

Company law

[Business](#), [Company](#)



| BUSINESS ENTITY | | | | | | | | | | Sole Proprietorship | Partnership | Un-
 incorporated Associations | Companies | | | | | | | | | | | | | | Limited
 Partnership | Private Companies | Public Companies | | | | | | | | | | | | | |
 One Man Company | Listed | Unlisted | | | | | | | | | | | | | | De facto | | De jure | |

Types of Business Enterprises include: - - The Sole Proprietorship - The Partnership - The Un-incorporated Association - The Company The Sole Proprietorship This is the oldest and simplest form of business. There is a single owner who has the prerogative and responsibility of making all the ultimate decisions concerning the business. Servants or agents may assist the Sole Proprietor, if he functions without the aid of others, his obligations are in Contract and his liabilities for wrongdoing are primarily by Tort.

Advantages of the Sole Proprietorship 1. Businesses commenced and dissolved with ease. 2. There are modest expenses involved in starting up the business. 3. Businesses subject to minimum regulation by law.

Disadvantages of the Sole Proprietorship 1. Un-incorporated owner is fully liable for all the debts and other obligations incurred by his business, for in law his business has no separate legal personality. 2. The courts adopt a hostile attitude when the sole proprietor attempts to segregate his property alienating his interest in the property by passing personal assets into the name of a spouse or other family members. 3. Absence of continuity; therefore death or prolonged illness may interrupt the business and ultimately destroy it. Partnership The partnership of the 21st century is virtually the same as it was at the start of the 19th century when it was defined by the 1891 UK partnership act as: " The relation which subsists between persons carrying on a business in common with a view to profit. "

The “ persons” may be companies or individuals or any combination of the two. All partners have the right to participate in the management of the business and all partners are jointly and severally liable for the debts and obligations of the partnership. To satisfy commercial interests, separate legal personalities have been bestowed in the United States and some Commonwealth Caribbean jurisdictions with the advent of the Limited Liability Partnership Act, for example, St. Lucia. But, by and large the United Kingdom Partnership Act of the 19th century continues to represent the foundation of partnership law in the Commonwealth Caribbean. The attractiveness lies in the informality of formation. They are not required to register and there are no filing requirements. It operates as a sole proprietorship as there is a collection of sole traders who co-operate for the sake of the business. The advantage lies in the flexibility and ease of operation. See the Jamaican decision in the case of Joseph v. MCKenzie (1993) 30 JLR 305 which is instructive of the essential characteristics of a partnership. The facts involved a breakdown in the relationship between the defendant (MCKenzie) and the plaintiff (Joseph) in relation to a restaurant. This business relationship started with an oral agreement relating to profit sharing. Justice Smith found the oral agreement was binding. He noted that it is a settled principle that a partnership can be formed as a result of an agreement between the parties to carry out a business in common with a view to sharing profit or loss. “ There must be a community of profit or loss and to ascertain whether or not a partnership exists the agreement must be construed as a whole. The mere fact that the parties to it claim that they are partners is not conclusive. ” Co-operatives 1. A co-operative differs from

other forms of businesses in that its structure reflects its aims, which are generally stated as to service its members and to benefit the society at large. This is reflected in the course of its business as well as the use of profits.

2. An essential feature of the co-operative is democratic control i. e. one member one vote. Persons elected, or appointed, in a manner agreed upon by the members conduct their affairs. The elected or appointed persons are also accountable to the members. The policy of a co-operative is laid down in the general meeting and is reflected in the bylaws of the co-operative. In contrast in a corporation control is vested in shareholders, primarily those with the largest financial interest.

3. Open membership: Membership in a co-operative society should be voluntary and available without artificial restriction and without any social, political, racial or religious discrimination to all persons who can make use of its services and are willing to accept the responsibilities of membership.

4. Surplus distribution: A co-operative society belongs to the members. The economical result therefore is that any surplus must be distributed evenly so as to avoid one member gaining at the expense of other members. When a surplus is distributed it is allocated between members on the basis of the transactions with the co-operative.

5. All co-operatives should make provision for the education of the employees, members, officers and the general public.

Liability A co-operative is an un-incorporated association so that historically a person seeking an action against a common fund would in effect have to prove the liability of all the members personally, since the fund is thought to be owned by all the members for the time being. This created problems because of fluctuations in membership and the procedural burden of getting

judgement against all the members personally. Legislation now permits that an association can be sued in its own name. *Taff Vale Ry v. A. S. R. S.* [1901] AC 426 is authority for the proposition that an un-incorporated association can be liable in Tort through a class action. *Boyce v. Committee of Management Enterprise Co-operative Credit Union Ltd.* (1975) 10 Barb. L. R 6 The court found for the credit union as the dispute related only to the committee as the body responsible for the management of the society.

Companies | Companies | | | | | | | Private Companies | | Public Companies | | | | | | Statutory Companies | | One Man | Closed Controlled | | Listed |

Not Listed | | | | | | | | De facto | De jure | | | As far as corporate legislation is concerned, it has many functions: 1. It is enabling; i. e. it empowers people to attain what they could not otherwise achieve, creating a body with a distinct corporate personality. 2. It is regulatory; legislation prescribes conditions, which have to be complied with to obtain incorporation. The rules of the Companies Act must be observed to protect the shareholders, creditors and the general public. The Companies Act classifies companies in terms of their size and their method of raising capital.

