ULTRA VIRES AND CORPORATE CAPACITY IN SINGAPORE

Introduction

The ultra vires doctrine originally developed as a protection to shareholders of companies. When the first modern Companies Act was enacted in 1862 it was not possible to alter the company's objects. Since the memorandum formed a contract among the members, there was an implied covenant that the company would not do anything beyond its stated objects.

However, it later became possible to alter a company's objects. It also became the practice to list as many objects as possible so as to circumvent the doctrine of ultra vires. Despite the fact that the justification for the strict rule had disappeared, English courts continued to apply the rule blindly. This created a situation where the ultra vires doctrine provided no protection to the members yet created a trap for unwary persons who dealt with the company.

Because of the dissatisfactions with the rule, it was amended in Australia. Singapore has incorporated the Australian provision into the Companies Act.

Section 25 and ultra vires

At common law, an act or transaction that was ultra vires was void and did not bind the company. However, s 25(1) provides that a transaction is not invalid by reason only that the company lacks capacity or power to enter into such transactions.

There are two views as to what constitutes an ultra vires transaction. The "wide view"is that an act or transaction is ultra vires even though within the objects clauses if it is entered into for an improper purpose. The "narrow view" propounded in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1984] BCLC 466 (Court of Appeal, England) is that a transaction is ultra vires only if it falls outside the company's objects.

It does not matter in Singapore whether one accepts the wide view or the narrow view. Either way the transaction is valid.

Ultra vires and agency

Because of s.25(l), actual authority can be given to a company's agents to enter into transactions that are ultra vires. However, an agent cannot have ostensible (as opposed to actual) authority to enter into an ultra vires transaction unless the company has made an express representation to that effect.

Ultra vires and breach of directors' fiduciary duties

If directors act for an improper purpose, this does not make the transaction ultra vires. Such transactions are voidable, but only as against a third party who knew of the improper purpose.

Ultra vires and gratuitous transactions

A gratuitous transaction is not ultra vires even if it is not in the company's interests. English cases on the point are not good law. Such transactions may be voidable as being entered into in breach of directors' fiduciary duties, but only as against a third party who knew of the breach.

Ultra vires and the rule in Foss v Harbottle

The ultra vires exception to the rule in *Foss v Harbottle* is not relevant in Singapore because of s.25(l).

Effect of ultra vires acts

(1) An ultra vires act may be restrained before it is fully performed by a member, a debenture holder secured by a floating charge or a trustee for such debenture holders: s.25(2)(a).

(2) The issue of a company's lack of capacity may be raised in any action by the company or a member against the present or former officers of the company: s.25(2)(b).

(3) The fact that a company has acted beyond its capacity may be relied upon in any petition by the Minister to have the company wound up: s.25(2)(c).

(4) If a transaction is ultra vires, it may not be made intra vires even by the unanimous assent of the members.

(5) Section 25 has no application in relation to foreign companies. The capacity of a foreign company is governed by the law of the place of incorporation.

Summary

The following summary of the doctrine of ultra vires may perhaps now be made. In the absence of local case authority, the following principles are advanced diffidently and are open to correction.

(1) A transaction entered into by a company incorporated in Singapore is not invalid by reason only that it is beyond the company's capacity or power.

(2) Such a transaction may not be binding upon the company if:
   (a) the agent who purported to act for the company did so without authority; or
   (b) the transaction was entered into in breach of the agent's fiduciary duty to the company and the third party was aware of this.

(3) An agent may have actual authority to enter into a transaction even though it is beyond the company's capacity or power. Such authority may be conferred by the company's board of directors or general meeting.

(4) An agent may have ostensible authority to enter into an ultra vires transaction if the company has represented to the third party that the agent has actual authority. In such a case, the company would be estopped from denying the agent's actual authority even though the transaction is ultra vires.

(5) If the directors authorise an ultra vires transaction, they do not thereby breach their duty to the company if they have acted bona fide for the interests of the company.

(6) If directors do not act bona fide in the interests of the company the transaction may be voidable by the company, but only as against a third party who knew of the breach of duty.

(7) Gratuitous transactions entered into by a company are valid as long as the directors have acted bona fide in the interests of the company.

(8) The ultra vires exception to the rule in *Foss v Harbottle* is irrelevant.

