

CHAPTER-7

JUDICIAL RESPONSE/CONTROL OF THE DOCTRINE AND ITS STATUS IN OTHER COUNTRIES

1. DOCTRINE IN GENERAL

As we are aware that the doctrine of *ultra vires* is a Judge made law and it is the result of unaccounted numerous decisions given by the different courts around the globe. But if we talk about the status of the doctrine in England and look at its background than we could conclude that this doctrine was not paid much attention before introduction of the limited liability Act 1855. With the introduction of the above Act it was deemed proper on the part of ambitious directors, to use the corporate capital of the company only for certain specified objects so that the interest of shareholders and the creditors is protected. This was further elaborated by the Act of 1856, which specified that a company should include an objects clause within its memorandum which would also define the contractual capacity of the company with any outside parties.⁸¹²

But the above referred Act of 1856 failed to stipulate any method by which the alteration of the objects clause could be achieved hence the status of the clause and its effect on contractual capacity was not clear. For example, the omission of any alteration power in relation to the objects clause could, on one hand, have been indicative of the legislature's desire to prohibit any alteration to a company's objects clause subsequent to the company's registration. Alternatively by failing to expressly state that the alteration of an objects clause was prohibited, the 1856 Act could have been interpreted as allowing alterations to the clause (following the consent of the company's membership) in which case, any attempted restriction on corporate capacity would have been seriously weakened. Fortunately such a vexing question also did not arise clearly until after the passing of the companies Act 1862, which expressly provided that but with two exceptions namely:-

812 Gower L.C.B. Principles of Modern Company Law 4th Ed. 1979 Page 85

1. Re-organization of share capital and
2. With the consent of the Board of Trade, it also provided that “no alteration shall be made by any company in the conditions contained in the memorandum of association”.⁸¹³

The position in this regard was not finally settled until 1875, when the House of Lords decided the celebrated case of *Ashbury Railway Carriage & Iron Co. V Riche*⁸¹⁴, in which the House of Lords held that a contract that was *ultra vires* the company’s objects was altogether void.

In this case the company bought a concession for the construction of a Railway system in Belgium and entered in to an agreement whereby Messrs Riche were to construct the railway line. As a result of the above agreement M/S Riche commenced the work and the company paid over certain sums of money in connection with the contract. Thereafter the company ran in to difficulties and the shareholders desired that the above contract should be taken over by directors in their personal capacities and shareholders be indemnified accordingly. As a result of which the directors repudiated the contract on behalf of the company and M/S Riche sued the company for the breach of contract. The main issue arose whether the contract entered into between parties was *intra vires* and valid. The objects clause of the company stated that the company was established for the following objects

“To make or sell or lend on hire railway carriages, wagons and all kinds of railway plants, fittings, machineries and rolling stocks, to carry on business of mechanical engineers and general contractors, to purchase and sell as merchant timber, coal, metal and other material on commission or as agents.”

The House of Lords held that the purchase of the concession to build a complete railway system from Antwerp to Touranai in Belgium was *ultra vires* and void because it was not falling within the objects of the company. The words empowering the company to carry out the business of general contractors must be construed *Ejusdem Generis* with the preceding words and must therefore be restricted to contracting in the field of plants, fittings, and machineries only. The contract entered into with M/S Riche was therefore void and the directors are entitled to

813 Section 12 of English Companies Act
814 (1875) LR 7 HL 653

repudiate the same. It was further stated that even if all the shareholders had assented to the contract it would still remain void, because there can be no ratification of an *ultra vires* contract.

Lord Cairns L.C. after stating that the subscribers “are to state the objects for which the proposed company is to be established and then the company comes into existence, for those objects alone” and after referring to the words at the end of section 12 (re-enacted in an amended form in section 4 of the Act of 1948) to the effect that “no alteration shall be made by any company in the conditions contained in its memorandum of association” proceeded as follows:-

“If that is the purpose for which the corporation is established, it is a mode of incorporation that contains in it both that which is affirmative and that which is negative.”

It states affirmatively the ambit and extent of vitality and power which by law is given to the corporation, and

it is necessary to state, negatively, that nothing shall be done beyond that ambit and that no attempt shall be made to use the corporate life for any other purpose than, that which is so specified.⁸¹⁵

It may be mentioned that at the very outset this doctrine was not made applicable to Chartered Companies.⁸¹⁶ Originally, this was the only way by which a company could be created in England, apart from passing of a specific statute in Parliament for each and every company, otherwise created. The East India Company was an example of such a chartered company. It was granted the Charter merely to carry on trade in East India with only a monopoly right for such business. Acquisition of territories by company and intrigues could not, by any stretch of imagination, be within the ‘objects’ of such an apparently innocuous trading company. Therefore, quite early, the doctrine of *ultra vires* prevented a company from changing over one business to another business even when it was highly commendable from all points of view. The business minded people like the English people could have enacted in the

815 Ibid page 670

816 A company created under a Royal Charter. See also Sutton’s Hospital Case

companies Act 1962, the doctrine of *ultra vires* with two exceptions “no alteration shall be made by any company in the memorandum of association.”⁸¹⁷

Soon after *Ashbury’s* case in the year 1875 an another case came up in the year 1880 namely *Attorney General V Great Eastern Railway Co.*⁸¹⁸, in which the doctrine was made more clear with evolution of a rule of reasonableness with regard to the objects of a company as contained in the memorandum. In this case the House of Lords affirmed the principle laid down in the above referred *Ashbury’s case* and held that the doctrine of *ultra vires* ought to be reasonably and not unreasonably understood and applied; and whatever may fairly be regarded as incidental to or consequential upon, those things which the legislature has authorized, ought not, (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*.⁸¹⁹

By the above decision, the company came to be empowered to do an act which was:-

- (a) Necessary for, or
- (b) Incidental to the attainment of its objects or
- (c) Any act which was otherwise authorized by the Act.

Even if incidental objects are not so stated, they would be allowed by the doctrine of reasonable construction, for example, a company formed “to buy, sell and deal in coal” may for the purpose of carrying out its stated objects, employ labors, open shops, buy and hire lorries, draw and accept bill of exchange, borrow and give security and employment. Thus in addition to the powers specifically conferred by the memorandum, a company has power to do whatever may fairly be regarded as incidental to its express objects. But no company can devote any part of its funds to an object which is neither essential nore incidental to the fulfillment of its objects, how beneficial so ever that object might seem likely to prove.⁸²⁰

In *London County Council V Attorney General*⁸²¹, the council having statutory power to work tramways was restrained from running omnibus in connection with the tramways. The court found that the omnibus business was in no way incidental to the

817 Section 12 of English Companies Act

818 (1880) 5 AC 473

819 Ibid page 478 (Per Lord Salborne)

820 Eastern Countries Railway Co. V Hawk (1855) 1 ER 928 at page 934 (Per Lord Chancellor)

821 (1902) AC 165

business of working tramways, and therefore, could not be undertaken, although it might have materially contributed to the success of the council's tramways.

2. DOCTRINE AS MEANS OF JUDICIAL CONTROL

There are certain cardinal principles of the doctrine of *ultra vires*, about which it has been pointed in the introduction part of his work by Seward Brice⁸²², stating that the doctrine of *ultra vires* is “the introduction of principles which limits the capacities powers and liabilities of the companies”.

As a summary and outline of the law and introductory to a special consideration of the doctrine, following propositions indicate the leading principles involved in and making up of the doctrine of *ultra vires*.⁸²³

1. A corporation has all the capacities for engaging in transaction which are expressly given it by the constating instruments.
2. A corporation has all the capacities for engaging in all transactions which are impliedly given to it by reasonable implication from the language of the constating instruments.
3. A corporation has all the capacities or powers for management which are given by its constating instrument either expressly or by reasonable inference there from.
4. Capacities and powers for management may be given by wide general language.
5. Corporations have no capacities of power other than those indicated in the four previous propositions and they cannot legally or validly engage in other transaction.
6. Courts in dealing with corporation will look to those capacities and persons and powers only which they actually possess at the time.
7. Corporations cannot be rendered directly liable upon *ultra vires* transactions but must account for benefits received there from.

822 Brice Seward on Law of Corporations and companies, A Treatise on the Doctrine of Ultra Vires 1893, 3rd. Ed. preface page XVIII

823 Ibid Chapter V, page 60

8. Formalities are generally not imperative but merely directory, and therefore, the absence of them can be set up against those persons only who are cognizant of the defect (formalities are useful as a protection but they may not be turned in to instruments of dishonesty either against or on behalf of a corporation).
9. Franchise and special privileges or powers in the nature of franchise cannot be delegated.
10. Special powers of what ever description can be used only bona-fide for the purpose for which created.
11. The capacities and powers of the governing body and “a Fortiori” those of subordinate agents of the corporations cannot be greater and will generally be much more restricted than those of the corporation.
12. Any party to an *ultra vires* transaction may setup the defense thereof and any one corporator may call upon the courts to restrain the corporation from engaging therein.

3. PLEADING OF THE DOCTRINE

As per H.A. Street, pleading of the doctrine by third parties not permitted by way of defense.⁸²⁴ The plea of *ultra vires* may always be taken by the corporation guilty of impugned transaction, whether such corporation be plaintiff or defendant and no estoppels will preclude the plea; but the doctrine having been enunciated as a weapon of defense for the protection of corporations, when sued for the breach of contract,⁸²⁵ no other party can take the plea as defense against it.

