares and vice versa have the effect of retaining as payable any amount which is unpaid on any share immediately before the conversion when called or due (Arts 40A(5) and 40B(6)).

Conversion between Types of Company

7.48. A guarantee company can be converted into a limited company by issuing shares; once shares are issued, the company ceases to be a guarantee company (Art 3G). It would, however, not appear to be possible for a company which has members holding shares to become a guarantor company in the same manner by redeeming or purchasing all of its issued shares because the shares cannot all be redeemed or purchased so as to leave only guarantor members (Arts 55, 57). A conversion of shares held by members into guarantees given by members by way of an amendment to the memorandum may be possible but could constitute a reduction of capital which requires court approval in most circumstances (Art 61). It might also be achieved by way of a scheme of arrangement, again requiring a court approval (Art 125). A further possibility, if permitted by the constitution of the company, would be for all of the issued shares to be purchased or redeemed except for a single nil-paid, unlimited share which could then be surrendered (Art 60). This would be a reduction of capital under Part 12 of the Companies Law but, if the share is unlimited, it could be done without confirmation by the court. It is not easy to see, however, why a company would need or wish to change its status in this way.

Creation of Classes of Shares

7.49. As stated in paragraphs 7.12.-7.14. above, Art 2 of the Standard Table provides that a company may create shares to be issued with such rights or restrictions as the company may by special resolution determine, thus explicitly authorising the creation of shares of different classes.

7.50. Art 54 on the registration of particulars of special rights applies to the situation of public companies issuing certain shares (see paragraphs 4.21.-4.22. above).

Registers of Shares

7.51. Art 41(1) stipulates the content of the register of members. All companies are required to keep a register, on which the following details are noted:

a) The name and address of every member.

b) Where the membership derives from the holding of shares in the company: (i) the number of shares held by the member; (ii) the issue numbers of individual shares (if the shares are numbered); (iii) the class or classes of shares held by the member (if the company has more than one class of shares); and (iv) the amount remaining unpaid on each share (in the case of shares which are not fully paid).

c) Where the membership derives from the status of guarantor member in the company: (i) the fact that he or she is a member in that capacity; (ii) the amount of the undertaking subscribed to by the guarantor member to contribute to the assets of the company if it is wound up; and (iii) the class to which he or she belongs (if the company has more than one class of guarantor members).

d) For all types of membership, the date on which he or she was registered as a member and, where a person ceases to be a member, the date on which that event occurred. Art 41(4) permits an entry relating to a former member of the company to be removed from the register after 10 years from the date on which the member ceased to be a member.

7.52. Conversion by the company of shares into stock will require, under Art 41(2), the register to show the amount and class of stock held by each member instead of the amount of shares and the particulars relating to shares specified as required above.

7.53. Failure to comply with these requirements exposes the company and every officer in default to liability for an offence. In relation to civil liability, Art 41(5) states that liability incurred by a company from the making or deletion of an entry in its register of members, or from failure to make or delete any such entry, is not to be enforceable more than 10 years after the date on which the entry was made or deleted or the failure first occurred. This is without prejudice to any lesser period of limitation or prescription as set out by law.

7.54. Art 44(1) provides that the company's register of members is to be kept at its registered office or at another place, if it is made up there. Notice under Art 44(2) must be given to the registrar of the place where the register of members is kept, and of any change of that place, unless the register has at all times (or, in the case of a register in existence prior to the law coming into force, at all times since then) been kept at the company's registered office (Art 44(3)). The company is required under Art 44(4) to comply with notice requirements within 14 days of the creation or change of location of the register, in default of which, the company is liable for an offence.

7.55. Art 48 prevents trusts from being entered on the register as the beneficial owner of shares. No notice of a trust, express, implied or constructive, is in fact receivable by the registrar or to be entered on the register of members. The register is to be treated as *prima facie* evidence of any matters which the law directs or authorizes to be inserted in it. This injunction is repeated in Art 4 of the Schedule to the Companies (Standard Table) Order 1992.

7.56. Art 49(2) authorises the maintenance of an "overseas branch register", which may be used by any public company which transacts business in any country, territory or place outside Jersey. The register, under Art 49(1) may contain details of members resident in that country, territory or place. Notice under Art 49(3) must be given within 14 days of any event to the registrar of the situation of the office where the company keeps an overseas branch register, of any change in that place and, if the keeping of the register is discontinued, of its discontinuance. Art 49(4) requires the company to keep a duplicate of the overseas branch register at the place where its usual register of members is kept and must transmit to its registered office a copy of every entry in the overseas branch register, as soon after it is made as possible, with the entry to be made in the duplicate of the overseas branch register.

7.57. The law treats, according to Art 49(5) the overseas branch register and its duplicate as parts of register of members and the same rules for the keeping of that register will apply. However, while an overseas branch register subsists, Art 49(6) requires the shares to which it relates to be distinguished from those to which the usual register of members relates. This means that no transaction in respect of any shares to which it relates shall be registered or otherwise entered in any other register except the duplicate of the overseas branch register. Art 49(7) provides that, on the discontinuance of an overseas branch register, the company is to transfer all entries in it to: (a) any other overseas branch register kept by it in the same country, territory or place; or (b) to its usual register of members. The company may make any rules in its articles of association relating to the keeping of an overseas branch register (Art 49(8)), although failure to comply with the terms of the law stated here will expose the company to liability for an offence.

Inspection of the Register

7.58. The law provides that the register of members is to be open to the inspection of a member of the company without charge during the company's business hours, while other persons may be required to pay any sum the company may require, not to exceed the published maximum (Art 45(1)). Art 45(3) states that failure to comply with the inspection provisions (refusal of inspection or failure to supply a copy of the register) will render the company liable to conviction for an offence. A refusal or default will permit a court to make an order compelling an immediate inspection of the register, or directing that the copies required be made available to the person requesting them.

7.59. In the case of any company, payment of the requisite sum is sufficient to open the register for inspection and require a copy to be made (Art 45(2)), subject, in the case of a public company to the additional submission of a declaration complying with Art 46 (below). The company has 10 days following payment and/or submission of a declaration to make available a copy of the register at the place where the register is kept, which must be collected by the applicant during business hours.

7.60. Art 46 sets out the requirements in the case of a declaration. It stipulates that the declaration is to be made in writing under oath and state the name and address of the applicant. It must also contain an undertaking by the applicant that no information contained in the copy of the register made available to the applicant will be used by the applicant, or by any person who acquires any such information on behalf of the applicant, or directly or indirectly from the applicant or any such person, save for a number of limited purposes:

a) To call a meeting of the members.

b) To influence the voting by members of the company at any such meeting.

c) In the particular context of a take-over bid, to offer to acquire all the shares, or all the shares of any class in the company other than shares in which the applicant has directly or indirectly a beneficial interest.

d) Any other purpose prescribed by the law. Failure to use the information in a manner consistent with the terms of a declaration exposes the person making the declaration to conviction for an offence (Art 46(3)).

7.61. In the case of an application by an individual, Art 46(2) requires the declaration to state the person's residential address, while for a corporate body, the declaration is made by one of its directors with the address given being its address for service.

Transfer and Certification Requirements

7.62. Under Art 42(1), a company is not bound to register a transfer of shares in the company unless: (a) an instrument of transfer in writing has been delivered to it; (b) the transfer is exempted from these provisions (in the case of specified companies or classes of companies or as regards specified shares or classes of shares); or (c) an order has been made under Art 51A (in the case of uncertificated securities). Art 22 of the Schedule to the Companies (Standard Table) Order 1992 states that the instrument of transfer must be in the usual form or one approved by the directors, must be signed by the transferor and, where shares are not fully paid, by the transferee. Art 23 of the Schedule to the Companies (Standard Table) Order 1992 allows the directors to refuse to register a transfer to a person of whom they do not approve or of a share over which the company has a lien. The instrument of transfer must also be deposited in an approved location, refer to a single class of shares and involve no more than 4 transferees. Art 26 of the Schedule to the Companies (Standard Table) Order 1992 states that no fee may be charged for the registration of instruments of transfer or any other documents evidencing title to shares..

7.63. Art 42(2) states that the transfer requirements do not prejudice any power the company may have to register a person as a shareholder where that person has been transmitted a right to shares by operation of law. In the case of a deceased member, the transfer by a personal representative is, under Art 42(3) treated as valid as if the personal representative had been a member at the time of the execution of the instrument of transfer, even though the personal representative is not a member of the company. In fact, Art 28 of the Schedule to the Companies (Standard Table) Order 1992 states that the survivor of joint holders or personal representative(s) of a deceased holder are to be recognised by the company as having title to the share concerned, although this does not release the deceased member's estate from any liability in respect of sums due (whether on a personal or joint basis). Art 29 of the Schedule to the Companies (Standard Table) Order 1992 goes on to state that a person with title consequent on the death or bankruptcy of a member may elect to become the holder of those shares or to transfer them to another party entirely. Notice in the case of election to hold must be given or an instrument of transfer executed where the intention is that a third party have the shares. The rules on transmission of shares apply *mutatis mutandis* in the latter case. Art 30 of the Schedule to the Companies (Standard Table) Order 1992 also states that a person entitled on the death or bankruptcy of a member is to be treated as a holder, but may not attend or vote at class or general meetings until registration of that person as the holder.

7.64. A person transferring a share or interest in the company may apply, under the aegis of Art 42(4) for the entry in the company's register of members of the name of the transferee in the same manner and subject to the same conditions as if the application for the entry had been made by the transferee. The transferee must ordinarily consent to become a member of the company; note Art 25 requiring agreement to be manifest in order that a person may become a member of a company.

Re Level One Holding (Jersey) Ltd 2007 JLR Note 39: a proposed transfer of shares was void because the transferee had not agreed to become a member of the company (as such agreement could only have been given by the board of directors of the transferee, which had not been given). Under Art 25(1), a transfer of shares was clearly a bilateral transaction and the transferee had to agree to become a member of the company.

7.65. Refusal by the company to register a transfer of shares must be notified to the transferor and transferee within 2 months after the date on which the transfer was lodged with the company (Art 42(5)). This provision is replicated in Art 24 of the Schedule to the Companies (Standard Table) Order 1992. Registration of transfers may also, under Art 25 of the

Schedule to the Companies (Standard Table) Order 1992 be suspended at such times and for such periods as the directors may determine (provided the period does not exceed 30 days in any year). Art 27 of the Schedule to the Companies (Standard Table) Order 1992 states that instruments of transfers that have been refused are to be returned to the person lodging the instrument on notice being given of the refusal. Otherwise, the company is at liberty to retain the document.

7.66. Art 43 on the certification of transfers also applies here. An instrument of transfer is deemed to be certificated if it bears the words "certificate lodged" or words to like effect under Art 43(1). In the case of a company, the certification is deemed to have been made if the person issuing the instrument is a person authorized to issue certificated instruments of transfer on the company's behalf and the certification is signed by a person authorized to certificate transfers on behalf of the company or by an officer or servant of the company or of a body corporate who has been authorised to do so. In the case of an individual, the certification is deemed to have been signed by a person if it purports to be authenticated by the person's signature or initials (whether handwritten or not) and it is shown that the use of the signature or initials was not for the purpose of certificating instruments of transfer on behalf of a company.

7.67. Certification by a company of an instrument of transfer of any shares or debentures in a company is to be taken as a representation by the company to any person acting on the faith of the certification that documents showing a *prima facie* title to the shares or debentures in the transferor named in the instrument of transfer have been produced to the company, although this is not to be treated as a representation that the transferor in fact has any title to the shares or debentures (Art 43(2)). If the company makes a false certification negligently, the company is under the same liability to the person as if the certification had been made fraudulently (Art 43(3)).

7.68. The certification may be time limited to a period of 42 days or more, in which case, Art 43(4) states that the company is not, in the absence of fraud, liable in respect of the registration of any transfer of shares or debentures comprised in the certification after the expiration of the period concerned if in fact the instrument of transfer has not been lodged with the company for registration within that time.

Rectification of the Register

7.69. Art 47(1) authorises the rectification of the share register to correct the following details that may, without sufficient reason, have been entered in or omitted from a company's register of members:

a) The name of a person.

b) The number of shares held.

c) The class of shares held.

d) The amount paid up on the shares.

e) The class of members to which the person belongs.

7.70. Similarly, any failure or unnecessary delay in entering on the register the fact of a person having ceased to be a member may also be rectified.

7.71. In both cases the person aggrieved as well as the company or one of its members may apply to court for rectification of the register. Under Art 47(2), the court may refuse the application or may order rectification of the register and payment by the company of any damages sustained by a party aggrieved or may decide any necessary or expedient question, in accordance with the terms of Art 47(3), with respect to the rectification of the register. Where an order is made, the company must deliver the relevant Act of the court to the Registrar for registration within 14 days after the making of the order, in default of which the company is guilty of an offence.

In re Thayer Group Ltd 2006 JLR Note 24 sets out the criteria for the exercise by the court of this power. The power to rectify a company's share register is to be widely construed, although the court retains a discretion as to whether it should do so even if satisfied that there are grounds for granting rectification. Rectification may be retrospective to take effect as from the date on which the correct entry should have been made, but unless this would prejudice the rights of third parties.

Re Level One Holding (Jersey) Ltd 2007 JLR Note 39: rectification would be ordered where a proposed transfer of shares was void because the transferee had not agreed to become a member of the company.

Re Ellastone [2008] JRC 091: where the dissolution of an SPV raised the possibility that the register of members was incorrect, the court would allow rectification of the register under the principles in *Re Thayer.* Here, where there was no prejudice to third parties, rectification would be ordered on a retrospective basis.

Capital Accounts

7.72. The company is required to maintain a number of accounts noting the capital of the company for particular purposes. Under Art 1, "capital accounts" means in relation to a par value company, its share capital accounts and any share premium accounts and *capital redemption reserves*; and in relation to a no par value company, its stated capital accounts.

7.73. In relation to capital redemption reserves (and share premium accounts), the definition refers to "any [such account or reserve]" that a company may have because not all companies need to maintain a capital redemption reserve (or share premium account) and many companies, perhaps most, will not have a capital redemption reserve. Sums credited to the capital redemption reserve are treated in effectively the same way as sums representing the nominal amount of par value shares.

7.74. Capital redemption reserves were originally required to be created (creating non-distributable capital reserves out of otherwise distributable reserves) to "replace" share capital "leaving" the company on a redemption or repurchase, and some companies may still have such reserves representing locked in capital.

7.75. The capital redemption reserve, where maintained, is part of the historic mechanisms established under the law for the purposes of ensuring maintenance or preservation of capital by companies. The original notion of capital maintenance held that capital is a reserve that underpins the security of the claims of creditors. Once capital has been paid into a company by shareholders in payment for shares issued by it, that capital cannot simply be paid out again to shareholders: except in certain special circumstances where the position of the creditors has been considered and protected, the capital may be applied only to making payments to creditors; shareholders get paid capital only once the claims of creditors have been satisfied.

7.76. The mechanism for achieving this maintenance of capital was established by the arrangements for the capital accounts. Companies were required to treat certain of their accounts (or, strictly, the reserves recorded in them) as non-distributable so that they could be applied only to a limited range of purposes. These non-distributable accounts included the capital redemption reserve. The purpose of the bookkeeping relating to the capital redemption reserve was to maintain the "creditors' buffer"; to ensure that there always remained net assets in the company of not less than the amount of the nominal share capital.

7.77. The historic rules under the law relating to distributions and the arrangements in respect of maintenance of capital were changed, however, in 2008. Amongst other amendments to the Companies Law, the changes made included deleting the provisions that required that transfers be made to capital redemption reserves. There are now, consequently, no provisions in the law that require the creation of capital redemption reserves although there are provisions that contemplate sums being credited to a capital redemption reserve. Under the current law, the "creditors' buffer" is maintained by statutory solvency tests that must be met before amounts may be returned to shareholders.

7.78. Capital redemption reserves were not, however, abolished by the changes made. The law continues to provide for the treatment of capital redemption reserves for those companies that do have capital redemption reserves so that they are consistent with the maintenance of and continue to operate to maintain the buffer for the creditors of the company. Thus:

(a) a distribution (which is a payment to a member in its capacity as a member (Art 114(1)) may not be made from the capital account, nor from the capital redemption reserve (Art 115(7)(b));

(b) a reduction of capital accounts must be approved by the court except in special circumstances (under Art 61(3)) where the creditors are protected because the "creditors' buffer" is not reduced. These circumstances include reduction of a share capital account or stated capital account where (i) the reduction does not extinguish or reduce the liability on any share in respect of capital that is not paid up; and (ii) the reduction does not reduce the net assets of the company and (iii) the amount of the reduction is credited to a capital redemption reserve that may be applied only in paying up shares that are to be issued as fully paid bonus shares (Art 61(5));

(c) where a company has capital redemption reserves as a result of the application of previous provisions of the law applicable on redemptions (Art 55) and purchases of by a company of its own limited shares (Art 57), or pursuant to Article 61(5), they may be used to pay up fully paid bonus shares (Art 55(16)); and

(d) in the context of the conversion of a company from being a par value company to being a no par value company, any amounts standing to the credit of a capital redemption reserve are added to the stated capital account for the class of shares which would have fallen to be issued if that amount had been applied in paying up fully paid bonus shares (Art 40A(4)(b)). Upon a conversion of a company from being a no par value company to being a par value company (Art 40B), there is no equivalent provision because no par value companies do not have capital redemption reserves and the stated capital account is transferred to the share capital account or, to the extent necessary, to the share premium account for the par value shares (Art 40B(5)).

7.79. The effect in each case is that share capital is maintained because sums that are debited to the capital redemption reserve are credited to the share capital account for those bonus shares or to a stated capital account, as applicable.

8. Prospectuses

Definition of Prospectus

8.1. The law defines "prospectus" to mean an invitation to the public to become a member of a company or to acquire or apply for any securities, for which purposes: (a) an invitation is made to the public where it is not addressed exclusively to a restricted circle of persons; and (b) an invitation shall not be considered to be addressed to a restricted circle of persons unless: (i) the invitation is addressed to an identifiable category of persons to whom it is directly communicated by the inviter or the inviter's agent, (ii) the members of that category are the only persons who may accept the offer and they are in possession of sufficient information to be able to make a reasonable evaluation of the invitation, and (iii) the number of persons in Jersey or elsewhere to whom the invitation is so communicated does not exceed 50;

8.2. For these purposes, "securities" is defined to mean (i) shares and debentures of any body corporate; (ii) interests in any shares and debentures; or (iii) rights to acquire shares, debentures or interests in these.

Regulation of Circulation

8.3. Art 29 states that the Minister may provide by Order for a prohibition on (a) the circulation by any person of a prospectus in Jersey; (b) the circulation by a company of a prospectus outside Jersey; and (c) the procuring (whether in or outside Jersey) by a company of the circulation of a prospectus outside Jersey, except in any circumstances and subject to any conditions as may be specified. Failure by a person or officer of a body corporate, in the case of the offence being committed by a company, to comply with the provisions of any order will make the person or office in default liable to conviction for an offence.

8.4. For the purposes of regulation, an invitation to the public to acquire or apply for securities in a company is deemed to be a prospectus circulated by the company, if the securities are not fully paid or if the invitation is first circulated within 6 months after the securities were allotted, unless it is shown that the securities were not allotted with a view to their being the subject of such an invitation.

8.5. In fact, the Companies (General Provisions) (Jersey) Order 2002 now regulates this area and applies Art 3 generally, subject to exceptions, to a prospectus relating to securities in or membership of a company.

8.6. Art 3(2) of the Order exempts:

a) Companies that are open-ended investment companies (i) holding a permit as a functionary specified in Group 1 of Part 2 of the Schedule to the Collective Investment

Funds (Jersey) Law 1988, or (ii) in relation to which a certificate granted under Art 8B of that Law is in force.

b) Companies that are unregulated funds within the meaning of the Collective Investment Funds (Unregulated Funds) (Jersey) Order 2008.

c) The issue of a document relating to a scheme intended to facilitate or to encourage the holding of shares or debentures in a company by or for the benefit of: (i) directors or former directors (to include people performing or who have performed the functions of directors by whatever name called) of the company, the company's subsidiary or holding company or a subsidiary of the company's holding company; (ii) the bona fide employees or former employees of the company, the company's subsidiary or holding company or a subsidiary of the company's holding company; or (iii) the wives, husbands, widows, widowers or minor children or minor step-children of such directors or employees or former directors or employees.

8.7. Art 4 of the Order stipulates that the provisions are in addition to and do not derogate from the requirements of the Control of Borrowing (Jersey) Order 1958.

8.8. Under Art 5(1) of the Order, three prohibitions are set out: (a) no person may circulate a prospectus in Jersey; (b) no company may circulate a prospectus outside Jersey; and (c) no company shall procure the circulation of a prospectus outside Jersey, unless strict conditions are complied with.

8.9. Art 5(2) requires as conditions: (a) that the prospectus contains the information specified in Part 1 of the Schedule to the Order; (b) that the prospectus includes the statements specified in Part 2 of the Schedule to the Order; (c) that a copy of the prospectus, signed by or on behalf of all of the directors of the company, as well as a signed copy of any report included in or attached to the prospectus, and any other information required by the Registrar must be delivered to the Registrar; and (d) that the Registrar has in fact given consent to the circulation of the prospectus. A minor exception exists in that, under Art 5(3), the Registrar may give consent to the circulation of a prospectus that does not comply in every respect with the above if he is satisfied that the deviation from those requirements does not affect the substance of the prospectus and is not calculated to mislead. For these purposes, a Memorandum of Compliance in the standard form must be completed and provided to the Registrar confirming full compliance with requirements of the Order, partial compliance or non-compliance. Where the Order is not fully complied with, the reason is required to be given. A pro-forma is available on the Jersey Financial Services Commission web-site as the appendix to the Checklist for Securities Issues by Jersey Companies.

Information in Prospectus

8.10. Part 1 of the Schedule to the Order requires the following information as detailed below.

8.11. Details relating to the offer, including:

a) The names, occupations and addresses of (i) the offerors or vendors, and (ii) any promoter of the securities or membership of the company.

b) The terms applicable to the acquiring of the securities or membership of the company, and (if a price is payable) the method, time and place of payment.

c) The opening and closing dates and times of the offer.

d) The minimum amount to be raised by the offer required by the company.

e) When and how moneys will be returned in the event of the offer not being completed or any securities applied for not being allotted.

f) The anticipated date and forecast amount of the first dividend or interest payment on the securities that are the subject of the offer.

g) General particulars of any property that is to be acquired with the proceeds of the offer, and, in the case of any business that is to be acquired with the proceeds of the offer, the length of time during which that business has been carried on (if more than 2 years from the date of issue of the prospectus).

8.12. Capital, including:

a) In the case of a par value company, particulars of the nominal, issued and paid up share capital of the company.

b) In the case of a no par value company, particulars of the stated capital.

c) In the case of an offer of securities, particulars of the securities that are the subject of the offer.

d) In the case of an invitation to become a guarantor member, particulars of the amount of the guarantee, together with details of any existing issued securities that are not part of the offer.

8.13. Goodwill, preliminary expenses and benefits, including particulars of any amounts to be written off or provided for in respect of goodwill or preliminary expenses, or of any benefit given to a promoter.

8.14. Contracts, including the dates of, parties to and general nature of every material contract, except for contracts entered into in the ordinary course of the business carried on or intended to be carried on by the company or contracts entered into more than 2 years before the date of issue of the prospectus.

8.15. The interests (if any) of directors, including full particulars of the nature and extent of the direct or indirect interest in the offer (if any) of every director of the company and where the interest consists of being a partner in a firm, full particulars of the nature and extent of the interest of the firm as well as details of all sums paid or agreed to be paid to any such director or firm in cash or shares or otherwise by any person to induce that director to become or to qualify as a director, or otherwise for services rendered by the director or by the firm in connection with the promotion or formation of the company.

8.16. Any debentures and loans, including details of any subscriptions, allotments or options to be given, or already existing, in respect of any other securities of the company, including any that have a prior right over the securities covered by the offer to a distribution of the company's profits.

8.17. Accounts and reports, including a copy of the company's latest accounts accompanied by a report by the company's auditors and any other specialist reports by an expert on any aspect of the company's business, identifying any unusual element of risk to the investor.

8.18. The address of the company's registered office and (if different) the address at which its register of members is kept.

8.19. The location and nature of the company's principal operating establishments.

8.20. The names, business occupations (if any) and addresses of the directors or proposed directors of the company and the name, qualifications (if any) and address of the secretary of the company.

8.21. In relation to corporate advisers, a statement of the names and addresses of the company's auditors, legal advisers and principal bankers.

8.22. Any other material information that an investor (including a person who cannot be expected to have any special knowledge of investments of the nature being offered) would reasonably require to enable the person to make an informed judgment about the merits of investing in the securities offered in the prospectus.

8.23. The date of issue of the prospectus.

Statements in Prospectus

8.24. Part 2 of the Schedule to the Order requires the following statements, the substance of which is detailed below.

a) A copy of this document has been delivered to the Registrar in accordance with Art 5 of the Order, and the Registrar has given, and has not withdrawn, consent to its circulation.

b) The Jersey Financial Services Commission has given, and has not withdrawn, its consent under Art 2 of the

Control of Borrowing (Jersey) Order 1958 to the issue of securities in the company.

c) The giving of these consents does not imply that either the Registrar or the Jersey Financial Services Commission takes any responsibility for the financial soundness of the company or for the correctness of any statements made, or opinions expressed, with regard to it.

d) Notes to the reader in these terms: “If you are in any doubt about the contents of this document you should consult your stockbroker, bank manager, solicitor, accountant or other financial adviser.” and “The directors of the company have taken all reasonable care to ensure that the facts stated in this document are true and accurate in all material respects, and that there are no other facts the omission of which would make misleading any statement in the document, whether of facts or of opinion. All the directors accept responsibility accordingly.”

e) If the prospectus is in respect of the issue of securities, a note to the reader in these terms: “It should be remembered that the price of securities and the income from them can go down as well as up.”

Civil Liability for Defects in Prospectus

8.25. Art 30(1) sets out the principle of compensation for misleading statements in prospectus, stating that any person who acquires or agrees to acquire a security to which a prospectus relates and suffers a loss in respect of the security as a result of the inclusion in the prospectus of a statement of a material fact which is untrue or misleading, or the omission from it of the statement of a material fact, shall be entitled to compensation, subject to the terms of Art 31.

8.26. Compensation is payable by the body corporate making the issue and each person who was a director of the body when the prospectus was circulated in the case of securities offered for subscription. If the securities were offered otherwise than for subscription (e.g. for sale, where the securities concerned may have already been issued), then compensation is payable by the person making the offer and, in the case of a body corporate, from each person who was a director of the body when the prospectus was circulated.

8.27. Compensation is also payable by any person stated in the prospectus as accepting responsibility for the prospectus, or any part of it, except that in the latter case, only to the extent of a statement made in or omitted from that part. Furthermore, person who has authorized the contents of, or any part of, the prospectus is also liable to make compensation.

8.28. The sole exception in Art 30(2) relates to advice as to the contents of a prospectus given in a professional capacity, which does not render the maker responsible by reason only of giving that advice.

8.29. Art 30(3) states that its provisions do not affect any liability incurred by any person under other statutory or legal provisions.

8.30. Art 31 states that exemption from liability to pay compensation may be available in five instances:

a) Where the prospectus was circulated without the person’s consent.

b) Where, having made any reasonable enquiries, the person reasonably believed that the statement was true and not misleading or that the matter omitted was properly omitted from the circulation of the prospectus until the securities were acquired.

c) Where after the circulation of the prospectus and before the securities were acquired the person, on becoming aware of the untrue or misleading statement or of the omission of the statement of a material fact, took reasonable steps to secure that a correction was brought to the notice of persons likely to acquire the securities.

d) Where a loss is caused by a statement purporting to be made by a person whose qualifications give authority to a statement made by the person which was included in the prospectus with the person’s consent, that, when the prospectus was circulated, the person reasonably believed that the person purporting to make the statement was competent to do so and had consented to its inclusion in the prospectus.

e) Where the person suffering the loss acquired or agreed to acquire the securities knowing that the statement was untrue or misleading or that the matter in question was omitted.

8.31. Art 32(1) on recovery of compensation states that a person is not debarred from obtaining compensation from a company by reason only of the person holding or having held shares in the company or any right to apply or subscribe for shares in the company. Similarly, the right to be included in the company’s register of members in respect of shares is not a bar to compensation.

8.32. Art 32(2) provides that any sum due from a company to a person who has acquired or agreed to acquire shares in the company due as compensation for loss suffered by the person in respect of the shares is to be treated as a sum due to the person otherwise than in the person’s character of a member, so as to avoid the deferral of such payments in the distribution of the company’s assets in the event of winding up, whether or not the company is in fact wound up. This rule applies even though compensation is due under any other statutory or legal provision apart from Art 30.

Criminal Liability for Defects in Prospectus

8.33. Art 33 exposes a person to conviction for an offence where a prospectus is circulated with a material statement in it which is untrue or misleading or with the omission from it of the statement of a material fact, unless that person can satisfy the court that he or she reasonably believed, when the prospectus was circulated, that the statement was true and not misleading or that the matter omitted was properly omitted. These defects may also render a person liable to prosecution under the Investors (Prevention of Fraud) (Jersey) Law 1967.

9. Recovery of Shares

Redeemable Shares

9.1. Art 55(1) gives the company power to issue redeemable shares if authorised to do so by its articles of association. The power may be exercised to issue new shares or to convert existing non-redeemable shares, whether already issued or not, into limited shares that may be redeemed, or are liable to redemption, either in accordance with their terms or at the option of the company or of the shareholder.

9.2. Art 55(2) dictates that a company may not issue redeemable limited shares at any time when there are no issued shares of the company that are not redeemable. Similarly, a prohibition exists in Art 55(3) on the conversion of existing issued non-redeemable limited shares into redeemable shares if as a result there are no issued shares of the company that are not redeemable. The import of these requirements is that there must always be non-redeemable shares of the company in existence alongside any redeemable ones that may be created or converted from non-redeemable shares.

9.3. Conditions for the exercise of the redemption right are stipulated in the law and are dependent on the type of company in question.

a) In the case of a par value company that is not an open-ended investment company, provided they are fully paid up, the redeemable limited shares are capable of being redeemed from any source (Art 55(4)).

b) In the case of a no par value company that is not an open-ended investment company, provided they are fully paid up, the redeemable limited shares are capable of being redeemed from any source (Art 55(5)).

c) In both above instances, the directors of the company authorising the redemption must make a statement under Arts 55(8)-(9) containing the following opinions that the directors are required to form:

i) The company will be able to discharge its liabilities as they fall due immediately following the date on which the payment is proposed to be made.

ii) The company will be able to continue to carry on business, to discharge its liabilities as they fall due and until the expiry of the period of 12 months immediately following the date on which the payment is proposed to be made or until the company is dissolved under Art 150, whichever first occurs. This statement must be with due regard to the prospects of the company and to the intentions of the directors with respect to the management of the company's business and to the amount and character of the financial resources that will in their view be available to the company.

iii) Failure to have reasonable grounds for the opinion expressed in the statement will expose the director making the statement to conviction for an offence (Art 55(10)).

d) In the case of an open-ended investment company (as defined in Art 1), whether it is a par value or no par value company, the redeemable limited shares may be redeemed from any source (Art 55(11)), subject to the shares being fully paid up and redeemed at a price not exceeding their net asset value. The directors must further have reasonable grounds for believing that, immediately following the date on which the payment is proposed to be made, the company will be able to discharge its liabilities as they fall due (Art 55(12)).

e) A company may apply a capital redemption reserve in issuing shares to be allotted as fully paid bonus shares, provided this is authorised prior to the event by a special resolution (Art 55(16)).

9.4. The effect of redemption is set out in Art 55(17), which stipulates that the amount of the company's issued share capital shall be diminished by the nominal value of the limited shares of a par value company that are redeemed, although the redemption is not to be taken as reducing the authorized share capital of the company. Furthermore, a par value company that is about to redeem limited shares may issue shares up to the nominal amount of the shares to be redeemed as if those shares had never been issued (Art 55(18)). This does not apply where the company intends to hold shares as treasury shares under Art 58A(2)(d). Art 55(21) further states that any shares redeemed under this Art (other than shares that are, immediately after being purchased or redeemed, held as treasury shares) are treated as cancelled on redemption.

9.5. In relation to shares issued prior to the law coming into force, Art 55(19) states that limited preference shares issued by a company may be subject to redemption in accordance with these provisions or with those under Art 5 of the Companies (Supplementary Provisions) (Jersey) Law 1968 (although repealed). Furthermore, any capital redemption reserve fund established by a company for the purposes of the same repealed rule may be treated as if it were a capital redemption reserve for the purposes of this law (Art 55(20)).

9.6. This is also subject to Art 181, which states that where a company (other than an open-ended investment company) is being wound up in a creditors' winding up and (a) it has within 12 months before the commencement of the winding up made a payment under Arts 55, 57 or 59 in respect of the redemption or purchase of its own shares; (b) the payment was not made lawfully; and (c) the aggregate realisable value of the company's assets and the amount paid by way of contribution to its assets (apart from under this provision) is not sufficient for the payment of its liabilities and the expenses of the winding up, the court may, on the application of the liquidator, order a person from whom the shares were redeemed or purchased or a director to contribute in accordance with this Art to the company's assets so as to enable the insufficiency to be met. A person from whom any shares were redeemed or purchased may be ordered to contribute an amount not exceeding so much of the payment as was made in respect of his or her shares. However, a person from whom shares were redeemed or purchased shall not be ordered to contribute under this Art unless the court is satisfied that, when he or she received payment for his or her shares, he or she knew or ought to have concluded from the facts known to him or her, that, immediately after the payment was made, the company would be unable to discharge its liabilities as they fell due, and that the realisable value of the company's assets would be less than the aggregate of its liabilities. Where a contribution is forthcoming, the court may direct any other person who is jointly and severally liable to contribute under this provision to pay to the contributory such amount as the court thinks just and reasonable.

Purchase of Own Shares

9.7. Art 57(1) gives the company general power to purchase its own limited shares (including any shares that are redeemable). Sanction must be given, under Art 57(2) by a special resolution of the company, except where the company purchasing its own shares is a wholly-owned subsidiary of another company. The terms of Art 55 (including those on statements and sources of payment) apply to any purchase effected by a company (Art 57(6)). One caveat exists in that a company may not carry out a share purchase if the net effect of the transaction is that there is no longer any member of the company holding shares other than redeemable shares or treasury shares (Art 57(7)).

9.8. Two separate procedures are instituted depending on whether the shares are to be purchased via a stock exchange or otherwise.

a) In the case of shares to be purchased on a stock exchange, the resolution authorizing the purchase must specify, under Art 57(4), the maximum number of shares to be purchased, the maximum and minimum prices which may be paid and a date on which the authority to purchase will expire, which must be no later than 18 months after the passing of the resolution. For these purposes, maximum and minimum prices are determined by specifying either particular sums or a basis or formula by which the amounts can be calculated without reference to any person's discretion or opinion (Art 57(4A)).

b) For shares to be purchased otherwise than on a stock exchange, they may only be purchased in pursuance of a contract approved in advance by a resolution of the company and may not exercise the right to vote on the resolution sanctioning the purchase or approving that contract (Art 57(3)).

9.9. The rules on special resolutions and procedures do not apply to an open-ended investment company (Art 57(5)).

9.10. As stated above in paragraph 9.6., this is also subject to the rules and liability set out in Art 181.

Shares Redeemed/Purchased and Held as Treasury Shares

9.11. Rules introduced in 2008 set out how shares may be held as treasury shares, i.e. without there being a member exercising ownership rights over them with the shares remaining in the company ready for issue to subsequent subscribers.

9.12. Art 58A(1) states, as a general principle, that a company may hold shares as treasury shares any of the shares it has redeemed or purchased, provided it is authorised by a resolution to do so and it is not in fact prohibited, under the terms of its memorandum or articles of association, from holding shares as treasury shares. While held as treasury shares, the company, under Art 58A(2), may cancel, sell or hold the shares and may further transfer the shares for the purposes of or under an employees' share scheme. An employees' share scheme is defined in Art 58A(9) as a scheme for encouraging or facilitating the holding of shares or debentures in a company by or for the benefit of the bona fide employees or former employees (of the company, the company's subsidiary or holding company or a subsidiary of the company's holding company) or the family of such employees, to include the wives, husbands, widows, widowers or minor children or minor step-children of such employees or former employees.

9.13. Art 58A(3) provides that shares held as treasury shares do not:

a) Entitle the company to be treated as being a member or as holding shares in the company for the purposes of Arts 71 (inclusion in annual return), 89 (requisition of general meetings) and 92(2) (notice of and quorum at general meetings).

b) Entitle the company to exercise any voting rights attaching to the shares.

c) Qualify to be taken into account in determining if the law requires a proportion of votes attaching to shares held in the company to be obtained or a proportion of the holders of shares of the company, (which may include persons representing by proxy other holders of shares of the company) to consent or not to consent in order for a resolution to be passed or an action or decision to be taken or not to be taken by any person.

d) Entitle the company to make or receive any dividend, or any other distribution (whether in cash or otherwise) of the company's assets (including any distribution of assets to members on a winding up), in respect of those shares.

e) Permit the exercise by or against the company of rights in respect of the shares.

f) Permit the enforcement by or against the company of the obligations in respect of the shares.

g) The law treats as void any purported exercise or enforcement of a right, obligation or requirement referred to in paragraphs (b)-(f) above.

9.14. The above prohibitions do not prevent an allotment of shares as fully paid bonus shares in respect of treasury shares or the payment of any amount payable on the redemption of redeemable shares that are held as treasury shares (Art 58A(4)). In fact, the law will treat any shares allotted as fully paid bonus shares in respect of shares held as treasury shares by a company as if they were purchased by the company at the time they were allotted (Art 58A(7)). This acts as an anti-dilution provision.

9.15. The effect of redemption in Art 55(17) (diminution of issued share capital) does not apply in relation to any shares that are, immediately after being purchased or redeemed, held as treasury shares unless and until they are cancelled (Art 58A(5)). Where a par value company wishes to cancel limited shares, it may issue shares up to the nominal amount of the shares to be cancelled as if those shares had never been issued (Art 58A(6)).

9.16. Shares held as treasury shares must be noted in the register kept under Art 41 and an entry relating to the number of shares held as treasury shares on 1 January in the year of the return must be included in the annual return required by Art 71 (Art 58A(8)).

9.17. A company may normally hold as treasury shares so many shares in the company that it has redeemed or purchased as it thinks fit (Art 58B(1)), if another person holds at least one non-redeemable share in the company or where the articles of the company specify that more than one non-redeemable share in the company or a specified proportion of non-redeemable shares in the company must be held by one or more persons other than the company so that the company may hold shares as treasury shares, then that number or proportion must exist, whether held by one or more persons.

9.18. In essence, so that treasury shares are not the only shares within a company, the law requires disposals to others of one or more shares or a proportion of shares, whether or not the articles of association require this to be the case.

a) Where the company holds shares as treasury shares, under Art 58B(2), if the articles of the company do not specify that more than one non-redeemable share in the company or a specified proportion of non-redeemable shares in the company must be held by one or more persons other than the company, so that the company may hold shares as treasury shares, then, if at any time there ceases to be any person who holds at least one non-redeemable share in the company, the company must dispose of to another person or persons at least one non-redeemable share in the company within 12 months of the occurrence of this event.

b) Conversely, where the articles do specify that more than one non-redeemable share in the company or a specified proportion of non-redeemable shares in the company must be held by one or more persons other than the company, so that the company may hold shares as treasury shares, then, if at any time there ceases to be any person who holds that number or proportion of non-redeemable shares in the company, the company must dispose of to another person or persons that number or proportion of non-redeemable shares in the company within 12 months of the occurrence of this event (Art 58B(3)).

9.19. Failure to comply with the disposal provisions stated in Arts 58B(2)-(3) is an offence.

9.20. The redemption, purchase of own shares or cancellation under Part 11 of the law is not to be treated as a reduction of capital that would fall within the rules of Part 12 (as noted below) (Art 58C).

Reduction of Capital: Special Resolution Phase

9.21. Art 61 sets out a complex procedure for the process and necessary authorisation in the case of the reduction of capital. Art 61(1) contains the general principle that a company may proceed to a reduction of capital in any way subject to the obtaining of a special resolution authorising this.

9.22. Particular instances in which companies may use these powers are given as examples in Art 61(2):

a) To extinguish or reduce the liability on any of its shares in respect of share capital not paid up.

b) To reduce any capital account by an amount which is lost or is unrepresented by available assets or pay off any amount standing to the credit of a capital account which is in excess of the company's wants, without, however, extinguishing or reducing liability on any of its shares.

In re Randgold Resources Ltd 2004 JLR Note 19: A company may reduce its share capital under Art 61(2)(b) after sustaining a loss, provided that the loss is permanent and not merely a temporary fall in the value of a capital asset.

9.23. General reasons for a company to reduce its capital include:

(a) To create distributable reserves, as noted above, particularly where it is material that the distribution should be income and not capital. This may be used to return capital in excess of needs. This is an issue that arises because under the law, subject to the directors having formed the required opinion about solvency, a distribution may be made from any account of the company including capital accounts (other than the capital redemption reserve or nominal capital account of a par value company) (Art 115);

(b) returning surplus capital: if a company has capital that is surplus to its requirements, a reduction of capital may enable it to return that capital to its shareholders. The position might arise if, for example, a company had issued shares to fund a potential acquisition which did not then take place. Without going through the reduction of capital procedure the surplus funds raised may not be distributable to shareholders (although the difficulties in this regard have been reduced since the maintenance of capital provisions in the law have been revised so that the test is solvency rather than distributable reserves);

(c) to assist with a redemption or repurchase where shares are partly paid by reducing the outstanding liability so that the shares become fully paid (Arts 55 and 57); or

(d) to be used in combination with a scheme of arrangement for the purposes of a takeover by way of a cancellation and reissue of shares. The cancellation and reissue is achieved by way of a reduction of capital in the target company. The distributable reserve created by the reduction is capitalised and applied in paying up shares that are issued to the bidder.

9.24. Reductions of capital are normally subject to confirmation by the court, except in two instances (Art 61(3)):

a) A reduction of capital by extinguishing or reducing a capital account maintained in respect of unlimited shares (Art 61(4)).

b) A reduction of capital by reducing a share capital account or stated capital account that is maintained in respect of limited shares. In this instance, the exemption from confirmation only applies if the reduction does not extinguish or reduce the liability on any share in respect of capital that is not paid up and does not reduce the net assets of the company. Furthermore, the amount of the reduction is credited to a capital redemption reserve that may be applied only in paying up unissued shares that are to be allotted to members as fully paid bonus shares (Art 61(5)).

Reduction of Capital: Order of Confirmation Phase

9.25. Art 62(1) requires an application to the court for an order of confirmation for the reduction taking place.

9.26. Proposed reductions of share capital involving either a diminution of liability in respect of any amount unpaid on a share or the payment to a shareholder of any paid up capital require consideration of the creditors' interests as part of the procedure. The court may also involve creditors in other types of reductions proposed, as it directs (Art 62(2)).

9.27. Any creditor, who at a date to be fixed by the court is entitled to a debt or claim, which would be admissible in proof against the company in any winding up of the company is normally entitled to object to the reduction of capital (Art 62(3)).

9.28. The court will settle a list of creditors entitled to object and ascertain as far as possible the names of those creditors and the nature and amount of their debts or claims, without necessarily requiring an application from any creditor. The court may also publish notices fixing a day or days, by which creditors not entered on the list are to claim for entry to the list or be excluded from the right to object to the reduction of capital (Art 62(4)).

9.29. A creditor entered on the list whose debt or claim is not discharged or has not determined may object to the reduction. The court may dispense with the consent of that creditor on the company securing payment of the creditor's debt or claim by appropriating (as the court may direct) the full amount of the debt or claim, if the company admits the claim. This also applies where the company does not admit the claim, but is willing to provide for it. However, if the company does not admit, and is not willing to provide for, the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount will be fixed by the court after an enquiry and adjudication (Art 62(5)).

9.30. Where the proposed reduction of capital involves either the diminution of a liability in respect of unpaid capital or the payment to a shareholder of paid up capital, the court may direct that the procedure not apply as regards any class or any classes of creditors having regard to any special circumstances of the case it thinks proper to do so (Art 62(6)).

In re Henderson Far East Income Ltd 2007 JLR Note 16: The court has a discretion whether to approve a reduction of capital approved by shareholders by special resolution. It must consider the interests of shareholders and creditors of the company. In relation to the former, it will have to be satisfied that (a) the shareholders have been treated equally, particularly if there are different classes; (b) the proposals for reduction have been properly explained to them; and (c) the reduction has a discernible purpose (e.g. to reflect the loss of asset values or to create distributable reserves). An applicant company should give a detailed explanation of the arrangements in any prospectus issued and should in particular explain in simple lay terms why the reduction is considered to be a good idea for shareholders. Under Art 62(3), if a proposed reduction involves a diminution of liability in respect of any amount unpaid on a share or the payment to a shareholder of any paid up capital and in any other case if the court so directs, creditors should be circulated with the proposal and asked whether they consent to the reduction. The court attaches importance to the position of creditors and Art 62(6) provides that it may dispense with this requirement if it considers it proper to do so, having regard to any special circumstances, as for example, if the company has a sufficient fund to meet its liabilities.

In re MV Leveraged Finance Limited 2007 JLR Note 18: When considering whether to approve a reduction of capital approved by shareholders by special resolution (affecting capital which had not yet been issued), the court must consider the interests of the shareholders and creditors of the company. In relation to shareholders, it will have to be satisfied that (a) they have been treated equally, particularly if there are different classes; (b) the proposal for reduction has been properly explained to them; and (c) the reduction has a discernible purpose (applying *In re Henderson Far East Income Ltd* 2007 JLR Note 16).

Re Tarsus Group Plc [2008] JRC 202: where the conditional approval of a reduction of capital not yet issued was sought, as in *In re MV Leveraged Finance Limited* 2007 JLR Note 18, the court needs to be satisfied that new shareholders have been made fully aware of the proposed reduction that had been approved by the founding shareholders and that the purpose of the reduction (to continue a distribution and buy-back policy) has been properly explained to them. See also *Re Regus* [2008] JRC 180 similarly decided in relation to the reduction of a share premium account.

Re Real Estate Opportunities [2008] JRC 025: where all the creditors have previously consented to a proposed reduction in share capital (to be carried out in conjunction with a scheme of arrangement), the court may waive the requirement for them to be circulated with the proposed scheme that had been approved by shareholders under Art 125. See also *Re Vodaphone* [2011] JRC 030A.

Re Sygen [2011] JRC 077: where there are no creditors, the court only has to consider the position of shareholders and need only apply the test in *In re Henderson.* See also *Re Wolseley plc* [2011] JRC 007.

9.31. Art 63(1) stipulates that a court may issue an order on such terms and conditions as it thinks fit confirming the reduction if it is satisfied that every creditor of the company entitled to object to the reduction of capital under Art 62 has either consented or had their debt or claim discharged, determined or secured

9.32. The court may also make an order requiring the company to publish (as the court directs) the reasons for reduction of capital or such other information in connection with it that the court thinks expedient with a view to giving proper information to the public as well as the causes which led to the reduction, in the last case if the court thinks fit (Art 63(2)).

9.33. Art 64(1) provides that the company must deliver to the Registrar the Act of the court confirming the reduction and a minute, approved by the court, showing in respect of the company the following information required by Art 64(2):

a) The amounts of the capital accounts.

b) The number of shares into which the share capital is to be divided, and, in the case of a par value company, the amount of each share.

c) In the case of a par value company, the amount (if any), at the date of the registration of the Act and minute, which will remain paid up on each share which has been issued.

d) In the case of a no par value company, the amount (if any) remaining unpaid on issued shares.

9.34. The resolution for reducing the capital as confirmed by the Act of court takes effect once the Registrar registers both documents (Art 64(2A)). When registered, the minute is deemed to be substituted for the corresponding part of the company’s memorandum (Art 64(4)). A certificate noting the registration of the Act and minute and signed by the Registrar and sealed with the Registrar’s seal is conclusive evidence that all the requirements of the law with respect to the reduction of share capital have been complied with, with the company’s share capital being as stated in the minute (Art 64(3)).

Outstanding Liability on Reduced Shares

9.35. Art 65 sets out the liability of members of the company for shares that have been reduced. In principle, in the case of the reduction of a par value company’s share capital, a member of the company (whether past or present) is not liable in respect of any share to a call or contribution exceeding in amount the difference (if any) between the amount of the share as fixed by the minute and the amount paid on the share or the reduced amount (if any) which is deemed to have been paid on it (Art 65(1)).

9.36. Referring to the reduction procedure, the law also stipulates liability towards creditors. Where a creditor, entitled in respect of a debt or claim to object to the reduction of share capital is not entered on the list of creditors, either by reason of the creditor’s ignorance of the proceedings for reduction of share capital or of their nature and effect with respect to the creditor’s claim, then, should the company be unable to pay the amount of the creditor’s debt or claim after the reduction of capital occurs, liability will fall on the members (Art 65(2)).

9.37. Liability for the payment of the debt or claim in question will in this case accrue to every person who was a member of the company at the date of the registration of the Act and minute for an amount not exceeding that which the person would have been liable to contribute if the company was subject to winding up proceedings on the day before the registration (Art 65(3)).

9.38. Where the company is wound up under the law, or a declaration is made under the Désastre Law, the court may settle a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list, as if they were ordinary contributories in a winding up, on the application of the creditor in question (Art 65(4)), although this does not affect the rights of the contributories to seek contributions among themselves (Art 65(5)).

9.39. Art 66 provides for liability for the misuse of the power or authority to reduce capital. Where an officer of the company wilfully conceals the name of a creditor entitled to object to the reduction of capital, misrepresents the nature or amount of the debt or claim of a creditor or aids, abets or is privy to any such concealment or misrepresentation, conviction for an offence may ensue.

Forfeiture of Shares

9.40. Art 60 provides for the possibility of forfeiture of shares subject to the procedure being authorised by the company's articles of association. Forfeiture may take place for failure to pay any sum due and payable on any of the company's shares which have been issued otherwise than as fully paid. In the case of par value shares, this includes both the nominal amounts as well as the premium; in the case of no par value shares, this means the agreed issue price. Alternatively, the company may accept the surrender of the shares.

9.41. Art 17 of the Schedule to the Companies (Standard Table) Order 1992 stipulates that the directors may give to the person from whom an unpaid call is due and payable not less than 14 clear days' notice requiring payment of the amount unpaid together with any interest which may have accrued. The notice must name the place where payment is to be made and state that if the notice is not complied with the shares in respect of which the call was made are liable to forfeiture. Non-compliance with the notice may result, according to Art 18 of the Schedule to the Companies (Standard Table) Order 1992, in the directors passing a resolution forfeiting the shares as well as any dividends or other moneys payable in respect of the forfeited shares which have not been paid before the forfeiture.

9.42. Forfeited shares may be sold, re-allotted or otherwise disposed of on any terms and in any manner the directors determine to any person, including the person who was the holder prior to forfeiture. In fact, Art 19 of the Schedule to the Companies

(Standard Table) Order 1992 allows the directors to cancel the forfeiture on such terms as they think fit.