THE ULTRA VIRES DOCTRINE IN SINGAPORE

Introduction

When a natural person is born, he has inherent power to do anything that is physically and legally possible. He may have an aim in life, an object that he wishes to accomplish. An artificial person has none of these automatically built in upon its creation. A company's powers must be defined and it must be supplied with objects upon its incorporation.

It is by no means inevitable that this should be so; for example, corporations incorporated by charter had all the powers of a natural person.[1] However, the rule that developed in relation to registered companies was that such a company was set up for specific purposes and any transactions that fell outside those purposes were beyond the capacity of the company.[2] The original aim of this was to ensure that unscrupulous promoters did not use the funds of a company for purposes alien to the aims of the subscribers. Section 12 of the Companies Act 1862[3] (the first of the modern Companies Acts) provided basically that the objects of the company could not be altered. This was significant in the development of the doctrine of ultra vires. As Lord Cairns explained it in the leading case of *Ashbury Railway Carriage & Iron Co v. Riche*[4]:

1. *Sutton's Hospital Case* (1612). See Gower, *Principles of Modern Company Law* (4th Ed, 1979), p.162.
2. *Ashbury Railway Carriage & Iron Co v. Riche* (1875) LR 7 HL 653 (House of Lords).
3. 25 & 26 Vic. c.89.
4. (1875) LR 7 HL 653, 670 (House of Lords).

> "The covenant [among the members], therefore, is that not merely that every member will observe the conditions upon which the company is established, but that no change shall be made in those conditions; and if there is a covenant that no change shall be made in the objects for which the company is established, I apprehend that that includes within it the engagement that no object shall be pursued by the company, or attempted to be attained by the company in practice, except an object which is mentioned in the memorandum of association."

It will be noted that the rationale for the doctrine of ultra vires as it was understood in England was that the corporators had come together for a specific purpose and had covenanted not to do anything alien to that purpose. This original justification made perfect sense when companies were set up for limited purposes. Back in 1875, Lord Cairns could not perhaps have foreseen a time when joint-stock companies would come to dominate the commercial world as they do now.

As in so many other things, the original justification for the strict ultra vires rule was forgotten. Later Companies Acts allowed amendment of the objects clauses. By practice, memoranda of association were drafted with a plethora of objects so as to circumvent the restrictive nature of the ultra vires doctrine.[5] These two developments taken together effectively meant that a person who invested in a company no longer had any real protection if the company changed its original business. This being so, the justification for the strict ultra vires doctrine had disappeared. Instead of recognising commercial realities, non-business-minded judges nevertheless continued to cling on to the doctrine regardless. Like some dangerous mutant, the original benign doctrine became a trap for the unwary and an engine of oppression against persons who dealt with companies in good faith.

The Australians were more progressive than the English. Recognising the undesired effects of the ultra vires doctrine, the Uniform Companies Acts of 1960-61 greatly restricted the scope of doctrine. These provisions found their way into our Companies Act 1967 and today survive as s.25 of the Act. The Australians have gone even further. In 1985 the Companies Act 1981 was amended so as to give to companies the legal capacity of a natural person.[6] Thus did the Australians consign the ultra vires doctrine to the junk heap of history while the English continued to grapple with its intricacies.

Singapore (and Malaysia) are in a position mid-way between England and Australia as far as ultra vires is concerned. We have not yet had the courage

5. A practice recognised as effective in *Cotman v. Brougham* [1981] AC 514 (House of Lords).
6. See s.67(l).

to completely abandon the doctrine as the Australians have done, but our s.25 makes it much less of an impediment to business than in England. The real problem is the interpretation of the section in a way that will not revive all the old evils. In this respect we are on our own. There have been no cases from Singapore or Malaysia interpreting the section, despite the fact that it has existed for almost a quarter of a century. Australian authority on their equivalent of s.25 is equally sparse. English cases must be applied with extreme caution, since the doctrine applies differently in England. The matter must be approached from first principles.