Thus, where a corporation entered into a paying contract not under seal and over 50 pounds worth of work was completed, there-under, a rate payer was not permitted to accept contribution by pleading that contract was void.⁸²⁶

Further to mention in the matter of *Cotman V Cotman*⁸²⁷, where the trustee of a friendly society sued the maker of a note given to obtain a loan and the maker pleaded that the loan was *ultra vires*. In the wordings of Jessel M.R.:-

824 Street H.A On A Treatise on the Doctrine of Ultra Vires 1930 Ed. (By Sweet & Maxwell London) Page 30

825 Cheshire & Fifoots, on Law of Contract 9th Ed. Page 1877

826 Bourne Mouth Corporation V Waths (1884) 14 QBD, page 87

827 (1881) 19 Ch. D. 64-69

“How the person who borrowed it, there being no illegality in the borrowing..... can set up the doctrine that they are relieved from their liability by reason of the money having originally belong to a friendly society is a thing which I am quite unable to understand”.

But the doctrine of *ultra vires* can be used as a defense in the pleading in the cases of illegality. A shareholder can maintain a suit in respect of the illegality where a special resolution is improperly passed where the action of the majority is illegal.⁸²⁸

It is to emphasize here that a shareholder has got the right to oppose by way of pleading any attempt of a company to act *ultra vires* and the court will interpose in the matter by way of injunction.⁸²⁹ This can be treated as an exception to the majority rule or the rule mentioned in the famous case *Foss V Harbottle*⁸³⁰, If the act has been actually committed then an order will be sought from the court of law requiring the directors of the company to pay compensation, for which the defendant will be the company as a whole, so that it may be bound by the Judgment of the respective court, and even a single shareholder is sufficient for this.

Further if a company purchases any property without having any such power to purchase, then the transfer of the title of the property will vest in the company on the basis of the equitable principles and the vendor will be stopped from taking the plea that the acquisition of such property was *ultra vires* and therefore the company will be legally entitled to the property so purchased, since in the matters of the ordinary sale and purchase of these property the vendor becomes the trustee for the purchaser, as soon as the purchase amount is paid and this trust would equally be enforceable despite the *ultra vires* character of the property so acquired. Further if a company lends money when it has no power to give then the borrower of the money is stopped from pleading that the loan was *ultra vires*.⁸³¹

If an *ultra vires* contract is executory on both sides, then either party can maintain an action for non-performance of the contract. However, if the *ultra vires* contract is executory on one side only, and the other party has performed it from their side, then the relief to the injured party will purely depend upon the discretion of the

828 *Star Tile Works V Govindan* (1959) Kar 259

829 *Simson V West Minister Palace Hotel Co.* (1880) 8 HL , C. 717

830 (1843) 2 Hare 461

831 *Coltman V Coltman* (1861) 19 Ch. D. 64

court and in these sort of cases, the party who has failed to perform is either asked by the court to perform the contract on their part or to pay compensation to the other party by returning the amount of benefit earned by the defaulting party.⁸³²

If any stranger cannot sue the company, the company who has not sustained any special injury. An action also cannot be brought against the company by an individual shareholder complaining about anything which is *ultra vires*, if he has obtained benefit out of that *ultra vires* acts and establish the plea that he is suing the company on behalf of himself and any other person/ persons who may be stranger to the company⁸³³

A. BURDEN OF PROOF IN QUESTION OF ULTRA VIRES⁸³⁴

Corporations, as we have seen, have all such powers as are expressly or by implication given to them either by legislature, or by common law, or by their own constating instruments. It is clear that in regard to acts and transactions which are apparently within their powers, express or implied, they will be presumed to be valid, unless those who impeach their validity are prepared to prove the contrary. But these are not the only powers which a corporation has. It is now established that in addition to its expressed and implied powers, a corporation has power to do all such acts as are incidental to, and may reasonably and properly be done under and along with, the main objects of its corporation.⁸³⁵

The question is, in reference to these acts, on which will the onus of proof to show that they are valid or invalid? The older authorities are inclined to take the view that the burden of proof is on the party who sets up their validity. Thus it is stated by the Court of Common Pleas in *East Anglian Railway Co. V Eastern Counties Railway Co*⁸³⁶ .-

“it is clear that the defendants have a limited authority only and are a corporation only for the purpose of making and maintaining the railway sanctioned by the act and

832 Dutta on Company Law 4rth Ed. (1976) Page 538

833 Tower V African Tug. Co. (1904) 1 Ch. 558

834 Infra Note 838, Page 41-47

835 Attorney General V Great Eastern Railway Co. 5 App Case 473 at page 478

836 11 C.B. P 775

that the funds can only be applied for the purposes directed and provided by the statute.

From this it would seem that the onus of proof in reference to such transaction as are incidental to and might reasonably and properly be done under the main objects of incorporation would be on the person who sets up their validity. But the more recent authorities are not prepared to accept this view, as would appear from that, Lord Wensleydale says in *Scottish North-Eastern Railway Co. V Stewart*⁸³⁷, “there can be no doubt that a corporation is fully capable of binding itself by any contract under its common seal in England, and without it in Scotland, except when the statute by which it is created or registered expressly or by necessary implication prohibit such contract between parties. *Prima facie*, all its contracts are valid, and it lies on those who impeach any contract to make out that it is avoided”.

This is perhaps going from one extreme to another. The doctrine of onus of proof must be reasonably applied by the court, having regard to the special facts and circumstances of the case before it. It may, however, be asserted that, generally speaking, the acts of a corporation are to be assumed to be valid and that it is for the party who challenges their validity to show the contrary. But in regard to acts which are clearly and manifestly beyond its powers no such presumption as to their validity will be made and the onus of proof would be on the party who sets it up. Where a statute prescribes a procedure as a condition precedent to conferring jurisdiction or giving power to do an act, a non-compliance with the requirements of the statute makes the act a nullity.⁸³⁸

When a certificate under section 9 of the Public Demands Recovery Act 1895, did not specify the amount and the space intended for the insertion of the figures was left blank and the certifying officer appeared to have mechanically signed it without perusal or consideration, it is not duly made under the provisions of the Act and a sale held under such a certificate is not valid.⁸³⁹

Further in *Bajjnath V Ramjat*⁸⁴⁰, Lord Davey observed; “It is obvious that those are very stringent provisions. The proceeding in the first instance is apparently

837 3 Macq. 382 at p. 415

838 Das Satyaranjan On The Law Of Ultra Vires (Tagore Law Lectures) 2nd. Ed. (1981), Page 40-41

839 Mohiuddin V Prithichand, 31, I. C. 664 Cited from Supra Note 838

840 23 Cal 775= 23 I. A. 45 affirming 5CLJ 687 Cited from Supra Note 838

ex-parte. The certificate is to be made by the collector in a certain form and filed, and when the certificate is filed, it has the effect of a decree against the persons named as debtors in the certificate so far as regards the remedies for enforcing it, and when served, it also binds their immovable property. It is unnecessary to point out the necessity there is, when power is given to the public officer to sell the property of any of Her Majesty's subjects, that the forms required by the Act, which are matters of substance, should be complied with, and if the certificate is to have the extraordinary effect of a decree against the person named in it as debtors and to have the effect of binding their immovable property, at least it should be in a form, such as provided by the Act, which enable any person who reads it to see who the judgment-creditor is, what is the sum for which the judgment is given, and that those particulars should be certified by the hand of the proper officer appointed by the Act for the purpose. If no such certificate is given, then the whole basis of the proceeding is gone. There is no judgment, there is nothing corresponding to a Judgment or decree for payment of the amount, and there is no foundation for the sale. The authority to proceed to the sale is based on the certificate which has the effect of judgment or decree, and if no judgment or decree is given, and no certificate is filed having the force or effect of a judgment or decree, there can be no valid sale at all".

In order to deprive the proprietor of a permanently-settled estate of his right to take settlement of Chur land contiguous to his estate. It is necessary that the provisions of Regulation VII of 1882 should be strictly complied with. In the absence of any report by the Settlement Officer or by the Collector that the settlement of Chur land with the proprietor of a permanently-settled estate contiguous to it, who was also the previous holder of the Chur would endanger the public tranquility or otherwise be seriously detrimental, the government have not the power to settle the Chur with a third party in contravention of section 3 of Bengal Regulation VII of 1882.⁸⁴¹

A District Magistrate has no jurisdiction to eject any person from property under section 43 of the Bombay District Police Act 1890, without first taking temporary possession himself, and an order prohibiting a person from entering a temple under such circumstance is *ultra vires*.⁸⁴²

841 Brindaban Chandra V Karuna Nidhan, 23 C.W.N. 261

842 Dharmbhai V Empror., 45 I.C. 396

Where a sub-deputy magistrate not appointed by the Local government to perform the functions of a magistrate under the Assam Labor and Emigration Act (VI of 1901), acquitted certain persons of offences under section 164 of that Act, but at the same time passed an order that the proprietor of the garden for which the coolies were recruited should deposit the expenses of repatriation of the coolies, it was held that the “Sub- deputy Magistrate’s order were entirely without jurisdiction inasmuch as section 2 of the Act defines the magistrate as the magistrate of the district, Sub-Divisional Magistrate or other persons appointed by the local government to perform the function of the magistrate under this Act and this Sub-Deputy Magistrate was not so appointed by local government. His orders are therefore clearly *ultra vires*.”⁸⁴³