9.43. Art 20 of the Schedule to the Companies (Standard Table) Order 1992 goes on to provide for the consequences as to membership of the person whose shares have been forfeited, who ceases to be a member in respect of them and is required to surrender to the company for cancellation the certificate for the shares forfeited. Nonetheless, that person remains liable to the company for all moneys which at the date of forfeiture were payable by the person to the company in respect of those shares with interest. Art 21 of the Schedule to the Companies (Standard Table) Order 1992 also states that a declaration under oath by a director or the secretary of the company that a share has been forfeited on a specified date is to be treated as conclusive evidence of the facts stated in it and binds all persons claiming to be entitled to the share and is itself good title to the share.

10. Rights attached to Shares

Legally Required Rights/Impact of Memorandum and Arts

10.1. Rights in shares are generally determined by the Memorandum and Arts of Association of the Company to the extent that the law permits derogations from certain minimum rights set out by legislation.

10.2. There are usually two sets of rights most of concern to the member of the company, the first being the incidences of holding capital, while the second relate to membership of the company as a consequence of owning shares in the capital of the company, including the entitlement to attend and vote at the general meetings of the company. Capital rights are dealt with above in Chapters 7-9. Membership rights are dealt with below in Chapter 13, while rules on the general meetings are covered in Chapter 14.

Alteration/Variation of Class Rights

10.3. Art 52 is the provision that deals with the variation of class rights. It is subject to the rules in Art 11(3) (non-binding effect of certain alterations to memorandum and articles) (see paragraph 6.6. above). Art 52 is principally concerned with the variation of the rights of any class of members of a company, but does not apply to any conversion of shares in accordance with Arts 40A or 40B (see paragraphs 7.39.-7.45. above) (Art 52(1)).

10.4. Primacy is given to the rules in the memorandum or articles or those that may apply by reason of admission to membership together with any attendant terms. Rights may thus only be varied in accordance with any provision for the variation of the rights of any class of members in those documents (Art 52(2)). Any alteration of a provision in either the memorandum or articles for the variation of the rights of any class of members of a company, or the insertion of such a provision in the memorandum or articles, is treated itself as a variation of those rights (Art 52(6)). Similarly, any alteration which has the effect of abrogating those provisions or a term relating to admission to membership is to be treated as a variation (Art 52(7)).

10.5. In the absence of any such provision, rights may be varied if, and only if, the following persons, under Art 52(3), consent in writing:

a) The holders of not less than 2/3rds in nominal value of the issued shares of any class of par value shares.

b) The holders of not less than 2/3rds in number of the issued shares of any class of no par value shares.

c) The holders, in the aggregate, of not less than 2/3rds of the total liability of all the members of any class of guarantor members.

d) In any case, the variation must be sanctioned by a special resolution passed at a separate meeting of the class of members concerned.

10.6. A variation of rights intended to apply to one class may require the consent of other classes in three situations set out in Art 52(4), where the effect of the variation is to:

a) Reduce the liability of any class of members to contribute to the share capital of a company.

b) Reduce the liability of any class of members otherwise to pay money to a company.

c) Increase the benefits to which any class of members is or may become entitled.

d) For the purpose of calculating the voting thresholds under Art 52(3), any person who may benefit from one of the proposed variations under Art 52(4) and who is also a member of any other class may not be counted in that other class for the purposes of voting (Art 52(5)).

10.7. Although reasonably clear, the provisions may not always apply to certain situations, where the net effect may be alter some part of the relationship between members. The question to ask is whether in substance, if not in form, there is a variation of class rights. See *Greenhalgh v Arderne Cinemas Ltd* [1946] 1 All ER 512: AC (England and Wales), part of a series of four cases dealing with a "white knight" takeover of a company. The directors convened a general meeting at which shares belonging to G and others would be assimilated into one class with all existing shares (which would be subdivided into equal shares) so as to have the same voting rights in respect of each share. The effect of this was to further reduce any control G exercised in the company's affairs. G claimed that the reclassification was contrary to the spirit of the agreement entered into when G joined the company and had not received the consent of the shareholders who would be affected. Held: The reclassification was not contrary to the agreement, which did not preclude the company from creating new capital. As the voting rights in respect of each share would not change, such a resolution was valid.

10.8. Where there is a variation, the variation must also be in accordance with the law: *Cumbrian Newspapers v Cumberland and Westmorland Herald* [1987] Ch 1, [1986] 2 All ER 816 (England and Wales). In this case, the plaintiff had acquired 10.67% of the shares in a company as part of an arrangement designed to prevent an outsider gaining control. The articles were altered to allow the plaintiff rights of pre-emption in the company, to further share issues and to appoint a director subject to a qualifying threshold of shares being retained. Held: these were class rights enjoyed by the plaintiff that could only be altered pursuant to statutory formula.

10.9. A purported variation of rights must also be tested against the rule that it must also be just and equitable in the interests of the class as a whole: *Re Holders Investment Trusts Ltd* [1971] 1 WLR 583, [1971] 2 All ER 289 (England and Wales). Trustees exercising votes to support substitution of preference by ordinary shares were also holders of substantial amounts of ordinary shares and thus gained from a positive vote: Held: class vote ineffective because trustees considered their own interests and not those of the class. In Jersey, Art 141 could be used as a further remedy in this instance.

Objections to Alteration/Variation of Rights/Class Rights

10.10. Under Art 53, the members of a company have a right to object to the variation taking place, subject to a minimum threshold. An application may be made to court in a case where the rights of any class of member of a company are varied in accordance with the memorandum or articles, or otherwise in accordance with Art 52, provided that those who did not consent or vote in favour of the resolution seeking to vary amount to:

a) The holders of not less than 1/10th in nominal value of the issued shares of any class of par value shares.

b) The holders of not less than 1/10th in number of the issued shares of any class of no par value shares.

c) The holders, in the aggregate, of not less than 1/10th of the total liability of all the members of any class of guarantor members.

10.11. In the event of an application to the court, any variation that has been made by the company will not have effect unless and until it is confirmed by the court (Art 53(2)). The application must be made within 28 days after the date on which the consent was given or the resolution was passed and may be made, on behalf of the members who are entitled to make it, by one or more of them as they appoint in writing (Art 53(2A)). Notice signed by or on behalf of the applicants must also be given to the Registrar within 7 days stating that an application to the court has been made (Art 53(3)).

10.12. The court must satisfy itself that the notice requirement under Art 53(3) has been met. It may then choose one of two options:

a) If satisfied, having regard to all the circumstances, that the variation would unfairly prejudice the members of the class, disallow the variation.

b) Otherwise to confirm it.

c) The company is required to deliver the relevant Act of the court to the Registrar within 14 days after the making of an order by the court, in default of which, the company is guilty of an offence (Art 53(5)).

Particular Protection for Public Company Shareholders

10.13. Art 54 requires, in the case of a public company, for the registration of rights where a member is admitted and these rights are not stated in its memorandum or articles or a resolution or agreement that must be delivered to the Registrar (see paragraphs 4.21.-4.22. above).

Distributions

10.14. Art 114(1) governs the issue of distributions, including the payment of dividends, and defines these to mean every description of distribution of the company's assets to its members as members, whether in cash or otherwise. Four exceptions are stated to the definition in Art 114(2):

a) An issue of shares as fully or partly paid bonus shares.

b) The redemption or purchase of any of the company's shares (Arts 55 and 57).

c) Any reduction of capital in accordance with Part 12 of the law (Art 60 et seq.).

d) A distribution of assets to members of the company on its winding up (Art 150).

10.15. Art 115 stipulates that distributions are subject to the making of a solvency statement. Although the principle is that a company may make a distribution at any time (Art 115(1)), distributions may not be made except in accordance with the terms of the law (Art 115(2)). Distributions are not to be regarded as reductions of capital falling within Part 12 of the law (Art 115(9)).

10.16. Except in the case of an open-ended investment company, under Arts 115(3)-(4), no company may make a distribution unless the directors who are to authorize the distribution make a statement that the directors have formed the following opinion:

a) That the company will be able to discharge its liabilities as they fall due immediately following the date on which the distribution is proposed to be made.

b) That the company will be able to continue to carry on business and discharge its liabilities as they fall due until the expiry of the period of 12 months immediately following the date on which the distribution is proposed to be made or until the company is dissolved under Art 150, whichever first occurs. The directors are required to have regard here to the prospects of the company and to their intentions with respect to the management of the company's business as well as the amount and character of the financial resources that are in their view available to the company.

c) If a director makes a statement without having reasonable grounds for the opinion expressed in the statement, he is guilty of an offence (Art 115(5)).

10.17. An open-ended investment company may make a distribution only if the directors who are to authorize the distribution reasonably believe that immediately after the distribution has been made the company will be able to discharge its liabilities as they fall due (Art 115(6)).

10.18. Distributions made are normally debited, under Art 115(7), to the company's share premium account or stated capital account or to any other account of the company, other than the capital redemption reserve or the nominal capital account, the last of these being defined to mean a share capital account of the company to which are credited funds equivalent to the nominal value of the shares issued by the company (Art 115(8)).

10.19. For the making of distributions, Art 93 of the Schedule to the Companies (Standard Table) Order 1992 provides that the company may by ordinary resolution declare dividends in accordance with the respective rights of the members, but not to exceed any amount as recommended by the directors. The directors may also, subject to Art 94 of the Schedule to the Companies (Standard Table) Order 1992, pay interim dividends if it appears to them that they are justified by the profits of the company available for distribution. The word "profits" appears to be a relic of the position prior to recent reforms to the law and could be better read as "funds" (NB. This is probably because the Standard Table has not been revised since its introduction).

10.20. Furthermore, Art 95 of the Schedule to the Companies (Standard Table) Order 1992 stipulates that all dividends shall be declared and paid according to the amounts paid up on shares on which the dividend is paid, with dividends being apportioned and paid proportionately to the amounts paid up on the shares during any portion or portions of the period in respect of which the dividend is paid. Art 96 of the Schedule to the Companies (Standard Table) Order 1992 permits a general meeting declaring a dividend on the recommendation of the directors to state that the dividend is to be satisfied out of assets and the directors will determine the conduct of the distribution. Art 97 of the Schedule to the Companies (Standard Table) Order 1992 states that cash dividends may be paid by cheque or warrant and sent by post to the registered address of the holder (or the first listed holder where shares are jointly held). In the case of joint holdings, a receipt issued by any one of the holders acknowledging payment is deemed good. Cheques or warrants are payable to the order of the holder(s) or to a third party if instructions in writing have been received. Payment discharges the company from any further obligation. Art 98 of the Schedule to the Companies (Standard Table) Order 1992 does not authorise interest on dividends or other sums payable in respect of shares unless the rights attached too those shares permits it. Dividends unclaimed after 10 years may be forfeited at the instance of the directors, whereupon it is no longer deemed a debt of the company (Art 99 of the Schedule to the Companies (Standard Table) Order 1992).

10.21. The broad scope of the definition of distribution has the effect that transactions by a company may in fact be treated as a distribution even though they appear to be something completely different, for example an agreement to pay the costs of a shareholder in respect of a share transaction or a sale of property by a subsidiary to its parent or some other intra-group transfer: see *Aveling Barford Ltd v Perion Ltd* [1989] BCLC 626 (England and Wales).

10.22. Art 102 of the Schedule to the Companies (Standard Table) Order 1992 states that the directors may, with the authority of an ordinary resolution, resolve to: (a) capitalise any undivided profits not required for the payment of a preferential dividend or sums standing to the credit of the share premium account or capital redemption account; (b) appropriate the capitalised sums to the members in proportion to the nominal amounts of their capital or use those capitalised sums towards the payment of shares or debentures to be issued to the members on a fully paid basis or a combination of the above; (c) in the case of fractional entitlements, issue cash or fractional certificates; and (d) authorise a person acting on behalf of the membership to enter into an agreement to effect the above.

Liability for and Consequences of Unlawful Distribution

10.23. Art 115A sets out the consequences of an unlawful distribution. If a distribution or part of a distribution made by a company to one of its members is made in contravention of Art 115, the member receiving it is liable to repay it or the part of it to the company or, if a distribution was made otherwise than in cash, to pay to the company a sum equal to the value of the distribution or the part of it at that time. This is provided the member knows or has reasonable grounds for believing that, at the time of the distribution was made, it contravened Art 115.

10.24. As a coda to the rules on distributions, the prohibition on financial assistance to existing or prospective members for the acquisition of shares has now been abolished by Regulation 5 of the Companies (Amendment No. 2) (Jersey) Regulations 2008. Under the amended Art 58(1), anything which would have been unlawful by reason of any rule of law prior to the modification of Art 58 is no longer to be unlawful, while the repeal of the former provision is to be taken as authority that the rules it contained are no longer to apply to any situation now rendered lawful by the amendments (Art 58(2)). However, under the "whitewash" provisions that did apply under the former Art 58, which authorised certain types of financial assistance, any financial assistance that was given and which was not treated as a distribution for the purposes of the former law remains excluded from the distribution rules under the new law (Art 58(3)).

11. Company Administration and Organs

Location of Registered Office

11.1. A company is required under Art 67(1) to have at all times a registered office in Jersey to which all communications and notices may be addressed. A company will not comply with this requirement unless the occupier of premises where the registered office is situated authorises their use for that purpose (Art 67(2)). In fact, the Registrar may by written notice served on those applying for the incorporation of a company refuse to carry out the incorporation unless he is satisfied that the occupier of premises has authorised their use for the company's registered office (Art 67(3)). The first registered office will be that specified in the statement sent to the Registrar under Art 7 at the moment of incorporation (Art 67(4)). Thereafter, the company may change the situation of its registered office by giving notice to the Registrar (Art 67(5)). Where the Registrar serves notice that he is no longer satisfied that the occupier of premises where the registered office is situate in fact authorises their use as such, the company must change its registered office within 14 days and give notice of the same to the Registrar (Art 67(6)). Notices by the company under Arts 67(5)-(6) will only have effect when the notice is in fact registered by the Registrar. Nonetheless, service on the company at its previous registered office continues to be valid for 14 days after registration takes place (Arts 67(7)). The Registrar may also refuse, again by giving written notice, the registration of any notice by the company in accordance with Arts 67(5)-(6) if he is not satisfied that the occupier of premises authorises their use as the location for the company's registered office (Art 67(8)). Default by the company and any of its officers in compliance with the law exposes them to liability for an offence (Art 67(9)). In order that an occupier of premises can evidence that authorisation has been given for the use by a company of those premises as its registered office, information will need to be provided in a form to be prescribed (Art 67C).

11.2. Where a company unavoidably ceases to perform at its registered office any duty to keep documents or make these available for public inspection and in circumstances in which it is not practicable to give prior notice to the Registrar of a change in the situation of its registered office, then, when the company resumes performance of that duty at other premises as soon as practicable and gives notice to the Registrar of a change in the situation of its registered office within 14 days of doing so, the company is not to be treated as having failed to comply with that duty, provided that the Registrar does in fact register that notice (Art 67A). A refusal received by written notice under Art 67(3) will entitle the applicants for the incorporation of a company to appeal to court on the ground that the Registrar's decision was unreasonable having regard to all the circumstances of the Case (Art 67B(1)). A similar appeal lies in the case of notice served on the company under Art 67(6) stating that the Registrar is no longer satisfied that the occupier of premises where the company's registered office is situate in fact authorises their use as such (Art 67B(2)). Finally, receipt of notice of a refusal by the Registrar to register a notice of change of registered office given by the company, whether made under Arts 67(5) or (6) will also entitle the company to appeal (Art 67B(3)). In all these cases, the appeal must be made within 28 days of notice being received. On hearing the appeal the court may confirm or reverse the Registrar's decision and make any order with respect to costs as it thinks fit (Art 67B(4)).

11.3. Since 2005, companies are no longer required to have displayed the name of the company outside the registered office (repealed Art 68).

Transparency Requirements (Name and Number/Particulars in Correspondence)

11.4. Art 69 requires the company's name to appear in legible characters in all of the following documents, in default of which the company is liable to conviction for an offence:

a) Business letters, statements of account, invoices and order forms.

b) Notices and other official publications.

c) Negotiable instruments and letters of credit signed by or on behalf of the company.

11.5. Art 70(1) stipulates that the address of the registered office of a company is to appear in legible characters on all of its business letters and order forms. If the stationery used for letters or order forms contains a reference to the amount of the company's share capital, that reference must be to the paid up share capital. Failure to comply with these provisions exposes the company to liability for an offence.

Corporate Seal

11.6. As stated in paragraph 3.8. above, companies in Jersey are no longer required to have a corporate seal. Accordingly, the provisions of Arts 22 (company seals), 23 (official seal for use abroad) and 24 (official seal for securities) have no application in instances where companies no longer use seals.

11.7. Where a company nevertheless, uses a seal, it may have one or more of the seals referred to in Arts 22-24. Art 92 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 stipulates that the seal or seals may only be used on the authority of the directors (or of a committee appointed for that purpose). In default of any determination, an instrument to which the seal is affixed is to be signed by 2 directors or by a director and the secretary.

11.8. In respect of the company seal, Art 22(1) stipulates that a company which has a common seal shall have its name engraved in legible characters on that seal, in default of which the company is liable to conviction for an offence (Art 22(1A)). Similarly, the use of any seal purporting to be a company seal and which does not have the company's name engraved on it in legible characters, exposes the officer or agent of the company to liability for an offence (Art 22(2). Common seals may also be issued with duplicates (Art 22(1B)).

11.9. Art 23(1) provides that a company with a common seal which engages in business outside Jersey may have an official seal for use outside Jersey in the form of a facsimile of the common seal of the company with the addition on its face either of the words "Branch Seal" or the name of the country, territory or place where it is to be used, provided that the existence of a branch seal is authorised by the articles of association. Branch seals may also be issued with duplicates (Art 23(1A))

11.10. Any document to which the official seal for use outside Jersey has been affixed has the same value as if it had been sealed with the common seal (Art 23(2)). The company may also appoint an agent to affix the official seal for use outside Jersey to any document to which the company is party, provided the appointment and authority to do so is made in writing under its common seal (Art 23(3)). In this instance, the authority of the agent *vis-à-vis* third parties continues until actual notice is given to the third party of the termination of the agency (Art 23(4)).

11.11. Art 24 authorises any company with a common seal to have made a facsimile of its common seal, with the additional word "Securities" on its face, as well as duplicates of the same, for use for sealing securities issued by the company and for sealing documents creating or evidencing securities that may be issued.

Annual Return and Other Compliance Requirements

11.12. Art 71(1) stipulates that every company must, before the end of February in every year after the year in which it is incorporated, deliver to the Registrar a return (the "annual return"), failure to comply with which is an offence (Art 71(6)). Exceptions are made for companies in a creditors' winding up or which are the subject of a declaration under the Désastre Law.

11.13. The annual return must state the following classes of information:

a) In the case of a par value company, either of the following options:

i) The name and address of each member who on 1 January in the year of the return held not less than one per cent in nominal value of all the issued shares of that class and the number of shares so held by him or her. Furthermore, the number of the members who on that date each held less than one per cent in nominal value of all the issued shares of that class and together also with the total number of shares comprised in those holdings must also be supplied.

ii) The name and address of every member who on 1st January in the year of the return held any shares of that class, and the number of shares of that class held by him or her.

b) In the case of a no par value company, either of the following options in respect of each class of shares:

i) The name and address of each member who on 1 January in the year of the return held not less than one per cent in number of all the issued shares of that class and the number of shares so held by him or her. Furthermore, the number of the members who on that date each held less than one per cent in number of all the issued shares of that class and together also with the total number of shares comprised in those holdings must also be supplied.

ii) The name and address of every member who on 1 January in the year of the return held any shares of that class, and the number of shares of that class held by him or her.

c) In the case of a company which includes guarantor members, the name and address of each person who was such a member on 1 January in the year of the return.

d) In the case of a company which includes persons who are members with unlimited shares or guarantor members, the name and address of each person who was a guarantor member on 1 January in the year of the return and, in the case of a person holding unlimited shares, the number of shares held by him.

e) In the case of a company which on 1 January in the year of the return is either a public company or a subsidiary of a public company, the particulars required by Art 84 to be kept in the register of the directors and secretary of the company with respect to the directors of the company.

11.14. Where a company has converted any of its shares into stock, the return shall give the corresponding information in relation to that stock, stating the amount of stock instead of the nominal value or number of shares (Art 71(2)).

11.15. The return must contain any information and be verified in any manner as specified in a notice published by the Commission (Art 71(3)), while on filing of the return, a company must pay the published fee and any late filing fee (Art 71(5)).

11.16. Under Art 71(4), a copy of the return of a public company may not be made available by the Registrar unless the applicant has made the declaration required by Art 46 (see paragraphs 7.56.-7.57. above).

Corporate Registers and Minutes (Maintenance and Inspection)

11.17. A company is required by Art 83(1) to keep a register of its directors and secretary at its registered office with the particulars required by Arts 84 and 85. The register must be open to the inspection of the Registrar and of a member or director of the company without charge and, as far as public companies or companies which are subsidiaries of a public company are concerned, to any other person on payment to the company of any sum required, not to exceed the published maximum. The period within which the register must be available must be not less than 2 hours in each business day during business hours, subject to any reasonable restrictions as the company may impose in general meeting or by its articles of association (Art 83(2)).

11.18. If inspection is refused or there is a failure to comply with the requirements on holding a register or its contents, the company and every officer in default is guilty of an offence (Art 83(4)). Furthermore, a court may compel an immediate inspection of the register (Art 83(5)).

11.19. Information obtained by the Registrar as a result of the exercise of the right to inspect may not be disclosed except to the Commission on being required in writing by it to do so or used except for the purpose of enforcing any provision of the law or any obligation owed to the company by an officer or secretary of the company (Art 83(3)).

11.20. The particulars required by Art 84 on directors are:

a) The director’s present forenames and surname.

b) Any former forenames or surname.

c) The director’s business or usual residential address.

d) The director’s nationality.

e) The director’s business occupation (if any).

f) The director’s date of birth.

g) The date on which the person became a director and, where appropriate, the date on which the person ceased to be a director.

11.21. Art 85 imposes requirements in respect of the particulars of company secretaries. The register must contain the following particulars in relation to any secretary or joint secretary:

a) In the case of an individual, the person’s present forenames and surname, any former forenames or surname and the person’s usual residential address.

b) In the case of a body corporate or a Scottish firm, its corporate or firm name, the place where it is incorporated and its registered or principal office.

c) In both cases, the date on which the person or the body/firm became the secretary and, where appropriate, the date on which the person or the body/firm ceased to be the secretary.

11.22. Minutes are required by Art 98(1) to be kept of all proceedings at general meetings, meetings of any class of its members, meetings of its directors and of committees of directors to be entered in books kept for that purpose. The names of the directors present at any meeting must be recorded in the minutes. Failure to comply with this requirement renders the company and every officer in default to conviction for an offence (Art 98(4)).

11.23. Minutes signed by the chairman of the meeting at which the proceedings took place, or by the chairman of the next succeeding meeting, are treated as evidence of the proceedings (Art 98(2)). Furthermore, unless proof is brought to the contrary, the existence of minutes is deemed to denote that the meeting to which they relate was duly held and convened and that all proceedings which took place at the meeting to have taken place (Art 98(3)).

11.24. The minute books must, under Art 99(1), be kept at the company's registered office and, during business hours, be open to the inspection of a member without charge. A member may also require by submission to the company of a written request and on payment of any sum required, not to exceed the published maximum, a copy of the minutes. The company must make available, within 7 days after the receipt of the request and the payment, the copy required at the registered office of the company for collection during business hours (Art 99(2)).

11.25. Refusal of an inspection or failure to make a copy of the minutes available will make the company liable to conviction for an offence (Art 99(3)). In the case of a refusal or default, the court may make an order compelling an immediate inspection of the books in respect proceedings at meetings or directing that copies of the minutes required be furnished to the persons requiring them (Art 99(4)).

Service of Documents on Company

11.26. Art 72 states that a document may be served on a company by leaving it at, or sending it by post to, the registered office of the company. It may also be served under Art 67(4) by leaving it within 14 days of any change of registered office at the former registered office of the company. NB. This reference should now be read as referring to Art 67(7). In the case where no office is registered, service on a public company may be effected by sending the document by post to any person who is shown on the register kept under Art 83 as a director or secretary of the company at the address entered in that register.

11.27. In any other case, documents may be sent to any person shown as a member of the company in the register of members or in the latest annual return delivered to the Registrar under Art 71 at the person's address shown in the register or return. If no annual return has been delivered to the Registrar in compliance with Art 71, service may be validly made on any person whose name appears as a subscriber in the company's memorandum at the person's address as shown in the memorandum.

Notice Requirements

11.28. Arts 103-108 of the Schedule to the Companies (Standard Table) Order 1992 deal with notices generally. Art 103 states that notices required by the articles of the company must be in writing, the only exception being in relation to a meeting of the board of directors. Members are entitled to receive notice even though their registered addresses are not within the British Isles. Notices may be served personally or by being sent by post or left at the member's registered address. Notice to the first listed of joint holders will suffice as notice to all (Art 104). Proof that notice was properly addressed and, where sent by post, that the correct postage was prepaid, shall be conclusive evidence of notice having been given. Such notice will take effect 48 hours after it was deemed to have been sent (Art 107).

11.29. Notice on the predecessor in title of a person who subsequently becomes registered as the holder of shares binds the successor (Art 106). Where a person becomes entitled to shares on the death or bankruptcy of a member, the company may send or deliver any notice in the terms authorised by the articles addressed to that person by name or by a title (personal representatives of the deceased member or trustee in bankruptcy of a member) at an address notified by that person. Prior to an address being supplied, notice in any manner as if the death or bankruptcy has not occurred is adequate (Art 108).

11.30. A member present in person or by proxy at a class or general meeting is deemed to have received notice of that meeting and of the purposes for which it was called (Art 105).

Company Organs

11.31. The traditional view of corporate democracy is that directors, being servants of the company, act according to directions of the company (i.e. decisions taken by the company, meaning its shareholders, in general meeting). Hence the power is delegated, but ultimate authority lies with the shareholders. See *Gibson v Barton* (1875) LR 10 QB 329 (England and Wales). This traditional view is consonant with the position that shareholders are "partners" in the enterprise and will act so as to manage the company. Also, shareholders have a "reserve" of powers and, in the absence of specific mention elsewhere, hold all residual power as "owners" of the company.

11.32. The modern reality is very different in that the courts in common law have tended to interpret statements such as that in Art 64 of the Schedule to the Companies (Standard Table) Order 1992 to mean that general meetings may only interfere with directors' powers by way of special resolution or constitutional amendments; i.e. ordinary decisions will not suffice. A possible reason: to ensure that decisions, because they need a greater majority, will be truly reflective of the membership. Also, shareholders have in larger companies, and especially in public companies withdrawn from management (Berle and Means' study in 1933 is a classic exercise in understanding shareholder apathy). This is certainly true given greater and more diffuse shareholdings and given the rise in the numbers of institutional shareholders (unit trusts, pension funds etc).

11.33. This has resulted directly in directors obtaining more and more power. In fact, the theory that shareholders have 'residual' power has been doubted by the courts in: *John Shaw and Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 at 134 per Greer LJ: "…The only way in which the general body of shareholders can control the exercise of the powers vested by the articles in the directors is by altering the articles, or… by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders…". In Jersey, although the residual power may subsist, the court in *In re Esteem Settlement* 2003 JLR 188 observed (albeit *obiter* and in relation to a single shareholding): "...in other words, the control of a shareholder is a lawful control conferred upon him by company law which enables him quite legitimately to procure that the company acts as he wishes (subject only to any duties owed to creditors)" (para 105). Under Art 64 of the Schedule to the Companies (Standard Table) Order 1992, the delegation of the management of the business to the directors and the provision that they may exercise all the powers of the company is subject to any directions given by special resolution. It is not easy to reconcile these provisions with the duties imposed on directors by Art 74 (of the law) and the requirement in respect of an authorisation or ratification of a breach of duty that it be passed by all the shareholders (and not just the shareholders sufficient to pass a special resolution). On that basis, it appears that to the extent that shareholders do have a power to direct the actions of directors, it is subject to the overriding duties of directors under Art 74.

11.34. The model of company administration is, for most purposes, therefore fixed in this bilateral or bi-polar manner, in which shareholders and directors each exercise a constituent part of the power to manage the company. The organs of the company that exercise this power are the board of directors and general meeting of the company.

a) Board of Directors: the directors are appointed to fulfil a management function and represent the company for the purposes of fulfilling any requirements imposed by law. Directors of the company normally exercise their responsibility collectively as part of a board. Directors' qualification and disqualification requirements as well as the duties to which they are subject are dealt with below in Chapter 12.

b) General Meeting of Shareholders: general meetings are occasions on which members/shareholders meet to receive reports by directors and to vote on matters within their remit. The consequences of and incidences to membership are dealt with below in Chapter 13, while the conduct of the general meeting is dealt with in Chapter 14.

11.35. Other parties are involved in the administration and functioning of the company: the auditors and the company secretary.

a) The Auditors: the auditors are appointed to certify, where the law requires, the preparation of accounts for delivery to the shareholders. The qualification, role and function of auditors are dealt with below in Chapter 15.

b) The Company Secretary: the company secretary is appointed by the directors, largely to ensure compliance with the requirements of the law and that the general administration needs of the company are met. The law largely leaves the position of company secretary unregulated. By virtue of Art 90 of the Schedule to the Companies (Standard Table) Order 1992, the secretary is appointed by the directors for a term at such remuneration and upon such conditions as they think fit, with the decision on the removal of the secretary also left to the directors.

c) A point to note is that, for the purposes of compliance with the law, mention of the term "officers" of a Jersey company includes the directors or, where applicable, the liquidator. The company secretary is not an officer of the company for the purposes of the law.

12. Directors

Qualification and Particulars of Directors

12.1. A company may have many members (large public companies may have hundreds, thousands, even hundreds of thousands of members) and elect a small body of people who may be (but, subject to the Arts of Association, need not be) members to direct the company. The directors of a company will have considerable power over the company's assets and are elected to deploy these assets skilfully so as to increase the profitability of the company. Consequently, the legal relationship between a company and its directors is a complex amalgam of elements of fiduciary relationships (derived from principles of equity) and elements of negligence (derived from tort) plus a large dose of statutory intervention which tries to cover the ever-growing business practices in our society and the abuses to which these may give rise.

Definition and Terminology

12.2. Art 1(1) defines a "director" to mean a person occupying the position of director, by whatever name called. Nonetheless, the law does not define the position of a director nor the extent of his/her role, except insofar as particular duties apply and liabilities accrue to anyone occupying that position. Not everyone given the title of "director" is a director for the purposes of the Companies (Jersey) Law, 1991. Titles such as "finance director", "human resources director" or "technical director", for example may be given to people who head divisions within companies and have a portfolio of responsibilities but are not directors for the purposes of the law. Conversely, it is possible for a person to be a director for the purposes of the law without being identified at all as a director. The determining factor is the influence and control that that person exercises over the corporate affairs of the company. The powers of the directors of a company are set out in its Articles of Association. In the Schedule to the Companies (Standard Table) Order 1992, Art 64 provides that "the business of the company shall be managed by the directors who may exercise all the powers of the company".

Holland v HMRC [2010] UKSC 51 (England and Wales): In the absence of a precise definition of what a director is (see section 741(1), Companies Act 1985 (United Kingdom) and section 250, Companies Act 2006 (United Kingdom)), the court held that those who assume to act as directors and who thereby exercise the powers and discharge the functions of a director, whether validly appointed or not, must accept the responsibilities of the office.

12.3. The directors exercise their powers collectively, meeting as a board (Board of Directors) (see Art 64 of the Schedule to the Companies (Standard Table) Order 1992 and Arts 79-89 relating to the proceedings of directors) and are jointly and severally responsible for decisions of the board and those of its agents and delegates. The articles of association of a company may make provision for the appointment of directors with particular titles, for example as "Executive Directors", and provide for the delegation to them of particular powers (although there are no such provisions in the Standard Table) or the appointment of a managing director but they have no distinct status as directors under the Companies (Jersey) Law which refers only to "directors" and does not recognise different types of director. The additional authority of a managing director (acknowledged, for example, in *Jakobsson v. Offshore Nautical sales Limited* [2003] JCA 049 adopting as part of the law of Jersey the analysis by Lord Denning MR in *Hely-Hutchinson v. Brayhead Ltd* [1968] 1QB 549) derives from the authority that is impliedly (or expressly) delegated to an individual director by the Board of Directors with the appointment and not from having a different status as a director for the purposes of the Companies (Jersey) Law.

12.4. A number of terms or titles are commonly used in relation to directors:

a) “Chairman”/“Chairwoman” of the company is, if one is appointed, a director who presides over meetings of the Board of Directors or general meetings of the company and may be given a particular role or authority in the articles of association (see, for example, the chairman's casting vote under Arts 46 and 79 of the Schedule to the Companies (Standard Table) Order 1992).

b) “Managing Director”, if one is appointed, is a title that may be given to a director to whom the Board of Directors has delegated specific powers (see, for example, Arts 66 and 75 of the Schedule to the Companies (Standard Table) Order 1992).

c) “Executive Director”, if one is appointed, is a title that the articles of association of a company may provide may be given to a director who has been appointed to hold a particular executive office in the company. An executive director may have a service contract. The term is not used in the Standard Table.

d) “Non-Executive Director”, if appointed, is a title that may be given to a director who is not concerned with carrying on the day-to-day management of the business but is considered to have particular skills which will assist the board or, in some cases act as a representative for shareholders to the board.

e) “Alternate Directors” are appointed to act instead of a director who is absent or incapacitated or for any reason the law permits. Alternate directors may but, subject to the articles of association of the company, need not be directors. A person appointed as an alternate director does not become a director by virtue of appointment as an alternate but acts as the representative of the appointing director with the powers given by the terms of the appointment. An authorisation by a company to the directors to execute documents, for example, would not, without specific provision, give authority for those documents to be executed by alternate directors.

f) "Nominee Director" is a title that is sometimes used to describe a director who has been appointed by a particular shareholder. The term should be avoided because the duties of a director are personal and cannot be exercised by a nominee acting upon the instructions of another person. They are owed by the director to the company as set out in Art 74 of the Companies (Jersey) Law. Carrying out the role of director as the nominee of another person (such as an individual appointor of the director) would not excuse the individual director (whether acting in the interests of the appointor or any other person) from acting in the best interests of the company. If a person appointed as a director were to carry out the role by way of following the instructions of another person, that may have the effect of putting the person whose instructions are being followed in the position themselves of being a director.

Qualifications and Number of Directors

12.5. No formal qualifications are necessary for the position of director unless the articles of association so provide. Art 73(3) sets out a list of persons prohibited from being a director as follows: (i) persons under 18 years; (ii) interdicts; and (iii) people who have been disqualified under the Companies Law or any other enactment. A body corporate may be a director only if it satisfies certain criteria (see paragraph 12.9. below).

12.6. Art 73(1) stipulates that a private company must have at least one director, while Art 73(2) increases that number to 2 in the case of a public company. Art 58 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 also stipulates that, unless otherwise determined by special resolution, the number of directors (other than alternate directors) is not subject to any maximum but must be at least 2.

12.7. In general, persons occupying the position of auditor, company secretary and adviser are not appointable to the position of director, although it is common in some jurisdictions for a company secretary to also be a director. The secretary of a company cannot also be its sole director (Art 81(2)). A failure to obtain qualification shares, where that requirement is imposed by the articles of association, renders the appointment of a director void. Art 24 of the Désastre Law states that a debtor cannot become a director and must resign after a declaration of *désastre* until a discharge is obtained.

12.8. The issue of potential conflict of interests must also be looked at in the context of appointments. In *Re Clark* (1989), the court held that a Constable must resign a directorship in a company regardless of whether the directorship affected his duties unless the activities were conducted by the company wholly outside his parish. In the case, the conflict arose because the company owned a pub in the parish where the Constable was bound to enforce licensing laws.

12.9. The issue of corporate bodies acting as directors, a position permitted in other jurisdictions, is dealt with by Art 73(4), which states that a body corporate (note that this includes companies incorporated outside Jersey) may not be a director under the law except in the case of a company permitted under the terms of its registration under the Financial Services (Jersey) Law 1998 to act as or to fulfil the requirements of a director and, furthermore, that body corporate does not itself have any director that is also a body corporate. Art 73(4A)-(4B) extends the prohibition to incorporated limited partnerships and separate limited partnerships.

Appointment of Directors

12.10. The first directors of the company are commonly appointed at or shortly after incorporation. In Jersey, companies can be incorporated without directors, although they cannot function unless and until appointments are made. Art 67 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 stipulates that the first directors of the company are to be appointed in writing by the subscribers of the memorandum or a majority of the subscribers. It is only necessary to specify the identities of directors in the documents delivered to the registrar for incorporation in the case of companies that are incorporated as public companies. Where a company is incorporated as a public company, Art 7(3) requires that the statement delivered to the registrar include the following particulars with respect to each director: (i) present forenames and surname; (ii) any former names; (iii) the business or usual residential address of the director; (iv) nationality of the director; (v) business occupation of the director (if any); and (vi) the date of birth of the director.

12.11. During the life of the company, directors may be appointed at a general meeting or by the Board of Directors to fill vacancies that may arise or through co-option by the other directors. Art 68 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 states that no person may be appointed a director at any general meeting unless that person is in fact recommended for appointment by the existing directors. Alternatively, a person may be proposed by a member qualified to vote at a general meeting through notice being given to the company not less than 14 clear days (and not more than 35 clear days) before the date appointed for the meeting. The notice must state the intention to propose a person for appointment and furnish the particulars that would need to be entered in the company’s register of directors if the person were appointed. Furthermore, the individual put forward for appointment must also execute a notice indicating a willingness to be appointed.

12.12. Art 69 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 provides that notice may be given to all the members entitled to receive notice of the holding of a general meeting which states that the directors will be making a recommendation for appointment or reappointment of a person as a director at the meeting or that the company has received notice of the intention to propose a person to the meeting for appointment as a director. Notice must be given not less than 7 and not more than 28 clear days before the date appointed for holding the general meeting and must contain the particulars that would need to be entered in the company's register of directors if the person were appointed.

12.13. Art 70 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 also states that, subject to the foregoing provisions, the company may by ordinary resolution appoint a person who is willing to act to be a director either to fill a vacancy or as an additional director. Furthermore, the directors may appoint a person who is willing to act as a director, either to fill a vacancy or as an additional director unless the appointment would cause the number of directors to exceed the maximum number of directors as provided in the articles of association or determined in accordance with one of its provisions. A director appointed in this way will only hold office until the next annual general meeting to follow, but may be eligible for reappointment. If the person is not reappointed, he/she is to vacate office at the conclusion of that meeting (Art 71 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

12.14. It is also possible that persons may be seen as being directors by course of conduct, i.e. occupying the position of director, carrying out business and making key decisions (see the discussion in *Holland v HMRC* [2010] UKSC 51 (England and Wales)). Less commonly, the courts may appoint directors as necessary or authorise appointments by others. In *Re: Noel Tedman Holding Property Ltd* (1967) Qd R 561 (Queensland, Australia): a Queensland company had two directors, who were also the only shareholders, both killed simultaneously in an accident. Held: the company continued its existence and the court would allow the personal representatives of the estates of the deceased to nominate new directors to transact the company's business.

Alternate Directors

12.15. Jersey law authorises the appointment of alternate directors. Art 59 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 states that any director, who is not himself an alternate director, may appoint another director or a person approved by resolution of the directors and willing to act, to be an alternate director in his stead and may also remove the alternate director as he sees fit. The appointment or removal of an alternate director may be made by notice to the company signed by the director making or revoking the appointment or in any other manner that the directors may approve (Art 62 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992). Art 80 on the validity of the acts of directors despite any defect in appointment also applies to alternate directors by virtue of Art 63 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992.

12.16. Art 60 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 provides that an alternate director is entitled to receive the same notice of meetings of directors and of all meetings of committees of directors of which the person appointing him/her is a member. The alternate director is also entitled to attend and vote at any such meeting at which the director making the appointment is not personally present. The alternate director is generally entitled to perform all the functions of the director concerned, but is not entitled to receive any remuneration from the company for his/her services as an alternate director. Nonetheless, the rules go on to stipulate that an alternate director is deemed for all purposes to be a director and is alone responsible for his acts and defaults. For these purposes, the alternate director is not to be deemed the agent of the appointing director (Art 63 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992). Where authorisations are given by the Board of Directors to directors to, for example, execute documents, care must be taken if alternate directors have been appointed because they are not included within authorisations given to directors only.

12.17. An alternate director ceases to be an alternate director if the appointing director ceases to be a director. However, any reappointment of the appointing director will cause the appointment of an alternate director to be reactivated where the appointment was in force immediately prior to the reappointment (Art 61 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

Particulars of Directors

12.18. A company is required by Art 83(1) to keep a register of its directors and secretary at its registered office with the particulars required by Arts 84 and 85. The register must be open to the inspection of the Registrar and of a member or director of the company without charge and, as far as public companies or companies which are subsidiaries of a public company are concerned, to any other person on payment to the company of any sum required, not to exceed the published maximum. The period within which the register must be available must be not less than 2 hours in each business day during business hours, subject to any reasonable restrictions as the company may impose in general meeting or by its articles of association (Art 83(2)).

12.19. If inspection is refused or there is a failure to comply with the requirements on holding a register or its contents, the company and every officer in default is guilty of an offence

(Art 83(4)). Furthermore, a court may compel an immediate inspection of the register (Art 83(5)).

12.20. Information obtained by the Registrar as a result of the exercise of the right to inspect may not be disclosed except to the Commission on being required in writing by it to do so or used except for the purpose of enforcing any provision of the law or any obligation owed to the company by an officer or secretary of the company (Art 83(3)).

12.21. Art 84 requires the company to keep a register stating:

a) The director's present forenames and surname.

b) Any former forenames or surname.

c) The director's business or usual residential address.

d) The director's nationality.

e) The director's business occupation (if any).

f) The director's date of birth.

g) The date on which the person became a director and, where appropriate, the date on which the person ceased to be a director.

Removal of Directors

12.22. Art 72 of the Schedule to the Companies (Standard Table) Order 1992 sets out a number of instances in which the office of a director becomes vacated:

a) Through the director ceasing to be a director by virtue of any provision of the law or through becoming prohibited by law from or disqualified for being a director (e.g. in instances of mental incapacity and/or incapacity to deal with one's own affairs etc.).

b) Through the director becoming bankrupt or making any arrangement or composition with the director's creditors generally (see definition of "bankruptcy" in Art 8, Interpretation (Jersey) Law 1954).

c) Through the director resigning office by notice to the company (note that the notice needs only to be given, it is not necessary for the company to accept the resignation).

d) Through the director being absent for more than 6 consecutive months from meetings of directors held during that period with the other directors resolving that the office be vacated.

e) Through the company so resolving by ordinary resolution, although the articles might provide that such resolutions may be subject to other provisions on weighted voting (usually inserted to prevent dismissal). A director who is also a shareholder cannot prevent dismissal by this route by not attending meetings so that the meeting is inquorate because the court can reduce the required quorum: *In re Inter-Channel Pharmaceuticals Ltd* 2002 JLR Note 25.

12.23. In addition, directors may also be removed, usually by the articles of association providing for this to happen, in the case of retirement, expiry or breach of their service contract (if any and if the articles so provide), attainment of a maximum age (where one is fixed) or a failure to obtain qualification shares (if there is such a requirement). Furthermore, an event may occur such as death or insanity to bring the directorship to an end. A person in respect of whom a curator has been appointed under the Mental Health (Jersey) Law 1969 is an interdict and is not eligible to be a director under Art 73.

Powers of Directors

General Exercise of Powers

12.24. Art 64 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 states that the business of the company is managed by the directors who may exercise all the powers of the company. They may do this subject to the provisions of the law, the memorandum and the articles of association and to any directions given by special resolution. Any subsequent alteration of the memorandum or articles or direction does not invalidate any prior act of the directors which would have been valid if that alteration had not been made or that direction had not been given. Furthermore, this rule is not limited by any special power given to the directors by the articles of association. Any meeting of directors at which a quorum is present may exercise all powers exercisable by the directors.

12.25. The articles of association may set out who has power to act on behalf of the company and bind it (see, for example, Arts 64-65 of the Schedule to the Companies (Standard Table) Order 1992). However, the early application of the "constructive notice rule" by the courts led to the conclusion that persons dealing with the company were deemed to know these provisions of the company's articles (and thus could not enforce contracts unauthorised by or under the articles). The courts developed the so called "indoor management rule" to ameliorate the full impact of the constructive notice rule: *Royal British Bank v. Turquand* (1856) 6 E & B 317; (1856) 6 E & B 327 (England and Wales). This rule states that in favour of any person dealing with the company, they are deemed free of any limitation contained in the company's constitution unless proof to the contrary is brought by the person alleging the knowledge. The common law rule is now replicated in Art 19, which stipulates that no person is deemed to have notice of any records (including company constitutional documents) by reason only that they are made available by the registrar or by the company for inspection. If, however, a person contracting with a company does, in fact, have notice of restrictions in the memorandum (whether actual or constructive notice), it may be arguable that they are assisting in a breach of fiduciary duty by the directors and that any benefit from the contract is held on constructive trust for the members (*In re Esteem Settlement* 2003 JLR 188).

12.26. Furthermore, in relation to ultra vires, Art 18 stipulates in relation to the capacity of a company that the doctrine of *ultra vires* in its application to companies is abolished. Accordingly, the capacity of a company is not limited by anything in its memorandum or articles or by any act of its members. However, limitatively, Art 18 does not affect the capacity of an existing company (as defined in the law) in relation to anything done by it before the Companies Law came into force. Furthermore, although abolishing *ultra vires*, Art 18 does not confer on the directors of an existing company the authority to exercise any power that the company did not have when the law came into force until the company resolved otherwise by special resolution. As a matter of current practice, the view is taken that the effect of including an objects clause into the memorandum of a company incorporated after Art 18 came into effect is to limit the powers of the directors without affecting the capacity of the company, retaining, it might be said, the internal effect of the *ultra vires* doctrine.

12.27. Also underpinning the concern for third parties transacting with the company, the law also stipulates in Art 80 that the acts of a director are valid notwithstanding any defect that may afterwards be found in the director’s appointment or qualification. In *Morris v Kansen* [1946] AC 459 (England and Wales), the court stated in relation to the equivalent common law rule that the protection extended only to defects in appointment and not where there had been no appointment at all. A director whose appointment is subsequently found to be defective may rely on the validity of his acts as long as he acted in good faith when doing so: *Channel Collieries Trust v Dover Light Railway Company* [1914] 2 Ch 506 (England and Wales).

12.28. In order to exercise their powers, the law states that the directors are entitled to examine all documents the company produces or has in its possession until such time as they cease to occupy the position of director: *Shirley v Channel Islands Knitware Ltd* 1985 JLR 404, where a director's right to inspect correspondence was held to cease upon termination of the directorship as the inspection would be in interests of that person and not the company.

12.29. Despite the concern for the protection of third parties, in certain circumstances transactions may still be impugned. In *In Re Zaki Ltd* 1987 JLR 244, the court indicated that even acts ostensibly *intra vires* the company might be set aside if it were shown that directors exercised powers for improper purposes such as for gratuitous purposes. On the facts, the transaction could be set aside if in fact the guarantee given by the directors was done so gratuitously and the other party had actual or constructive knowledge of this. Furthermore, the directors were unable to show *cause* for the guarantee having been given in good faith and in the best interests of the company, the allegation being that the directors had abused their powers for the sole benefit of the other parties to the transaction.

Delegation of Powers: Committees and Sole Directors

12.30. Art 66 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 states that the directors may delegate any of their powers to any committee consisting of one or more directors. Furthermore, if they think fit, a delegation may be made to include one or more other persons, although on any committee thus constituted, a majority of the members must be directors. In fact, no resolution of the committee shall be effective unless a majority of those present when it is passed are directors. Subject to any conditions contained in the delegation, the proceedings of a committee with 2 or more members is governed by the articles regulating the proceedings of directors insofar as they are capable of applying.

12.31. Art 66 also states that a delegation may be given to a managing director or any director holding any other executive office such powers as are considered desirable to be exercised by the managing director or director. The delegation may be made subject to any conditions the directors may impose and may be revoked or altered. Powers given in this way may be exercised collaterally with those exercised by the board or to the exclusion of their own powers. At common law, if a director, acting within the scope of his actual authority, makes a contract on behalf of the company, then the company will be bound by it. However, even if the person entering into a transaction purportedly on behalf of the company has no actual authority, then he may have ostensible authority to act on behalf of the company. What constitutes actual or apparent/ostensible authority is set out in: *Freeman & Lockyer v. Buckhurst Park Prop* [1964] 2 QB 480 (England and Wales) and *Hely-Hutchison v Brayhead* [1968] 1 QB 549 (England and Wales). The dicta of Lord Denning MR in the latter case were cited with approval in *Jakobsson v Offshore Nautical Sales* (2003) (unreported).

Agency

12.32. Agency is a fundamental necessity of company law because a company cannot function except through the actions of human beings. Art 65 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 states that the directors may appoint any person to be the agent of the company for such purposes and on such conditions as they determine, whether in the form of a power of attorney or otherwise. The agency may include authority for the agent to delegate all or any of the agent's powers. However, in general, directors must take care not to delegate powers where the result may be to neglect or conflict with their duties under Art 74 and must maintain adequate supervision of the delegate, the possibility of delegation not being available as a means of avoiding the director's duties.

12.33. In relation to civil capacity, and especially the form of company contracts, Art 20 provides that a person acting under the express or implied authority of a company may make, vary or discharge a contract or sign an instrument on behalf of the company in exactly the same manner as if the contract were made, varied or discharged or the instrument signed by a natural person, thus harmonising the formalities for all parties natural or corporate. Nonetheless, where the law provides that a contract must be passed before the court, this applies also to corporate contracts.

12.34. The rules on actual and ostensible authority also apply to the position of agents. In *Eckman v Saco Defense* (2002) (unreported), the court stated that allowing someone to appear (to a third party) to be authorised to agree something on behalf of a company will give that person the necessary (ostensible/apparent) authority to contract on behalf of the company (see also *Jakobsson v. Offshore Nautical Sales Limited* [2003] JCA 049).

Directors' Remuneration and Expenses

12.35. The general principle at common law is that the directors are not entitled to remuneration or expenses unless the company or its members agree to this: *Guinness v Saunders* [1990] 2 AC 663 (England and Wales). In that light, Art 73 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 provides that the directors are entitled to such remuneration as the company may by ordinary resolution determine and, unless the resolution provides otherwise, the remuneration is deemed to accrue from day to day (i.e. on a daily basis).

12.36. The rules also provide that the directors may be paid all travelling, hotel, and other expenses properly incurred by them in connection with their attendance at meetings, whether of directors or committees of directors or general meetings or any separate meetings of the holders of any class of shares or of debentures of the company. They may be paid similar expenses in connection with the general discharge of their duties (Art 74 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

12.37. Art 78 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 permits the directors to provide benefits for any director who has held but no longer holds any executive office or employment with the company, whether by the payment of gratuities or pensions or by insurance or otherwise. The same applies to directors of any body corporate which is or has been a subsidiary of the company or a predecessor in business of the company or of any such subsidiary. Benefits may also be provided for any member of the director's family (including a spouse and a former spouse) or any person who is or who was dependent on the director. The company is authorised to contribute to any fund and pay premiums for the purchase or provision of any such benefit, whether before or after the director ceases to hold office or employment with the company or any related bodies.

Proceedings of the Board of Directors

12.38. Generally, Art 79 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 enables the directors to regulate their proceedings as they think fit, subject to the provisions of the articles of association. A director may call a meeting of the directors, as can the company secretary at the request of a director. Art 91 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 stipulates that minutes of any meetings are to be recorded in books kept for that purpose.