The term "ultra vires" has been confusingly used to denote several other matters that are not strictly speaking beyond the capacity of a company. Thus, for instance, the Federal Court of Malaysia spoke of a breach of a company's articles as being "ultra vires" in *Mahima Singh v. Baldev Singh.*[7] Such loose usage merely confuses matters. An act that is beyond the company's capacity (ultra vires in the strict sense) should be distinguished from an act that is a breach of the company's articles or an abuse of the directors' powers. The latter type of acts have nothing to do with the company's capacity. Breaches of the articles may be restrained by members, but on different principles, viz, the principle that the articles are a contract among the members *inter se.*[8]

Similarly, an act that is beyond the powers of an agent is not necessarily ultra vires. Agency and capacity are distinct (this will be discussed in more detail below). Finally, ultra vires should not be confused with illegality. An act that is illegal (in the sense of being contrary to law or public policy) is void on general principle, but this has nothing to do with the doctrine of ultra vires. The voidness of the act depends on the well-established principle that no action arises out of an illegal act.[9] To avoid confusion, the term "ultra vires" should be used only to denote acts that are truly beyond a company's capacity.

Section 25 and ultra vires

At common law, an act or transaction that was ultra vires was void and did not bind the company.[10] Not even the unanimous assent of the corporators could make an ultra vires act intra vires. Because of this rule, it was essential (and still is in England) to distinguish between a transaction that is ultra vires in the strict sense and one that is entered into in breach of directors' duties

7. [1975] 1 MLJ 173.

8. section 37(1).

9. The classic statement of the principle is that of Lord Mansfield in *Holman v. Johnson* (1775) 1 Cowp. 341, 343: "The principle of public policy is this: *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiffs own stating or otherwise, the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law of this country, then the court says that he has no right to be assisted".

10. *Ashbury Railway Carnage & Iron Co Ltd v. Riche* (1875) LR 7 HL 653 (House of Lords).

or in excess of agents' powers. A company could not adopt or effectively ratify an ultra vires act but could adopt and approve of an act that was merely unauthorized or irregular.[11]

Section 25(1) of the Companies Act provides as follows:

> "No act or purported act of a 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."

This means that if a transaction is otherwise valid and binding upon a company, the fact that it is ultra vires is irrelevant. This, however, oversimplifies matters. A company might yet get out of a transaction even though it is intra vires. This might happen if the transaction was entered into by an agent who lacked authority, or if the company's directors were acting for an improper purpose when committing the company to the transaction.

Whether a particular act or transaction is ultra vires depends primarily upon the construction of the objects clauses of the memorandum of association. Apart from powers expressly stated in the objects clauses, a company has implied power to do anything that is reasonably incidental to the attainment of its objects.[12] In addition, a company incorporated in Singapore has the statutory powers set out in the Third Schedule to the Companies Act.[13] An act which is not within a company's express, implied or statutory powers is ultra vires.[14]

What of a transaction that is within the powers of a company but which is entered into in furtherance of some purpose that is not authorised by the memorandum of association? The old view was that such an act would be ultra vires. The basis of this is that the powers of a company must be exercised for the purposes of the company as specified in its objects clauses. This "wide view" of ultra vires found expression in *Re Introductions Ltd.*[15] In that case, the company started life as a company offering services to tourists attending the Festival of Britain in 1951. In 1960 it switched to pig breeding. No amount of stretching the objects clauses would bring pig breeding with the purposes for which the company was incorporated. The company borrowed money from a bank for its pig breeding business. There was a specific clause empowering

11. *Clarkson v. Davies* [1923] AC 100, 110 (Privy Council on appeal from Ontario).
12. *Attorney-General v. Great Eastern Railway Co* (1880) 5 App Cas 473 (House of Lords); *Re Horsley & Weight Ltd* [1982] Ch 442, 448 (Court of Appeal, England).
13. See s.23(1).
14. See eg *Rosemary Simmons Memorial Housing Association Ltd v. United Dominions Trust Ltd* [1986] 1 WLR 1440 (High Court, England).
15. [1970] Ch 199 (Court of Appeal, England).

the company to borrow money. The Court of Appeal however held that this clause was a power and not an independent object. As a power had to be employed for the legitimate purposes of the company, it was held that the borrowings were ultra vires. The transactions were entered into for the purposes of a business that was not authorised by the memorandum of association.

This view of the law was rejected by the English Court of Appeal in *Rolled Steel Products (Holdings) Ltd v. British Steel Corporation.*[16] A distinction was drawn between acts that were beyond the corporate capacity of the company and acts that were an abuse of power on the part of the directors. Only acts beyond the capacity of the company could strictly speaking be characterised as ultra vires. Such an act would be void (in England at least). On the other hand, an act that was merely an abuse of the directors' powers would not be void, but could be set aside if the other party knew of the abuse of powers. Therefore, if as a matter of construction an act is authorised by the objects clauses of a company, it is does not become ultra vires just because it done for purposes that were not authorised by its memorandum of association.[17] Thus, in England, an act is only ultra vires if it is clearly outside the substantive powers of a company (the "narrow view").

