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The Abrogation of Ultra Vires Doctrine of Company Law by the English Courts

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Abstract

The company has a limited legal capacity for the performance of any transaction and an attempt to perform any act beyond its legal capacity is ultra vires. The paper discourses the development of ultra vires doctrine in English company law. With this purpose, this piece unearths the canon of English courts judgments to pinpoint how and why the doctrine has been abrogated with time. The article demonstrates how the abrogation and modification of the objects clause have ended the doctrine of ultra vires in company law.

Keywords: Ultra vires • Company • Object clause • Ejusdem generis rule of construction • Substratum rule • Constructive notice rule

Introduction

Ultra Vires doctrine refers to the performance of any transaction beyond the authority or power. When a corporate body performs any transaction or acts beyond its power prescribed in the object clause then such act or transaction is called ultra vires. This piece endeavors to describe the ultra vires doctrine and its scope and development with time and also inspects the emergence of ultra vires doctrine and meticulously analyses the English courts' judgments. The article scrutinizes the English courts' jurisprudence to highlight how and why the ultra vires doctrine of the company had been abrogated by the courts over time. The article discusses how commercialization had affected the doctrine in the late twentieth century and how the English courts played a vital role in the demise of the ultra vires doctrine by a series of inconsistent and confusing decisions. Furthermore, this paper also investigates how the object clause of the company has been modified that led to the abolition of the doctrine. To this end, the piece pinpoints the purpose of the abrogation of the ultra vires doctrine. The paper also inspects how the Companies Act 2006 abolished the ultra vires doctrine by eradicating the objects clause from the memorandum of the company.

The development of ultra vires doctrine in company law

The ultra vires is defined as anything that is "beyond the power." However, in company law, it gives multiple connotations according to the circumstances. The act of a company is considered ultra vires to the memorandum of association or article of association or it can also be ultra vires the scope of power of the company's officials. These distinctions depend upon the nature and scope of the ultra vires action. The action of the company ultra vires to the memorandum will be entirely void and there is no option for the ratification of it. It will not be ratified even if the shareholders of the company tried to or consented to do so. However, the action that is ultra vires to the article of association and beyond the power of the company's official can be ratified by the corporation. To this end, there is a need to mention the landmark observation made by Lord Cranworth in *Eastern* Counties Railway v Hawkes [1] Lord stated that:

"It must therefore be now considered as well settled doctrine that a company incorporated by Act of Parliament for a special purpose cannot devote any part of its funds to objects unauthorized by the terms of its incorporation, however desirable such an application appears to be".

To safeguard the creditors' interest, in 1855 an act called the "Limited Liability Act" (hereinafter 1855 Act) was presented by the legislature of England. This Act was the need of the hour [2]. The 1855 Act deliberated that the funds of the creditors and the shareholders must be utilised for a specific purpose. This ground was authenticated by another Act of 1856 called the "Joint Stock Companies Act" (hereinafter 1856 Act) as well. The 1856 Act was well documented hence; it has indicated that there must be the existence of an object clause in the company's memorandum. The purpose and the basic aim of such a clause was the elucidation of the company's contractual capacity [3]. There was a limitation in the 1856 Act that it remained unsuccessful to describe any way for alteration of the object clause. However, the 1856 Act lacked to designate the status of the object clause along with it, several other ambiguities regarding the company's contractual capacity were also not defined in the 1856 Act as one of such ambiguities was that the 1856 Act had not defined the effect of that clause on the contractual capacity of the corporation.

After that in 1862, the Companies Act (hereinafter 1862 Act) was introduced that resolved the problem regarding alteration. The 1862 Act provided exceptions related to alteration as well. The 1862 Act states: "no alterations shall be made by any company in the conditions contained in the memorandum of association." However, the position was not settled till the year 1875. 1875 was the time of celebration of Ashbury Railway Carriage and Iron Co. Ltd v Riche [4] where the company as a general contractor was manufacturing the railway carriage and other vehicles. The company contracted to finance the construction of a railway track. The contract was challenged. In Ashbury, the court decided that any contract whose status was ultra vires to the object of the company would be considered void. Hence, the challenged contract was void because it was ultra vires to the object of the company. Lord Cairns stated that the object of the company was the guiding principle that determined the actions of the company. The company could not go beyond its object. The object was a base on which the foundation of the company was placed. Furthermore, it was established that the company had no power to make alterations to the terms and conditions defined and described in its memorandum of associations. Moreover, it was stated as:

"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 are given to the corporation, and it states, if it is necessary to state, negatively, that nothing shall be done beyond that ambit, and that no

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attempt shall be made to use the corporate life for any other purpose than, that which is so specified."