Public Companies - The Barbados Companies Act S. 2 defines a public company as a company whose shares or debentures^[1] are issued to the public. - This type of company dominates important segments of our economy and it represents perhaps the biggest centre of non-governmental power. - Typically the share-holding body is massive and wide spread. - The company is managed by a board of directors who delegate their powers to executive directors. - S. 59 of the Barbados Companies Act states that a public company must have no fewer than three directors at least two of who

are not officers or employees of the company or any of its associates. - If public companies are going to be listed on the stock exchange they must have a minimum capital requirement. No such requirement for private companies of minimum capital. Listed Companies Some companies are listed on the stock exchange. Stock exchanges were incorporated in the region in the mid 1980's. These were created to fill a void in the financial system. It comprises designated and non-designated members who make up the board. Designated members include the Minister of Trade, Governor of the Central Bank and Minister of Finance. Companies listed on the exchange fall under the purview of Securities Legislation. Such as: Barbados Securities Act of 2002 Jamaica Securities Act of 1993 Trinidad and Tobago Securities Act of 1995[2]. The listed company must enter into a listing agreement, which imposes a number of obligations on issuing companies. They enter into obligations relating to the conduct of trading prohibiting manipulative and fraudulent practices. In order to secure a listing a company must have a trading record or history and a certain number of shares must be held by members of the public who are not associated with the directors or major shareholders. Private Companies Generally these are small family type companies[3]. According to statute in "new law[4]" jurisdictions, there must be at least one director. It is a closely-knit unit with family members often comprising the share holding body. Because of the nature of this type of company, many of the formal requirements stipulated in the Companies Act are abandoned i. e. requirements for taking minutes, the holding of meetings. This is because often Directors do not bother to hold general meetings concentrating rather on running the business. Another

characteristic of Private Companies is they normally have in their constitution a pre-emptive rights clause. It is used to ensure shareholders remain “friendly”. It is a clause, which states that no shareholder can sell shares without the approval of the board. Holding and Subsidiary Companies This is where one company is in a position of control over another by owning more than 50% of the shares in that company. This is covered by the Companies Acts: Barbados S442 Jamaica S149 Trinidad and Tobago S5. Control is an essential ingredient. The parent or holding company has the ability to control or influence the policies of the other company and they can appoint executives. Limited and Unlimited Companies Not all companies are limited by shares, if they are limited, the letters Ltd. or the word “limited” must be affixed after the corporate name. If it is a public limited company the letters PLC or the words “Public Limited Company” must also be affixed after the corporate name. Method of Incorporation In Jamaica, Belize[5] and the Bahamas[6], incorporation is achieved by filing the memorandum of association and the articles of association. The memorandum of association is the company’s principal constitutional document and it governs the relationship between the company and the outside world. The memo sets out the details of the company’s existence. For example the company name, domicile, capital structure, whether it is a private or public company and the company’s objects. The articles of association regulate the company’s internal day to day affairs. For example when meetings have to be held, the number and rights of shareholders as well as directors powers. The first subscribers for shares sign both the memorandum and the articles of association, see for example Jamaica Companies Act Arts. 3 & 6. The

signatures must be witnessed and each subscriber must take at least one share. The number of shares taken will be entered alongside the name in the memorandum. In new law jurisdictions there are pre-printed forms which are filled out. There are actually five standard forms, these are: Notice of Directors form Request for Name Search form Registered Head Office form Certificate of Incorporation and an Affidavit The affidavit stems from articles such as S. 4 of the Barbados Companies Act, which provides that you must be over 18, you must not be bankrupt, and you must be of sound mind. These things are sworn by an attorney in an affidavit. Lecturer: Ms. Lesley Walcott Date: September 23rd, 2003. Advantages of Incorporation 1. A company has perpetual succession. Unlike partnerships and sole traders, the "business" continues despite the death (or serious illness[7]) or shareholders and directors. 2. Its assets are owned and its debts owed by the company and not its members, this is so even with one-man companies, which are permissible in some territories[8]. 3. Generally a shareholder can freely transfer his share holdings unlike a partnership where the consent of the other partners must be obtained. 4. The liability of a shareholder is limited by his shares. In Barbados all shares must be fully paid whereas in Jamaica shares might be partially paid[9]. 5. Shareholders are not bound by a fiduciary duty either to themselves or the company. 6. There are fiscal advantages of incorporation as opposed to being a sole trader, there is scope for tax avoidance (which is legal as opposed to tax evasion which is illegal.) Where there are high profits, it is advantageous to incorporate[10]. 7. It is arguably easier for a company to raise additional finance from banks and other financial institutions through shares and debentures. 8. As a separate

legal person, the company can sue or be sued in its own name.

Disadvantages of Incorporation 1. National Insurance contributions are payable by both employer and employee. 2. There has been an increase in the corporate tax rate, which makes incorporation to reduce tax liability less attractive.[11] 3. There is reduced flexibility, one has to maintain minutes, records of meeting and comply with the various statutory requirements. These are quite significant with regard to public listed companies. There are additional accounting and audit requirements imposed on companies and considerable financial information should be given to the shareholders by the board of directors. Corporate Persona A company is defined by S. 2 of the Companies Act of Barbados as “ A body corporate that is incorporated or continued under this act. ” Section 2 of the Jamaica Companies Act defined a company as “ A company formed or incorporated under this act or an existing company. ” In the eyes of the law, the company is regarded as a separate distinct person apart from its shareholders. For example, see the case of A. G. v. Antigua Times Ltd.[12] where the court stated that “ the term person includes the body corporate. ” See also the Interpretation Acts. Section 17 in the Barbados Companies Act provides that: - “ A company has the capacity and subject to this act, the rights, powers and privileges of an individual. ” The decision cited as establishing the legal personality of the company is the House of Lords decision in the case of Salomon v. Salomon & Co. Ltd.[13] In this case Salomon carried on business as a manufacturer of leather goods, he was a sole trader. Due to an increase in profitability he was advised to incorporate, he then created a limited liability company, which purchased the business. The company thereafter started to experience