12.39. Art 79 also states that questions arising at any meeting are decided by a majority of votes, while, in the case of an equality of votes, the chairman has a second or casting vote. Furthermore, a director who also serves as an alternate director is entitled to a separate vote on behalf of the appointing director, in addition to his/her own vote, in the absence of the appointor at the meeting.

12.40. Art 80 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 states that the quorum for the transaction of the business of the directors may be fixed by the directors and, if not so fixed, is to be at least 2 persons. A person who holds office only as an alternate director may be counted in the quorum if the appointing director is not present. Although continuing directors or a sole continuing director may act notwithstanding any vacancies in their number, if their number is less than the number fixed as the quorum, they may only act for the purpose of filling vacancies or of calling a general meeting (Art 81 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

12.41. Art 82 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 provides that the directors may appoint one of their number to be the chairman of the board of directors and may at any time remove the director from that office. The person so appointed presides at every meeting of directors at which he/she is present unless unwilling to do so. If no director holds that office or the person who does hold it is unwilling to preside or is not present within 5 minutes after the time appointed for the meeting, the directors that are present may appoint any one of their number to be chairman of the meeting.

12.42. In line with Art 80 of the law, Art 83 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 states that all acts done by a meeting of directors, or of a committee of directors, or by a person acting as a director are valid, notwithstanding the later discovery that there was a defect in the appointment of any director or that any of them were disqualified for holding office, or had vacated office, or were in fact not entitled to vote, as if there had been due appointments and qualifications as well as an entitlement to vote.

12.43. Furthermore, a resolution in writing signed by all the directors entitled to receive notice of a meeting of directors or of a committee of directors is deemed valid and effectual as if it had been passed at a meeting of directors or (as the case may be) a committee of directors duly convened and held. The resolution may consist of several documents in like form each signed by one or more directors, although an appointing director is not required to countersign a resolution signed by his/her alternate director. Similarly, if the appointing director has signed the resolution, it need not be signed by his/her alternate (Art 84 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

12.44. Art 85 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 deals with the issue of a conflict of interests. It states that, unless otherwise provided for by the articles of association, a director must not vote at a meeting of directors or of a committee of directors on any resolution concerning a matter in which the director has, directly or indirectly, an interest or duty which is material and which conflicts or may conflict with the interests of the company, unless the conflict arises in one of five possible cases:

a) The resolution relates to the giving to the director of a guarantee, security, or indemnity in respect of money lent to, or an obligation incurred by the director for the benefit of, the company or any of its subsidiaries.

b) The resolution relates to the giving to a third party of a guarantee, security or indemnity, in respect of an obligation of the company or any of its subsidiaries in cases where the director has assumed partial or complete responsibility, whether solely or jointly with others, under a guarantee or indemnity or by the giving of security.

c) The interest arises by virtue of the director subscribing or agreeing to subscribe for any shares, debentures or other securities of the company or any of its subsidiaries. Similarly, the exception extends to situations where the director is or intends to become a participant in the underwriting or sub-underwriting of an offer of any such shares, debentures, or other securities by the company or any of its subsidiaries for subscription, purchase or exchange.

d) The resolution relates in any way to a retirement benefits scheme which has been approved, or is conditional upon approval, by the Comptroller of Income Tax for taxation purposes.

e) The resolution relates to an agreement for the benefit of employees of the company or any of its subsidiaries which does not accord to the director any privilege or advantage not generally accorded to the employees to whom the arrangement relates.

12.45. Where a director is not entitled to vote on any matter, he/she is not to be counted in the quorum present at a meeting in relation to the relevant resolution (Art 86 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

12.46. By way of exception to the harshness of the prohibition rules, Art 87 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 permits the company to suspend or relax to any extent any provisions of the articles prohibiting a director from voting at a meeting of directors or of a committee of directors, whether generally or in respect of a particular matter, the suspension or relaxation to be made by ordinary resolution. Where a question arises at a meeting of directors or of a committee of directors as to the right of a director to vote, the question must be referred prior to the meeting ending to the chairman of the meeting, whose ruling in relation to any director other than himself/herself is treated as final and conclusive (Art 89 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

12.47. Art 88 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 permits proposals concerning the appointment of 2 or more directors to offices or employments with the company or any body corporate in which the company is interested to be considered by any meeting to be divided and considered in relation to each director separately. Where this takes place and provided the director is not for another reason precluded from voting, the directors concerned are entitled to vote and to be counted in the quorum in respect of each resolution except that relating to his/her own appointment.

12.48. The importance of following procedure cannot be overstated. Nonetheless exceptionally, actions not authorised by the board as a whole may be undertaken by the directors in order to safeguard the interests of the company. In *Gérant de Barclays Bank v The Dupont Pipe Co. Ltd*. (1955/56), 2 directors, without the authority of the board, removed the name of the company secretary from a bank mandate, where the secretary had resigned even though the resignation had not been formally acknowledged at a meeting of the board. Where the bank permitted one of the other directors to cash a cheque with the secretary's signature, the court held that the two directors had the right to do so as a temporary and protective measure to protect the interests of the company by sending the bank a letter notifying it of the withdrawal of the mandate. The bank was prevented from denying the validity of letter and was wrong to cash the cheque. As a matter of practice, companies may adopt authorised signatory lists giving a general or standing authority to the named people.

12.49. Similarly, although proper procedure may not be followed, acts of directors not authorised by the board may be ratified at a subsequent meeting. In *Baker v Falle* 1991 JLR 284, the court held that where notice of a board meeting was not given to all the directors, then the meeting is invalid unless all directors attend, but that its decisions, such as they were, could be ratified at a subsequent meeting.

Disqualification of Directors/Consequences of Contravention

12.50. Art 78(1) authorises the Minister, the Commission or the Attorney General apply to the court for an order against a person in the public interest that the individual should not be, without the leave of the court:

a) A director of a company.

b) In any other way directly or indirectly concerned or take part in the management of a company.

Hawkes v Cuddy [2007] EWHC 1789: the appointment of a wife to act while the husband was disqualified (in relation to a different company) and her letting him give her instructions and act on her behalf made him indirectly concerned in the management of the company.

c) In any way directly or indirectly concerned or take part in the management of a body incorporated outside Jersey while present in Jersey.

12.51. Art 78 also extends to disqualifying a person from being a member of the council of a Foundation or being concerned with the management of a Foundation.

12.52. *In Re Dimsey* 2000 JLR 401: a person can only be disqualified under Art 78 for conduct in relation to a Jersey company, although the evidence of conduct could come from anywhere in the world and need not relate to behaviour resulting in the commission of an offence in Jersey. However, convictions which do not relate to Jersey companies cannot be considered. Nonetheless, a judgment of the Court of Appeal (England and Wales) revealed ample material in relation to a Jersey company entitling the local court to find the defendant guilty of conduct justifying a disqualification order. There was no need for an actual conviction to justify the making of a disqualification order, which the court stated should be for a 3-year period. However, in relation to the factual bases for the disqualification, events of 20 years ago could not have a bearing on fitness to be a director today and a long delay by the Attorney-General in bringing proceedings could be an abuse of process.

12.53. If the court is satisfied that the person's conduct in relation to a body corporate (wherever it is incorporated and wherever it carries on business) makes the person unfit to be concerned in the management of a company or to be concerned in the management, in Jersey, of a body incorporated outside Jersey, the court may make the order sought for such period not exceeding 15 years as the court directs.

12.54. *AG v Barnes* 2002 JLR Note 13: The Managing Director of a luxury power boat company abstracted £110,000 from company fund. The court held that the breach of trust merited a 4-year disqualification.

12.55. *AG v Channing* 2001 (unreported): A person sold 13 cars which were the subject of hire purchase agreements with the company he directed. The court held this merited a 5-year disqualification.

12.56. Art 43 of the Désastre Law also has a similar rule authorising the Attorney-General to apply for an order in the course of a *désastre* proceeding applying to a company where it appears in the public interest to do so.

12.57. *In Re Delaney* 1995 JLR Notes 2b: Where a company has been declared *en désastre* and its director has been convicted of a criminal offence relating to that *désastre*, the Attorney General must act with expedition in applying to the court under Art 43 for an order that the director be disqualified from being the director or concerned in the management of a company. The correct time to make the application is at the time the director is sentenced for the offence, although failure to do so will not result in a subsequent application for his disqualification being refused on the ground of lateness if in the circumstances of the case the director should be disqualified.

12.58. Art 79 sets out personal responsibility for any liabilities where a person acts while disqualified. Art 79(1) states that a person acting in contravention of an order made under Art 78 is personally responsible for the liabilities of the company or other body corporate incurred at a time when that person was involved in its management in contravention of an order. Joint and several liability also attaches where two or more persons are liable for acting in contravention of an order in relation to a company or other body corporate (Art 79(2)). Involvement in the management of the company or body corporate is defined to include the situation where a person acts as director or is concerned, whether directly or indirectly, or takes part in its management (Art 79(3)).

Duties of Directors

General Duties

12.59. Art 74(1) sets out a statement of the duties of directors, which requires a person, in exercising director's powers and discharging director's duties, to:

a) Act honestly and in good faith with a view to the best interests of the company.

b) Exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

Good Faith/In the Best Interests of the Company

12.60. As far as the requirement of good faith is concerned, the transaction must be in the best interests of the company as a whole. The question is whether the best interests of the company equals the interests of shareholders? This must be a transaction to benefit the company or to fulfil its objects or reasonably incidental to its business, i.e. necessarily intra vires. What if directors think they know best?

12.61. The test of what is in the best interests of the company is what an intelligent and honest person in the position of a director would believe to be for the benefit of the company, taking into account all the circumstances in relation to that transaction: *Charterbridge Corporation v Lloyds* [1970] Ch 62 (England and Wales). In *Baker v Falle* 1991 JLR 284, discretionary powers consisting of a power to veto the transfer of shares were to be exercised *bona fide* in the interests of the company and not for any collateral purpose. However, the court held that it is for the person asserting *mala fides* to prove it. In general, the courts hold that the directors should balance any short-term benefits against the long-term interests of present as well as prospective members as a whole when determining what may be in the best interests of the company: *Gaiman v National Association of Medical Health* [1971] Ch 317 (England and Wales).

12.62. A number of cases in the context of takeovers illustrate how delicate the exercise may be for a director to determine what may be in the best interests of the company. In *Hogg v Cramphorn* [1967] Ch 245 (England and Wales): to defeat a takeover bid, the directors lent money to the employee pension scheme to buy shares they then issued. Minority objected (presumably because the takeover terms were generous). Held: the directors were acting outside powers and, even if within, not acting in good faith as they were solely interested in preventing takeover, which might be to the company's benefit. Conversely, in *Howard Smith v Ampol* [1974] AC 821 (England and Wales): Ampol was the parent company of M. M was the subject of takeover bid from HS. Directors felt the takeover to be in the best interests of company and used powers to allot shares to HS. Ampol, already hostile to bid, challenged the allotment. Held: it was an improper use of powers to change the balance of voting in company, also abuse of fiduciary duty to act bona fide.

12.63. Similarly, *Lee Panavision v Lee Lighting* [1992] BCLC 22 (England and Wales): P had power to nominate directors of D. Directors of D executed a second management agreement in order to enforce debt owed by D to an associated company. New shareholders took over and renounced agreement. P tried to bring injunction. Held: it was improper for the directors to execute this second agreement, knowing new shareholders would not be in favour, power thus used for an improper purpose. Finally, in *Dawson International plc v Coats Paton plc* [1989] 5 BCC 405 (England and Wales): Dawson and Coats negotiated takeover of Coats; Dawson thought it a done deal; Coats then entertained a rival suitor who won the company's affections; Dawson objected and sought to recover costs expended during takeover bid; held: Coats was entitled to change its mind and prefer a new suitor as the directors had an overriding duty to act in the best interests of the company.

Care, Diligence and Skill

12.64. Historically, standards of directors were not very high. Although a director was expected to bring any particular skill and experience he/she had to the company, there was no expectation that the directors was required to have any expertise in a particular kind of business, but was supposed to have the skills of a "reasonably prudent person". In *Re: Brazilian Rubber Plantations* [1911] 1 Ch 425 (England and Wales), where a failed business venture occasioned a suit by the shareholders, 1 director knew nothing of the business, 1 was deaf and 1 became a director because he liked the other directors and was doing them a favour. Held: none were accountable for company's failure. Similarly, in *Re: Cardiff Savings Bank* [1892] 2 Ch 100 (England and Wales), the Marquess of Bute was President of the Cardiff Savings Bank, to which position he had been appointed aged 1. He attended 1 meeting during his presidency before the business failed and the company suffered losses. Held: there was no duty on him to act in any effective way.

12.65. Even as late as *Re City Equitable Fire Insurance* [1925] Ch 407, the standard only extended insofar as a director was required to exercise the degree of skill and diligence amounting to the reasonable care that an ordinary man would be expected to take in relation to his own assets and need not show a greater degree of skill than might reasonably be expected of a person of his knowledge and experience. Furthermore, a director was not expected to give continuous attention to the affairs of the company as these duties are of an intermittent nature to be performed at board meetings held periodically. Finally, duties which could be properly left to another person might be delegated without the director needing to monitor performance as this course of action is justified in the absence of any reason not to trust the delegate.

12.66. Matters only recently changed in *Dorchester Finance v Stebbings and others* [1989] BCLC 498 (England and Wales), where the non-executive directors left the management to an executive director and pre-signed cheques for his use. Consequent on a misuse of company funds, the company sued all the directors. Held: all the non-executives were liable for negligent behaviour. As a result, a new standard for directors was imposed, who must show such skill and care as may be reasonably expected from persons of their knowledge and experience, take such care as an ordinary person might be expected to in the conduct of their own affairs and exercise any and all powers in good faith in the best interests of the company.

Other Aspects of the Fiduciary Duty

12.67. The courts have, historically, extended the fiduciary duty to encompass different fact situations. Thus, apart from the general statement in Art 74(1), other aspects of the fiduciary duty can be discerned in the case law and from general statements of principle elucidated by the judges.

12.68. There is a general requirement to act honestly, which is encompassed within the good faith requirement: *Re W & M Roith Ltd* [1967] 1 WLR 432 (England and Wales).

12.69. There is also a requirement to act for a proper purpose, which is an aspect of the requirement that directors act in the best interests of the company. A proper purpose necessarily includes the case of a transaction to benefit the company or to fulfil its objects or which is reasonably incidental to its business, i.e. necessarily *intra vires*: *Howard Smith v Ampol* [1974] AC 821 (England and Wales). See also *Baker v Falle* 1991 JLR 284 and *In re Zaki* 1987 JLR 244.

12.70. There is a duty not to gain personal benefits or advantages from transactions except as agreed by the company: *Boston Deep Sea Fishing Company v Ansell* (1888) 39 Ch D 339 (England and Wales), in which Ansell bought a trawler for the company and received a personal commission from the shipwrights. Held: this was an unauthorised secret profit and a clear breach of fiduciary duty.

12.71. There is a duty not to treat the company's assets as their own. This could be treated as theft (in France, there is an offence of the 'misuse of corporate property' (*abus de biens sociaux*)) or false accounting. The result could also serve to blur the corporate veil and allow creditors to bring claims to seize the directors' personal assets.

12.72. *Woodman v Viscount* (1975): a company had a suspense account and a frozen account. The latter was in debit to bank for £30,000 guaranteed as to £10,000 each by the two directors and another person. The company received a payment of £20,000 which was credited to the suspense account. The 2 directors each drew a £10,000 cheque on the suspense account and presented to them to the bank in discharge of their guarantees. Bank credited them to a frozen account and returned to them their guarantees. The Viscount alleged misappropriation and breach of fiduciary duty. Held: all that had happened was that the suspense account had been debited and the frozen account credited with the monies (in both accounts the company was a principal debtor). Even if there has been misappropriation, the monies had been accounted for and the directors were under no further liability (i.e. no breach of fiduciary duties) as the company had suffered no damage. NB. At the time, there was no law against the giving of preferences, which would now be dealt with under Art 176A (see Chapter 19 below).

12.73. *In Re Esteem Settlement* 2003 JLR 188: a constructive trust may be imposed on property or profits fraudulently obtained from the company by a director with the company becoming a beneficiary of the trust with an equitable proprietary interest in trust property entitled to trace funds to recover the proprietary interest.

12.74. There is also a duty not to treat shareholders differently: *Alexander v Automatic Telephone Company* [1990] 2 Ch 56 (England and Wales), in which directors required shareholders to pay a premium on shares, but exempted themselves. Held: this was a breach of duty, the benefit only accruing to the directors and resulting in the differential treatment of shareholders.

12.75. There are also duties not to exploit confidential information obtained solely by privilege of the directors' position in the company to appropriate corporate opportunities and not to compete with the company.

Customary Law Duties

12.76. In certain circumstances, if a director acts outside his authority, this will constitute a breach of warranty of authority on the basis that the director has misrepresented his authority to act on behalf of the company.

12.77. *Viscount v Shelton* (1984) JJ 115: all directors were prima facie liable for acting outside the authority given them in the articles of association, although on appeal the Privy Council upheld the directors' entitlements to an indemnity given in the articles of association. Held: directors of pre-92 companies require a special resolution to exercise powers they did not have before the law came into force.

12.78. Where a director authorises an act or omission resulting in the commission of a tort by the company, he may also be liable on a joint or several basis as a joint tortfeasor.

Other Statutory Duties/Liabilities

12.79. The following obligations are imposed on the directors, occasionally couched in terms of a positive duty and in other provisions as a negative liability for an act or omission:

a) Art 29(3) liability for untrue or misleading statement of a material fact or omission of a material fact from a prospectus.

b) Art 30(1)(a) liability to pay compensation to any person affected by an act/omission under Art 29.

c) Art 36(2) liability for failure to comply with information required on commission payments.

d) Art 41(3) liability for failure to maintain the register of members.

e) Arts 50(5)-(6) liability for failure to comply with rules on the issue of share certificates or direction to remedy failure.

f) Art 54(5) liability for failure to comply with the registration of particulars of special rights.

g) Art 55(10) liability for failure to have reasonable grounds for making redemption statement.

h) Art 66 liability for concealing name of creditor or amount of debt.

i) Art 67(9) liability in connection with rules for maintaining a registered office.

j) Art 74 general duty.

k) Art 74A(2) liability for failure to comply with rules on contracts with sole members.

l) Art 75 duty to disclose interests.

m) Art 76(1) duty to account for undisclosed interests.

n) Art 79(1) liability for acting while disqualified.

o) Art 82(1) duty to ensure company secretary qualified for function.

p) Art 83(4) liability for failure to maintain the register of directors and secretaries.

q) Art 87(8) liability for failure to comply with rules on general meetings for public companies.

r) Art 88(3) liability for failure to comply with Commission's direction to summon general meeting.

s) Arts 96(3) and (5) liability for failure to state members' entitlement to attend meeting by proxy or for issue to limited numbers of members of proxy statement.

t) Art 98(4) liability for failure to keep minutes.

u) Art 109 liability for failure to comply with Art 103-108 (making and retaining records, preparing accounts (including interim accounts), making copies of accounts available as well as delivery of accounts to the Registrar).

v) Art 113(10) liability for failure to appoint auditors for a public company.

w) Art 113B(13) liability for failure to send auditor's statement to members.

x) Art 113C(2) liability for making a false statement to the auditors.

y) Art 113Q(4) liability for failure to comply with a direction by the Minister or Commission with view to having accounts re-audited or re-stated.

z) Art 115(5) liability for failure to have reasonable grounds for making statement in connection with distribution.

aa) Art 119(6) liability for failing to issue statement of right to be bought out to minority shareholder.

bb) Art 126(6) liability for failure to comply with rules on compromises.

cc) Art 127G(1) liability for providing false, misleading or deceptive information or document in connection with a merger application.

dd) Art 127G(2) liability for signing a certificate in connection with a merger application without having reasonable grounds for so doing.

ee) Art 146(4) liability for failure to have reasonable grounds for making solvency statement and/or its delivery to the Registrar.

ff) Art 150(7) liability for failure to have reasonable grounds for making statement that company has no assets and no liabilities.

gg) Art 151(12) liability for failure to comply with rules on summoning of creditors' meeting.

hh) Art 154(5) liability for failure to have reasonable grounds for making statements in connection with the termination of winding up.

ii) Art 155(6) liability for failure to send court order commencing winding up to the Registrar.

jj) Art 158(2) liability for failure to give notice of winding up by advertisement.

kk) Art 160(3) liability in connection with holding of creditors' meeting.

ll) Arts 163(2) and 164(3) duties to cease acting as director except as permitted in a winding up.

mm) Art 183(1) duty to co-operate with the liquidator.

nn) Art 185(3) duty to co-operate with Attorney-General for the purpose of criminal proceedings.

oo) Art 191(2) liability for failure to give notice of winding up on company documents.

pp) Furthermore, other duties and liabilities exist by virtue of, *inter alia*, the Depositors and Investors (Prevention of Fraud) (Jersey) Law 1967, Companies Securities (Insider Dealing) (Jersey) Law 1988, the Bankruptcy (Désastre) (Jersey) Law 1991 and the Money Laundering (Jersey) Order 2008.

Consequence and Ratification of Breach of Duties

12.80. One of the major consequences of a breach of duties is to impose a constructive trusteeship on the director to enable the recovery or restoration of property: *Selangor United Rubber Estates v Cradock (No 3)* [1968] 1 WLR 15 (England and Wales), where it was held that a company could sue for damages for breach of trust even though it was a party to the transaction misapplying the property. See also *Belmont Finance v Williams Furniture Ltd* [1978] 3 WLR 995 (England and Wales): directors selling company property worth 60K for inflated price of 500K liable for damages for conspiracy to company, even though company was necessarily a party to the transaction. In *Royal Brunei Airlines v Tan* [1995] 2 AC 378, [1995] 3 All ER 97 (Privy Council, Brunei), RBA appointed agents who became insolvent owing 335K collected on their behalf under a contract clause imposing a trust. The issue was whether the agent's managing director (principal director/shareholder) would be liable as constructive trustee? The Privy Council held him liable on grounds he had failed to protect the sums under trust.

12.81. An account for profits may also accompany or replace an order requiring the recovery or restoration of property, particularly where property has been dissipated or is in the hands of third parties against whom orders cannot be sought (i.e. innocent third parties or parties outwith the jurisdiction). In some circumstances, equitable tracing of proceeds may be made into the hands of third parties. Directors may also be liable to orders for damages or compensation. Furthermore, unless compliance is made with the rules below on contracts with the company in which directors are deemed to have an interest, these contracts may be avoided. An injunction or other declaratory relief may also issue where the breach is threatened or has not yet occurred. These may also issue where the breach is a continuing one and future breaches may need to be restrained. Of note also is the possibility that directors may be at risk of summary dismissal for serious breaches of their duties.

12.82. In some instances, ratification may be a method for avoiding some or all of the consequences of breach. Art 74(2) permits all of the members of the company to authorize or ratify an act or omission in breach of the director's duty, provided that, despite the act or omission, the company will be able to discharge its liabilities as they fall due. It is important to note that the requirement is that the act is ratified by all of the members, which includes any members who may hold shares without voting rights. This is without prejudice to the operation of any rule of law empowering all or some of the members to authorize or ratify a breach. Ratification requires full disclosure to the company of actions or omissions that may have engendered a breach. The company, acting in general meeting, may give retrospective approval except in the case of inherently fraudulent transactions, transactions not permitted or that would be unlawful under companies or other legislation, transactions that have the effect of causing unfair prejudice towards a minority of shareholders or where creditors may become prejudiced because the company is or will be insolvent as a result. Where to repair the consequences of the act, an amendment to the memorandum or articles of association is required, a special resolution is required. Otherwise, ratification may take place by ordinary resolution.

Bamford v Bamford [1970] Ch 212 (England and Wales): the directors of the company issued shares to a new member to prevent a takeover. While litigation was being undertaken by a minority of objecting shareholders, the General Meeting ratified the issue. Held: the issue was a breach of fiduciary duty but the ratification was valid. Furthermore, the litigation would be dismissed as it no longer served any useful purpose.

Conflict of Interests Provisions

Contracts with Sole Member Companies

12.83. Art 74A(1) states that a private company with a sole member who is also a director of the company must ensure that the terms of the contract, which, although entered into, is not in writing, are either set out in a written memorandum or recorded in the minutes of the first meeting of the directors of the company following the making of the contract. The rule does not apply to contracts entered into in the ordinary course of the company's business (Art 74A(5)). Furthermore, the rule does not exclude the operation of any other rule of law that may apply to contracts between a company and a director (Art 74A(4)).

12.84. Although failure to comply does not affect the validity of the contract (Art 74A(3)), the company and every officer in default will be liable to conviction for an offence (Art 74A(2)).

Service Contracts

12.85. The law provides especially for the situation of service contracts with directors. Art 75 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 states that the directors may appoint one or more of their number to the office of managing director or to any other executive office under the company. The directors may also enter into an agreement or arrangement with any director for the director's employment by the company or for the provision by the director of any services outside the scope of the ordinary duties of a director. The directors are entitled to impose the terms that they determine and provide for such remuneration as they think fit. The appointment of a director to an executive office automatically terminates if the director ceases to be a director, but without prejudice to any claim to damages for breach of the contract of service between the director and the company.

Other Contracts

12.86. For all companies, rules require disclosure by directors of an interest in corporate transactions. Art 75(1) states that a director of a company must disclose to the company the nature and extent of any interest she/he may have and of which he is aware. Disclosure is required of an interest in a transaction entered into or proposed to be entered into by the company or by a subsidiary of the company which to a material extent conflicts or may conflict with the interests of the company, whether the interest is held directly or indirectly. The availability of disclosure does not affect the operation of any rule of law that may restrict directors of a company from having an interest in transactions with a company (Art 75(4)).

12.87. Disclosure in accordance with the terms of the law stating that a director is to be regarded as interested in a transaction with a specific person is sufficient disclosure of the extent of any interest in the transaction that is entered into after the disclosure is made (Art 75(3)), reiterated in Art 77(a) of the Schedule to the Companies (Standard Table) (Jersey) Order 1992). Nevertheless, an interest of which a director has no knowledge and of which it is unreasonable to expect the director to have knowledge is not to be treated as an interest of the director (Art 77(b) of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

12.88. Disclosure may be made at the first meeting of the directors at which the transaction is considered after the director concerned becomes aware of the circumstances giving rise to his or her duty to make it or as soon as practical after that meeting, by notice in writing delivered to the secretary, if for any reason the director is unable to comply with the requirement to disclose at the meeting (Art 75(2)). Disclosure at a meeting of the directors is recorded in the minutes of the meeting (Art 75(2B)). Disclosure to the secretary will result in the secretary informing the directors that it has been made and tabling notice of the disclosure at the next meeting of the directors after it has been made (Art 75(2A)).

12.89. Once disclosure is made, Art 76 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 states that the director, notwithstanding the fact she/he occupies the position of director may be:

a) A party to, or otherwise interested in, any transaction or arrangement with the company or in which the company is otherwise interested.

b) A director or other officer of, or employed by, or a party to any transaction or arrangement with, or otherwise interested in, any body corporate promoted by the company or in which the company is otherwise interested.

12.90. Where disclosure is made, the director is not accountable to the company for any benefit which she/he may derive from any office or employment with another body or from any such transaction or arrangement or from any interest in any such body corporate. Furthermore, any transaction or arrangement is not liable to be avoided on the ground of any such interest or benefit.

12.91. Where a director fails to disclose an interest under Art 75, Art 76(1) authorises the company or a member of the company to apply to the court for an order setting aside the transaction concerned. The order may also direct that the director account to the company for any profit or gain realised and the court may make the order sought or any other order it thinks fit. Although the court may at will order an accounting for any profit or gain realised, the court may not, however, set aside a transaction unless it is satisfied that the interests of third parties acting in good faith would not be unfairly prejudiced and that the transaction was not reasonable or fair in the interests of the company at the time it was entered into (Art 76(3)).

12.92. Ratification is available, however, by special resolution where the nature and extent of the director’s interest in the transaction are disclosed in reasonable detail in the notice calling the meeting at which the resolution is to be passed. As a result, the transaction is not voidable and the director is not liable to render an account of profits or gains (Art 76(2)).

The Corporate Opportunity Doctrine

12.93. Although directors are entitled to enter into contracts with third parties, the misappropriation of contracts is not sanctioned. In *Cook v Deeks* [1916] AC 554 (Privy Council, Canada), C sued D because D and certain directors had misappropriated a lucrative construction contract for the railways and caused a General Meeting at which they commanded a majority to pass a resolution disclaiming any interest. Held: this was a breach of their fiduciary duty and an abuse of the majority voting power.

12.94. Furthermore, the exploitation of corporate opportunities and information only available by reason of the director’s position is not permitted, even if the company itself does not wish to exploit the opportunity or information to enter into any transaction. In *Regal Hastings v Gulliver* [1967] 2 AC 134 (England and Wales), the directors of Regal bought shares in a subsidiary (an opportunity known only to them), enabling the subsidiary to acquire cinema leases. There was evidence they did so because the company itself did not have all of the funds to be able to make the investment. When the shares of both companies were subsequently sold and it was discovered the directors had made a profit, the new controllers of the companies caused them to sue. Held: this was a secret profit to be handed over to company. Similarly, in *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734 (England and Wales): D was the managing director of the ACP group. After a takeover, new owners alleged D had dishonestly diverted assets and business opportunities (sale of second-hand machinery and commission thereon) to himself and to B, a foreign company under his control. Held: it was no defence for D to state that ACP would not have exploited opportunities concerned, disclosure to and consent from shareholders being necessary. D and B were liable to account for profits with the corporate veil being raised here as the court held that B functioned merely as an off-shore bank account.

Competition with the Company

12.95. A director also has a duty to avoid transactions with third parties that have the effect of causing the director to enter into competition with the company. In *Coleman Taymar Ltd v Oakes* [2001] 2 BCLC 749 (England and Wales), O used position as director to negotiate a new lease of the company's premises in favour of his own business and used fellow employees for the new venture. Held: he had to account for profits as this was a clear breach of fiduciary duty. Similarly, in *Ball v Eden Project* [2002] 1 BCLC 313 (England and Wales), B, co-founder of the Eden Project, registered the venture's trademark in his own name. B sued when dismissed from Board and claimed sum for the use of his intellectual property rights, the Eden Project counterclaimed for breach of fiduciary duty. Held: B's registration, being aware of the use of the name by the Eden Project and the goodwill likely to be generated, was purely for his personal interest and in conflict with the interests of the company.

12.96. *Hi-Speed Freight v Gaudion* 1985 JLR 216: a director has a duty to avoid conflicts of interest during the directorship, but not after resignation in the absence of a non-competition covenant. The court held that once the director left employment, he was entitled to exercise his professional know-how and skills to establish his own competing business and in doing so should be able to contact and canvass his former employer's customers. The only restriction in such circumstances was that he had a duty not to disclose confidential information acquired during his employment.

Focus of Duties (Shareholders/Creditors/Third Parties)

12.97. The focus of the director's duty is to the company and not to individual shareholders: *Percival v Wright* [1902] 2 Ch 421 (England and Wales), where the directors were looking to sell the company as a whole to takeover bidder; directors invited W, who had previously declared an interest in selling his shares, to sell them to the director. Once the sale had occurred, the directors duly transferred the shares to the takeover bidder. W knew nothing of the full transaction and objected to the lack of disclosure. Held: the directors were not bound to consider individual members' interests but that of the company as a whole.

12.98. If the company is solvent, there is no general duty to the creditors as they can investigate documents on public record or use their bargaining power to compel the company to disclose: *Re Multinational Gas and Petrochemical Co Ltd* [1983] 1 Ch 258 (England and Wales). However, in *Winkworth v Edward Baron* [1987] 1 All ER 114 (England and Wales), a husband and wife were in the process of divorce and neither attended to the management of a jointly owned company. A creditor sued for losses suffered. Held: there was a duty of care.

Relief to Directors

12.99. Ratification is available in certain circumstances (see paragraphs 12.80.-12.82. above).

12.100. Art 77 deals with the position of indemnities. The default scenario is that any provision, whether in the articles of association or in a contract with the company, a subsidiary or any other person offering an indemnity to a person who is or was an officer of the company is void. The indemnity must aim at exempting that person from liability or indemnifying him against any liability which by law would otherwise attach to the person by reason of his/her position (Art 77(1)). That said, Art 110 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 states that insofar as the law allows, every present or former officer of the company may be indemnified out of the assets of the company against loss or liability incurred by the officer by reason of being or having been an officer of the company.

12.101. As a result, Art 77(2) sets out four exceptions in which an indemnity may be lawfully given to a person against:

a) Any liability incurred in defending civil or criminal proceedings, in which judgment is given in the person's favour or the person is acquitted or which are discontinued otherwise than for some benefit conferred by the person or on the person's behalf or some detriment suffered by the person. Furthermore, where proceedings are settled on terms which include such benefit or detriment and , in the opinion of a majority of the directors of the company (excluding any director who conferred such benefit or on whose behalf such benefit was conferred or who suffered such detriment), the person was substantially successful on the merits in the person's resistance to the proceedings, an indemnity is also lawful.

b) Any liability incurred otherwise than to the company if the person acted in good faith with a view to the best interests of the company.

c) Any liability incurred in connection with an application made under Art 212 in which relief is granted to the person by the court.

d) Any liability against which the company normally maintains insurance for persons other than directors.

12.102. Art 77(3) also states that the effect of the provision does not deprive a person of any exemption or indemnity to which the person was lawfully entitled in respect of anything done or omitted by the person before the law came into force. Furthermore, Art 77(4) states that the general prohibition on indemnities does not prevent a company from purchasing and maintaining insurance against any such liability for its officers (commonly referred to as D&O Insurance).

12.103. *Viscount v Shelton* (1984) JJ 115: an indemnity given by the company to directors save in respect of dishonesty exonerated them from personal liability for their innocent participation in an *ultra vires* act: entry into a contract to buy property in England, although the memorandum of company provided that the main objects should only be carried out in the Channel Islands, thus causing loss to company. The court held that nothing prevented the company's articles from making effective provision to exonerate a director from acts *ultra vires* the company since there is no reason to differentiate between a loss arising from an *ultra vires* act and a blameworthy loss arising from a similar act. It was not the case that such a provision has the indirect effect of validating the *ultra vires* act: its effect was simply to restrict the persons who could be sued for the loss which the *ultra vires* act caused.

12.104. Art 212 also authorises the court to grant relief in certain cases. In proceedings for negligence, default, breach of duty or breach of trust against an officer of a company or an auditor, a court may relieve a person, either wholly or partly, from liability on such terms as it thinks fit, provided it appears to the court that the person has acted honestly and that having regard to all the circumstances of the case (including those connected with his or her appointment) he or she ought fairly to be excused. This is despite the fact that is or may be liable in respect of the matters alleged (Art 212(1)).

12.105. An application may also be made by an officer or auditor to the court where there a claim has been made or there is a possibility of a claim in respect of negligence, default, breach of duty or breach of trust. The court has exactly the same powers to offer relief, notwithstanding that the person is or might be found liable in the event that proceedings were brought (Art 212(2)).

12.106. *P v P* 2002 JRC 80: a company was not put into funds by its beneficial owner in order to defend an action for maintenance by a former spouse. The directors (provided by a trust company) were absolved from any responsibility for the fact that the company could not defend itself against the wife's claim as there were no funds to instruct lawyers or for directors to consider the matter themselves. *Obiter*, the court stated that if directors had not instructed lawyers at the outset on being served an injunction, then this would have probably been a breach of their fiduciary duties.

Directors' Liability for Fraudulent and Wrongful Trading

12.107. In the course of a creditor's winding up, the liquidator may apply to court for an order, if the court thinks it proper to do so, in relation to a person who is or has been a director of the company requiring that person be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company arising after a stipulated time (Art 177(1)). That time is calculated from when that person knew that there was no reasonable prospect that the company would avoid a creditors' winding up or the making of a declaration under the Désastre Law or, on the facts known to him or her, was reckless as to whether the company would avoid such a winding-up or the making of such a declaration (Art 177(2)).

12.108. The court may not make the order unless it is satisfied that, after either one of the conditions specified in Art 177(2) was met, that person took reasonable steps with a view to minimising the potential loss to the company's creditors (Art 177(3)). In the hearing of the application before the court, the liquidator may give evidence or call witnesses (Art 177(4)).

Re Purpoint Ltd [1991] BCC 121 (England and Wales): The court, in making an order under the wrongful trading provision, is concerned to ensure that any depletion in the assets of the company attributable to the period after the moment when the directors knew or ought to have known that there was no reasonable prospect of avoiding an insolvent winding up, in effect, while the company's business was being carried on at the risk of creditors, is made good.

12.109. Art 178(1) authorises the liquidator to apply to the court for an order that persons who were knowingly parties to the carrying on of the company's business with intent to defraud creditors of the company or creditors of another person, or for a fraudulent purpose, be liable to make such contributions to the company's assets as the court thinks proper. In the hearing of the application before the court, the liquidator may give evidence or call witnesses (Art 178(2)).

12.110. A court making an order under Arts 177 or 178 may give further directions as it thinks proper for giving effect to the order (Art 178(3)) and, in relation to a person who is a creditor of the company, may direct that the whole or part of a debt owed by the company to that person and any interest it carries will rank in priority after all other debts owed by the company and after any interest on those debts (Art 178(4)). Arts 177 and 178 also have effect notwithstanding that the person concerned may be criminally liable in respect of the matters by reason of which the order is made (Art 178(5)).

12.111. In relation to parent or holding companies, the courts are more willing to hold that the subsidiary's autonomy is impaired provided that the facts tend to support this contention. Questions of commonalty of management and decision-making, the interests of the companies at stake and whether conflicts are resolved in the favour of the parent or subsidiary are all factors to be taken into account. Nevertheless, an objective assessment of a director's position will need to ask two things: whether the director in fact realised or should have realised that the company could not avoid insolvent liquidation under any reasonable assessment of its prospects and whether the director had in fact taken all necessary steps to minimise the loss to creditors.

12.112. The courts do not normally, when faced with a company in financial difficulties, use hindsight to judge the actions of directors, but will form a view of their actions on the basis of the information actually known to them or which a reasonable diligent director would have ascertained at the relevant time. In the case of a director who takes no action, when objectively it may be argued he should do so, or who relies too much on the action or advice of fellow directors, he may be held liable to contribute to the company's assets. Furthermore, directors who do not adhere to the minimum standards required for keeping abreast of the company's financial position are unlikely to be viewed sympathetically: *Re Produce Marketing Consortium* [1989] 3 All ER 1 (England and Wales).

Directors' Criminal Liability

12.113. See discussion on corporate criminal liability above in Chapter 3.

Company Secretary

12.114. The law also requires the appointment of a company secretary who is obliged to fulfil certain functions (generally to ensure compliance and to advise directors). In larger companies, this may be a full-time occupation; in smaller ones, a person may occupy this position and a directorship simultaneously (provided the company has more than one director). The company secretary is not, under Jersey law, an officer of the company.

12.115. Art 81(1) requires every company to have a secretary, but the law does not permit a sole director to also be the secretary (Art 81(2)). Furthermore, a company may not have a body corporate act as its company secretary if the body's sole director is also the sole director of the company (Art 81(4)).

12.116. Art 90 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 stipulates that the secretary is appointed by the directors for a term with any remuneration and subject to any conditions they may think fit. The directors may also remove the secretary at any time. If the position of secretary is vacant or there is for any reason o secretary capable of acting, anything requires to be done by or to the secretary may be performed by an assistant or deputy secretary or, if there are none capable of acting, by any officer of the company generally or specially authorised by the directors (Art 81(3)).

12.117. Art 82(1) imposes a duty on the directors of a public company to take all reasonable steps to ensure that the secretary (or joint secretary) of the company is a person who has the requisite knowledge and experience to discharge the functions of secretary of the company.

12.118. Art 82(1) also states that the company secretary may be drawn from the ranks of any person who on the law coming into force was the secretary or assistant or deputy secretary of the company, an advocate or solicitor of the Royal Court, a member of certain recognised professional bodies as well as a person who, by virtue of holding or having held any other position or being a member of any other body, appears to the directors to be capable of discharging those functions. The relevant professional bodies are defined in Art 82(2) as including:

a) The Institute of Chartered Accountants in England and Wales.

b) The Institute of Chartered Accountants of Scotland.

c) The Association of Chartered Certified Accountants.

d) The Institute of Chartered Accountants in Ireland.

e) The Institute of Chartered Secretaries and Administrators.

f) The Chartered Institute of Management Accountants.

g) The Chartered Institute of Public Finance and Accountancy.

12.119. Art 85 imposes requirements in respect of the particulars of company secretaries. The register must contain the following particulars in relation to any secretary or joint secretary:

a) In the case of an individual, the person's present forenames and surname, any former forenames or surname and the person's usual residential address.

b) In the case of a body corporate or a Scottish firm, its corporate or firm name, the place where it is incorporated and its registered or principal office.

c) In both cases, the date on which the person or the body/firm became the secretary and, where appropriate, the date on which the person or the body/firm ceased to be the secretary.

13. Membership

Definition of Membership

13.1. Art 25(1) provides that subscribers to a company's memorandum are deemed to have agreed to become members of the company. On registration of the company, these persons shall be entered as members in the company's register. Art 25(2) further states that every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company.

Restrictions on Membership

13.2. Art 26(1) states that a body corporate cannot be a member of a company which is effectively its holding company and that, accordingly, an allotment or transfer of shares in a company to its subsidiary is void. Companies, which before the commencement of the law, were in this position may continue to be members of their holding company, but may not exercise a right to vote at a meeting of the holding company or of a class of its members or acquire further shares in the holding company (Art 26(2)). The same rules apply to the position of a nominee for a body corporate which is a subsidiary (Art 26(3)). Before 1991, this was a popular structure for tax reasons.

13.3. One exception, however, to the rule on acquiring shares in the holding company exists in that an allotment to the subsidiary of fully paid shares in its holding company may be made by way of a capitalization of reserves of the holding company (Art 26(3A)). A further exception exists in that the rules do not apply to subsidiaries in the position of personal representatives or trustees, unless, in the case of a trustee, the holding company or another of its subsidiaries has an interest under the trust as a beneficiary and not merely an interest as a security holder (Art 26(4)).

13.4. Art 28 also prohibits minors and interdicts from becoming members of the company unless their rights of membership were transmitted following the death of a member of the company.

13.5. Art 27 stipulates a minimum membership for carrying on business applies to public companies. Under Art 27(1), if a public company carries on business without having at least 2 members and does so for more than 6 consecutive months, any person who, for the whole or any part of the period that it so carries on business after those 6 months (a) is a member of the company and (b) knows that it is carrying on business with only one member becomes liable, jointly and severally with the company, for the payment of the company's debts contracted during the whole or part of the period. The rule does not apply to a public company whose issued shares are held by a holding body or a nominee on its behalf. Similarly, the rule does not apply to private companies.

Evidence and Registers of Membership

13.6. Art 51(1) states that a certificate is evidence of title to the relevant shares. Any certificate sealed by the company, or signed either by two of its directors or by one of its directors and its secretary, specifying any shares held by a member is to be treated as prima facie evidence of the member's entitlement to the shares. Art 51(2) states this to be the case despite any subsequent change of the currency in which the nominal amount of the shares to which the certificate relates is expressed.

13.7. By way of exception, Art 51A, dealing with uncertificated securities, states that title to securities or to any specified class or description of securities may be evidenced and transferred without a written instrument subject to an order being made by the Minister to that effect. In fact, the Companies (Uncertificated Securities) (Jersey) Order 1999 (as amended) provides for shares in a Jersey company to be held in uncertificated form to permit trading on the CREST system.

13.8. See above paragraphs 7.48-7.67 for rules on the maintenance of the register of members, inspection of the register of members, transfer and certification requirements for shares and rectification of the register.

13.9. If there is an error in the register of members, it is possible that the company and member(s) affected could agree on the correction of the register. This type of consensual ratification could be held effective although open to a challenge brought on grounds that it had an impact on the position of a third party. Nonetheless, the law does provide that the person affected or a member of the company or the company itself may apply to court under Art 47 for rectification of the register. *In re Thayer Group Ltd* 2006 JLR Note 24 sets out the criteria for the exercise by the court of this power. The power to rectify a company's share register is to be widely construed, although the court retains a discretion as to whether it should do so even if satisfied that there are grounds for granting rectification. Rectification may be retrospective to take effect as from the date on which the correct entry should have been made, but the court may refuse to make such an order if it would prejudice the rights of third parties (applying *In re Sussex Brick Co. Ltd.* [1904] 1 Ch 598 (England and Wales). For examples, rectification in the case of shares held as security would undoubtedly have an impact upon the position of the creditor.

Obligation to observe Memorandum and Arts

13.10. Art 10 sets out the effect of the memorandum and articles of association. It states in Art 10(1) that the memorandum and articles, when registered, bind the company and its members to the same extent as if they respectively had been signed and sealed by the company and by each member, and contained covenants on the part of the company and each member to observe all the provisions of the memorandum and articles. This is subject to the general provisions of the law. Furthermore, Art 10(2) stipulates that money payable by a member to the company under the memorandum or articles is treated as a debt due from the member to the company.

13.11. The Memorandum and Arts form the basis of the contract between shareholders and between a shareholder and the company. The law bases this on a "covenant" to observe provisions. It is often the embodiment of a contract between would-be shareholders prior to incorporation; for that reason, the term "shareholders' agreement" is often heard. The "statutory contract" is that "bundle of rights and liabilities created by the memorandum and articles of the company [to which] must be added those rights and obligations… conferred and imposed by the Companies [Law]": *Soden v British and Commonwealth Holdings* [1998] AC 298 (England and Wales).

13.12. The "statutory contract" is unlike an ordinary contract: it cannot be defeated by arguing misrepresentation, it cannot be rectified on grounds of mistake and the courts may not look at surrounding terms when implying terms into it. The contract derives its force from the statute and not necessarily from the agreement between the parties: *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCLC 693 (England and Wales).

13.13. The articles bind the company and the members. The articles bind members qua members. See above in Chapter 6 for the rule in *Hickman v. Kent or Romney Marsh Sheep-Breeders' Association* [1915] 1 Ch 881 (England and Wales) laying down three propositions for understanding the effect of the memorandum and articles of association is on membership.

13.14. In case of conflict between the memorandum and the articles of association, the former prevails.

13.15. *A. De Gruchy & Co. Ltd* (1972-3): A company's share capital was divided into "A" preference shares and "B" deferred shares. The articles provided that "A" shares received an annual cumulative dividend of 6%, while "B" shares were entitled to remaining divisible profits. The articles were silent as to the respective rights of "A" and "B" shares in the distribution of surplus assets in the event of winding up. The court held: Arts are subordinate to the memorandum. Where there is an inconsistency, the memorandum prevails. If the memorandum is silent, then you should turn to the articles. Where the memorandum and articles define clearly the rights in surplus assets in a winding up, the provisions are paramount and exhaustive. In order to make the decision, the Court has to examine the articles (the memorandum being silent) to see whether there was any contrary intention as to leave no gap which could be filled by the prima facie rule of equality. There was evidence to show the intention that "B" shareholders should retain exclusive entitlement to the reserve in a winding up after payment of the dividend on the preference shares.

Rights of Members

13.16. The members of a company have the right to participate in the decision making structure of the company and to apply to court for various orders or to the regulatory authorities in charge of oversight to require action to be taken. In certain defined circumstances, they have the right to receive reports from the directors and auditors on the financial and other affairs of the company.

Participation in Decision Making

13.17. See Chapter 14 below for specific rights in relation to the conduct of general meetings.

13.18. Most decisions of the general meeting are taken by ordinary resolution with the exception of certain decisions of constitutional importance, requiring a special threshold or unanimity in making the decision.

13.19. The special resolution threshold is normally two-thirds, unless the Arts of Association specify a higher threshold (Art 90(1)-(1A)). It applies to:

a) Art 11 on the alteration of the memorandum and articles of association.

b) Art 14 on changing the name of the company.

c) Art 16 on changing the status of a public company.

d) Art 17 on changing the status of a private company.

e) Art 18 on extending the authority of directors of companies formed before the law came into force.

f) Art 38 on alterations of the par value capital of companies.

g) Art 38A on alterations of the no par value capital of companies.

h) Art 39A on transfers to a stated capital account for no par value companies.

i) Art 40A on the conversion of shares in par value companies.

j) Art 40B on the conversion of shares in no par value companies.

k) Art 52 on the variation of class rights.

l) Art 55 on the application of a capital redemption reserve towards the issue of shares.

m) Art 57 on the purchase by a company of its own shares.

n) Art 61 on the reduction of capital accounts.

o) Art 76 on confirmation of a transaction in which a director has failed to disclose an interest.

p) Arts 127F and 127FA on the approval of a merger agreement.

q) Art 146 on the summary winding up of companies.

r) Art 149 on the appointment of a liquidator or authorising the directors to act post-appointment.

s) Art 153 on the removal of a liquidator.

t) Art 154 on the termination of a summary winding up.

u) Art 157 on the opening of a creditors' winding up.

v) Art 167 on the binding effect of an arrangement.

w) Art 185A on the termination of a creditors' winding up.

x) Art 194 on the disposal of company records.

13.20. A three-quarters threshold applies to Art 125 on the power of the company to compromise with its creditors and members.

13.21. A unanimity requirement applies to:

a) Art 74 on ratifying the consequences of a director's breach.

b) Art 87 on dispensing with the general meeting.

c) Art 91 on waiving the requirement of notice for general meetings.

13.22. Art 11 stipulates that any alteration having the effect of increasing a member's liability has no effect unless the member agrees in writing to be bound by it.

Applications to Court

13.23. Members may apply to court under:

a) Art 16 on a direction or condition imposed by the Commission.

b) Art 17 on a direction or term (or amendment of any term) imposed by the Commission.

c) Art 47 on the rectification of the register of members.

d) Art 50 on making good a failure in the issue of a share certificate.

e) Art 53 on objecting to a variation in rights.

f) Art 76 on setting aside a transaction in which a director has an undisclosed interest.

g) Art 83 on compelling inspection of the register of directors and secretaries.

h) Art 94 on the court's power to summon a general meeting.

i) Art 99 on compelling the inspection of minute books.

j) Art 121 on annulling or varying the terms of an offer for the acquisition of shares.

k) Art 125 on requiring the summoning of a meeting to decide on a compromise.

l) Art 127FB on objecting to a merger taking place.

m) Art 141 on the unfair prejudice action.

n) Art 155 on the right to apply for a just and equitable winding up.

o) Art 161 on the nomination of the liquidator.

p) Art 203 on the enforcement of a company's duty to make returns.

Applications to Regulatory Authorities

13.24. Members may apply to the regulatory authorities under:

a) Art 88 on requiring the Commission to act to summon a general meeting.

b) Art 128 on company investigations.

Liabilities of Members

13.25. Art 9(3) states that from the date of incorporation mentioned in the certificate the subscribers of the memorandum and any other persons who become members of the company are a body corporate with only such liability on the part of its members to contribute to its assets as is provided by the law or any other enactment in the event of its being wound up.

13.26. Art 27 also provides that if a public company carries on business without having at least 2 members and does so for more than 6 consecutive months, a person who, for the whole or any part of the period that it so carries on business after those 6 months, is a member of the company and knows that it is carrying on business with only one member is liable (jointly and severally with the company) for the payment of the company's debts contracted during the period or any part of it.