There is a distinction between a finding or conclusion and the reasons for the said finding or conclusion. As the Supreme Court said in *Mahabir Prasad V State of Uttar Pradesh*⁸⁴⁴, it must appear not merely that the authority entrusted with quasi-judicial authority has reached a conclusion on the problem before him; it must appear that he reached a conclusion which is according to law and justice and for ensuring that end he must record the ultimate mental process leading from the dispute to its solution. Recording of reasons in support of a decision on a disputed claim by such an authority ensures that the decision is reached according to law and is not the result of caprice, whim or fancy or reached on grounds of policy or expediency. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied in the subject-matter for a decision, whether it is purely administrative or quasi-judicial. As the Supreme Court said in another case, they should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable.⁸⁴⁵

The reasons must be sufficiently clear and explicit in order to inspire confidence in the judiciary process. The rule requiring reasons to be given in support of an order is, like the principle of *audi alteram partem*, a *basical* principle of natural justice which must inform every quasi-judicial process and this rule must be observed

843 Supra Note 838 Page 42

844 AIR 1970 S.C. 1302

845 Union of India V M.L. Kapoor AIR 1974 SC 87

in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law.⁸⁴⁶ Here a reference may also be made to the famous case of *Maneka Gandhi's Passport Case*⁸⁴⁷ decided by Supreme Court.

Where a person bona-fidely puts up constructions on land belonging to State with the latter's permission, he cannot be considered as trespasser. He cannot be removed by an executive fiat and it is well settled that the maxim "what is annexed to the soil goes with the soil" has not been accepted as an absolute rule of law in India.⁸⁴⁸

In this case, on the facts before it, the Supreme Court condemned the action of the government in taking the law into their hands and dispossessing persons concerned by the display of force as a callous disregard of the normal requirements of the rule of law apart from what might legitimately and reasonably be expected from a government functioning in a society governed by a constitution which guarantees to its citizens against arbitrary invasion by the executive of peaceful possession of property. While recording these observations the Supreme Court reiterated its earlier decision in *Wazir Chand V State of Himachal Pradesh*⁸⁴⁹ to the effect that the state or its executive officer cannot interfere with the rights of others unless they can point to some specific rule of law which authorizes their acts. In *Wazir Chand's case*, it was further held that seizure of goods in utter violation of the provisions of law amounted to an infringement of fundamental rights both under Article 19 and Article 31(as it then existed) of the constitution.

The giving of a contract by a Deputy Commissioner in a manner which can counter to the policy of the legislature which is that matters of such consequence to the state revenue cannot be dealt with arbitrarily and in the secrecy of an office was held to be *ultra vires*.⁸⁵⁰

846 Siemens Engineering V Union of India, AIR 1976 SC 1785

847 AIR 1978 SC 597

848 Bishan Das V State of Punjab, AIR 1961 SC 1570

849 AIR 1954 SC 415

850 Guruswamy V State Of Mysore, AIR 1954 SC 592

Where a statutory provision clearly prescribes certain requirements as condition precedent for the retrenchment of workmen, failure to comply with the said provisions renders the impugned orders invalid and in-operative.⁸⁵¹

The determination of the question whether a provision is mandatory or directory would, in the ultimate analysis, depend upon the intent of the law maker. And that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other. Following this principle, Rule 5(2) framed by the Mysore Government and Rule 3(b) framed by the Madras Government under sections 5A and 55 of the Land Acquisition Act 1894 were held to be mandatory and not *ultra vires* of section 5A, and the Supreme Court quashed the notification under section 6 made by the Collector for non-compliance with the requirement of the said Rule.⁸⁵²

Where it is a case of discretion of an authority, the court would only quash the order and ask the authority to reconsider the matter if the discretion has not been properly exercised. But where the discretion is not absolute but is circumscribed by statutory provisions which lay down a duty on the authority, then it is open to the court to direct the authority to carry out the duty so laid down in the statute.⁸⁵³

Where the Central Government functioning as a quasi-judicial authority passes an order without giving opportunity to the party concerned to meet the case against it, the order is vitiated as being contrary to the principles of natural justice, the reason being that it was rendered without affording to the part a reasonable opportunity of being heard which is a *sine-qua-non* of a fair hearing. An error of law which is apparent on the face of the record can be corrected by a writ but an error of fact, however grave it may appear to be, and where the order of a domestic tribunal makes a reference to several grounds, some relevant and existent, and others irrelevant and non-existent, the order will be sustained if the court is satisfied that the authority would have passed the order on the basis of the relevant and existing grounds, and the

851 State of Bombay V Hospital Mazdoor Sabha AIR 1960 SC 610

852 State of Mysore V V.K. Kangon AIR 1975 SC 2190

853 Mahboob Sheriff & Sons V Mysore S.T. Authority AIR 1960 SC 321

execution of the irrelevant or non-existing grounds could not have affected the ultimate decision.⁸⁵⁴ But in any case reasons for decisions must be stated.⁸⁵⁵

In England the Town and Country Planning Act of 1971 forms the principal Act dealing at present with town and country planning. The requirements for planning permission are meant to regulate planning. In granting permission the local authority must consider the policies laid down in the structure plan. The permission is sometimes granted by the minister, whose present designation is secretary of state for Environment. The grant of permission being effective only for the purpose of the Act, the developer is not absolved of the necessity of complying with the provisions and requirements of other legislations and bye-laws which relate to the use and development of land and construction of buildings and roads. Planning permissions may be accompanied by certain conditions but these conditions must be valid. The condition must fairly and reasonably relate to the permitted development. It must not be uncertain nor should it be “wholly unreasonable”. The task of the court is not to decide what it thinks is reasonable but to decide whether the condition imposed by the local authority is one which no reasonable authority acting within the corners of their jurisdiction could have decided to impose.⁸⁵⁶

Condition upon a developer to construct an ancillary road on its land for public use is invalid as the proper course is for the council to acquire the land on proper compensation and then construct the road at public expense. Condition in a permission to house builder that the house when constructed should first be occupied for 10 years by persons on the council’s waiting list is unreasonable.⁸⁵⁷ Such condition to a planning permission that the permission would terminate on the expiry of a certain period of time is equally invalid. A planning permission should not impose a condition taking away the existing right of user.⁸⁵⁸

On a proposal for reconstruction of a railway station the planning permission was granted with the condition imposed that a certain piece of land should, at all times, be made available for parking of cars and that the land should be used for no

854 Swarn Singh V State of Punjab, AIR 1976 SC 232

855 Union of India V M.L. Kapoor, Air 1975 SC 87

856 Associated Provincial Picture House Ltd. V Wednesbury Corporation, 1947-2 A.E.R. 680

857 R V Hillingdon London Borough Council, 1974-2 A.E.R. 643

858 Minister of Housing V Hartnell, 1965-1 A.E.R. 490

other purpose. An electric traction cable ran across this land and on the council serving an enforcement notice upon the board, the latter preferred an appeal to the Minister who quashed the notice. The condition was held to be *ultra vires* as it “prevented the lawful use of land without compensation”.⁸⁵⁹

Taxing laws are also not wholly immune from attack and may be struck down as *ultra vires*. Courts are not concerned with the policy underlying a taxing statute nor are they concerned as to whether a particular taxing statute could have been imposed in a different way or in a way that the courts might think more just or equitable. If the legislature has classified persons or properties in to different categories which are subjected to different rates of taxes with reference to income or property, such a classification would not be open to attack of inequality on the ground that the tax burden resulting from such a classification was unequal. In deciding whether a taxation law is discriminatory or not it is necessary to bear in mind that the state has a wide discretion in selecting the persons or objects, it will tax and a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is only when within the range of selection, the law operates unequally and that cannot be justified on the basis of valid classification that it would be violation of Article 14 of our constitution.⁸⁶⁰

So the Supreme Court of India struck down as *ultra vires* the Travancore-Cochin Land Tax Act 1955 as amended by the Act of 1957, which laid down in barest outline the policy to impose a uniform rate of tax on all lands in the state of Kerala, without making any provision of issue of notice or submission of return and without any provision even for appeal. The court held that inequality was writ large in the Act by reason of the fact, that a tax was levied at a flat rate irrespective of the quality of land and consequently of its productive capacity.⁸⁶¹

Similarly the Mysore High court struck down the Mysore Building Tax Act 1962 because it had adopted the floorage basis as the only basis for the imposition of the tax which was not only unscientific but was also arbitrary and mechanical. It did not confirm to any of the known principles of taxation. In the very nature of things

859 Kingston-upon-Thames Royal London B.C. V Secretary of State for Environment 1974-1 All E. R

860 Supra Note 838 Page 45

861 K.T. Moopil Nair V State of Kerala, AIR 1961 SC 451

under that basis the incidence of tax must fall unevenly on things similar. The Court held that the object of the Act was not to limit the floorage of the buildings in towns but to raise public revenue and so the classification on the basis of floorage had no just relationship with the object of the Act.⁸⁶²