In Singapore, as far as persons dealing with companies are concerned it does not matter whether the wider view or the narrower view of ultra vires is adopted. Consider the following example. A company has only one main object, to run a travel agency. It has power to borrow. It borrows for the purpose of running a pig farm. According to the wider view, this is an ultra vires act. However, because of s.25(1) it is still a valid transaction. If, on the other hand, one adopts the narrow view of ultra vires propounded in the *Rolled Steel* case the transaction is not ultra vires but only a breach of the directors' duties. It will accordingly be binding upon the company, subject to the possibility of being restrained or set aside if the contractor knew of the breach of directors' duties.

Similarly, it does not matter to the members of a company whether the wide view or the narrow view is adopted. In the example given above, if the act is ultra vires a member would be entitled to have it restrained under s.25(2)(a). If the act is intra vires but is entered into by the directors in breach of their duty, it may still be restrained at the instance of a member.[18] The only persons affected by the adoption of the narrow view of ultra vires are debenture holders secured by a floating charge. Section 25(2)(a) contemplates that such debenture

16. [1984] BCLC 466 (Court of Appeal, England).
17. *Re Introductions Ltd* [1970] Ch 199 (Court of Appeal, England) (see facts above) was rationalised on the ground that it was not a true ultra vires case and the bank knew of the improper purpose: see p.517 per Browne-Wilkinson LJ.
18. *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1984] BCLC 466, at p.515 per Browne-Wilkinson LJ.

holders may apply to have an ultra vires act restrained before it is performed. If one adopts the narrow view of ultra vires enunciated in the *Rolled Steel* case, however, this remedy will be abridged. To continue with the example given, the debenture holders might restrain the borrowing on the wide view but not on the narrow view of ultra vires.

There is much that is attractive about the narrower view enunciated in the *Rolled Steel* case. Conceptually, the abuse of a power by the directors of a company has nothing to do with whether the act is within the capacity of the company. If the directors misuse their powers, they breach their fiduciary duty to the company and may be called to account. The act itself should not be void, but merely voidable; and even then, voidable only against a third party who knew of the improper purpose. However, whatever the attractiveness of the narrow view of ultra vires, the fact remains that our s.25 was enacted when the wide view held sway. It was enacted to cure the mischief as it was understood then; the mischief being that an ultra vires act is void. To adopt a narrow view of ultra vires will affect the rights of a debenture holder secured by a floating charge. Be that as it may, it is still open to a court to adopt the narrow view of ultra vires here since there is no binding precedent one way or another.

Ultra vires and agency

A large problem that has not been resolved (or even considered) is the interrelationship between agency principles and ultra vires in Singapore. Given that an ultra vires act can be valid, could an agent of a company be authorised to enter into an act that is beyond the capacity of the company? A distinction must be made between actual authority and apparent authority in this connection.

Section 25(1) contemplates that an agent of the company may be expressly or impliedly authorised to enter into an ultra vires transaction. The section provides that "no act. . . .of a company *(including. . . . . any act done on behalf of the company under any purported authority, express or implied, of the company).* . . . . .shall be invalid by reason only of the fact that the company was without capacity or power to do such act.."; *(emphasis added).* The highlighted words clearly indicate that a company may give actual authority to an agent to enter into an ultra vires act. The question is, who is to give such authority? It is suggested that in deciding whether an agent is actually authorised, one should ignore questions of capacity of the company. Thus, if the board of directors or the general meeting (acting within their respective spheres) give actual authority to an agent to do an act, it matters not that the company was itself without capacity or power to do that act. Similarly, an agent with power to delegate authority to sub-agents may give actual authority to such a sub-agent irrespective of whether the act authorised was within the corporate capacity of the company.