13.27. Art 181 states that where a company (other than an open-ended investment company's being wound up in a creditors' winding up and (a) it has within 12 months before the commencement of the winding up made a payment under Arts 55, 57 or 59 in respect of the redemption or purchase of its own shares; (b) the payment was not made lawfully; and (c) the aggregate realisable value of the company's assets and the amount paid by way of contribution to its assets (apart from under this provision) is not sufficient for the payment of its liabilities and the expenses of the winding up, the court may, on the application of the liquidator, order a person from whom the shares were redeemed or purchased or a director to contribute in accordance with this Art to the company's assets so as to enable the insufficiency to be met. A person from whom any shares were redeemed or purchased may be ordered to contribute an amount not exceeding so much of the payment as was made in respect of his or her shares. However, a person from whom shares were redeemed or purchased shall not be ordered to contribute under this Art unless the court is satisfied that, when he or she received payment for his or her shares, he or she knew or ought to have concluded from the facts known to him or her, that, immediately after the payment was made, the company would be unable to discharge its liabilities as they fell due, and that the realisable value of the company's assets would be less than the aggregate of its liabilities. Where a contribution is forthcoming, the court may direct any other person who is jointly and severally liable to contribute under this provision to pay to the contributory such amount as the court thinks just and reasonable.

13.28. Art 192(1) provides that where a company is wound up, each present and past member of the company is liable to contribute to its assets to an amount sufficient for payment of its liabilities, the expenses of the winding up, and for the adjustment of the rights of the contributories among themselves. However, a past member of a particular class is not, as a member of that class, liable to contribute (a) unless it appears to the court that the present members of that class are unable to satisfy the contributions required to be made by them as such members; (b) if he or she ceased to be a member of that class for 12 months or more before the commencement of the winding up; or (c) in respect of a liability of the company contracted after he or she ceased to be a member of that class (Art 192(2)).

13.29. Similarly, a past or present guarantor member is not liable in that capacity to contribute unless it appears to the court that the past and present members in their capacity as the holders of limited shares are unable to satisfy the contributions required to be made by them as such members (Art 192(3)). Furthermore, a past or present member in his or her capacity as the holder of an unlimited share is not liable to contribute unless it appears to the court that the past and present members in their capacities as the holders of limited shares or as guarantor members are unable to satisfy the contributions required to be made by them as such members (Art 192(4)).

13.30. A limitation exists on the contribution in that it is not to exceed (a) any amount unpaid on any limited shares in respect of which he or she is liable; or (b) the amount undertaken to be contributed by him or her to the assets of the company if it should be wound up (Art 192(5)). Set off is limitedly available in that a sum due to a member of the company, in his or her capacity as a member, by way of dividends, profits or otherwise is not in a case of competition between himself or herself and any other creditor who is not a member of the company, a liability of the company payable to that member, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributors among themselves (Art 192(6)).

Particular Protection for Minority Shareholders

13.31. The position of minority shareholders is one that has preoccupied the drafters of company law and the courts, especially the disparity in power capable of being exercised by different groups of shareholders within the company.

13.32. Where the majority prevails, shareholders in a minority unhappy with the decision will have the choice of selling their shares (if they can), accepting the fact, acting so as to protect themselves (in future), complaining to the courts or the relevant regulatory authority or, as a last resort, having the company wound up.

13.33. A minority may well be unreasonable in their objection and reference may be had to the fact that the articles will often say that the minority must abide by the wishes of the majority, that any action by the minority will raise questions of any remedy that may be given, whether it benefits the shareholder or the company, that allowing a remedy may lead to clogging up the courts with pointless actions, even allowing for the fact that courts dislike having to second guess business, while in the last analysis, even with a remedy being available, it may be "pointless protection" in the face of powers to ratify the acts of directors: *Bamford v Bamford* [1970] Ch 212 (England and Wales).

13.34. If, however, the minority is in fact being reasonable, not to allow a remedy may entrench the ability of the majority to disadvantage a minority, for example through changing the constitution to create new methods of voting or allocation of property within the company (shares, options and rights to dividends and preferential payments). It may also lead to the majority (if also in control as directors) failing to reveal information and keeping other shareholders in the dark. Other considerations in whether a remedy should be allowed include whether the shareholders are able to exercise their residual powers (to hire/fire the directors or approve matters), the fact that court action may be expensive, that the relevant regulatory authority may refuse to act and, also, that shares may not be easy to sell (especially in private companies where pre-emption rights may apply). Finally, there is the issue of fairness in that directors should be brought to account, but how voting is exercised may prevent this.

13.35. Company remedies work on two basic premises, arising from the rule in *Foss v Harbottle* (1843) 2 Hare 461 (England and Wales), in which Foss and Turton were in a minority; Harbottle and his friends the majority. Harbottle sold land to the company at an inflated price and Foss sued to impugn the transaction. At the time, the fiduciary principle was not clearly applied in company law and the court held: it was not for Foss to raise an action, the company was the "proper plaintiff". In any event, a majority should bind a minority. The court also declined to discuss issues of fraud or mismanagement. This appears to be an illogical and potentially unfair decision because of requirement for shareholder approval for action against directors (unlikely to be obtained where a majority is in control of the company).

13.36. In line with *Foss*, some breaches of constitutional provisions are considered 'internal irregularities' for which no personal action will lie: *Macdougall v Gardiner* (1875) Ch D 13 (England and Wales): "… if the internal affairs of the company are not being properly managed, then the company is the proper person to complain. There is no use in having litigation the ultimate end of which is only that a meeting has to be called and then ultimately the majority gets its wishes." It should be noted that, under Art 10, the nature of the statutory contract is that it is binding on all members (actual and prospective); courts are reluctant to create list of internal irregularities for which no action will lie, thus bringing into existence (by analogy) a list of those for which actions will always lie.

13.37. However, exceptions to *Foss* do exist, commonly grouped into four discrete areas.

Ultra Vires/Illegality

13.38. Although Art 18 has limited the scope of ultra vires, it may still be available to restrain directors' behaviour outside the scope of powers they have delegated to them under the memorandum and articles of association. The purpose of using this exception is to obtain injunctions against the directors continuing with present or entering into future contracts. Three problems exist: how does the shareholder know about proposed action by the directors, in some cases (but not where illegality exists), ratifications and indemnities against liability can be obtained by special resolution of the members and, lastly, questions of definition and interpretation may be helpful to the directors given the way in which constitutions are normally broadly drawn.

Failure to follow Proper Procedure

13.39. Analogous to the ultra vires principle, a failure to follow proper procedure laid out in the company constitution is considered to undermine the statutory contact entered into by members with the company: *Quin and Axtens v Salmon* [1909] AC 442 (England and Wales), where both managing directors were required to approve certain contracts and 1 would not. It was held that an ordinary resolution assented to by the shareholders to authorise one managing director to sign was not valid as a special resolution was required to change the constitution in order to dispense with the procedure it set out. Similarly, *Edwards v Halliwell* [1950] 2 All ER 1064 (England and Wales), in which trade union subscriptions were increased before approval was sought from the membership. Held: the action was invalid.

Infringement of Personal Rights

13.40. This exceptions refers to decisions of the directors that have the effect of negating rights enjoyed by the members under the memorandum and articles of association. *Pender v Lushington* (1877) 6 Ch D 70 (England and Wales), in which for every 10 shares, 1 vote was available to a maximum of 100 votes, irrespective f size of shareholding. A member transferred shares to Pender so that more votes were available in order to defeat a resolution. Lushington (the chair of the general meeting) refused to count the votes concerned. The court held: there was nothing in the articles to prevent a transfer for the purpose of exercising votes. Similarly, *Oliver v Dalgleish* [1963] 1 WLR 1274 (England and Wales), where proxy votes were wrongfully excluded. Held: they would be counted although the result was that the resolution would be defeated.

Fraud on the Minority

13.41. This exception covers the situation where property or other entitlements are effectively taken away from the minority. See *Cook v Deeks* [1916] 1 AC 554 (Privy Council, Canada), where Cook sued Deeks because Deeks and his friends had misappropriated a lucrative construction contract for a railways and had caused a general meeting in which they were the majority to pass a resolution disclaiming any interest in the contract, which they intended to enter into through a second company that only Deeks and his friends controlled. Held: not only was it a breach of fiduciary duty, but an abuse of majority voting power.

13.42. In Jersey, negligence or breach of duty may also come within this exception to the rule in *Foss*, especially where the effect is to deprive the minority of an interest. See *Khan v Leisure Enterprises (Jersey) Ltd* 1997 JLR 313, where the directors were instructed by all the shareholders that they could act on instructions of a majority of shareholders. The majority instructed them to grant a power of attorney to Spanish lawyers to sell shares in the company Spanish subsidiary. Upon the power being granted, the lawyers transferred the shares to a Gibraltar company (in which the minority had no interest) for nil consideration. Held: Although the minority was effectively deprived of property in which they were entitled to participate, there was no unfair prejudice as the prejudice caused by acts of attorneys not act of directors. Applying *Daniels v Daniels* [1978] Ch 406 (England and Wales), it was insufficient that the directors acted negligently or in breach of duty, they must also benefit from their actions for there to be fraud or negligence.

Actions Available: Personal and Derivative Actions

13.43. At common law, two types of actions were recognised at an early stage:

a) The personal action by a member for a wrong done to the member personally, for example a refusal to honour the right to vote or to pay dividends.

b) A derivative action taken by the member on behalf of the company and for the benefit of the company, to which the company was added as a notional “extra” defendant. The disadvantage was that damages, if own, accrued to the company, but any losses and litigation expenses to the member, unless the company agreed later to indemnify the member: *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849 (England and Wales).

Eves v Crill 1998 JLR Note 6c: The exception to the rule in *Foss* v. *Harbottle* allows an action to be brought in the name of a director or shareholder rather than in the name of the company if, *inter alia*, the act complained of infringes the personal rights of an individual shareholder *vis-à-vis* the company.

13.44. However, in order to sue, the shareholder had to show that the act fell within the exceptions outlined in *Eves & Eves v St Brelades Bay Hotel* 1995 JLR Notes 8a, which included the fact that the persons against whom the relief was sought held or controlled the majority of the shares and would not otherwise permit the action to be brought in the company's name. Directors and shareholders may thus only bring an action in the following circumstances: (a) where the act complained of is *ultra vires* the company or illegal; (b) the act complained of amounts to a fraud against the minority of the shareholders and the wrongdoers control the company; (c) there is an irregularity in respect of which a qualified majority of votes is required; or (d) the act complained of infringes the personal rights of an individual shareholder. It is therefore only when the board of the company is under the control of fraudsters that a derivative action may be brought by an individual shareholder.

13.45. In fact, in *Gamlestaden Fastigheter AB v Boleat* 1998 JLR Notes 6b, a derivative action was struck out because the wrongdoers did not have the control to prevent the company suing in its own name. In the same case, it was held that the exception to the rule in *Foss* only applies if the minority shareholder is bringing the action *bona fide* for the benefit of the company and in respect of a wrong for which no other remedy is available. Consequently, if the action is being brought for an ulterior purpose or if an alternative application under Art 141 would lie, the derivative action may be struck out.

13.46. In *Pacific Investments Ltd v Christensen* 1995 JLR 250, the court held that the views of independent minority shareholders would have to be considered before the court could decide whether it was proper to allow a single minority shareholder to bring a derivative action on behalf of the company. For this purpose, it was appropriate that the court should have before it evidence of the outcome of the Extraordinary General Meeting. It was not at a preliminary stage for the court to consider whether the information put to the minority shareholders had been fair, since that would be a matter to consider, together with the proceedings at the Extraordinary General Meeting itself, at a resumed hearing. Moreover, the court would need all this information whether it was considering the propriety of a derivative action or a minority shareholders' application under Art 141. A derivative action may be brought in the name of a member rather than in the name of the company if the act complained of infringes both corporate rights and the personal rights of the individual shareholder, although the court will act so as to avoid any possibility of "double recovery" for the same harm: *Prudential Assurance Company Ltd v Newman Industries Ltd (No 2)* 1981 Ch 257 (England and Wales).

13.47. To bring a derivative action, there must be no other remedy available. In *Robertson v Slous* 2000 JLR 246, in which Robertson and Slous went into partnership through the medium of a company in which there was 50:50 ownership. Robertson was paid a salary, but otherwise neither drew profits. No shares were registered in Robertson's name nor was he officially a director, although in an earlier action the court had held that Robertson was entitled to 50% of shares from incorporation of the company. Slous was a director along with another colleague. The parties fell out after Robertson expressed concerns at how the company was run, whereupon Slous told Robertson the relationship was at end and that Robertson would have no further involvement with the company and denied that Robertson had any shareholding in the company. A derivative action was struck out, although Robertson was granted an order under Art 143 (see below) that Slous buy his shareholding in the company. Held: the derivative action failed because Robertson had the alternative of an action under either Arts 141 (unfair prejudice) or 155 (just and equitable winding up).

The Unfair Prejudice Action

13.48. The protection at common law has been supplemented by a statutory form of action titled the unfair prejudice action. Art 141(1) states that a member of a company may apply to the court for an order under Art 143 of the law on the ground that the company's affairs 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 its members (including at the very least the member concerned). The power to apply is also available in the case that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. Art 141(2) extends the benefit of this provision to any person not already a member of the company, but to whom shares in the company have been transferred or transmitted by operation of law.

13.49. In the wake of an investigation under Art 128 and the receipt of an inspector's report under Art 135, a power is also given to the Minister or the Commission to apply to court for an order under Art 143 in much the same circumstances as those entitling the application by a member or deemed member (Art 142(1)). Where, in any case, the Minister or the Commission may exercise a discretion, the decision of the Commission prevails.

13.50. Art 143(1) authorises the court to make such order as it thinks fit for giving relief to the applicant in respect of the matters complained of, provided it is satisfied that the application is well founded. Although the court has wide discretion under this provision to make an order, a number of possibilities are set out in Art 143(2) for the court to make an order:

a) Regulating the conduct of the company's affairs in the future.

b) Requiring the company to refrain from doing or continuing an act complained of by the applicant or to do an act which the applicant has complained it has omitted to do.

c) Authorising civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct.

d) Providing for the purchase of the rights of any members of the company by other members or by the company itself. In this case, the court may also order the reduction of the company's capital accounts accordingly

13.51. An order that requires the company not to make any, or any specified, alterations in the memorandum or articles of association will result in the company being unable to make those alterations without leave of the court (Art 143(3)). On the other hand, if the order is to make an alteration in the company's memorandum or articles of association, then that alteration has the same effect as if duly made by resolution of the company and the law will apply to the memorandum or articles of association altered in that way (Art 143(4)).

13.52. Where an order is made requiring the alteration of, or giving leave to alter, a company's memorandum or articles of association, a copy of the act of the court must be delivered by the company to the Registrar for registration within 14 days from the making of the order or any longer period that the court may allow. Failure to comply with this requirement will render the company liable to conviction for an offence (Art 143(5)).

13.53. The term unfairly prejudicial connotes both that the action was unfair and contained prejudice to the interests of the member concerned: *Re Sam Weller* [1989] 3 WLR 923 (England and Wales), where the directors who were also majority shareholders had not increased the dividend for 37 years but paid themselves wages and considerable benefits. The minority complained at the poor dividend, to which the majority countered that they equally suffered. They argued that hence under common law there was no claim when no prejudice all around. Held: the directors could not get around the law in this way. Their actions, when seen in the round, were unfair and prejudicial in that they received benefits from the profits of the company, which could have legitimately been distributed to all of the shareholders. In *Re Sunrise Radio (Kohli v Lit)* [2009] EWHC 2893 (England and Wales), the courts reiterate that unfair prejudice has to contain both an element of unfairness and prejudice, the prejudice here being that a rights issue the defendant could not afford to subscribe to was unfair in that, although in the best interests of the company, it diluted her portion of control. The case of *Gamlestaden Fastigheter AB v Boleat* 1998 JLR Notes 6b also suggests that the courts may take into account interests other than in the capacity of a shareholder (e.g. as a creditor).

13.54. In *O'Neill v Phillips* [1999] 1 WLR 1092, the House of Lords considered the scope of the provision and decided to narrow its scope by restricting its effect. They held that ordinarily a member will not be able to complain of unfairness unless there has been a breach of the terms on which it has been agreed that the affairs of the company should be conducted but that equitable considerations may enable the court to say that the terms are being used in a manner equity would regard as being a breach of good faith. In *Robertson v Slous* 2000 JLR 246: a comprehensive definition of what is unfairly prejudicial was held to be not appropriate, but the context and background to any application will be important (applying *Re RA Noble and Sons (Clothing)* [1983] BCLC 273 (England and Wales) and *O'Neill v Phillips* [1999] 1 WLR 1092 (England and Wales)).

13.55. A remedy appropriate to the facts may be given; a court is not constrained by the list or range available and may exercise any inherent equitable jurisdiction: *Re HR Harmer Ltd* [1958] 3 All ER 689 (England and Wales). Although the remedies are "equitable" in nature, there is no "clean hands" requirement: *Re: London School of Electronics Ltd* [1985] 3 WLR 474 (England and Wales), where competition by setting up rival school preceded the subsequent dismissal of the complainant. However, an applicant must be pro-active (it does not do to complain after the event). A court may also consider that the views of independent shareholders should be heard as to the merits of the litigation: *Pacific Investments Ltd v Christensen* 1995 JLR 250.

Khan v Leisure Enterprises 1997 JLR 313: It was a rule of Jersey law that an action to redress a wrong done to a company should be brought by the company itself. An exception was made to this rule if the defendants held and controlled the majority of the shares and would not permit an action to be brought in the company's name. In such a case, the minority shareholders could bring an action in their own names but could have no greater right to relief than would be available to the company itself. They could not complain of acts which had been or could be approved by the majority of the shareholders, unless those acts were fraudulent in nature or beyond the powers of the company.

13.56. *Gamlestaden Fastigheter AB V Baltic Partners and others* 2007 JLR 393: Held: The first question considered by the court was whether an order for payment of damages to the company whose affairs have allegedly been conducted in an unfairly prejudicial manner can be sought and made in an unfair prejudice application (or to put it another way, whether a cause of action allegedly vested in the company can be prosecuted to judgment in an unfair prejudice application). It was held that there was nothing in the wide language of Art 143(1) to suggest a limitation that would exclude the seeking or making of such an order. The second and main question considered by the Court was whether it was open to a member of a company to make an unfair prejudice application for relief in circumstances where, as here, the company in question was insolvent, would remain insolvent whatever order was made on the application and where the relief sought would confer no financial benefit on the applicant qua member. It was held that if mismanagement by the directors of a corporate vehicle led to loss it was somewhat artificial to insist that the qualifying loss, for Art 141 purposes, must be loss which has reduced the value of the investor's equity capital and that it is not sufficient to show that it has reduced the recoverability of the investor's loan capital. Arts 141 and 143 properly construed do not ipso facto rule out the grant of relief simply on the ground that the relief sought will not benefit the applicant in his capacity as member. This is taken to mean that the unfair prejudice action would still be available to an applicant where the benefit/prejudice occurs in some other capacity (e.g. that of a creditor).

13.57. Under Art 141, equitable considerations could make it unfair for those conducting the affairs of the company to rely on their strict legal powers. Unfairness could therefore consist in a breach of the rules or in using the rules in a manner which is contrary to good faith. Moreover, the test of unfairness is objective; it is not necessary for the representor to show that the respondent acted with conscious knowledge that his actions were unfair or mala fides, but that, objectively speaking, they were.

In re Northwind Yachts 2005 JLR 137 is authority for the proposition that the availability of liquidation as an alternative remedy precludes an Art 141 action being brought. Furthermore, the court held that there is no Art 142 action available where the company is in liquidation. It appears from this case that the Art 142 regulatory action is deemed unavailable when the company's members have already taken steps to wind the company up. Similarly, because the decision is by a majority of the members, an unfair prejudice action under Art 141 should not be available unless the resolution to wind up has been procured by some fraud on the part of the majority. The rationale here would appear to be that the affected member would be getting their capital back after the creditors have had their due and is not therefore prejudiced by the decision to discontinue business. Where the issue is open, i.e. all remedies are available, then Art 141 appears to be preferred to the derivative action, while liquidation is preferred to Art 141, thus creating a de facto “hierarchy” between the actions. However, it should be noted that the derivative action and Art 141 action, although overlapping in a number of instances, may also cover slightly different fact situations, resulting in one or the other not being appropriate for the type of claim being brought.

14. General Meeting of Shareholders

Why are Meetings held?

14.1. The way in which power is exercised in the company has been outlined above in Chapter 11. Although shareholders are an integral part of corporate democracy and the General Meeting of Shareholders is a constituent organ of the company, the power is firmly in the hands of the directors. The question therefore arises as to why shareholders should meet. There are a number of reasons:

(a) the directors may feel, as professionals, they are best placed to run the company. It would be opportune and useful for them to justify this to the members;

(b) the directors may feel tempted to misuse corporate assets for their own purposes. They may be called to account through the general meeting, which is also an appropriate forum for the directors to divulge information and provide data to prevent the directors from misleading the shareholders;

(c) as the members provide the capital of the company, it is reasonable that they have a say as to its disposal (but whether they have enough business acumen to appreciate risk is another question entirely);

(d) some actions by directors are subject to particular rules about disclosure because they have a strong personal element. The general meeting is one of the places where disclosure is made to shareholders for their approval (this is also true for ratification in the case of breach of duty);

(e) meetings can sometimes be a useful exercise in "touching base" (i.e. directors listening to shareholder concerns and views). Too often there is a "them and us" view on both sides that may be defused by regular contact. However, is there any utility in this for either party where there are too many shareholders?;

(f) some matters fall to be decided by the shareholders in general meeting (required under the law) and general meetings are usually the only place where members can exercise the ultimate power to (dis)continue the directors' mandate.

14.2. There are, however, some downsides to having meetings:

(a) the cost to the company (paperwork, meeting locations, organisation, etc.) and to the shareholders (travel, time off work, etc.);

(b) scheduling (the law has a usually strict timetable for meetings and does not allow for spontaneity, unless the shorter notice provisions can be complied with);

(c) agendas can be rigid because of legal and procedural requirements and thus not of much interest to shareholders. Agendas may also be controlled by the directors ("competent business" only requirement, planted questions, directors with shares being able to command a majority or use weighted votes), thus giving limited opportunity for shareholders to raise particular concerns;

(d) shareholder apathy (and their sole interest in the dividend) may make general meetings poorly attended and “unrepresentative”.

14.3. In fact, meetings may not always be the most appropriate forum:

(a) for smaller companies where shareholders and directors are closely knit, more decisions are taken informally (hence some companies are permitted to dispense with annual general meetings, while a written resolution procedure is also available as an alternative to general meetings);

(b) investors in large companies may be unhappy about washing the dirty linen in public at general meetings. They may choose to act privately and express their concerns directly to management (the threat of the withdrawal of a significant investment can often concentrate the directors’ minds wonderfully, but is also a Sword of Damocles for the investor);

(c) general meetings may look weighted because institutional investors tend to back management. What does the smaller shareholder do? Litigation is expensive and obtaining support from other minority shareholders can be difficult;

(d) in those companies with an Employee Share Schemes (ESS), where the member is also an employee, employees do not feel able to publicly challenge directors for fear of losing their jobs.

Nonetheless, as will be seen below, general meetings remain the focus of corporate democracy and the law is geared towards ensuring their success and the maintenance of shareholder rights.

The Calling or Requisition of General Meetings

14.4. Art 87(2) requires every company each year to hold a general meeting as its annual general meeting in addition to any other meetings in that year. The label annual general meeting must be specified in the notice calling it (also repeated in Art 34 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992). Where a company is newly incorporated, as long as it holds its first annual general meeting within 18 months of incorporation, it need not hold it in the year of its incorporation or in the following year. Not more than 18 months (in the case of a public company) or 22 months (in the case of a private company) must elapse between the date of one annual general meeting and the date of the next (Art 87(3)). Failure by a public company and any director in default to comply with these requirements is an offence (Art 87(8)). Art 32 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 labels all general meetings other than the annual general meeting “extraordinary general meetings”.

14.5. These rules are subject to certain dispensatory provisions. For example, if all the members of a company agree in writing that an annual general meeting may be dispensed with, then it will not be necessary for that company to hold an annual general meeting for as long as the agreement is in effect (Art 87(4)). However, but for such an agreement, if, in any year in which an annual general meeting would have been required to be held, a member of the company sends written notice to the company no later than 3 months before the end of the year requiring the holding of an annual general meeting in that year, then the company must duly summon a meeting (Art 87(5))

14.6. Any agreement dispensing with the holding of an annual general meeting will cease to have effect if any person becoming a member of the company while the agreement is in force does not accede to the agreement within 2 months of becoming a member or if any member of the company gives written notice to the company to bring the agreement to an end (Art 87(6)). If an agreement ceases to have effect for any reason following the end of 18 months after the incorporation of the company and an annual general meeting has not previously been held in that year, the directors are required to immediately call an annual general meeting to be held within 3 months after the agreement ceases to have effect (Art 87(7)).

14.7. Art 89(1) requires the directors to proceed to call a general meeting or a meeting of any class of members on a members' requisition being received. The meeting must be held as soon as practicable and, in any case, no later than 2 months after the date of the requisition is deposited with the company (Art 33 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 also reinforcing this time limit). For these purposes, a members' requisition is defined as a requisition of members of the company holding at the date of the requisition is deposited not less than one-tenth of the total voting rights of the members of the company who have the right to vote at the meeting that has been requisitioned (Art 89(2)). The provisions of Art 90 apply to any special resolution required to be put to that meeting, in default of which, the directors are deemed not to have duly called the meeting in question (Art 89(7)).

14.8. The requisition must state the objects of the meeting, and shall be signed by or on behalf of the members requisitioning the meeting and deposited at the registered office of the company. The requisition may be made up of one or more documents in similar form each signed by or on behalf of one or more of those members (Art 89(3)).

14.9. The members requisitioning a meeting, or any of them representing more than one half of the total voting rights of all of them, may themselves call a meeting to be held within 3 months of the date of the requisition, provided that the directors have not proceeded to do that within 21 days from the date of the deposit of the requisition (Art 89(4)). A meeting called by the members in this way must be called in the same manner, as nearly as possible, as that in which meetings are called by directors (Art 89(5)). Reasonable expenses incurred by the members due to the failure of the directors to call a meeting will be paid to them by the company with the sums concerned being retained by the company out of any fees or remuneration due to the directors who are in default (Art 89(6)).

14.10. Art 91(1) renders void any provision of the articles of association that provides for the calling of a meeting of the company or of any class of members of the company (with the exception of an adjourned meeting) by less than 14 days' notice in writing. Unless the articles of association stipulate otherwise, as may be the case where a longer period is required, any meeting of the company (other than an adjourned meeting) may be called by 14 days' notice in writing (Art 91(2)). Art 34 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 stipulates a 21-day notice period for meetings at which a special resolution or a resolution appointing a person as a director is intended to be passed.

14.11. However, a meeting called by shorter notice than specified in the law or in the company's articles (as the case may be) is deemed to have been duly called if all the members entitled to attend and vote at the meeting agree (in the case of the annual general meeting) or by a majority in number (holding not less than 95 per cent of the total voting rights of the members with that right) of the persons who have the right to attend and vote at any other type of meeting (Art 91(3))

14.12. Under Art 92(2)(a), provided that as far as the memorandum or articles of a company or the terms of admission to membership of the company do not make provision otherwise, notice of a meeting shall be given, to every member entitled to receive it, by delivering or posting it to his or her registered address. Art 34 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 also stipulates that the notice must specify the day, time and place of the meeting and the general nature of the business to be transacted and must be given to all the members and any persons entitled to a share in consequence of the death or bankruptcy of a member and to the directors and auditors (if any). However, Art 35 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 also states that accidental omission to give notice of a meeting to (or non-receipt of notice of a meeting by) any person entitled to receive notice does not invalidate proceedings at the meeting concerned.

14.13. *Baker v Falle* 1991 JLR 284 is authority for the proposition that failure to give proper notice to directors (and by extension to the members) invalidates the proceedings at the meeting concerned, subject to the rule on accidental omission above. Nonetheless, a person who has not received notice or who has received defective notice (not properly complying with the requirements) may waive the need for notice by attending the meeting and doing so: *Re Oxted Motor Company Limited* [1921] 3 KB 32 (England and Wales).

Power of Commission/Court to Order the Holding of General Meetings

14.14. Art 88(1) authorises the Commission to act in the event of any default by the company in holding a meeting in accordance with Art 87. An application may be made by any officer, secretary or member of the company, with the Commission being able to call or direct the calling of a general meeting of the company. It may also give ancillary or consequential directions as it thinks expedient, including directions modifying or supplementing the operation of the company's articles that deal with the calling, holding and conduct of meetings. Directions given in this way may also include a direction that one member of the company present in person or by proxy be deemed to constitute a meeting (Art 88(2)). Default by the company or any officer or secretary in complying with the Commission's directions will constitute an offence (Art 88(3)).

14.15. If the Commission calls or directs the holding of a meeting, that meeting will be deemed to be an annual general meeting of the company, unless otherwise directed. If the meeting is not held in the year in which default in holding an annual general meeting occurred, it will not be treated as the annual general meeting of that subsequent year unless the company resolves otherwise (Art 88(4)). A copy of any resolution to that effect must be communicated to the Registrar within 21 days of it being passed for him to record it, in default of which, the company will be liable to conviction for an offence (Art 88(5)).

14.16. Alternatively, if for any reason it is impracticable to call a meeting of the company or a meeting of a class of members of the company as the law or its articles of association require, the court may of its own motion or on the application of a director or member of the company with an entitlement to vote at the meeting concerned order a meeting to be called, held and conducted in any manner the court thinks fit (Art 94(1)). The court may also give any ancillary or consequential directions as it thinks expedient, including a direction that one member of the company present in person or by proxy be deemed to constitute the meeting (Art 94(2)).

14.17. Impracticable has been held not to be synonymous with impossible. In *In Re Inter-Channel Pharmaceuticals Limited* 2002 JLR Note 25, the court held that it was necessary to examine the circumstances in order to decide whether the meeting desired could be conducted in a practical way. The facts were that the majority shareholder (80%) wished to convene a meeting to replace the directors who were nominees of the minority shareholder. The minority shareholder refused to attend the meeting and, in the absence of the quorum of 2 required by the articles, the resolution could not be put to the meeting. The majority shareholder sought an order to hold a meeting at which he would constitute a quorum of one. The court agreed that the quorum provisions should not be used to frustrate the wishes of the majority and assented to the calling of the meeting.

Participation and Quorum at General Meetings

14.18. Art 86(1) permits, subject to any stipulation in the company's articles of association, the fact that a member is in communication (by any means) with one or more other members so that each member participating in the communication can hear what is said by any other of them to deem all those participating in the communication to be present at a meeting. Participation in a form of communication by the directors or members of a committee of directors is also covered by this provision (Art 86(2)).

14.19. Where a private company has only one member, Art 92(1) authorises that member to be the quorum at any meeting of the company, or of any class of member, whether she/he is present personally or by proxy, notwithstanding anything that may be stipulated to the contrary in the memorandum or articles of association or in any terms covering admission to membership of the company. That said, normally, unless the same documents stipulate otherwise, 2 members present personally is the quorum for a meeting of the company (Art 92(2)(b)). Art 36 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 repeats the stricture and also provides that no business is to be transacted unless a quorum is present.

14.20. In the case of a meeting of a class of members, Art 92(2)(c) states that the quorum is constituted by:

a) Persons holding or representing by proxy not less than 1/3rd in nominal value of the issued shares of that class (in the case of a class of par value shares).

b) Persons holding or representing by proxy not less than 1/3rd in number of the issued shares of that class (in the case of a class of no par value shares).

c) Persons whose liability is as guarantor members or who represent guarantor members, whose liability is in the aggregate not less than 1/3rd of the total liability of all members of that class (in the case of a class of guarantor members).

d) Where an adjournment of a class meeting has taken place, one person of that class personally or by proxy.

e) Where a quorum has not been constituted within half an hour from the time appointed for the meeting or a quorum ceases to be present during the meeting, the meeting will be adjourned to the same day in the week following at the same time and place, unless the directors otherwise determine (Art 37 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

14.21. With the consent of a meeting at which a quorum is present (and especially if directed by the meeting), the chairman may adjourn the meeting from time to time and from place to place, subject to the rule that no business may be transacted at an adjourned meeting unless it could have been properly transacted at the meeting that was adjourned. If a meeting is adjourned for 14 days or more, at least 7 clear days' notice specifying the day, time and place of the adjourned meeting and the general nature of the business to be transacted must be given, but not in other cases (Art 41 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

Agenda and Conduct of General Meetings

Deciding the Agenda

14.22. It is the case that, other than those matters required by law to be submitted to the general meeting, which include reports by the directors and auditors (if any), the annual accounts as well as the (re-)appointments of directors and auditors (if any), all other matters to be placed on the agenda of the meeting are normally decided on by the directors. However, in order for business to be validly approved at a meeting, proper notice of the meeting must be given: *Baker v Falle* 1991 JLR 284; *Re Level One Holdings (Jersey) Limited* 2007 JLR Note 39. What constitutes proper notice will depend upon the circumstances and practice of the company.

14.23. In order for notice to be sufficient, notice must be given not only that the meeting is to be held and of the date, time and location but also of the business to be discussed at the meeting. Notices have been held to be invalid for being both too general: *Ephstathis v Greek Orthodox Community of St George* (1988) 13 ACLR 691 (Queensland, Australia); *Normandy v Ind Coope & Co* [1908] 1 Ch 84 (England and Wales) or too particular: *Smith v Deighton* (1852) 8 Moo PC 179 (England and Wales). The adequacy or otherwise of the notice will depend upon the facts but the key point is that it should contain "enough information to enable the recipient to decide for himself whether he should attend, or appoint a proxy on his behalf, or whether he is content to let matters take their course at the meeting: to enable him "to decide for himself whether he should do more": *Normandy v Ind Coope & Co* (above). Consistent with this is the requirement that special business (business outside the scope of the ordinary business of the meeting) needs to be clearly explained if a resolution in relation to it is to be valid: *Wills v Murray* (1850) 4 Ex Reps 843 (England and Wales); *Pacific Coast Coal Mines Ltd v Arbuthnot* [1917] AC 607 (England and Wales).

14.24. From the requirement that notice must enable the addressee to decide what he or she wants to do in relation to the meeting, follows the rule that only matters of which notice (which may be explicit or implicit from a course of practice or the constitution of the company: *Choppington Collieries v Johnson* [1944] 1 All ER 762 (England and Wales) has been given should be considered at the meeting and if other matters are considered of which notice has not been given, the resolution may be ineffective. In *Deveraux Holdings Pty Ltd v Pelsart Resources NL (No 2)* (1985) 9 ACLR 956 (New South Wales, Australia) Young J observed that a resolution of a company could be attacked in relation to a defective notice in two ways: first at common law, since (unless all the corporators were present or otherwise consented) a meeting was only competent to deal with business that had been properly notified to members; and secondly in equity, since it was the fiduciary duty of the directors not to mislead the corporators who were to consider the resolution by providing them with full information. From this it also follows that if all those who are entitled to attend and vote are present, they can decide at the meeting what they wish to discuss: the requirement in this regard is practical rather than formal in nature: *Re Express Engineering Works* [1920] 1 Ch 466 (England and Wales); *Re Oxted Motor Co* [1921] 3 KB 32 (England and Wales) although, to the extent that the point is still relevant, it will not extend to matters that are *ultra vires* the company: *Re Bailey, Hay & Co. Ltd* [1971] 1 WLR 1357 (England and Wales).

14.25. It is common practice on an agenda to include an item of "Any Other Business". In relation to this the following observation is made in <u>Shackleton</u>: "This might more correctly read "Any other business which can properly be put before the meeting", as only matters of an informal or unimportant nature can be transacted under this heading". If there is an important matter that is too urgent for proper notice to be given, the matter should be specifically ratified or confirmed at the next duly convened meeting.

14.26. The same considerations apply in relation to amendments to a motion to be put to a meeting. If the amendment is within the scope of the notice originally given, it can be made: *Torbock v Lord Westbury* [1902] 2 Ch 871 (England and Wales); *Henderson v Bank of Australasia* (1890) 45 ChD 330 (England and Wales). If, however, a member proposes a motion during the meeting, then in cases where notice is required and there has been none or it was insufficient, the chairman should refuse to accept it. As noted above, however, if all the people entitled to be at the meeting are present they can waive irregularities.

Attending and Chairing the Meeting

14.27. Art 92(2)(d) states that any member or director of the company may be chairman of the meeting, if elected by the members present at that meeting. However, Art 38 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 stipulates the default position to be that the chairman of the board of directors or, in the chairman's absence, a director nominated by the directors will preside as chairman of the meeting. If neither is available or present within 15 minutes after the time appointed for holding the meeting and/or unwilling to act, any directors present must elect one of their number present to be chairman of the meeting. If only one director is present, that director will be chairman of the meeting. Only if there is no director present within 15 minutes after the time appointed for holding the meeting or willing to act as chairman will those present and entitled to be counted in a quorum be able to choose one of their number to be chairman (Art 39 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

14.28. The members of the company generally have an unfettered right to attend the general meeting of the company and any meeting of a class of shareholders to which they belong, whether personally or by proxy. Furthermore, Art 40 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 authorises any director to attend and speak at any general meeting and at any separate meeting of the holders of any class of shares notwithstanding the fact that director may not be a member of the company.

Decision Making at the Meeting

14.29. Normally, most decisions at a general meeting are made by ordinary resolution, a resolution that requires a simple majority in order to pass. Certain decisions of constitutional impact or which are considered by the law to require a greater degree of assent are subject to higher thresholds to succeed. See Chapter 13 above for instances in which a higher threshold is required for special and other resolutions.

14.30. Art 90(1) requires such decisions to be taken by means of a special resolution, defined to mean a resolution that has been passed by the majority specified in the Articles of Association (not less than 2/3rds) who, being entitled to do so, vote in person or by proxy at a general meeting or meeting of a class of members, provided these meetings have been summoned with not less than 14 days' notice signifying the intention to place the resolution before the meeting as a special resolution. If less than 14 days' notice is given for any such meeting, the requisite threshold is a majority together holding not less than 95% of the total voting rights of the members who have the right to attend and vote that meeting on the resolution put before it (Art 90(2)).

14.31. For the purposes of Art 90, notice is deemed to be given and the meeting to be duly held where notice is made in the manner provided for in the law or by the company's articles of association (Art 90(5)). Furthermore, references in the law to a special resolution are expressly limited to resolutions proposed and carried with the requisite thresholds at general meetings of the company (Art 90(6)). Art 90(1A) states that the majority required shall be two-thirds unless the Arts of Association specify a higher majority, whatever that may be.

14.32. A declaration by the chairman of the meeting that a special resolution has been carried is conclusive evidence of the fact without proof being required of the number or proportion of the votes recorded in favour of or against the resolution. This rule stands unless a poll is demanded (Art 90(3)). For the purposes of any poll that may be held reference is to be made to the number of votes cast for and against the resolution in order to compute the majority on the poll (Art 90(4)).

Alternative Decision Making: Resolutions in Writing

14.33. Art 95 provides an alternative form of decision making outside the purview of the meeting by means of resolutions in writing. Two exceptions are stated, the first being that, although both ordinary and special resolutions may be decided using this method, a resolution removing an auditor requires the summoning of a general meeting (Art 95(1)). Furthermore, if the company's memorandum or articles of association prohibit the use of resolutions in writing, then this method may not be used (Art 95(1A)).

14.34. Subject to those exceptions, any decision which may be made in general meeting or at a meeting of a class of members of the company may also be done by a resolution in writing signed by or on behalf of each member who, at the date when the resolution is deemed to be passed, would be entitled to vote on the resolution if it were proposed at a meeting. This is subject to the caveat that the memorandum or articles of association of the company do not make provision otherwise in respect of any types of decisions that may be taken by the company (Art 95(1B)).

14.35. The law is not intended to affect or limit any provision of the memorandum or articles of association, or indeed any rule of law, that may stipulate how assent to a document, act or matter otherwise than at a meeting of members is to be treated as effective (Art 95(6)). This is a reference to the rule in *Re Duomatic* [1969] Ch 365 (England and Wales), which states that a decision agreed to by all the members outside a formally convened and constituted general meeting is binding and effective on the membership as if it had been passed at a general meeting. Similarly, a member attending a meeting who does not challenge the manner in which a decision is taken within a reasonable time after it is made is taken to have acquiesced in the decision: *Re Bailey Hay and Company* [1971] 1 WLR 1357 (England and Wales).

14.36. A resolution in writing may take the form of one or more instruments in the same form each signed by or on behalf of one or more members (Art 95(2)). Where more than one instrument is used, it is deemed to be passed when the last of these instruments is signed or on any later date that may be specified in the resolution (Art 95(3)). A document annexed to the resolution is deemed to have been laid before a meeting of the members that sign the resolution (Art 95(4)). The rules in Arts 98 (minutes of the meeting) and 100 (filing of resolutions) apply to a resolution in writing as if it had been passed at a meeting (Art 95(5).

Counting the Votes: Voting Methods

14.37. Art 92 refers to two forms of voting: by show of hands or on a poll being taken. Art 92(2)(e) stipulates that, on a show of hands, every member present in person at a meeting has one vote, while Art 92(2)(f) states that, on a poll every member has a vote for every share held and, in the case of stock, one vote for each share from which the holding of stock arose, while every member who does not have a share has one vote. Art 49 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 repeats the right of an individual present in person or (if a body corporate) present by a duly authorized representative (whether or not a member entitled to vote) to have one vote on a show of hands or a vote for every share held in a poll.

14.38. Voting by show of hands is the most common form of signifying assent. Nonetheless, Art 97(1) provides that a demand for a poll may be made and that any provision contained in a company's articles that limits how a poll may be sought is to be treated as void. In particular, if the provision excludes the right to demand a poll at a general meeting, or at a meeting of any class of members, on a question other than the election of the chairman of the meeting or the adjournment of the meeting, it is void. Furthermore, if its purpose is to make a demand for a poll ineffective even if made by not less than 5 members having the right to vote on the question or by a member or members representing not less than 1/10th of the total voting rights of all the members having the right to vote on the question, it is also void.

14.39. An instrument appointing a proxy to vote at a meeting confers the same authority to demand or join in the demand for a poll with the demand by a proxy being treated as the equivalent to a demand by a member (Art 97(2)). The rules also state that a member is not bound, whether present in person or by proxy to use all the votes that member is entitled to or indeed to cast them all in the same way (Art 97(3)).

14.40. Art 42 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 states that a resolution put to the vote at any meeting is normally decided on a show of hands unless before or at the declaration of the result, a poll is demanded by any of the following, with requests by members or by proxies being deemed to have the same value:

a) The chairman.

b) At least 2 members with the right to vote on the resolution.

c) A member or members representing not less than one-tenth of the total voting rights of all the members with the right to vote on the resolution.

d) A member or members holding shares conferring a right to vote on the resolution being shares on which an aggregate sum has been paid up equal to not less than one-tenth of the total sum paid up on all the shares conferring that right.

14.41. In the absence of a demand for a poll, a declaration by the chairman that a resolution has been carried, carried unanimously or by a particular majority, lost or not carried by a particular majority, accompanied by an entry to that effect in the minutes of the meeting is treated as conclusive evidence of the fact without proof of the number or proportion of the votes, whether in favour or against the resolution, being necessary (Art 43 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992). Where a poll has been requested, votes may be given either personally or by proxy and a member may appoint more than one proxy to attend on the same occasion (Art 54 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

14.42. In the case of there being an equality of votes, whether on a show of hands or on a poll, the chairman is entitled to a casting vote in addition to any other vote the chairman may have (Art 46 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

14.43. The demand for a poll may be withdrawn before the poll is held, although only with the consent of the chairman. The fact that it is withdrawn does not invalidate the result of any show of hands declared before the demand was made (Art 44 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992). The chairman may direct how the poll is to be held and may also appoint scrutineers (who need not be members of the company). The chairman may also fix a day, time and place for declaring the result of the poll. The result of the poll is deemed to be a resolution of the meeting at which the poll was demanded (Art 45 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

14.44. Polls may be held at the meeting or at another time. Art 47 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 states that a poll on the question of the election of a chairman or an adjournment must be taken forthwith. On any other question, a poll may be held there and then or on a day and at a time and place as the chairman directs, provided this is not more than 30 days after the demand for the poll. If the day, time and place are announced at the meeting, then no further notice need be given to the members. In all other cases, at least 7 clear days' notice must be given (Art 48 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

14.45. The fact a poll has been demanded does not prevent the meeting from continuing and for the transaction of any business other than the question on which the poll was demanded. If the withdrawal of a demand for a poll has taken place, then the meeting continues as if there had been no request for a poll (Art 47 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

Counting the Votes: Voting Representation

14.46. If there are joint holders of shares, the vote of the senior, whether in person or by proxy, is accepted to the exclusion of the votes of other joint holders, seniority being determined by the order in which the names of the holders stand in the register of members (Art 50 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

14.47. If an order has been made by any court having jurisdiction (whether in Jersey or elsewhere) in matters concerning mental disorder, the member concerned may only vote via the member's curator or other person authorized in that behalf appointed by the relevant court. The curator or other person may vote in person or, where a poll is held, also by proxy. Nonetheless, evidence will be necessary to the satisfaction of the directors and must be deposited, either at the company's registered office or any other place in Jersey that the articles dealing with the deposit of instruments of proxy specify, not less than 48 hours before the time appointed for holding the meeting or adjourned meeting at which the right to vote is to be exercised, in default of which the right to vote may not be exercised (Art 51 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

14.48. A member may not vote at any general meeting or separate meeting of the holders of any class of shares in the company, either in person or by proxy, in respect of any share held by that member unless any sums due in respect of that share have been paid (Art 52 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

14.49. Any objection to the qualification of any voter can only be raised at the meeting or adjourned meeting at which the vote objected to has been tendered. An objection made within due time is referred to the chairman, whose decision is final and conclusive. Any vote not disallowed at the meeting is treated as valid (Art 53 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

14.50. Where the authority of a person acting as a proxy or duly authorized representative of a body corporate has been determined, any vote given or poll demanded by proxy is valid notwithstanding the determination until such time as the company receives notice, either at the company's registered office or any other place in Jersey where the deposit of instruments of proxy was made, at a time before the commencement of a meeting (or adjourned meeting) at which the vote is taken or poll demanded. In the case of a poll held otherwise than on the same day as the meeting or adjourned meeting, notice must be received prior to time appointed for taking the poll (Art 57 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992).

Representation and Proxies of Individual or Corporate Shareholders

14.51. Where a body corporate is a shareholder, whether or not it is a company within the meaning of the law, it is entitled by resolution of its directors or other governing body to authorize any person it thinks fit to act as its representative at any meeting it is entitled to attend, whether of the company, of a class of members of the company or of the creditors of the company (Art 93(1)). The person so authorised is entitled to exercise the same powers on behalf of the body corporate which the person represents as that body corporate would be able to if it were an individual member or creditor of the company (Art 93(2)).

14.52. A shareholder, whether an individual or body corporate, who is entitled to attend and vote at any meeting is also entitled to appoint another person (whether the latter is a member or not) as the member's proxy to attend and vote instead of the member. In the case of a private company, a proxy appointed to attend and vote instead of a member also has the same right as the member to speak at the meeting, but does not have the right to vote, except on a poll, unless the company's articles of association otherwise provide (Art 96(1)). These rules apply to meetings of any class of members as they do to general meetings (Art 96(6)).

14.53. Every notice calling a meeting of the company must bear, reasonably prominently, a statement of a member's entitlement, where the member is entitled to attend and vote at that meeting, also to appoint a proxy. Where it is permitted, a member may appoint one or more proxies to attend and vote instead of the member. In any event, proxies need not also be members of the company (Art 96(2)). A failure to comply with these requirements exposes any defaulting officer of the company to conviction for an offence (Art 96(3)). The fact a member may appoint more than one proxy to attend on the same occasion is also referred to in Art 54 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992.

14.54. Art 55 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 states that an instrument appointing a proxy must be in writing in the usual form or a form approved by the directors and must, additionally, be executed by or on behalf of the appointor. Art 56 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 continues by providing that the instrument of proxy and any authority under which it is executed or a copy of the authority that has been certified notarially or otherwise approved by the directors may be deposited at or delivered to (in default of which the proxy is invalid):

a) The office or any other place within Jersey specified in the notice convening the meeting or in any instrument of proxy sent out by the company in relation to the meeting. This must occur not less than 48 hours before the time for holding the meeting or adjourned meeting at which the person named in the instrument proposes to vote.

b) As above, in relation to a poll taken more than 48 hours after it is demanded. This must occur after the poll has been demanded, but not less than 24 hours before the time appointed for the taking of the poll.

c) To the chairman or to the secretary or to any director, in relation to a poll not taken instantly, but within 48 hours after it was demanded. This must occur at the meeting at which the poll has been demanded.

14.55. Art 96(4) stipulates that any provision contained in a company's articles, whose effect is to require the instrument appointing a proxy, or any other document necessary to show the validity of, or otherwise relating to, the appointment of a proxy, to be received by the company or any other person more than 48 hours before a meeting or adjourned meeting in order that the appointment may be effective is void insofar as it purports to do so.

14.56. If invitations to appoint a person or one of a number of persons specified in the invitations as a proxy are issued at the company's expense to only some of the members entitled to be given notice of a particular meeting and to attend by proxy, Art 96(5) provides that any officer of the company who knowingly and wilfully authorizes or permits their issue in that manner is guilty of an offence. However, a company officer is not liable by reason only of the fact that a form of appointment naming a proxy or list of persons willing to act as proxy has been issued to a member following that member's request made in writing, provided that the form or list is available to any member entitled to vote at the meeting by proxy who makes a similar request.

The Recording of Resolutions and Inspection of Minute Books

14.57. Art 98(1) requires every company to have minutes of all proceedings at general meetings, meetings of any classes of members, meetings of directors and of committees of directors to be entered in books kept for that purpose with the names of the directors present at any meetings recorded in the minutes. A minute signed by the chairman of the meeting at which proceedings took place or by the chairman of the next meeting following is deemed to be evidence of the proceedings (Art 98(2)). In fact, unless evidence is brought to the contrary, the making of minutes deems the meeting concerned to have been duly convened and held and that all proceedings taking place at the meeting to have duly taken place (Art 98(3)). Failure to comply with the requirement to keep minutes renders the company and every defaulting officer liable to conviction for an offence (Art 98(4)). Art 91 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992 reiterates the stipulation that minutes of any meetings are to be recorded in books kept for that purpose.

14.58. Where a private company has only one member and that member takes a decision which may be taken by the company in general meeting and which has effect as if it had been agreed by the company in general meeting, then the member is required to provide the company with a record in writing of the decision, unless that decision was already taken in the form of a resolution in writing (Art 95A(1)). Failure to comply with these requirements exposes the member concerned to conviction for an offence (Art 95A(2)), although the validity of the decision is not affected by any such failure (Art 95A(3)).

14.59. Art 99(1) requires the books containing the minutes of a general meeting or of a meeting of any class of members to be kept at the company's registered office and to be made available for inspection by a member without charge during business hours. A member may also require by submission to the company of a written request and on payment of any sum required, not to exceed the published maximum, a copy of the minutes. The company must make available, within 7 days after the receipt of the request and the payment, the copy required at the registered office of the company for collection during business hours (Art 99(2)).

