English Law and Terminology 2.

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Company Law.

History of Company Law.

- By1900 England had the largest stock market in the world and was the leading industrial nation. Remarkably, freedom to incorporate as a limited liability company had been available only since 1855. Even more remarkable was the fact that England had undergone the Industrial Revolution without freedom of incorporation and with a legal framework which restricted the development of business organisation.
- Company Law (known as Corporate Law in some countries) refers to the formation and governance of corporate entities. In the UK, the responsible body is the Corporate Law and Governance Directorate of the Department for Business, Enterprise and Regulatory Reform (BERR), formerly the Department of Trade and Industry (DTI).
- Most of the business enterprises which formed the backbone of the Industrial Revolution were sole traders, partnerships or unincorporated companies.
- Therein is the need to identify what we mean by the company. The modern company or corporation has **five basic legal characteristics** – *separate legal personality, limited liability, transferable joint stock, delegated management, and investor ownership*.

Legal Characteristics of Company Law.

- **Legal personality** is where a firm or organisation is permitted to act as a legal person distinct from its owners and managers. This enables firms to enter contracts more efficiently, sue and be sued in the name of the firm's designated officers, own real estate and assets, and pledge real estate and assets to creditors.
- The affirmative asset-partitioning role of having a separate legal personality, is important because it means that the assets of the firm are shielded from their owners and managers as well as the personal creditors of their owners and managers.
- Without a discrete legal personality, it is very difficult to *separate ownership from control and for a managerial hierarchy to be formed*. Unlike most of the other features of the company, separate legal personality cannot be crafted by private contracting and is ultimately the gift of the State.
- **Delegated management** is important because it lets third parties know who has the authority to make decisions and enter binding contracts on behalf of the firm. Investor ownership is the flip side of delegated management because it permits shareholders to have control rights and cash-flow rights without having to participate directly in the management of the firm.
- **Limited liability** for shareholders means that the creditors of the company are limited to making claims solely against the company and not against the assets of the individual shareholder.
- **Transferable joint stock** refers to the ability of owners to transfer their ownership shares to other individuals. The benefit of transferable joint stock means that a business can continue completely uninterrupted even though its underlying owners may change

Company Law- methods of trading.

- The main (not only) types of trading organisations in the UK are: *sole traders partnerships (general and limited) limited liability partnerships limited liability companies.* These are simply ways in which a business enterprise can be organised.
- **Sole Traders**: The majority of businesses in the UK operate as 'sole traders' and that sole trader is personally responsible for any business debts. There is no legal separation between personal and business assets. A sole trader can keep his/her assets secret (apart from to Her Majesty's Revenue and Customs (HMRC)).
- **Partnerships**: Covered by the Partnership Act 1890, a partnership is responsible for its own debts and partners are responsible for each other's debts in respect of the partnership business (joint and several liability). The accounts do not need to be disclosed.
- A partnership is created by agreement (not necessarily in writing- each partner is an agent of the partnership, it does not have legal personality (but does in Scotland), every partner has an equal say in the management (unless otherwise agreed)
- Note - the Limited Partnership Act 1907 provided for a hybrid form of partnership. These are not common but are used in certain business ventures.
- **Limited Liability Partnerships**: The Limited Liability Partnership Act 2000 came into force on 5th April 2001. After a slow take up of this 'new' business association it has become more popular; by April 2012 there were 49,005 LLP's.
- *The difference between a LLP and a general partnership* is that, once registered with the registrar of companies, it attains status as a separate legal personality. Consequently the personal and business assets and liabilities of the partners and LLP are separate.
- **Limited Liability Companies**: These are created under provisions of the Companies Act 2006 by registration of documents with the registrar of companies. There are approximately 2.6m registered companies in the UK. When a company is incorporated, it gains a 'legal personality' separate to any human individuals associated with it. Most importantly members are not normally responsible for the company's debts.
- Also, there are considerable formalities associated with forming a company, a company can own property, sue and be sued in its own name, it does not have a maximum number of members, its management is delegated to directors, it has perpetual succession , companies can give floating charges (a form of security for indebtedness).
- A limited liability company is owned by its members (shareholders in a company limited by shares).

Company Law's evolution.

