THE APPARENT AUTHORITY OF AN AGENT OF A COMPANY

PART A: INTRODUCTION

The positive doctrine of constructive notice

Thirty years ago the dominant opinion of the legal profession in England appears to have been that a contractor[1] dealing with a company through one purporting to act on behalf of the company could hold the company liable merely by showing that there was provision in the articles of association empowering the company to confer authority on the purported agent to carry out the transaction. The doctrine was thought to be derived from *Turquand's* case. The absence of authority, it was considered, arose because the power to confer authority had not been exercised, but it was not necessary for the contractor to show it had been exercised. Whether or not it had been exercised was a matter of indoor management, and *Turquand's* case dispensed with the need to inquire into such matters.

The best exposition of the professional opinion was by Sir Arthur Stiebel in his article "The Ostensible Powers of Directors"[2] in which he surveyed the relevant authorities.[3] A judicial statement of the rule supported by it, though there the rule is put on a different basis is found in the judgment of Wright J. (as he then was) in *Kreditbank Cassel* v. *Schenker's, Ltd.* "The memorandum and articles are public documents, and everyone dealing . . . with a limited company is taken in law to be acquainted with their terms . . . He is bound by the articles if they are adverse to his claim: it seems that if the articles are in his favour

1. This is the terminology of Diplock L.J. in the *Buckhurst* case (considered later). Gower in his *Modern Company Law* adopts what he calls the 'vivid American terminology' of 'outsider', but he rightly draws attention to the difficulties associated with that terminology when members deal with the company.

2. (1933) 49 *L.Q.R.* 350. The term 'ostensible authority' is synonymous with 'apparent authority'. The term 'apparent authority' is the more common, and is the one preferred by Diplock L.J. in his judgment in the *Buckhurst* case.

3. Sir Arthur relied on a note by the learned reporter, Mr. Hussey Griffith, to his report of *British Thomson-Houston* v. *Federated European Bank, Ltd.* [1932] 2 K.B. 176. (hereafter referred to as the *B. T.-H.* case). The note is at p. 184. In it the reporter said: "It is submitted that actual knowledge on the part of the plaintiff of the contents of the articles of association is irrelevant except to an issue raised as to his bona fides". This proposition is not quoted by Willmer L.J. in the *Buckhurst* case. He does quote with approval other propositions stated by the reporter in which a distinction is drawn between acts ordinarily beyond the powers of an officer of a company, and acts ordinarily within his powers.

he should be entitled to benefit by their terms.[4] This simple statement of some new equity goes back to an earlier principle than that of *Turquand's* case. It is the doctrine established by the House of Lords in 1857 in the case of *Ernest* v. *Nicholls*.[5] There Lord Wensleydale laid down "The stipulations of the [articles] which restrict and regulate . . . authority are obligatory on those who deal with the company: and the directors can make no contract so as to bind the whole body of shareholders, for whose protection the rules are made unless they are strictly complied with."[6] This statement contains, no reference to a fiction that the public are taken in law to be acquainted with the articles. But the doctrine soon became based on such a fiction, and known as the doctrine of constructive notice of the articles. One hundred years after it was established the doctrine was termed by Gower "wholly unrealistic". He states the doctrine in the language of notice thus: "Anyone dealing with a company is deemed to have notice of its public documents".[7] One of the merits of a new terminology for the formulation of the doctrine proposed by Diplock L.J. in the *Buckhurst* case[8] is that it accords more with Lord Wensleydale's language and does not resort to a fiction, thereby raising more clearly the issue as to what is the actual policy supporting the doctrine.

The doctrine propounded by Wright J. was by no means universally accepted. In the courts Sargant L.J. intervened in the argument in *Houghton & Co.* v. *Nothard, Lowe & Wills, Ltd.*[9] to say that he did not agree with it. In his intervention he created the terminology which has since been used in discussion of the correctness of the professional opinion propounded by Sir Arthur Stiebel. He said: "The doctrine of constructive notice is not a positive doctrine, but a negative one operating against the person who has not inquired." [10]

The view of Sir Arthur Stiebel could thus be stated as one asserting the existence of a positive doctrine of constructive notice of the articles of association. It was regarded as a consequence of the statutory provisions of company law. There was little examination of the manner in

4. [1926] 2 K.B. 450 at p. 459. This case will hereafter be referred to as *Schenker's* case. The decision of Wright J. was reversed in the Court of Appeal: [1927] 1 K.B. 826.

5. (1857) 6 H.L.C. 401.

6. *Ibid.*, at p. 419. Lord Wensleydale referred not to articles but to the deed of settlement which was the predecessor of articles of association. Lord Wensleydale prefaced the quoted dictum with the words: "All persons, therefore, must take notice of the deed and the provisions of the Act. If they do not choose to acquaint themselves with the powers of directors it is their own fault". He thus related the doctrine to the social policy of legalising joint stock companies with limited liability in order to promote commercial enterprise and further the national economy. The doctrine is one of the means of protecting the shareholders of the new enterprises.

7. *Modern Company Law* (2nd ed.,) at p. 144.

8. See Part D *infra.*

9. [1927] 1 K.B. 246.

10. *Ibid.*, at p. 253.

which it was related to the doctrine of apparent authority of agents in general. Indeed that doctrine had not been subjected to any extensive scrutiny in England. In the United States Ewart in his work *Estoppel* had based apparent authority on the doctrine of estoppel.[11] This view, however, was not adopted in the Agency Restatement, where apparent authority was distinguished from estoppel.