14.60. Refusal of an inspection or failure to make a copy of the minutes available will make the company liable to conviction for an offence (Art 99(3)). In the case of a refusal or default, the court may make an order compelling an immediate inspection of the books in respect proceedings at meetings or directing that copies of the minutes required be furnished to the persons requiring them (Art 99(4)).

Filing of Resolutions

14.61. Art 100(1) states that a printed copy of every resolution or agreement to which the law applies must be forwarded to the Registrar within 21 days after it is passed or made to be recorded by the Registrar. Failure to send a copy to the registrar within the stipulated deadline will subject the company to a late filing fee (Art 100(4)). Nonetheless, notwithstanding any failure to deliver a copy to the Registrar, a resolution or agreement to which this Art applies has effect on the company and its members (Art 100(6)).

14.62. Furthermore, a printed copy of every such resolution or agreement for the time being in force shall be embodied in or annexed to every copy of the memorandum or articles issued after the passing of the resolution or the making of the agreement. A printed copy of every such resolution or agreement must be forwarded to any member at his request, subject to payment to the company of any sum required, not to exceed the published maximum (Art 100(2)). Failure to comply with the request is an offence (Art 100(5)).

14.63. Art 100(3) subjects to the terms of Art 100 all:

a) Special resolutions.

b) Resolutions or agreements which have been agreed to by all the members of a company but which, if not so agreed to, would not have been effective for their purpose unless they had been passed as special resolutions. This may include the *Re Duomatic* [1969] Ch 365 (England and Wales) type of decision agreed to by all the members outside a formally convened and constituted general meeting and which is deemed to be binding and effective on the membership as if it had been passed at a general meeting.

c) Resolutions or agreements which have been agreed to by all the members of any class but which, if not so agreed to, would not have been effective for their purpose unless they had been passed or agreed to by some particular majority or otherwise in some particular manner, and all resolutions or agreements which effectively bind all of the members of any class though not agreed to by all those members.

The position of a shareholders' agreement that purports to amend the articles or to vary the way in which they are applied is uncertain, but it may be that these also need to be filed.

14.64. Where a resolution is passed at an adjourned meeting of the company, of any class of members of the company or of the directors or a committee of directors of the company, Art 101 treats the resolution as having been passed on the date on which it was in fact passed and not at any earlier date.

15. Accounts and Auditors

Interpretation

15.1. Extensive changes were introduced to these rules by the Companies (Amendment No. 4) (Jersey) Regulations 2009 with effect from 5 April 2010. Art 102(1) sets out definitions for the purposes of Part 16 and states that, unless the context otherwise requires, the following terms have the following meanings:

a) ‘accounts’ means accounts prepared in accordance with Art 105.

b) ‘auditor’ means:

i) an individual who is a member of a recognized professional body and is permitted by that body to engage in public practice; or

ii) a partnership that is a qualified partnership and where each of the persons who is responsible to it for examining or reporting on the accounts of a company pursuant to Art 113, is an individual who is a member of a recognized professional body and is permitted by that body to engage in public practice; or

iii) a body corporate that is controlled by auditors and where each of the persons who is responsible to it for examining or reporting on the accounts of a company pursuant to Art 113, is an individual who is a member of a recognized professional body and is permitted by that body to engage in public practice; or

iv) an individual or firm authorized by the Commission under Art 113D(6) to carry out an audit in respect of a company that is not a market traded company.

c) ‘controlled by auditors’, in respect of a body corporate, means a body corporate where:

i) individuals who are members of a recognized professional body or auditors that fall within paragraph (ii) or (iii) of the definition ‘auditor’; or

ii) partnerships accepted by a recognized professional body as being qualified for appointment as auditors of companies incorporated in the United Kingdom; or

iii) bodies corporate accepted by a recognized professional body as being qualified for appointment as auditors of companies incorporated in the United Kingdom; or

iv) individuals who hold a qualification to audit accounts under the law of a European Economic Area member state other than the United Kingdom or the Republic of Ireland, or

v) any combination of persons mentioned in sub-paragraphs (i), (ii), (iii) and (iv) who constitute more than half the number of members of the body corporate, hold more than half the voting rights of each class of members of the body corporate, make up more than half the number of directors of the body corporate (if individuals) or hold more than half of the voting rights in the board of directors, committee or other management body of the body corporate.

d) 'Directive' means Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments as for the time being in force (OJ L 145/1 30 April 2004).

e) 'exempt company' means:

i) a company that is an issuer exclusively of debt securities admitted to trading on a regulated market, the denomination per unit of which is at least €50,000 or, in the case of debt securities denominated in another currency, equivalent, at the date of issue, to at least €50,000; or

ii) an open-ended investment company that holds a permit as a functionary specified in Group 1 of Part 2 of the Schedule to the Collective Investment Funds (Jersey) Law 1988 and in relation to which a certificate granted under Art 8B of the Collective Investment Funds (Jersey) Law 1988 is in force or that is an unregulated fund within the meaning of the Collective Investment Funds (Unregulated Funds) (Jersey) Order 2008.

f) 'firm' means an entity, whether or not a legal person, that is not an individual and includes a body corporate, a corporation sole, a partnership, and an unincorporated association.

g) 'market traded company' means a company whose transferable securities have been admitted to trading on a regulated market or a company in respect of which transferable securities have been admitted to trading on a regulated market, but does not include an exempt company.

h) 'partnership' includes a firm of a similar character to a partnership formed under the law of a country or territory outside Jersey and a limited liability partnership that is registered under the Limited Liability Partnerships (Jersey) Law 1997 (none have so far been created) or a firm of a similar character to a limited liability partnership formed under the law of a jurisdiction outside Jersey, except where the partnership is a body corporate.

i) ‘professional oversight body’ means a body designated by an Order made under Art 113N.

j) ‘qualified partnership’ means a partnership:

   i) in which more than half of its partners are any of, or any combination of, individuals who are members of recognized professional bodies, partnerships that are themselves auditors as defined in paragraph (ii) of the definition ‘auditor’, bodies corporate that are themselves auditors as defined in paragraph (iii) of the same definition or individuals who hold a qualification to audit accounts under the law of a European Economic Area member state other than the United Kingdom or the Republic of Ireland; and

   ii) in which more than half of the voting rights in the partnership and, if it has a management body, in that body are held by those persons.

k) ‘recognized auditor’ means a firm or an individual whose name appears on the Register of Recognized Auditors.

l) ‘recognized professional body’ means any of the following bodies –

   i) the Institute of Chartered Accountants in England and Wales;

   ii) the Institute of Chartered Accountants of Scotland;

   iii) the Association of Chartered Certified Accountants; or

   iv) the Institute of Chartered Accountants in Ireland.

m) ‘Register of Recognized Auditors’ means the Register kept by the Commission under an Order made under Art 110(1).

n) ‘regulated market’ has the same meaning as in Art 4.1(14) of the Directive, which states that it means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments in the system and in accordance with its nondiscretionary rules in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with the provisions of Title III (on Regulated Markets).

o) ‘rules’, in respect of a recognized professional body, means the rules of the body as to the eligibility of persons for appointment as auditors and the conduct of audit work that are binding on persons acting as auditors under Part 16 and, where Art 112(6) applies, includes rules published by the Commission under the terms of that article.

p) ‘transferable securities’ has the same meaning as in Art 4.1(18) of the Directive, which states that they mean those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, including shares, bonds, depositary receipts, options and derivatives.

q) Art 102(1A) states that, unless the context otherwise requires, the word “partnership” does not include either an incorporated limited partnership or a separate limited partnership.

r) Art 102(2) further defines ‘officer of the auditor in default’ in connection with liability for an offence as meaning any officer, director, partner or member of the auditor or of the recognized auditor who knowingly and wilfully authorizes or permits the default, refusal or contravention mentioned.

Accounting Records: Requirements

15.2. Art 103(1) requires every company to keep accounting records that will sufficiently show and explain its transactions. The accounts must be able to disclose with reasonable accuracy the financial position of the company at any time at which they are prepared and enable the directors to ensure that the company accounts are compliant with the requirements of the law (Art 103(2)).

15.3. The company’s accounting records may be kept at any place the directors think fit but must be open at all times to inspection by the company’s officers and the secretary (Art 104(1)). If records of a public company are kept outside Jersey, returns with respect to the business dealt with in the accounting records must be sent to and kept in the island and must at all times be open to inspection by the company’s officers and its secretary (Art 104(2)). Accounts kept outside Jersey must be able to disclose with reasonable accuracy the financial position of the company at intervals of not more than 6 months and enable the directors to ensure that the company accounts are compliant with the requirements of the law (Art 104(3)).

15.4. Under Art 104(4), accounting records that a company is required to keep under Art 103 must be preserved for 10 years from the date on which they are made, unless they are subject to the rules on disposal of accounts in winding up under Art 194.

Preparation and Certification of the Accounts

15.5. The directors of every company are required to prepare accounts for a period of not more than 18 months beginning with the date on which the company was incorporated. Alternatively, if the company has previously prepared a profit and loss account, this period begins at the end of that covered by the most recent accounts (Art 105(1)). An exception is provided in that the directors of a holding company need not prepare separate accounts if consolidated accounts for the company are prepared, unless they are required to do so by the members of the company by ordinary resolution (Art 105(11)).

15.6. Art 2 of the Companies (General Provisions) (Jersey) Order 2002 requires as part of the statement delivered to the Registrar on the occasion of a company's formation, details, in the case of a public company, of the period to which the first accounts of the company required by Art 105(1) will relate.

15.7. In the case of a market traded company, the accounts must be prepared in accordance with generally accepted accounting principles that have been prescribed, while, in the case of any other company, must be prepared in accordance with any generally accepted accounting principles (Art 105(2)). The accounts must also specify the generally accepted accounting principles that have been adopted in their preparation (Art 105(3)). Where a company is required under Art 113(1) to appoint an auditor, the accounts must show a true and fair view of or be presented fairly in all material respects so as to show the company's profit or loss for the period covered by the accounts and the state of its affairs at the end of the period. In all other respects, the accounts must also comply with the law (Art 105(4)).

15.8. The company's accounts must be approved by the directors and signed on their behalf by one of them (Art 105(5)).

15.9. The accounts must be prepared and, if required, be examined and reported upon by auditors as well as laid before a general meeting together with a copy of the auditors' report (if any) (Art 105(6)). The above actions must be undertaken within 7 months (public company) or 10 months (private company) after the end of the financial period (Art 105(7)). This is subject to the existence of any agreement under Art 87(4) dispensing with the holding of an annual general meeting (Art 105(8)), in which case, the company is not obliged to lay the accounts for that period or a copy of any auditors' report before a general meeting, unless a member of the company gives written notice to the company not later than 11 months after the end of that period to require the placing of the accounts and any auditors' report before a general meeting (Art 105(9)). In this case, the general meeting must be held within 28 days after receipt of the notice by the company or after approval of the accounts by the directors, whichever is the latest to occur (Art 105(10)).

15.10. Art 106 forbids a company from publishing interim accounts, whether or not these have been audited, unless they have been, in the case of a market traded company, prepared in accordance with generally accepted accounting principles that have been prescribed, while, in the case of any other company, prepared in accordance with any generally accepted accounting principles.

15.11. A member of the company who has not otherwise been furnished with a copy of the company's latest accounts is entitled to a copy of those accounts together with a copy of any auditors' report, provided a written request has been made (Art 107(1)). The company is required to comply with a request within 7 days of it being made and may not charge for the accounts or auditor's report supplied (Art 107(2)). Art 100 of the Schedule to the Companies (Standard Table) Order 1992 states that members do not have a right to inspect any accounting records or document of the company unless authorised by law or authorised by the directors or by ordinary resolution of the company.

Delivery of the Accounts

15.12. The directors of a public company that is required under Art 105(1) to produce accounts must, in respect of each financial period, deliver to the Registrar a copy of the accounts for the period signed on behalf of the directors by one of them together with a copy of the auditors' report as well as a translation into English, certified as a correct translation, of any document delivered in any other language (Art 108(1)). If a public company becomes a private company during any financial period, the same requirements will still apply, although they may be satisfied if the accounts relate to either all of the financial period (including a period when the company was no longer a public company) or only the part of the financial period during which the company was a public company (Art 108(3)).

15.13. Delivery of the accounts to the Registrar must take place within 7 months after the end of the financial period to which they relate (Art 108(2)). Payment of the requisite filing or late fee must be made (Art 108(7)).

15.14. An application may be made in writing to the Commission for an extension of the periods under Arts 105(1) (the accounting period), 105(7) (the period within which accounts must be prepared, examined and reported upon as well as laid before a general meeting) or 105(9) (laying of accounts before a general meeting requested by a member) (Art 108(4)). Under Art 108(5), the Commission may for any special reasons it thinks fit extend any of the following periods by written notice to the company, provided it also serves notice of the same on the Registrar (Art 108(6)).

15.15. Failure to comply with the keeping, retention, preparation, submission or delivery of accounting records (Arts 103-108) will, under Art 109, render the company and any defaulting officer (in the case of a public company) liable to conviction for an offence.

Register and Registration of Auditors

15.16. The Commission is required to keep a register, called the Register of Recognized Auditors, of persons who are auditors qualified to be recognized auditors under Art 112 and who have applied and have been approved by the Commission to have their names entered on that register (Art 110(1)). The entry on the register must contain, in respect of each recognized auditor, his/her/its name and address, the name of the recognized professional body of which, in the case of an individual, that person is a member and, in the case of a firm, the specified information relating to each of the persons who is responsible to the firm for examining or reporting on the accounts of a market traded company pursuant to Art 113A. Other information to be included in the entry may be specified (Art 110(2)).

15.17. In pursuance of the objectives for which the register is established and insofar as considered necessary, obligations may be imposed on recognized professional bodies, any professional oversight body and/or any persons qualified or approved to be recognized auditors (Art 110(3)). Failure by a person qualified or approved to be a recognised auditor to comply with an obligation imposed under Art 110(3) or who knowingly or recklessly provides information that is false or misleading in a material particular, where an obligation to provide information has been imposed, will be guilty of an offence (Art 110(5)).

15.18. Furthermore, rules may be made requiring that specified entries on the register be open to inspection at times and places specified or determined in accordance with the rules, enabling a person to require a certified copy of specified entries on the register and authorizing the charging of published fees for inspecting the register and for the provision of certified copies of its entries. The rules will also prescribe circumstances in which entries on the register will not be open for inspection or made available as certified copies (Art 110(4)).

15.19. Applications to have their names entered on the register may be made by persons who are auditors qualified under Art 112 in the manner published by the Commission and by paying the published fee (Art 111(1)). If the Commission is not satisfied that the person is competent to act as a recognized auditor, it may refuse to enter the name of that person on the register (Art 111(2)). Even after entry is made, the Commission must remove the name of a recognized auditor from the register if the Commission is satisfied that the recognized auditor is no longer qualified under Art 112 (Art 111(9)).

15.20. Registration of the person may be made subject to the person complying with such conditions and limitations as the Commission considers appropriate, details of which must be entered on the register when an entry is first made of the name of a person on the register or at any subsequent time (Art 111(3)). The conditions and limitations may be amended at any time on the Commission’s own volition or on the application of the recognized auditor (Art 111(4)). Registration is also subject to the recognized auditor paying any published fee imposed on recognized auditors (Art 111(18)).

15.21. Suspension or revocation of the registration of a person as a recognized auditor may occur if, in the opinion of the Commission, the recognized auditor is no longer competent or is not a fit and proper person to act as a recognized auditor. Suspension or revocation is also available where the recognized auditor has breached any condition or limitation imposed under Art 111(3), the recognized auditor is found guilty of an offence under Arts 111(16)-(17), the recognized auditor has failed to pay a fee mentioned in Arts 111(18) or 113M(4), the recognized auditor has breached any of the rules mentioned in Art 112(1) applicable to him/her, the recognized auditor fails, within a reasonable time, to provide information required by the Commission pursuant to Art 113L or is found guilty of an offence under Art 113L(4) or, lastly, if, in the opinion of the Commission, the continued registration of the recognized auditor may adversely affect a company of which the recognized auditor is auditor or any other person (Art 111(5)). Suspension under Art 111(5) may be made for a specified period or until the auditor, following an application made to this end, satisfies the Commission that the suspension may be revoked (Art 111(6)).

15.22. Suspension may also take place where a person who is a recognized auditor requests the Commission to suspend or revoke his/her registration. The Commission is required to comply with the request and may publish the name of the person, details of the action it took in respect of that person and the reason why it took that action (Art 111(7)). Suspension on a personal request will be made for a specified period or, if no period is specified, until the recognized auditor applies to the Commission for the registration to be restored (Art 111(8)).

15.23. The Commission is required, under Art 111(11), to serve a notice specifying the action taken by the Commission, setting out the reasons why the Commission took the action and advising the applicant or recognized auditor of their right of appeal. Notice must be served, under Art 111(10), on the applicant or recognized auditor, as the case may be, within 7 days of any of the following actions:

a) refusal to enter the name of a person on the register under Art 111(1);

b) making the registration of a person subject to conditions and limitations under Art 111(3);

c) amendment of conditions and limitations under Art 111(4)(a);

d) refusal to amend a condition or limitation following an application made under Art 111(4)(b);

e) suspension or revocation of the registration of a person as a recognized auditor under Art 111(5);

f) refusal to revoke the suspension of the registration of a person as a recognized auditor following an application under Art 111(6)(b); or

g) removal of the name of a recognized auditor from the register under Art 111(9).

15.24. Where notice has been served under Art 111(10), the person upon whom the notice was served may appeal to the court against the action taken by the Commission that was specified in the notice on the ground that it was unreasonable for the Commission to take the action in all the circumstances of the case. The appeal must be made within 28 days of the service of the notice or within such longer period as the court may permit. However, unless otherwise ordered, the action taken by the Commission and specified in the notice is not stayed and continues to have effect (Art 111(12)). The court may make any order it considers appropriate in relation to the appeal (Art 111(13)).

15.25. Under Art 111(15), the Commission may publish the name of the person or recognized auditor, details of the action it took in respect of the person or recognized auditor and the reason why it took that action, provided that the period for appealing under Art 111(12) has expired or the appeal was unsuccessful or withdrawn, where the Commission has performed one of the following actions stipulated in Art 111(14):

a) making the registration of a person subject to conditions and limitations under Art 111(3);

b) amending conditions and limitations under Art 111(4);

c) suspending or revoking the registration of a person as a recognized auditor under Art 111(5); or

d) removing the name of a recognized auditor from the Register of Recognized Auditors under Art 111(9).

15.26. An auditor must inform the Commission of any material change in any information supplied to the Commission at the time of the application to become a recognized auditor or at any subsequent time. If the auditor fails to do so as soon as practicable and, in any event within 1 month of the change, the auditor and each officer of the auditor (where the auditor is a partnership, firm or body corporate) in default is liable to conviction for an offence (Art 111(16)). Furthermore, if a person knowingly or recklessly provides information for the purposes of an application for entry under Art 111(1), for amendment of terms and limitations under Art 111(4) or for revocation of a suspension under Art 111(6), that person is guilty of an offence (Art 111(17)).

15.27. An auditor is qualified to be a recognized auditor if the auditor is bound by rules governing the conduct of the audit of market traded companies issued by a recognized professional body and approved by the Commission or, if no rules have been issued or have not been approved, by rules governing the conduct of the audit of market traded companies published by the Commission (Art 112(1)). The rules published by the Commission are to be the rules of the recognized professional body applicable to the eligibility of a member of that body to be appointed as a statutory auditor under section 1212(1) of the Companies Act 2006 (United Kingdom), amended so as to make them applicable to Jersey and the auditing of the accounts of market traded companies in accordance with the law and so as to comply with any additional relevant requirement of an order made under Art 112(2) (Art 112(6)).

15.28. Art 112(2) requires the making of an order prescribing what rules approved or published by the Commission must provide for. In particular, the order may, under Art 112(3), ensure that the rules:

a) are adequate to ensure that an auditor is a fit and proper person;

b) are adequate to prevent a person who is not an auditor or, where an auditor is a firm, who is not an officer, director, partner, member or employee of the firm from being able to exert influence over the way in which an audit of a market traded company is conducted in circumstances in which that influence would be likely to affect the independence or integrity of the audit;

c) are adequate to ensure that audit work is carried out properly and with integrity and that an auditor is not appointed in circumstances in which the auditor has an interest that is likely to conflict with the proper conduct of the audit;

d) cover the technical standards to be applied in audit work and the manner in which those standards are to be applied in practice;

e) are designed to ensure that an auditor maintains an appropriate level of competence;

f) contain provisions to ensure that an auditor who carries out audit work takes any steps required to enable the performance of the work to be monitored;

g) are fair and reasonable and include adequate provision for appeals where they relate to the grant and withdrawal of eligibility for appointment as auditor and the discipline the body exercises;

h) contain provisions designed to ensure an auditor must take reasonable steps to be able to meet claims arising out of audit work; and

i) contain provisions designed to ensure that the Commission or a professional oversight body can conduct investigations in relation to an auditor and, in fact, has the right to take appropriate action.

15.29. The rules of a recognized professional body may not be approved, under Art 112(4), by the Commission unless it has satisfied itself that the body:

a) has adequate arrangements and resources for the effective monitoring and enforcement of compliance with its rules;

b) has effective arrangements for the investigation of complaints against auditors, and against itself in respect of matters arising out of its functions under the rules;

c) promotes and maintain high standards of integrity in the conduct of audit work;

d) will cooperate, by the sharing of information or otherwise, with the Minister, the Commission and any other authority, body or person having responsibility for the qualification, supervision or regulation of auditors, whether in Jersey or elsewhere; and

e) will carry out a quality assurance review of each recognized auditor at least once in any period of 3 years.

15.30. Withdrawal of the approval of the rules of a recognized professional body may be made at any time by the Commission if it is satisfied, under the terms of Art 112(5) that the body:

a) has failed to comply with any obligation placed on it by an order under Art 110(3);

b) has ceased to have or is not using any of the arrangements or resources for the effective monitoring and enforcement of compliance with its rules;

c) has ceased to have or is not using any of the arrangements for the investigation of complaints against auditors, and against itself in respect of matters arising out of its functions under the rules;

d) has not promoted or has not maintained high standards of integrity in the conduct of audit work;

e) has failed to cooperate with any of the bodies mentioned in Art 112(4)(d);

f) has failed to carry out a quality assurance review of each recognized auditor at least once in any period of 3 years; or

g) has failed to give notification or supply information when required to do so under Art 113K (notification of matters to the Commission).

Appointment of Auditors and their Functions

15.31. Under Art 113(1), a company must appoint auditors to examine and report in accordance with the law on the accounts prepared under the law in three cases: where the company is a public company, where the company's articles of association require it or where the general meeting of the company has passed a resolution requiring it. Failure to comply with this requirement renders the company and every officer in default liable to conviction for an offence (Art 113(10)). Where the company is a market traded company, the auditor that is appointed must be a recognised auditor, otherwise any purported audit is of no effect for the purposes of the law (Art 113(2)). Art 101 of the Schedule to the Companies (Standard

Table) Order 1992 reiterates the requirement to appoint auditors subject to the requirements of the law.

15.32. A company that is required to appoint auditors must do so at each annual general meeting with the auditors holding office from the conclusion of that meeting to the conclusion of the next annual general meeting (Art 113(3)). In the case of a recently incorporated company, the directors or, if the directors do not act, the company in general meeting may, at any time before the first annual general meeting, appoint auditors to hold office to the conclusion of that meeting (Art 113(4)).

15.33. However, if a company required to appoint auditors dispenses with the holding of an annual general meeting under Art 87(4), any auditors then in office continue to act and are deemed to be re-appointed for each succeeding financial period until the conclusion of the next annual general meeting or until the company in general meeting resolves that the appointment of the auditors be brought to an end (Art 113(5)). If a company which has dispensed with the holding of an annual general meeting becomes bound to appoint auditors (for example, on its conversion to a public company or if a resolution requires it), the directors must appoint auditors to act until the conclusion of the next annual general meeting (Art 113(6)).

15.34. The directors or the company in general meeting may fill any casual vacancy in the office of auditors and fix their remuneration (Art 113(7)). The company, by resolution in general meeting, may at any time remove an auditor notwithstanding anything in any agreement or contract between the company and the auditor (Art 113(8)). However, if an auditor is removed, the company remains liable for compensation or damages payable to the person in respect of the termination of the person's appointment as auditor (Art 113(9)).

Appointment of a Partnership

15.35. Where a partnership constituted under the law of Jersey or of a jurisdiction in which a partnership is not a legal person, is by virtue of the law appointed as the auditor of a company, the appointment is an appointment of the partnership as such and not of the partners, unless a contrary intention appears (Arts 113G(1)-(2)).

15.36. If the partnership ceases, the appointment is to be treated as extending to any appropriate partnership that succeeds to the practice of the partnership any other appropriate person who succeeds to the practice having previously carried it on in partnership (Art 113G(3)). A partnership or other person is 'appropriate' for these purposes if the partnership or person is an auditor or, as the case may be, a recognized auditor and is not prohibited by an order made under Art 113E(1) from acting as auditor of the company (Art 113G(6)).

15.37. For the purposes of determining succession, a partnership is to be regarded as succeeding to the practice of another partnership only if the members of the successor partnership are substantially the same as those of the former partnership and a partnership or other person is to be regarded as succeeding to the practice of a partnership only if the partnership or person succeeds to the whole or substantially the whole of the business of the former partnership (Art 113G(4)). If the partnership ceases and the appointment is not treated as extending to any partnership or other person, the appointment may be treated as extending to an appropriate partnership or other appropriate person who succeeds to the business of the former partnership or such part of that business that is to be treated as comprising the appointment. Consent to succession and to treatment of the equivalence of the part must be given by the company, whose auditor the partnership is, at a general meeting (Art 113G(5)).

Preparation/Delivery of Report

15.38. Where a company is required to appoint auditors under Art 113, the auditors are required to make a report to the company's members on the accounts they examine (Art 113A(1)). The report must state, whether in the auditors' opinions, the accounts have been properly prepared in accordance with the law and give a true and fair view or are presented fairly in all material respects (Art 113A(2)).

15.39. The report must state the name of the author and be signed and dated (Art 113A(3)). Where the auditor is an individual, the report must be signed by the auditor and, where the auditor is a firm, the report must be signed in his or her name by the individual in the firm who is responsible to it for examining and reporting on the accounts, the signature stating that it is made for and on behalf of the auditor (Art 113A(4)). The fact, however, that an individual signs an audit report does not make the individual liable to any civil liability to which he/she would not otherwise be liable (Art 113A(5)).

Duties and Powers of Auditors

15.40. The requirements of Art 113B apply only to those companies required to appoint auditors (Art 113B(1)).

15.41. Art 113B(2) authorises the auditors to carry out any investigations to enable them to form an opinion as to whether proper accounting records have been kept by the company and proper returns adequate for the audit have been received from branches they do not visit and whether the company's accounts are in agreement with the accounting records and returns. The auditors must state in their report if they are of the opinion that proper accounting records have not been kept or that proper returns adequate for their audit have not been received from branches they do not visit or if the accounts are not in agreement with the accounting records and returns (Art 113B(3)).

15.42. Under Art 113B(4), the auditors have a right of access at all times to the company's records and are entitled to require information and explanations from the company's officers and the secretary as they think necessary for the performance of their duties as auditors. Similarly, auditors are entitled to receive notice of and attend any meeting of members and to be heard on any part of the business of the meeting which concerns the auditors (Art 113B(5)). Similarly, if they fail to obtain all the information and explanations which, to the best of their knowledge and belief, are necessary for the purposes of their audit, they are to state that fact in their report (Art 113B(6)).

15.43. An auditor may resign the office by leaving a notice in writing to that effect at the company's registered office (Art 113B(7)). The notice operates to bring the auditor's term of office to an end on the date on which the notice is deposited or at any later date it may specify (Art 113B(8)). At the same time as the notice, the auditor is required to deposit a statement to the effect that there are no circumstances connected with the auditor ceasing to hold office which the auditor considers should be brought to the notice of the members or creditors of the company or that are such circumstances as specified in the statement (Art 113B(9)). Failure to make the statement renders the outgoing auditor and any officer of the auditor liable to conviction for an offence (Art 113B(12)).

15.44. Where the company receives a statement from the auditor, it is required to send a copy to every member of the company and to any person entitled to receive notice of general meetings within 14 days (Art 113B(10)), in default of which the company and every defaulting officer is guilty of an offence (Art 113B(13)).

15.45. A recognized auditor of a market traded company must maintain the working papers relating to company audits in the English language and, on demand, must make those working papers available to the Commission, to a recognized professional body or to a professional oversight body (Art 113B(11)). Failure to comply with this requirement exposes the auditor and any officer of the auditor to conviction for an offence (Art 113B(14)).

Liability for False Statements to Auditors

15.46. The requirements of Art 113C apply only to those companies required to appoint auditors (Art 113C(1)). In the case of any company required to appoint auditors, Art 113C(2) makes it an offence for an officer or secretary of the company to knowingly or recklessly make to the company's auditors an oral or written statement which conveys or purports to convey any information or explanation which the auditors require, or are entitled to require, as auditors of the company and which is misleading, false or deceptive in any material particular.

Ineligibility to act as Auditor

15.47. Art 113D(1) states that a person who is not a recognized auditor must not accept an appointment to be, or act as, the auditor of a market traded company or attempt to persuade others that he/she is a recognized auditor. Similarly, a person who is not an auditor must not do the same or hold themselves out as the auditor of any other type of company (Art 113D(2)). Breach of these rules exposes the recognised auditor or auditor to liability for an offence (Art 113D(4)).

15.48. An auditor of a company who discovers during the term of office that to their knowledge, that they become ineligible for appointment as an auditor, must vacate office and give written notice complying with Art 113B(7) to the company of their resignation by virtue of no longer being eligible, together with the statement required under Art 113B(9) (Art 113D(3)). Failure to give the requisite notice exposes the recognised auditor or auditor to liability for an offence (Art 113D(4)).

15.49. In proceedings against a person for an offence under Art 113D(4), it is a defence for the person to show that the person did not know and had no reason to believe that the person was, or had become, ineligible for appointment as the auditor of the company (Art 113D(5)).

15.50. In relation to companies that are not market traded companies, the Commission may, subject to an application being made, authorize the individual or firm to carry out an audit of the company for the purposes of the law (Art 113D(6)). An individual or firm knowingly or recklessly providing information in respect of an application that is false or misleading in a material particular will be liable to conviction for an offence (Art 113D(7)). If authorisation is given by the Commission, it may be made subject to the individual or firm complying with such conditions and limitations as the Commission considers appropriate. In particular, in the case of a firm, the condition or limitation may set out who within the firm would be responsible for examining and reporting on the accounts of a company under Art 113 (Art 113D(8)). Any condition or limitation imposed may be amended by the Commission at any time on its own volition or on the application of the individual or firm authorized by the Commission (Art 113D(9)).

15.51. Suspension or revocation of the authorisation of a person or a firm may occur if, in the opinion of the Commission, the individual or firm is no longer competent or is not a fit and proper person to carry out an audit of the company or the individual or firm has breached any condition or limitation imposed under Art 113D(8) (Art 113D(10)). Suspension under this provision may be made for a specified period or until the individual or firm, following an application made to this end, satisfies the Commission that the suspension may be revoked (Art 113D(11)).

15.52. Suspension may also take place where an individual or firm requests the Commission to suspend or revoke their authorisation. The Commission is required to comply with the request and may publish the name of the person, details of the action it took in respect of that person and the reason why it took that action (Art 113D(12)). Suspension on a personal request will be made for a specified period or, if no period is specified, until the individual or firm applies to the Commission for the authorisation to be restored (Art 113D(13)).

15.53. The Commission is required, under Art 113D(15), to serve a notice specifying the action taken by the Commission, setting out the reasons why the Commission took the action and advising the individual or firm of their right of appeal. Notice must be served, under Art 113D(14), on the individual or firm within 7 days of any of the following actions:

a) refusal to authorise an individual or firm under Art 113D(6);

b) making the authorisation subject to conditions and limitations under Art 113D(8);

c) amendment of conditions and limitations under Art 113D(9)(a);

d) refusal to amend a condition or limitation following an application made under Art 113D(9)(b);

e) suspension or revocation of the authorisation under Art 113D(10);

f) refusal to revoke the suspension of the authorisation following an application under Art 113D(11)(b).

15.54. Where notice has been served under Art 113D(15), the individual or firm upon whom the notice was served may appeal to the court against the action taken by the Commission that was specified in the notice on the ground that it was unreasonable for the Commission to take the action in all the circumstances of the case. The appeal must be made within 28 days of the service of the notice or within such longer period as the court may permit. However, unless otherwise ordered, the action taken by the Commission and specified in the notice is not stayed and continues to have effect (Art 113D(16)). The court may make any order it considers appropriate in relation to the appeal (Art 113D(17)).

15.55. Under Art 113D(19), the Commission may publish the name of the individual or firm, details of the action it took in respect of the individual or firm and the reason why it took that action, provided that the period for appealing under Art 113D(16) has expired or the appeal was unsuccessful or withdrawn, where the Commission has performed one of the following actions stipulated in Art 113D(18):

a) making the authorisation of an individual or person subject to conditions and limitations under Art 113D(8);

b) amending conditions and limitations under Art 113D(9);

c) suspending or revoking the authorisation under Art 113D(10); or

d) removing the name of a recognized auditor from the Register of Recognized Auditors under Art 111(9).

Independence Requirement

15.56. Circumstances relating to an actual or possible lack of independence on the part of the auditor may be prescribed by order in which an auditor must not act as the auditor of a company for the purposes of the law (Art 113E).

15.57. An auditor of a company who discovers during the term of office that to their knowledge, that they become prohibited from acting as an auditor by virtue of an order under Art 113E, must resign from office and give written notice complying with Art 113B(7) to the company of their resignation by virtue of no longer being eligible, together with the statement required under Art 113B(9) (Art 113F(1)). Failure to resign or to give the requisite notice exposes the auditor to liability for an offence (Art 113F(2)). In proceedings against an auditor or officer for an offence under Art 113F(2), it is a defence for the auditor or officer to show that they did not know and had no reason to believe that they were, or had become, prohibited from acting as the auditor of the company by virtue of the order that was made (Art 113F(3)).

Compliance and Transparency

15.58. Art 113I(1) provides that rules may be made to require a recognized auditor to keep and make available to the public specified information, to include information on:

a) the auditor’s ownership and governance;

b) the auditor’s internal controls with respect to the quality and independence of the auditor’s audit work;

c) the auditor’s turnover; and

d) the companies for whom the auditor has acted as a recognized auditor.

15.59. Those rules may, under Art 113I(2), impose such obligations on recognized auditors as are thought fit and to also require the information to be made available to the public in a specified manner, in default of which, fines may be imposed (Art 113I(3)).

15.60. Art 113K(1) authorises the Commission to require that a recognized professional body notify the Commission immediately of the occurrence of any events that the Commission may specify in writing, give it specified information in respect of those events as well as give the Commission specified information at such times or in respect of such periods as the Commission may specify in writing.

15.61. The notices and information that are required must be what the Commission may reasonably require for the exercise of the Commission’s functions under the law (Art 113K(2)). The Commission may require the information to be given in a specified form or verified in a specified manner (Art 113K(3)).

Any notice or information required must be given in writing unless the Commission specifies or approves some other manner (Art 113K(4)).

15.62. Art 113L(1) authorises the Commission to require by written notice that a recognized auditor give any information as it may reasonably require for the exercise of its functions under the law. The Commission may require the information to be given in a specified form or verified in a specified manner (Art 113L(2)). Any information required must be given in writing unless the Commission specifies or approves some other manner (Art 113L(3)). Failure by a recognized auditor to comply within a reasonable time with a requirement made by the Commission or, in purported compliance with such a requirement, the knowing or reckless provision of information that is false or misleading in a material particular will expose the recognized auditor and each officer of the auditor in default to conviction for an offence (Art 113L(4)).

Enforcement

Commission

15.63. The Commission's role to enforce compliance is underpinned by the rule that the Commission must ensure that an audit of a market traded company carried out under the law by a recognized auditor is carried out in accordance with the rules mentioned in Art 112(1) that are applicable to the auditor when auditing a market traded company (Art 113M(1)).

15.64. Where the relevant rules applicable are those of a recognized professional body, the Commission or its agent must ensure that the recognized professional body or an approved delegate monitors and enforces compliance with those rules and otherwise carries out its obligations under the law. Where the rules are those published by the Commission, the Commission must monitor and enforce compliance with those rules (Art 113M(2)). For the purposes, the Commission or its agent may check directly that the audit of a market traded company has been carried out in accordance with the rules mentioned in Art 112(1) (Art 113M(3)).

15.65. Where the Commission has published rules under Art 112(1)(b), it may apply to the court to secure the enforcement of its rules. The Commission may seek an order enabling the Commission to enforce disciplinary action it has decided to take against a person who is or was a recognized auditor bound by the rules or an order making a recognized auditor who is bound by the rules subject to such supervision, restraint or conditions when carrying out an audit of a market traded company under the law as may be specified by the order (Art 113O(5)). The court may make the order requested and any ancillary order it considers necessary, appropriate or desirable (Art 113O(6)).

Recognised Professional Body

15.66. To secure the enforcement of rules established by a recognized professional body noted in Art 112(1) (qualification to be a recognised auditor by reason of membership of a recognized professional body), that body may apply to court for an order enabling the body to enforce disciplinary action it has decided to take against a person who is or was a recognized auditor bound by the rules or for an order making a recognized auditor who is bound by the rules subject to such supervision, restraint or conditions when carrying out an audit of a market traded company under the law as may be specified in the order (Art 113O(1)). The court may make the order requested and any ancillary order it considers necessary, appropriate or desirable (Art 113O(2)).

15.67. Where a recognized professional body appears to the Commission or a professional oversight body to have failed to secure the enforcement of its rules, as noted in Art 112(1) or has otherwise failed to comply with any of its obligations under the law, the Commission or the professional oversight body may apply to the court to secure the enforcement of the rules or compliance with any of its obligations (Art 113O(3)). Where an application has been made, the court may order the recognized professional body to take such steps as the court directs to secure the enforcement of the body's rules or compliance with any of its obligations under the law (Art 113O(4)).

Fees and Delegation of Powers and Duties

15.68. Fees may be charged for the Commission's exercise of its powers and carrying out of its duties under Arts 113K, 113L and 113M. Where any of the Commission's powers or duties are exercised or carried out by an agent, fees may be charged to reimburse the Commission for any costs incurred by it by virtue of that arrangement (Art 113M(4)).

15.69. An order may be made, on the recommendation of the Commission, to enable the powers and duties of the Commission under Arts 113K, 113L and 113M to be exercised or carried out by a body designated by the order (Art 113N(1)). The body may be a body corporate established by the order or a body corporate or an unincorporated association that is already in existence either in Jersey or elsewhere (Art 113N(2)).

15.70. An order may not be made transferring powers unless it appears to the Minister that the body is able and willing to exercise the powers or to carry out the duties that would be transferred and the body has arrangements in place relating to the exercise of the powers or to the carrying out of the duties that are such as to be likely to ensure that certain conditions are met (Art 113N(6)). The conditions are that the powers and duties intended to be transferred will be exercised or carried out effectively and, where requirements or other provisions relating to the exercise of the powers or the carrying out of the duties by the designated body are intended to be imposed as appropriate by the Minister under Art 113N(8), that those powers and duties will be exercised or carried out in accordance with any such requirements or provisions (Art 113N(7)). The provisions may include, inter alia, rules permitting the designated body to publish and charge fees for exercising the powers or carrying out the duties delegated to it (Art 113N(9)).

15.71. The order has the effect of transferring to the body it designates all the powers and duties of the Commission under Arts 113K, 113L and 113M with any specified exceptions and reservations (Art 113N(3)). The order may also confer on the body it designates any other supplementary or incidental powers and duties as may appear appropriate (Art 113N(4)).Where an order has been made, during the time the powers and duties of the Commission have been transferred to the designated body, the Commission cannot exercise any transferred powers concurrently with the body and the obligation to carry them out rests with the body and not with the Commission (Art 113N(5)).

Confidentiality and Liability

15.72. An obligation of confidentiality applies to any information (in whatever form) relating to the private affairs of an individual or any particular business and which has been provided to a body or person in connection with the exercise of its functions under the law (Art 113P(1)). The obligation applies to a recognized professional body, the Commission, a professional oversight body and the Registrar (Art 113P(2)). The default rule is that, subject to regulated exceptions, the information may not be disclosed during the lifetime of the individual or so long as the business continues to be carried on without the consent of the individual or the person carrying on the business (Art 113P(3)). Information that is disclosed in contravention of these rules renders a person liable to conviction for an offence unless that person can show that he/she did not know, and had no reason to suspect, that the information had been provided subject to a confidentiality requirement or that he/she took all reasonable steps and exercised all due diligence to avoid the commission of the offence (Art 113P(9)).

15.73. Disclosure may, however, take place to a recognized professional body, the Commission, a professional oversight body, the Registrar, any other authority, body or person having responsibility for the qualification, supervision or regulation of auditors, whether situated in Jersey or elsewhere as well as an organization outside Jersey that carries out any function that is the same as, or similar to, a function that is carried out in Jersey by the Commission, including any officers or agents of the above, to enable them to carry out their functions (Arts 113P(4)-(5)).

15.74. Disclosure may also take place under the terms of Art 113P(6) of information:

a) to assist a recognized professional body, the Commission or a professional oversight body to carry out its duties under the law;

b) to be used to assist an inspector appointed under Part 19 of the law (see Chapter 16 below);

c) to a company and that relates to an audit of the company's accounts;

d) to the public and that relates to the powers and duties of the Commission or a professional oversight body pursuant to Art 113M (compliance rules) and that does not enable an audited company or an auditor to be identified;

e) to be used, actually or potentially, for the purposes of criminal proceedings;

f) that is a summary or collection of information that does not enable any person to whom the information relates to be identified;

g) that may be published under Arts 111(7) (publication of details of a suspended or revoked registration), 111(15) (publication of details in relation to other action), 113D(12) (publication of details of suspended authorisation) or 113D(19) (publication of details in relation to other action).

15.75. Disclosure is also not prohibited where information is or has been available to the public from any other source (Art 113P(7)). However, the authority to disclose under the law does not authorise the making of a disclosure that would contravene the Data Protection (Jersey) Law 2005 (Art 113P(8)).

15.76. An exemption from liability for damages in relation to anything done or omitted in the discharge or purported discharge of functions is conferred by the law on a recognized professional body or a professional oversight body, their officers and employees, a member of their governing bodies or a member of one of their committees (Arts 113J(1)-(2)).

15.77. The functions covered by the exemption from liability are those relating to or arising out of the rules, practices, powers and arrangements of the body, the obligations to promote and maintain high standards of integrity in the conduct of audit work and the obligations imposed on the body by the law (Art 113J(3)). The exemption will not apply where the act or omission is shown to have been in bad faith or if it prevents an award of damages in respect of the act or omission on the ground of a breach of Art 7(1) of the Human Rights (Jersey) Law 2000 (acts of public authorities incompatible with Convention rights) (Art 113J(4)).

16. Company Investigations

Application for Investigation/Power to appoint Inspectors

16.1. Art 128(1) authorises the Minister or the Commission to appoint one or more competent inspectors to investigate the affairs of a company and to report on them as the Minister or the Commission may direct, whether or not the company is in the process of being wound up (Art 128(4)).

16.2. Appointments may be made on the application of the Registrar, the company or a member, officer or creditor of the company (Art 128(2)), subject to the provision of security from any person other than the Registrar for an amount not to exceed £10,000 or any sum that may be prescribed for payment of the costs of the investigation (Art 128(3)). In the case of a market traded company, applicants may include the Minister and the Commission and the rules on security for costs do not apply (Art 113Q(5)) (see Chapter 15 above). Where the Minister or Commission may exercise discretion to open an investigation, the decision of the Minister shall prevail (Art 128(5)).

16.3. Apart from the provision of security, under Art 137(1), the Minister or the Commission must defray the expenses of and incidental to an investigation by inspectors, subject to the possibility of repayments being made by:

a) Any person who is convicted in proceedings on a prosecution instituted as a result of the investigation, where an order is made in the same proceedings for the payment of the expenses.

b) Any person who is ordered to pay the whole or any part of the civil proceedings brought on behalf of a company under Art 136, where an order is made in the same proceedings for the payment of the expenses.

c) A body corporate in whose name proceedings are brought under Art 136, to the amount or value of any sums or property recovered as a result of those proceedings.

d) A body corporate which has been the subject of the investigation except insofar as the Minister or the Commission may otherwise direct.

e) The applicant or applicants for the investigation (other than the Registrar), to the extent (if any) to which the Minister or the Commission may direct.

f) Persons in the first three categories ((a)-(c) above) incurring a liability to repay the Minister or the Commission (subject to satisfying this liability first) will also incur a liability to indemnify persons in the last two categories (bodies corporate subject to investigation and applicant(s)), while persons in the first two categories ((a)-(b) above) will also incur a liability to indemnify a person in the third category (body corporate in whose name proceedings are brought) (Art 137(3)). Any person incurring a liability is prima facie entitled to a contribution from any other person liable under the same provision (Art 137(4)).

16.4. Costs and expenses incurred in connection with proceedings brought under Art 136, including any indemnity to the body corporate in whose name proceedings are brought, are treated as expenses of the investigation giving rise to the proceedings (Art 137(2)). Also to be treated as expenses are any reasonable sums as the Minister or the Commission may determine in respect of general staff costs and overheads (Art 137(6)).

16.5. Any expenses that cannot be recovered from any party liable under this provision will be paid out of moneys provided by the States or the Commission as appropriate (Art 137(5)).

Powers of Inspectors

16.6. Extension of the investigation may take place under Art 129(1), which authorises the inspectors to investigate the affairs of another body corporate which is or at any relevant time has been the company's subsidiary or holding company or a subsidiary of its holding company or a holding company of its subsidiary provided they think it necessary for the purposes of their investigation. Insofar as the results of their investigation of the other company affairs are relevant to the investigation, they have power to investigate and to report on the same. Art 113Q(1) extends, in the case of market traded companies, investigations to the company's compliance with accounting principles and any aspect of its accounts or their auditing, where there appear to be important issues affecting the public interest (see Chapter 15 above).

16.7. Information coming to light as the result of an investigation tending to show that an offence has been committed may be given to the Minister or the Commission, as the case may be, as well as the Attorney General, without it being necessary for an interim report to be made (Art 129(2)).

Production of Documents/Other Evidence/Inspection of Bank Accounts

16.8. For the purposes of the investigation, the inspectors may require, where they consider that a person is or may be in possession of information relevant to the investigation, that person who is subject to a duty under Art 130(1) to do so:

a) To produce and make available to them all records in the person's custody or power in relation to the matter.

b) To attend before them, provided reasonable notice has been given for attendance at a reasonable time.

c) To give the inspectors all assistance in connection with the investigation which the person is reasonably able to give.

16.9. A person may be examined on oath by the inspectors, who are empowered to administer it, for the purposes of the investigation (Art 130(2)). If a person required to answer any question by the inspectors knowingly or recklessly makes a statement which is false, misleading or deceptive in a material particular or withholds any information the omission of which makes the information which is furnished misleading or deceptive in a material particular, that person is liable to conviction for an offence (Art 130(3)).

16.10. Answers to questions put by the inspectors may not be used in evidence against any person in any criminal proceedings, excepting proceedings in which the person is charged with knowingly or recklessly making a false statement in the course of being examined on oath or withholding information under Arts 130(2)-(3) as well as any proceedings for contempt of court under Art 134(2) (Art 130(4)).

16.11. For the purposes of the investigation, the inspectors may also require a director or past director of a company or other body corporate whose affairs they are investigating to produce and make available to them all records in the director's possession or under the director's control relating to any bank account of any description, whether operated alone or jointly with another person and whether in Jersey or elsewhere. This is subject, under Art 131, to the inspectors having reasonable grounds for believing that money in any way connected with an act or omission, or series of acts or omissions, constituting misconduct (whether fraudulent or not) on the part of that director has been paid into or out of that bank account.

16.12. If any person fails to comply with a requirement under Arts 130 (examination on oath) or 131 (production of banking information) or refuses to answer any question put by the inspectors for the purposes of the investigation, under Art 134(1), the inspectors may certify the refusal in writing to the court. The court may enquire into the matter and punish the offender as if that person were guilty of contempt of the court, subject to hearing any witness for or against the offender as well as any statement in defence (Art 134(2)).

Searches and Seizures of Material

16.13. Inspectors may also apply, under Art 132(1), to the Bailiff for a warrant in relation to specified premises for the purpose of an investigation, premises being defined widely to include any place and any vehicle, vessel, aircraft or hovercraft, any offshore installation and any tent or movable structure (Art 132(5)).

16.14. Art 132(2) stipulates that the Bailiff is authorised to issue a warrant authorizing a police officer and any other person named in the warrant to enter the specified premises (using such force as is reasonably necessary) and to search them. This is provided the Bailiff is satisfied that there are reasonable grounds for suspecting that material (whether or not it can be particularised) which is likely to be of substantial value (whether by itself or together with other material) to the investigation is on the premises concerned and that the investigation might be seriously prejudiced unless immediate entry can be secured to the premises (Art 132(3)).

16.15. A person entering premises in execution of a warrant issued by the Bailiff may seize and retain any material, other than items subject to legal professional privilege, that is likely to be of substantial value (whether by itself or together with other material) to the investigation (Art 132(4)).

16.16. Art 133 provides that any person wilfully obstructing a person acting in the execution of a warrant is guilty of an offence.

Inspectors' Reports and Enforcement

16.17. Art 135(1) provides that the inspectors may make interim reports and a final report on conclusion of their investigation to be submitted to the Minister or the Commission as the case may be. The Minister or the Commission may also direct them to do so.

16.18. Art 135(2) permits the Minister or the Commission to forward a copy of any report to the company's registered office and cause it to be printed and published. The Minister or the Commission may also furnish a copy on request and on payment of a fee to:

a) Any member of the company or other body corporate the subject of the report.

b) Any person whose conduct is referred to in the report.

c) The auditors of the company or that body corporate.

d) The applicants for the investigation.

e) A relevant supervisory authority, defined in Art 135(3) to mean an authority discharging supervisory functions corresponding to those of the Commission in respect of bodies corporate in a country or territory outside Jersey.

f) Any person whose financial interests appear to the Minister or the Commission to be affected by the matters dealt with in the report, whether as a creditor of the company or as a body corporate.

16.19. In the case of a market traded company, Art 113Q(2) (see Chapter 15 above) states that the Minister or Commission may also forward a copy of the report to:

(a) any relevant recognised professional body;

(b) a professional oversight body; and

(c) the Registrar.

16.20. Art 136(1) authorises the Minister or the Commission to bring civil proceedings in the public interest in the name and on behalf of a body corporate as a result of any report made or information obtained in connection with an investigation.

Where the Minister or the Commission may exercise a discretion to bring proceedings, the decision of the Minister prevails (Art 136(3)). The Minister or the Commission is also required to indemnify the body corporate against any costs or expenses incurred by it in or in connection with proceedings brought under this provision (Art 136(2)).

16.21. Art 138(1) states that a copy of an inspectors' report is admissible in legal proceedings as evidence of the opinion of the inspectors in relation to a matter contained in the report, provided the copy is certified a true copy by the Minister or the Commission. Any document purporting to be a certificate is admissible in evidence and is deemed to be a certificate unless the contrary is proved (Art 138(2)).

