Conclusion

In the *Vandervell Case* the Court was faced with a difficult situation. If it accepted the interpretation placed on a section of an Act of Parliament by courts of the highest authority, and took it to its logical conclusion, the result would have been (in Lord Upjohn's words) to "make assignments unnecessarily complicated . . . (and) . . . the section more productive of injustice than the supposed evils it was intended to prevent".[58] The Court might have been placed in an even more awkward position had counsel for the Revenue not conceded an important point.[59] However, the Court was still obviously somewhat troubled at the prospect of reconciling s.23C (1) (c) with the concept of effective oral assignments by absolute beneficial owners, and stated simply that in such cases s.23C (1) (c) did not apply. It is submitted that the decision can be justified, not by means of referring to legislative intentions 300 years ago or by *argumentum ab inconvenienti*, but by a complete reconsideration of the traditional view of legal and equitable estates.

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DIRECTORS' AUTHORITY AND THE RULE IN TURQUAND'S CASE

HELY-HUTCHINSON v. *BRAYHEAD LTD.*

The recent decision of *Hely-Hutchinson* v. *Brayhead Ltd.*[1] was concerned with the authority of company directors, with the so-called rule in *Turquand's Case*[2] and with the effect on a contract between a company and one of its directors of a failure by that director to disclose his interest in the contract to the board.

THE FACTS

In 1956 the plaintiff, Hely-Hutchinson, was the chairman and managing director of Perdio Electronics Ltd. (Perdio) and subsequently acquired a controlling interest in the company. A Mr. Richards was also a shareholder and a director of Perdio. In 1962 Richards acquired control of the defendant company, Brayhead Ltd. (Brayhead), of which company he became chairman.

By 1964 Perdio had begun to sustain losses and obtained overdraft facilities for £50,000 from a firm of merchant bankers, Guinness Mahon & Co. Ltd. The plaintiff gave his own personal guarantee to Guinness Mahon in respect of this loan.

However, Perdio's needs were not satisfied by the amount of the overdraft and early in 1965 discussions took place between the plaintiff and Richards which resulted in an agreement whereby Brayhead was to gain effective

[58] *Ibid.*

[59] See *ibid.*: "Counsel for the Crown admitted that where the legal and beneficial estate was vested in the legal owner and he desired to transfer the whole legal and beneficial estate to another he did not have to do more than transfer the legal estate and he did not have to comply with (S.23C (1) (c))."

[1] (1968) 1 Q.B. 549.

[2] *Royal British Bank* v. *Turquand* (1856) 6 E. & B. 327.

control of Perdio by acquiring 60% of that company's shares. Most of these shares were purchased from the plaintiff, who became a director of Brayhead at this time.

Although further moneys were obtained from Brayhead itself and from other merchant bankers, by early May of 1965 the situation had worsened. The plaintiff agreed with Richards that he would advance some of his own money to Perdio if Brayhead would guarantee such loans and also furnish him with an indemnity in respect of his personal guarantee to Guinness Mahon.

On 19th May, 1965, the plaintiff attended at a board meeting of Brayhead. This was in fact the first board meeting that he had attended, although he had been a director of the defendant company for some four months. During the meeting the purchase of shares in Perdio was approved but no mention was made of what had been agreed between the plaintiff and Richards.

Shortly after the meeting, some documents under the company's letterhead were executed by Richards as chairman. One of these documents purported to indemnify the plaintiff in respect of his guarantee given to Guinness Mahon; another purported to guarantee the plaintiff's loans to Perdio. There was no evidence that the existence of these documents, both of which were signed "A. J. Richards, Chairman", was ever disclosed to the Brayhead board.

On the strength of these documents, the plaintiff had by 11th June, 1965 advanced some £45,000 of his own money to Perdio. By September, 1965 the situation had not improved and Perdio was headed for liquidation. The plaintiff resigned from the board of Brayhead. He was, however, obliged to honour his personal guarantee to Guinness Mahon for £51,000.