The present position

In an article the present writer differed from Stiebel, and asserted "there is no positive doctrine of constructive notice".[12] He disagreed with Stiebel's interpretation of the authorities, related the general doctrine of the apparent authority to the principles governing estoppel, and asserted that those principles applied in the realm of transactions with companies as elsewhere. The doctrine of constructive notice was traced to *Ernest* v. *Nicholls* and an examination was made of *Turquand's* case[13] in order to show that it in no way constituted authority for a positive doctrine of constructive notice. The view that there was no positive doctrine was firmly asserted in 1952 by Slade J. in *Rama Corporation, Ltd.* v. *Proved Tin and General Investments, Ltd.*[14] where there was a careful examination of the previous authorities. But the manner in which the view that there is only a negative doctrine of constructive notice has become universal is now strikingly illustrated by the case of *Freeman and Lockyer* v. *Buckhurst Park Properties* (*Mangal*), *Ltd.*[15] which it is submitted concludes the debate,[16] and provides a rationale for the apparent authority of an agent

11. Cook disputed Ewart's thesis, and though Ewart made an effective reply, Seavey, the reporter for the Agency Restatement, intervened on Cook's side, which was thereafter favoured by academic opinion generally. See my review of the literature in (1938) 16 *Can B.R.* 758, where I supported Ewart's view that apparent authority derives from the doctrine of estoppel.

12. (1934) 50 *L.Q.R.* at p. 240.

13. *Royal British Bank* v. *Turquand* (1856) 5 E. & B. 246: 6 E. & B. 327.

14. [1952] 2 Q.B. 147; [1952] 1 All E.R. 554. This case will hereafter be referred to as *Rama's* case. All references in footnotes solely to the number of a page and a letter are to the report of this case in the All England Law Reports. Once again I plead that all publishers of law reports will sub-divide their pages so as to indicate where on a page a passage appears. An alternative to the All England Law Reports letter system is that used by publishers of poetry of printing the figures 10, 20, etc. against the tenth, twentieth etc. line.

15. [1964] 2 Q.B. 480; [1964] 1 All E.R. 630. This case is hereafter called the *Buckhurst* case.

16. Gower in *Modern Company Law,* at p. 149 (text and n. 90) describes earlier discussion of the authorities in order to see whether they establish a positive or negative doctrine of constructive notice in these terms: "The vexed question whether the outsider is entitled to rely on a provision in the articles when he has never read the articles at all ... is discussed *ad nauseam* by Stiebel (1933) 49 L.Q.R. 350; Montrose (1934) 50 L.Q.R. 224; and in *Houghton & Co.* v. *Nothard, Lowe & Wills, supra*; *Kreditbank Cassel* v. *Schenkers, supra*; *B.T.H.* v. *Federated European Bank, supra* (where the reporter was moved to reject his normal reticence and to append a note giving *his* understanding of the law); *Clay Hill Brick Co.* v. *Rawlings, supra* (where Tucker J. approved the reporter's note); and finally (to date) *Rama Corporation* v. *Proved Tin & General Investments, Ltd.*, *supra* (where Slade J. in an elaborate judgment dissented from Stiebel and the reporter's note, and agreed with Montrose)".

of a company. Counsel and court in the case accepted completely the view that there was no positive doctrine of constructive notice. The legal issue in the case arose over the contention of counsel for the defendants who maintained that the authorities did not merely establish that the doctrine of constructive notice was wholly negative, but went further and said that it negated all claims based on apparent authority unless there was actual knowledge of the existence of articles of association, either conferring authority or empowering the grant of authority. The Court of Appeal unanimously rejected that contention. This necessitated another examination of the authorities, and of the debate about their interpretation. The Court once again asserted that the doctrine of constructive notice was negative, but while asserting this considered its impact on the doctrine of apparent authority, and also affirmed that apparent authority is based on estoppel by representation. There is moreover an examination of the interaction between actual and apparent authority by Diplock L.J., and as has already been stated he proposed a new terminology to replace that of "constructive notice".

PART B: THE BUCKHURST CASE

The facts of the case

K was a property developer. He entered into a contract to purchase the Buckhurst Park estate for the purpose of its development. The purchase price was greater than the resources of K. Accordingly he entered into an arrangement with one H whereby a private limited company was formed, the defendant company. H invested in this company the sum required to complete the purchase, and the estate was conveyed to the company. K and H and two other nominees were the directors. H went abroad, and all the management of the estate, and the planning of its development and sale, were left in the hands of K. No properly called board meetings with the required quorum took place and in consequence there were no valid resolutions authorising K to act as he did. However all the directors were aware that K was managing the estate. K employed the plaintiffs, who were architects and surveyors, to draw up the necessary plans for the development of the estate and to apply for planning permission. The hopes for development and re-sale came to nothing. K disappeared, and the plaintiffs sued the company.

The argument

Counsel for the plaintiffs argued that there was actual authority for K to employ the plaintiffs. This was based on the construction of the articles of association, and on the proceedings at so-called, but invalidly held, board meetings. Neither the county court judge, nor the Court of Appeal agreed with this submission. Though Diplock L.J. was far from so emphatic, Willmer L.J. said it was hopeless to contend that K was ever clothed with authority to do what he did.[17] Counsel, however, maintained that there was apparent authority. He based the existence of such authority on the fact that despite his not having been formally appointed K had in fact acted as managing director, and that

17. [1964] 1 All E.R. at p. 635 E.

the other members of the board knew that this was so and approved of his so acting. K's instructions to the plaintiffs were within the ordinary scope of the business and of a managing director. Counsel for the plaintiffs admitted that they were unaware of the provisions in the articles whereby K could have been appointed as managing director, and had made no inquiries about the articles.[18] Nor did they call in aid such provisions by maintaining there was a positive doctrine of contructive notice. They based their case on the existence of apparent authority apart from the articles. The county court judge found as a fact that there was apparent authority, and his finding was accepted by the Court of Appeal.[19]

Counsel for the defendant, though challenging the county court's findings of fact on which the existence of apparent authority apart from the articles was based, said that the case was not concluded against him by those findings. He admitted that there were no restrictions in the articles of association preventing the company from conferring authority on K. Far from there being restrictions there were powers by whose exercise K could have been appointed. Consequently the negative doctrine of constructive notice, as it had been hitherto understood, could not prevent the plaintiffs from recovering. He maintained that the authorities established the existence of an extended negative doctrine. His contention was:[20]

> Even if K was acting as managing director to the knowledge of the company the plaintiffs could still not rely on K's apparent authority because they had no knowledge of the defendants company's articles of association, and had made no inquiries with regard to them, and so could not rely on any power of delegation contained in the articles.