- The legislative framework of UK company law experienced a comprehensive overhaul with the implementation of the **Companies Act 2006** which was intended to simplify and modernise company law in the UK.
- The 2006 Act exists alongside the **Companies Act 1985 and Companies Act 1989** (together with the 2006 Act, the **"Companies Acts"**). There are a number of other statutes to be considered depending on the activity a company wishes to follow. When a company is formed it is said to be **incorporated**.
- **Types of Business Structure**: The first question to be considered by anyone wishing to establish a business operation in the UK is the type of structure to be used: Although the corporate structure is the one which is most widely used in the UK, there are a variety of other structures available to overseas entities seeking to establish a presence in the UK including setting up a branch or place of business of an overseas company, a partnership, joint venture or a limited liability partnership.
- Overseas companies can register as a branch or as a place of business in the UK. A branch is part of an overseas limited company organised to conduct business through local representatives in the UK. A place of business is for companies who cannot register as a branch because they are from within the UK, they are not limited companies or their activities in the UK are not sufficient to define it as a branch (for example if the activity is simply a representative office).
- The formation of a company in the UK is easy and a corporate vehicle structured to the relevant needs can be obtained very quickly with an expedited "same day" service being available. There are no requirements for local shareholders or directors and no minimum capital rules apply (only applicable to a private company). Certain documents, for example the company's constitutional documents, must be filed with the Registrar of Companies to form a company.
- The structuring of a company has important advantages such as perpetuity of business and limited liability. It can facilitate investment in a business venture, mitigate and minimise risk of the venture with an organisational or decision making structure. A company has therefore become one of the most popular forms of business organisation.

Classification of companies.

- **Types of Companies**: There are different types of corporate structure, which can be used under UK law.
- Companies can be either public, which means that they can offer their shares or other securities for public subscription, or private, which means that they are not allowed to offer their shares or other securities to the public.
- In the UK, there are four ‘standard’ types of company: Public Limited Company (PLC), Private Company Limited By Guarantee, Private Company Limited By Shares & Private Unlimited Company.
- A private company bears the suffix “Limited” or “Ltd” and a public company bears the suffix “PLC”.
- The most common structure used is a private company limited by shares.

Classification of companies.

- **A public limited company**, often shortened to just 'public company' or abbreviated to PLC, is **one that can sell shares or debentures to the general public.**
- Such companies usually start out as private limited companies before being re-registered as a PLC in order to raise capital.
- To become a public limited company, a business must have share capital of £50,000 or more, of which at least 25% must have been paid up before the company can begin trading. Public limited companies are also required to have at least two directors and a company secretary.
- All businesses that are listed on a stock exchange are PLCs, but there are many privately held ones that benefit from the status and credibility that being a PLC gives. Shareholders often choose to incorporate as a PLC because they intend to list in the future, or in order to appear larger and have greater financial backing. Being a shareholder in a PLC is often seen as being more prestigious than being a shareholder in a private limited company.
- The liability of the company is limited to the value of its reserves.
- **A private company limited by guarantee** limits its guarantors' liability to a pre-agreed amount that they must pay in the event that the company is wound up.
- Non-profit organisations such as charities, clubs, student unions, societies and social enterprises are typical entities that use this type of company to set a low limit to the amount that members (owners) must pay if something goes wrong.
- There is no share capital, and therefore no shareholders, in a private company limited by guarantee. Members of the company are guarantors and are often only liable for a nominal sum such as £1 if the company is wound up.
- **Private companies limited by sh**ares are the most frequently-used type of company in the UK. They are more commonly referred to as private limited companies and must have the word 'Limited' or the abbreviated suffix 'Ltd.' at the end of their name.
- One of the main reasons why this particular type of company set up is so popular is that, like public limited companies, the amount for which shareholders are liable in the event that the company is wound up is limited to the reserves of the company.
- In contrast, a sole trader is personally liable for all debts associated with his or her business. His or her personal assets can be seized to repay debts.
- Unlike public limited companies there is no minimum capital requirement for a private company limited by shares, so many are set up with a very small capital investment.

Classification of companies.