Apparent authority, on the other hand, stands on a different footing. There are statements in English cases that an agent can only have apparent authority to perform acts that are within the capacity of the company. The rationale for this is that an agent could not do something that the company itself lacked capacity to do nor could the company be estopped from denying the validity of the act.[19] This rationale is irrelevant here because of s.25(1). It is suggested that in Singapore an agent may have ostensible authority to enter into ultra vires contracts on behalf of a company. However, the scope of this authority would be severely curtailed.

Apparent or ostensible authority depends upon a representation made by the company to a contracting party. The contractor cannot rely upon the ostensible authority of an agent if he knew of the agent's lack of actual authority or if he was put on inquiry and did not inquire. Suppose that Alpha enters into a contract that is clearly outside the scope of the company's memorandum of association on the company's behalf. The other party to the contract is deemed to have constructive notice of the contents of the memorandum of association.[20] This being so, he cannot rely upon the ostensible authority of Alpha to enter into the contract on the company's behalf. He should ask for proof that Alpha has actual authority to enter into the transaction notwithstanding that it is ultra vires. If an express representation is made by a person in authority to the effect that the agent is authorised to enter into the ultra vires transaction on behalf of the company, this express representation will be sufficient to found an estoppel. This, it is suggested, is the only way an agent could have ostensible authority to enter into an ultra vires transaction. If, however, the wide view of ultra vires is accepted, an estoppel may be founded upon an agent's general ostensible authority. A transaction that is within the scope of the memorandum may be ultra vires if it is entered into for an unauthorised purpose. In such a situation, the other contracting party would not be put on inquiry, since it would not be apparent on the face of things that the agent was unauthorised.

If the above reasoning is correct, it would appear that an agent could never have ostensible authority to enter into a transaction that is clearly beyond the memorandum of association unless an express representation as to his authority to do so has been made by an authorised person. In the absence of such a representation, a transaction wholly beyond the memorandum of association would be binding on the company only if the agent had actual authority, whether express or implied, to enter into it. However, an agent may have ostensible authority to enter into a transaction that is ultra vires in the wide sense.

19. *Freeman & Lockyer v Buckhurst Park Properties (Mongol) Ltd* [1964] 2 QB 480, 504 (Court of Appeal, England).

20. *Ernest v Nicholls* (1857) 6 HL Cas 401 (House of Lords); *Woodland Development Sdn Bhd v Chartered Bank* [1986] 1 MLJ 84, 88-89 (High Court, Malaysia).

Ultra vires and breach of directors' fiduciary duties

A great problem that has bedevilled the courts is confusion between breach of fiduciary duties by a director on the one hand and ultra vires on the other. Many cases which have nothing to do with the vires of a company have been decided on that basis. For some time it was thought that if the board of directors was actuated by an improper purpose in acting, such an act was ultra vires the company. This confusion of thought was sorted out by the English Court of Appeal in *Rolled Steel Products (Holdings) Ltd v British Steel Corporation*.[21] In that case it was held that the fact that directors have been actuated by improper motives does not render the transaction ultra vires.[22] Because of the confusion between breach of directors' duties and ultra vires in the earlier cases, these should be treated with great circumspection when used as authority. In considering the effect of a breach of directors' duties on a transaction with a third party one must go back to first principles.

A transaction which is intra vires the company (and in Singapore even one that is ultra vires) is not void even though entered into in breach of directors' fiduciary duties. Such a transaction can only be voidable. There are two scenarios: firstly, where the directors themselves are parties to the transaction with the company; secondly, where persons other than directors are parties to the transaction with the company.

Where directors have entered into contracts or transactions with their own company in breach of their fiduciary duties, such contracts or transactions are voidable at the instance of the company. The basis of this is an equitable principle akin to undue influence.[23] Unless the company has subsequently affirmed the contract or transaction it may be set aside vis-a-vis the offending directors. It is inconceivable that a court of equity would specifically enforce a contract entered into by the directors of a company on its behalf with themselves in breach of their duty to the company.[24]

Where a transaction has been entered into with third parties by the company, the position is not quite so simple. Whether or not the transaction can be avoided vis-a-vis the third party must depend upon whether that party knew or ought to have known of the directors' breach of duty in procuring the company to enter into the transaction. In many of the old so-called ultra vires cases it was said that in order for a transaction to be set aside because of some

21. [1984] BCLC 466.
22. *Ibid.* at pp.507 (Slade LJ), 515 (Browne-Wilkinson LJ).
23. *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1230 per Lord Penzance (House of Lords). Though this case deal with promoters, the same must be true of directors who like promoters are fiduciaries of the company.
24. *Austin v Keele* (1987) 72 ALR 579, 585 (Privy Council on appeal from New South Wales).

invalidating purpose on the part of the directors, knowledge of the invalidating purpose must be brought home to the other contracting party.[25] It is suggested that these statements should be understood in a modern context to mean that where a company seeks to set aside a transaction which its directors have entered into on its behalf in breach of their fiduciary duties, knowledge of that breach must be brought home to the other contracting party.