The rejection of counsel's contention: *general principles.*

Counsel's contention was a distortion of the principle that there is no positive doctrine of constructive notice of the articles. The positive doctrine asserted that a contractor could base a claim merely on the existence of a power to confer authority contained in the articles: the contractor was to be regarded as a person who had read the articles so that there was an appearance of authority. A denial of the positive doctrine involves the proposition that a contractor cannot base a claim on a power to confer authority contained in the articles unless he has read them. This if properly understood may be accepted. A claim by a contractor that apparent authority existed by virtue of a power to confer authority requires proof that the contractor had knowledge of the articles. This follows from the nature of estoppel on which the doctrine of apparent authority is based. But the proposition may be misunderstood, and when misunderstood supports counsel's contention. Whenever a contractor is claiming against a company through a transaction with an agent he must show that there is in existence a power in the articles to confer authority on the agent. In the absence of such a power the

18. See *per* Willmer L.J. at p. 638 B.

19. *Per* Willmer L.J. at p. 636 I; *per* Pearson L.J. at p. 641 B. & E.; *per* Diplock L.J. at p. 643 C.

20. [1964] 2 Q.B. at p. 482.

negative doctrine of constructive notice comes into operation and the contractor must in consequence fail in his claim. But if he can only affirm that there is such a power in the articles if he has read them then counsel's contention is established. The answer to this argument is that properly understood the proposition that a contractor cannot base a claim on unread provisions in articles is confined to the situation where they are required in order to establish the existence of apparent authority. If at the time of the transaction the contractor did not know of a provision of the article how can he say that it appeared to grant authority? No invocation of the Rule in *Turquand's* case will help him. On the other hand whether or not restrictions on authority exist in the articles has nothing to do with the knowledge of the contractor, either when he entered into the transaction or at any other time. If there are no restrictions the contractor is not affected by the negative doctrine of constructive. He need not wait for the company to allege that restrictions exist. He can assert at any time that they do not exist by pointing to the existence of powers to confer authority, whether he was previously aware of them or not. If the contractor can establish the existence of apparent authority at the time of the transaction apart from the articles, then his knowledge, or absence of knowledge, of provisions in the articles is quite immaterial. Counsel's contention was completely unsound in principle.

The rejection of counsel's contention: *the authorities.*

An affirmation of basic principles establishes the unsoundness of the contention. In Part C we shall examine the judges' examination of the basic principles governing apparent authority. Counsel was, however, able to cite a number of judicial dicta in support of his contention. They were to be found mainly in *Houghton's* case, *Schenker's* case, and *Rama's* case, the authorities which before the *Buckhurst* case were the principal ones for the rejection of the positive doctrine. It is undoubtedly true that there are difficulties of interpreting the judgments in these and in other cases. This can be illustrated by reference to the conflicting interpretations which have been placed on them.

We begin by noting that the members of the Court of Appeal in the *Buckhurst* case differed as to the interpretation of the judgment of Slade J. in *Rama's* case. Willmer L.J.[21] and Diplock L.J.[22] thought that the contention of counsel for the defendant was supported by Slade J. On the other hand, Pearson L.J.[23] did not consider that Slade J. had adopted that view. Willmer L.J. and Diplock L.J. said they preferred to their view of what Slade J. decided the contrary doctrine enunciated in the *B. T.-H.* case.[24]

21. [1964] 1 All E.R. at p. 638 D.

22. *Ibid*., at p. 674 H.

23. *Ibid*., at p. 642 I.

24. This is my abbreviation for *British Thomson-Houston Co*., *Ltd.* v. *Federated European Bank, Ltd.* (see note 3 *supra).* Judges do now use abbreviations of the names of cases: e.g. in the *Buckhurst* case we read of *Mahony's* case, *Houghton's* case and so on. The *B. T.-H.* case is only once abbreviated: and then only as the *British Thomson-Houston* case by Diplock L.J. at p. 648 A.

Slade J. in *Rama's* case interpreted the judgments of Scrutton and Slesser L.JJ. in the *B. T.-H.* case and Sargant L.J. in *Houghton's* case in a different manner from that in which they were interpreted by Willmer L.J. in the *Buckhurst* case.[25] So too Diplock L.J. disagrees with Slade J. as to the law laid down in *Houghton's* case and the *Kreditbank Cassel* case.[26] Slade J. thought that Scrutton and Slesser L.JJ. in the *B. T.-H.* case had expressed a view inconsistent with *Houghton's* case, and in the conflict between the two Court of Appeal decisions he followed the earlier *Houghton's* case.[27] Willmer L.J. thought there was no conflict between *Houghton's* case and the *B. T.-H.* case.[28] Diplock L.J. also thought there was no conflict, but if there were he said he would prefer to follow the later *B. T.-H.* case.[29]

This sketch of labyrinthine wanderings may be completed by stating that Slade J. thought that Scrutton and Slesser L.JJ. had propounded an erroneous proposition in the *B. T.-H.* case, because they had misinterpreted what Atkin L.J. had said in *Schenker's* case: Greer L.J. on the other hand had rightly interpreted Atkin L.J.[30]

An explanation of conflicting interpretations: *the ambiguity of the phrase 'rely on'.*

It is not proposed to enter on a consideration of the various interpretations of the various dicta in order to put forward submissions of correct interpretations. The 'correct' doctrine it is considered has now been propounded in the *Buckhurst* case, and it is not necessary to investigate thoroughly the earlier authorities. It is however submitted that much of the difficulty in interpretation of judgments and in the exposition of principles arises from incomplete comprehension of the ambiguity of the commonly used phrases connected with the clause 'rely on the

25. [1964] 1 All E.R., at p. 638 D.