The plaintiff had never read the Memorandum and Articles of Association of Brayhead Limited, which contained an express power to appoint a managing director. Although this power had never been exercised, it was found that Richards at all times acted as managing director as well as chairman, and that the board of Brayhead had acquiesced in Richards' professing to bind the company in previous transactions. It was not suggested that the acts of giving the indemnity and the guarantee were *ultra vires* of Brayhead, but these acts had never been reported to any board meeting of Brayhead. Nor was the plaintiff's interest in the transactions formally disclosed to the board, as was required by Article 99[3] of Brayhead's articles and by s.199[4] of the Companies Act, 1948 (Eng.). Article 99 contained the provision that the director might contract with the company and not be liable to account for any profit made as a result, provided that the nature of his interest in the contract was declared to the board of directors. Section 199 of the

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[3] Art. 99, so far as material, provided:
"A director may contract with and be interested in any contract or proposed contract with the company either as vendor, purchaser or otherwise, and shall not be liable to account for any profit made by him by reason of any such contract or proposed contract, provided that the nature of the interest of the director in such contract or proposed contract be declared at a meeting of the directors as required by and subject to the provisions of s.199 of the Act. . . ."

[4] S.199, so far as material, provides that:
"(1) . . . it shall be the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the Company to declare the nature of his interest at a meeting of the directors of the company.
(2) In the case of a proposed contract the declaration required by this section to be made by a director shall be made at the meeting of the directors at which the question of entering into the contract is first taken into consideration, or if the director was not at the date of that meeting interested in the proposed contract, at the next meeting of the directors held after he became so interested, and in a case where the director becomes interested in a contract after it is made, the said declaration shall be made at the first meeting of the directors held after the director becomes so interested. . . .
(4) Any director who fails to comply with the provisions of this section shall be liable to a fine not exceeding £100."

Companies Act, 1948 (Eng.) is in similar terms to s.123 of the Companies Act, 1961 (N.S.W.).

Relying on the two documents, the plaintiff sued the defendant company; when the company, in its defence, denied Richards' authority, the plaintiff joined Richards as second defendant, claiming in the alternative against him damages for an alleged breach of warranty of authority.

THE DECISIONS

(1) *The decision of Roskill, J.*

The defences raised by the defendant company at the trial were several.[5] First, that Richards had no authority, actual or ostensible, to sign documents on behalf of the company. Secondly, even if there was an ostensible or apparent authority upon which a third party could rely under the rule in *Turquand's Case*,[6] yet the plaintiff was a director of Brayhead and must be treated for all purposes as having been put on notice of the contents of the articles; he must thus be taken to be aware of any lack of authority and could not rely upon the ostensible or apparent authority of Richards. Thirdly, the transactions were not "usual" ones within the meaning of the rule in *Turquand's Case*, both because of their very nature and because in entering into them the plaintiff was in breach of his obligations and duties under Article 99 and s.199 of the Companies Act, 1948. Fourthly, by reason of Article 99, neither the plaintiff nor Brayhead had any contractual capacity; hence these contracts were void or voidable or at least unenforceable against the company.

Roskill, J. found that Richards was at all times in the position of the managing director, and that he was chief executive as well as being chairman.[7] However, he refused to find that there was implied authority to do what he had done merely from the fact of his status either as chairman or as *de facto* managing director or chief executive of the company.

However, Roskill, J. found that there was ostensible or apparent authority in Richards to act as he had acted. He instanced various occasions when Richards had plainly committed Brayhead and then reported the matter to the board afterwards.[8] The board had allowed him to bind the company in this way previously, and had acquiesced in his doing it.

It followed on Roskill, J.'s reasoning that if the plaintiff was an "outsider" he would *prima facie* be entitled to rely on the rule in *Turquand's Case*. Roskill, J.[9] relied upon the statement of the rule contained in 5 *Halsbury's Laws of England* (2nd edition) at page 423:

> But persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to enquire whether acts of internal management have been regular.