financial difficulties. Salomon gave the company a loan, which was secured with company assets. The company was forced into liquidation and Salomon claimed the assets of the company, which had been used to secure his loan, the liquidator and the other creditors objected to this. The House of lords unanimously reversed the decision of Vaughan Williams LJ and held that Salomon was under no liability to the company and its creditors that his debentures were validly issued, and his security over the company's assets were effective against the company and its other creditors. Lord MCNaghten stated in summing up a company's personality: - " The company is at law a different person all together from the subscribers to the memorandum, and though it may be that after incorporation, the business is precisely the same as it was before and the same persons are the managers and the same hands receive profits, the company is not in law the agent of the subscribers or a trustee for them. Nor are the subscribers as members liable in anyway shape or form except to the extent and in the manner provided by the act. " The House of Lords held that no matter how large a proportion of the share capital is held by a shareholder, the company's assets, liabilities and rights were not those of it's controlling shareholders. Application of the Doctrine The principle of the company's separate legal personality has been consistently applied since Salomon v. Salomon & Co. Ltd.[14] See for example the case of Macaura v. Northern Assoc. Co. Ltd.[15] where the House of Lords held that the assets of the corporation were not those of the shareholders. See particularly the judgments of Wrenbury and Lord Buckmaster. This case is also authority for the proposition that the shareholders do not have an insurable interest in the in the property of the

corporation because they do not have a legal or equitable interest in the property. Determine the validity of the arguments used in the case of *Constitution Ins. Co. of Canada v. Kosmopolous* [1987] 34 DLR (4th) 208. Since a company is a legal person, separate from its shareholders, the following applies: - 1. A contract of employment can be entered into by a company and its sole director and controlling shareholder. See the case of *Lee v. Lee Air Farming* [1961] AC 12.[16] 2. Regardless of whether the person holds all the shares in the company, the company's business is not necessarily that person's business in the eye of the law. However, where an individual controls a number of companies whereby their existence represents a sham, the court will treat these companies as his creatures whereby the individual will be personally liable. Piercing the Corporate Veil There are instances where the courts will pierce the corporate veil and disregard its separate existence. Within traditional legal scholarship, there is no principled distinction between the two limbs i. e. instances where the principle is applied and instances where it is ignored. The courts seem unwilling to define clear guidelines, preferring rather to describe instances where the corporate veil is used as a sham or a cloak. It is difficult to rationalise the cases except under broad and rather questionable headings. These headings are: - 1. Agency 2. Fraud 3. Trusts 4. Enemy & 5. Statute[17] See also the United States Patriot Acts and the Helms Burton legislation. Lecturer: Ms. Lesley Walcott Date: September 25th, 2003. Fraud Equity will not allow an individual to use a company as a shield for improper conduct or fraud. In a group relationship, the claimant must attack the artificiality of the Parent subsidiary relationship. The onus lies on the claimant and a high

burden of proof must be discharged. He/she must establish that the company is a sham, cloak and buffer. See *Gilford Motor Co. v.*

Horne[18] where the court of appeal held that the plaintiff was entitled to an injunction against both the defendant and the company which, the defendant, in contravention of a contract, formed a company and solicited his former employers clients. See also the case of *Jones v. Lipman*[19] where a vendor of land sought to avoid specific performance by transferring the land in breach of the contract to a company he had formed for that specific purpose. The court treated the company as a sham and granted an order for specific performance. See also the case of *BG Preeco Pacific Coast Ltd.*

[1989] DLR 30. Please note however that an unsuccessful claim of fraud renders the claimant liable for costs. Agency An examination of the cases indicates that agency is often used in conjunction with other heads, for example fraud. One should consider whether agency precedes the lifting of the veil by virtue of the courts imputing an agency relationship-using agency as a means of lifting the veil resulting in implied or constructive agency. See the decision of *Smith Stone & Knight Ltd. v. Birmingham Corp.*[20] and note that there are two types of agency, agency as a result of capitalist control, and agency as a result of functional control. Functional control is a question of fact. The factors to be considered are: 1. Does the shareholder treat as their own the profits of the company? 2. Who appoints the persons conducting the business? 3. Who is the head and brain of the trading venture? 4. Who decides what and how much capital should be injected into the various ventures? 5. By whose skill and direction are profits made? 6. In a group subsidiary relationship who closely and directly controls the

subsidiary? Group Enterprises Regional company statutes contain definitions of the holding, subsidiary and affiliated companies. These are: - Jamaica S. 149 Bahamas S. 2 Barbados Ss. 440 — 443 Trinidad & Tobago S. 5 On the financial implications of the holding and subsidiary relationship see the case of *Acatos & Hutchinson Plc Watson* [1995] 1BCLC 218, which involved an arrangement whereby the company acquired another company which held shares in it. See also the decision in *Ord v. Bellhave Pubs Ltd.*[21]

Advantages of the Holding Company

1. It is suitable as a medium for controlling modern large-scale business enterprises.
2. There is simplicity in formation, by simply acquiring a majority of the shares that carry voting powers. This does not disturb creditors or preference shareholders or any minority of ordinary shareholders and it does not interfere with the good will and reputation of an existing business.
3. The holding company may be used for the purpose of financing the operations of its subsidiaries.
4. Tax advantages may be obtained for example where a company with accumulated losses acquires a subsidiary with substantive gains, the losses may be carried forward for income tax purposes and deducted from future profits.
5. Subsidiary companies insulate each individual company from the creditors of other subsidiary companies. In this way the risk of loss to the holding company is limited to the amount of capital subscribed in the subsidiary. The mere fact of ownership of shares or capitalist control does not impose a responsibility on the holding company.

Disadvantage and Abuse of the Holding Company

Some of the advantages mentioned may prove to be disadvantages: -

1. Holding companies tend to create monopolies and concentrate the control of big business in the hands of a few

[22]. 2. Share Pyramiding; control can be acquired by investing a relatively small amount of capital in a number of subsidiary companies. Control is achieved over the whole chain by holding a majority of shares in the first company. 3. Manipulation of accounts; inter-corporate transfer and transactions may be hidden.[23] Financial statements may be obscure and cover up essential information Generally the doctrine of *Salomon v. Salomon & Co. Ltd.*[24] can be easily abused and the corporate personality used as a veil behind which to shield conduct prejudicial to the corporations creditors. An insolvent subsidiary is generally treated, as a separate legal entity so that it's parent company will rarely if ever be liable for it's debts. The application of this principle to group companies has caused hardship to the unsecured creditors of the insolvent subsidiary. See the case of *Multinational Gas v. Multinational Gas & Petrochemical Services Ltd.*[25] where the court held that there was no agency relationship between the plaintiff and defendant company. The court further found that when the parent company sent instructions to the subsidiary company and it was carried out, the subsidiary company ratified the instructions. In the case of *DHN Ltd. v. Towel Hamlet*, [26] the parent company requested that the courts pierce the veil because the subsidiary company had been compulsorily acquired. It was in this case that Lord Denning devised the " Single Economic Unit" theory. He felt the courts should pierce the veil in the " interest of justice. " In *Adams v. Cape Industry Plc* [1990] 2 WLR 657. The subsidiary company was mining asbestos; the court however found that there was no agency relationship between the parent and subsidiary companies. The court in this case also expounded the view that there was no such thing as " in the interest of