On general principles of agency, as long as the directors were acting within the scope of their apparent authority the company will be bound by what they do, notwithstanding that they are actually breaching their fiduciary duties to the company.[26] Dixon J put it with his customary clarity in *Richard Brady Franks Ltd v Price:* [27]

> "Directors are fiduciary agents and their powers must be exercised honestly in furtherance of the purposes for which they are given. Under the general law of agency it is a breach of duty for an agent to exercise his authority for the purpose of conferring a benefit on himself or upon some other person to the detriment of his principal. But, at the same time, if his act is otherwise within the scope of his authority it binds the principal in favour of third parties who deal with him bona fide and without notice of his fraud. The rule, no doubt, is the same with respect to the acts of directors. It follows that a transaction carried out by directors for their own or some other persons' benefit and not to further any purpose of the company is voidable but not void."

The same reasoning can be applied to an act which is done for an improper purpose. The breach of a director's fiduciary duties is a matter between him and the company. An outsider need not inquire when he enters into a transaction that is prima facie within directors' powers whether the directors are acting for an improper purpose.[28] Nor, by a parity of reasoning, does he have to inquire whether the directors have disclosed any potential conflicts of interest to the company as required by the law. It is only where the other contracting party knew or ought to have known of the directors' breach of duty that the transaction is voidable.

A problem arises in relation to a transaction that is beyond the company's capacity or power. The transaction is not invalid only because it is beyond

25. See eg *Re David Payne & Co Ltd* [1904] 2 Ch 608, 617-620 (Court of Appeal, England); *Hawkesbury Development Co Ltd* v *Landmark Finance Pty Ltd* (1970) 92 WN (NSW) 199, 216 (Supreme Court of New South Wales).

26. *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1984] BCLC 466, 507-508 (Slade LJ), 515 (Browne-Wilkinson LJ).

27. (1937) 58 CLR 112, 142 (High Court of Australia).

28. *Re David Payne & Co Ltd* [1904] 2 Ch 608, 613 per Buckley J (High Court, England; affirmed by the Court of Appeal *loc.cit.at* pp.615-620).

the company's capacity or power to enter into that transaction because of s.25(l). However, a transaction that is entered into in breach of directors' duties may be set aside vis-a-vis a party that knew or ought to have known of the breach. When the directors cause a company to enter into a transaction which is ultra vires, do they automatically breach their duty to the company thereby? English cases are of little assistance in this respect, since there is no UK equivalent of our s.25. The matter must again be considered from first principles.

A fiduciary power is one that must be exercised in the interests of the company[29] and for the proper corporate purposes.[30] As long as a director exercises his powers in good faith and for the purpose for which that power was given and not a collateral purpose, he is not in breach of his duty to the company. It is suggested that the fact that the company has no power or capacity to enter into a transaction is irrelevant in Singapore to the question of whether a director has breached his duty to the company. Consider what the result would be if it were held that a director who caused the company to enter into an ultra vires transaction were automatically in breach of his duty. The transaction would be voidable because of the breach. Because of the doctrine of constructive notice[31] all persons will be deemed to know that the transaction is ultra vires. The transaction could therefore be set aside in virtually all cases. This would mean that section 25(1) would have practically no effect. It is suggested that it is undesirable to adopt a view of directors' duties that would have the effect of nullifying section 25(1). This cannot have been the intention of the legislature. The better view, it is submitted, is that directors can be given actual authority to enter into transactions that are ultra vires the company, and if they do commit the company to such transactions they are not in breach of their duty to the company so long as they act in the interests of the company and for the proper purposes.