The Kerala Building Tax Act, 1961 was also struck down as *ultra vires* because it sought to impose tax on buildings on the basis of the floor-area of the building, without having anything to do with the quality of the building, its location, its usefulness and much less its value and for that matter the income that could be derived from that building. The value of a building located in a big city would be much higher than its counterpart elsewhere due to various reasons, namely, cost of construction, the cost of land on which it was built and its letting value will also be different from that of a similar building situated in the country. The Kerala High Court very correctly held that when taxes were levied on land and buildings the basis of tax must either be capital value of the land and the building or the annual letting value thereof.⁸⁶³

The Supreme Court approved the above decision and struck down the Bombay Municipal Corporation Act, 1949, as it sought to impose property tax on textile mills, factories, buildings of universities etc, adopting the flat rate method according to floor area. Following the above principles Sabyaschi Mukherji, J. of Calcutta High Court struck down as *ultra vires* the West Bengal Multi-storied Building Tax Act 1975.⁸⁶⁴

The state Legislature has, however, replaced the 1975 Act by a new Act in 1979, after the aforesaid decision. To sum up, therefore, taxation is exaction and even ex-proportion and, therefore, the right to property is in peril when a fiscal measure is afoot. Article 19 of the constitution of India comes in to play when law is made for purposes of taxation and that law must comply with the Part III of the constitution, namely the fundamental rights provided there-in. Arbitrariness must be excluded in the law, for, if power is arbitrary it is potential inequality and Article 14 of the Constitution is fatally allergic to inequality before the law. This was said by Iyer J. of

862 Bhubaneswar V State, AIR 1965 Mysore 170

863 N. Kunhali Haji V State of Kerala AIR 1966 Kerala 14

864 State Bank of India V State of West Bengal, 1979-1 CLJ 363

the Supreme Court in September 1978, while dealing with a heavy bunch of writ petitions impeaching the validity of a tax on foreign liquor at the flat rate of one rupee per bottle imposed by the Punjab Government. The learned Judge however, held that intoxicating liquids falling in the well known category of foreign liquors from one class and a flat minimal rate of rupee on per bottle has no constitutional stigma of inequality. Picking and choosing within limits is inevitable in taxation.⁸⁶⁵ Similarly, project-wise price fixation of flats cannot be dubbed as arbitrary or discriminatory in comparison with other projects at different places.⁸⁶⁶

But there cannot be taxation without legislation. Article 265 of the Constitution of India specifically provides “No tax shall be levied or collected except by the authority of law”. In other words, a tax including any impost, general, local or special, cannot be levied or collected by an executive fiat. There must be a law to support the same. Again, a taxing law, like other enactments, may be given retrospective effect, but the validity of the tax has to be determined with reference to the competence of the legislature concerned to enact the law when it was actually enacted. That excludes consideration of subsequent changes though an *ultra vires* tax law can be validated by a competent legislature by a re-validating Act.⁸⁶⁷

It has been observed by Mr. Brice⁸⁶⁸ and by Mr. H.A. Street⁸⁶⁹ as well, who are the leading authority on the subject concerned that there are two principles to be considered at the time of applying the doctrine of *ultra vires* on which the question of burden of proof is depending.

As per Mr. Brice-

“Has a corporation only those powers which are given to it expressly or by implication by its constating instrument? Or

“Has it all such powers as will conduce to the attainment of its ends, except such as are by direct provision in its constating instrument or by necessary inference from the

865 Arvinder Singh V State Of Punjab AIR 1979 SC 321

866 Premji Bhai V Delhi Development Authority AIR 1980 SC 738

867 Prithi Mills V Broach Municipality, AIR 1967 SC 1512

868 In His Book Law of Corporations & Companies, A Treatise on the Doctrine of Ultra Vires 3rd Ed. 1893 at Page 50

869 In His Book A Treatise on the Doctrine of Ultra Vires 1930 Ed.(By Sweet & Maxwell) London at Page 28

same denied? While considering the above two principles, there have been two different views on the question of burden of proof, which are as under-

Early view

According to the earlier view, the party impugning the transaction must make out a *prima-facie* case but the onus is then thrown upon the corporation to point out the power. If *prima-facie* the power exists it will be for the impugning party to show why it can be exercised. This view was adopted by the courts in the earlier following cases:

*In Colman V Eastern Counties Railway Co.*⁸⁷⁰, Longdale M.R. said-

“It has been very properly admitted that railway companies have no right to enter into new trades or business not pointed out by the acts.”

*In East Anglian Railway Co. V Eastern Counties Railway Co.*⁸⁷¹, the court of common plea stated-

“It is clear that the defendants have limited authority only and are a corporation only for the purpose of making and maintaining the railway, sanctioned by the acts and that the funds can only be applied for the purposes directed and provided for the statute.”

Latter view

But in some latter cases, a contrary view has been taken, according to which, *prima-facie* a corporation may contract under seal and will be bound under it. If anyone objects, the burden is on him; he must show that the particular contract is one, for which the corporation has no power to enter into. Hence, it must be shown *prima-facie* that there is a breach of duty or something align to the main objects for which the company was basically established.

As we have seen *In the Scottish North Eastern Rly. Co. V Stewart*⁸⁷², Lord Wensleydale version is already quoted above. However there-after in *Taylor V Chichester & Mild Hurst Co.*⁸⁷³, Blackburn J. added as under-

870 (1846) 10 Beav 1

871 (1851) 11 C.B. 775

872 Cited at Supra Note 838

873 (1867) 2 Ex. 356, 384

“I think therefore, we are entitled to consider the question not whether the present defendants had by virtue of the act of incorporation authority to make the contract but whether they are by those statute forbidden to make it.” The similar view has been adopted by other courts in other cases.⁸⁷⁴

The ultimate result of the English authorities has remained as under – Corporations certainly those for commercial purposes and probably all corporations to which the doctrine applies, have by implication all capacities and powers which being reasonably incidental to their enterprise or operations are not forbidden for them, either expressly or by implication, by their constating instrument or by necessary inference, there-from.⁸⁷⁵

Present Opinion

The earlier legal view on the subject was adopted as correct opinion as pronounced by House of Lords in *Ashbury Railway Co. Case*⁸⁷⁶, which we know is the leading case pertaining to this doctrine. In this case Lord Blackburn held, a contract entered into by the Railway Company with the firm of M/S Riche would not have been *ultra vires* on the following grounds-

1. First ground of the common law and
2. Second ground, being that general power of contracting on the part of a company is an incident to its incorporation.

But in this case there was no such incident, therefore, the contract was held *ultra vires* the company, and it was said that the company should not do any other activities, than those which are necessary for the purpose for which the company is formed.

Further Lord Chelmsford remarked that⁸⁷⁷ “I do not know how stronger words than these could be used to prohibit a company formed under the statute from entering into any contract for any object beyond those mentioned in the memorandum.”

Finally while making a conclusion, it was remarked that the corporations have all such authorities and capacities such as:-

874 South Wales Rly Co. V Redmond (1861) 10 C.B. (N.S.) 675

875 Supra note 868, Brice Page 52

876 (1875) L. R. 7, H.L. 753

877 Supra Note 868 Brice at page 29-30

1. Belonging to them generally or by general common law principles, or
2. As are given to these corporations by their own constating instruments and acts which are authorized by their constating instruments, either expressly or by necessary implication, presumed to be valid, unless contrary is proved by those objecting them and can establish their invalidity.

B. LATEST TREND IN BURDEN OF PROOF

There have been few recent trends in burden of proof which can well be attributed to section 9(1)⁸⁷⁸, since by this legal provision the doctrine is abolished in the favor of the person dealing with the company in good faith. And during the course of litigation, on the question of this doctrine, there will be rebuttable presumption that the person dealing with the company acted in good faith and the burden of contrary proof shall lie on the company concerned, who has to show lack of good faith.

It is pertinent to mention here that the above section 9(1) of the European Communities Act 1972, later on re-enacted in to section 35 of the English companies Act 1985, which attempted to dispose off all the problems posed in two short sub-sections.

The first of which provided that, in favor of a person dealing with a company in good faith, any transaction decided on by the directors should be deemed to be within the capacity of the company, and

The second of which relieved the other party of any obligation to inquire about those matters.⁸⁷⁹

After receiving the recommendations of Professor Dan Prentice, which were received in the year 1986, which is also known as Consultative Document, were enacted in the Companies Act 1989. A special thing was done by this new Act of 1989 that it substituted the section 35 of the 1985 Act with a new section 35 into the 1989 Act. The new section 35 of the 1989 Act reads as under:

878 Of the European Communities Act 1972

879 Supra Note 812 Page 136

(1) “The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company’s memorandum.”

This is obviously an improvement on the former section 35(1). It omits the former words “in favor of a person dealing with a company in good faith” and thereby does not merely remove the uncertainties flowing from “dealing with” and “good faith” but makes it clear that neither the company nor a third party can any longer invoke strict *ultra vires*. However, whilst the legislator’s objectives was to relieve third parties from the impact of the *ultra vires* doctrine, it wished to retain the effect, within the company’s internal affairs, of the restrictions contained in the memorandum on the scope of the company’s business.