justice. " In the case of Polly Peck International plc.[27] the court of appeal affirmed the principles arising from Adams v. Cape Industry Plc[28]. In the United Kingdom, there continues to be a marked unwillingness on the part of the courts to acknowledge the economic reality of groups and pierce the corporate veil. In Europe, the " single economic unit" theory receives a far more favourable response. See the Barbadian case of Debtor Co. Ltd. v. Wilkinson[29]. In this case the owner of Bresmay transferred all of Bresmay's assets to Debtor Co. Ltd. and only maintained the employees' contracts with Bresmay. Miss. Wilkinson was terminated and sued for wrongful dismissal. She was successful but there were no company assets to settle the debt. The owner of Debtor then provided a Debtor cheque to settle the debt. He then argued in court that he had no authority to use Debtor assets to settle a Bresmay debt. The court of appeal held that although Bresmay had employed the former employee, it was no more than a shell. William's J expressed the view of the court when he said: - " The court strongly disapproves of the use of the corporate concept as a device for treating employees unjustly...It is nothing more than a shell, an entity used as a tool to hold contractual arrangements made with those who are employed in the business. When successful claims are made by employees, there is no substance to satisfy them and the employees are left with feelings of injustice and frustration. " Lecturer: Ms. Lesley Walcott Date: October 9th, 2003. Promoter There is a lack of judicial definition of the word promoter in the Jamaica Companies Act see S43 & 44 in Barbados the Companies Act refers to an incorporator. In jurisdictions such as Jamaica and Belize there is a promoter, but in the new law jurisdictions reference is made to an

Incorporator. The term incorporator and Promoter are not synonymous.

Promoters are persons who conceive the idea of forming a company, they undertake its incorporation, and they provide shares and loan capital. See for example the case of *Emma Silver Mining Co. v. Lewis & Son*[30] where Lindley LJ stated that: - “ as used in connection with companies the term promoter involves the idea of exertion for the purpose of getting and starting a company, or what is known as floating it. ” The nearest attempt at a definition can be found in *Twycross v. Grant*[31] in the 19th Century where Cobourne CJ states that a promoter is: - “ one who undertakes to form a company with reference to a given project and to see it going and who takes the necessary steps to accomplish that purpose. ”

The Need for a Definition

A definition is often of the utmost practical importance so as to impose liability upon a defendant/promoter. See for example Vice Chancellor Bacon’s comments in *Bagnall v. Carlton*.[32] The grant of a particular relief or remedy may depend solely on this issue. In Jamaica see S. 40 of the Companies Act and the third schedule to the legislation. How therefore can a company and the persons who have authorised the issue of the prospectus fulfil this duty without knowing who is the promoter?

Reasons For The Lack of Definition.

1. Where a promoters conduct falls to be considered by the courts the judges simply resort to equitable remedies. Relying on the principle that secret profits are inequitable, and anyone who has made them is a promoter.
2. One school of thought insists that the term promoter is best left as a business term rather than a legal one. See for example the case of *Twycross v. Grant*.[33]
3. The courts have intentionally failed to set down a definition in a formal sense, because if a definition were laid down it might be possible

for persons concerned in the promotion of companies to avoid its application, taking advantage of their fiduciary position without incurring the liability of promoters. 4. A comprehensive definition is impossible due to the wide range of companies promoted, from small one-man companies to the large public corporations, and given the varied activities of the person engaged in promoting the company. Suggested Test The animus factum test see the case of *Bagnall v. Carlton*[34] when the defendants were held to be promoters “ because it was their intention and conviction to sell the prospect of the company”. There we witness the element of intention and the fulfilment of this intention as the criteria. See the case of *Re Leeds & Hanley Theaters of Varieties Ltd.*[35] where the element of intention was also stressed by Vaughan Williams LJ he stated: - “ If you trace all the proceedings of the finance company as detailed in their own minutes, it seems clear that they were acting and intended to act as promoters of the company. ” Similarly see the decision of *Twycross v. Grant*[36] where it was stated that: - “ The defendants acts were done with a view to the promotion of the company. ” The inference from these is that a promoter is not under a liability merely because he agreed to promote the company. To be liable the person had to act. See the case of *Whaley Bridge Calico Printing v. Green & Smith*[37] as to what constitutes an active step. There is an active step of promotion only where the vendor has negotiated the promotion with other institutions. Please note that this has not been followed by later House of Lords decisions such as *Gluckstein v. Barnes*[38] and *Erlanger v. New Sombrero Phosphates & Co.*[39]. Termination of Promotion In the decision of *Twycross v. Grant*[40] Cobourne LJ stated that: - “ So long as the work of