Declaring himself bound in this area of the law by the Court of Appeal decision in *Freeman & Lockyer* v. *Buckhurst Park Properties (Mangal) Limited*,[10] Roskill, J. held that the only question was whether or not on these facts, the plaintiff was an "insider" or an "outsider". After a brief review of the authorities Roskill, J. said[11] that they did not compel the exclusion of a director from

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[5] These are set out in the judgment of Roskill, J., (1968) 1 Q.B. at 558-59.
[6] *Supra* n2.
[7] (1968) 1 Q.B. at 560.
[8] *Id.* at 561.
[9] Following Lord Simonds in *Morris* v. *Kanssen* (1946) A.C. 459 at 474.
[10] (1964) 2 Q.B. 480.
[11] (1968) 1 Q.B. at 567-68. Roskill, J. referred to *Howard* v. *Patent Ivory Manufacturing Co.*; *Re Patent Ivory Manufacturing Co.* (1888) 38 Ch.D. 156 and *Morris* v. *Kanssen*, *supra* n.9.

the benefit of the rule in *Turquand's Case* where, acting in his personal and individual capacity and not on behalf of the company, he makes a contract with the company acting through another director who is in fact the chairman and chief executive of the company.

The conclusion to be drawn from this part of the judgment seems to be that a director is not automatically to be excluded by virtue of his office from the category of an "outsider", at any rate where the contract between him and the company has nothing to do with his duties and obligations as a director and he acts otherwise than in his capacity as a director in making the agreement.[12]

Further, the operation of the rule was not precluded by the transactions being "unusual". Counsel for the defendant company had argued that they were unusual, firstly because they were not the sort of transaction that one would expect to be entered into in those circumstances by a managing director with a person who was in fact also a director of the same company, and secondly, because the agreements were or may have been contracts in which the plaintiff was "interested" within the meaning of Article 99. Roskill, J. claimed that neither of these arguments was sustainable.[13]

Considering the defendant company's final defence, Roskill, J., after commenting on the paucity of relevant authority, held that the effect of non-compliance with Article 99 and s.199 was not to make the contract void or unenforceable. The true principle, he said, was that equity in an appropriate case might allow the company to recover any profit made by the director as a result of the contract or might permit the company to avoid the contract.[14] Thus, at the worst, the contract was only voidable; however, as restitution to the original position was at that time clearly impossible, it was far too late for the defendant company to seek to avoid the contract.[15]

Consequently, the plaintiff was entitled to succeed against Brayhead; but even if that conclusion were wrong, then the plaintiff was entitled to succeed against Richards on the breach of warranty of authority, that is to say that "he could recover from Mr. Richards that which he could not recover from Brayhead for want of Mr. Richards' authority".[16]

(2) *The decision of the Court of Appeal*

The decision of Roskill, J. was unanimously upheld by the Court of Appeal, although on somewhat different grounds. In effect, the Court of Appeal was able to sidestep the whole question of the applicability of the rule in *Turquand's Case*, by holding that the necessary conclusion from the facts as found by the trial judge was that there was implied actual authority in Richards to do what he had done. It was held to follow from this presence of actual authority that it was unnecessary to consider the operation of the rule in *Turquand's Case*.

The only other question therefore was to consider the effect on the contracts of the plaintiff's failure to disclose his interest. On this point the Court of Appeal seemed to agree with Roskill, J. In the words of Lord Denning, M.R.:

> In this case, therefore, the effect of the non-disclosure by the plaintiff was not to make the contract void or unenforceable. It only made the contract voidable. Once that is held, everyone agrees that it is far too late to avoid it.[17]

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[12] (1968) 1 Q.B. at 568.
[13] *Id.* at 568-69.
[14] *Id.* at 570.
[15] *Id.* at 571.
[16] *Id.* at 573.
[17] *Id.* at 586. Lord Wilberforce (at 591) and Lord Pearson (at 595) reached the same conclusion.

The Court of Appeal also agreed with Roskill, J. that had the plaintiff failed because the second defendant had no authority, actual or ostensible, then he could have succeeded against Richards on the alleged breach of warranty of authority.[18] Consequently the appeal was dismissed, and the plaintiff was held entitled to recover from the defendant company in respect of both the guarantee and the indemnity.