- There are not that many **private unlimited companies**, compared to the other types.
- There is no cap to the amount that its members are required to pay if the company is wound up, so they tend to be used for companies where insolvency is a very low risk.
- Another important quality for private unlimited companies is that they are not required by law to submit annual accounts to Companies House. This makes unlimited companies attractive to businesses that wish to maintain a level of secrecy about their financial status.
- In addition to the four main types of public and private companies, there are also a few specific non-standard limited company entities. These are: **Community Interest Companies (CICs), Right to manage companies (RTMs) and Societas Europaeas (SEs).**
- Community Interest Companies are set up for businesses that seek to be of benefit to the community rather than the shareholders or members of the company. They can be either public or private and can be limited by share capital or guarantee.
- Some examples of the type of entities that set up as Community Interest Companies include housing associations, community development trusts and leisure centres. Charities and political parties cannot be set up as CICs.
- In order for regulators to allow an entity to become a CIC it must meet some criteria which show it is in fact being established for the benefit of the community and that its assets and any profits will be used for community purposes.
- **A Right To Manage company (RTM)** is set up to transfer powers for such things as the maintenance and repair work of a building from the landlord to the leaseholders. All RTMs must be set up as a special kind of private company limited by guarantee.
- **Societas Europaea, or SE companies**, are business entities that can be established in all European Economic Area. When established in the UK, SEs are a type of public limited company which can be formed as a subsidiary of another company or as a holding company. SE companies can also be created by mergers or from an existing PLC.
- SEs that are set up in the UK are required to have a registered office and a head office in the United Kingdom and must have a share capital of at least €120,000 (or equivalent).

Constitution of a company.

- A company is required to file its **memorandum of association with the Registrar of Companies on applying for registration**. The memorandum of association need only state that the initial subscribers wish to form a company under the 2006 Act and they agree to become members of the company and to take at least one share each.
- The articles of association contain the regulations relating to the internal management of the company covering matters such as the holding of meetings of directors and shareholders, transfer of shares and changes to share capital, appointment and removal of directors and the powers of directors.
- *There is a standard or model form of articles of association, known as the Model Articles*, which many UK private companies follow to some extent. The Model Articles will automatically apply to any company limited by shares that does not adopt its own articles of association on incorporation.
- No government or other permission is required to establish a company, although there is some regulation of the use of certain business and trading names. Once registered, the name of a company can be changed by special resolution (75% majority) of the shareholders but care must be taken to check that the desired name is available for use by the company.
- Under the 2006 Act, any person can object to a company's registered name on the grounds that it is the same as, or similar to, a name in which the objector has goodwill. Objections to the registration of company names must be lodged with the Companies Names Adjudicator.
- The memorandum of association and articles of association are the two charter documents, for setting up of the company and its operations thereon. '**Memorandum of Association**' abbreviated as MOA, is the root document of the company, which contains all the basic details about the company. On the other hand, '**Articles of Association**' shortly known as AOA, is a document containing all the rules and regulations designed by the company.
- While the MOA sets out the company's constitution, and so it is the cornerstone on which the company is built. Conversely, AOA comprises of bye-laws that govern the company's internal affairs, management, and conduct. Both, MOA and AOA, requires registration, with the **Registrar of companies (ROC)**, when the company goes for incorporation.
- Memorandum of Association is a document that contains all the fundamental information which are required for the incorporation of the company.
- Articles of Association is a document containing all the rules and regulations that governs the company.

Constitution of a company cont.

- Formation of a Company: This is governed by **ss.7-16 Companies Act 2006** and administered by Companies House in Cardiff and the registrar of companies.
- The key constitutional document is the Articles of Association, under s.18, CA'06, which contains internal rules on how the company is to be run.
- The Memorandum of Association ss.7 and 8 CA'06) is now a simple statement (authenticated by each subscriber) of: intent to form a company *and* an agreement to become members and take at least one share each.
- It will contain the name of the company, its registered office, its purpose and liability. These areas will be covered in detail in later lectures. Once formalities are complete, the Registrar will issue a certificate of incorporation (ss.15-16).
- There are restrictions on the names a company can choose (Part 5 CA'06) and complaints about the use of a name can be made to the Company Names Adjudicator.
- Companies previously set up, but no longer trading, can also be bought 'off the shelf' and effectively re-used by a newly forming company

Constitution of a company cont.