26. *Ibid.*, at p. 647 H.

27. [1952] 1 All E.R., at p. 569 C. Apparently he did not consider that he had a discretion of choosing between two inconsistent decisions. Contrary to the opinion of the court in *Young* v. *Bristol Aeroplane Co.* he thought he was bound to follow the earlier of two inconsistent decisions. A possible reason for such a view is that the latter of two inconsistent decisions must be wrong for the court was bound by the earlier decision.

28. [1964] 1 All E.R., at p. 638 D.

29. *Ibid.*, at p. 647 B.

30. Slade J. considered that the views of Scrutton and Slesser L.J. formed the ratio decidendi of the *B. T.-H.* case because they were the majority. He was only able to follow Greer L.J. because of the conflict with *Houghton's* case. Diplock L.J. also considered himself bound by the majority of a Court of Appeal. It should be noted that we are not dealing with situations in which a minority dissents, and the majority pronounce the decision of the Court, but situations where majority and minority pronounce different reasons for the same decision. It should be further noted that all the narrated search for the correct interpretation of earlier judgments illustrates the doctrine rightly expressed by Lord Reid in *Midland Silicones* v. *Scrutton's, Ltd.* [1962] A.C. 446 that the ratio decidendi of a case is arrived at by a process of interpretation of the actual reasoning, and that this ratio decidendi is usually binding.

articles'.[31] The consequence has been confusion between different propositions denoted by similar language.

There are two different meanings of the phrase 'rely on the articles', (i) There is that reliance on the articles which exists when a legal contention is advanced. Thus counsel relies on a provision in the articles to establish the existence of actual authority: or to show that the negative doctrine of constructive notice does not apply by pointing to a power to confer authority to be found in the provision, (ii) 'Reliance on the articles' may designate a factual situation, such as a contractor acting on the faith of a provision in the articles of which he has actual knowledge. The result of this ambiguity is that two propositions may appear to be inconsistent when in substance they are not: and one proposition may be mistaken for a quite different proposition.

A simple example of the ambiguity, where the context makes clear the different uses, is found in the judgment of Sargant L.J. in *Houghton's* case which Willmer L.J. said was "much relied on by the defendant company in the present case".[32]

> Next as to the power to delegate which is contained in the articles of association. In a case like this where that power of delegation had not been exercised, and where admittedly Mr. Dart and the plaintiff firm had no knowledge of the existence of that power and did not rely on it, I cannot for myself see how they can subsequently make use of this unknown power so as to validate the transaction. They could rely on the fact of delegation, had it been a fact, whether known to them or not. They might rely on their knowledge of the power of delegation, had they known of it, as part of the circumstances entitling them to infer that there had been a delegation and to act on that inference, though it were in fact a mistaken one. But it is quite another thing to say that the plaintiffs are entitled now to rely on the supposed exercise of a power which was never in fact exercised and of the existence of which they were in ignorance at the date when they contracted.[33]

There, it is clear, that when 'rely on' is first used the reference is to what happened at the time of the transaction: in so far as the power in the articles constituted a representation it was not relied on, in the sense of action taken on the faith of the representation. In all the subsequent uses of the phrase 'rely on', as is abundantly clear from its last use, the reference is to the submission to the court of a legal contention, and the sentences may be translated thus: (i) the contractor can assert the existence of actual authority, whether he had knowledge of it or not when he contracted; (ii) the contractor can assert that there was apparent authority, and to establish such authority he can point to the power as one of the factors constituting an appearance of apparent authority, but he cannot succeed in a claim based on apparent authority unless he can show reliance on the apparent authority in the sense of action taken in the belief that authority existed, which must include knowledge of the power; (iii) the contractor cannot assert an actual authority when there

31. Examples of such phrase in addition to 'rely on the articles', are 'relied on the articles', 'reliance on the article'.

32. [1964] 1 All E.R., at p. 639 C. Note that Willmer L.J. is referring by his use of 'relied on' to a legal contention submitted by counsel.

33. [1927] 1 K.B. at p. 266.

was no action taken in the belief that there was authority.

Another passage whose interpretation was disputed is that from the judgment of Slade J. in *Rama's* case:

> I understand this case [the *B. T.-H.* case] to have been decided by Scrutton L.J. and Slesser L.J. on the footing that Atkin L.J. in his judgment in *Schenker's* case had said that there were cases in which one could rely on the articles of association, and a power conferred by the articles, even when one did now know of the existence of the articles and, *ex hypothesi,* could not have relied on them.[34]

Here it is clear that the first reference is to the submission of a legal contention. It is also clear that the second reference is to actual behaviour, action taken by reason of knowledge of the power in the faith that it had been exercised. But what is not clear is the character of the legal contention. Was the reliance on the articles a submission that the existence of the power established, in accordance with the Rule in *Turquand's* case, that the negative doctrine of constructive notice had no application? Or was it a submission that apparent authority existed? The differences of interpretation of *Schenker's* case and *Rama's* case arise from this latent ambiguity. It is my opinion that Slade J. misinterpreted Scrutton L.J. and Slesser L.J. in the *B. T.-H.* case. They were not asserting that a contractor could call in aid an article of association containing a power of delegation, of which they had had no knowledge at the time of the transaction, in order to establish apparent authority. On the other hand the judgment of Slade J. was wrongly interpreted by Willmer L.J. and Diplock L.J. in the *Buckhurst* case. He did not, by rejecting what he erroneously believed to be the ratio of Scrutton L.J. and Slesser L.J. in the *B. T.-H.* case, assert that a contractor could not for the purpose of the Rule in *Turquand's* case point to a power of delegation, unless he knew of it at the time of the transaction. He clearly made no such assertion, for that would have contradicted the ratio of Greer L.J. in the *B. T.-H.* case which he accepted as valid.