COMMENT

(1) *The authority of company directors — actual and ostensible*

In *Freeman & Lockyer* v. *Buckhurst Park Properties (Mangal) Limited*,[19] the Court of Appeal made a valiant attempt to grapple with some of the problems which arise concerning the ostensible authority of persons who purport to act as agents of a company. The judgment of Diplock, L.J. in particular contains a clear and useful statement of principles reducing the chaos of earlier decisions to a series of straightforward and fairly simple propositions. It is thought to be a matter for regret that the Court of Appeal in *Hely-Hutchinson's Case* has, by blurring the distinction between actual and ostensible authority, disturbed the simplicity thus achieved.

The facts of the two cases were not dissimilar. In *Freeman & Lockyer's Case* a Mr. Kapoor formed the defendant company with one Hoon to purchase and resell a large estate. Kapoor and Hoon and a nominee of each were appointed directors. Although the Articles of Association contained power to appoint a managing director, none was in fact appointed. Kapoor engaged the plaintiffs, a firm of architects, to do work for the defendant company and the plaintiffs subsequently brought the action to recover their fees from the defendant company. The trial judge found for the plaintiffs, and the defendant company appealed on the ground that the liability was not theirs but that of Kapoor.

The trial judge had found that Kapoor, though never appointed as managing director, had throughout been acting as such in employing agents and taking other steps to find a purchaser for the estate, and that this was well known to the board. The Court of Appeal accepted this finding of fact, and interpreted it to mean that although Kapoor had no actual authority[20] to employ the plaintiffs, nevertheless in doing so he was acting within the scope of his ostensible authority.

The distinction between an actual and an ostensible authority was explained by Diplock, L.J. thus:

> An "actual" authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implication from the express words used, the usages of the trade, or the course of business between the parties.[21]

By contrast, an "apparent" or "ostensible" authority was explained as:

> . . . a legal relationship between the principal and the contractor created

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[18] *Id* at 586 (*per* Lord Denning, M.R.), at 591-92 (*per* Lord Wilberforce), and at 595 (*per* Lord Pearson).

[19] *Supra* n.10.

[20] Referring to the reasons for holding that Kapoor had no actual authority, Diplock, L.J. said ((1964) 2 Q.B. at 501): "I accept that such actual authority could have been conferred by the board without a formal resolution recorded in the minutes . . . (b)ut to confer actual authority would have required not merely the silent acquiescence of the individual members of the board, but the communication by words or conduct of their respective consents to one another and to Kapoor."

[21] *Id.* at 502.

> by a representation made by the principal to the contractor intended to be and in fact acted upon by the contractor that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority so as to render the principal liable to perform any obligations imposed upon him by such contract.[22]

The commonest form of such a representation is by conduct, for example permitting the agent to conduct the principal's business with other persons in a particular manner.

Diplock, L.J. went on to lay down four principles relating to the creation of ostensible authority where the principal is a company:

> It must be shown:
>
> (1) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
>
> (2) that such representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
>
> (3) that he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and
>
> (4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.[23]

In *Hely-Hutchinson's Case*, Roskill, J. purported to apply these four principles to the facts as he had found them. There was no doubt that conditions (3) and (4) were satisfied, but Roskill, J.'s treatment of conditions (1) and (2) is puzzling. He states that the representation to the effect that Richards had authority was made by Mr. Richards himself, and that Mr. Richards was, in his position as *de facto* managing director of Brayhead, the man who had "actual authority to manage" the affairs of the company, and that Richards was acting as such in signing the two documents.[24]

Now it seems clear that if Mr. Richards, as distinct from the board, had "actual authority to manage" and thus to represent *himself* as having apparent authority to contract on behalf of the company, then the whole discussion of ostensible authority is irrelevant. To speak of someone having actual authority to confer apparent authority upon himself amounts to saying that the person has actual authority to perform those acts which he is holding himself out as authorised to perform. This seems to make any mention of ostensible authority quite beside the point. Yet Roskill, J. did not draw the conclusion that Richards had actual authority to do what he had professed to do.[25] The correct analysis would appear to be that the board, by its previous course of acquiescence in acts of management by Richards, had effectively held him out as having authority to manage.