Ultra vires and gratuitous transactions

In some English cases, a gratuitous transaction entered into by the company has been treated as void on the ground of ultra vires. Thus, for example, in *Re Lee, Behrens & Co Ltd*[32] and in *Re W & M Roith Ltd*[33] the grant of a pension to the widow of a former managing director was held to be ultra vires and void because it was not for the benefit of the company. These cases must now be treated as of doubtful authority. Following on from what was discussed in the last section of this paper, it will be seen that such transactions are not

29. *Samuel Tak Lee v Choti Wen Hsien* [1984] 1 WLR 1202, 1206 (Privy Council on appeal from Hong Kong).
30. *Mills v Mills* (1937) 60 CLR 150, 185 (High Court of Australia).
31. *Ernest v Nicholls* (1857) 6 HL Cas 401 (House of Lords); *Woodland Development Sdn Bhd v Chartered Bank* [1986] 1 MLJ 84, 88-89 (High Court, Malaysia).
32. [1932] 2 Ch 46 (High Court, England).
33. [1967] 1 All ER 427 (High Court, England).

void for want of corporate capacity but rather voidable as being made in breach of directors' fiduciary dities. Indeed, it would be strange if the company's capacity depended upon the subjective intention of the directors in entering into such transactions.

Thus, as far as gratuitous transactions are concerned the real question is not whether the company has capacity to enter in such transactions but whether the transactions are for the benefit of the company. For example, suppose that Company A guarantees the debts of Company B. In England, the first issue is whether Company A had any express or implied power to enter into such a guarantee. If it had no such power, the guarantee is ultra vires and void.[34] In Singapore, however, no transaction shall be invalid by reason only that the company was without capacity and power to enter into it: s 25(1). Therefore, the company's capacity to enter into the guarantee would be irrelevant; the guarantee would not be invalid by reason only of the company's lack of capacity or power. From this it follows that the only real issue is whether the directors (or agents) of the company who entered into the transaction did so bona fide in the company's interests. If it was bona fide in the company's interests then it would be perfectly valid and binding. If not, it might be set aside vis-a-vis a third party who was aware of the breach of duty on the part of the company's directors or agents.

Ultra vires and the rule in Foss v Harbottle

An action brought by a minority member to enforce a company's rights is liable to be defeated by the rule in *Foss v Harbottle*.[35] The defendants may object that the pleadings disclose no reasonable cause of action,[36] since a company's cause of action is not vested in a member. If this happens, the court may strike out the action. This can be avoided only if the plaintiff can show that the case falls within one of the exceptions to the rule in *Foss v Harbottle*.

There are two recognised exceptions to the rule in *Foss v Harbottle:* firstly, in the case of ultra vires acts; secondly, where there is a fraud on the minority and the wrongdoers are in control of the company.[37] It has been stated in England that the rule in *Foss v Harbottle* has no application where the act complained of is wholly ultra vires the company. This is because there is no question of the transaction being confirmed by any majority.[38] If a company entered into an ultra vires transaction, any member could sue to have the transaction restrained.[39] As an incident of this action, such a member would also be allowed to recover the company's property from a third party to whom

34. See *Rosemary Simmons Memorial Housing Association Ltd v United Dominions Trust Ltd* [1986] 1 WLR 1440 (High Court, England).

35. (1843) 2 Hare 461 (Vice-Chancellor's Court, England).

36. In an application to strike out the pleading under RSC Ord.18 r.19.

37. See *Burland v Earle* [1902] AC 83, 93 per Lord Davey (Privy Council on appeal from Ontario); *Edwards v Halliwell* [1950] 2 All ER 1064, 1066 (Court of Appeal, England).

38. *Edwards v Halliwell* [1950] 2 All ER 1064 (Court of Appeal, England).

39. *Russell v Wakefield Waterworks Co* (1875) LR 20 Eq 474 (Master of the Rolls' Court, England).

it had been transferred under the ultra vires agreement.[40] In Singapore, however, this is not so. An ultra vires transaction is not void vis-a-vis a third party because of s.25(1). The question of recovery of the company's property from a party to an ultra vires transaction will therefore not arise. An action to restrain the ultra vires act would not be prevented by the rule in *Foss v Harbottle*, because s.25(2)(a) specifically permits such an action. In such a case the member would be suing to enforce his own personal rights and thus the action falls completely outside the rule. Accordingly, the ultra vires exception to the rule in *Foss v Harbottle* may be treated as moribund (if not actually dead) in Singapore.