Section 35, consequently, goes on to make two major qualifications to the principle stated in section 35(1) and sub-section (2) provides as under-

(2) “A member of the company may bring proceedings to restrain the doing of an act which but for sub-section (1) would be beyond the company’s capacity; but no such proceedings shall lie in respect of an act done in fulfillment of a legal obligation arising from a previous act of company”.⁸⁸⁰

This preserves the right of the individual shareholder to restrain the commission by the company of *ultra vires* acts, but clearly this right of the member has to be subordinated to that of the third party to enforce his or her transaction with the company, if the policy behind section 35(1) is to be fully implemented. This is achieved by the provisions to sub-section (2), that a member cannot bring proceedings to restrain an act of the company which, but for sub-section (1), would be beyond its capacity, if that act is to be done in fulfillment of a legal obligation arising from a previous act of the company. Hence, if, say, the company has entered into a contract which is beyond its powers, but which as a result of sub-section (1), cannot be questioned, the company cannot be restrained from performing its obligations under that contract. If, however, that contract was one under which, say, the company bought an option to purchase, a member could take proceedings to restrain it from exercising the option since it would not be under a legal obligation to do so. Thus, overall, the policy of protecting third

880 Supra Note 812, Page 139

party's legal rights is given priority to that of holding the company to constitution.⁸⁸¹

4. RECOMMENDATIONS OF THE REVIEW GROUP AND STATUS OF THE DOCTRINE IN OTHER COUNTRIES

A. RECOMMENDATIONS OF REVIEW GROUP

The Review Group was asked to consider whether the *ultra vires* doctrine, applicable today, should be retained or reformed. A transaction entered into by a company, which does not come within that company's objects (as described in its memorandum of association), or which is not reasonably incidental to its objects, is *ultra vires*. A contract, out side company's objects is void and unenforceable against the company (save in certain circumstances where the company's counterparty has entered contractual relations with the company in good faith).

The *ultra vires* doctrine, to a greater or lesser extent, has been diluted or removed in a number of common law jurisdictions. It is now associated with circumstances where the legitimate business expectations of parties to transaction have been frustrated, with unjust consequences.⁸⁸²

It appears from the case of *Sutton's Hospital* (decided nearly 400 years ago)⁸⁸³, that a chartered corporation had all the powers of a natural person, but if it exceeded its objects as set out in its charter then action could be taken to restrain the corporation or to have its charter forfeited. This action though, if successful, would not affect the validity of the transactions entered into by the corporation.

With the development of the industry and commerce particularly in England, during the 19th century, the need arose to protect the interests of the investors/shareholders and creditors to the effect that a corporation's activities be restricted to activities set out in its objects clause. This is subject to the corporation being able to carry on any activities incidental to the objects such as a trading company's power to borrow.⁸⁸⁴

881 Ibid Page 140

882 Website, www.clr.org/cuploads, Chapter 10, Corporate Capacity and Authority Para 10.1.1 visited on 28th Oct. 2011

883 (1612) 10 Co REP 1

884 General Auction Estate & Monetary Company V Smith (1891) 3 Ch. 342

This approach was firmly established in 1875, in *Ashbury Railway Carriage & Iron Co. V Riche*⁸⁸⁵, where the House Of Lords emphasized that the purpose of the *ultra vires* rule is the protection of both investors and creditors, i.e. investors should know the purpose for which their funds are to be used and creditors should know the nature of the business of the company to which they are giving credit.

Although the intention was that a company be limited in its activities by the objects set out in its memorandum of association, this has been effectively circumvented by the companies having objects clauses enabling them to carry on most type of activity, as held in *Bell Houses Ltd. V City Wall Properties Ltd.*⁸⁸⁶, by the Court of Appeal, which upheld the validity of an object permitting the company to ‘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 any of the above businesses or the general business of the company’.

However, the courts have constrained this development by distinguishing between objects and powers, powers being used only for the purpose of carrying out the objects. The distinction was explained by BUCKLEY L.J. In *Horsley & Weight Ltd*⁸⁸⁷, in case of express objects which upon construction of the memorandum or by their very nature, are ancillary to the dominant or main objects of the company, an exercise of any such power can only be *intra vires*, if it is in fact ancillary to the pursuit of some dominant object.

In *Cotman V Brougham*⁸⁸⁸, both the parties were liquidators. Cotman was liquidator of M/S Essequibo Rubber Estate Ltd. and Brougham was the liquidator of M/S Anglo-Cuban Oil Company. The rubber company had an object clause with thirty sub-clauses enabling it to carrying on almost every kind of business. It appeared that the Rubber company under wrote the shares in the oil company although the main clause of E’s object clause was to develop rubber estate abroad. However, a sub-clause (12) allowed the E company to promote companies and deal in shares of other companies and gave other numerous powers. The final clause of E’s objects clause said in effect that each sub-clause should be considered as an independent main

885 (1875) LR 7 HL 653

886 (1966) 2 QB 656

887 (1982) Ch. 442 at 448

888 (1918) AC 514

object. When the oil company was wound up, the Rubber Company was placed on the list of contributories and E's liquidator asked that this company be removed from the list because the contract to under write was *ultra vires* and void. The House of Lords mitigated the effect of the main objects rule by upholding an "independent objects clause" which declared that every sub-clause of the objects should be construed 'as a substantive clause and not limited or restricted by reference to any other sub-clause..... And none of the sub-clause or objects specified therein should be deemed subsidiary or ancillary merely to the objects mentioned in the first sub-clause'. The limits of the independent objects clause were expressed.

However in *Re introduction Ltd.*⁸⁸⁹, it was held that the power to borrow money can never be an independent object.

The second Directive on Company Law⁸⁹⁰, sets out safeguards for the protection of the interests of members and others in respect of the formation of public limited companies. While the Directive was concerned principally with the maintenance and alteration of capital, it provided also that the instrument of incorporation of a public company limited by shares (and also a public company limited by guarantee and having a share capital), would include the objects of the company. The statute or the instrument of incorporation of the company shall always give at least the following information:-

- (a) The type and the name of the company;
- (b) The objects of the company.⁸⁹¹

The Directive provides also that in so far as they are not legally determined, the instrument of incorporation would include the rules governing the number of, and the procedure for, appointing members of the bodies responsible for representing the company with regard to third parties, administration, management, supervision or control of the company and the allocation of powers among those bodies.⁸⁹²

889 (1968) 2 All ER 1221

890 77/91/EEC of 13 December 1976 (20 OJ L26, 31 JAN 1977 , PP 1-13)

891 Ibid Article 2

892 Ibid supra Note 882

B. STATUS OF DOCTRINE IN OTHER COUNTRIES

I. UNITED KINGDOM

In the United Kingdom, in the seminal case of *Anisminic V Foreign Compensation Commission*⁸⁹³, Lord Reid is accredited with formulating the doctrine of *ultra vires*. However, *ultra vires*, together with unreasonableness, was mentioned much earlier by Lord Russell in the well known case of *Kurse V Johnson*⁸⁹⁴, regarding challenging by-laws and other rules. *Anisminic* is better known for not depriving courts of their jurisdiction to declare a decision a nullity, even if a statute expressly prevents the decision being subject to judicial review. Further cases such as *Bromley LBC V Greater London Council*⁸⁹⁵ and *Council of Civil Service Unions V Minister for the Civil Service*⁸⁹⁶ have sought to refine the doctrine.

In *Hammersmith & Fulham London Borough Council V Hazell*⁸⁹⁷, the House of Lords held that interest rate swaps entered into by local authorities (a popular method of circumventing statutory restrictions on local authorities borrowing money at that time) were all *ultra vires* and void, sparking a raft of satellite litigation.⁸⁹⁸

In the year 1945 the Cohen committee report⁸⁹⁹ in the United Kingdom noted the tendency to include a whole range of activities in a company's objects clause, the effect of which was to make the doctrine of *ultra vires* "an illusory protection for the shareholders and yet may be a pitfall for third parties dealing with the company."⁹⁰⁰ They considered that the *ultra vires* doctrine serves no positive purpose but is, on the other hand, a cause of unnecessary prolixity and vexation.⁹⁰¹ Accordingly they recommended that a company should have the same powers as an individual. However, this recommendation was not implemented in the U.K. Companies Act 1948.⁹⁰²

893 (1969) 2 WLR 163, downloaded from www.wikipedia, the free encyclopedia on Ultra Vires under Adm. Law visited on 21st Jul. 2011

894 (1898) 2 Q.B. 91

895 (1983) AC 768

896 (1985) AC 374

897 (1992) 2 AC 1

898 Ibid Website, Supra Note 893

899 Report of committee on company law amendment (1945) downloaded from www.clrg.org.cuploads visited 28th Oct 2011, Para 10.2.1

900 Ibid Para 12

901 Ibid

902 Website at Supra note 899 Para 10.2.1

Subsequently, in 1962, the Jenkin committee⁹⁰³ reported that a company, not being a natural person, could act only through directors or other agents exercising powers delegated to them by the company. The committee considered that the delegation to the directors of all the powers of a natural person (conferred on the company) would be a retrograde step. The Jenkin highlighted the difficulty posed by the third parties being fixed with constructive notice of the directors delegated powers, which would make the third parties with such notice little better off if the *ultra vires* rule was abolished. The report stated that to give complete protection to the third party, it would be necessary to absolve him not only from constructive, but also from express, notice of any limitation upon the director's delegated powers. In other words he would have to be deemed not to know things which he actually did know- a legislative expedient which seems to us highly undesirable.⁹⁰⁴

The Jenkin report did recommend that a contract should not be invalidated against a party entering into the contract "in good faith" even though the contract was beyond the powers of the corporation.⁹⁰⁵ The concept of good faith was given statutory recognition in the U.K. by the European Communities Act 1972. Real reform seemed likely in the U.K. with the introduction of the companies Bill 1973, but, with the change of government the following year, the Bill lapsed.