To make confusion worse confounded, Lord Denning[26] gave as an example of ostensible authority the case of a managing director duly appointed by the board, whose authority to purchase goods is expressly limited to £500; in such a case his actual authority is limited accordingly, but his ostensible authority includes all the usual authority of a managing director; and if he exceeds the limitation in the exercise of his office, the company will be bound to the other party who is unaware of the secret limitation. Surprisingly, however, Lord Denning suggests that the holding out may arise from the

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[22] *Id.* at 503.
[23] *Id.* at 506.
[24] (1968) 1 Q.B. at 564.
[25] *Id.* at 561-62.
[26] *Id.* at 583.

act of the managing director himself, as where he signs the order in his official capacity. It is suggested, with respect, that the proper analysis is that the holding out has been done by the board and consists of the act of appointment of the managing director with only a secret limitation on what otherwise would have amounted to actual authority.[27]

Diplock, L.J., by using the term "actual authority to manage" in *Freeman & Lockyer's Case,* was, it is submitted, referring to those persons who were expressly authorised under the constitution of the company. In most cases this will be the board of directors, unless a managing director has in fact been appointed. Clearly, in the instant case, Mr. Richards could not satisfy this requirement of express appointment, and consequently Roskill, J. should have concentrated rather upon the fact that the *board of directors,* by their acquiescence in Richards' actions, were making representations as to Richards' apparent authority. Either there was actual authority in Richards to do what he did, a conclusion which Roskill, J. refused to draw from the facts as he had determined them, or there was at most ostensible authority, the conclusion which was in fact drawn by Roskill, J., and which, it is submitted, is correct, despite Roskill, J.'s confused application of the four principles laid down by Diplock, L.J. in *Freeman & Lockyer's Case.*

As mentioned above, the Court of Appeal accepted the facts as determined by Roskill, J. but drew the conclusion that these facts imported implied actual authority.[28] It is suggested that such a conclusion resulted from a confusion as to the nature of actual authority. In short, the decision of the Court of Appeal amounts to holding that acquiescence by the board in the actions of a director is tantamount to an implication of actual authority to do those actions.

Such a holding is difficult to reconcile with the decision in *Freeman & Lockyer's Case,* especially when it is remembered that the facts in that case were very similar to those in the instant case.

Lord Denning, M.R. came to the conclusion:

> It is plain that Mr. Richards had no express authority to enter into these two contracts on behalf of the company; nor had he any such authority implied from the nature of his office. He had been duly appointed chairman of the company but that office in itself did not carry with it authority to enter into these contracts without the sanction of the board; but I think that he had authority implied from the conduct of the parties and the circumstances of the case.[29]

Lord Denning then went on to cite the findings of Roskill, J. and held that Richards had actual authority ". . . implied from the circumstances that the board by their conduct over many months had acquiesced in his acting as their chief executive and committing Brayhead to contracts without the necessity of sanction from the board".[30]

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[27] This seems to be Lord Pearson's analysis: see *id.* at 592-93.

[28] *Id.* at 584 (*per* Lord Denning, M.R.), at 588 (*per* Lord Wilberforce) and at 593 (*per* Lord Pearson).

[29] *Id.* at 584. Lord Wilberforce agreed that no implied authority arose *ipso facto* from Richards' office as chairman (*id.* at 586). Lord Pearson did not advert to this aspect of the case.

It is submitted that the decision on this point has helped to resolve the question as to "why the right to take the chair should carry with it the right to manage out of the chair", raised by L.C.B. Gower, *The Principles of Modern Company Law* (2 ed. 1957) 147. Gower was referring to two cases in which it was suggested that a chairman of directors did possess a greater usual authority than an ordinary director, approximating to that of a managing director: *British Thomson-Houston Co. Ltd.* v. *Federated European Bank* (1932) 2 K.B. 176, and *Clay Hill Brick Co.* v. *Rawlings* (1938) 4 All E.R. 100. The Court of Appeal's decision on this point is in accordance with the earlier case of *Houghton & Co.* v. *Nothard, Lowe & Wills* (1927) 1 K.B. 246, where it was considered that a chairman of directors did not have any greater usual authority than an ordinary director.

[30] (1968) 1 Q.B. at 584.