- Since the introduction of the Companies Act 2006, a company's 'articles of association' (articles) are now the key constitutional document - see s.17 CA'06. They, along with any resolution and agreements affecting the company's constitution, form the basis of the constitutional documents of the company.
- Some examples will be special resolutions and shareholder agreements either between a shareholder and the company or with another shareholder(s).
- The articles, covered in Chapter 2, CA'06, are essentially the rule book of the company. Some of the key issues set out in the articles are: Voting rights attached to different classes of shares, Powers of directors, Powers of the board, Payment of dividends and Alteration of capital structure.
- For practitioners this area of company law is very important as legal advice on how to set up rules to protect individuals' interests are common.
- **Shares**: The articles may provide directors with powers to issue shares, as does statute under s.551 CA'06, and may contain pre-emption rights (right of first refusal to buy shares on not less favourable terms). This is common in many companies, particularly private companies who cannot, by law, offer their shares to the public.
- The articles of a company operate in conjunction with statute (mainly the Companies Act 2006 and Insolvency Act 1986) and are also likely to contain: rules on the allotment of new shares (s.561, CA'06) and rights which attach to shares (e.g. voting rights).
- **Details of the Articles:** All companies must have articles under s.18(1) CA'06, but if they do not create their own, a default set of articles will apply under s.20. Currently these are the Companies (Model Articles) Regulations 2008.
- A company's articles will be void if they are inconsistent with the general law or statutory provisions. The articles are a business document to allow businesses to effectively operate.

Entities of company law.

- **Directors**: A company acts through the people who represent it. The members of a company (its shareholders) appoint directors (normally office holders) and delegate the running of the company to them. It is the directors who make the day to day decisions on the way the company is run.
- What constitutes a director is defined in s.250 CA'06 – it can be someone who acts in that capacity even if they are not called, or formally appointed, as a director. There are different types of director e.g. shadow directors, de-jure directors, de-facto directors, executive directors, non-executive directors, alternate directors and nominee directors. Companies can also be directors.
- Number of directors (s.154 CA'06) Private companies – must have at least one director. Public companies – must have at least two. Note – the registration requirements under ss.162 to 167 CA'06. Directors do not have to be qualified in any way, although in a public company a Company Secretary, under s.272 CA'06, has to be qualified.
- **Appointment**: There are formalities under ss.9-16 CA'06 on the appointment of directors when the company is first formed and subsequently. Directors can be appointed by either members or directors. Since the CA'06, a director cannot be appointed if under 16 years-old (s.157(1) CA'06) but there is now no maximum age. Section 161 CA'06 makes it clear that the acts of a director are valid, even if there was a defect in their appointment.
- **Termination:** In public companies a system of retirement by rotation exists, although they may seek reappointment by the members. Directors can be disqualified from office and the Model Articles (art 18/22) details when a person ceases to be a director – e.g. if they resign, retire, become bankrupt or become physically or mentally incapable.
- Formalities on the dismissal of a director are contained in ss.168 to 169 CA'06 and this can be by ordinary resolution (over 50% required as defined in s.282). The normal position is that the company's articles of association cannot override statute but see the way weighted voting clauses can be construed to, in effect, 'get around' the intention of statute.
- Section 288 CA'06 also provides for removal by written resolution but note that, as directors may be employees as well as office-holders, dismissal may be a breach of contract.
- **The Board and Decision Making**: The board of directors are chosen to govern the affairs of a company and directors operate as part of that board. They must act collectively and all directors may take part in the decision making process. Decisions have to be taken in accordance with the company's constitution and a general rule is that decisions are taken following a unanimous or majority vote.
- The Model Articles do allow companies to set a quorum (minimum number who must be present) for directors' meetings. They also contain details on notice periods of meetings and voting. One director can be appointed to chair meetings and the decision making process. Each director has one vote but the chairman can exercise a casting vote (art. 13/14). In the absence of a casting vote clause in a company's adopted articles a resolution is not adopted in the event of equal votes.
- **Directors Remuneration**: The basic position is that a director has no right to remuneration unless provided for in the company's constitution and approved by the members. The terminology is key here; directors, as office holders, are paid 'fees' for holding office and they are normally referred to as office holders.
- Quoted companies have to produce a report, by name, of what a director has been paid (s.420 CA'06) and every company is required to have a note in annual accounts of directors' aggregate remuneration, although small companies (defined in s.383) can omit this.

Entities of company law.