Some reforms were made by the U.K. companies Act 1985. Shortly thereafter, a report on the reform of *ultra vires* was prepared by Dr. Dan Prentice of Pembroke College, Oxford, for the department of Trade and Industry.⁹⁰⁶ The consultation document which followed his report invited recommendations on the proposals that:-

1. A company should have the capacity to do any act whatsoever;
2. A third party dealing with a company should not be affected by the contents of a document merely because it is registered with the registrar or with the company;
3. A company should not be bound by the acts of its board or of an individual director;

903 Report on the company law committee 1962 by Jenkin

904 Ibid, Para 39(ix)

905 Ibid, Para 41

906 Reform of the Ultra Vires Rule, A consultative Document, Department of Trade and Industry (1986)

4. A third party should be under no obligation to determine the scope of the authority of a company's board or an individual director or the contents of a company's memorandum or articles;
5. A third party who has actual knowledge that a board or individual director does not have actual authority to enter in to transaction on behalf of the company, should not be allowed to enforce it against the company but the company should be free to ratify it;
6. Companies should not be required to register objects but to provide a statement of their principal business activities when they commence business and thereafter as part of their annual return;
7. No additional safeguards are required to protect the interests of shareholders and creditors against imprudent or unfair gratuitous distributions;
8. Existing remedies are sufficient to protect the interests of shareholders generally even if full capacity is conferred on a company.⁹⁰⁷

It appears to the Review Group that many of these proposals have much merit. These proposals gave rise ultimately to certain provisions of the U.K. companies Act 1989. The group understands that U.K. law (as set out in section 35 of the U.K. companies Act 1985 and amended by section 108 of the U.K. companies Act 1989) can be broken down in to three sub-divisions:-

- (i) The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum.⁹⁰⁸ In addition, a number of companies may bring proceedings to restrain it from doing an act which would be beyond the company's capacity and it remains the duty of the directors to observe any limitations on their powers flowing from company's memorandum.⁹⁰⁹
- (ii) In favor of a person dealing with the company in good faith, the powers of the board of directors to bind the company, or authorize others to do so, shall be deemed to be free of any limitation under the company's constitution.⁹¹⁰

A person is not regarded as acting in bad faith by reason only of his

907 Ibid, pp 3-4

908 U.K. companies Act 1985 S. 35(1)

909 Ibid, section 35(2)& (3)

910 Ibid, section 35A (1)

knowing that an act is beyond the powers of the directors under the company's constitution.⁹¹¹

- (iii) A party to a transaction with a company is not bound to enquire as to whether it is permitted by the company's memorandum or as to any limitation of the powers of the board of directors to bind the company or authorize others to do so.⁹¹²

Subsequently, in October 1992, the final report of the **LEGAL RISK REVIEW COMMITTEE in U.K.** proposed that the *ultra vires* doctrine be abolished and all artificial persons should have the same capacity as natural persons. It indicated the reasons for this as being:-

- (i) There is no conceptual reason why the powers of a corporation or other artificial person should be limited by its constituent instruments;
- (ii) The powers or purposes expressed in that instrument may be treated as delimiting the powers of the corporation's agent to act on its behalf;
- (iii) A counterparty dealing with the corporation may then be able to claim the benefit of the principle of the ostensible authority;
- (iv) This provides a general safe harbor for counter parties who reasonably rely on the corporation's representation that its agents have power to act on its behalf.

However, it added that it does not protect a counter party who knew or should reasonably have known that the agent's powers were limited but removes risks arising from an honest misapprehension induced by the corporation itself.

The review group has sympathy with that report's suggestion that the *ultra vires* doctrine creates unnecessary risks and allocates them in an unfair way. It leads, as it did in the *swaps case*⁹¹³, to a denial of legitimate expectations that bargains will be enforced. The report concludes that some criticism can be made of the language of the amendments introduced by the companies Act 1989 and it would in their view have been more elegant to adopt the Australian solution of giving a company the legal capacity of natural person.

911 Ibid, Section 35A(2)

912 Ibid, section 35B

913 *Hazell V Hammersmith & Fulham LBC* (1992) 2 AC

It appears that, notwithstanding the recommendations of the legal risk review committee, no action has been taken in the U.K. to implement the committee's recommendations.

In the United Kingdom, the Companies Act 2006, section 31 and 39 greatly reduced the applicability of *ultra vires* in corporate law, although it can still apply in relation to Charities and a shareholder may apply for an injunction, in advance only, to prevent an act which is claimed to be *ultra vires*.⁹¹⁴

Section 42 of the above Act⁹¹⁵ provides constitutional limitations to those companies which are charities. This section restates section 65 of the Charity Act 1993. It provides that the protection afforded to an external party by section 39 and 40 will not apply where the company in question is a charity, unless:

- The external party was unaware (at the time that the act was done) that the company was a charity; or
- The company has received full consideration in respect of the act done, and the external part was unaware that the act in question was beyond the company's capacity or beyond the powers of the directors.

The corresponding provisions for charities that are registered in Scotland can be found in section 112 of the Companies Act 1989 (see sub-section 5).

II. IN AUSTRALIA

In Australia, the Corporations Act 2001⁹¹⁶, provides that a company has the legal capacity and powers of an individual both in and outside this jurisdiction. A company also has all the powers of a body corporate. It goes on to set out some powers.⁹¹⁷

- (a) The power to issue and cancel shares in the company;
- (b) Issue debentures (despite any rule of law or equity to the contrary, this power include power to issue debentures that are irredeemable, redeemable only if a contingency, however remote, occurs, or redeemable only at the end of a period however long);

914 WWW Wikipedia, The free Encyclopedia, under U.K. Company Law visited 21st July 2011

915 English Companies Act 2006

916 In section 124 (1)

917 Ibid

- (c) Grant options over unissued shares in the company;
- (d) Distribute any of the companies property among the members, in kind or otherwise;
- (e) Give security by charging uncalled capital;
- (f) Grant a floating charge over the companies property;
- (g) Arrange for the company to be registered or recognized as a body corporate in any place outside the jurisdiction;
- (h) Do anything that is authorized to do by any other law including a law of foreign country;

Interestingly, the legislation provides that a company's legal capacity to do something is not affected by the fact that the company's interests are not, or would not be, served by doing it.⁹¹⁸ This provision should be particularly helpful in the context of corporate guarantees where a common law principle of commercial benefit has developed in Ireland⁹¹⁹, a position more recently recognized by the 2001 Act.⁹²⁰ It would be useful also in respect of some corporate transactions, such as a reorganization, which may involve a gratuitous element on the part of a corporation within a group, as held in *Re Frederick Inns Ltd.*⁹²¹, the sale of assets by companies in a group with a view to meeting the liability of a group to the Revenue Commissioners was held to be *ultra vires* since the proceeds contributed by some of the companies exceeded their own individual liability to the Revenue Commissioners.

The Australian legislation further provides⁹²², that "if a company has a constitution, it may contain an express restriction on, or a prohibition of, the company's exercise of any of its powers" and further that "if a company has a constitution, it may set out the company's objects." It goes on to provide that an act or the exercise of a power is not invalid merely because it is contrary to an express restriction or prohibition, or beyond any objects.

918 Ibid section 124 (2)

919 In *Hutton V West Cork Railway Co.* (1883) 23 Ch. D 654

920 Section 78 of the 2001 Act Repealed and Substituted Section 34 of 1990 Act

921 (1991)ILRM 582 (High Court)

922 Corporation Act 2001

The legislation prescribes⁹²³ the manner in which a person dealing with a company or its agent should act. It specifies that a person dealing with a company is entitled to make certain assumptions, namely:-

- (1) A person may assume that the company's constitution (if any), and any provision of this law that apply to the company as replaceable rules, have been complied with.
- (2) A person may assume that anyone who appears, from information provided by the company that is available to the public from ASIC⁹²⁴, to be a director or a company secretary of a similar company;
 - (a) Has been duly appointed; and
 - (b) Has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.
- (3) A person may assume that anyone who is held out by the company to be an officer or agent of the company;
 - (a) Has been duly appointed; and
 - (b) Has authority to exercise the powers and perform the duties customarily exercised or performed by that kind of officer or agent of a similar company;

The Review Group believes these assumptions are helpful.

However, the legislation provides that a person is not entitled to make such an assumption if, “at the time of the dealings they knew or suspected that the assumption was incorrect.”⁹²⁵ The Review Group believes this would give rise to interpretative difficulties, but may be useful with an additional statutory provision to the effect that there is no duty on a third party to review a company's constitution prior to entering into a contract with the company.