16.22. Under Art 139, disclosure or production of evidence in an investigation is not required from any person who would in a court action be entitled to refuse to disclose or produce on the grounds of legal professional privilege in proceedings in the court except, if the person is a lawyer, the name and address of his or her client. Similarly, information or records relating to the affairs of customers other than the company or other body corporate under investigation is not required to be disclosed by the company's bankers.

16.23. For the purposes of, or as a consequence of, an investigation of a market traded company (see Chapter 15 above), the Commission or the Minister may direct a company to have its accounts re-audited or to restate its accounts in respect of a specified period by a specified date and, subject to a further direction, to have them audited (Art 113Q(3)). Failure to comply with a direction exposes the company and each officer of the company in default to conviction for an offence (Art 113Q(4)).

17. Corporate Reorganisations: Takeovers

Introduction and Definitions

17.1. A "takeover offer" means an offer to acquire all the shares, or all the shares of any class or classes, in a company (other than shares which at the date of the offer are already held by the offeror) (Art 116(1)). The reference to shares already held by the offeror includes a reference to shares which the offeror has contracted to acquire. However, this is not to be construed as including shares which are the subject of a contract binding the holder to accept the offer when it is made entered into by the holder for nothing other than a promise by the offeror to make the offer (Art 116(5)).

17.2. "Shares" means shares (other than relevant treasury shares) that have been allotted on the date of the offer (Art 116(2)). "Relevant treasury shares" means shares which are held by the company as treasury shares on the date of the offer or become shares held by the company as treasury shares after that date but before a specified date (Art 116(2B)).

17.3. "Offeror" means, subject to Art 122, the person making a takeover offer and "company" means the company whose shares are the subject of the offer.

17.4. A takeover offer, under Art 116(2A), may include among the shares to which it relates:

a) All or any shares that are allotted after the date of the offer but before a specified date.

b) All or any relevant treasury shares that cease to be held as treasury shares before a specified date.

c) All or any other relevant treasury shares.

17.5. For the purposes of any offer, a "specified date" means a date specified in or determined in accordance with the terms of the offer.

17.6. Art 116(1) states that the offer is to be on terms which are the same in relation to all the shares to which the offer relates or, where those shares include shares of different classes, in relation to all the shares of each class. The terms will be treated as being the same in relation to all the shares or, as the case may be, all the shares of a class, notwithstanding any variation that has been permitted by Art 116(4) (Art 116(3)).

17.7. A variation under Art 116(4) is permitted where the law of a country or territory outside Jersey either precludes the acceptance of an offer in the form or any of the forms specified or precludes it except after compliance by the offeror with conditions that the offeror may be unable to comply with or which the offeror regards as unduly onerous (e.g. the USA, where cash may be more simply offered than shares, in relation to which stricter controls exist).

Furthermore, the variation must be such that the persons by whom the acceptance of an offer in that form is precluded are able to accept an offer of substantially equivalent value, although it may be made otherwise than in that form.

17.8. Where the terms of an offer make provision for their revision and for acceptances on former terms to be treated as acceptances on revised terms, the revision is not to be regarded as the making of a fresh offer. References to the date of the offer are to be construed, in the case of any revision, as the date when the original offer was made (Art 116(6)).

The Buy-Out Provision and Notice Requirements

17.9. Art 117(1) permits the offeror to give notice, to the holder of any shares to which the offer relates which the offeror has not acquired or contracted to acquire, that he or she desires to acquire those shares, effectively a right to buy out minority shareholders. The notice may be subject to conditions. This is provided that, in cases where the takeover offer does not relate to shares of different classes, the offeror has by virtue of acceptances of the offer acquired or contracted to acquire:

a) Not less than 9/10ths in nominal value of the shares to which the offer relates (in the case of a par value company).

b) Not less than 9/10ths in number of the shares to which the offer relates (in the case of a no par value company).

17.10. Where the takeover offer does relate to shares of different classes, the offeror may make, under Art 117(2), the same offer to members of any class, provided the offeror has by virtue of acceptances of the offer acquired or contracted to acquire:

a) Not less than 9/10ths in nominal value of the shares of any class to which the offer relates (in the case of a par value company).

b) Not less than 9/10ths in number of the shares of any class to which the offer relates (in the case of a no par value company).

17.11. Notice in relation to buying out minority shareholders of the company or any class of shareholders may not be given unless the offeror has acquired or contracted to acquire the shares necessary to satisfy the minimum specified before the end of the period of 4 months beginning with the date of the offer. Furthermore, the notice may not be given after the end of the period of 2 months beginning with the date on which the offeror has acquired or contracted to acquire shares which satisfy that minimum, in theory allowing a maximum of six months for notice to be served (Art 117(3)).

17.12. A copy of any notice in relation to the offer must be sent to the company together with a declaration that the conditions for the giving of the notice are satisfied (Art 117(4)). If the offeror is a body corporate, the declaration is to be signed by a director (Art 117(5)).

17.13. Failure to send the notice or declaration is an offence, as is making a declaration knowing it to be false or without having reasonable grounds for believing it to be true (Art 117(6)). However, it is a defence for a person charged with any offence for failing to send a copy of a notice to prove that she/he took reasonable steps for securing compliance with the notice requirements (Art 117(7)).

17.14. Art 117(8) states that if the offeror acquires or contracts to acquire any of the shares to which the offer relates but otherwise than by virtue of acceptances of the offer during the period within which the offer can be accepted, the offeror shall be treated as having acquired or contracted to acquire those shares by virtue of acceptances of the offer. This is provided their acquisition value (the value of that for which they are acquired or contracted to be acquired) does not exceed the value receivable by an acceptor under the terms of the offer or, where terms are subsequently revised, the acquisition value no longer exceeds the value receivable by an acceptor under the terms of the offer. In any other case, the shares are treated as excluded from those to which the offer relates.

17.15. Subject to any challenge to the court under Art 121, the offeror is entitled and bound to acquire shares on the terms of the offer where notice is given in respect of any shares under Art 117 (Arts 118(1)-(2)).

17.16. Where the terms of the offer are to give the holder of any shares a choice of payment for the holder's shares, Art 118(3) requires the notice to give particulars of the choice and state that the holder of the shares may indicate the holder's choice in writing sent to the address specified in the notice within 6 weeks from the date of the notice and which payment of the choices stipulated in the notice will apply in default of the holder indicating a choice, at which point the terms of the offer are determined.

17.17. The above notice requirements apply irrespective of whether any time limit or other conditions applicable to the choice under the terms of the offer can still be complied with. If the payment chosen by the holder of the shares is not cash and the offeror is no longer able to make that payment or it was to have been made by a third party who is no longer bound or able to make that payment, payment is taken to consist of an equivalent cash sum payable by the offeror (Art 118(4)).

17.18. The offeror must send a copy of the notice to the company and make payment to the company for the shares to which the notice relates by the end of 6 weeks from the date of the notice (Art 118(5)). The copy of the notice must be accompanied by an instrument of transfer executed on behalf of the shareholder by a person appointed by the offeror. On receipt of the instrument, the company will register the offeror as the holder of those shares (Art 118(6)). Where payment is to be made in shares or securities to be allotted by the offeror, this is to be construed as a reference to the allotment of the shares or securities to the company (Art 118(7)).

17.19. All moneys and payments received are to be held by the company on trust for the person entitled to the shares in respect of which the moneys or payment were received (Art 118(8)). Any sums or dividends accruing from moneys or payments received by the company must be paid into a separate bank account bearing interest at an appropriate rate and subject to withdrawal at any appropriate notice (Art 118(9)). If, after reasonable enquiry made at any reasonable intervals, a person entitled to the moneys or payments held on trust cannot be located and 10 years have elapsed since the sum or other payment was received or the company is wound up, the moneys or payments, together with any interest, dividend or other accrued benefit will be paid to the Viscount (Art 118(10)). The expenses of making the enquiry are to be defrayed out of the moneys or property held on trust for the person(s) to whom the enquiry relates (Art 118(11)).

Joint Offers and Offers to Associates

17.20. Joint offers, by 2 or more persons acting together, may be made under Art 122(1). Under Arts 117 (right to buy out) and 119 (right to be bought out), the conditions for the exercise of rights conferred by those Arts may be satisfied by the joint offerors acquiring or contracting to acquire the necessary shares jointly (as respects acquisitions by virtue of acceptances of the offer) and either jointly or separately (in other cases). Furthermore, rights and obligations of the offeror under Arts 117, 118 (effect of notice), 119 and 120 (effect of right to be bought out) are treated as joint rights and joint and several obligations of the joint offerors (Art 122(2)).

17.21. Compliance with notice provisions relating to offers may be satisfied, in the case of notices or documents to be given to or sent by joint offerors, if it is sent to or by any one of them (Art 122(3)). The sole exception is in relation to the declaration required by Art 117(4), where it must be made by all of the joint offerors and, where any one of them is a company, signed by a director of that company.

17.22. References to offeror in Arts 116 (definition of offeror), 118(7) (payments by offeror in shares/securities) and 123 (associates of offeror) are to be construed as references to joint offerors or to any of them (Art 122(4)). The reference in Art 118(6) (notice accompanied by instrument of transfer) to the offeror is to be construed as references to joint offerors or to any one of them as they may determine (Art 122(5)). In Art 121 (applications to court), reference to the offeror is to be construed as one to joint offerors, although for the purposes of Arts 121(3) and (5), any one of joint offerors may make the application concerned (Art 122(7)).

17.23. References in Arts 118(4)(a) and 120(4)(a) to the offeror no longer being able to make the relevant payment are to be construed as references to none of the joint offerors being able to do so (Art 122(6)). The reference to the offeror in Art 121(5)(a) being unable to trace one or more persons holding shares is to be construed as a reference to none of the offerors having been able to do so (Art 122(7)).

17.24. Art 116(1) requires that a takeover offer must extend to all the shares, or all the shares of any class or classes, in a company. This requirement is satisfied, according to Art 123(1), notwithstanding that the offer does not extend to shares which "associates" of the offeror hold or have contracted to acquire. In fact, shares held or contracted for acquisition by "associates" at the time the offer is made or subsequently do not count for the purposes of enumerating the shares to which a takeover offer relates.

17.25. One exception remains in that the shares may count as shares to which the offer relates, even though acquired or to be acquired by "associates", provided either one of the conditions in Arts 117(8)(a) or (b) (acquisitions otherwise than by virtue of acceptances) is satisfied as respects those shares (Art 123(2)).

17.26. In Art 119(1)(b) and (2)(b) (right of minority to be bought out), the reference to shares which the offeror has acquired or contracted to acquire includes a reference to shares which any associate of the offeror has acquired or contracted to acquire (Art 123(3)).

17.27. Associate is defined in Art 123(4) as including:

a) A nominee of the offeror.

b) A holding company, subsidiary or fellow subsidiary of the offeror or a nominee of such a holding company, subsidiary or fellow subsidiary. For these purposes, a company is a fellow subsidiary of another body corporate if both are subsidiaries of the same body corporate but neither is a subsidiary of the other (Art 123(5)).

c) A body corporate in which the offeror is substantially interested. The definition of a substantial interest is satisfied if that body or its directors are accustomed to act in accordance with the offeror's directions or instructions or the offeror is entitled to exercise or control the exercise of one-third or more of the voting power at general meetings of that body (Art 123(6)).

d) The spouse and any minor child or step-child of the offeror (where the offeror is an individual) (Art 123(7)).

The Right to be Bought Out

17.28. If an offer relates to all the shares in a company, the holder of any shares who has not accepted the offer may by a written communication addressed to the offeror, at any time before the end of the period within which the offer can be accepted, require him or her to acquire those shares, effectively allowing a minority shareholder the right to be bought out by the offeror. This is provided, under Art 119(1), the offeror has by virtue of acceptances of the offer acquired or contracted to acquire some (but not all) of the shares to which the offer relates and those shares amount to:

a) Not less than 9/10ths in nominal value of all of the shares in the company (in the case of a par value company).

b) Not less than 9/10ths in number of all of the shares in the company (in the case of a no par value company).

17.29. If an offer relates to shares of any class or classes in a company, the holder of any shares who has not accepted the offer may similarly require the offeror to acquire those shares. This is provided, under Art 119(2), the offeror has by virtue of acceptances of the offer acquired or contracted to acquire some (but not all) of the shares to which the offer relates and those shares (with or without any other shares in the company which he or she has acquired or contracted to acquire) amount to:

a) Not less than 9/10ths in nominal value of all of the shares of that class in the company (in the case of a par value company).

b) Not less than 9/10ths in number of all of the shares of that class in the company (in the case of a no par value company).

17.30. The offeror must give any shareholder who has not accepted the offer notice within one month of the end of the relevant period of the rights that are exercisable by the shareholder in respect of a request to be bought out and, if the notice is sent out before the end of that period, mention that the offer is still open for acceptance (Art 119(3)). The notice may stipulate a period within which those rights are exercisable, provided that it is for not less than 3 months after the end of the period within which the offer can be accepted (Art 119(4)). The notice need not be sent if the offeror has already given the shareholder a notice under Art 117 in respect of the shares in question (Art 119(5)).

17.31. Failure to comply with the notice requirement is an offence, for which the offeror and, in the case of a company, the defaulting officers or those to whose neglect the failure is attributable may be convicted (Art 119(6)). However, it is a defence for an offeror (other than a company) charged with the offence of failing to send the notice to prove that she/he took reasonable steps for securing compliance with the notice requirements (Art 119(7)).

17.32. Subject to any challenge to the court under Art 121, the offeror is entitled and bound to acquire shares on the terms of the offer or such other terms as may be agreed (Arts 120(1)-(2)).

17.33. Where the terms of the offer are to give the holder of any shares a choice of payment for the holder's shares, Art 120(3) requires the holder of the shares to indicate the holder's choice when requiring the offeror to acquire them. The notice required under Art 119(3) will give particulars of the choices and of the rights under the law and may state which payment will apply in default of the holder indicating a choice, at which point the terms of the offer are determined.

17.34. The above notice requirements apply irrespective of whether any time limit or other conditions applicable to the choice under the terms of the offer can still be complied with. If the payment chosen by the holder of the shares is not cash and the offeror is no longer able to make that payment or was to have been made by a third party who is no longer bound or able to make that payment, payment is taken to consist of an equivalent cash sum payable by the offeror at the date the holder of those shares requires the offeror to acquire them (Art 120(4)).

Challenging the Buy Out

17.35. Art 121(1) provides that, where notice is given under Art 117 to any holder of shares, the court may make, on an application made by the shareholder within 6 weeks from the date on which the notice was given, an order that the offeror shall not be entitled or bound to acquire the shares or that terms of acquisition different from those of the offer will apply. Where the holder of shares exercises the rights to be bought out under Art 119, the court may, on an application by either the shareholder or offeror, order that the terms on which the offeror is entitled and bound to acquire the shares be such as the court thinks fit (Art 121(3)).

17.36. An order for costs or expenses may not be made against a shareholder making an application unless the court considers that the application was unnecessary, improper or vexatious or that there was unreasonable delay in making the application or unreasonable conduct on the shareholder's part in conducting the application proceedings (Art 121(4)).

17.37. Where an application to court remains pending longer than the 6 weeks given following notice under Art 118(5), that period is treated as suspended until the application has been disposed of (Art 121(2)).

17.38. Where a takeover offer has not been accepted to the extent necessary to trigger the notice requirements under the buy-out provisions (Arts 117(1)-(2)), the offeror may apply to court for an order authorizing the offeror to give notices under Art 117. The court may only do so if it considers that it is just and equitable to do so having regard to the number of shareholders that have been traced but who have not accepted the offer and if it is satisfied that:

a) The offeror has been unable to trace one or more of the persons holding shares to which the offer relates after any reasonable enquiry.

b) The shares which the offeror has acquired or contracted to acquire by virtue of acceptances of the offer, together with the shares held by the person or persons that cannot be traced amount to not less than the minimum specified in Art 117 (nine-tenths in nominal value or number).

c) The terms offered are fair and reasonable.

Take-Overs: Part 16, Companies (Jersey) Law 1991

Buy-Out Provisions

O	O+4 months	A + 2 months	BON + 6 weeks	P + 10 years
Offer (Arts 116, 117(1)).	Time within which offeror has to acquire or contract to acquire 90% of target shares of company/class (**A**) (Art 117(3)).	Buy-Out Notice to be given (**BON**) (Art 117(3)).	Copy of notice given and payment for shares made to company (P) (Art 118(5)). Challenge to terms of BON to be brought (Art 121(1)).	Obligation for company to retain funds for untraced shareholders, following which remittance to Viscount (Art 118(10)).

Sell-Out Provisions (Notice to be bought out)

O	O+4 months	B + 1 month	SON + no period noted	N + 3 months
Offer (Arts 116, 117(1)).	Time within which offeror has to acquire or contract to acquire 90% of target shares of company/class (**A**) (Art 117(3)). Offeror has in fact acquired 90% of all shares of company/class (**B**) (Art 119(1)-(2)). On B occurring, Sell-Out Notice may be given by shareholder (**SON**) (Art 119(1)-(2)).	Notice to shareholder that sell-out rights available and, if still within period (O+4 months) mention offer is still open (**N**) (Art 119(3)).	Challenge to terms of SON to be brought (Art 121(3)).	Period within which sell-out rights may be exercisable (Art 119(4)).

18. Corporate Reorganisations: Mergers

Introduction and Definitions

18.1. The Companies (Amendment No. 5) (Jersey) Regulations 2011, which were made on 16 February 2011 and came into effect on 23 February 2011, effected wholesale changes to the mergers regime in Jersey in Article 5 of that text in order to provide a framework for cross-border mergers missing from the law as it stood. Transitional provisions in Article 9 of that text mean that the new rules will not apply to mergers initiated prior to the rules coming into force provided that merger approval has been given under old Articles 127B or 127C and the registrar has not proceeded to record the fact of the merging companies ceasing to exist under the law (old Article 127G(3)). Otherwise, the new rules have effect.

18.2. For the purposes of the new rules, Article 127A provides a number of definitions:

(a) 'merged body' means the body resulting from a merger under Article 127C ('merged company' being read accordingly);
(b) 'merger agreement' means an agreement under Article 127D;
(c) 'merging body' means a body that is seeking to merge with another body under Part 18B ('merging company' being read accordingly);
(d) 'new body' means a merged body that is new within the meaning of Article 127C(2) ('new company' being read accordingly);
(e) 'overseas body' means a body incorporated in a jurisdiction outside Jersey;
(f) 'relevant Jersey company' means a company that is not a cell company or a cell and does not have unlimited shares or guarantor members; and
(g) 'survivor body' means a merging body that becomes a merged body as provided for in Article 127C(1)(a) ('survivor company' being read accordingly).

18.3. The takeover rules in Part 18 and the scheme of arrangement rules in Part 18A of the law are not to be construed as preventing the acquisition or takeover of one merging body by another by way of merger (Article 127A(4)). As a preliminary note, Article 127G(1) imposes liability on any person who, in connection with any application under the law, knowingly or recklessly provides to the Commission or to the Registrar any information which is false, misleading or deceptive in a material particular or any document containing any such information.

Eligibility for Merger

18.4. Article 127B(1) states that a relevant Jersey company may merge with one or more bodies that fall within the scope of the text. These include:

(a) another relevant Jersey company (Article 127B(2));
(b) a body that is incorporated (but is not a company) in Jersey under rules that permit it to merge with a company (Article 127B(3)); and
(c) an overseas body that is not prohibited under the law of the jurisdiction where it is incorporated from merging with a Jersey company, provided the Commission is satisfied this is the case and provided also that it does not fall within a class of excluded bodies designated by the Minister as excluded from the benefit of the merger rules (Article 127B(4)). The Minister may not designate bodies that have been designate as recognised entities under Regulation 2 of the Foundations (Mergers) (Jersey) Regulations 2009 (Article 127B(5)). The designation must be made in the form of a notice and published in a way that will bring the notice to those likely to be affected by it (Article 127B(6)).

18.5. Article 127A(3) states that references for the purpose of these rules to a body incorporated (whether in or outside Jersey) are to be construed without reference to the exclusions contained in Article 1(2)(b)-(d) (excluding from the definition of body corporate an association incorporated under the *Loi (1862) sur les teneures en fidéicommis et l'incorporation d'associations*, a Scottish firm; a limited liability partnership registered under the Limited Liability Partnerships (Jersey) Law 1997 and an incorporated limited partnership).

18.6. Article 127C(1) provides that the result of a merger is that the merging bodies continue as a single merged body. This body must be either one of the merging bodies or a new body. In relation to new bodies, these must be one of the following: a relevant Jersey company, a body incorporated in Jersey under rules (other than those applicable to companies) that are the same as those applicable to one of the merging bodies or an overseas body incorporated under the law of the same jurisdiction as one of the merging bodies and which has not been the subject of a designated exclusion. A merged body is defined as new if it is created by the merger from which it results (Article 127C(2)).

The Merger Agreement: Formation and Termination

18.7. Article 127D(1) requires that companies proposing to merge must enter into an agreement in writing with each body that is to be subject to the merger. The merger agreement, under Article 127D(2) must set out the terms and means of effecting the merger and contain the following information:

(a) details of the proposed merged body, including whether it is to be a survivor body or a new body, whether it is to be a company, an overseas body or some other body;

(b) the names and addresses of the persons who are proposed to be its directors or to manage it if it is the type of body that does not have directors;
(c) details of any arrangements necessary to complete the merger and to provide for the management of the merged body;
(d) details of any payment, other than of a type included in paragraph (e) below, that is proposed to be made to a member or director of a merging company or to a person having a similar relationship to a merging body that is not a company;
(e) in relation to any securities of a merging company, whether the securities are to be converted into securities of the merged body and, it being the case, the manner in which that conversion is to be done or, otherwise, what the holders are to receive instead and the manner in which and the time at which they are to receive it (Article 127D(3)).

18.8. Article 127D(4) states that if the merged body is to be a new company, the merger agreement must also set out the proposed memorandum and articles of the merged company and a draft of any other document or information that would be required under the law to be delivered to the registrar as if the merged company were being incorporated under the law (otherwise than through the merger procedure).

18.9. Article 127D(5) provides that if the merged body is to be a survivor company, the merger agreement must state whether any amendments to the memorandum and articles of the company are proposed to take effect on the merger (together with any details of those amendments) and whether, on merger, any person will become or cease to be a director of the company (together with the name and address of any such person).

18.10. Article 127D(6) requires that where shares of a merging company are held by or on behalf of another merging company and the merged body is to be a company, the merger agreement must provide for the cancellation of those shares, without any repayment of capital, when the merger is completed and no provision may be made in the merger agreement for the conversion of those shares into securities of the merged company.

18.11. Article 127D(7) allows for the termination of the merger agreement if the merger agreement itself provides that, at any time before the completion of the merger, the agreement may be terminated. Termination may be effected by any one or more of the merging companies, notwithstanding that it has been approved by the members of all or any of those companies or any of the merging bodies that are not companies. Where termination has occurred, nothing in the merger rules is to be taken as requiring or authorising any further steps to be taken to complete the merger (Article 127D(8)).

The Approval Procedure: Pre-Requisite Resolutions and Certificates

18.12. Article 127E(1) states that the directors of a merging company must pass a resolution to the effect that the merger is in the best interests of the company prior to notice being given of a meeting to approve a merger agreement under Article 127F (ordinary approval procedure) or approval being forthcoming under Article 127FA (simplified approval procedure).

18.13. The resolution must in addition state that the directors voting for the resolution are satisfied on reasonable grounds that they can properly make a solvency statement in respect of the company (Article 127E(3)). A solvency statement is defined for these purposes as a statement that the person making it reasonably believes that the company is, and will remain until the merger is completed, able to discharge its liabilities as they fall due, subject to their having made full inquiry into the affairs of the company (Article 127E(2)).

18.14. Where the directors are unable to make a solvency statement, Article 127E(4) provides that the resolution instead state that the directors voting for it are satisfied on reasonable grounds that there is a reasonable prospect of obtaining the permission of the court for the merger under Article 127FD. The company must also inform the other merging bodies of the inability to make a solvency statement as soon as practicable after the passing of the resolution.

18.15. Following the passing of the resolution and before notice is given for approval of the merger to take place (whether under Article 127F (ordinary approval procedure) or Article 127FA (simplified approval procedure)), Article 127E(5) requires each director who voted in favour of the resolution to sign a certificate containing a solvency statement or a statement that the director is satisfied on reasonable grounds that there is a reasonable prospect of obtaining the permission of the court under Article 127FD, together with the grounds for making the relevant statement.

18.16. Before notice is given, Article 127E(6) requires a further certificate from a prescribed list of persons to the effect that, in their opinion, the merged body will be able to continue to carry on business and discharge its liabilities as they fall due on and immediately after the completion of the merger or, if these events may happen later, that the requirements will be satisfied until 12 months after the signing of the certificate. The grounds for that opinion must also be given, having particular regard to the prospects of the merged body, the proposals in the merger agreement with respect to the management of the merged body’s business or any proposals in the special resolutions passed under Article 127FA (simplified approval procedure) as well as the amount and character of the financial resources that will be available to the merged body. Article 127E(7) lists these persons as including the persons proposed in the merger agreement or in a special resolution passed under Article 127FA (simplified approval procedure) to act as directors of the merged body or to manage the merged body, if it is a body that does not have directors. Otherwise, this additional certificate must be signed by one of the persons mentioned in Article 127E(5).

18.17. 17A.17. Article 127A(2) contains a saving provision stating that nothing in the merger rules is to be read as preventing more than one person from signing the same certificate or preventing more than one certificate from being included within the same document. Article 127G(2) provides that a person commits an offence if he or she signs a certificate without having reasonable grounds for the opinion expressed in the certificate or for the statement made in the certificate.

The Approval Procedure: Approval of the Merger Agreement

Ordinary Approval Procedure

18.18. Article 127F(1) provides that, for approval of the merger agreement to take place, the directors of each merging company are to submit the merger agreement for approval by a special resolution of the company. Where there is more than one class of members, approval must be given by a special resolution of a separate meeting of each class. A merger will be deemed to have been approved when all of the special resolutions have been passed in respect of all of the merging bodies that are companies (Article 127F(3)). In fact, a merger cannot be completed unless it is approved under these provisions or under Article 127FA (simplified approval procedure) (Article 127F(4)).

18.19. Under Article 127F(2), the notice for the meeting to approve the merger agreement must be accompanied by:

(a) a copy or summary of the merger agreement;
(b) copies of the proposed constitutional documents for the merged body, or a summary of the principal provisions of those documents;
(c) where a summary is supplied, information as to how a copy of the original document may be inspected by members;
(d) a copy of the certificates signed under Articles 127E(5)-(6) in respect of the company as well as a copy of any information that may have been provided, by the date of the notice, to the company by any other merging company under Article 127E(4)(b) (inability to make solvency statement);
(e) a statement of the material interests in the merger of the directors of each merging body and of the persons managing any merging body that does not have directors;
(f) any further information that a member would reasonably require to reach an informed decision on the merger; and
(g) sufficient information to alert members to their right to apply to the court under Article 127FB.

Simplified Approval Procedure – Intra-Group Mergers

18.20. Article 127FA provides a simplified form of approval for mergers involving subsidiaries. Under the law, a holding company merger or an inter-subsidiary merger may be approved by a special resolution of each merging company without approval of a merger agreement (Article 127FA(1)). A merger is only approved under this provision when all of the merging companies have passed the requisite special resolutions (Article 127FA(6)). The general rules on mergers apply here, to the extent that they apply to a merger between companies of which one is a survivor, with the exception of Articles 127B (eligibility of bodies to merge), Article 127D (merger agreement) and Article 127F (ordinary approval procedure) (Article 127FA(7)). In fact, the simplified procedure is wider in that it applies to any company (whether or not having unlimited shares or guarantor members) as long as it is not a cell or a cell company (Article 127FA (8)).

18.21. A holding company merger is defined as a merger in which the merging bodies are a holding company and one or more other companies that are its wholly-owned subsidiaries with the holding company being the merged body (thus continuing as a survivor company) (Article 127FA (2)). In a holding company merger, under Article 127FA (3), special resolutions in relation to the merging subsidiary/subsidiaries must provide that its/their shares are to be cancelled without any repayment of capital, while the special resolution of the holding company must:

(a) provide that the capital accounts of each merging subsidiary are to be added to the capital accounts of the holding company;
(b) provide that no securities are to be issued and no assets distributed by it in connection with the merger (whether before, on or after the merger);
(c) specify any changes to its memorandum and articles that are to take effect on the merger; and
(d) state the names and addresses of the persons who are proposed to be the directors after the merger.

18.22. An inter-subsidiary merger is defined in Article 127FA (4) as a merger in which the merging bodies are all companies that are wholly-owned subsidiaries of the same holding body (whether that holding body is incorporated in Jersey or elsewhere) and the merged body is to be one of the merging companies, continuing as a survivor company. In the case of an inter-subsidiary merger, under Article 127FA (5), each special resolution of a merging company, other than the survivor company, must provide that its shares are to be cancelled without any repayment of capital and its capital accounts are to be added to the capital accounts of the survivor company. The special resolution of the survivor company must:

(a) provide that the capital accounts of each other merging company are to be added to the capital accounts of the survivor company;

(b) specify any changes to the memorandum and articles of the survivor company that are to take effect on the merger; and
(c) state the names and addresses of the persons who are proposed to be the directors of the survivor company after the merger.

Objections by Members

18.23. Article 127FB (1) confers a right to object to the merger by application to court for an order under Article 143 (unfair prejudice remedy) on the ground that the merger would unfairly prejudice the interests of the member. Applications cannot be made more than 28 days after the merger is deemed to have been approved, whether under the ordinary or simplified approvals procedure and, in any event, by a member who voted in favour of the merger under either of those procedures (Article 127FB (2)).

Notice to Creditors

18.24. Article 127FC(1) states that each merging company is to send written notice to each of its creditors known to the directors to have a claim against the company exceeding £5,000. The directors are required to make reasonable enquiries to that effect to ascertain the identity of creditors. Notice must be sent no later than 28 days after the merger is deemed to have been approved, whether under the ordinary or simplified approvals procedure. The threshold sum may be varied by order of the Minister (Article 127FC(7)). The notice must be published once in a newspaper circulating in Jersey or in any other manner approved by the Registrar and published by the Commission (Article 127FC(5)). Publication must occur no later than 28 days after the merger is deemed to have been approved, whether under the ordinary or simplified approval procedure, or as soon as practicable after the company sends the last of any notices to creditors covered by these rules, whichever is the sooner (Article 127FC(6)).

18.25. The notice is required to state that the company intends to merge, in accordance with the law, with one or more bodies specified in the notice, and that the merger agreement, or the company's special resolution passed under the simplified approval procedure, is available to creditors from the company on request and free of charge (Article 127FC(2)). Where an application to court under Article 127FD is forthcoming, under Article 127FC(3), the notice must also:

(a) state that a merging company has applied or will apply for the permission of the court under that provision;
(b) state that any creditor of any of the merging bodies may request the company making the application to send a copy of the application to the creditor; and
(c) set out information as to how a creditor may contact the company making the application or a person representing it in the application and the time when the application has

been or is proposed to be made for the purposes of determining when the court is likely to hear it.

18.26. Where no application to the court under Article 127FD is required, the notice must in addition state that any creditor of the company may object to the merger under Article 127FE(2)(a) or require the company to notify the creditor if any other creditor of the company applies to the court under Article 127FE(2)(b).

No Solvency Statement Forthcoming - Application to Court by Company

18.27. Under Article 127FD(1), where a merger certificate under Article 127E(5) does not contain a solvency statement for the purpose of that provision, the company must apply to court for an Act of the court permitting the merger to take place on the ground that the merger would not be unfairly prejudicial to the interests of any creditor of any of the merging bodies. The merger is not complete unless this is obtained (Article 127FD(2)).

18.28. A merging company to which the certificate relates or all such companies if there are more than one must (jointly in the case of plurality of companies) must apply to court as soon as practicable after the merger is approved, whether under the ordinary or simplified approval procedure (Article 127FD(3)). In addition, a copy of the application must be sent to creditors known to the directors to have a claim against the company exceeding £5,000. The directors are required to make reasonable enquiries to that effect to ascertain the identity of creditors. Notice must also be sent to any other creditor of any of the merging bodies who requests a copy from the company concerned as well as the Registrar. The court may not hear the application for at least 28 days after it is made to the court (Article 127FD(4)).

Solvency Statements Forthcoming - Application to Court by Creditor

18.29. Where solvency statements in respect of all merging bodies have been made, Article 127FE(1) permits an objection to be raised by a creditor. Any such creditor of a merging company who objects to the merger may give notice of the creditor's objection to the company within 28 days of the date of the publication of the notice to creditors under Article 127FC(5). The creditor may also if the creditor's claim against the company has not been discharged, apply to the court for an order restraining the merger or modifying the merger agreement, this to be accomplished within 28 days of the date of the notice of objection (Article 127FE(2)).

18.30. Where a creditor makes an application to court, under Article 127FE(3), the company must send a copy of it within a reasonable time, after it has received a copy of the application, to the following:

(a) a creditor to whom a notice was sent under Article 127FC(1);

(b) a creditor who has required notification under Article 127FC(3)(b);
(c) a creditor who has given notice of objection under Article 127FE(1)(a); or
(d) a creditor to whom the court orders a copy to be sent.

18.31. Where on an application made to court, the court is satisfied that the merger would unfairly prejudice the interests of the applicant, or of any other creditor of the company, the court may make any order it thinks fit in relation to the merger, including, but not limited to, an order restraining the merger or modifying the merger agreement in any manner specified in the order (Article 127FE(4)). Where a merger agreement does not already contain a termination clause under Article 127D(7), the court may not make any order unless it inserts such a provision in the agreement and the court is satisfied that each merging body will have an adequate opportunity to reconsider whether to proceed with the merger following the modification (Article 127FE(5)-(6)). References to a merger agreement are to be read as references to the special resolutions passed under Article 127FA in the case of the simplified approval procedure being used.

Commission Consents to Mergers

Ordinary Application and Information Procedure

18.32. For mergers involving bodies other than companies, Article 127FF requires the consent of the Commission to be sought. Where any of the merging bodies is not a company, they must apply jointly to the Commission for consent to be forthcoming and the merger may not be completed unless the Commission gives consent and any conditions attached to the consent have been complied with (Article 127FF(1)).

18.33. The consent application may only be made once the date of the last publication of a notice to creditors under Article 127FC(5) has passed (Article 127FF(2)). Under Article 127FF(3), the application must be accompanied by the following information:

(a) a copy of the merger agreement and the special resolutions passed under Article 127F (ordinary approval procedure);
(b) in respect of each merging company, a copy of the directors' resolution under Article 127E(1) (merger in best interests of company), together with a list identifying the directors who voted in favour of that resolution (if that information is not already contained in the resolution);
(c) the certificates signed under Article 127E(5)-(6) (solvency statement/application to court; future prospects statement);
(d) in respect of each merging company, a copy of the notice to creditors under Article 127FC (with the date of its publication under Article 127FC(5)); and
(e) information, as at the time of the application under this provision, as to any application made by a member to the court under Article 127FB (objection by member) or, if no

such application has been made to the court, the date on which the time for doing so has elapsed or will elapse.

18.34. Where an application to court by the company is forthcoming under Article 127FD, the consent application must be accompanied by information, as at the time of the consent application on the application made, or to be made, to the court and the applicants must keep the Commission informed of the progress of the court application as well as provide, when it is available, a copy of the Act of the court permitting the merger (Article 127FF(4)).

18.35. Where solvency statements have been made and no court application is forthcoming, the consent application must also be accompanied by information, as at the time of the consent application, as to any notice of objection given by a creditor under Article 127FE(2)(a) or, if no such notice has been given, the date on which the time for doing so has elapsed or will elapse. The consent application must further include evidence satisfactory to the Commission that the merger would not be unfairly prejudicial to the interests of any creditor of any of the merging bodies (Article 127FF(5)).

18.36. General requirements as to documents, information or evidence to be provided are contained in the rules. Under these, authentication may be required in any manner published by the Commission or, where no manner of authentication in relation to that document, information or evidence has been specified, in any manner appearing reasonable to the Commission (Article 127FF(14)). Documents, information or evidence not in either English or French must be accompanied by a translation into English or French, which is certified to be a correct translation in the form approved by the Commission (Article 127FF(15)).

Supplementary Information – Merger Type Dependent

18.37. Supplementary information is required depending on the components of the merger. Under Article 127FF(6), if the merged body is to be a company, the consent application must also be accompanied by the consents of its proposed directors to act as such and a copy of its proposed memorandum and articles, unless it is to be a survivor company without any amendment to its memorandum or articles. In this case, the Commission will inform the Registrar of the name proposed in the merger agreement for the merged company. The Registrar will subsequently inform the Commission whether that name is in his or her opinion in any way misleading or otherwise undesirable.

18.38. Where one or more of the merging bodies is an overseas body, the consent application is accompanied by evidence satisfactory to the Commission, in respect of each overseas body, that the laws of the jurisdiction in which the overseas body is incorporated do not prohibit either or both of the proposed merger or the incorporation, as the result of the merger, of the merged body as a new body in that jurisdiction.

Where authorisation is necessary for the application or for the merger under the laws applicable to or the constitution of the overseas body, evidence that the authorisation has been given must also be provided. Furthermore, if the overseas body is not to be a survivor body, evidence must also be provided that the overseas body will, after completion of the merger, cease to be a body incorporated under the laws of the jurisdiction in which it is presently incorporated (Article 127FF(7)).

18.39. Where the merged body is to be an overseas body, the consent application must be accompanied by evidence satisfactory to the Commission that the laws of the jurisdiction in which the merged body is to be incorporated provide that, upon the merger:

(a) the property and rights to which the merging bodies were entitled immediately before the merger will become the property and rights of the merged body;
(b) the merged body will become subject to any criminal and civil liabilities, and any contracts, debts and other obligations, to which the merging bodies were subject immediately before merger; and
(c) any actions and other legal proceedings that, immediately before the merger, were pending by or against any of the merging bodies may be continued by or against the merged body (Article 127FF(8)).

Continuing Obligation to Provide Information

18.40. Unless no objection to the merger has been made or the time for making any objection has elapsed, there is a continuing obligation to provide information in relation to objections, here defined to mean a member's application to court under Article 127FB in respect of any merging company (objections by members) and where a creditor of any merging company has given notice of objection under Article 127FE(2)(a) (Article 127FF(9)-(10)).

18.41. Applicants in a consent application must notify the Commission of any objection of which they become aware after the application, notify the Commission of the result once any objection, whenever made, has been disposed of, and provide to the Commission any further information or document reasonably required by the Commission in connection with any objection (Article 127FF(11)). Until compliance with these requirements is made, the Commission must not make any decision on the application other than to refuse consent on grounds unconnected to an objection. It may also take any other action short of making a decision or take no further action (Article 127FF(12)). Where any further information or document reasonably required by the Commission is not provided within a reasonable time, the Commission may give the applicants a warning notice stating that the application will be refused unless the document or information is provided within a period specified in the notice. This period may not be less than 14 days (Article 127FF(13)).

Fees, Expenses and Security

18.42. Article 127FG(1) applies the rules on Registrar's fees and expenses in Article 201 to the Commission's function of considering consent applications. Where a consent application has been received, the Commission may estimate the likely amount of its expenses in dealing with the application (Article 127FG(2)). Where the estimate exceeds any fee chargeable under Article 201, the Commission may require the applicants to give it security to its satisfaction for any excess (Article 127FG(3)). If during the course of examining the application, the Commission subsequently forms the view that its expenses will be of a higher amount, it may require the applicants to give it security to its satisfaction for any difference (Article 127FG(4)). If this security is not forthcoming, the Commission need take no further action in respect of the application until the security has been given (Article 127FG(5)).

18.43. Until payment of the fees chargeable under Article 201 or any security that may be required under Article 127FG(3)-(4) within a reasonable time from the making of the application or the imposition of the requirement for security, the Commission may give the applicants a warning notice stating that the application will be refused unless the fee is paid, or the security given, within a period specified in the notice. This period may not be less than 14 days (Article 127FG(6)).

18.44. Where the Commission has required security to be given, the Commission shall ascertain the actual amount of its expenses on determining the application. If the actual amount exceeds any fee payable under Article 201, the Commission may require the applicants to pay the excess by serving them notice in writing (Article 127FG(7)). Any excess the subject of notification is treated as a debt jointly and severally due and payable by the applicants to the Commission (Article 127FG(8)). If the excess is not paid by the applicants on demand, the Commission may recover that excess by realising any security given. This is without prejudice to any other mode of recovery available to the Commission (Article 127FG(9)).

Further Information

18.45. Article 127FH authorises the Commission to request further information to be supplied. Following receipt of a consent application, the Commission may by notice require the applicants to supply to the Commission any other document or information as the Commission may reasonably require to determine whether to accept the application (Article 127FH(1)). Special mention is made of the facility to require documents and information to include any reasonably required to assess the solvency, and interests of any creditors, of any merging body that is not a company (Article 127FH(2)). Documents or information must be authenticated in any manner reasonably required by the Commission (Article 127FH(3)).

18.46. Where notice for the provision of further information or documents has been served, the Commission need take no further action in respect of the application until the document or information has been supplied and it may give the applicants a warning notice stating that the application will be refused unless the document or information is supplied within a period specified in the notice (of not less than 14 days), where the document or information is not supplied within a reasonable time after the notice is issued (Article 127FH(4)).

Decisions and Appeals

18.47. In relation to a consent application, after consideration is given to the application, the Commission may give its consent with or without conditions or refuse its consent (Article 127FI(1)). As part of the decision process, Article 127FI(2) requires the Commission to consider all the relevant circumstances and to have particular regard to the interests of creditors of the merging bodies. In addition, it must have regard to the matters specified under Article 7 (Guiding Principles) of the Financial Services Commission (Jersey) Law 1998, which are:

(a) the reduction of the risk to the public of financial loss due to dishonesty, incompetence or malpractice by or the financial unsoundness of persons carrying on the business of financial services in or from within Jersey;
(b) the protection and enhancement of the reputation and integrity of Jersey in commercial and financial matters;
(c) the best economic interests of Jersey; and
(d) the need to counter financial crime both in Jersey and elsewhere.

18.48. Article 127FI(3) stipulates that the Commission may refuse its consent, or impose conditions on its consent, on any grounds. These grounds may include:

(a) the view taken that the merger would unfairly prejudice the interests of a creditor of a merging body;
(b) the opinion that the merger would be undesirable with regard to any matter mentioned in Article 127FI(2);
(c) the fact that the applicants have not complied with a warning notice under Article 127FF(13) (provision of document/information within a reasonable time), Article 127FG(6) (paying fees/giving security) or Article 127FH(4)(b) (supply of further document/information) within the period specified in that notice;
(d) the failure to meet any other requirement under the law in respect of the merger.

18.49. Where the merged body is to be an overseas body, the Commission must impose on any consent a condition that the consent is subject to the merging bodies complying with Article 127FK(2) (pre-registration steps) and the merged body complying with Article 127FK(3) (pre-registration notices/information), unless it is satisfied that it would be preferable in the circumstances not to do so (Article 127FI(4)).

18.50. Where the merged body is to be a new company, a further ground for refusal of consent by the Commission may include those grounds included in Part 2 of the law, i.e. any ground on which the incorporation or registration of that company could be prevented under the law, whether by the registrar, the Commission or the court (Article 127FI(5)).

18.51. When the application has been determined, the Commission is required under Article 127FI(6) to inform the applicants in writing of its decision, the terms of any condition (if consent is given subject to any condition) and the reasons for that refusal or condition (if consent is refused or given subject to any condition). The decision must also refer to the right of appeal, under which the applicant(s) may, within one month after being informed of the decision, appeal to the court on the ground that the decision was unreasonable having regard to all the circumstances of the case (Article 127FI(7)). On hearing any appeal that may be brought, the court may confirm, reverse or vary the decision of the Commission and may make such order as to the costs of the appeal as it thinks fit (Article 127FI(8)).

Registration Requirements – Pre-Registration Steps

Option 1 – All Merging Bodies are Companies

18.52. Where all the merging bodies in a merger are companies, they must apply jointly to the Registrar to complete the merger using any published form and manner (Article 127FJ(1)-(2)). Under Article 127FJ(3), the application may not be made until after the last of the following dates (where applicable) has passed:

(a) if any application was made to the court under Article 127FB (objections by members), the last date on which such an application is disposed of otherwise than by an order restraining the merger;
(b) if Article 127FD (no solvency statement/court approval required) applies to the merger, the date of the Act of court permitting the merger;
(c) where solvency statements are made:
   (i) 28 days after the last date on which a notice was published under Article 127FC(5), if by then no creditor has given notice of objection under Article 127FE(2)(a);
   (ii) 28 days after the last date on which the last notice of objection by a creditor was given under Article 127FE(2)(a), if by then no creditor has applied to the court under Article 127FE(2)(b); or
   (iii) if any application was made to the court under Article 127FE(2)(b), the last date on which such an application is disposed of otherwise than by an order restraining the merger.

18.53. Article 127FJ(4) requires the application to be accompanied by:

(a) a copy of the merger agreement, unless the merger was approved under Article 127FA (simplified approval procedure);
(b) a copy of its memorandum and articles (if the merged company is to be a new company);
(c) alternatively, any amendment to its memorandum or articles provided for under Article 127D(5)(a) (merger agreement terms) or 127FA(3)(b)(iii) (special resolution of holding company) (if the merged company is to be a survivor company);
(d) a copy, in respect of each merging company, of the resolution passed under Article 127E(1) (merger in best interests of company), together with a list identifying the directors who voted in favour of that resolution (if that information is not contained in the resolution) and the certificates signed under Article 127E(5)-(6) (solvency statement/application to court; future prospects statement);
(e) a further certificate, signed by each director who signed a certificate under Article 127E(5), stating that the director, and the merging company of which he or she is a director, have complied with the requirements of the law in respect of the merger and that in the director's opinion the merger will not unfairly prejudice any interests of any creditor of that merging company (where Article 127FD on company applications to court does not apply to the merger) (NB. Article 127G(2) provides that a person commits an offence if he or she signs a certificate without having reasonable grounds for the opinion expressed in the certificate or for the statement made in the certificate);
(f) a copy of any Act of the court under Article 143 (unfair prejudice remedy) on an application under Article 127FB (objections by members), Article 127FD (no solvency statement/company application to court) or Article 127FE (solvency statements/objection by creditor); and
(g) any other document or information required by the Registrar to establish that the requirements in relation to the passing of time have been met.

18.54. The Registrar may proceed to registration of the merger notices in accordance with Article 127FM only if satisfied that the application complies with the requirements as to the published form and permissible time as well as the fact that the documents accompanying the application comply with the law and the provisions it mentions. Furthermore, where the merger agreement provides for the merged company to be a new company, the Registrar may only proceed to registration if he or she would have registered the memorandum and articles of the company under Article 8 if it had been incorporated otherwise than by merger (Article 127FJ(5)).

Option 2 – Merged Body not a Company

18.55. Article 127FK(1) states that special rules will apply where the proposed merged body is not a company, the Commission has given its consent to the merger under Article 127FI and any conditions attached to the consent have been met to the satisfaction of the Commission (with the exception of the pre-registration notices/information requirements referred to in Article 127FI(4)).

18.56. 17A.56. Under Article 127FK(2), the merging bodies are to take whatever steps are necessary to complete the merger in accordance with the merger agreement under the laws governing the merged body and those merging bodies that are not companies. As soon as is reasonably practical after the completion of the merger, the merged body must inform the Commission that it has been completed (including the date of completion), provide any document or information that the Commission may reasonably require to establish the fact and date of the completion and authenticate any such document or information in any manner that the Commission may reasonably require (Article 127FK(3)).

18.57. 17A.57. Once the Commission is satisfied that the merger has been completed, it will provide the registrar with copies of the merger agreement, the certificates signed under Article 127E(5)-(6) (solvency statement/application to court; future prospects statement), any Act of court provided to the Commission under Article 127FF (consent application) or Article 127FH (further information) and the documents provided to the Commission to prove completion. The Commission will then instruct the registrar to register the merger (Article 127FK(4)). The Registrar will register the merger notices in accordance with Article 127FM as soon as practicable after receipt of the documents and instruction from the Commission (Article 127FK(5)).

Option 3 – All Other Cases

18.58. Article 127FL applies to all other cases, including where:

(a) one or more of the merging bodies in a merger is not a company;
(b) the merged body provided for in the merger agreement is to be a company;
(c) the Commission has given its consent to the merger under Article 127FI; and
(d) if any conditions were attached to that consent, those conditions have been met to the satisfaction of the Commission.

18.59. In these cases, under Article 127FL(2), the Commission must provide the registrar with copies of the merger agreement, the certificates signed under Article 127E(5)-(6) (solvency statement/application to court; future prospects statement), the memorandum and articles of the merged company, if they were provided to the Commission under Article 127FF(6)(a)(ii) (consent application), and any Act of court provided to the Commission under Article 127FF (consent application) or Article 127FH (further information). The Commission will then instruct the registrar to register the merger. The Registrar will register the merger notices in accordance with Article 127FM as soon as practicable after receipt of the documents and instruction from the Commission (Article 127FL(3)).

Registration of Merger Notices

18.60. Article 127FM(1) sets out the procedure for registration of merger notices following one of the events outlined in Options 1-3 above (Articles 127FJ, 127FK or 127FL). For these purposes, the completion date of a merger is deemed to be the date notified under Article 127FK(3) (if the merged body is not a company) or the date the last entry on the register is made under this provision in relation to the merger (if the merged body is a company) (Article 127FM(2)).

18.61. The notice to be entered by the Registrar in the register, in respect of each merging company that is not a survivor body, states that the company has ceased to be incorporated as a separate company because it has merged with a body or bodies specified in the notice, so that they have together continued as a merged body and specifies the name of the merged body. In relation to the merged body, it also refers to the enactment under which it is incorporated in Jersey or the jurisdiction outside Jersey in which it is incorporated (Article 127FM(3)).

18.62. Where the merged body is a survivor company, the notice to be entered by the Registrar will state that the company has merged with a body or bodies specified in the notice, so that they have together continued as the merged survivor company, and refer to any change in the company's memorandum and articles that takes effect on the merger (Article 127FM(4)).

18.63. Where the merged body is a new company, the Registrar will register the memorandum and articles of the new company under Article 8, and issue a certificate of its incorporation under Article 9 as if the registrar had received an application for the creation of the company under the law with the memorandum and articles provided for in the merger agreement. This is provided that the Registrar would have registered the company under the law if it had been incorporated otherwise than as the result of a merger. The Registrar will also enter a notice that states that the company is the result of a completed merger between the former bodies specified in the notice, which have together continued as the new company (Article 127FM(5)).

18.64. For the purposes of registration of merger notices, all entries required to be inserted in the register must include a note specifying the completion date of the merger to which it relates and may, in addition, include a note of any further information that the Registrar considers useful in relation to the merger (Article 127FM(6)). Where a notice relates to an overseas body, the Registrar must also send a copy of the notice to the appropriate official or public body in the jurisdiction in which that body is or was incorporated (Article 127FM(7)). The notice must be sent immediately and by electronic means or some other means of instantaneous transmission. If no such means are practicable, the Registrar will use some means that is believed likely to be acceptable to that official or public body (Article 127FM(8)).

18.65. Article 127FN(3) stipulates that entries made on the register under Article 127FM are conclusive evidence of the following matters:

(a) that on the completion date specified in the entry the merging bodies merged and continued as the merged body; and
(b) that the requirements of the law have been complied with in respect of the merger of the merging bodies as well as all matters precedent to and incidental to the merger.