The decision of Ashbury became a landmark and well celebrated. In every case, it had been followed instinctively. If the company failed to comply with its objective clause, in such case the shareholder becomes competent to file a petition in which he could plea for the winding up of the company on merits [5].

Abrogation of ultra vires by the courts

This segment of the article critically scrutinises how the ultra vires doctrine has been abrogated by English courts over time. Moreover, it also inspects how the object clause has been modified and led to the abolition of the doctrine.

The ashbury case

The 1862 Act was called a commendable job. After the introduction of the 1862 Act, the English courts started to evolve and seek clarity on the nature and scope of the object clause [6]. He perusal of Ashbury evinces a different interpretation of the 1862 Act that the company was given all powers that were conferred on an individual. A company could enjoy such power until these powers had specifically and expressly been removed. It was merely an interpretation to describe the intent of the legislature while constituting the 1862 Act. Another interpretation of the 1862 Act could be that if in the objects clause of the company, the power was not given to the company either expressly or impliedly then the company could not entertain such powers. Such power would be restricted for the company. This second interpretation was considered and upheld by the court in *Ashbury.* The court had made a ground that this second interpretation was better in the interests of the creditors as well as preserved the interests of the creditors. It was believed by the court that making amendments or alterations in the objects clause of the company could be harmful to the company because it would expose the business of the company. It could cause the default in the creditors' agreements as creditors used to enter into contracts according to their knowledge of the business activities of the company.

It can be observed that the court had limited the scope of altering the objects clause of the company. The court had restricted the capacity of the company to change or modify its object clause in the circumstances in which the company was expressly or impliedly authorized. This restriction could lessen the risk for the creditors and the company's investors correspondingly that depended on the objects clauses to estimate or measure the risk attached to any kind of potential investment. The courts in Ashbury considered the contract ultra vires. The courts in *Ashbury* described that the contract based on ultra vires was an abuse of the capacity of a company. The charter companies and the registered companies should be prevented from such abuse. A ground of public interest to save the shareholders and creditors was also advanced by the court in Ashbury [7].

Effects of Ashbury's decision

An injunction as relief was available to the shareholders in the case when the alteration of objects clause was entitled to ultra vires. This effect was the result of the Ashbury's decision. The remedy of injunction was unavailable for the unsecured creditors however; the secured creditors could enjoy this remedy. Cross v Imperial Continental Gas Association can be cited in this regard [8]. The ultra vires transaction, action, or business could be set aside on the demand of the shareholder. The question was whether a third party could invoke the principle of ultra vires against a business. Bell Houses Ltd v City Wall Properties Ltd [9] affirmed that a third party had the right to invoke the ultra vires principle against a transaction. Shareholders could demand the winding up of the corporation, in the case when the main objects of the company had failed [10]. Lawrence v West Somerset Mineral Railway Co. described winding up could not be pursued by the creditor [11]. The unsecured creditor was not legally protected. The reason behind this was that there was a lack of legal knowledge as well as due to lack of funds; the legal advice was not accessible to construe the objects clause.

Substratum and ejusdem generis rule of construction

The exemplary objects that were given in the subsequent Companies Acts were basically devised by the drafters of corporate objects. Consequently, these were called 'inclusive list syndrome.' Hence, it was a plethora of objects and the power that was generated by the intellect or imagination of advisers. However, in response to inclusive list syndrome, a rule employed by the courts was the "Ejusdem *Generis* rule of construction." In the views of the court, this principle was capable of restricting the formulation of the object clause. Therefore, it was indispensable that the object was to be construed in the respect of the main corporate object of the company which was called a "Substratum Rule" instead of being given their factual literal meaning. Similarly, it could be seen in *Ashbury*, in the case when the objects permitted the corporation to work as "general contractors," in line with the principle of the Ejusdem Generis, the main object of business of the company was mechanical engineering.