- **Promoter** A person who devises a plan for a business venture; one who takes the preliminary steps necessary for the formation of a corporation.
- **Promoters** are the people, who, for themselves or on behalf of others, organize a corporation. They issue a prospectus, obtain stock subscriptions, and secure a charter.
- Promoters owe fiduciary duties to others within the future corporation. Owing fiduciary duties means that promoters have legal duties to act solely in another party's interests. Promoters owe a duty of good faith to the other participants in the business venture. This includes a high standard of honesty and frankness. This is to ensure that the corporation's interests are served before the promoter's own interests.
- Another major subset of fiduciary duties that promoters owe the corporation is a dedication to corporate funds for the corporate purpose. In essence, the promoter cannot keep corporate funds for himself aside from an appropriate pay for his time. The promoter must not allow any corporate funds under his control to go to waste, and ensure that the corporation's interests are best served at each step of the way.
- **Company secretary** is one of the most important persons who perform some specified duties in the company from of business. The overall functions of a company can be of two types; management of the business and secretarial work.
- The latter includes maintenance of books and registers required by the company's Act, issue of share certificates, certification of shares, recording of transfer of shares, preparing agenda, issuing notice of meetings, arranging and attending meetings, drafting the minutes, sending returns to the registrar etc.

Entities of company law.

- **Liability of Shareholders**: Every company having a share capital, whether public or private, must have at least one shareholder. There are no rules relating to the residency of shareholders.
- In the case of both private and public companies, the liability of the shareholders or members is limited to the amount unpaid on the shares held by them. The company and its shareholders are regarded for company law purposes as separate legal persons.
- **Confirmation Statement**: Companies must complete a confirmation statement each year, which gives details of its share capital, shareholders, location of the statutory books, registered office, directors and secretary. It is now also necessary to maintain a register of persons with significant control and influence over the company and to file this information with the Registrar of Companies.
- Persons with significant control and influence include various categories of person, but broadly speaking are most usually persons who hold more than 25% of the shares or voting rights or have the right to appoint or remove directors but would also include persons who exercise significant control or influence, either directly or through an intermediate organisation.
- **Accounts and Auditors**: Subject to exemptions for small companies, every company must appoint a firm of auditors to audit and report on its accounts for each financial period. Companies are also required to file accounts and a directors' report with the Registrar of Companies, and these documents must comply with the requirements of the 2006 Act and show a true and fair view of the financial position of the company.
- The 2006 Act lays down detailed rules as to the form and content of accounts and time limits for their delivery to the Registrar of Companies.

- Companies come in many different shapes and sizes; there are key differences in what they can and cannot do, and the purpose for which each is designed. But all are separate legal persons independent of their directors and shareholders. Only rarely will the law look behind a company and treat it as being the same person as those who control it.
- This concept of a company as a separate legal personality has two consequences:
- A company's property belongs to it and not to its directors, management or shareholders. Even if you are a sole director and a 100 per cent shareholder, you can still be found guilty of stealing from your own company. Liquidators and future owners will have an interest in pursuing claims for theft or misuse of assets where a company has been plundered by those in day-to-day control. Many a corporate swindler has been pursued through the courts for forgetting this basic principle.
- A company is responsible for its own debts and liabilities. The shareholders and, as a general rule, directors cannot be forced to pay them.
- That second point is why 'limited' companies give their shareholders 'limited liability'. A limited company may be sued until all its assets have been exhausted, but no creditor can turn to the shareholders and ask them to meet any deficit. Once a company has received at least the nominal value of its issued shares (£1 for a £1 share, etc), the shares are 'fully paid' and the shareholder has no further liability. Shares may be issued 'partly paid': a £1 share may be issued with 25p payable on issue and 75p at some future date or on an earlier liquidation. But once those amounts are paid in full, the shareholder has no further liability for the company's debts.

Entities of company law.

- **Share capital and company formation:** All companies limited by shares must have at least one share. Most small limited companies elect to have ordinary £1 shares
- Since the implementation of the Companies Act 2006, new limited companies no longer have to specify their total share capital. Instead, the new company will need to deposit an initial statement of capital, or a statement of guarantee. This can then be updated when new shares are issued.
- Existing companies still need to amend their Articles of Association if they wish to allot shares beyond the 'authorised share capital' ceiling stated on incorporation.
- The 'issued share capital' of a limited company is the total value of shares in issue. For example, a company with 1000 shares of £1 has an issued share capital of £1000.
- Shares are 'allotted' to members (shareholders) upon incorporation, and the company may allot shares to new members further down the line (subject to the terms of the Articles of Association, and agreement of the board).
- There are 4 main types of shares used by limited companies:
- *Ordinary shares* – which have no special rights or restrictions (these can be sub-divided into ordinary shares with different values).
- *Preference shares* – holders of this type of shares will be paid annual dividends by the company before other shareholders are paid.
- *Cumulative preference shares* – similar to preference shares, but allows the company to carry forward dividend payments if they cannot be made in one given years.
- *Redeemable shares* – these shares are issued on condition that the company has the option to buy them back after a certain period of time, or on a certain date.