With respect, it seems that this was not a case of actual authority. There is no doubt that had Richards been expressly appointed managing director then, in the absence of express limitations on that authority, he would also be impliedly authorised to perform all subordinate acts which were incidental to and necessary for the effective exercise of his express authority — that is, all those acts which fell within the scope of the usual duties of a managing director.[31] But it is difficult to understand how an implication of actual authority can be drawn from the board's acquiescing in Richards' actions as *de facto* managing director, when it was not disputed that there had never been any express appointment at all. Rather, implied authority would seem to depend for its very existence on the presence of an express authority.[32] Surely it is of the nature of actual authority that it comprises what is expressly agreed between agent and principal and that the only intelligible meaning of "implied actual authority" is authority to do certain acts which are found on a proper construction of the terms of the express authority to be included in those terms by implication. While in some circumstances the actions of directors without any formal resolution of the Board may amount to an express appointment, as distinguished from a holding-out,[32a] it is submitted that in the circumstances of *Hely-Hutchinson* they did not. Which is not of course to say that their actions did not amount to a holding-out sufficient to raise an authority by estoppel as in *Mahony's Case*.[32b]

It may be that the Court of Appeal confused the notion of the authority of an agent with that of the power of an agent, that is to say the relationship between principal and agent (internal aspect) as distinct from the extent to which an agent can alter his principal's relations with third parties (external aspect).[33] As Professor A. L. Corbin has succinctly put it,

> Authority denotes merely the factual relationship between principal and agent; Power expresses the concept of possible future changes in the legal relations of the principal with third persons.[34]

(2) *The rule in Turquand's Case*

As mentioned above, the Court of Appeal's decision made it unnecessary to consider the application of the rule in *Turquand's Case*, and their Lordships expressed no opinion on the treatment by Roskill, J. of this question.[35]

In holding that the plaintiff in the present case was not excluded from the benefit of the rule in *Turquand's Case*, Roskill, J. appears to have been influenced by considerations of business convenience.[36] He said that the exclusion of such protection in a case such as the present would have "very far-reaching ramifications on ordinary day-to-day business transactions and would, or might, involve very often considerable enquiry before a contract could be signed what the respective position and authority was of a particular individual by whom it was proposed that a contract should be signed".[37]

His Lordship seems to imply that insistence by the law that a director, even when not acting for the company, should be familiar with the Articles and Memorandum of Association and the minute book of the company of which

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[31] R. Powell, *The Law of Agency* (2 ed. 1961) 40; see also *id.* 37.

[32] *Cf. id.* 37: " it is an extension of express authority."

[32a] The distinction is that drawn by Diplock, L.J. in *Freeman, supra* n.20.

[32b] (1875) L.R. 7 H.L. 869.

[33] See R. S. Nock, "When is a Director not a Director?" (1967) 30 *Mod. L.R.* 705 at 706-7.

[34] A. L. Corbin, "The 'Authority' of an Agent — Definition" (1925) 34 *Yale L.J.* 788 at 794. See also Powell, *op. cit. supra* n.31 at 36.

[35] (1968) 1 Q.B. at 584-85 (*per* Lord Denning, M.R.), at 588 (*per* Lord Wilberforce) and at 593-94 (*per* Lord Pearson). As to Lord Pearson's view, see *infra* n.44.

[36] *Id.* at 567-68.

[37] *Id.* at 567.

he is a director would be an undesirable impediment in the conduct of day-to-day business transactions. But it is not immediately apparent why such weight should be given to "business convenience". For, as one commentator has pointed out,[38] it seems inconceivable that in a case where a director had in fact made the necessary enquiries, the Court would accept an argument to the effect that actual knowledge acquired *qua* director is to be disregarded when he is dealing with the company in a personal capacity. If this is so, then to hold that the director is not bound by knowledge that he should have acquired as a director of the company but has not done so would appear to encourage directors to some extent to neglect their duty.[39]

Some support for the views of Roskill, J. may however be found in the following statement by Lord Denning concerning his hypothetical example[40] of a managing director who contracts to purchase goods at a price in excess of a secret limitation on his actual authority:

> Even if the other party happens himself to be a director of the company, nevertheless the company may be bound by the ostensible authority. Suppose the managing director orders £1,000 worth of goods from a new director who has just joined the company and does not know of the £500 limitation, not having studied the minute book, the company may yet be bound.[41]

Yet it is not easy to appreciate why the following statement by Lord Simonds in *Morris* v. *Kanssen*[42] should not, in point of policy, be of general application to directors as well when they are dealing with the company in their own personal capacity as when they are acting on behalf of the company:

> It is the duty of directors and equally of those who act as directors to look after the affairs of the company, to see that it acts within its powers and that its transactions are regular and orderly. To admit in their favour a presumption that that is rightly done which they have themselves wrongly done is to encourage ignorance and condone dereliction from duty. It may be that in some cases, it may be that in this very case, a director is not blameworthy in his unauthorised act . . . but I cannot admit that there is open to him the remedy of invoking this rule and giving validity to an otherwise invalid transaction. His duty as a director is to know; his interest when he invokes the rule is to disclaim knowledge. Such a conflict can be resolved in only one way.[43]

If a director has a duty to be familiar with the affairs of a company, that duty ought to apply also where his own interests are involved in a contract with the company, whether or not in relation to that contract he is acting on behalf of the company. Such a salutary rule would be fully in accordance with what R. R. Pennington claims to be the basis of the rule in *Turquand's Case*, namely that an outsider has "no right to insist on proof by the directors that the provisions of its Memorandum or Articles of Association have been complied with, and he cannot therefore be deemed to have constructive notice of some failure to comply which he has no means of discovering".[44]

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[38] Nock, *supra* n.33 at 708-09.
[39] *Id.* 709.
[40] See the text *supra* at n.26.
[41] (1968) 1 Q.B. at 583-84.
[42] (1946) A.C. 459.
[43] *Id.* at 476.
[44] R. Pennington, *Company Law* (2 ed. 1967) 105. See also K. Polack, Note (1967) *Cambridge L.J.* 173 at 175, and S. J. Stoljar, *The Law of Agency* (1961) 142. In the present case, Lord Pearson admitted that "(i)t can be suggested that a director has by virtue of his office the means of knowing the true facts about the alleged authority and that therefore he is not entitled to rely on the representation of authority": (1968) 1 Q.B. at 594.

Why should a director ever be entitled to be excused from making use of those means of knowledge which he has by virtue of his status as director?

(3) *The effect of non-disclosure of interest by a director*

It is apparent that the fiduciary duties of directors can be modified to a limited extent by the insertion of "exclusion" clauses in the articles. Article 99[45] of Brayhead's articles is an example of this practice. All of their Lordships considered that the effect of compliance with Article 99 was to relieve the director from the consequences which would otherwise follow under the general law relating to the duty of a fiduciary towards the person to whom the duty is owed.[46] As indicated in the passage cited earlier,[47] Lord Denning, M.R. (with whom the other members of the Court of Appeal agreed) took the view that under the general law, the effect was to make the contract voidable at least until such time as *restitutio in integrum* became impossible. Roskill, J. thought that this result followed only in an "appropriate" case, but he did not give any instance of when such result would not be appropriate.[48] The company could also make the director accountable for any profit received by him.[49] Their Lordships apparently considered that no "profit" was involved in the present case where the plaintiff was seeking to recover only the amounts paid out by him as a result of the company's indebtedness.

Section 199[50] on the other hand makes mandatory the disclosure by a director of his interest, but the only consequence of non-compliance provided by the section is that it renders the director liable to a fine of up to £100. However L. C. B. Gower takes the view that a breach of s.199 "automatically removes any protection afforded by the exclusion clauses in the articles and brings the basic equitable principle into operation; in other words, the contract is voidable by the company and any profits made by the interested director are recoverable."[51]