formation continues, those who carry on that work must retain the title of promoter. " There is no statutory limitation of promoters, the courts have developed a test of intention and the promotion period covers all activities designed to start the company. As a reality; 1. The term promoter is not a term of art. 2. The obligations of the promoter have been built up piecemeal by the courts. See the use of agency and trust principles, buttressed at times by legislation. 3. Where attempts have been made at judicial definitions, the definitions have not been exhaustive. 4. The matter of whether or not someone is a promoter is a question of fact. 5. The promoter is not an agent of the company as there is no principal (This is because the principal or company is not yet formed). Duties and Obligations The promoters stand in a fiduciary relationship to the company. See the case of *Erlanger v. New Sombrero Phosphates & Co.*[41] which was the first decision to recognise the existence of a fiduciary relationship Lord Blackburn commented on the extensive, almost unlimited powers which promoters have. Lord Blackburn indicated that such powers must be checked by an objective test of reasonable use. 1. A promoter must not make any secret profit out of the promotion of the company without the company's consent. 2. A promoter is under a duty to disclose any interest in which he may have in a venture in which he has entered into. 3. A contract entered into between the promoter of the company is voidable at the instance of the company unless all material facts have been disclosed to a full and independent board. " Independent", is a question of fact. If a company is a private company then the general meeting is the proper forum for disclosure. At this meeting, the promoter due to his vested interest must abstain from the vote. If the

company is a public company then full disclosure in the prospectus is sufficient. See the House of Lords decision in the case of *Erlanger v. New Sombrero Phosphates & Co.*[42] as well as *Gluckstein v. Barnes*[43] where a syndicate purchased property and resold it to the company. The syndicate only disclosed a portion of the profits. The House of Lords decided they were accountable for the remainder. See the case of *Whaley Bridge Calico Printing v. Green & Smith*[44] where a promoter was held accountable where he negotiated a sale of a business from a third party to the company and obtained a share of the profits.

Remedies

1. The company may bring proceedings in its own name for restitution of a benefit, which the promoter has received either in equity on the basis of constructive trust, or through an action for money had and received. See the case of *Gluckstein v. Barnes*[45].
2. The company may have a remedy in damages against the promoters for breach of their fiduciary duty. See *Re Leeds & Hanley Theatres of Varieties Ltd.*[46]
3. The promoter and his accomplices may be sued in an action of deceit. A promoter may be personally liable to compensate persons who subscribed for shares or securities on the faith of his prospectus. Where a promoter has been promised but has not received a profit, bribe or other benefit, the company may itself enforce his claim against the promisor on the basis that he held the claim as trustee for it.

a. restitution
b. damages
c. rescission
d. compensation

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Remuneration
A promoter is not entitled to recover any remuneration for his services from the company unless there is a valid contract between him and the company. See the cases of *Re: English & Colonial Produce Co.* [47] and also *Re: National Motor Mail Co.*[48]. In the absence of a valid

contract therefore, a promoter will be unable to recover his preliminary expenses and any registration fees or duties paid. The promoter is at the mercy of the directors of the company. In practice this does not present a significant problem because a provision is usually inserted in the articles or bylaws of the company authorising the directors to pay the promoter.

Furthermore, more often than not, the promoter himself becomes a director.

Pre-Incorporation Contracts The fact that Anglo-West Indian law does not recognise the existence of a corporation until a certificate of incorporation has been issued and other prescribed conditions met creates significant legal and practical difficulties. Where a promoter purports to conclude a contract on behalf of a prospective corporation. Pre-incorporation contracts are an essential part of commercial life. The promoter may feel that it is important to nail down the other party to the contract before he has had an opportunity to change his mind. The other party may insist on the contract being concluded by a given date, or the existence of the contract may be a pre-condition of the promoter being able to attract other investors to the corporation. Frequently the promoter is also under the mistaken impression that the corporation has already been incorporated or that compliance with the statutory incorporation requirement is only a minor inconsequential formality. **Common Law Position** Determining the enforceability of pre-incorporation contracts has led to a volume of case law. The common law can be regarded as unsatisfactory, arbitrary, unrealistic and fraught with fine distinctions. The structure and application of the common law is evident in the case of *Kelner v. Baxter*[49] and *Newbourne v. Sensolid (Great Britain Ltd.)*[50]. In the case of *Kelner v. Baxter*[51] the court stated that a promoter

who purports to make a contract on behalf of an unformed company will be personally liable despite signing as agent of the unformed company. This is provided that on the face of the instrument it is evident that he was a party to the contract. The rationale for this is: - 1. Prior to the incorporation a company lacks the capacity to enter into contracts and is not bound by contracts made by the agents purporting to act on its behalf prior to incorporation. 2. A company is prevented from ratifying pre-incorporation contracts because when the company comes into existence, it is a totally new creature. Rights and liabilities begin on the date of incorporation and not before. Thus when the company in *Kelner v. Baxter* purported to ratify the promoters contract, it was held that in the absence of a principal who could be originally bound, they themselves were liable. 3. An agent for a non-existing principal must be considered as personally incurring liability. In the case of *Kelner v. Baxter* Earle CJ applied the parol evidence rule. Where an instrument is clear and unambiguous on its face, oral evidence is inadmissible to contradict the written instrument. In the case of *Kelner v. Baxter*, all the parties were aware that the company was not in existence. In the case of *Newbourne v. Sensolid (Great Britain Ltd.)*[52] a written contract was made for the supply of goods by the appellant to the respondent, as in *Kelner v. Baxter*[53] the appellant was acting for an un-incorporated company, the respondent refused to accept delivery, and the appellant sought specific performance relying on the principle in *Kelner's* case. The appellant claimed the contract was binding and enforceable by him as the company's agent. The Court of Appeal rejected his arguments and held that the company and not the promoter was the contracting party and since the

vendor was non-existent; there was no contract at all. As a result of the decision, the courts became pre-occupied with the form of the pre-incorporation contract as opposed to its substance. The court of appeal placed specific emphasis on the manner in which the contract was signed. The position is that if as in *Kelner v. Baxter*[54] a promoter signs for and on behalf of a non-existent company, he will be considered as personally incurring liability. If the promoter signs as per director of an unformed company, there is no company and no one is liable. The issue came up for consideration in the case of *Black v. Smallwood*[55], here the attestation clause in the contract for the sale of land contained the name of the company as purchaser followed by the signatures of two persons as directors. The signatories believed the company had been incorporated and they were the directors of the company. The vendor sued for the specific performance of the contract citing the case of *Kelner v. Baxter*[56] and it was also claimed that the signatories were personally liable. The court held that the 'directors' were not liable. *Kelner v. Baxter*[57] was distinguished on two grounds: - 1. In *Kelner*, both sides were aware of un-incorporation 2. That the court in *Kelner* had concluded that the documents disclosed an intention that the directors should be personally bound. The court in *Black v. Smallwood*[58] introduced intention as a guideline as to whether an agent will be personally liable. See *Phonogram v. Lane*[59] which is a case concerned with S. 9 ss. 2 of the United Kingdom European Community Act of 1972. Lord Denning criticised the fine common law distinction between a contract signed for another and a contract signed as agent for another. The real question in every case was the true intention of the parties. The liability of