Entities of company law.

- **How do you allot or transfer shares?**
- When you first form a company, you complete a Statement of Capital (Part 3 of Form IN01). This provides Companies House which details the types of share in issue, the rights associated with each class of share, information about the current shareholders, the number of shares that are 'paid up' or 'unpaid', and the currency used by the company.
- If you make changes to the share capital of a company (e.g. new shares are allotted, or the company buys back shares), you must provide an updated Statement of Capital.
- If you want to reduce the number of shares in issue, you must complete Companies House Form SH19 (section 644 and 649).
- If you want to allot new shares, you must complete Companies House Form SH01 (subject to board approval), and submit it within one month of the new allotment taking place.
- The Statement of Capital also forms part of the Annual Return Form AR01which every company must complete each year.
- If you want to sell or transfer shares in your company, you should first consult your accountant, as there may be significant tax implications involved.
- To transfer shares, the current shareholder must complete a Stock Transfer Form, and return his/her share certificates to the company.
- The register of members should be updated with the new details, and new share certificates will be issued to the new shareholder.
- Stamp duty of 0.5% is normally payable by the buyer on the value of the purchase, and capital gains tax may be payable by the seller .

Entities of company law.

- **Powers of Management**: The Model Articles state that 'subject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company'.
- They are required to exercise those powers within the constitution of the company but this may involve taking decisions against the wishes of majority shareholder.
- Directors make the day to day decisions of the company. This differs to the members who make the strategic decisions. Clearly the members appoint directors and vote on matters not reserved for the company's management.
- Members do have a reserve power, exercised by the passing of a special resolution (75%, s.283 CA'06), to direct directors to take, or refrain from taking, specified action – but this is rarely done. In many companies, directors are not only shareholders but may also be majority shareholders, so they can dominate all aspects of the running of a company.
- **Directors' Duties**: The Companies Act 2006 altered the legal position with regard to the law on the duties of directors. The previous common law, equitable and fiduciary duties were codified into seven general duties: s.171 - Duty to act within powers s.172 - Duty to promote the success of the company s.173 - Duty to exercise independent judgment s.174 - Duty to exercise reasonable care, skill and diligence s.175 - Duty to avoid conflicts of interest s.176 - Duty not to accept benefits from third parties s. 177 -Duty to declare interest in proposed transaction or arrangement.
- These general duties are based on common law rules and equitable principles (s.170(3)&(4)) so much (though not all) of the common law will remain relevant. Consequently, a director still has a fiduciary duty to act bona-fide in the best interests of the company and an equitable duty of extreme trust and good faith – these are now codified, in statute, in the general duties. A director owes his duty to the company (s.170(1)).
- Note – these are not the only duties directors have – these are just the general ones. Directors have a number of wide ranging responsibilities contained in the Companies Act 2006 and other legislation. The consequences for any breach of these general duties are the same as they were at common law, or under equitable principles, as defined in s.178 CA '06. Often this will require a director to account for any profit (pay it back) or indemnify for any loss.
- **Remedies against directors in breach:** Remedies are designed to deter directors from breaching their duties, not to compensate a company for loss. Civil remedies for failing to gain approval for substantial property transactions (s.195) and loans/quasi loans (s.213), exist in the Companies Act 2006, as do criminal sanctions for failing to declare an interest in an existing transaction or arrangement (s.183).
- A court can order property to be returned to the company and It can also confiscate the profits of a director and return it to the company. In addition, Additionally this will still be the case even if the profit could not have been made by the company without the director.
- Rescission is a remedy where each party returns what was transferred in the first place. Equitable compensation by the court is also a remedy, if the remedies above do not sufficiently address the situation, although s.21 of the Limitation Act 1980 limits any claim for breaches of fiduciary duty to six years.

Entities of company law.