It is worth while giving further examination to the latent ambiguity, referred to in the above paragraph, of the phrase 'rely on the articles'. Without awareness of that ambiguity it may be believed for example that the two following propositions are inconsistent. The doctrine that an apparent authority cannot be asserted unless a contractor acted in the belief that authority existed may yield the proposition: a contractor cannot rely on provisions in articles of association whereby a power exists to delegate authority, unless he had actual knowledge of the provisions. On the other hand one aspect of the Rule in *Turquand's* case can be expressed thus: a contractor can rely on provisions in articles of association, whereby a power exists to delegate authority, even though he had on actual knowledge of the provisions. Despite the apparent contradiction of the expressions there is no inconsistency between the propositions: they refer to different legal contentions. When the phrase 'rely on the articles' is encountered we should ask what is the purpose of the reliance. If a contractor is seeking to establish the existence of apparent authority then the rule prohibiting reliance without knowledge applies. If apparent authority exists apart from the articles a contractor

34. [1952] 1 All E.R., at p. 569 C.

has no need to rely on the articles for that purpose. Nevertheless a contractor will not recover despite the existence of apparent authority if the articles prohibit the agent from acting as he did. He may however point to a provision in the articles to show there was no such prohibition. If a contractor is seeking to show that permission for the agent to act is found in the articles then the rule allowing reliance without knowledge applies.

The operation of knowledge of articles of association.

One can state in the following manner the propositions established by the *Buckhurst* case with regard to the operation of knowledge or absence of knowledge of provisions in articles conferring powers to delegate authority, (i) Knowledge of such provision at the time of the transaction is not required (a) for the purpose of rejecting a contractor's claim by virtue of the negative doctrine of constructive notice of *Ernest* v. *Nicholls* (b) for the purpose of allowing a contractor's claim by virtue of the Rule in *Turquand's* case, (ii) Knowledge of such provisions (a) is not required for the purpose of accepting a contractor's claim based on apparent authority existing apart from the articles, (b) is required for the purpose of accepting a contractor's claim based on apparent authority where no such authority exists apart from the articles. With regard to the fourth proposition it should be noted that knowledge of the provision is not by itself enough. Not only must there be 'reliance on' the knowledge, the knowledge is but 'part of the circumstances' which may constitute apparent authority. Those circumstances should indicate that it is usual for the person with whom the contractor has dealt to have the authority on which the contractor relies. If the circumstances are such that there could not usually be authority then mere knowledge of the provision in the articles would be inadequate.[35]

PART C

The present doctrine of the apparent authority of the agent of a company.

Apparent authority and estoppel.

All the judges in the Court of Appeal in the *Buckhurst* case recognised that the doctrine of apparent authority was based on estoppel. Diplock L.J. provides a rationale for the doctrine in these terms, contrasting it with actual authority which is created by a consensual agreement between principal and agent, and by which a contractor may obtain rights against the principal even though 'totally ignorant of the

35. The principle that the existence of unusual circumstances puts a contractor on inquiry as to the terms of the actual authority is to be found in *Underwood* v. *Bank of Liverpool* [1924] 1 K.B. 775; see *per* Bankes L.J. at p. 788 and Atkin L.J. at p. 797. See also the discussion of *Houghton's* case, *Schenker's* case and *Rama's* case by Willmer L.J. in [1964] 1 All E.R., at p. 638 E, where he said "They were all cases of most unusual transactions, which would not be within what would ordinarily be expected to be the scope of the authority of the officer purporting to act on behalf of the company."

existence of any authority'.[36]

> An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted on by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed on him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation. The representation, when acted on by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.[37]

Pearson L.J. succinctly says: "The expressions 'ostensible authority' and 'holding out' are somewhat vague. The basis of them when the situation is analysed, is an estoppel by representation."[38]

In order for apparent authority to exist there must be the appearance of authority. In other words in terms of the theory of estoppel there must be a representation, that the person purporting to act as agent was authorised to act on behalf of the company in the manner in which he purported to act. Thus apparent authority is a question of fact concerned with the general circumstances of the transaction, and not merely with the terms of the articles of association. Indeed from the circumstances apart from any provision in the articles it may be reasonable for the contractor to infer that authority existed. In such a situation there is appearance of authority and knowledge of the articles is immaterial.[39] It is only where there is no apparent authority apart

36. It is worth reciting the whole of the passage on actual authority and noticing that he accepts the thesis of circuity of action I had propounded as the rationale for the liability of an undisclosed principal "An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the 'actual' authority, it does create contractual rights and liabilities between the principal and the contractor. It may be that this rule relating to 'undisclosed principals', which is peculiar to English law, can be rationalised as avoiding circuity of action, for the principal could in equity compel the agent to lend his name in an action to enforce the contract against the contractor, and would at common law be liable to indemnify the agent in respect of the performance of the obligations assumed by the agent under the contract." [1964] 1 All E.R., at p. 644 D.

37. *Ibid*., at p. 644 F.

38. *Ibid*., at p. 641 F. Later he says: "as against the other contracting party, who has altered his position in reliance on the representation, the company is estopped from denying the truth of the representation". What is meant by alteration of position? It appears to be assumed by all the judges of the Court of Appeal that merely agreeing with the apparent agent about the term of the contract 'entering into the contract' according to Diplock L.J. in his condition (c), is a reliance and this constitutes an alteration of position. But this is not the general American view: see n. 11.