It is submitted that this is in fact a correct statement of the position and accords with the holding of the Court of Appeal, although some explanation is necessary. The section *itself* has no effect whatever on the contract; the result of a breach of s.199 does not in its terms entail voidability of the contract. However, in a situation where an exclusion clause similar to Article 99 is inserted in the articles, a breach of the section would *ipso facto* involve a breach of Article 99 (by the fact of non-disclosure to the Board) and this would result in the removal of exemption from the general law consequences. Further, it is submitted that any attempt to insert an exclusion clause which by its terms required no disclosure at all would be avoided by s.205 of the Act (which is in similar terms to s.133 of the Companies Act, 1961 (N.S.W.)) which provides that a provision is void which purports to exempt a director or other officer of a Company from liability for "negligence default, breach of duty or breach of trust". Section 199 is in effect a qualification of s.205 and would seem to set the limit of a valid relieving clause in relation to this aspect of a director's duty. On the other hand it seems that where there is no Article 99 in the articles, mere compliance with s.199 would not prevent the Company seeking to avoid the contract, since s.199

[45] Set out *supra* n.3.

[46] (1968) 1 Q.B. at 571 (*per* Roskill, J.), at 585-86 (*per* Lord Denning, M.R.), at 590 (*per* Lord Wilberforce) and at 594 (*per* Lord Pearson).

[47] See *supra* n.17.

[48] (1968) 1 Q.B. at 570-71.

[49] *Id.* at 570 (*per* Roskill, J.), at 585 (*per* Lord Denning, M.R.) and at 589 (*per* Lord Wilberforce). Lord Pearson did not refer to this point.

[50] Set out *supra* n.4.

[51] Gower, *op. cit. supra* n.29 at 481. Roskill, J. in fact thought that this principle was too widely stated: (1968) 1 Q.B. at 571.

only requires disclosure to the Board of Directors whereas disclosure to and ratification by the Company in general meeting is required by the general law.[52]

The holding of the Court of Appeal on this point is in accordance with the view taken by the New South Wales Court of Appeal in *Castlereagh Motels Ltd.* v. *Davies-Roe*,[53] where it was held that s.129 of the Companies Act, 1936 (N.S.W.) (the forerunner to s.123 of the Companies Act, 1961 (N.S.W.)) would not support an action brought by a company against one of its directors, claiming damages at common law for breach of statutory duty. The Court took the view that the only effect of a failure by the director to comply with s.129 was to make him liable to a criminal sanction.[54] This would seem to be the proper approach, in view of the fact that the section expressly preserves the operation of the rules of the general law.[55]

CONCLUSION

It is submitted that the Court of Appeal failed to appreciate the nature of actual authority, and confused the distinction between actual authority and ostensible authority. In holding the case to be one of implied actual authority and not one of apparent authority, it avoided the important issue of who is an "insider" for the purposes of exclusion from the operation of the rule in *Turquand's Case*. If the Court of Appeal had dealt with the applicability of the rule in *Turquand's Case* it may well have reached the opposite conclusion to that reached by Roskill, J., and held that, on such authority as there was, and on considerations of the practical basis of that rule, the rule should not have been held to apply in the instant case. It would follow from this that the defendant company would not have been liable on the contracts and that the plaintiff would have had instead to rely on Richards' breach of warranty of authority.

However, if the rule had been held to apply, it seems that the plaintiff would be entitled to succeed against the defendant company, notwithstanding that he had failed to disclose his interest in the contract as required by s.199 of the Companies Act, 1948 (Eng.).

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GOODS ON HIRE PURCHASE: MEASURE OF DAMAGES FOR "WRONGFUL" ASSIGNMENT

WICKHAM HOLDINGS LTD. v. *BROOKE HOUSE MOTORS LTD.*[1]

This case is the latest pronouncement by the English Court of Appeal on the measure of damages obtainable by an owner of goods "sold" on hire-

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[52] See Gower, *op. cit.* at 482, 483.
[53] (1967) 66 S.R. (N.S.W.) 279.
[54] *Id.* at 284 (*per* Wallace, P.) and at 286-87 (*per* Jacobs & Asprey, J.J.A.).
[55] See s.129(5). *Cf.* Companies Act, 1961 (N.S.W.) s.123(8), and Companies Act, 1948 (Eng.), s.199(5).
[1] (1967) 1 W.L.R. 295. Waiver and estoppel questions arising from commercial practice were also involved but are omitted in this note.