- **Relief for Directors:** A company can ratify acts in breach of his duty as a director, under s.239 CA'06 if it relates to negligence, default or breach of duty or trust – i.e. it can relieve the general duties. However, only 'disinterested' members can vote s.239(3)&(4).
- Note that some acts, for example illegal actions, are incapable of being ratified (s.239(7)). Fully informed consent for ratification to be valid is needed.
- CA'06 gives the court power to relieve a director from liability if he acted honestly and reasonably. The test for acting reasonably is an objective test however The test whether someone is acting honestly is subjective.
- **Disqualification of Directors:** The protection of limited liability can be abused. A Director can carry on business, via a company, allow it to slide into insolvency, form a new company and carry on that business, 'leaving behind him a trail of unpaid creditors'. This was major concern of Cork Committee 1982.
- This area of law is now primarily governed by the Company Directors Disqualification Act 1986 (hereafter CDDA) and this lays down a regime to address the need to protect the public against abuse of the corporate form. The effect of a disqualification order under s.1(1) is that a person is, inter alia, prevented from being in any way, directly or indirectly, concerned with the promotion, formation or management of a company, for a specified time period, without the leave of the court.
- Being involved is a company's management is widely interpreted so as to capture people like management consultants. Disqualification applies to companies as well as individuals, and both public and private companies. Notice must also be given to the party who the order is sought against (s.16 CDDA'86).
- Since the introduction of the Insolvency Act 2000, disqualification undertakings can be made without the need for court hearings . It is a criminal offence under s.13o breach a disqualification order or undertaking; to do so can carry a two-year custodial sentence. Importantly, those in contravention may also be liable under s.15 for all the debts and liabilities of the company incurred whilst in breach.
- **Shares and Shareholders**: There are different types of securities which encompass: shares, debentures, options and share warrants, to name a few.
- An often quoted definition of a share is from **Borland's Trustee v Steel Bros & Co Ltd [1901] 1 Ch 279 (Ch) 288** (Farewell J) 'A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second.... A share is not a sum of money...but is an interest measured by a sum of money and made up of various rights...'
- A person becomes a shareholder by exchanging capital in return for a share of the company. First shareholders pay the company for those shares; after that shares can be bought from existing shareholders. People can also become shareholders through employee share schemes and under operation of law (e.g. when a shareholder dies, their shares will transmit to their personal representative). After those who, on incorporation, have subscribed for shares, a company issues shares and allots them to new members (s.558, Companies Act 2006). Note that companies can also become shareholders, not just human beings.
- A shareholding gives a member certain rights, most notably to share in company profits, attend and vote at meetings and take a share in any surplus capital should the company be wound-up. Under s.542 CA'06, each share must have a value assigned to it and this is called its 'nominal' value.

Entities of company law.

- **Directors' Approval:** A general power exists in most private companies allowing directors to restrict membership; such a power exists in art. 26(5) of The Companies (Model Articles) Regulations 2008 (SI 2008/3229) for private companies.
- Even in public companies (where shares are freely transferable) art. 63(5) gives a general power to refuse to register partly paid shares. Other than that, in public companies, refusal would only occur in exceptional circumstances (art 46(3)). If a company adopts its own articles, such a power of refusal must exist in them and it must be sufficiently clear.
- A refusal to register must be notified to the transferee within two months and, new to company law in the Companies Act 2006, the company must give reasons for doing so (s.771).
- **Transfers and pre-emption rights**: A director has a duty not to register shares to an outsider that is subject to pre-emption rights. If they do, an existing member has a right to purchase those shares.
- **Fraudulent transfers**: If a signature of a shareholder is forged, the instrument is void and the shares are not transferred. Section 775 stipulates that a certificate does not represent the transferor's title to the shares, so a remedy for a transferee would have to be to claim damages for negligent false certification.
- A company is indemnified at common law by the person who has presented a transfer for registration, but if the error was that of the company, the indemnity is lost.
- **Shareholders meetings and votes**: Meetings are the major way shareholders (effectively the owners of a company) can make their opinions known to the directors (the managers of the company). This area is covered by Part 13 CA'06. There are different types of meeting (e.g. General Meetings, Class Meetings) and the general rules are that it should be properly convened and conducted with a minimum number of people present, and voting has to be properly carried out (s.301).
- Historically, the idea was that meetings could be conducted face-to-face, although a proxy (someone attending on a shareholders behalf) has always been allowed. With modern expertise, audio and visual technologies allow valid meetings to be conducted without the need to physically meet (s.360A).
- **Types of General Meeting:** Extraordinary general meetings and Annual General Meetings (AGM) Private companies are not required to have AGM's (but many do). Public companies must hold them within six months of the accounting reference date (s.336 CA'06). This allows members to debate the company's latest annual results.
- **Notice Decisions:** in meeting will be invalid if they are not called in line with ss.301 to 335 CA'06 (note additional requirement under ss.336 to 340 for public companies).
- **Special Notice:** When dismissing a director or auditor (or replacing one who has been dismissed) 28 clear days notice is required Contents Notification needs to contain sufficient detail as to what the meeting will discuss (s.311).
- *Circulars* are important as they contain more detail to the notification letter, and in some cases are key in relation to the interests of directors. Directors will normally call company meetings, and propose resolutions, but members can also do this under s.303 and s.314 respectively. Additionally a court can call a meeting (s.306).