With regard to constructive notice, the legislation provides that (save in the case of a charge that is register-able under the Act), “a person is not taken to have

923 Ibid Sections 128 & 129

924 Australian Securities and Investments Commission

925 Ibid section 128(4) of the Act

information about a company merely because the information is available to the public from ASIC.”⁹²⁶

In many jurisdictions, such as Australia, legislation provides that a corporation has all the powers of a natural person plus others; also the validity of the acts which are made *ultra vires* is preserved.⁹²⁷

III. NEW ZEALAND

There are somewhat similar provisions in the New Zealand Companies Act 1993 which provides that (subject to the other provisions of the Act) “ a company has full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction, and for (these purposes has) full rights, powers and privileges.”⁹²⁸ It also provides that subject to certain exceptions, no act of company and no transfer of property to or by a company is invalid merely because the company did not have the capacity, the right, or the power to do the act or to transfer or to take a transfer of the property.⁹²⁹ It further provides, as in Australia, that “the fact that an act is not, or would not be, in the best interests of a company does not affect the capacity of the company to do the act.”⁹³⁰

Helpfully, the New Zealand legislation refers also to guarantors. A company, or a guarantor of an obligation of a company, may not assert against a person dealing with the company, or with a person who has acquired property, rights or interests from the company, that the constitution of the company has not been complied with, or that a person held out by the company as a director of the company has not been duly appointed or does not have the authority to exercise a power, unless the person has, or ought to have, by virtue of his or her position with or relationship to the company, knowledge of the matters referred to.⁹³¹

It is also provided that a person is not affected by, or deemed to have notice or knowledge of the contents of, the constitution of, or any other document relating to a company merely because:-

926 Ibid section 130

927 Ibid Supra Note 882

928 Section 16 of the New Zealand Companies Act 1993

929 Ibid section 17 (1)

930 Ibid section 17 (3)

931 Ibid section 18

- (a) The constitution or document is registered on the New Zealand Register; or
- (b) It is available for inspection at an office of the company;⁹³²

The Review Group believes this is a useful provision, taking the objects clause out of the realm of being subject to constructive notice, although the Group believes, it should be subject to the caveat that this does not apply to registered charges (as excluded under the Australian legislation). Registered charges are a separate area of the law and not the subject of deliberation at this time by the Review Group.

IV. CANADA

The provisions under the Canada Business Corporation Act 1985 are somewhat similar; this act provides that a corporation has the capacity and rights, powers and privileges of a natural person.⁹³³ Indeed the New Zealand provision is almost identical to it. Although a corporation is restricted from exercising any power contrary to its articles, there is no constructive notice by virtue if a document being filed or available for inspection.⁹³⁴

V. BELGIUM

In Belgium, the legal form of limited liability company known as – *Societe-anonyme*- is governed by the code on commercial companies. This can be pronounced as (CCC). The doctrine of *ultra vires* was present there. As a general rule, the companies are not bound by the various acts performed by their authorized persons and representatives, beyond the purview of the objects mentioned there-in, otherwise the same will be held *ultra vires* which means beyond the power which was sanctioned to them. This is also in favor of the restrictions imposed upon the representatives under the articles of association of the company, which have been given publicity by the law of the land. Thereafter it has been observed that this practice has been reduced by the various decisions of the court. Because the courts have introduced a doctrine, known as doctrine of apparent authority, by which doctrine, companies are liable to the third parties dealing with and entering into

932 Ibid section 19

933 Section 15 (1) of the Above Act

934 Ibid section 17

contract with the company which must have reasonably expected to ascertain the situation before doing so.⁹³⁵

VI. FRANCE

The doctrine of *ultra vires* exists in France too, because if we look at the powers of the managements of the companies towards any third party, then in the wordings of Maurice Hannart,⁹³⁶ the spirit of 1966 Act mention that a general manager of the company, who may not be the member of the Board, should be made responsible to the third parties, if they did not themselves faced any *ultra vires* on his own part. Hence the parties would feel secure totally while making any transaction with the company.

VII. ITALY

In this country, especially in the cases of joint stock companies, which are called “*societa per azioni*” memorandum of association contains objects clause (under article 2328 of the civil code). This is a limit imposed upon the powers of the directors, but not on the companies as such. Hence company can enter into *ultra vires* transaction, and the same is considered valid, however the defaulting directors are liable to companies for such *ultra vires* transactions (Article 2298 of the civil code), which means, that the powers of directors are limited by the objects clause, but only as regard shareholders.

Article 1 of the company law reform draft provided as follows:-

A company can not raise the objection against third parties that a transaction made by them is unrelated to its objects.⁹³⁷

VIII. NETHERLANDS

In this country the companies are governed by the commercial code. The powers of the directors of the companies, in relation to third parties are regulated by the law (CC Article 47 ff) and by the articles of associations. According to which, a

935 Charles De Houghton on the Company Law 1970 Ed. Page 144

936 Hannart M. on Memoire sur les problems de enterprise (1964), CREE, Document No. 28

937 Supra Note 935, Page 56

director of a company can enter in to a contract on behalf of the company, only in those transactions which are covered by the objects, which are found mentioned in the articles of associations. Those transactions which are not covered within the scope of the defined objectives are null and void. However a company is contractually bound by unauthorized acts, if those acts are subsequently ratified by the company (provided it comes within the objects as defined in the article of association) or alternatively, the interest of the company is served by those acts.

An executive director of a company in this country who having acted *ultra vires*, is deemed to have entered in to the contract, at his own, unless the third parties prefer to choose their claim otherwise, (commercial code Article 47 b).⁹³⁸

IX. SWEDEN

In this country, any person who is authorized to sign on behalf of the company, if acts against the laws laid-down there-in, then his action will not be a valid action, notwithstanding the realization on the part of the third parties in negative or in positive way. A third party is supposed to be acquainted about the limitations contained in the objectives of the company, so that they may realize that a particular agreement is inconsistent with the objectives of the company. Such a weak principle of *ultra vires* is seldom pleaded.⁹³⁹

Hence it can be concluded that Swedish company law positively provide that the activities of the company shall be laid down in the articles of association and restrictions, on company's freedom to go beyond the limits laid down in the articles of association, and thereby restricts the freedom of the company to go beyond the limits laid down there-in. The Act of 1944 which is in force adopts the rigors of English doctrine of *ultra vires*, and in practice a provision in the companies Act about the objectives of the companies activities is insignificant. The Act further requires a more exact definition of the field or fields of business, that may be covered by company's activity but in practice it has not happened.⁹⁴⁰ Thus in Sweden a third party is protected if he has acted in good faith

938 Ibid page 158

939 Ibid Page 162

940 Ibid Page 86-87

X. SINGAPORE AND MALAYSIA

The Singapore Companies Act 1963⁹⁴¹, provide as follows:-

“ No act or purported act of a company including the entering into of an agreement by the company and including any act done on behalf of a company by an officer or the agent of the company under any purported authority, whether expressed or implied, of the company and no conveyance or transfer of property, whether real or personal, to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to do such act or to execute or take such conveyance or transfer.”

Singapore and the Malaysian Companies Act⁹⁴², both these laws provide that no act or purported act of a company shall be invalid by reason only of the fact that the company was without capacity or power to do such act.

In May 2000, the registry of the companies in Malaysia issued a requirement that not more than three objects could be stated in a company’s memorandum of association. In Ireland, the registrar could not issue such a requirement without statutory authority. It could not be effective, in any event, without further reform as most companies carry out more than three objects or powers in the normal course of their business. It does, however, highlight the need for reform in common law jurisdictions.⁹⁴³

XI. IN IRELAND

In 1958, the Cox Report⁹⁴⁴, in Ireland noted that the purpose of the doctrine of *ultra vires* has been largely defeated. It does not now give any protection to the shareholders or the creditors of the company and becomes a waste of time and paper. There is much in favor of the view that the doctrine should now be wholly abolished

941 Chapter 50, Section 25(1)

942 Act no 125 (1965)

943 Supra Note 882 Ibid Para. 10.3.13

944 Report of the Company Law Reform Committee (PR 4523) (1958) at Para 10.4.1 of website at Supra note 882

and that every company should have the same powers as an individual whether these are conferred by the memorandum or not.⁹⁴⁵

Despite this statement, the committee decided not to recommend the abolition of the doctrine. In referring to the Cohen Committee Report's recommendation for reform, they noted that this is not adopted by the British parliament and we must assume that there were strong reasons for this decision.⁹⁴⁶ In fact the Cohen Committee's proposals had not been implemented simply because the Board of Trade decided it would not be justified in holding up the preparation of the U.K. Companies Act 1948, in order to work out what appeared to them to be a "far reaching change" which could involve "highly complicated drafting."

However, partial reform was implemented by section 8 of 1963 Act. This section states:

- (1) Any act or thing done by a company which if the company had been empowered to do the same would have been lawfully and effectively done, shall, notwithstanding that the company had no power to do such act or thing, be effective in favor of any person relying on such act or thing who is not shown to have been actually aware, at the time when he so relied thereon, that such act or thing was not within the powers of the company, but any director or officer of the company who was responsible for the doing by the company of such act or thing shall be liable to the company for any loss or damage suffered by the company in consequence thereof.
- (2) The court may, on the application of any member or holder of debentures of a company, restrain such company from doing any act or thing which the company has no power to do.

Accordingly, this section gives effect to any act done by a company, notwithstanding that the company had no power to do such act, in favor of a person who is not shown to have been actually aware, at the time when he so relied thereon, that such act or thing was not within the power of the company.