the signer did not turn on the distinction drawn in the *Newbourne v. Sensolid (Great Britain Ltd.)*[60] case. The common law applies in Jamaica and Belize, the common law does not apply in the Bahamas, Barbados, Guyana, Trinidad & Tobago, Dominica, Grenada and St. Lucia, this problem with the common law has been corrected by statute. In old law jurisdictions, reliance must also be placed on the common law and the cases of *Newbourne v. Sensolid (Great Britain Ltd.)*[61] and *Kelner v. Baxter*[62] apply. Reliance must also be placed on the common law doctrine of novation i. e. the person making the contract will be released from liability if the company after incorporation enters into a second contract with the contractor incorporating some of the same terms as the pre-incorporation contract. Cogent evidence is required to prove the existence of a second, fresh contract. See the case of *Bagnot Pneumatic Tyre Co. v. Clipper Pneumatic Tyre Co.*[63] where it is demonstrated that a mere mistaken belief is not sufficient., see also *Re Northumberland Avenue Hotel Co.*[64] If a company takes possession of property transferred to it under a pre-incorporation contract the court may be able to infer a new contract see the case of *Re Patent Ivory Manufacturing Co.*[65] Consider the Jamaican decision of *Hadlinton Construction co. Ltd*[66] a Court of Appeal decision which illustrates the traditional common law approach. This case involved a series of building contracts with allegations of negligence: - 1. The issue of pre-incorporation contracts arose as a preliminary issue reaffirmed the salient principle in the common law that a company cannot enter into contracts before incorporation because it does not yet exist as a legal person. Nor for the same reason is it found by contracts made by agents purporting to act on its behalf before

incorporation. 2. In response to arguments that there was no enforceable contract, the court of appeal held that a company cannot ratify or adopt a pre-incorporation contract. However, a new contract may be inferred and in this case, there was cogent evidence to support such an agreement between the appellant and the respondent. 3. The Court of Appeal found there was an entirely new contract following the case of *National Land v. Colonisation* [1904] AC 120. and therefore that novation operated to save the agreement. This doctrine operates wholly apart from the common law position against ratification. See the case of *Canwest International v. Atlantic* (1994) 48 WIR 40. Lecturer: Ms. Lesley Walcott Date: October 7th, 2003. Dealings With The Company and Liability for Torts and Crimes The rule in *Foss v. Harbottle*[67]:

- If a wrong is done to the company, only the company can rectify the wrong.

There are exceptions to this rule. The exceptions include: _ 1. ultra vires 2. Personal Action; the personal rights as an ordinary shareholder are infringed. 3. Special Majority; the special majority requirements for decisions breached. 4. Fraud; this is referred to as fraud on the minority (it has been argued by some, that this is the only true exception). The four exceptions have either been replaced or supplemented by Statutory Derivative Act. In the Barbadian decision of *Canwest International v. Atlantic* (1994) 48 WIR 40. In this case William's CJ enabled or empowered a third party who acquired rights under a pre-incorporation contract to bring an action against the company. A complainant may bring an action and is defined as a shareholder or former shareholder, director or former director, and the Director of Companies and any other person who is a fit and proper person to bring the action. Williams CJ interpreted the phrase " any other person who is fit and proper..." to

include third parties who acquire rights under a pre-incorporation contract. In the Jamaican case of Chinatown Restaurant Ltd. et al v. Wong[68], the case was thrown out because the shareholder did not live in Jamaica, Jamaica therefore follows the rule in Foss v. Harbottle. The Doctrine of Ultra Vires The Memorandum of Association This is the company's principal constitutional document, it governs the relationship between the company and the outside world. The memorandum sets out the essential details of the company's existence. For instance the company name, domicile, capital structure and whether it is a private or public company. The Objects Clause This is the most important clause in the memorandum of association. This clause defines the capacity of the company. It sets out the main business activity of the company. Its purpose is to protect investors, shareholders and others dealing with the company. A company has natural limitations in accordance with Suttons Hospital[69], a company cannot commit treason, it cannot marry and it cannot be excommunicated. The law has introduced an artificial limitation in the form of the doctrine of ultra vires. This doctrine is based on the fact that companies were formed historically to fulfil a specific limited purpose as stated in the companies constitution. See the case of Ashbury Railway Carriage & Iron Co. Ltd. v. Riche[70], which settled the uncertainty as to whether, the doctrine applied to companies. In this case the company's memorandum gave the company power to make and sell railway carriages. The directors entered into a contract to purchase a concession. The issue was whether the contract was valid, and if it was not, could the shareholders ratify the contract. The House of Lords held the contract was of a nature not provided for in the memorandum and was therefore null and void and

incapable of ratification. Lord Cairns expressed the view that: - " The memorandum is the area beyond which the action of the company cannot go. " In the subsequent House of lords decision in the case of *A. G. v. Great Western Rly. Co.*[71] the court sought to relax the harsh application of the ultra vires doctrine by introducing the " reasonably incidental" test stating that the court will accept those acts which are reasonably incidental to the expressed objects unless they are expressly prohibited. Lord Selbourne stated that: - " The doctrine of ultra vires ought to be reasonable and not unreasonably understood and applied. " Certain powers are implied in the case of trading companies unless expressly prohibited for example the power to appoint and act through agents, the power to borrow money, to give security on property, to employ labour, to have a bank account. It is evident that the doctrine of ultra vires operates as a fetter on commercial enterprise, because the doctrine of ultra vires by confining the activities of a company to its stated objects has the effect of restricting the companies actions and may prejudice bona fide creditors. Draftsmen have devised numerous schemes in an attempt to ensure the company's capacity remains unfettered: - 1. The Subjective Clause; provides that the " company can carry on any other trade or business whatsoever which, can in the opinion of the board of directors be advantageously carried on by the company in connection with or ancillary to the general business of the company. " This type of clause vests the company and its directors with the power to define its commercial activities enabling the company to extend its area of operations. See the case of *Bellhouse Ltd. v. City Wall Properties Ltd*[72] where the court of appeal reluctantly upheld such a clause. This decision

attempts to throw doubt on *Re Crown Bank*[73] an earlier decision, which stated that “ an objects clause must be capable of ascertainment, it must contain a definite purpose. ”