Cotman v Brougham [12] highly criticised the principle business objects approach. The court called this principle a "lever for confusion." The court in Re Haven Gold Mining Company [13] tried to contest the syndrome by demanding that the memorandum should necessarily have the main object. The court further stated that the other entire objects should be based on this main object enshrined in the memorandum. This approach rested well with Ashbury's substratum rule. However, Attorney-General v Great Eastern Company redundant these approaches. In Attorney-General, the court stated that the principle of the ultra vires must *". reasonably understood and applied* and that whatever may fairly be regarded as incidental to, or consequential upon, these things, which the legislature has authorised, ought not to be held, by judicial construction to be ultra vires" [14].

Abrogation of substratum rule

The risk to subscribers would be narrower if the object clause would be made narrower. In this way, the subscribers would definitely carry over the security of those who transact or manage the commercial businesses with the corporation since that endorsed activities of the business. Cotman v Brougham [15] was the case that abrogated the substratum rule. Cotman defined the object clause. In Cotman, it was stated by the court that the object clause had a great significance as it permitted "multi-clauses to be considered as the independent clause, not ancillary to the main clause." The court stated that there was no requirement of applying the substratum rule or the Ejusdem Generis principle of construction when the registrar of the company had approved the memorandum. Such approval showed that all the legal requirements regarding the corporation had been fulfilled as well as all the requirements related to the registration had also been fulfilled. Although the objects inscribed in the memorandum were really confusing, this fact was neglected by the court. The decision was based on the only reason that the registrar had approved the memorandum. Hence, the court held that the validity of such a memorandum could never be challenged in any court of law. Due to this the *Cotman* clause was invoked that made the objects ancillary and independent of each other and become predominant in a bid to evade the two methods engaged by the courts.

The substratum rule was summarised by the court as: [16] "the question whether or not a company can be wound up for failure of substratum is a question of equity between a company and its shareholders. The question whether or not a transaction is ultra vires is a question of law between the company and third party." The abrogation of the substratum rule for third parties was gesticulated by the court in Cotman. However, the substratum rule could be invoked in the case when the winding up of a company by the court would be pursued by the shareholder. Re German Date Coffee can be cited in this regard [17]. The court in Re Kitson [18] held that it was probably for the substratum of the company to have more than one principal object. However, it had abrogated the ultra vires by enhancing the contractual capacity of a corporation.

The abrogation constructive notice rule

In the light of the constructive notice, the third party while contracting with a corporation was deemed to have constructive information about the company's objects clause. Royal British Bank v Turquand [19,20] had moderated the scope of the constructive notice rule. The court held that the contracting third party should not know all the internal regulations of the company. Whether or not

such regulations had been fulfilled. This "indoor management rule" presumes that all the power and the authority should be given to the company's directors by the boards to act more than their specified authority. Howard v Patent Ivory Manufacturing Co. established that "a third party cannot rely on this exception where they had actual knowledge that the transaction was outside the authority given by the company's constitution."

The constructive notice rule was another hurdle for the companies that were interested in trying to generate extra revenue. Due to fear of ultra vires doctrine, the third parties would not like to enter into any kind of contract or agreement. Hence, such an issue caused the impracticability of ultra vires and constructive notice rule. This reason would be one of the grounds for the abrogation of ultra vires.

The misinterpretation of Re David Payne [21] was clarified in Charterbridge Corporation v Lloyds Bank. In Charterbridge, a company Castleford agreed to mortgage with a bank over "freehold properties." Such property was sold to Charterbridge. While contracting with Castleford, Charterbridge had no constructive notice that the bank had the legal title of the property. Charterbridge challenged that the mortgage was ultra vires on the ground that mortgage transaction was not held to benefit Castleford but such transaction was benefiting other corporations within the group. The court after the perusal of the objects clause of the company held that the transaction was not ultra vires because the objects clause permitted the company to enter into mortgage transactions with the bank. Moreover, the objects clause empowered the company to enter into mortgage transactions with the banks. The court rejected the company's benefit test while determining whether a transaction was ultra vires or not.

Power of director and capacity of company

AG v The Great Eastern Railway Company [22,23] encouraged the abrogation of the ultra vires doctrine. The court had allowed that the company could perform any other businesses that were particularly not mentioned in the principle objects clause of the company. The court stated that such new business must be practically incidental to the principal objects. Moreover, the court permitted the company to employ any power that should be reasonably incidental to the main objects of the company. The court stated that such employed powers should not necessarily be mentioned expressly in the object clause of the company.