39. "It is possible to have ostensible or apparent authority apart from the articles" Slade J. in *Rama's* case [1952] 1 All E.R. 566 E, approved in the *Buckhurst* case.

from the articles that knowledge of the articles becomes material. A provision in the articles may constitute a representation of authority. If there is knowledge of it, and the representation is 'relied on' by entering into a contract with the company through the agent, then the company may be estopped from denying the existence of authority. But a provision in the articles, for example, of a power to delegate is not by itself sufficient to constitute an appearance of authority. The general circumstances, including the nature of the representation, may be such as to put a reasonable person on inquiry as to the existence of actual authority. They may indeed be such that a reasonable person would not believe that authority existed. For example, where a contractor has knowledge that a person purporting to sign cheques is but an office boy he could not assume merely form knowledge of a provision in the articles of a power to delegate to 'any person' that the office boy has authority to sign cheques. Whenever an agent is purporting to exercise powers not in the ordinary scope of the powers of such an agent there is no appearance of authority. The provision in the articles has to be read together with the general circumstances as a whole in order that there should be a representation of authority.

The rejection of the positive doctrine of constructive notice follows from the doctrine of estoppel .A statement in the articles may constitute a representation by the company that a particular person has authority, but the company cannot be estopped from denying that he has authority if such in fact be the case, unless the contractor knows of the representation and has acted on it. Thus, Willmer L.J. said: "the three decisions relied on by the defendant company are to my mind no more than illustrations of the well-established principle that a party who seeks to set up an estoppel must show that he in fact relied on the representation that he alleges".[40] Diplock L.J. in his rationale sets out "four conditions which must be fulfilled to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so". Two only of the conditions concern us now. They are: "(a) a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor ... (c) that the contractor was induced by such representation to enter into the contract i.e. that he in fact relied on it."[41] This is a restatement of the thesis that the doctrine of apparent authority is derived from estoppel, but later in his explanation of the authorities 'relied on' by defendant's counsel he said:

> The contractor in each of the three cases sought to rely on a provision of the articles, giving to the board power to delegate wide authority to the agent, as entitling the contractor to treat the conduct of the board as a representation that the agent had had delegated to him wider powers than those normally exercised by persons occupying the position in relation to the company's business which the agent was in fact permitted by the board to occupy. Since this would involve proving that the representation on which he in fact relied as inducing him to enter into the contract comprised the

40. [1964] 1 All E.R., at p. 639 B.

41. *Ibid*., at p. 646 D. The dissection of the masterly discourse of Diplock L.J. and the presentation of isolated passages is a wholly inadequate acknowledgment of the great contribution to theoretical understanding as well as practical application which the judgment as a whole constitutes.

> articles of association of the company as well as the conduct of the board, it would be necessary for him to establish, first, that he knew the contents of the articles (i.e., that condition (c) was fulfilled in respect of any representation contained in the articles) and, secondly, that the conduct of the board in the light of that knowledge would be understood by a reasonable man as a representation that the agent had authority to enter into the contract sought to be enforced, i.e., that condition (a) was fulfilled.[42]

The modification of the doctrine of apparent authority arising from the provisions of the Companies Act.

The result of the doctrine of *Ernest* v. *Nicholls* is that, notwithstanding that the contractor has relied on an apparent authority, he cannot recover if the articles do not permit the exercise of the purported authority. The Rule in *Turquand's* case says that requirements of 'household management' do not constitute a denial of such permission unless they have been fulfilled. On the contrary a provision stating that authority can be exercised when the 'household management' requirements have been fulfilled constitutes permission. These propositions are enunciated in accordance with conventional terminology by Willmer L.J. He states:

> It is well established that all persons dealing with a company are affected with notice of its memorandum and articles of association, which are public documents open to inspection by all: see *Mahony* v. *East Holyford Mining Co.* However, by the rule in *Royal British Bank* v. *Turquand,* re-affirmed in *Mahony's* case, it was also established, in the words of Lord Hatherley in the latter case.
>
> > "that, when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company."
>
> Thus in *Biggerstaff* v. *Rowatt's Wharf, Ltd,,* where the articles of association conferred power to appoint a managing director, the company was held bound by the act of a person who purported to contract as its managing director, though he had never been formally appointed as such.[43]

Diplock L.J. also restates the propositions but he does so in accordance with the new terminology which he proposes and which is considered in Part D.

The modification of the doctrine of apparent authority arising from the nature of corporate personality: *interaction of actual and apparent authority.*

A natural person himself makes representations about the authority of an agent. A corporation can only make representations through agents. This gives rise to problems which are for the first time analysed and expounded by Diplock L.J.[44]

42. *Ibid*., at p. 647 D.

43. *Ibid*., at p. 637 C.

44. Pearson L.J. acknowledges their existence when he says "The identification of the persons whose acknowledge and acquiescence constitute knowledge and acquiescence by the company depends on the facts of the particular case". *Ibid,* at p. 641 H.

Some preliminary discussion will be found in (1934) 50 *L.Q.R.* at p. 229.

The Lord Justice points out that to create apparent authority there must be a representation made by persons who have actual authority to make the representation. Actual authority may be conferred by the articles of association directly: quite often powers of the board of directors are specified. On the other hand there is often power to delegate authority, and the delegate by exercising such power may confer authority to make representations. Estoppel may be by words or conduct and the commonest form of representation of apparent authority in general is by conduct, "viz. by permitting the agent to act in the management or conduct of the principal's business". In relation to transactions with a company it follows that if a board of directors permit an agent to act in the management of the business they represent that he has authority so to act. Such a representation is usually within the actual authority of the board of directors. One who purports to be an agent cannot confer apparent authority on himself, "a contractor cannot rely on the agent's own representation as to his actual authority". But if the board of directors know that he is purporting to be an agent, and permit him to act as agent, they may create an apparent authority. However a representation by a board of directors as to the authority of the agent of a company instead of being actually authorised as part of the board's function of management of the company's affairs may in fact be inconsistent with the memorandum or articles of association. In such a situation, in accordance with *Ernest* v. *Nichols,* the company will not be bound by the board's permitting some one to act as agent, or permitting an agent with limited authority to act beyond the scope of such limited authority.[45]