Effect of ultra vires acts

The existence of section 25(1) means that the ultra vires doctrine is practically dead in Singapore. However, certain residual effects still remain. Basically, a person who deals with a company need not concern himself with whether the act is within the company's capacity or not. Within the company itself, however, it is still relevant to determine whether an act (or proposed act) is ultra vires.

Firstly, an ultra vires act may be restrained before it is fully performed by a member, a debenture holder secured by a floating charge or a trustee for such debenture holders: s.25(2)(a). Restraining the company from acting upon an ultra vires contract does not affect the validity of that contract; it will still be valid because of section 25(1). Accordingly, the company may be in breach of the contract if an injunction is issued to restrain it from performing. To avoid this unpleasant situation, an application should be made by the company to join the other contracting party as a party to the action. If all the parties to the contract are parties to the action, the court may (if it is just and equitable) set aside and restrain the performance of the contract, and may also allow compensation to any party to the contract for any loss or damage sustained because of the setting aside of the contract: s.25(3). Where the court has made an order setting aside the contract, the company will not be in breach if it is restrained from performance. The other party may be compensated for any loss incurred when the court makes the order to set the contract aside. However, section 25(3) provides that this compensation is not to include a sum in respect of anticipated profits. Once a transaction is wholly completed it can no longer be restrained.[41] Thus, once an ultra vires transaction is completed it is beyond challenge on that score.

40. *Ibid,* at pp 481-482 per Jessel MR.

41. *Hawkesbury Development Co Ltd v Landmark Finance Pty Ltd* (1970) 92 WN (NSW) 199, 217 (Supreme Court of New South Wales).

Secondly, the issue of a company's lack of capacity may be raised in any action by the company or a member against the present or former officers of the company: s.25(2)(b). This will probably take the form of an action to restrain an officer from causing the company to act in a manner that is unauthorised by its memorandum of association.

Thirdly, the fact that a company has acted beyond its capacity may be relied upon in any petition by the Minister to have the company wound up: s.25(2)(c).

Fourthly, if a transaction is ultra vires, it may not be made intra vires even by the unanimous assent of the members. The English cases establish that an ultra vires act cannot be ratified so as to make it binding upon the company.[42] In Singapore there is no necessity for ratification in order to make an ultra vires transaction binding; it is binding by virtue of section 25(1). However, the principle that an ultra vires act cannot be made intra vires even with the unanimous consent of the corporators still remains. This means that a member may sue to restrain an ultra vires act even if he previously consented to it. The court will of course take into consideration the member's previous consent before it exercises its discretion to restrain the act.

Fifthly, section 25 has no application in relation to foreign companies. This is because the section refers to "companies" not "corporations"; the word "company" refers to a company incorporated under the Act or its predecessor legislation: see the relevant definitions in s 4(1). The capacity of a foreign company is governed by the law of the law of the place of incorporation. Thus, companies incorporated in England which do business here would be subject to the common law ultra vires doctrine.

Summary

The following summary of the doctrine of ultra vires may perhaps now be made. In the absence of local case authority, the following principles are advanced diffidently and are open to correction.

(1) A transaction entered into by a company incorporated in Singapore is not invalid by reason only that it is beyond the company's capacity or power.

(2) Such a transaction may not be binding upon the company if:
   (a) the agent who purported to act for the company did so without authority; or
   (b) the transaction was entered into in breach of the agent's fiduciary duty to the company and the third party was aware of this.

42. *Ashbury Railway Carriage & Iron Co v Riche* (1875) LR 7 HL 653 (House of Lords).

(3) An agent may have actual authority to enter into a transaction even though it is beyond the company's capacity or power. Such authority may be conferred by the company's board of directors or general meeting.

(4) An agent may have ostensible authority to enter into an ultra vires transaction if the company has represented to the third party that the agent has actual authority. In such a case, the company would be estopped from denying the agent's actual authority even though the transaction is ultra vires.

(5) If the directors authorise an ultra vires transaction, they do not thereby breach their duty to the company if they have acted bona fide for the interests of the company.

(6) If directors do not act bona fide in the interests of the company the transaction may be voidable by the company, but only as against a third party who knew of the breach of duty.

(7) Gratuitous transactions entered into by a company are valid as long as the directors have acted bona fide in the interests of the company.

(8) The ultra vires exception to the rule in *Foss v Harbottle* is irrelevant.

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