2. Lengthy and Comprehensive Memorandum; Corporate draftsmen developed the technique of specifying in the objects clause, not only the main objects which the company was to pursue, but also a seemingly endless list of other activities covering every conceivable business venture. Lord Wrenbury in the case of *Cotman v. Brougham*[74] in response to this the courts attempt to restrict this development by developing the main objects rule of construction. See the case of *Re Haven Goldmining Company* (1882) 20 Ch. 151 and the application of the *ejusdem generis* rule. Where the main objects specified in the first few paragraphs of the memorandum of association are followed by wide powers expressed in general words, the latter should be construed subject to the main objects.

3. Separate and Independent Objects Clause; in order to circumvent the *ejusdem generis* rule draftsmen inserted a separate and independent objects clause at the end of the objects clauses. These clauses provided that each paragraph is to constitute a separate and independent clause not limited by or to other paragraphs. See the case of *Cotman v. Brougham*[75] where the House of Lords reluctantly upheld such a clause, contrast this with the case of *Re Introductions Ltd. v. National Provincial Bank Ltd.*[76] where a company was incorporated with the object of hosting foreign students, later it became involved in pig breeding. Two debentures over the company’s assets were created to secure a large overdraft. The objects clause stated that the company could borrow by debentures, and there was also a clause which provided that each of the preceding sub-clauses should be construed

independently and should in no way be limited in any way to any other sub, sub-clause. The Court of Appeal held that the ability to borrow money was a power and not an object, and the power to borrow money could not be elevated into an object by an independent objects clause. We witness the distinction between objects and facilitative powers with powers being considered as facilitating an object. Lecturer: Ms. Lesley Walcott Date: October 9th, 2003. The Doctrine of Ultra Vires Rolled Steel Products Ltd[77] (H of L) & Russell v. Northern Bank Dev. Corporation Ltd.[78] In the case of Rolled Steel Products (Holdings) Ltd v. British Steel Corporation[79], which is based on complex facts, and has to do with the maintenance of capital in accordance with S. 151 of the UK Companies Act 1985. The memorandum gave the plaintiff company power to lend and advance money, to give guaranties and give securities. The controller of the plaintiff company established a service company which ran up a debt with a third company which was subsequently acquired by the defendant company. The controller of the plaintiff company gave a guarantee on the companies indebtedness and subsequently guaranteed the balance of the debts and issued a debenture to secure the debt. On the subsequent liquidation of the plaintiff company, the plaintiff instituted proceedings against the defendant for money paid under the debenture. They also sought a declaration as to the validity of the guarantee and the debenture granted. Justice Vinn Lott in the lower court stated that the power to lend and advance money in the plaintiffs memorandum was not a separate independent object, but merely an ancillary power which had to be exercised in pursuance to the main objects and purpose of the company. Since the defendant knew that the

granting of the debentures and guarantee was under the ancillary power, and was not to further the companies main purpose and objects, the guarantee and debenture were ultra vires, and being ultra vires, the shareholders even if acting unanimously could not ratify them. The Court of Appeal reversed this decision finding instead that " an act which comes within the scope of a power conferred expressly or impliedly by the company's memorandum is not made ultra vires by reason of the fact that the director entered into it for some improper purpose. " The court of appeal decision can be regarded as blurring the distinction, or eradicating the distinction between an object and a power. Lord Justice Slade in the Court of Appeal put forward six propositions: - 1. It is a question of construction of the memorandum of association whether a particular transaction is within or outside a company's capacity. 2. The state of mind or knowledge of persons dealing with it is irrelevant when considering corporate capacity. 3. While due regard must be paid to any express conditions attached to the company's memorandum, for example a power to borrow only up to a specified amount. The court will not ordinarily construe a statement in the memorandum as a condition limiting the company's corporate capacity, but rather as a limitation on the authority of the directors. 4. In the absence of unanimous consent of all shareholders, the directors of a company will not have actual authority from the company to exercise any expressed or implied powers other than for the purpose of the company as set out in its memorandum of association. 5. A company holds its directors as having ostensible authority to bind the company to any transaction which falls within the powers expressly or impliedly conferred on it by the memorandum

of association. Unless he is put on notice to the contrary, a person dealing in good faith with a company that is carrying on an intra vires business is entitled to assume that its director are properly exercising such powers for the purpose of the company as set out in the memorandum of association. 6. If a person dealing with the company is put on notice he cannot rely on the ostensible authority of the directors. Note the following: - 1. It is questionable whether the decision of Rolled Steel Products (Holdings) Ltd v. British Steel Corporation[80] is applicable when there has been a total abandonment of the companies original business as in the case of Re Introductions Ltd. v. National Provincial Bank Ltd.[81]. 2. Brady v. Brady[82] seems to indicate that the distinction between an object and a power has not been wholly eradicated. Gratuitous Dispositions Gratuitous dispositions include employee benefit schemes and dispositions for non-business purposes. The classical approach is that an activity not bona fide designed to enhance the profitability of the company is ultra vires. See the case of Hutton v. West Cork Railway[83] where it was stated that: - " Charity cannot sit at the board room table, and there are no cakes and ale except for the benefit of the company. " See the case of Re Lee Behrens[84]; in this case a director of a company awarded a widow of one of the company's former directors an annuity, the court upheld the liquidators claim which was that the payment was mere gratuity and therefore ultra vires the company. Eve J laid own the test for determining the validity of such gratuitous grants: - 1. Is the transaction incidental to the carrying on of the companies business? 2. Is it a bona fide transaction? 3. Is it done for the benefit of and to promote the prosperity of the company? See the case of Re W&M Roith Ltd.[85] where a