Completion of Merger - Effects

18.66. Article 127FN provides for the effects of the completion of a merger. On the completion date of the merger, all merging bodies are merged and continue as one merged body as provided in the merger agreement or in the special resolutions passed under Article 127FA (simplified approval procedure). Furthermore, any merging company that is not a survivor company ceases to be incorporated as a separate company and any merging body falling within Article 127B(3) (Jersey entity not a company) that is not a survivor body ceases to be incorporated as a separate body (Article 127FN(1)).

18.67. A merger in which the merged body is a company or a body falling within Article 127B(3) (Jersey entity not a company) entails, on its completion, the following things:

(a) all property and rights to which each merging body was entitled immediately before the merger was completed become the property and rights of the merged body;
(b) the merged body becomes subject to all criminal and civil liabilities, and all contracts, debts and other obligations, to which each of the merging bodies was subject immediately before the merger was completed; and
(c) all actions and other legal proceedings which, immediately before the merger was completed, were pending by or against any of the merging bodies may be continued by or against the merged body.

18.68. Article 127FN(4) provides that the operation of this provision is not to be regarded as a breach of contract or confidence or otherwise as a civil wrong, nor is it to be seen as a breach of any contractual provision prohibiting, restricting or regulating the assignment or transfer of rights or liabilities. Furthermore, it is not to be treated as giving rise to any remedy by a party to a contract or other instrument, as an event of default under any contract or other instrument or as causing or permitting the termination of any contract or other instrument, or of any obligation or relationship.

Mergers: Part 18B, Companies (Jersey) Law 1991, as amended by the Companies (Amendment No. 5) (Jersey) Regulations 2011

Merger Proposal	**Directors' Resolutions and Certificates**	**Notice of Meetings**	**Approval of Merger Agreement**	**AMA+28 Days**	**Notice+28 Days**	**Objection+28 Days**	**Registration (if JFSC Consent not required)**
Merger Proposal made with terms of the merger to be set out in a merger agreement (Art 127D).	Directors to pass resolution stating merger in company's best interests and that either company solvent or company has reasonable prospect of obtaining court permission (Art 127E)	Shareholder meetings summoned to consider proposal (SR notice period of 21 clear days in Art 34, Standard Table or 14 days or less in Art 90(1)-(2)) (Art 127F(1)).	Approval of merger agreement by relevant companies when last special resolution passed (Art 127F(3)).	Challenge to terms of merger proposal to be brought by shareholders (Art 127FB). Written notice to creditors of approval of merger proposal and publication of notice in newspaper/other format (Art 127FC).	Objection by creditor to the merger to be notified in writing to company (Art 127FE(2))	Application by creditor to court to restrain/modify the merger (Art 127FE(2))	After all foregoing steps complete (Art 127FJ)
		Court Approval (for non-solvent company)			**JFSC Approval (Mergers of Bodies other than Companies)**		**Registration (if JFSC Consent required)**
		Application may not be heard before expiry of 28 days from date of application (Art 127FD(4))			Application cannot be made until after notice/publication under Art 127FC (Art 127FF(2))		As soon as practicable after JFSC instruction (Arts 127FK-FL)

19. Corporate Reconstructions and Winding Up

Schemes of Arrangements and Compromises

First Phase: First Court Order

19.1. The advantages of schemes of arrangement are that they are generally flexible and open to a number of different possible outcomes. They also avoid the formality of insolvency procedures and also their outcome, which can only be the dissolution of the company. The disadvantages are, however, that schemes of arrangement are really restricted to solvent companies, although they are also available in Jersey in the context of a winding up. They require a very elaborate procedure demanding the close attention of directors and extensive (and expensive) documentation drafted by legal advisors. One of the difficulties with schemes is the necessity to define the classes of persons who may be affected and, where there are differences between them the need to summon them separately. There may also be delays in summoning meetings and between the first and second court orders required as part of the process.

In *Representation of China Real Estate Opportunities* [2010] JRC 114 and 115, the scheme would affect a class who had no voting rights. The applicant proposed that the shareholders affected should simply be sent a copy of the scheme for information as they could not in any event vote on the proposals. Held: the court did not regard a class meeting of the affected shareholders as necessary. However, it did require the information to be made available to the shareholders concerned, to include mention of their right to be heard when the court convened to hear the scheme post-approval.

19.2. Art 125(1) sets out the provisions entitling a court to order a meeting of the creditors (or class of creditors) or of the members of the company (or class of members) in any manner it may direct in order to consider a compromise or arrangement proposed between a company and its creditors or members. The application is usually made by the company or by one of its creditors or members, although, where the company is being wound up, the liquidator may also act. Schemes may be member-only, creditor-only or involve both members and creditors.

19.3. *In re Telewest Finance (Jersey) Limited* [2004] JRC 109: the court does not consider the merits or fairness of the scheme in the first phase: approving the calling of the relevant meetings as this will be done at the hearing to sanction the scheme of arrangement.

Re Vallar [2011] JRC 051: the court applies the principles set out in the Chancery Court's Practice Statement [2002] 3 All ER

96, which state 5 things: (i) the applicant for a scheme should bring to the attention at the earliest possible time anything affecting the constitution or conduct of creditors' meetings; (ii) the court should consider the composition and number of meetings; (iii) the court should consider giving directions for the resolution of any creditor issues brought to its attention; (iv) unless there is a good reason for not doing so, the applicant should take all reasonable steps to notify any person affected by the scheme as to the purpose of the scheme, the creditor meetings which the application considers will be necessary and their composition (notice should normally be given of a proposed scheme before the initial hearing unless there are good reasons to the contrary); and (v) creditors who feel they have been unfairly treated will still be able to raise objections at the sanctions hearing, but will need to show why they did not raise these objections earlier. The Jersey court also holds that these principles apply equally to members' meetings and issues.

Second Phase: Meeting of Creditors or Members

19.4. A scheme of arrangement is binding on all creditors (or a class of creditors) or all the members (or a class of members) as well as on the company or on the liquidator and contributories of the company, in the last case, where the company is in the course of being wound up. Under Art 125(2), this is subject to two conditions:

a) A majority in number representing 3/4ths in value of the creditors (or class of creditors) or 3/4ths of the voting rights of the members (or class of members), whichever is the case, agreeing to the compromise or arrangement at a meeting, where they are present and voting either in person or by proxy.

b) It is sanctioned by the court in an order, which does not have effect until the relevant Act of the court has been delivered to the Registrar for registration (Art 125(3)). The Act of the court must also be annexed to every copy of the company's memorandum issued after the order has been made, in default of which an offence has been committed.

19.5. *In re TSB Bank* 1992 JLR 160: Art 125 of the Jersey Law was in identical terms with its English counterpart and the court would have the fullest regard to the interpretation given by the English and Scottish courts to the relevant sections of the Companies Acts. It was clear from the authorities that the scheme proposed by the representor (the acquisition of the remaining 49% holding in the daughter company's shares by the parent company, which already had 51%) would sufficiently affect the rights and obligations between the company and its shareholders to bring it fully and properly within Art 125. Art 125 would be broadly construed to enable a wide variety of schemes to be put forward.

19.6. *In re Royal Bree's Hotel Limited*: "the role [of the court] is to direct the manner in which the meeting should be held … a particular person should be appointed chairman of the meeting and … should be directed and to report the results of the meeting to the Court …". Although the court may determine its own notice periods, it is usual to use those in Art 91 (q.v., however, the difference in Art 34 of the Schedule to the Companies (Standard Table) (Jersey) Order 1992). There are, however, no notice periods stipulated in the case of creditors' meetings.

19.7. *In re Representation of Plus 500 Emerging Markets High Yield Fund Ltd* (1996): the court's ability to select the chairman of the meeting and to require a report on proceedings to the court is an important aspect of court control over the process.

19.8. Art 126(1) requires information as to a compromise to be circulated prior to the meeting of creditors or members. Art 126(2) stipulates that the notice calling the meeting given to a creditor or member must include a statement explaining the effect of the compromise or arrangement. In particular, it must state any material interests of the directors of the company (whether as directors or as members or as creditors of the company or otherwise) and the effect on those interests of the compromise or arrangement where the effect on their interests is materially different from the effect on the interests of other persons.

19.9. Where the compromise or arrangement affects the rights of debenture holders of the company, the statement is required to give the same explanation with respect to trustees of the deed for securing the issue of the debentures as is given in respect of the company's directors (Art 126(4)).

19.10. Where the notice calling the meeting is made by advertisement, it must include either the statement noted above or information about where and how those creditors or members entitled to attend the meeting may obtain copies of the statement (Art 126(3)). Where an indication is given that copies may be obtained by application, every creditor or member making the application is entitled to a copy of the statement free of charge (Art 126(5)).

19.11. Every director or trustee is required to give notice of any matters having an impact on the making of a statement for the purposes of this provision, in default of which an offence is committed (Art 126(7)). Furthermore, if the company fails to comply with any requirement of this provision, it and every defaulting officer is liable to conviction for an offence. For these purposes only, a trustee of a deed for securing the issue of debentures of the company is also deemed an officer. However, a person is not liable if she/he can show that their default was due to another person's refusal (for example a director or trustee) to furnish particulars of their interests (Art 126(6)).

Third Phase: Court Sanction

19.12. In the sanction phase, the court making the order effectively binds dissenting creditors and members of the company, hence additional requirements have been imposed to ensure the fairness and equity of the process:

a) The fair representation of any class summoned to meeting (i.e. meetings are representative), following the principle in *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 213 (England and Wales).

19.13. *In re Royal Bree's Hotel Limited*: the court has a discretion as to whether or not to sanction the compromise or arrangement (having regard to what occurred at the meeting).

19.14. *Re Altitude Scaffolding Limited* [2006] EWHC 1401 (England and Wales): in considering whether or not to sanction the compromise or arrangement, the court will consider the numbers attending at the meeting. There must be more than one person present. Low turnout is in itself not a valid reason for refusing to sanction a scheme, but will be considered in the context of other factors which may affect the vote.

b) The majority must vote in best interests of class as a whole (akin to principle that majority of shareholders must vote bona fide in the interests of the company as a whole). The principles developed in cases such as *Allen v Gold Reefs of West Africa Ltd* [1900] Ch 656 (England and Wales) and *Greenhalgh v Arderne Cinemas* [1951] Ch 286 (England and Wales) also apply here.

19.15. *In re Representation of Andsberg Limited* (2007) JLR Note 53: in determining whether or not to sanction the scheme, the court will consider whether the provisions of the statute have been complied, the class was fairly represented by those attending the meeting and that the statutory majorities are acting *bona fide* and not coercing the minority in order to promote interests adverse to those of the class they represent. Furthermore, the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in his interests, might reasonably approve (following *Telewest*). The rule in *Andsberg* has been followed in *In re CPA* [2010] JRC 021 and *In re Rambler Media Limited* [2010] JRC 034.

In re CPA 2010 JLR Note 11: The court stated that its duty when considering applications under Art 125 is as set out in the case of *the Representation of Andsberg Limited* [2007] JLR N 53 and repeated in *Re CI Traders Limited* [2007] JRC 149A. The three-fold test requires the court to consider: test is three-fold. The Court must consider: (a) whether the provisions of the law have been complied with; (b) whether the class of shareholders to be affected by the proposed scheme was fairly represented by those who attended the meeting and whether that the statutory majority are acting *bona fide* and not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and (c) whether the arrangement is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve. The refinement in this case is that the court, in an earlier hearing on 15 December 2009 gave directions as to the counting of votes at the court meeting so as to ensure that it was the views of the beneficial owners which were counted rather than the views of the registered shareholders who are just nominees. In light of full disclosure to the registered shareholders and via them to the beneficial owners of opinions both for and against, the court was satisfied that the majority was obtained in line with the statutory requirements as well as those in the articles of association and that this majority was representative of the shareholders concerned, no evidence of coercion by the majority being forthcoming.

In re Rambler Media Limited [2010] JRC 034: In this case, the court reiterated its statement as to the Art 125 requirements as set out in *In re CPA* [2010] JRC 021, the refinement in this case being in relation to the consideration/cause at which the company's shares were to be transferred to the successful bidder, particularly in light of an objection received from one of the shareholders. The court was of the view that it was important to note that the shares to be subject to the scheme were no longer available for sale on the listed market and that there is therefore a very limited market indeed in those shares. In light of the fact that share value in the company has fluctuated over the last few years and submissions made that a number of shares have in fact been acquired during 2009 at the offer price and despite the fact that share value was undoubtedly a matter upon which different shareholders may take a different view, the court was of the view that the offer price was not unrealistic in all the circumstances, particularly also bearing in mind that the objecting shareholder did not appear before court to voice its dissent in the appropriate forum.

19.16. Particular powers are given in Art 127 to facilitate a compromise or arrangement proposed between a company and any creditors or members. Where the compromise or arrangement has been proposed for the reconstruction of one or more companies or for the amalgamation of 2 or more companies and, under the scheme, the whole or part of the undertaking or the property of a company concerned in the scheme ("transferor company") is to be transferred to another company ("transferee company"), the court may make provision in the order sanctioning the compromise or arrangement or subsequently for a number of matters under Art 127(2):

a) The transfer to the transferee company of the whole or part of the undertaking and of the property or liabilities of a transferor company. "Property" is defined in Art 127(5) to include property, rights and powers of every description, while the definition of “liabilities” includes duties.

b) The allotting or appropriation by the transferee company of shares, debentures, policies or other similar interests in that company which under the compromise or arrangement are to be allotted or appropriated by the company to or for any person.

c) The continuation by or against the transferee company of legal proceedings pending by or against a transferor company.

d) The dissolution, without winding up, of a transferor company.

e) The provision to be made for persons who dissent from the compromise or arrangement, within a time and in a manner as directed by the court.

f) Any incidental, consequential and supplemental matters necessary to secure that the reconstruction or amalgamation is fully and effectively carried out.

19.17. An order providing for the transfer of property or liabilities results in the property being by virtue of the order transferred to, and vested in, the transferee company, while the liabilities are similarly transferred to and become liabilities of the company (Art 127(3)). The property vests free from any hypothec, security interest or other charge, which ceases to have effect by virtue of the compromise or arrangement.

19.18. A copy of the Act of the court verifying the making of the order must be delivered to the Registrar for registration within 14 days after the making of the order, in default of which the company is liable to conviction for an offence (Art 127(4)).

Schemes of Arrangement: Part 18A, Companies (Jersey) Law 1991

SoA	Mt	ASA	CH	CH + 14 days
Scheme of Arrangement Proposal made (Art 125).	Meetings summoned to consider proposal (court may fix notice periods for meetings or could use in case of shareholder meetings: SR notice period of 21 clear days in Art 34, Standard Table or 14 days or less in Art 90(1)-(2)); no notice period is specified in the law for creditors' meetings) (Art 126).	Approval of scheme proposal by relevant meeting(s) (Art 125).	Court hearing to give order in relation to scheme proposal (Art 127(1)-(3)).	Notice to Registrar of court order (Art 127(4)).
Court considers: Whether proposal prima facie a scheme of arrangement that could be put to meetings. If determination of groups/classes for purposes of meetings correct.			Court considers: Whether meetings fair (having regard to attendance and representation of all members of group/class) and whether majority vote in accordance with best interests of company principle.	

Meeting procedure: timings, notices, circulation of scheme information (or alternatively where they may be obtained) and appointment of chairs. Statement of material interests of directors/deed trustees in relation to scheme and effect of scheme on interests must accompany scheme information.			Whether arrangement is such that an intelligent and honest member of group/class might reasonably approve of.	

Company Winding Up

General Observations

19.19. Winding up is the final step for many companies. Normally, it is the conversion of assets into cash for the payment of creditors. The purpose of winding up is to effect an organised and equitable method for distributing funds to those entitled to them. In a creditors' (insolvent) winding up or a *désastre,* because there is usually insufficient value to pay everyone, the distribution of moneys is undertaken by means of a list of priorities established by statute. This is so as to avoid a free-for-all, where the most hardnosed creditor obtains their cut, while others lose out. This is not the same as when the secured creditor gets their cut ahead of unsecured ones as this is authorised by law. Because the protection of creditors is at the heart of winding up, anything which harms their collective interests has to be guarded against. For example, transactions that deprive the creditors (as a whole) of benefit may be impugned or reversed so as to restore assets to the company. That is why there are rules on preferences and vulnerable transactions.

19.20. Another good reason for winding up is that it clears the books. It winds up the unprofitable business and allows the directors and managers to begin again. Fresh starts are permitted only where directors are themselves only lightly at fault or are victims of macro-economic circumstances (i.e. those outside their control or for which the law does not hold them as to blame). However, to guard against fraud and the phenomenon of phoenix companies, directors can be disqualified where they are shown to have made serious mistakes or committed fraud. That is why there are rules on wrongful trading and directors' liability that back up liquidation as penalties for delinquent directors. Also directors may be compelled to make contributions to repair the damage they cause.

19.21. The sequence of winding up is generally:

a) The type of winding up is decided.

b) The liquidator begins to gather in the assets while the assets and liabilities are ascertained and verified. Whether there are claims against particular assets or security over certain assets or asset-pools will be one of the first items for the liquidator to ascertain so as to be able to deal with any secured creditors.

c) Where necessary, the directors may be questioned as to the reasons for the financial collapse; litigation may ensue to reverse transactions and compel contributions from those at fault;

d) The liquidator begins the process of distribution by making distributions;

e) After payment is made in full or when moneys are exhausted, the liquidator applies to the Registrar for the company to be dissolved and struck off (this is when its separate legal existence comes to an end).

f) In certain instances, the liquidator may be advised by a liquidation committee, whose task is to represent the interests of members and general creditors (usually the unsecured ones).

Winding Up of Companies of Limited Duration

19.22. Chapter 1 of Part 21 makes specific provision for the winding up of limited life companies and other companies of limited duration. The usual mechanism for initiating the winding up of a company requires that the shareholders pass a special resolution to initiate the process. Where a company is a company of limited duration, necessarily a winding up is not initiated by a resolution of the shareholders because its constitution provides that it is to be wound up and dissolved upon the occurrence of the specified external event, whether a contingency or a time limit. Chapter 1 of Part 21 of the Companies Law therefore provides a mechanism for initiating winding up in the absence of a special resolution being passed by the shareholders. Limited life companies (that is, companies whose constitution includes a contingency) and companies of limited duration (other than limited life companies) (that is, companies that are time limited only) are dealt with separately in Article 144 and Article 144A respectively. For a limited life company it is the special resolution which is deemed to be passed upon the occurrence of the specified external event, whether it is a contingency or a time limit, that initiates the winding up and dissolution and, if it is a summary winding up, the winding up commences upon the limited life company being deemed to have passed that resolution (Article 147(a)).

19.23. Art 144(1) states that, where a limited life company is to be wound up and dissolved upon either the expiry of a fixed period of time or happening of some other event specified in its memorandum or articles of association, the company is deemed to have passed a special resolution for its winding up summarily when the period expires or that event happens. Notice of the resolution that was deemed to be passed must be delivered to the Registrar within 21 days of the period expiring or event happening (Art 144(2)).

19.24. The subsequent procedure for winding up depends on whether a statement of solvency in compliance with Art 146(2) has been delivered within 28 days of the period expiring or event happening. If it has, then the company may be wound up summarily in accordance with Chapter 2 of Part 21 (see below) (Art 144(3)). Article 144 also provides in Article 144(3)-(4), a mechanism for dealing with circumstances in which a company cannot be wound up using the summary winding up procedure. If the company has not delivered a statement of solvency, then a creditors' winding up in accordance with Chapter 4 of Part 21 (see below) will apply (Art 144(4)). For the purposes of a creditors' winding up, the opinion required under Art 151 (which stipulates that either the liquidator or directors must form a view as to the solvency of the company) is deemed to have been recorded 28 days of the period expiring or event happening. If a limited life company cannot be wound up using the summary winding up procedure, under Article 159(1)(a), a creditors' winding up is deemed to commence at the time that the resolution for winding up is deemed to have been passed under Article 144(4).

19.25. Where the constitution of a company only includes a specified external event that is a time limit and there is no specified external event that is a contingency, the company is, as noted, still a company of limited duration but it is not a limited life company. The winding up of a company of limited duration that is not a limited life company is dealt with in Article 144A. Companies of a limited duration (other than a limited life company), which are to be wound up and dissolved upon the expiration of a fixed period of time specified in its memorandum or articles must deliver to the Registrar a notice stating that the period has expired and the date of expiry within 21 days of it happening (Art 144A(1)). In default of the company doing so, any of its directors, members or creditors may deliver the notice at any time after the expiry of the 21 days allotted (Art 144A(2)). A copy must also be delivered to the company by the same persons at the same time as it is delivered to the Registrar (Art 144A(3)).

19.26. Article 144A also provides a mechanism for dealing with circumstances in which a company cannot be wound up using the summary winding up procedure. Where companies are time limited only and are not limited life companies, subject to one exception, there is no provision for the passing, even deemed passing, of a special resolution. The winding up and dissolution is initiated by the expiry of the time limit and if it is to be wound up summarily, by virtue of Article 147(b), the winding up commences upon the delivery of the statement of solvency pursuant to Article 144A(4). The subsequent procedure for winding up depends on whether a statement of solvency in compliance with Art 146(2) has been delivered together with the notice required by the company to the Registrar or by the persons mentioned within 28 days after they have served notice on the Registrar and the company. If it has, the company may be wound up summarily in accordance with Chapter 2 of Part 21 (see below) (Art 144A(4)). The exception referred to is where the company is not able to deliver a solvency statement under Article 144A(4) and is not able to be wound up using the summary winding up procedure but must use the creditors' winding up procedure. If it has not delivered a statement of solvency, the company will be wound up in a creditors' winding up under Chapter 4 of Part 21 (Art 144A(5)). For these purposes, the company is deemed to have passed a resolution for a creditors' winding up at the point notice has been delivered to the Registrar by the company or

28 days following service by the persons mentioned on the Registrar and the company.

Summary Winding Up

19.27. Chapter 2 of Part 21 provides for the summary winding up procedure.

Application of Summary Winding Up Procedure

19.28. Art 145 states that a summary winding up applies to the winding up of a company that has one of the following liability situations:

a) No liabilities at all.

b) Liabilities that have already fallen due or that fall due within 6 months after the commencement of the winding up that it will be able to discharge in full within that period.

c) Liabilities that will arise more than 6 months after the commencement of the winding up that it will be able to discharge in full as they fall due.

d) A combination of liabilities fallen due or falling due within or beyond the 6 month period.

19.29. Art 146(1) stipulates that the procedure is open to a company that is not subject to a declaration made and unrecalled under the Désastre Law. Compliance with Arts 144 or 144A is required for companies of limited duration.

19.30. For all other companies, Art 146(2) requires the directors to first make a statement of solvency, to be signed by each director, stating that, following a full enquiry into the company's affairs, each director is satisfied that one of the following fact situations applies:

a) The company has no assets and no liabilities.

b) The company has assets and no liabilities.

c) The company will be able to discharge its liabilities in full within the 6 months after commencement of the winding up.

d) The company has liabilities that will fall due more than 6 months after the commencement of the winding up that it will be able to discharge in full as they fall due.

e) A combination of liabilities fallen due or falling due within or beyond the 6 month period.

19.31. In addition, Art 146(3) requires the company to pass a special resolution for summary winding up within 28 days after the statement of solvency has been signed by the directors and for a copy of the special resolution and statement to be delivered to the Registrar in compliance with Art 100 (filing of resolutions). The making and delivery to the Registrar of a statement of solvency without reasonable grounds for doing so is an offence (Art 146(4)).

Commencement of Summary Winding Up

19.32. Art 147 provides that a summary winding up commences:

a) In the case of a limited life company, when it is deemed to have passed a special resolution for winding up under Art 144(1).

b) In the case of a company (other than a limited life company) whose existence is limited by a period of time, when the requirement of Art 144A(4) (delivery of notice and statement of solvency) has been complied with.

c) In the case of all other companies, when the requirement of Art 146(3)(a) (delivery of special resolution and statement of solvency) has been complied with.

19.33. The company continues to enjoy its corporate status and capacity even after the commencement of the summary winding up until such point as the company is dissolved (Art 148(1)). Notwithstanding this, its powers may not be used except to realise its assets, to discharge its liabilities and to distribute its assets in accordance with Art 150 (Art 148(2)). This is subject to the ability of the company to apply for the termination of the winding up under Art 154 or to court for the determination of a matter in the course of the winding up under Art 186A.

Appointment of Liquidator

19.34. Art 149(1) authorises the company to appoint, at or after the winding up commences, a person to be a liquidator for the purposes of the winding up, whereupon the powers of the directors cease in respect of the company, those powers being exercised by the liquidator (Art 149(2)). Three exceptions exist: where the resolution appointing the liquidator or a subsequent special resolution of the company provides otherwise as well as where the directors carry out a distribution of assets under Art 150 (Art 149(3)). The record of the appointment of the liquidator is subject to compliance with the same particulars required to be kept for directors on a register maintained by the company (Art 149(4)).

19.35. Dissolution of the company may take place on delivery of a statement under Art 146 that the company has no assets and no liabilities once the Registrar has registered that statement (Art 150(2)). Where the statement under Art 146 states that the company has assets, but no liabilities, the company is authorised to distribute its assets among its members according to their rights or otherwise as provided by its memorandum or articles of association once the statement has been registered by the Registrar (Art 150(3)).

19.36. Where the statement under Art 146 states that the company has liabilities, once registration of the statement has occurred, the company may satisfy those liabilities as they become due or within 6 months of commencement of the winding up, as the case may be; and may then distribute its remaining assets among its members according to their rights or otherwise as provided by its memorandum or articles, provided that the directors reasonably believe that the company will be able to pay any remaining liabilities as they fall due (Art 150(4))

19.37. Once distribution has taken place of assets, the directors or liquidator appointed under Art 149 must deliver a signed statement to the Registrar stating that having made full enquiry into the company's affairs, each director or liquidator is satisfied that the company has no assets and no liabilities (Art 150(5)). Once that statement is registered, the company is dissolved (Art 150(6)). The signing of a statement without having reasonable grounds for stating that the company has no assets and no liabilities exposes any director or liquidator signing it to conviction for an offence (Art 150(7)).

19.38. Art 152 provides that a liquidator appointed under Art 149 is to receive from the company the remuneration agreed between the liquidator and the company before his or her appointment or that subsequently approved by the company in general meeting or as subsequently determined by the court.

19.39. Art 153 stipulates that a liquidator appointed under Art 149 may be removed from office by a special resolution of the company and, if ceasing to be qualified to hold the office, vacate the office.

Termination of Summary Winding Up

19.40. Summary winding up comes to an end under the following procedure. Where, under Art 154(1), the summary winding up of a company has commenced; the company has not received any contribution from any present or past member under Art 192, the company has not distributed any of its assets among its members, the company is able to discharge its liabilities as they fell due and the company has approved by special resolution the termination of the winding up, then, on delivery of certain specified documents to the Registrar, the winding up terminates.

19.41. The documents required by Art 154(2) are:

a) A certificate signed by all the directors of the company stating that the company has received no contribution under Art 192, that the company has made no distribution of its assets amongst the members and that the company is able to discharge its liabilities as they fall due. The signing of this certificate without having reasonable grounds for believing that the statements in it are true renders the signatory director liable to conviction for an offence (Art 154(5)).

b) A copy of the special resolution approving the termination of the winding up.

19.42. On the termination of the winding up, Art 154(3) states any liquidator appointed for the purpose of the winding up shall cease to hold office and, the company and all other persons is deemed to be in the same position as if the winding up had not commenced. Nonetheless, the validity of anything duly done by any liquidator, director or other person or by operation of law before the termination of the winding up is not affected by the termination (Art 154(4)).

Conversion of Summary Winding Up

19.43. The law also deals with the discovery of existing or supervening insolvency within a summary winding up. If, under Art 151(1), after the summary winding up commences, the directors or liquidator, where one has been appointed in accordance with Art 149, form the opinion that the company has liabilities that it will be unable to discharge within 6 months of the commencement of the winding up or, if they fall due after that date, as they fall due, Art 151(2) requires a record to be made of that opinion:

a) In the case of a liquidator, in his or her records of the administration of the affairs of the company.

b) In the case of directors, in the minutes of a meeting of the directors.

19.44. Notice of the calling of a meeting of the creditors must be given by the liquidator or directors:

a) By post to each creditor for a meeting to take place in Jersey not less than 14 days after the notice is served and not more than 28 days after the opinion of the liquidator or directors is recorded (Art 151(3)). The name of the person nominated as liquidator of the company to act in a creditors' winding up must be stated in the notice, a copy of which must be delivered to the Registrar (Arts 151(4)-(5)).

b) By advertisement in the Jersey Gazette not less than 10 days before the day for which the meeting is called (Art 151(6)).

19.45. Prior to the meeting, the liquidator or directors are required to furnish any creditor free of charge with information that the creditor may reasonably request concerning the affairs of the company (Art 151(7)).

19.46. The liquidator or directors are required to provide a statement, verified by affidavit by the liquidator or some or all of the directors, on the affairs of the company (Arts 151(8)-(9)). The liquidator, where one is appointed, or one of the directors nominated by the board of directors will preside over the meeting (Art 151(10)). The winding up is deemed to be a creditors' winding up from the day of the meeting and the meeting is deemed to be the creditors' meeting referred to in Art 160 with the power to nominate a liquidation committee as provided by Art 162 (Art 151(11)).

19.47. Failure, without reasonable excuse, by a liquidator or director to comply with the obligations in relation to the conversion of a summary winding up to a creditors' winding up is under Art 151(12) an offence.

19.48. A summary winding up may also be terminated in the case of a declaration under the Désastre Law (see paragraph 19.160. below).

Just and Equitable or Public Interest Winding Up

19.49. Chapter 3 of Part 21 provides for the just and equitable or public interest winding up procedure.

19.50. Under Art 155(1), the procedure applies to a company that is not subject to a declaration made and unrecalled under the Désastre Law. A court may, if the procedure is invoked wind up a company if it is either it is just and equitable or expedient in the public interest to do so.

19.51. As Art 155 is directly derived from section 122(1)(g) of the Insolvency Act 1986 (United Kingdom), *In re Leveraged Income Fund Limited* (2002) JRC 209 confirms the permissibility of having regard to case law from the jurisdiction to guide Jersey courts as to the interpretations placed on the meaning of the words "just and equitable". Generally, the court must be convinced that no other remedy is suitable (because winding up is a drastic remedy). See also *In re Belgravia* [2008] JRC 161, *Bisson v Bish* 2008 JLR Note 46 and *In re Poundworld (Jersey) Limited* 2009 JLR Note 12, which establish that the court must consider what is in the best interests of the creditors and have extended the scope of "just and equitable" to include what is convenient and would expedite the procedure. This may result in making this type of winding up a substitute for the usual creditors' winding up procedure (below) although originally it was intended as an exceptional procedure for use in problematic cases (as detailed below).

In re Poundworld (Jersey) Limited 2009 JLR Note 12: The court held it had a wide power to order a just and equitable winding up and that it was appropriate to do so, as it was clearly in the best interests of all the creditors for liquidators to be authorized to seek to secure the stock as soon as possible and to continue to trade to dispose of it on a retail basis. The court was of the view, however, that insolvent companies should normally be wound up by a creditors' winding up and the court should be cautious before ordering a just and equitable winding up in an ordinary case of an insolvent company.

In re Centurion Management Services [2009] JRC 227: Centurion was licensed to carry on trust company business and *inter alia* manages assets on behalf of third parties held in trusts and companies and had been the subject of close regulatory attention by the Jersey Financial Services Commission, which had required the appointment of the representors in the case as directors in order to bring Centurion's corporate governance in line with the code of practice for trust company business. A sale and revenue sharing agreement with Trustcorp Services Limited had been was proposed so as ultimately to bring the company's business to an end. As on both the balance sheet and cash flow tests, the company was insolvent, there was no prospect of it trading out of its current situation and there was no intention that it should do so. The winding up of the company was therefore inevitable, although three options were available, that of a creditors' winding up, a désastre or a winding up on just and equitable grounds. The court accepted that a just and equitable winding up was the most appropriate remedy for the following reasons, in particular that (a) while the business was being transferred, any liquidator appointed will continue to incur liability for transactions entered into by the company and there was an urgent need to appoint a liquidator, particularly one familiar with the company; (b) a creditors' winding up would not necessarily allow for the interests of the company's clients to be taken into account during the winding up, particularly bearing in mind the limitations on business being able to be conducted under Art 159(1); (c) although a *désastre* could be declared immediately, the Viscount was in no better position to deal with the winding up of the company than a liquidator, especially given the complexities of running a trust company business; (d) the company's business clients would have more confidence in a just and equitable winding up; and (e) with the transfer of the business, the company's substratum had also gone, applying *In re Leveraged Income Fund Limited* [2002] JRC 209. The court also held, applying *Re Belgravia* [2008] JRC 161, that a just and equitable winding up was the appropriate way of proceeding for these and a number of reasons it singled out, including the need for flexibility, the avoidance of conflict with the creditors, the need to protect the interests of the investors and the need for the appointment of an appropriately experienced liquidator. The result of this case appears to sanction a trading out procedure akin to what may happen in administration in the United Kingdom.

19.52. Just and equitable" has been held to include the position of a partner in a quasi-partnership using the incorporated company form for convenience.

19.53. *Ebrahimi v Westbourne Galleries* [1973] AC 360 (England and Wales): oriental carpets business set up by Ebrahimi and Nazar. Nazar brought introduced his son into the business and together they removed Ebrahimi. There was no oppressive treatment required under the unfair prejudice provision (section 210 of the Companies Act 1948), but the nature of the company was held to be akin to a quasi-partnership, hence winding up was appropriate.

Bisson v Bish 2008 JLR Note 46: The court held that the deadlock between the representor and the first respondents—*i.e.* the division of the membership and directors into two opposed and uncooperative factions inhibiting or indeed preventing decisions on matters crucial to the company's prosperity—was a sufficient reason to order a just and equitable winding up under Art 155. Applying the rule in *Ebrahimi v Westbourne Galleries* [1973] AC 360, the court stated that a just and equitable winding up was appropriate in the case of deadlock and a complete breakdown of the relationship between shareholders of a quasi-partnership company rather than a purely commercial company, a term it defined as a small company including one, or probably more, of the following elements: (a) an association formed or continued on the basis of a personal relationship, involving mutual confidence; (b) an agreement or understanding that the shareholders would participate in the conduct of the business; and (c) a restriction on the transfer of the members' interest in the company. The winding up of such a company was analogous to dissolution in partnership law.

19.54. *Virdi v Abbey Leisure* [1990] BCLC 342 (England and Wales): it was assumed that an application for a just and equitable winding up would be turned down if an offer had been made to buy out complainant for reasonable value (in order to save viable business and jobs). However, because under the unfair prejudice provision (section 459 of the Companies Act 1985 (UK), now section 994 of the Companies Act 2006 (UK)), the value attributed to minority shareholder shares is normally on a pro-rata basis. However, if the articles provide that the minority is to be bought out with an independent accountant setting the value of the shares, then (unless the articles otherwise state) the accountant would set a discounted value below the pro-rata value on account of the minority shareholding. Held: the petitioner was entitled to pro-rata valuation which would result from a just and equitable winding up.

19.55. "Just and equitable" also encompasses a fraudulent or illegal purpose.

19.56. *Re Thomas Brinsmead and Sons Ltd* [1897] 1 Ch 45 (England and Wales): relatives of piano manufacturer set up rival company; directors stole money and B took out injunction against use of name. A minority shareholder brought a successful petition for winding up.

19.57. "Just and equitable" can also include a deadlock in management.

19.58. *Re Yenidje Tobacco Co Ltd* [1916] Ch 426 (England and Wales): two tobacconists merged businesses and then fell out; no meetings were able to be held. The court allowed a winding up. See also *Ebrahimi v Westbourne Galleries* [1973] AC 360 (England and Wales) (above).

19.59. *Jean v Murfitt* 1996 JLR Note 8c: Jean and Murfitt owned a 50% stake each in a company. The relationship had broken down irreparably as a result of the dishonest conduct of Murfitt. The parties were not even speaking and there was total deadlock. An offer to sell by Jean to Murfitt was not taken up. Held: The paralysis of the company was in itself sufficient reason to order that it be wound up under Art 155 on the ground that it was just and equitable to do so; furthermore, the representor could no longer place confidence in the respondent. The phrase "just and equitable" had to be given a flexible interpretation: it could not be defined fully in what circumstances it would be just and equitable to wind a company up; rather, it would depend on the particular circumstances of each individual case (*In re Yenidje Tobacco Co. Ltd.* considered).

19.60. "Just and equitable" could also cover the situation where shareholders are being misled and no accounts or information is supplied to them (which would also constitute offences under the law).

19.61. Finally, "just and equitable" has been held to extend to the situation where the substratum (the fundamental purpose) of the company has gone. Although objects, where they are used, may be widely drafted, it is by no means certain that a company set up for a limited range of activities may be able to alter its business. In this case, although the majority of shareholders may wish to see the business continue in some form, it is open to a minority shareholder, who might otherwise be outvoted in any decision, to bring an action under this heading.

19.62. *Re German Date Coffee* (1882) 20 Ch D 169 (England and Wales): a Swedish patent for the manufacture of coffee from dates was substituted for a German patent the company was unable to obtain. A shareholder claimed deception and brought a successful petition for the winding up of the company.

19.63. *In re Leveraged Income Fund Limited* (2002) JRC 209: a fund made massive losses, owing £15 million to the bank, which had exercised its security interest and taken title to all the assets of the company. An Extraordinary General Meeting was convened to propose the winding up of the company. A shareholder of one of the classes of shares voted against the resolution in his proxy, but during the EGM sent an e-mail instructing the chairman that he now wished to vote in favour. The company's lawyers advised that the change of vote could not be counted and therefore the resolution failed. The company then applied for a just and equitable winding up. Held: There was no limit on the circumstances in which a just and equitable winding up could be ordered. It was possible to order a winding up where the main object(s) for which company was formed had gone. However, the mere fact that the company suffers trading losses will not destroy its substratum unless there is no real prospect of it ever making a profit in the future. It was held that substratum had gone and the company had no prospect of being able to recommence investment activities as all of its assets were owned by the bank. Rather than letting the company be struck off in due course, it was preferable for a winding up to take place under the supervision of liquidators (to be funded by the bank) who could prepare final accounts.

19.64. Under Art 155(2), an application for a just and equitable winding up may be made by the company or by a director or a member of the company. It may also be made by the Minister, the Commission or by a supervisory body within the meaning of the Proceeds of Crime Supervisory Bodies (Jersey) Law 2008. An application to court for a public interest winding up may only be made by the Minister or the Commission (Art 155(3)).

19.65. Where the court orders a company to be wound up, under Art 155(4), it may appoint a liquidator, direct the manner in which the winding-up is to be conducted and make such orders as it sees fit so as to ensure that the winding-up is conducted in an orderly manner. Art 155(5) requires the company to deliver a copy of the Act of the court ordering the winding up of a company to the Registrar within 14 days after it is made, for him to record. In default of delivery, the company and every defaulting officer is guilty of an offence (Art 155(6)).

Creditors' Winding Up

19.66. Chapter 4 of Part 21 provides for the creditors' winding up procedure and applies to the winding up of a company otherwise than under the previous three chapters (Arts 156(1)-(2)).

Application of Creditors' Winding Up Procedure

19.67. Art 157 stipulates that a company that is not subject to a declaration made and unrecalled under the Désastre Law may use this procedure provided it passes a special resolution to that effect.

19.68. Notice of the special resolution passed by virtue of Art 157 must be advertised in the Jersey Gazette within 14 days of it being made, failure to do so being treated as an offence (Arts 158(1)-(2)). Where companies of limited duration are deemed under Arts 144(4) or 144A(5) to have passed a special resolution, that fact must also be advertised.

Commencement of Creditors' Winding Up

19.69. A creditors' winding up is deemed under Art 159(1) to commence at the time:

a) The resolution for winding up is passed (Art 157).

b) In the case of a limited life company, when the resolution is deemed to have been passed (Art 144(4)). This will occur where no statement of solvency can be delivered.

c) In the case of other companies of limited duration, when the resolution is deemed to have been passed (Art 144A(5)).

d) Where, in a summary winding up, insolvency exists or supervenes and the winding up is converted to a creditors' winding up (Art 151).

e) Where, unless Art 148 has taken effect (cesser of business in a summary winding up), the company must from the commencement of the winding up cease to carry on its business, except insofar as may be necessary for the purposes of winding up.

19.70. Under Art 159(2), the corporate status and capacity of the company continue until the company is dissolved. However, any transfer of shares not made to or with the sanction of the liquidator and any alteration in the status of the company's members made after the commencement of the winding up is void (Art 159(3)). Furthermore, after the commencement of the winding up, no action may be taken or proceeded with against the company except by leave of the court and subject to such terms as the court may impose (Art 159(4)). A proposed amendment will ensure that the prohibition does not avoid a transfer of shares made pursuant to powers under Part 7 of the Security Interests (Jersey) Law 201- even if not made to, or with the sanction of, the liquidator (Art 159(5) (proposed amendment)).

Re Belgravia 2010 JLR 247: The court holds that there is a wide discretion to allow actions to be brought against the company. Here, however, the company had been subject to a just and equitable winding up in which leave to bring an action was to be subject to the court's consent being sought. Held: leave would be granted in this case to pursue the company as well as the directors concurrently in the same proceedings so as to avoid the risk of inconsistent findings and the multiplication of proceedings.

The Creditors' Meeting

19.71. Art 160(1) requires notice to be given of the summoning of a creditors' meeting, failure to comply with which is an offence:

a) By post to all creditors not less than 14 days prior to the date on which the company meeting will be held at which the resolution for a creditors' winding up is to be proposed, the meeting to be held in Jersey on the same day as, and immediately following the conclusion of, the company meeting. The notice must also nominate a person to be liquidator for the purposes of a creditors' winding up.

b) By advertisement in the Jersey Gazette not less than 10 days before the day on which that meeting will be held.

c) The company must also furnish creditors free of charge with such information as they may reasonably require concerning the company's affairs during the period before the creditors' meeting.

19.72. A statement as to the affairs of the company, verified by affidavit by some or all of the directors, must be laid before the creditors' meeting and the directors must appoint one of their number to preside over the meeting, attendance by this person being required (Art 160(2)). Failure to comply with these requirements will render the director or directors concerned liable to conviction for an offence (Art 160(3)).

The Appointment and Qualifications of the Liquidator

19.73. The meetings of the company or creditors held by virtue of the provisions in Art 160 may nominate a person to be liquidator for the purpose of the winding up (Art 161(1)). If a creditors' meeting is called under Art 151 (conversion of summary winding up), the person nominated as liquidator in the notice calling the meeting is deemed to have been nominated by the company (Art 161(2)). Persons nominated in either of these ways are appointed liquidator with effect from the conclusion of the creditors' meeting (Art 161(3)).

19.74. If different persons are nominated by the meetings mentioned, as a remedy for the deadlock that will probably ensue, a director, member or creditor of the company may within 7 days after the date on which the nomination was made by the creditors, apply to the court for an order to direct either that the person nominated as liquidator by the company act as liquidator instead of or jointly with the person nominated by the creditors or that some other person be appointed instead of the person nominated by the creditors (Art 161(4)).

19.75. A liquidator that has been appointed must give notice of the appointment within 14 days to the Registrar and the creditors, in default of which, the liquidator is guilty of an offence (Arts 161(5)-(6)). The Art 83 provisions on maintaining a register of directors and secretaries apply also to the liquidator (Art 161(7)).

19.76. Arts 7(1)-(2) of the Companies (General Provisions) (Jersey) Order 2002 also stipulates that the liquidator for a company being wound up in a creditors' winding up is not qualified for appointment unless the liquidator is a member of the Institute of Chartered Accountants in England and Wales, the Institute of Chartered Accountants of Scotland, the Association of Chartered Certified Accountants or the Institute of Chartered Accountants in Ireland. Art 7(3) deems the Viscount ex officio qualified for appointment as a liquidator of a company.

19.77. Art 7(4) of the Companies (General Provisions) (Jersey) Order 2002 states that a person is disqualified from appointment as a liquidator if that person is a secretary or an officer or servant of the company, or a partner or employee of such a person, a person against whom a disqualification order under Art 78 is in force. Art 7(5) also disqualifies a person if that person would be disqualified from acting in the case of any other body corporate that is that company's subsidiary or holding company or is a subsidiary of that company's holding company, including any situation where, were that body corporate a company, that person would be disqualified.

19.78. A liquidation committee may be appointed by a creditors' meeting to consist of not more than 5 persons, whose purpose to exercise the functions conferred on it by or under the law

(Art 162(1)). The company may also in general meeting appoint not more than 5 persons to the committee (Art 162(2)). In case of dispute by the creditors, the creditors may resolve that all or any of the persons appointed by the company should not be members of the committee, in which case they are disabled from acting unless the court otherwise directs. The court may also appoint other persons to replace those to whom the creditors object (Art 162(3)).

19.79. The liquidator is entitled to receive what remuneration is agreed between the liquidator and the liquidation committee or, if there is no committee, between the liquidator and the creditors or, failing any such agreement, as is fixed by the court (Art 163(1)). On appointment of a liquidator, the directors cease to be able to exercise their powers except insofar as the liquidation committee or, if there is no committee, the creditors sanction their continued use (Art 163(2)).

19.80. Arts 163(3)-(4) state that the creditors may at any time remove a liquidator and that should a vacancy occurs, by death, resignation or otherwise, in the office of a liquidator, the creditors may fill the vacancy. Art 175(1) permits the court to appoint a liquidator if for any reason there is no liquidator acting in a creditors' winding up. The court may also at any time with reasons being given remove a liquidator and appoint another (Art 175(2)). A vacancy in the office of a liquidator appointed by court does not entitle the creditors to appoint in the court's place.

19.81. *Hotel Beau Rivage Company Ltd v Careves International Ltd* 1985-86 JLR Notes-5b: The liquidator of a company in voluntary liquidation was invited to accept appointment as such by a director of the company's parent group, following the resignation of the previous liquidator. He was advised by his predecessor in office (the group's accountant) that his fees would be paid. However, it became clear that, since the company had no assets with which to pay them, the fees would fall to be paid by the group. The group was allegedly a substantial debtor to the company and consideration was also being given to actions against group directors personally to recover funds. As a consequence, the liquidator felt that his position was untenable: without funds, he would be under pressure from the principal creditor to pursue litigation against the group directors, while, if he embarked upon speculative litigation he might well be under pressure from the directors. Held: As there were additional unsatisfactory features of the progress of the liquidation, the conflicts of interest inherent in the liquidator's position could be given considerable weight. In the circumstances, it was preferable that his appointment should be rescinded and the company declared *en désastre*, so that the Viscount would be responsible for conducting the liquidation.

19.82. If for any reason, a creditors' winding up has commenced but no liquidator has been appointed, then during this period, the powers of the directors may not be exercised except with the sanction of the court, to secure compliance with Art 160 (calling of company and creditors' meetings) or to protect the company's assets (Arts 164(1)-(2)). Directors acting in contravention of the law, without reasonable excuse, are liable to conviction for an offence (Art 164(3)).

19.83. Under Art 165, the costs, charges and expenses properly incurred in a creditors' winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims.

The Law Applicable

19.84. Subject to the rules on costs and that on surplus, Art 166(1) stipulates the same rules as apply in a *désastre* apply to a creditor' winding up, including rules in relation to:

a) The respective rights of secured and unsecured creditors (e.g. Art 14, Désastre Law).

b) Debts provable (Art 29, Désastre Law).

c) The time and manner of proving debts (Art 30, Désastre Law).

d) The admission and rejection of proofs of debts (Art 31, Désastre Law).

e) The order of payment of debts and to setting off debts (Arts 32-34, Désastre Law).

19.85. For these purposes, references to a désastre in the Désastre Law are taken to be references to a creditors' winding up, while references to the Viscount are taken to be references to the liquidator.

19.86. The rule on surplus states in Art 166(2) that any surplus remaining after payment of the debts proved in the winding up is first to be applied in paying interest on those debts which bore interest prior to the commencement of the winding up before being used for any other purpose. Payment is to be made in respect of the period during which the debts have been outstanding since the commencement of the winding up and at the rate of interest applicable apart from the winding up.

19.87. In relation to company arrangements (see paragraphs 19.1.-19.18. above), Art 167(1) states that an arrangement entered into between a company immediately preceding the commencement of, or in the course of, a creditors' winding up and its creditors is binding (subject to any right of appeal) on the company, if sanctioned by a special resolution and on the creditors, if acceded to by three-quarters in number and value of them. Art 167(2) states that a creditor or contributory may appeal to the court against an arrangement within 3 weeks from its completion with the court being able to amend, vary or confirm the arrangement as it thinks just.

Company and Creditors' Meetings

19.88. The liquidator is required to call a general meeting of the company and a meeting of the creditors to be held on the first convenient date within 3 months after the end of the first 12 months from the commencement of winding up, provided the winding up continues for more than 12 months. Thereafter, the same interval applies to meetings after each successive 12 months of the winding up being in progress, unless the Commission allows a longer period. The liquidator is required to lay an account of his acts and dealings and of the conduct of the winding up during the preceding 12 months at these meetings (Art 168(1)), in default of which, the liquidator is guilty of an offence (Art 168(2)).

19.89. Under Art 169(1), a final meeting is required as soon as the affairs of a company in a creditors' winding up are fully wound up. The liquidator is required to present an account of the winding up, showing how it has been conducted and how the company's property has been disposed of, and is entitled to call a general meeting of the company and a meeting of the creditors for the purpose of laying the account before the meetings and providing an explanation of the account. Notice of the meetings must be provided at least 21 days in advance of the meeting and accompanied by a copy of the liquidator's account (Art 169(2)). Failure to call any of the meetings required is an offence (Art 169(8)).

19.90. The liquidator is required to make a return to the Registrar of the holding of the meetings and of their dates. In the case of a public company, he is also required to send a copy of the account. The returns must be made within 7 days of the date of the meetings or last meeting (if they are not held on the same date) (Art 169(3)). Failure to provide a return or copy of the account is an offence (Art 169(4)). Where the meetings fail to command a quorum, the liquidator may present, as an alternative to the return, one that states the meeting was duly called and that no quorum was present, which will be deemed to comply with the requirements of the law (Art 169(5)).

19.91. Once the Registrar receives the returns of the meetings and account, he will register them and the company will be deemed dissolved 3 months from when registration takes place. On the application of the liquidator or of an interested person, the court may order that the date be deferred for such time as the court thinks fit (Art 169(6)). Where such an order is obtained, the liquidator or interested person must deliver the relevant Act of the court to the Registrar for registration, in default of which that person commits an offence (Art 169(7)).

19.92. Art 169A replicates the provisions in Arts 8-9 of the Companies (General Provisions) (Jersey) Order 2002. Art 169A(1) provides that any creditor who has been given notice of a creditors' meeting is entitled to vote at the meeting (either in person or by proxy) and any adjournment of it with the value of the vote being calculated according to the amount of the creditor's debt at the date of the winding up commencing (Art 169A(2)). A debt for an unliquidated amount or a debt the value of which has not been ascertained does not give a creditor the right to vote at a creditors' meetings, although the chairman of the meeting is entitled to allocate the debt an estimated minimum value which will entitles the creditor to vote that amount (Art 169A(3)).