AG case verdict was not adopted in *Re Davies* [24]. The court in *Re Davies* held that affirmed the authentication of the doctrine of ultra vires. The court stated that the ultra vires doctrine would be infringed, in the case when a company entered into a contract or performed any action that would not be mentioned or beyond the scope of the objects clause of the company. Later in Re David Payne, it was held that the principle of ultra vires had no concern with how a business or transaction had occurred or how the power of the company had been exercised. The court stated that the doctrine of ultra vires examined whether or not the transaction, contract, or action performed by the court was resting well with the objects of the company. Whether or not the company had the capacity or the power to perform such a function [25] the court again tried to weaken the extent and scope of the objects clause and doctrine of the ultra vires.

The company law was basically evolving during the twentieth century; the court had drawn a line between the powers of the director and the objects of the company to highlight the distinction between them. Re David Payne [26] elucidated the power of the director. The court while describing the position of the power of the director deemed it as "borrowing" as falling within the ambit of the company's capacity however, the transaction would be voidable where such power was exercised, in the case when the third party would have constructive knowledge that the proposition on which they were entering into a contract did not sit well with the memorandum of the company. Accordingly, when such detail would not be in the notice and knowledge of the third party then such transaction would be valid. In the circumstances where the third party had the knowledge and had actual notice, "unless the transaction was ratified," it would not be enforceable. This was summarized by Buckley J as "A corporation cannot do anything except for the purposes of its business borrowing or anything else; everything else is beyond its power and ultra vires [27].

The aforementioned clarification related to the corporate power was never interpreted in its true sense whenever it had been related to the doctrine of ultra vires. In circumstances, if the company utilised its express or implied powers validated by its objects clause, not for the purpose of performing any transaction then utilisation of such power would also be ultra vires. This interpretation confused the concept of the capacity of a company with the legal utilisation of the power of a corporate body. This misperception surfaced in the case Re Lee Behrens and Co Ltd [28]. In this case, the board of directors had given some amount as a pension to the widow of the former company's managing director. Eve J stated that this transaction of the company was not beyond the power of the company and the company had an implied power to grant the pension to the widow. However, the court had recognized that granting a pension to the widow of a long-standing director was an ultra vires transaction. Consequently, a transaction could be void due to infringement of power of the director but it could never ultra vires as regard to the contractual capacity of a company.

It was stated in Rolled Steel v British Steel Corporation [29] that Re David Payne was describing the ultra vires of the directors rather than the ultra vires *of* the company's capacity. While the remarks made by Buckley J were totally irrelevant to the Re David Payne verdict [30] even it was not an accurate interpretation. Eve J stated that the transaction and action of the company were ultra vires on the ground that it was not bona fide and such transaction was not performed to promote the company. Furthermore, it was stated that the contractual capacity of the company must have no concern with the determination of the company's promotion of good faith. However, it can be observed that the judge had confused the issue of abuse of power of the director with the contractual capacity of the company.

Charterbridge Corporation [31] played a role in setting the confusion but making the distinction between two matters; where a transaction will have "ultra vires natures" and where a transaction will be called an "abuse of power." This correction and clarification had been followed in various cases [32]. Charterbridge Corporation [33] verdict was somehow disregarded on various rare occasions. As it can be observed in International Sales Ltd. v Marcus [33] the court relied on the remarks of Eve J summarised in Re Lee Behrens [35] and held that if the power to perform any transaction was not authorised by memorandum then it would be ultra vires either it was express or implied. This issue was settled in landmark Rolled Steel Products Ltd. v British Steel Corporation [36]. In this case, the court overruled the decision and interpretation of International Sales Ltd. v Marcus [37] and held that the doctrine of ultra vires had no applicability to the matter of the powers of the directors of a company as well as it had no applicability to benefit of a company when determining the capacity of a company to contract. The verdict of the Rolled Steel Products had brought more clarity to a confusing issue.

It is submitted that the intervention of the court needed more and more clarity over the concept, extent, scope, objective, and limitations of the doctrine of ultra vires. However, the larger extent of the ultra vires doctrine had been abrogated by the courts more specifically due to such abrogation third parties become incompetent to invoking the ultra vires doctrine when they found the transaction is beyond the scope of the objects clause. Conversely, the doctrine remained firmly settled with regard to the capacity of the company to perform any action beyond its objects.