Important Doctrines of Company Law.

- **Separate legal personality and 'lifting the veil' of incorporation:** The doctrine of separate legal personality 'has long been regarded as a cornerstone of English law'.
- A company is a separate legal entity from the people who make up the company and this is said to create a *'veil'* between the company and its other constituents (either human or corporate). Therefore, an incorporated company has separate legal personality from its members, directors, employees and it is a separate legal entity from any subsidiary company, even if it owns 100% of that subsidiary's shares: Whilst this is the general rule, this metaphorical 'veil' can be lifted by exception under common law, equity or statute.
- Separate Legal Personality and Limited liability Limited liability is not new; it was formally established by the Limited Liability Act 1855 (now replaced). Significantly this was extended by the case of **Salomon v A Salomon & Co Ltd [1897] AC 22 (HL).** This case was significant because it extended the principle of separate legal personality to essentially 'one-man' companies.
- **Effects of Separate Legal Personality**: In Salomon, the decision not to 'lift the veil' of incorporation worked to the advantage of the person who effectively owned the business, but this is not always the case.
- The general rule (is that the courts are unwilling to 'lift the veil' of incorporation to hold individuals to account. The exceptions to this general 'rule' arguably do not create a consistent principle, and the decision in Salomon still holds centre stage in legal decisions in this area.
- The Exceptions - **Statutory lifting of the Veil:** Lord Diplock in ***Dimbleby & Sons v National Union of Journalists [1984] 1 All ER 751 (HL) 758*** said that any intention to lift the veil should be 'expressed in clear unequivocal language'.
- Examples: Various Tax legislation; Matrimonial Causes Act 1973, s.24; Insolvency Act ss.213 Wrongful Trading and s.214 Fraudulent Trading; Company Directors Disqualification Act 1986 s.6 - Duty of court to disqualify unfit directors; Companies Act 2006 – s. 1205 Criminal consequences of failure to make required disclosure; Companies Act 2006 s 156(7) – Offence to trade more than 3 months with less than minimum number of directors; Companies Act 2006 s 767(3) – Doing business without a trading certificate.
- **Judicial Lifting the Veil**: Public Policy; Fraud/sham or façade; Agency Relationship; Single Economic Entity within Corporate Structures; Tort Law (although liability here was eventually established on common law tortious, duty of care principles, not lifting the veil); Equity - Personal relationship companies (quasi-partnerships) *AND* **Corporate Crime Corporate Manslaughter and Corporate Homicide Act 2007**.
- In ***Adams v Cape Industries Plc [1990] Ch 433 (CA)***, the court refused to lift the veil in the interests *of justice*. In that case Slade LJ famously stated: '…save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of Salomon…merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies...as separate legal entities'.

Winding Up.

- You can choose to liquidate your limited company (also called ‘winding up’ a company).
- The company will stop doing business and employing people. The company will not exist once it’s been removed (‘struck off’) from the companies register at Companies House.
- When you liquidate a company, its assets are used to pay off its debts. Any money left goes to shareholders. You’ll need a validation order to access your company bank account.
- If that money has not been shared between the shareholders by the time the company is removed from the register, it will go to the state.
- You’ll need to restore your company to claim back money after it’s been removed from the register.
- There are 3 types of liquidation:
- creditors’ voluntary liquidation - your company cannot pay its debts and you involve your creditors when you liquidate it
- compulsory liquidation - your company cannot pay its debts and you apply to the courts to liquidate it
- members’ voluntary liquidation - your company can pay its debts but you want to close it
- Your company may be forced into liquidation if it cannot pay its debts.