These considerations lead to the formulation by Diplock L.J. of two further "conditions which must be fulfilled to entitle a contractor to force against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so".[46] These are: "(b) that such representation was made by a person or persons who had 'actual' authority to manage the business of the company either generally or in respect of those matters to which the contract relates ... (d) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent".[47]

There is one situation which has a somewhat paradoxical character with which Diplock L.J. does not deal. That an unauthorised person cannot confer authority on himself, seems to be a clear proposition. But it does not follow that an agent with limited actual authority cannot confer a wider apparent authority on himself. The dictum of Diplock

45. If the agent is permitted to do acts beyond the scope of acts ordinarily done by an agent in his position the company will not be bound because there is no appearance of authority in the circumstances. Diplock L.J. does not refer to that situation, but he does deal with the similar situation where the agent does acts outside the ordinary course of the company's business.

46. The two other conditions (a) and (c) are set out at p. 264.

47. [1964] 1 All E.R., at p. 646 A to D.

L.J. that "a contractor cannot rely on the agent's own representation as to his actual authority" is not universally true. An agent whose actual authority is limited to certain classes of acts may also have actual authority to make representations as to the extent of his authority. He may abuse that authority to make representations by stating that his actual authority is wider than it is. If the contractor relies on such a misrepresentation, and circumstances are not such as to put a reasonable person on inquiry,[48] then the company is estopped from asserting the original limitation of the agents authority.[49]

PART D:

MISLEADING TERMS

"Constructive notice". The new terminology of Diplock L.J.

As we have already stated Diplock L.J. has proposed a new terminology to replace that of 'constructive notice' of the articles. He abandons the language of publicity with its concomitant of 'constructive notice', and adopts the language of public law with its concomitants of 'constitution' and 'ultra vires'. The reason he advances is that "the expression 'constructive notice' tends to disguise that constructive notice is not a positive but a negative doctrine, like that of estoppel of which it forms a part".[50] It is not clear that the phrase 'constructive notice' does suggest a positive doctrine. Perhaps the rule that a contractor is deemed to have notice of all the provisions in the articles of association does suggest that he is so deemed for all purposes, and is to be treated as if he had knowledge of the articles when he entered into the contract. This is, of course, the positive doctrine of constructive notice. If so the rule is misleading and the phrase 'constructive notice' which summarises the rule is misleading. But there are further reasons for abandoning the old terminology. In the first place the rule it suggests is a fiction. More importantly it obscures perception of the policies of the rules. The provisions of the Companies Acts requiring the powers of those in immediate control of the company's affairs[51] to be stated in the memorandum and articles of association are designed to protect the interests of shareholders against directors and others who might dissipate the funds of the company, derived from the investments of shareholders, by transactions outside the terms of the agreement on the faith of which the original shareholders contributed the funds, or subsequent shareholders purchased

48. And there is no inconsistency with the memorandum or articles of association.

49. This is the explanation preferred by me in 50 *L.Q.R.* 229 for the decision in *Hambro* v. *Burnand* [1904] 2 Q.B. 10.

50. [1964] 1 All E.R., at p. 645 D.

51. The shareholders are in ultimate de jure control of the company, though even such ultimate control may be exercised de facto by groups who use the company's resources or employ other means of de facto control. It is of course the directors who are in immediate control of the management of the company.

52. The marketability of shares is one of the inducements leading the original shareholders to contribute funds.

their shares.[52] The protection of shareholders, it is thought, would be inadequate if directors and their agents could exceed the stated powers. The publicity of memorandum and articles is for the benefit of those who contract with the company, so that they are able to know the nature of the company's enterprise and the manner of its operation, and see the limits of the powers of those who have the immediate control and management of the company's affairs.[53]

Diplock L.J. extends the use of the language of ultra vires from its present use in connection with the memorandum of association. He uses the concept of the 'constitution' of a company to include both the memorandum *and* articles of association. He states that the general doctrines of actual and apparent authority are affected where the principal is a corporation. "The capacity of a corporation is limited by its constitution i.e. in the case of a company incorporated under the Companies Act, by its memorandum and articles of association. . . . This affects the rules as to the 'apparent' authority of an agent in two ways. First, no representation can operate to estop the corporation from denying the authority of the agent to do on behalf of the corporation an act which the corporation is not permitted by the corporation to do itself. Secondly, since the conferring of actual authority on an agent is itself an act of the corporation, the capacity to do which is regulated by its constitution, the corporation cannot be estopped from denying that it has conferred on a particular agent authority to do acts which, by its constitution it is incapable of delegating to that particular agent. . . . these are direct consequences of the doctrine of ultra vires".[54]

It is rewarding to note how the various rules relating to the authority of an agent appear in the new terminology.

The rule of *Ernest* v. *Nicholls* becomes simply that an act ultra vires the constitution does not bind the company. There is no need to refer to any doctrine that the documents of a company are public documents. The rule applies to both actual and apparent authority.[55]

The Rule of *Turquand's* case becomes a rule concerning the interpretation of the constitution. Whenever a power to do any act, including the delegation of authority, is subject to some procedural requirement of 'indoor management' action taken without complying with the procedural requirement is not ultra vires the constitution. In such circumstances, however, there will be no actual authority, but there may be apparent authority.

53. The manner in which directors may deal only with general policy questions, and the day by day 'control' be in the hands of the executive and technical management, is the subject of legal-economic and legal-sociological study. In the nineteenth century a divorce between ownership and control was envisaged. This dichotomy is insufficient to describe accurately the operation of modern companies in which separation exists between (i) ownership (ii) control and (iii) management. Nor are these concepts adequate.