Purpose of abrogation of ultra vires doctrine

The company had been empowered to carry on any other business of any kind that could be profitable for the company in the views of the board of directors. Furthermore, such new business could be ancillary to the company's main and common business. Bell Houses Ltd v City Wall Properties Ltd can be cited in this regard. Before 1960, the court used to investigate and examine whether the action of the company was ultra vires or not. After 1960, the courts of law permitted the directors of the company to be competent authority to decide whether or not the act of the company was ultra vires. The responsibility of the company was undoubtedly owned by its director and it was the duty of a company to preserve the shareholders' interests. It could be concluded that such responsibility was given to the director to increase the profitability of the company. And the basic intention was to save the noble and huge enterprise

from an outdated legal principle hence, in this way, for another time the doctrine of ultra vires was abrogated by the court. To this end, the practical significance of the ultra vires had been lost.

The twentieth century was an era of the emergence of corporations and the commercialization of business was grooming and evolving year after year. Due to this, there was a high wave of incorporation and the corporations were gradually "feeding off debt finance in the form of debentures." To this end, the race of broadening the objects of the companies had begun to satisfy the markups of the emerging businesses. In this era of competition, there was no place for the well-established doctrine of ultra vires and hence, it was considered an impediment to commercial enterprise.

Ultra vires doctrine and companies act 2006

The Companies Act 2006 (hereinafter 2006 Act) is a fundamental document. However, several significant changes in the doctrine of ultra vires have been made in the 2006 Act. Section 39 says that none of the companies' actions will be interrogated regardless of anything in the constitution of such a company. It is submitted that the 2006 Act promotes unrestricted objects and in any case, where the object is restricted, the power of the directors is also restricted accordingly. Section 171 provides the basic and particular directors' duties that should rest well with the constitution of the company. Hence, section 171 does not restrict the duties of directors in correspondence with the restricted object.

In Practice Direction Insolvency Proceedings the court held that Section 39 is not dependent on any other section more specifically it is not dependent on section 31 which describes the statements of the object of the company. The court stated that section 31 elucidates that the object clause of a company is not restricted. The restriction on the object clause can only be imposed by the article of association. If section 39 is read with section 31 it is noticed that there is no restriction or limitation to the object clause or the capacity of the company. A company is a body that is independent and can easily perform its commercial transactions with anyone. As it is established that action on the behalf of which the corporation is engaged cannot be interrogated, hence, it is a clear abrogation of external effects of the doctrine of ultra vires.

It is the choice of the company whether or not it restricts the extent of its object in light of section 31. In Ceredigion Recycling v Clifford Pope the court stated that Section 39 describes that the act of the company will not be interrogated even though the object clause of the company particularly restricted the extent of the capacity of the company as set out in the constitution of the company or article of association. To this end, the effect of the principle of ultra vires rests unharmed and intact. The company's directors will be answerable to the shareholders for letting the company be engaged with the restricted acts or objects. In case when the director of the company is engaged in the restricted acts, he will be answerable to the shareholders and this will be an infringement of the statutory duty of the director's powers.

Conclusion

Ashbury Case developed the Ultra Vires doctrine in the English Company law. This doctrine was established to protect the third parties who were entering into any contract or performing any transaction with a company. Ultra Vires doctrine discouraged nefarious actions of promoters that defrauded the third parties. Hence, the English courts imposed the object requirements in the company's memorandum to lessen the risk on the shareholders as well as creditors. In the early twentieth century when the company law was evolving, companies were making very less contributions to the economy. However, in the later twentieth century, the more and more commercialization of companies and the aim of becoming the capitalistic pillar have ended the common law doctrine of ultra vires. Undoubtedly, the English courts had developed and evolved the Ultra Vires doctrine and unfortunately, the English courts had played an important role in the demise of the doctrine by their inconsistent, contradictory, vague, confusing, and subjective judgments. These judgments were followed in a series of new cases and led to innumerable exceptions and became the cause of abrogation of the doctrine. Moreover, the 2006 Act completely abrogated the ultra vires doctrine by eliminating the objects clause from the memorandum of the company.

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