19.93. For a resolution to pass at a creditors' meeting, it must be supported by creditors with at least half the value of the votes of all the creditors who vote on the resolution (Art 169A(4)). However, the creditors' meeting is not competent to act unless 3 creditors are present (in person or by proxy) or, if the company has less than 3 creditors, all of the creditors (or their proxies). In either case, the creditors must be under the rules entitled to vote (Art 169A(5)).

19.94. Art 182 stipulates that any resolution passed at an adjourned meeting of a company's creditors is treated for all purposes as having been passed on the date on which it was in fact passed and not at any earlier date.

Powers and Duties of the Liquidator

19.95. In a creditors' winding up, the liquidator may pay a class of creditors in full and compromise any claim by or against the company only with the sanction of the court or the liquidation committee or, if there is no committee, a meeting of the creditors (Art 170(1)).

Branch v Mc Evoy 2009 JLR Note 26: in a rare case seeking the sanction of the court to a compromise, the court held that, in the absence of a liquidation committee or meeting of creditors, creditors should, unless the circumstances make it wholly impracticable, ordinarily be given an opportunity of being heard, so that the court can take into account their views before a decision to sanction the compromise is made, bearing in mind that the decision is one which the court will be making in their interests. However, as far as the issue of sanction was concerned, the court adopted the words of Mr Justice Lightman in *Re Edennote Limited (No 2)* [1997] 2 BCLC 92 where he stated that: "*In deciding whether or not to sanction a proposed compromise the court must consider whether the interests of those, whether creditors or contributories, who have a real interest in the assets of a company in liquidation, are likely to be best served (i) by permitting the company to enter into that compromise with all the terms that it contains; or (ii) by not permitting the company to enter into that compromise. It is not for the court to speculate whether the terms of the proposed compromise were the best that could have been obtained; or whether the proposed compromise would have been better if it did not contain all the terms that it does contain; or whether there could have been a better compromise unless it is satisfied that, if the company is not permitted to enter into the compromise on the terms which the liquidator has negotiated there will then be better terms* *or some other compromise on offer, the decision is between the proposed compromise and no compromise at all."*

19.96. Without any sanction, the liquidator may:

a) Exercise any other power of the company required for its winding up (Art 170(2)).

b) Settle a list of contributories (with the list being treated as *prima facie* evidence of the persons named in it being contributories).

c) Make calls.

d) Summon general meetings of the company for the purpose of obtaining its sanction by special resolution or for any other purpose the liquidator may think fit (Art 170(3)).

e) Pay the company's debts and adjust the rights of the contributories among themselves (Art 170(4)).

19.97. Where more than one liquidator is appointed, the appointment must state whether any act must be done by all or any one or more of the liquidators acting jointly, in default of which the law deems that any act may be done by two or more liquidators acting in concert (Art 170(5)).

19.98. Art 174(1) states that a lien or other right to retain possession of a record of a company is unenforceable to the extent that its enforcement would deny possession of the record to the liquidator, unless that lien or document is one that gives a title to property and is held as such (Art 174(2)).

19.99. Art 180(1) permits a court to require that a person forthwith (or within a period which the court may direct) pays, delivers, conveys, surrenders or transfers property or records to the liquidator, where that person has in their possession or under their control property or records to which the company appears to be entitled. Where, under Art 180(2), the liquidator seizes or disposes of property that is not the property of the company and, at the time of seizure or disposal, the liquidator believes, and has reasonable grounds for believing, that he or she was entitled (whether in pursuance of an order of the court or otherwise) to seize or dispose of that property, then the liquidator is not liable to any person in respect of loss or damage resulting from the seizure or disposal (except in so far as the loss or damage is caused by the negligence of the liquidator) and, furthermore, enjoys a lien on the property, or the proceeds of its sale, for expenses incurred in connection with the seizure or disposal.

19.100. As listed in Art 183(2), persons in the following categories are under an obligation to co-operate with the liquidator, in default of which they are guilty of an offence (Art 183(4)):

a) Persons who are or, at any time, who have been officers of or the secretary to the company.

b) Persons taking part in the formation of the company at any time within 12 months before the commencement of the winding up.

c) Persons in the employment of the company or who have been in its employment within those 12 months and who are in the liquidator's opinion capable of giving information which he or she requires.

d) Persons who are or who have been, within those 12 months, officers of or employed by a body corporate that is or was, within those 12 months, secretary to the company in question.

19.101. For these purposes, "employment" also includes employment under a contract for services (*contrat de louage d'ouvrage*) (Art 183(3)).

19.102. The duty to co-operate may be fulfilled under Art 183(1) in the following ways:

a) Giving the liquidator information concerning the company and its promotion, formation, business, dealings, affairs or property which the liquidator may at any time after the commencement of the winding up reasonably require.

b) Attending on the liquidator at reasonable times and on reasonable notice when requested to do so.

c) Notifying the liquidator in writing of any change of his or her address, employment, or name.

19.103. Art 184(1) requires the liquidator to report any possible misconduct arising in the course of the winding up including whether the company has committed a criminal offence, whether any person has committed a criminal offence in relation to the company being wound up or, in the case of a director, whether his or her conduct would justify the seeking of an order of disqualification under Art 78. The conduct of the director may be in relation to the company being wound up, its holding company or any subsidiary of the holding company.

19.104. Under Art 184(2), the liquidator must report the matter to the Attorney-General and furnish any information and provide access to documents (whether information or documents in the possession or under the control of the liquidator and relating to the matter in question), together with any facilities for inspecting and taking copies of the documents as the Attorney-General may require. If it appears to the court in a creditors' winding up that any of the same categories of misconduct are present and that the liquidator has not made a report to the Attorney-General, the court may direct the liquidator to make such a report, whether of its own motion or on the application of a person interested in the winding up (Art 184(5)).

19.105. The Attorney-General may also refer the matter to the Minister or the Commission for further enquiry (Art 184(3)). In this instance, the Minister or the Commission will investigate the matter and may exercise any of the powers available to inspectors appointed under Art 128 in the context of company investigations (Art 184(4)).

19.106. For the purpose of an investigation by the Minister or the Commission, any obligation imposed on a person by the law to produce documents or give information to, or otherwise to assist, inspectors is to be regarded as an obligation similarly to assist the Minister or the Commission in their investigation (Art 185(1)). Answers given by a person to a question put to that person in an investigation attract the non-incrimination privilege in Art 130(4) (Art 185(2)).

19.107. If criminal proceedings are instituted by the Attorney-General following a report or reference under Art 184, the liquidator and every officer and agent of the company past and present (other than the defendant) is required to give the Attorney-General every assistance in connection with the prosecution which he or she is reasonably able to provide (Art 185(3)). In this context, agent is taken to include a banker, advocate or solicitor of the company as well as any person employed by the company as auditor, whether or not that person is an officer of the company (Art 185(4)). Failure to provide the assistance may result in the Attorney-General applying to court for an order directing the person to comply and, if the application is made with respect to a liquidator, direct that the costs shall be borne by the liquidator personally unless it appears that the failure to comply was due to the fact that the liquidator did not have sufficient assets of the company in his or her hands to enable him or her to do so (Art 185(5)).

Disclaimers of Onerous Property and Contract Leases

19.108. Art 171 provides a power for the liquidator to disclaim onerous property. Onerous property is defined in Art 171(1) as being any unprofitable contract or any other property, including movable property, a contract lease as well as immoveable property (situated outside Jersey), that is not saleable or not readily saleable because of a liability to pay money or perform an act which is onerous for the company.

19.109. Within 6 months after the commencement of the winding up, Art 171(2) requires the liquidator to give notice disclaiming on behalf of the company any onerous property of the company in writing signed by him or her and referring to Arts 171 and 173 (powers of the court) to any person who is interested in or under any liability in respect of the property disclaimed.

19.110. The effect of a disclaimer is to determine the rights, interests and liabilities of the company from the date the disclaimer is made in the property or in respect of the property as well as to discharge the company from all liability as of the date the creditors' winding up commence. It does not, however, affect the rights or liabilities of any person except insofar as may be necessary to release the debtor from liability (Art 171(3)). If the operation of a disclaimer results in any person sustaining loss or damage, this person is automatically deemed to be a creditor of the company and may prove for the loss or damage in the winding up (Art 171(4)).

19.111. The disclaimer of a contract lease does not take effect, according to Art 172(1), unless a copy of its disclaimer has been served on every person claiming under the company as a hypothecary creditor or under lessee to the extent that the liquidator is aware of their addresses. Furthermore, the disclaimer does not have effect unless no application is made to the court under Art 173 with respect to the contract lease within 14 days beginning with the day on which, where more than one hypothecary creditor or under lessee exists, the last notice was served on these parties. Where an application has been made, the disclaimer will only have effect where the court directs that it is to do so. Where the court makes such a direction, it may also make one or more orders in respect of fixtures, tenant's improvements or other lease matters as it thinks fit (Art 172(2)).

19.112. Where the liquidator has disclaimed property, an application may be made by a person who may have an interest in the disclaimed property (including, in the case of the disclaimer of a contract lease, a person claiming under the company as a hypothecary creditor or an under lessee) or who are subject to a liability (including the case of a guarantor) that remains undischarged by the disclaimer (Arts 173(1)-(2)).

19.113. The court may make an order on terms as it thinks fit to vest the disclaimed property in, or for its delivery to, any person with an entitlement to the property or who is subject to a liability in relation to that property or to any trustee for those persons (Art 173(3)). In relation to a person claiming by virtue of being subject to a liability, the court is bound not to make the order unless it would be just to do so for the purposes of compensating that person (Art 173(4)). Where a vesting order takes place, it is taken into account as a factor in assessing the amount that may be proved by that individual in the winding up involving the company (Art 173(5)).

Vulnerable Transactions

19.114. Vulnerable transactions as a category include transactions that may be impugned or whose effects may be reversed so as to restore the company's assets available for distribution to creditors. This category includes transactions at an undervalue, preferences, extortionate credit transactions and liabilities in respect of the purchase or redemption of shares.

Transactions at an Undervalue

19.115. Where a company has entered into a transaction with a person at an undervalue, Art 176(1) authorises the liquidator to make an application to the court for an order restoring the position to what it would have been if the company had not entered into the transaction, which order the court may make as it thinks fit. If the court is satisfied that the company entered into the transaction in good faith for the purpose of carrying on its business and that there were reasonable grounds for believing that the transaction would be of benefit to the company at the time the transaction was entered into, the court will not make the order sought (Art 176(2)).

19.116. According to Art 176(3)), an order of the court may do any one or more of the following things:

a) Require property transferred as part of the transaction to be vested in the company.

b) Require property to be vested in the company if it represents in a person's hands the application either of the proceeds of sale of property or of money that has been transferred.

c) Release or discharge (in whole or in part) security given by the company.

d) Require a person to pay in respect of a benefit received by him or her from the company a sum to the company as the court may direct.

e) Provide for a surety or guarantor whose obligation to a person was released or discharged (in whole or in part) under the transaction to be under such new or revived obligation to that person as the court thinks appropriate.

f) Provide for security to be given for the discharge of an obligation imposed by or arising under the order, for the obligation to be secured on any property and for the security to have the same priority as the security released or discharged (in whole or in part) under the transaction.

g) Provide for the extent to which a person whose property is vested in the company by the order or on whom an obligation is imposed by the order may prove in the winding up of the company for debts or other liabilities that arose from, or were released or discharged (in whole or in part) under or by, the transaction.

19.117. An order may affect the property of or impose an obligation on any person, whether or not he or she is the person with whom the company entered into the transaction (Art 176(4)). However, an order may not prejudice an interest in property that was acquired from a person other than the company and was acquired in good faith and for value, or prejudice any interest deriving from such an interest. Nor may it require a person who in good faith and for value received a benefit from the transaction to pay a sum to the company, except where the person was a party to the transaction (Art 176(5)).

19.118. A court may, in assessing whether a person has acted in good faith, take into consideration whether the person was aware that the company had entered into a transaction at an undervalue and that the company was insolvent or would become insolvent as a result of entering into the transaction as well as whether the person was an associate of or was connected with either the company or the person with whom the company had entered into the transaction (Art 176(6)).

19.119. For the purposes of the law, Art 176(7) states that a transaction at an undervalue occurs where the company enters into a transaction with a person by which:

a) It makes a gift to that person.

b) It enters into a transaction with that person on terms for which there is no *cause* or for a *cause* the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the *cause* provided by the company.

19.120. Also for the purposes of the law, Art 176(8) states that a transaction at an undervalue may be impugned if it was entered into during the period of 5 years immediately preceding the date of commencement of the winding up, but only if the company was insolvent when it entered into the transaction or became insolvent as a result of the transaction (Art 176(9)). Where the transaction is entered into with a person connected with the company or with an associate of the company, the burden of proof is reversed and the person must prove that the company was not insolvent when it entered into the transaction or that it did not become insolvent as a result of the transaction (Art 176(10)).

Preferences

19.121. Where a company has given a preference to a person, Art 176A(1) authorises the liquidator to make an application to the court for an order restoring the position to what it would have been if the company had not given the preference, which order the court may make as it thinks fit.

19.122. The court may make an order in the case of preferences to do one or more of the items mentioned in paragraph 19.116. above (Art 176A(2)). Any order made may affect the property of or impose an obligation on any person, whether or not he or she is the person to whom the company gave the preference (Art 176A(3)). However, an order may not prejudice an interest in property that was acquired from a person other than the company and was acquired in good faith and for value, or prejudice any interest deriving from such an interest. Nor may it require a person who in good faith and for value received a benefit from the preference to pay a sum to the company, except where the person was at the time of receipt of the preference a creditor of the company (Art 176A(4)).

19.123. A court may, in assessing whether a person has acted in good faith, take into consideration whether the person had notice of the circumstances that amounted to the giving of the preference by the company and of the fact that the company was insolvent or would become insolvent as a result of giving the preference as well as whether the person was an associate of or was connected with either the company or the person with whom the company had entered into the transaction (Art 176A(5)).

19.124. For the purposes of the law, Art 176A(6) states that a company gives a preference to a person if that person is a creditor of the company or a surety or guarantor for a debt or other liability of the company and the company either does anything or suffers anything to be done that has the effect of putting the person into a position, in the event of the winding up of the company, which is better than the position he or she would have been in if the preference had not been given.

19.125. Art 176A(7) stipulates that a court may not make an order impugning the preference unless the company was influenced in deciding to give the preference by a desire to put the person into a position, in the event of the winding up of the company, which would be better than the position in which the person would be if the preference had not been given. If at the time the preference was given, the person to whom it was given was an associate of or connected with the company (otherwise than by reason only of being the company's employee), the presumption will be made that the company was influenced in deciding to give the preference by the desire to better that person's position in the event of a winding up, unless proof to the contrary is brought (Art 176A(8)).

19.126. Also for the purposes of the law, Art 176A(9) states that the giving of a preference may be impugned if it was entered into during the period of 12 months immediately preceding the date of commencement of the winding up, but only if the company was insolvent when it gave the preference or became insolvent as a result of the preference (Art 176A(10)). Where the transaction is entered into with a person connected with the company or with an associate of the company, the burden of proof is reversed and the person must prove that the company was not insolvent when the preference was given or that it did not become insolvent as a result of the preference being given (Art 176A(11)).

Common Definitions for Transactions at an Undervalue and Preferences

19.127. For the purposes of the provisions on transactions at an undervalue and preferences, Art 176B(1) provides that a person is connected with a company if that person is one of the following:

a) A director of the company.

b) An associate of a director of the company.

c) An associate of the company.

19.128. Under Art 176B(2), the term associate encompasses:

a) In relation to an individual, if that person is the individual's husband or wife, or is a relative, or the husband or wife of a relative, of the individual or of the individual's husband or wife. Furthermore, if that person is in partnership with the individual, the individual as well as the husband or wife or relative of that individual is that person's associate. Finally, a person is associated with an individual if he or she employs or is employed by that individual. Art 176B(3) defines relative to include a brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant, whether the relationship is of the half blood or whole blood and whether or not the relationship, in the case of a child, arises through remarriage or adoption. Illegitimacy of a child is not a factor in computing association. Lastly, references to a husband or wife include former or reputed husbands or wives (Art 176B(4)).

b) In relation to a trust, a trustee is an associate of another person if the beneficiaries of the trust include that other person or an associate of that other person or the terms of the trust confer a power that may be exercised for the benefit of that other person or an associate of that other person.

c) In relation to a company, a company, whether or not incorporated within or outside Jersey (Art 176B(7)), is an associate of another company if the same person has control of both companies, or a person has control of one company and either persons who are his or her associates, or he or she and persons who are his or her associates, have control of the other company or if each company is controlled by a group of 2 or more persons and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he or she is an associate. Furthermore, a company is an associate of another person if that person has control of the company or if that person and persons who are his or her associates together have control of the company.

d) For the above purposes, control by a person is deemed to occur where the directors of the company or of another company that has control of it (or any of them) are accustomed to act in accordance with his or her directions or instructions or he or she is entitled to exercise or control the exercise of more than one third of the voting power at any general meeting of the company or of another company which has control of it. Where two or more persons together satisfy this threshold, they are taken as having joint control of the company (Art 176B(6)).

e) Where a person is an associate of another, the other is also taken to be an associate of that person. Furthermore, a director or other officer of a company is treated for these purposes as being employed by the company (Art 176B(5)).

Extortionate Credit Transactions

19.129. Art 179(1) applies to the situation where a company is or has been a party to a transaction for or involving the provision of credit to the company. The liquidator may, under Art 179(2) apply to the court for an order impugning the credit transaction if it is or was extortionate and it was entered into in the period of 3 years ending with the commencement of the creditors winding up. The presumption will be made in any application that the credit transaction concerned is or was extortionate, unless proof to the contrary is brought (Art 179(4)).

19.130. In particular, a transaction is deemed extortionate if, having regard to the risk accepted by the person providing the credit, one of the following applies:

a) The terms of the credit transaction are or were such as to require grossly exorbitant payments to be made in respect of the provision of the credit, whether these payments are made unconditionally or in certain contingent circumstances.

b) The credit transaction otherwise grossly contravened ordinary principles of fair dealing (Art 179(3)).

19.131. A court making an order under Art 179(5) may order one or more of the following as it thinks fit:

a) Provision setting aside the whole or part of an obligation created by the transaction.

b) Provision varying the terms of the transaction or varying the terms on which a security for the purposes of the transaction is held.

c) Provision requiring a person who is or was a party to the transaction to pay to the liquidator sums paid to that person by the company.

d) Provision requiring a person to surrender to the liquidator property held by him or her as security for the purposes of the transaction.

e) Provision directing accounts to be taken between any persons.

Liability in respect of the Purchase or Redemption of Shares

19.132. Art 181(1) applies to the situation where a company (other than an open-ended investment company) has within 12 months before the commencement of the winding up made a payment under Arts 55, 57 or Art 59 in respect of the redemption or purchase of its own shares and the payment was not lawfully made for the purpose of the redemption or purchase (termed in Art 181(2) to be a “relevant payment”) and, finally, the aggregate realisable value of the company’s assets and the amount paid by way of contribution to its assets is not sufficient for the payment of its liabilities and the expenses of the winding up.

19.133. The liquidator may apply to court for an order that a person from whom the shares were redeemed or purchased or a director of the company make a contribution to the company's assets so as to enable the insufficiency to be met (Art 181(3)). Where a director has expressed the opinion required under Art 55(9) (company able to discharge its liabilities), the director may be ordered, jointly and severally with any other person liable under this provision, to contribute an amount not exceeding the relevant payment, unless the court is satisfied that the director had grounds for the opinion expressed (Art 181(6)).

19.134. A person from whom any shares were redeemed or purchased may also be ordered to contribute an amount not exceeding the proportion of the relevant payment that was made in respect of his or her shares (Art 181(4)), although a court will not order a contribution under this heading unless it is satisfied that, when he or she received payment for his or her shares, the person knew or ought to have concluded from the facts known to that person that, immediately after payment was made, the company would be unable to discharge its liabilities as they fell due, and that the realisable value of the company's assets would be less than the aggregate of its liabilities (Art 181(5)). Where a person has contributed an amount under this provision, the court may direct a contribution to be made to him/her as the court thinks just and reasonable from any person together with whom the former is jointly and severally liable to contribute (Art 181(7)).

19.135. Art 192 (liability of past and present members as contributories) does not apply in relation to liability arising by virtue of this provision.

Wrongful and Fraudulent Trading

19.136. In the course of a creditors' winding up, the liquidator may apply to court for an order, if the court thinks it proper to do so, in relation to a person who is or has been a director of the company requiring that person be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company arising after a stipulated time (Art 177(1)). That time is calculated from when that person knew that there was no reasonable prospect that the company would avoid a creditors' winding up or the making of a declaration under the Désastre Law or, on the facts known to him or her, was reckless as to whether the company would avoid such a winding-up or the making of such a declaration (Art 177(2)).

19.137. The court may not make the order unless it is satisfied that, after either one of the conditions specified in Art 177(2) was met, that person took reasonable steps with a view to minimising the potential loss to the company's creditors (Art 177(3)). In the hearing of the application before the court, the liquidator may give evidence or call witnesses (Art 177(4)).

19.138. Art 178(1) authorises the liquidator to apply to the court for an order that persons who were knowingly parties to the carrying on of the company's business with intent to defraud creditors of the company or creditors of another person, or for a fraudulent purpose, be liable to make such contributions to the company's assets as the court thinks proper. In the hearing of the application before the court, the liquidator may give evidence or call witnesses (Art 178(2)).

19.139. A court making an order under Arts 177 or 178 may give further directions as it thinks proper for giving effect to the order (Art 178(3)) and, in relation to a person who is a creditor of the company, may direct that the whole or part of a debt owed by the company to that person and any interest it carries will rank in priority after all other debts owed by the company and after any interest on those debts (Art 178(4)). Arts 177 and 178 also have effect notwithstanding that the person concerned may be criminally liable in respect of the matters by reason of which the order is made (Art 178(5)).

Termination of Creditors' Winding Up

19.140. Art 185A(1) provides that the liquidator of a company in a creditors' winding up may apply to the court for an order terminating the winding up. Similarly, the members of the company may authorize the company by special resolution to make such an application. The court is required to refuse the application unless it is satisfied that the company is then able to discharge its liabilities in full as they fall due (Art 185A(2)).

19.141. The court will have regard to the interests of the company's creditors in considering the merits of the application (Art 185A(3)) and, where an application for a public interest winding up under Art 155 has been made, to the views of the Commission (Art 185A(4)). The court may also make any order for costs it thinks fit (Art 185A(5)).

19.142. On the termination of a creditors' winding up, the liquidator ceases to hold office (Art 185A(6)). However, the termination of the procedure does not prejudice the validity of any thing duly done by any liquidator, director or other person, or by operation of law, before its termination (Art 185A(7)).

19.143. In any winding up, the company's property is to be applied in satisfaction of the company's liabilities *pari passu*, subject to any statutory scheme setting out the order for the payment of debts (Art 186(1)). Any remaining property of the company will be distributed among the members according to their rights and interests in the company, unless the memorandum or articles of association otherwise stipulate (Art 186(2)). Art 109 of the Schedule to the Companies (Standard Table) Order 1992 states that, where a company is wound up, the directors may, subject to a special resolution being obtained, distribute all or part of the company's assets *in specie* to the members. A valuation is undertaken by the liquidator or, where one has not been appointed, the directors, who may determine the value of the assets and how the division/distribution will take place.

Vesting may take place in the members or, with the sanction of the members, in a trust for the benefit of the members on such terms as the members determine. These rules do not, however, require a member to accept an asset on which an outstanding liability exists.

19.144. Notwithstanding the rules on distribution, the liquidator or a director, if a liquidator is not appointed, may distribute that part of the company's assets not required to meet the costs of the winding up or creditors' claims to the members of the company, in a manner proportionate to their rights or interests or as otherwise provided by the company's memorandum or articles of association. This is provided that the liquidator or director is satisfied that the company's assets will be sufficient to ensure the payment of all costs, charges and expenses properly incurred in the winding up and the satisfaction in full of the claims of all creditors (including any interest owing on a debt) (Art 186(3)).

Conversion of Creditors' Winding Up

19.145. A creditors' winding up may also be terminated in the case of a declaration under the Désastre Law (see paragraph 19.161. below).

Common Provisions for Winding Up

Applications to Court

19.146. The company (in the case of a summary winding up) or the liquidator, a contributory or creditor of the company (in the case of a creditors' winding up) are able to apply to the court for the determination of any question arising in the winding up or for the court to exercise any of its powers in relation to the winding up (Art 186A(1)).

19.147. The court may agree wholly or partially to the application on such terms and conditions as it thinks fit or make any other order on the application as it thinks just, provided the court is satisfied that it will be just and beneficial to do so (Art 186A(2)). The court may in fact exercise any power that would have been exercisable by the court or by the Viscount if a declaration had been made under the Désastre Law in relation to the company and may also make an order terminating the winding up (Art 186A(3)).

Liquidator's Duties and Qualifications

19.148. Where a director or a liquidator who has defaulted in delivering a document or in giving any notice which the law requires that person to deliver or give and has failed to make good the default within 14 days of the service on that person of a notice requiring that person to do so, the court has the power to make an order directing the director or the liquidator to make good the default within a time to be specified in the order. Applications may be made by a creditor or contributory of the company or by the Registrar (Arts 187(1)-(2)).

19.149. The court may also provide that the costs of and incidental to the application will be paid by the director or the liquidator personally, whether in whole or in part (Art 187(3)). However, whether a court makes an order or not, that fact does not prejudice the operation of any provision imposing penalties on a director or a liquidator in respect of that default (Art 187(4)).

19.150. A person, other than an individual, is not qualified to act as a liquidator (Art 188(1)). Qualifications have been prescribed under Art 188(2) and the provisions of Art 7 of the Companies (General Provisions) (Jersey) Order 2002 will apply (see paragraphs 19.76.-19.77. above). An appointment made in contravention of the law will expose the liquidator acting when unqualified to conviction for an offence (Art 188(3)). In fact, a liquidator is required to vacate office where he ceases to be qualified to act as a liquidator (Art 188(4)).

19.151. Art 189 states that a person may be convicted of an offence where that person gives or agrees or offers to give to a member or creditor of a company any valuable benefit with a view to securing the appointment or nomination of that person or of another as the company's liquidator. An offence is also committed if the inducement is given to prevent the appointment or nomination of a person as a liquidator.

19.152. Notice must be given in writing and signed by the liquidator to the Registrar and, in the case of a creditors' winding up to the creditors, except where the removal is pursuant to Art 163(3) (removal by the creditors), within 14 days after the resignation, removal or vacation of office for any reason (Art 190(1)). Failure to comply with this requirement is an offence (Art 190(2)).

Sundry Rules

19.153. Every invoice, order for goods or services or business letter issued by or on behalf of the company or by the liquidator on behalf of the company, being any document on or in which the name of the company appears, must contain a statement that the company is in liquidation, where the company is subject to a winding up (Art 191(1)). Failure to comply with this requirement will render the company and every defaulting office liable to conviction for an offence (Art 191(2)).

19.154. Art 192(1) provides that where a company is wound up, each present and past member of the company is liable to contribute to its assets to an amount sufficient for payment of its liabilities, the expenses of the winding up, and for the adjustment of the rights of the contributories among themselves. However, a past member of a particular class is not, as a member of that class, liable to contribute (a) unless it appears to the court that the present members of that class are unable to satisfy the contributions required to be made by them as such members; (b) if he or she ceased to be a member of that class for 12 months or more before the commencement of the winding up; or (c) in respect of a liability of the company contracted after he or she ceased to be a member of that class (Art 192(2)).

19.155. Similarly, a past or present guarantor member is not liable in that capacity to contribute unless it appears to the court that the past and present members in their capacity as the holders of limited shares are unable to satisfy the contributions required to be made by them as such members (Art 192(3)). Furthermore, a past or present member in his or her capacity as the holder of an unlimited share is not liable to contribute unless it appears to the court that the past and present members in their capacities as the holders of limited shares or as guarantor members are unable to satisfy the contributions required to be made by them as such members (Art 192(4)).

19.156. A limitation exists on the contribution in that it is not to exceed (a) any amount unpaid on any limited shares in respect of which he or she is liable; or (b) the amount undertaken to be contributed by him or her to the assets of the company if it should be wound up (Art 192(5)). Set off is limitedly available in that a sum due to a member of the company, in his or her capacity as a member, by way of dividends, profits or otherwise is not in a case of competition between himself or herself and any other creditor who is not a member of the company, a liability of the company payable to that member, but any such sum may be taken into account for the purpose of the final adjustment of the rights of the contributors among themselves (Art 192(6)).

19.157. Following the winding up of a company and prior to its dissolution, the company's records and those of any liquidator may be disposed of in any manner that the company by special resolution directs (in the case of a summary winding up) or that the liquidation committee or the company's creditors, in the absence of a liquidation committee may direct (in the case a creditors' winding up) (Art 194(1)). In fact, the Commission may direct that the records of a company which has been wound up may not be destroyed for a period that it thinks proper not to exceed 10 years from the company's dissolution (Art 194(3)).

19.158. Any person who fails to act in accordance with a direction under Art 194 is liable to conviction for an offence (Art 194(4)). However, at the end of a 10 year period beginning with the company's dissolution, no responsibility rests on the company, the liquidator or any person to whom the custody of the records has been committed for failure to provide any record to a person claiming to be interested in the document (Art 194(3)).

Relationship of Winding Up to Other Procedures and Désastre

19.159. Art 193 states that the winding up of a company bars the right to any person to take other proceedings in bankruptcy, excepting the right of the creditor or the company to apply for a declaration under the Désastre Law.

19.160. In fact, where a summary winding up of a company has commenced, the making of a declaration is made in respect of the company under the Désastre Law will bring the summary proceedings to an end (Art 154A(1)). The termination will result in the liquidator appointed for the purpose of the winding up ceasing to hold office and the company and all other persons being in the same position as if the winding up had not commenced (Art 154A(2)). However, the termination of the winding up does not affect the validity of any thing duly done by the liquidator, director or other person or by operation of law before the termination (Art 154A(3)).

19.161. Similarly, where a creditor's winding up has commenced, the making of a declaration in respect of the company under the Désastre Law will also bring these proceedings to an end (Art 185B(1)). The termination will result in the liquidator appointed for the purpose of the winding up ceasing to hold office and the company and all other persons being in the same position as if the winding up had not commenced (Art 185B(2)). However, the termination of the winding up does not affect the validity of any thing duly done by the liquidator, director or other person or by operation of law before the termination (Art 185B(3)).

19.162. For the corporate désastre procedure, refer to the Law relating to Security on Movable Property and Bankruptcy Study Guide.

20. Dissolution of the Company

Power to Strike Off

20.1. The Registrar may in certain specified instances send a notice to a company stating that at the end of a period of 3 months following the date of the notice, the name of the company will be struck off the register and the company will be dissolved unless the company complies with a requirement of the law mentioned in the notice or the company or a member, creditor or liquidator of the company shows reason why the company's name should not be struck off the Registrar and the company should not be dissolved (Art 205(6)). Notice may be sent by post and, in the case of notice to a liquidator under Art 205(5), may be addressed to the liquidator at the liquidator's last known place of business (Art 205(10)).

20.2. Notice may be sent in the following instances:

a) If the Registrar has reason to believe that a company is not carrying on business or is not in operation and has sent to it a letter inquiring whether it is carrying on business or is in operation and either the Registrar receives an answer to the effect that the company is not carrying on business or is not in operation or no reply is forthcoming within one month after the letter is sent. The fact of the notice being sent must be published in the Jersey Gazette (Art 205(1)).

b) If a company does not deliver a return to the Registrar in accordance with Art 71 before 30 June in the year in which that return is due (Art 205(2)).

c) In the case of a company (other than a limited life company), its memorandum specifies or its articles specify a period of time for the duration of the company and that period has expired, but a notice under Art 144A (notice of expiry of company's duration) has not been delivered to the Registrar. The fact of the notice being sent must be published in the Jersey Gazette (Art 205(3)).

d) If a company is being wound up in a creditors' winding up and the Registrar has reason to believe either that no liquidator is acting or that the affairs of the company are fully wound up, but the returns required to be made by the liquidator have not been made for a period of 6 consecutive months. The fact of the notice being sent must be published in the Jersey Gazette (Art 205(4)).

e) If the Registrar has reason to believe that a company being wound up summarily has failed to comply with Art 150(4) (distribution of assets) for a period of 6 months. The fact of the notice being sent must be published in the Jersey Gazette. Notice in this instance may also be sent to the liquidator (if any) (Art 205(5)).

20.3. If the company does not make good the default in compliance or reason is not shown by the company or a member, creditor or liquidator of the company before the end of the period stated in the notice, the Registrar may strike the company's name off the register (Art 205(7)) and publish notice of that fact in the Jersey Gazette (Art 205(9)). Once struck off, the company is deemed to be dissolved, although the liability (if any) of every director and member of the company continues and may be enforced as if the company had not been dissolved (Art 205(8)).

20.4. In the case of a company, other than a limited life company, whose memorandum or articles of association specify a period of time for the duration of the company, which has expired, Art 205A(1) authorises the Registrar to send a notice by post to the company stating that, at the end of 3 months from the date of that notice, the name of the company will be struck off the register and the company will be dissolved, unless reason is shown to the contrary. The fact of the notice being sent must be published in the Jersey Gazette (Art 205A(2)).

20.5. Unless that reason to the contrary is forthcoming from the company or a member, creditor or liquidator of the company, once the period mentioned in the notice has expired, the Registrar will strike the company's name off the register and publish notice of that fact in the Jersey Gazette. Once struck off, the company is deemed to be dissolved, although the liability (if any) of every director and member of the company continues and may be enforced as if the company had not been dissolved (Art 205A(3)).

Reversing the Dissolution of the Company

20.6. At any time within 10 years of the dissolution of a company under this law or the Désastre Law, a court may make an order, on such terms as it thinks fit, declaring the dissolution to have been void, provided the application is made by the liquidator of the company or any other person appearing to the court to have an interest. Art 213(1) also stipulates that the court may give such directions and make such provisions as may be just to place the company and all other interested parties in the same position as nearly as may be as if the company had not been dissolved. The restoration of the company is designed to permit proceedings to be taken which might have been taken if the company had not been dissolved (Art 213(2)).

20.7. *In re Independent Marine Services Ltd* 1996 JLR 294: an ex parte application for reinstatement of a company to the register is properly brought with the applicant merely needing to show that the potential claim is more than "merely shadowy".

20.8. The applicant for the order is required to deliver to the Registrar for registration the relevant Act of the court within 14 days after the making of the order, unless the court extends this time, failure to do so being an offence (Arts 213(3)-(4)).

20.9. Where an order is made declaring that the dissolution of a company under Art 150 (dissolution on registration of statement) is void and the company's assets (if any) at the time of its dissolution were not sufficient for the discharge of all its liabilities at that time, the court may on the application of a creditor of the company order any person to whom assets were distributed under Art 150 and any director or liquidator who signed a statement delivered to the Registrar under Arts 146 or 150 that the company had no liabilities to contribute to the company's assets so as to enable the insufficiency to be met (Arts 213(5)-(6)).

20.10. A person to whom assets were distributed is liable to contribute an amount not exceeding the amount or value of the assets that were distributed to the person (Art 213(8)). A director or liquidator signing the statement may be ordered, jointly and severally with any other person liable to make a contribution under Art 213, to contribute an amount not exceeding the insufficiency mentioned (Art 213(9)). This latter category does not include persons who show that they had reasonable grounds for being satisfied when signing the statement that the company had no liabilities (Art 213(7)). Where contributions have been made under Art 213, the court may direct any other person who is jointly and severally liable to contribute to pay the person making the contributions any amount the court thinks just and reasonable (Art 213(10)). However, Art 192 (on the liability of contributories) does not apply to the liability arising by virtue of this article (Art 213(11)).

Appendix 1: Advocates and Solicitors Examinations: Past Papers

IMPORTANT NOTES

Time allowed: 2 hours

Answer **any four** questions

Each question carries 25 marks

The marks allocated to the parts of each question are shown in brackets

Unless otherwise stated assume that any reference to a company is a reference to a company incorporated under the Companies (Jersey) Law, 1991 and that the company has adopted the Standard Table without amendment

Give reasons for your answers and support your answers wherever possible by reference to statutory, judicial or other authority (including, where relevant, the Standard Table)

Please underline <u>case names</u> and <u>statutory references</u> and <u>Standard Table references</u>

Please write legibly – unreadable answers may result in lost marks

Your written paper will have to be photocopied so please

1. write in **black ink**

2. write within a margin of 1 inch around each page

3. write your assigned number at the t**op** of each page and the page number in the **top right** hand corner of each page (remembering to keep within the 1 inch margin around each page)

4. number your answers and start each new answer on a new page and

5. write on one side of the paper only

June 2011

<u>Types of Company/Public-Private Threshold Distinction</u>

1. You are asked to advise a client who wishes to incorporate a company in Jersey on the types of company available. He has the heard the following:

(a) That it is not possible to form a private company if there are proposed to be more than 30 members; (10 marks)

(b) That a limited company cannot be formed if there are members by guarantee and by shares in the company; (3 marks)

(c) That a company cannot both have shares of par value and no par value; (3 marks)

(d) That once the types of shares are chosen, the company cannot change its mind. (4 marks)

Your client now decides he wishes to form a company to undertake an investment for a short duration. He has heard that it is possible to limit the duration of the company to a term of years or, as an alternative, till the occurrence of an event as determined by the articles. Detail whether this is true and what types of companies may be formed? (5 marks)

Prospectus Issue and Liability

2. You are asked to advise the shareholder of a company who has received a letter from the company stating the following:

"You are cordially invited to subscribe for a proposed share issue to be made in 2011, whose purpose is to raise capital for a planned expansion of the company's business. Please write to the company by the end of September at the latest enclosing a cheque for £500. Full terms and conditions of the offer will be made available on demand."

Advise the shareholder whether he may safely take up the invitation enclosed in the letter. (25 marks)

Registered Office and Service Requirements

3. (a) Is a company required to have a registered office in Jersey? (3 marks)

(b) Can a company change the location of its registered office? (3 marks)

(c) What happens if an owner of premises fails to authorise their use as the location of a registered office? (3 marks)

(d) If a company moves its registered office, can it suspend its record-keeping and public inspection obligations? (3 marks)

(e) Must the company's name appear at the location of its registered office or on documentation it issues? (3 marks)

(f) Is a company required to have a corporate seal? (3 marks)

(g) Is a company required to keep its registers in Jersey? (3 marks)

(h) Where are documents served on a company? (4 marks)

Directors (Disqualification)

4. (a) You are asked to advise a client who was a director of a company in Jersey that was subject to insolvency proceedings in 2004. Proceedings were later brought against him in 2010, as a consequence of which he was disqualified for 10 years for wrongful trading and causing the creditors an estimated loss of £2 million. He has heard of a new business opportunity he is keen to take up with a United Kingdom company doing business in Jersey and would like your view on whether he is able to act as a director of the United Kingdom company. Alternatively, he would like to propose to the United Kingdom company that they form a Jersey subsidiary of which he would become a director. (5 marks)

(b) He also asks what would be the consequences of his accepting an appointment although disqualified. (5 marks)

(c) If it is unlikely that he can act as a director of any company, he has asked you whether it is possible that his wife could be appointed to a directorship in his place. (5 marks)

(e) He also wishes to know if the length of his disqualification order is open to challenge in light of the decisions of the courts in Jersey as to the appropriate length of disqualification. (10 marks)

Company Investigations

5. (a) Who may apply for a company investigation to take place? (3 marks)

(b) Who pays for the costs of the investigation? (3 marks)

(c) What powers do inspectors have? (6 marks)

(d) Do the inspectors have powers of search or seizure? (3 marks)

(e) To whom are reports supplied? (3 marks)

(f) What proceedings may take place as a result of a report being made? (3 marks)

(g) Are there any distinctions in the investigations procedure in the case of market-traded companies? (4 marks)

Company Liquidations: Just and Equitable Winding Up

6. (a) Who may apply for a just and equitable winding up and how does the application take place? (5 marks)

(b) In what instances can an application be made for a "just and equitable" winding up? (10 marks)

(c) On an application for a winding up of this type, what factors will influence a court to make or deny the order sought? (10 marks)

September 2010

What is the relevance of the rule in Salomon v A. Salomon & Co. [1897] AC 22 to the development of the idea of corporate personality? What exceptions are there that permit the raising/piercing of the corporate veil? (25 marks)

2. A company called Magical Roundabout (Jersey) Limited has four members (Davies, Gower, Sealy and Worthington), each holding 25% of the entire issued share capital. The four agree before the company is incorporated that the company will be run in the following way: (i) Davies will be made managing director for life; (ii) Mayson, a friend of Davies and a lawyer, will be company solicitor, also for life. Once the company is incorporated, its articles contain two clauses reflecting the understanding reached by the members.

   In reliance on this, the managing director (Davies) causes the company to enter into two contracts: the first with himself to provide services to the company for a price of £100,000 a year, the second with Mayson to serve as company solicitor for a fee of £50,000 a year. Both contracts contain references to the articles and incorporate them by reference as part of the contractual terms. Shortly after the company begins business, the company is sued by a dissatisfied client and Mayson defends the case badly, leading to judgment against the company.

   In light of this, a general meeting is called at which Gower, Sealy and Worthington vote in favour of a resolution deleting the article nominating Mayson as solicitor for life and terminating his contract. Mayson is now contemplating litigation against the company. In the meantime, Davies has used powers available to him under the articles to issue shares to Mayson from the authorised share capital available equal to the amount held by each member. Davies and Mayson have now summoned a general meeting at which they intend to put a further resolution reversing the effects of the first resolution. They have agreed with Worthington that, in consideration for a payment of £20,000, Worthington will vote with them on the resolution.

   Advise Gower and Sealy. (25 marks)

3. (a) What is a redemption of shares? (5 marks)

   (b) is a repurchase of shares authorised under Jersey law? (5 marks)

   (c) What is a treasury share? (5 marks)

(d) Describe the procedure by which the a reduction of capital occurs? (10 marks)

4. (a) How is a person qualified to be a director under Jersey law? (5 marks)

(b) How is a person appointed as a director under Jersey law? (5 marks)

(c) What are alternate directors? (5 marks)

(d) How may directors be removed? (5 marks)

(e) How may directors be disqualified from acting as such? (5 marks)

5. The Railway Construction Company (Jersey) Limited is a company in the railway construction sector with five nominated directors: Alpha, Bravo, Charlie, Delta and Echo. The company has negotiated a lucrative contract with the States of Jersey to construct a railway across the island, to which all of the directors are at first agreed. Echo then discovers through a friend who is active in an environmental group called "Treehuggers 'R Us" that the contract will require the building of a railway through an environmentally sensitive site that is not at the moment protected according to States legislation. He objects to the construction going ahead and decides to invoke a veto that all directors have in relation to contracts that are not "in the best interests of the company".

The other directors disagree with this view and point to a contrary opinion being expressed by a business-friendly group called "Carry on Chopping (down the Trees)", according to which they firmly believe that proceeding with the contract would be the best option for the company. Because of determined opposition by Echo, the other directors are exploring the options open to them and have read the Companies (Jersey) Law 1991. They note a number of possibilities, including proposing a resolution to the general meeting to remove the veto, proposing a resolution to the general meeting to disclaim any interest in the contract and to form a new company with only themselves as shareholders and directors to take on the business opportunity represented by the contract.

Echo has now heard of the other directors' intention and seeks your advice on whether he has any substantive remedies available under the law that would protect his position as a minority shareholder. (25 marks)

6. The directors of Christmas Festive Goods (Jersey) Limited, a company manufacturing seasonal goods, are having a difficult time. The market in seasonal goods declined in early 2010 but

will pick up again at the end of the year, probably from November onwards. In the interim, they owe money to a number of creditors, including £3000 to the Santa Hats Supply Company (Jersey) Limited, payment of which is due in September 2010. In addition, they have an overdraft with the North Pole Bank (Jersey) Limited. Because of the likely shortfall in funds, which will probably result in a total absence of meaningful income from the middle of 2010 onwards, the directors wish to ascertain what options are open to them and seek your advice. In particular, they wish to know:

(a) whether they should continue trading pending any further negotiations with the North Pole Bank about their overdraft?

(b) whether they should sell off their surplus stock of unsold seasonal goods (from last year's stock) at a huge discount so that they can obtain funds?

(c) whether they should pay off the Santa Hats Supply Company (Jersey) Limited in full with any moneys available to them, especially as the amount of the debt would entitle the creditor to initiate désastre proceedings?

(d) whether they should seek a loan from the South Seas Bank (Jersey) Limited, which is currently offering loans to struggling enterprises at a rate of 75% interest?

For the purposes of the above question, you may limit your advice to the provisions of the Companies (Jersey) Law 1991. (25 marks)

June 2010

1. (a) State the differences between:

   (i) A company limited by shares and a company limited by guarantee. (3 marks)

   (ii) A par value company and a no par value company. (3 marks)

   (iii) A limited life company and a company of limited duration. (3 marks)

   (iv) A public company and a private company. (5 marks)

   (b) Explain what is meant by:

   (i) Separate legal personality. (3 marks)

   (ii) Limited liability. (3 marks)

   (iii) Piercing the veil, as outlined in *In re Esteem Settlement* 2003 JLR 188. (5 marks)

2. (a) What steps must a person must take in order to form a company in Jersey? (6 marks)

   (b) What documentation is required? (6 marks)

   (c) What names are permissible? (6 marks)

   (d) What is the effect of registration of the company? (7 marks)

3. (a) The Hobbiton Company (Jersey) Limited wishes to issue shares to prospective investors. The company has par value shares whose nominal value is £1. One of the prospective investors, Gondor Investments, is willing to purchase 20,000 shares, but is pressing for the price to be reduced to 95p per share. Can this be done? (5 marks)

   (b) In order to accommodate Gondor Investments, the directors intend issuing 10,000 shares to other investors for a price of £1.10 per share. Can this be done? (5 marks)

   (c) The directors intend to repurchase from existing shareholders 10,000 shares to be able to offer these to Gondor Investments and will issue a further 10,000 shares to Gondor Investments at the price they have stipulated. As the directors wish to credit Gondor Investments with the full par-value of the share, they will apply the premium received from other investors to the Gondor Investments share account. Can this be done? (5 marks)

   (d) One of the other investors, Sauron, has received a letter stating that his offer to purchase shares has been accepted and that the first payment on them is now due. He has since heard of the terms of the Gondor Investment share deal and now refuses to pay the tranche that has been called. Can he do this? (5 marks)

   (e) Sauron also wants to know whether the deal with Gondor Investments can be impugned. Can this be done? (5 marks)

4. Mendicant is the managing director of the No-Hope (Jersey) Limited company and, while in office, does the following things:

   (i) apart from the remuneration agreed at the time of his appointment, he decides to pay himself a bonus every year and to issue shares to himself, for which he does not pay anything;
   (ii) he appoints his 18-year old son, Pobrecito, who is a first year student on a Law and Business programme at the University of the Channel Islands, as a director on a 3-year contract at a salary of GBP 50,000;
   (iii) he deals directly with suppliers to the company and insists that if they want to contract with the company they must pay him a commission;
   (iv) he regularly uses the company expenses account to book flights for himself and his mistress, Miskina, to go on holiday;
   (v) he forms a subsidiary, Poor-Loss (Jersey) Limited, in which he acquires shares, and uses the subsidiary to make a

significant investment, later selling the shares for considerable profit;

(vi) he discovers that No-Hope (Jersey) Limited has declined to enter into a contract for a business opportunity and decides to pursue the opportunity himself. He creates a new company, Le Pauvre SARL, a French company of which he is one of two directors, the other being his son Pobrecito, to enter into the contract. He also seconds an employee of No-Hope (Jersey) Limited to run the company as an interim manager and uses No-Hope (Jersey) Limited's offices as a base from which to run the foreign operations.

After No-Hope (Jersey) Limited subsequently fails and enters into a creditors' winding up, the liquidator discover what Mendicant has done. Advise the liquidator whether Mendicant has breached any duties to the company that may be used as grounds for a claim against him. (25 marks)

5. (a) A number of shareholders in Enchanting Carousel (Jersey) Limited are unhappy with its management and have asked the company to call a general meeting at which a resolution to dismiss the directors will be tabled. The directors decide not to accede to the members' request and have arranged to hold a general meeting at a later date on whose agenda they have tabled a vote of confidence in the directors and a resolution to alter the constitution to ensure that directors cannot be dismissed. The agenda for this meeting is sent out 14 days before the meeting is due to be held stipulating that the meeting will take place in a local hotel at 9 a.m.

On the day, the directors are first to turn up at 8.30 a.m. and decide to move the general meeting to one of the hotel bedrooms. Can the directors do this? (4 marks)

(b) By chance, one of the hotel employees is witness to this and directs some of the shareholders who turn up at 9 a.m. to the room. The directors admit about 10 and then lock the door because of concerns about the fire risk from overcrowding. Can the directors do this? (4 marks)

(c) The limited number they agree to admit do not include Dougal, whose friend Ermintrude is one of the aggrieved shareholders, and who has agreed to attend in her place. Zebedee, an aggrieved shareholder present in the room, attempts to table the shareholders' resolution and has this rejected by the chair of the meeting. Can the chair do this? (4 marks)

(d) Brian, another aggrieved shareholder who has a large bloc of shares in the company, notes that the majority of those in the room are friendly to the directors. He demands that the votes be carried out by a poll. This request is rejected by the chair of the meeting. Can the chair do this? (4 marks)

(e) Brian also asks for a minute to be taken recording the decision of the chair rejecting his request. This is also rejected. Can the chair do this? (4 marks)

(f) The meeting then descends into chaos and those present start arguing loudly and resorting to violence. At this point, the fire alarm bell sounds and the room is vacated. As a result of this, the meeting is abandoned. The aggrieved shareholders retire to consider their position and later, in common with all other shareholders, receive a letter stating that the meeting in fact voted for continuing confidence in the directors and the alteration to the constitution. The aggrieved shareholders decide to inspect the minutes of the meeting to ascertain whether this was in fact decided. When they visit the company's office, they are denied access to the records on the pretext that the company secretary is now on holiday. Can the company do this? (5 marks)

6. The Beleriand Shipping Company (Jersey) Limited wish to effect a transfer of their business to the Moria Mining Company (Jersey) Limited. In order to do so, an application is made to court for the summoning of the requisite meetings of the shareholders as well as of the creditors. There are three creditors, Sam (owed £15,000), Frodo (owed £10,000) and Pippin (owed £25,000). When the meeting is summoned, Frodo and Pippin attend and vote in favour of a scheme of arrangement on the basis of documents that are supplied to them at the meeting itself. Unknown to them, the letter summoning Sam has gone astray and as a result, he did not attend the meeting as he now says he wanted to. He also states that he would have voted against the resolution because the scheme would have meant that he would be required to meet a hitherto deferred demand for capital gains tax. He now objects to a further application made to court for the approval of the scheme, stating that the meeting was unrepresentative and did not comply with the requirements of the Companies (Jersey) Law 1991. Sam also states that because Frodo and Pippin are also shareholders of the Moria Mining Company (Jersey) Limited, separate meetings should have been held involving them (at one meeting) and him (at the other). Because this did not happen, he now says that the scheme is fundamentally unfair and should not be assented to by the court.

Advise Sam on the following issues:

(a) The general requirements for procedure in the Companies Law 1991 and whether, on the facts, these appear to have been complied with? (10 marks)

(b) The requirement for meetings to be representative and what this means? (7 marks)

(c) Whether a court would be entitled to refuse consent to the scheme on the basis of unfairness? (8 marks)