54. [1964] 1 All E.R., at p. 645 B.

55. There is, of course, in a strict sense no actual authority where an agreement to create authority is ultra vires.

There is no necessity to state that a person is deemed to have notice of articles of which he is in fact unaware. There is thus no basis for a 'positive doctrine of constructive notice' (to use the old terminology to designate a doctrine which never gets on its feet under the new terminology). Apparent authority of an agent of a company is a question of fact dependent on the circumstances in the same way as is the apparent authority of an agent of a natural person, subject however to the doctrine of ultra vires. It may arise apart from the articles: actual knowledge of a provision of the articles may be a factor in its establishment. The actual authority of an agent of a company is a matter of interpretation of the constitution, or of the agreement between the agent and other agents of the company whose actual authority is derived from the constitution. There is no actual authority if an agreement involves action ultra vires the constitution.

'rely on'

The problems concerned with this phrase have already been discussed.

'apparent authority'.

This phrase involves a fiction of hypostatization. The phrase is an elliptical way of referring to 'authority apparent to a contractor'. If a contractor is unaware of circumstances which, to those aware of the circumstances, would give rise to an appearance of authority it is clear that there is no appearance of authority to him. Yet current terminology states that there is apparent authority but that he cannot set up the apparent authority because he has not relied on it. Watts, the editor of *Smith's Mercantile Law,* stated the position accurately when he said "The term 'ostensible authority' denotes no authority at all.[55] It is a phrase conveniently used to describe the position [of] an appearance of authority".[56] In current language 'apparent authority' is often used as the maximum authority which may be reasonably apparent to some person dealing with the agent in some circumstances.[57]

56. Smith & Watts' *Mercantile Law,* (8th Ed., 1924), at p. 177 n. (s). The note in full is as follows: 'There is a clear distinction between the proper use of the two expressions, "implied authority" "ostensible authority." The former is a real authority, the exercise of which is binding not only as between the principal and third parties, but also as between principal and agent. It differs only from an express authority in that it is conferred by no express words in writing, but is to be gathered from surrounding circumstances. The *term "ostensible authority,"* on the other hand, *denotes no authority at all.* It is a phrase conveniently used to describe the position which arises when one person has clothed another with, or allowed him to assume, an appearance of authority to act on his behalf, without actually giving him any authority either express or implied, by which appearance of authority a third party is misled into believing that a real authority exists. As between the so-called principal and agent such "ostensible authority" is of no effect. As between such principal, however, and the third party it is binding, on the ground that the principal is estopped from averring that the person whom he has held out and pretended to be his agent is not in fact so.'

57. See the fuller discussion 50 *L.Q.R.* at p. 226 *et seq.* The following is an extract: "The apparent authority is treated as independent of a particular person dealing with the agent, and is derived from a consideration of the relation of the principal and agent only; though it is distinct from the actual authority, being the outward relation. In effect it is equal to the representation which

The operation of the doctrine of apparent authority involves two questions which are however obscured by the phrase 'apparent authority'[58] into which the doctrine is compressed. The language of appearance of authority raises the two questions more directly. They are: (a) from what does the appearance arise?, (b) to whom is the appearance made? The asking of these questions brings out the two corresponding aspects of the doctrine: (a) the circumstances must be such as to constitute a representation, by words or by conduct, that the purported agent has the authority the contractor thinks he has, (b) the contractor must have been aware of the authority — it must have appeared to him — and he must have entered into the contract believing it was within the agent's authority to negotiate.

'agent'.

The pervasiveness of the power of language to mislead prevails within the pervasive word in this branch of law — 'agent'. That word is often used to refer to somebody who is in fact no agent at all. It may be used to refer to a person with whom the contractor deals, and who purports to act on behalf of the company, but has no actual authority to do so. The term 'agent' is but an elliptical way of saying 'one who purports to be an agent'. This ellipsis is not easily perceived because of the use of the phrase 'apparent authority'. We say "A has apparent authority", though A in fact has no authority whatsoever, when it appears that A is authorised. We say that A is an "apparent agent", and, regarding apparent agency as a species of agency, we feel justified in saying that A is an agent.

The phrases 'agent' and 'apparent agent' have misleading effect not only in relation to the factual situation they describe but also in relation to the legal consequences. It is as we have seen important to distinguish, on the one hand, between a 'true' agent, one who has been actually authorised, but whose authority is limited to certain clauses of acts, and on the other hand, a so-called 'agent' a person who has no authority at all. Indeed our common language often describes as 'agent' one who is not even an 'apparent agent' — who does not reasonably appear to be one — but who nevertheless purports to be one.[59]

Where an agent is actually authorised, then in such a case he may also have authority to make representations as to the extent of his

may be said to be made by the principal to the world at large." See also the discussion in 16 *Can.B.R.* at p. 764 *et seq* where I say (inter alia): "When it is said that an agent's act was within the scope of his apparent authority all that is meant is that the act appeared to be authorised . . . there has grown up in the English cases a use of the term 'apparent authority' in an objective sense, in which 'apparent authority' is conceived to exist independently of its subjective perception by somebody. The notion of perception is not regarded as inherent in the phrase 'apparent authority' but as additional so that there may or may not be 'reliance on an apparent authority'."

58. For the use of the term "A has apparent authority" when he has no authority at all but appears to have authority, see below p.

59. Indeed ellipsis sometimes results in describing one as 'agent' who is not an apparent, and does not even purport to be one, but who is believed by the contractor to be one.

authority. If a contractor relies on such a representation, and enters into a contract outside the scope of the agent's actual authority but within the ambit of the authority the agent purported to have, the company will be estopped, and in consequence bound by the contract.[60]

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60. See my discussion of *Hambro* v. *Bumand, supra* n. 49.

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