Despite this reform, the practice of reviewing objects clauses to ensure that a company has the appropriate object or power to carry out and be bound by the

945 Ibid page 20, Para 49 of above report

946 Ibid Page 21, Para 50 of above report

intended transaction is still maintained in corporate conveyancing and secured lending transactions. Notwithstanding the language of the statute-‘actually aware’- the High Court held⁹⁴⁷, that a person or his agent who has read the memorandum of association, but who has not understood the language to mean that the company lacked capacity to enter in to a certain type of contract, is deemed still to have been “actually aware” of the company’s incapacity and therefore cannot rely upon section 8. Thus, the reform implemented by section 8 has not resulted in any change in practice from that prevailing prior to section’s implementation.⁹⁴⁸

More recently, the Supreme Court held that payments received by the Revenue Commissioners from a company in respect of taxes owed to them by other companies in the same group were *ultra vires*. Furthermore, although the Revenue Commissioners were not found by the Supreme Court, to have been ‘actually aware’ that the payments were *ultra vires*, they were prevented from relying on section 8 as the payments were held not to have been “lawfully and effectively done” within the meaning of section 8.⁹⁴⁹

According to Article 15.2 of the Irish Constitution, the *Oireachtas* (Parliament) is the sole law making body in the Republic of Ireland. However, the Irish Supreme Court held that the *Oireachtas* may delegate certain powers to subordinate bodies through primary legislation, so long as these delegated powers allow the delegate only to further the principles and policies laid down by the *Oireachtas* in primary legislation and not craft new principles or policies themselves. Any piece of primary legislation which grants the power to make public policy to a body other than the *Oireachtas* act within the confines of the constitution, any legislation passed by the *Oireachtas* must be interpreted in such a way as to be constitutionally valid where possible. Thus, in a number of cases where bodies other than the *Oireachtas* were found to have used powers granted to them by primary legislation to make public policy, the impugned primary legislation was read in such a way that it would not have the effect of allowing a subordinate body to make public policy. In these cases, the primary legislation was held to be constitutional but the

947 Northern Bank Finance Corporation Ltd. V Quinn Investment Company (1979) ILRM 221

948 Supra note 882 Para 10.4.3

949 In Re. Frederick Inns Limited (1994) 1 ILRM 387

subordinate or secondary legislation, which amounted to creation of public policy, was held to be *ultra vires* the primary legislation and was therefore struck down.⁹⁵⁰

CURRENT PRACTICES IN IRELAND

Notwithstanding the provisions of section 8 and regulation 6, the practice (in transaction involving a significant sum of money) is still to review the objects clause and articles of association of companies entering in to transactions. For example, a typical secured financing transaction may involve a company (in a group of companies) borrowing funds from a lender (or syndicate of lenders) to purchase a property and where each company in the group is guaranteeing the borrowing company's obligations to lender and creating a mortgage and charge over their respective assets in support of their guarantees or, in the case of a borrowing company, to secure directly their own borrowings. Prior to finalizing such a contract, the practice is that each company's memorandum and articles of association is reviewed to ascertain:

- (i) Its correct name;
- (ii) Its principal objects (to ensure that its borrowing is for the purpose of carrying out one or more of its principal objects);
- (iii) Its power to borrow and to mortgage/charge to secure borrowings;
- (iv) Its power to guarantee and to mortgage/charge to secure guarantees;
- (v) The power of its directors to manage the company and thus to authorize the giving of a guarantee and a mortgage or charge;
- (vi) Whether the proceedings of its directors satisfy requirements as to quorum;
- (vii) Its directors borrowing powers and any restrictions;
- (viii) Whether the company's sealing requirements in executing the mortgage/charge have been complied with;
- (ix) Whether any other clause or article imposes a restriction on the execution and performance of the anticipated transaction (such as ministerial consent for semi-state companies or the consent of preference shareholders or debentures holders).

950 www.wikipedia, the Free encyclopedia on doctrine of Ultra Vires visited on 21st Jul. 2011

If there are any inadequacies, a special resolution will need to be passed by each company (having any adequacies) amending its objects clause and/or articles of association so that the appropriate objects/powers/articles are sufficient. A notice of resolution with an amended memorandum and articles of association must be filled in the CRO. A certified copy of the amended memorandum and articles of association is therefore provided to the lender's solicitor so that he may be satisfied as to the appropriate capacity and powers of the company. This procedure, as required by current law, clearly adds to the cost and time of completing a commercial transaction and, as such, the Review Group believes that it is detrimental to commercial enterprise.⁹⁵¹

Sometimes comfort is given to counterparties when a company represents and warrants in an agreement that it has the appropriate capacity or power to enter into the agreement to perform its obligations under and to be bound by the terms of the agreements. It may be thought that the company would then be stopped from denying its lack of capacity or powers. This is likely to be false comfort, for a liquidator of the company is unlikely to be bound by such a warranty of representation particularly where the company may not have had the capacity to make such a warranty or representation in the first place.⁹⁵²

The decisions in England at the end of the 1980,s concerning the powers of local authorized, to enter into interest rate exchange transactions, starting with the House of Lords decision in *Hazell V hammersmith & Fulham LBC*⁹⁵³, prompted the Irish Bankers Federation to recommend to their members that they ensure that their corporate customers entering into interest and currency exchange agreements and other derivative transactions have the appropriate power to do so.⁹⁵⁴

XII. IN UNITED STATES

Several modern developments relating to corporate formation have limited the probability that *ultra vires* acts will occur. Except in the case of Non-profit corporations (including municipal corporations), this legal doctrine is obsolescent,

951 Supra Note 882 Para 10.6.2

952 Ibid Para 10.6.3

953 (1992) 2 AC 1

954 Ibid Supra Note 882 Para 10.6.4

within recent years, almost all business corporations are chartered to allow them to transact any lawful business. The Model Business Corporation Act of the United States provides that “The validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.” The doctrine of *ultra vires* still has some life among non-profit corporations or state-created corporate bodies established for a specific public purpose, like universities or Charities.⁹⁵⁵

According to American Laws, the concept of *ultra vires* can still arise in the following kinds of activities in some states.⁹⁵⁶

1. Charitable or political contributions;
2. Guaranty of indebtedness of another;
3. Loans to officers and directors
4. Pensions, bonuses, stock option plans, job severance payments, and other fringe benefits
5. The power to acquire shares of other corporations
6. The power to enter into a partnership.

5. ULTRA VIRES CLAIM AGAINST GOVERNMENTAL OFFICIAL IN OFFICIAL CAPACITY AS EXCEPTION TO GOVERNMENTAL IMMUNITY IN UNITED STATES⁹⁵⁷

In the matter of *City of El Pasco V Heinrich*⁹⁵⁸ in which, Chief Justice Jefferson delivered the opinion of the Court. “Sovereign immunity protects the state from lawsuits for money damages.” But “an action to determine or protect a private party’s right against a state official who has acted without legal or statutory authority is not a suit against the state that sovereign immunity bars.”⁹⁵⁹

Today we examine the intersection of these two rules. We conclude that while governmental immunity generally bars suits for retrospective monetary relief, it does not preclude prospective injunctive remedies in official- capacity suits against government actors who violate statutory or constitutional provisions. We affirm in

955 Ibid Supra Note 882

956 Ibid

957 From www.texas.opinion.com visited on 4th Nov. 2011

958 284 S.W.3d 366 (Tex 2009)

959 Fed Sign V Tex. S. Univ. 951 S.W.@d 401,405 (Tex. 1997)

part and reverse in part the court of appeal's judgment and remand this case to the trial court for further proceedings.

BACKGROUND

Lilli M. Heinrich is the widow of Charles D. Heinrich, a member of the EI Paso Police Department who died in August 1985 from wounds received in the line of duty. Shortly after Charles died, the EI Paso firemen and policemen's Pension Fund began paying Heinrich monthly survivor benefits equal to 100% of the monthly pension her husband had earned. The parties contest how those payments were apportioned. The city of EI Paso, the EI Paso Fireman and policemen pension fund ("the fund"), the fund Board of Trustees ("the Board"), and the individual Board members contend that the Fund's by-laws assigned only two-third of this payment to Heinrich, the other third being paid to her on behalf of her then-minor child. Heinrich, on the other hand, contends that, notwithstanding the bylaws, the Board voted to award her 100% of Charles pension benefit in her own right, as more fully explained below.

Accordingly, when in 2002 the Board reduced the monthly payments to Heinrich by one-third after Heinrich's son turned 23, Heinrich filed this lawsuit, alleging that petitioners violated the statute governing the Fund by reducing her benefits retroactively. Heinrich sought both declaratory relief and an injunction restoring Heinrich to the "status quo from (the) date of the illegal act." Petitioners filed pleas to the jurisdiction asserting that governmental immunity shielded the governmental entities from suit and that the individual board members enjoyed official immunity. The trial court denied the pleas, and petitioners filed an interlocutory.

The court of appeals affirmed, holding that "a party may bring a suit seeking declaratory relief against state officials who allegedly act without legal or statutory authority which is *ultra vires*, and such suit is not a "suit against the state."

CONCLUSION

In sum, because there is a question of fact as to whether Heinrich's pension payments have been reduced in violation of state law, her claims for prospective

declaratory and injunctive relief against the Board members and the mayor in their official capacities may go forward, but we dismiss her retrospective claim against them. All of her claims against the City, Fund and Board, however are barred by governmental immunity, and we dismiss them. Finally, we hold that the Board members have not been sued in their individual capacities, and to the extent the court of appeals held otherwise, we reverse its judgment. We affirm in part, and reverse in part, the court of appeals judgment and remand this case to the trial court for further proceedings.