service agreement with a director provided for a pension to his widow was held to be ultra vires the company on the grounds that tests one and three of Eve J's tests were not satisfied. Where there is an express provision in the memorandum, which identifies a substantive object of the company as charitable works, it should be immaterial whether the transaction benefits and promotes the prosperity of the company. See the case of *Re Horsley & Weight Ltd.*[86] where the court of appeal held that the grant of a pension was not ultra vires bearing in mind the separate and expressed provision in the memorandum. See the case of *Charterbridge Corporation v. Lloyds Bank Ltd.*[87] where it was held that the act was ultra vires regardless of whether or not it was intended for the benefit of the company because it was in pursuance of an express purpose.

Failure of Substratum If the objects for which the company has been formed cannot be achieved, the company is liable to be wound up on the just and equitable ground of failure of substratum. See the case of *Re German Date Coffee Co.*[88] where the memorandum of association of a company stated that it was formed for working a German patent which had been or would be granted. This German patent was never granted, and it was held that the shareholders were entitled to apply for the winding up of the company.

Remedies

1. A member can sue under a derivative action on behalf of a company to set aside the effect of an ultra vires transaction.
2. Shareholders are entitled to apply for an order of winding up. See the Jamaica Companies Act S. 203.
3. Members have the power to apply for an injunction to restrain the company from entering into an ultra vires transaction.
4. The company has the right to recover from its officers compensation for loss suffered as a result of an ultra

vires transaction which they have caused it to enter. Articles of Association
Every company is required to have articles of association (Jamaica, Bahamas, Belize and St. Kitts). This defines the companies corporate authority indicating contractual limitations placed upon the company by the shareholders. The articles of association determine how the objects of the company are to be achieved and how the powers are to be exercised.

Articles of Association generally contain the following provisions: - 1.

Appointment of the board of directors. 2. Specifications as to the powers which a director may exercise in a company's name. 3. The calling and holding of shareholders meetings. 4. The determination of voting rights. 5. Determination of rights of different classes of shareholders. 6. provisions dealing with the financial management of the company, for example: - a. Share capital and variation of rights clause. b. Calls on shares (this applies to partially paid up shares in Jamaica and Belize. c. Transfer of shares. d. Alteration of capital e. Annual accounts, profits and dividends. f. Winding up of the company. Lecturer: Ms. Lesley Walcott Date: October 14th, 2003.

Articles of Association... Interpretation Articles of association are subordinate to the memorandum of association, hence if there is any inconsistency between the memorandum and the articles of association, the memorandum will prevail and articles are void to the extent of their inconsistency. The authority for this comes from the case of Guinness v. Land Corp. of Ireland (1885) 30 Ch. 376. The articles of association may be examined to clarify Ambiguities in the memorandum. Please note that in determining the question of corporate authority the purposes of the corporation are material. The purposes are to be gathered from the ordinary natural meaning of the

words. The Contractual Effect of the Articles of Association This has been the centre of debate for over a century. The controversy stems from a drafting oversight in S. 20 of the 1948 UK Companies Act which is reflected in S. 14 of the 1985 UK Companies Act. This oversight has been carried through and adopted in the English speaking Caribbean. see for example S. 22 of the Jamaica Companies Act as well as S. 14 of the 1981 Companies Act of Belize. Section 20 of the UK Companies Act provided that: - “ Subject to the provisions of this act the memorandum and articles, when registered bind the company and its members to the same extent as if they respectively had been signed and sealed by each member, and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles. ” St. Kitts in 1996 remedied this lacuna with S. 10 of the Companies Act and now expressly mentions covenants on the part of each member and the company[89]. The deed of settlement failed to take into account the fact that the corporation is a separate legal entity. The courts as a result of this loophole became preoccupied with the following questions: a. Who are the parties to the statutory contract, the members of the company and the company, or just the members? b. Are the members deemed to have covenanted with each other, or the company or both? c. Could members sue another directly on the contract or must he enforce his statutory right only through the company? Some of the questions have been resolved: - 1. See the case of *Wood v. Odessa Waterworks Co.*[90] where the articles empowered a director with the sanction of a general meeting to declare dividends to be paid to shareholders. The company passed an ordinary resolution proposing to pay no dividends, but to give shareholders debenture

bonds redeemable over thirty years. An injunction was granted to the shareholder to prevent the company from acting on the resolution. A shareholder therefore has the right to enforce the terms of the articles by virtue of the statutory contract of S. 20. 2. The articles bind the shareholders only in their capacity as members of the company. They as shareholders cannot make the company abide by the articles by virtue of any special or personal right for example qua director, as solicitor or as managing director. These rights are not shared by all. This principle was illustrated in the case of *Hickman v. Kent or Romney Marshall Sheep Breeders Association*[91] and *Beattie v. E & F Beattie Ltd.*[92] In the case of *Hickman v. Kent*, the plaintiff was a member of the defendant company. The articles of the company contained an arbitration clause for the settling of disputes. The plaintiff brought an action complaining of irregularities in the affairs of the association. Astbury J examined the earlier decision in the case of *Pritchard, Melhado v. Porto Allegre Rly. Co*[93] as well as the decision in *Browne v. La Trinidad* (1887) 37 Ch. D 1. He stated that these decisions relied on by the plaintiff purported to give specific contractual rights to persons in some capacity other than that of shareholders, and in none of these cases did the members possess rights in common with other members. He laid down the following principles upon which most of the law as to the legal effect of a company's articles of association now rest: - 1. No article can constitute a contract between the company and a third party. 2. No right merely