PUBLICATION OF THE COMPANY NAME

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The title of this article is the heading of s. 116 of the Companies Act 1955 and it is here proposed to examine the practice as to publication of the corporate name.

Section 116, ss. 1 provides:

Every company

(a) Shall paint or affix, and keep painted or affixed its name on the outside of every office or place in which its business is carried on, in a conspicuous position, in letters easily legible:

(b) Shall have its name engraven or otherwise permanently marked in legible characters on its seal:

(c) Shall have its name mentioned in legible characters in all business letters of the company and in all notices and other official publications of the company and in all bills of exchange, promissory notes, endorsements, cheques, and orders for money or goods purporting to be signed by or on behalf of the company, and in all bills of parcels, invoices, receipts and letters of credit of the company:

and ss. 3 ,4 and 5 go on to provide for penalties against both the company and its directors for non-compliance.

Paragraphs (a) and (b) are quite straightforward. The extent and mode of observance of paragraph (a) however would suggest either that companies are not aware of their obligations or that observance is intended to be nominal or not taken seriously at all.

Practice today varies from no indication that the trader is limited to full and prominent use of the corporate name. In between those extremes is found the most common or general practice. It is commonplace today to see "X" emblazoned on the front of a company's premises whilst "This is the registered office of X Ltd" is discreetly displayed on the narrow frame above the main door. The size of the lettering and distinctiveness varies from enormous to insignificant, suggesting that the word "limited" is an offensive word which good taste decrees must be handled most discreetly. In the plain words of the section the name must be in a "conspicuous position"—unless the lettering is bold anything above head height is hardly conspicuous.

A more subtle deviation lies in the comparative size of the words comprising the corporate name. Whilst "Limited" may quite legitimately be abbreviated to "Ltd" there is no indication one way or the other in the Act as to what size this most important part of the name must be other than that the letters must be "easily legible". The current practice of having "Limited" in small to insignificant letters (even if it complies with the Act) appears to frustrate the purpose of the Act.

With regard to paragraph (c) difficulty lies in the interpretation of "official publications"; more precisely whether or not advertisements are included within the definition of "official publications". Prior to the 1955 Act the word "advertisements" appeared between "notices"

and "and other official publications". "Advertisements" was dropped in 1955 in line with the amendment made to the identical English provisions in 1947. The dropping of this word is open to two constructions—that the corporate name is not now required in advertisements or that "official publications" sufficiently includes advertisements.

The first interpretation is that adopted in 'Halsbury'—see Halsbury's *Statutes of England*, 2nd ed. at p.543—

> as a result of the amendment effected by s.57 of the 1947 Act and incorporated in this section, the name of the company need no longer be mentioned in advertisements . . . .

Inferential support for this view might be found in s. 23 of the Motor Vehicle Dealers Act 1958. This requires prominence to be given to the fact that a dealer is a licensed motor vehicle dealer "on all notices, *advertisements*, and other publications issued by the licensee". Anticipating later argument this instance would support the view that "advertisements" was deliberately dropped and the scrupulous compliance by motor vehicle dealers provides an interesting comparison. A note of doubt has however crept into the 1965 Cumulative Supplement to Halsbury's *Laws of England* when *General Radio Company* v. *General Radio Company (Westminster) Limited*[1] is cited for the proposition that an advertisement may be an "official publication". This second interpretation, it is submitted is more correct.

In the *General Radio Company* case (supra) an injunction was granted preventing the defendant passing itself off as the plaintiff, an American firm of high repute in its field. The passing off complained of arose out of the issue of catalogues and an advertisement in a paper headed "Important Announcements". In both these activities the defendants name appeared as General Radio Company; i.e. it dropped "Westminster Limited". Whilst emphasizing that the action was not an action to enforce the Companies Act Roxburgh J. commented that he had had no doubt that it was unlawful for the defendant to use the title but he now saw that the point was capable of argument. The following passages from pp. 484-5 merit quoting in full.

> It is curious that there is no authority on it at all, and that the writer of the only text book who seems to have even noticed the point takes a different view to the view which I am going to take which will be the law unless and until some higher Court decides otherwise. . . . .
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> Mr Phillimore, (Counsel for the defendant) supported, I think, by the Editor of 'Halsbury', has argued that the elimination of the word "advertisement" means that advertisement was never to be regarded for any of the purposes of this section as an official publication of the company. I do not think that that contention is well founded. It certainly would be strange if the Legislature wished to make it plain that an advertisement was in no circumstances to be treated as an official publication of the company, that it did not say so, seeing that hitherto it had been so regarded by them. Though curious things do happen in legislation, a more recondite way of effecting that change I find it difficult to conceive: . . . .
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> I do not see any reason for thinking that "advertisement" may not be just as much an official publication today as it certainly was before 1947. I do not know why it should not be an official publication. I really wonder what official publications are under consideration if an advertisement is in all circumstances to be excluded from that category. I accept the ingenious argument of Mr Shelley (Counsel for the Plaintiff) who says: 'Well there might be advertisements which were not capable of being described as official publications at all, and the Legislature may have grasped that fact in 1947, and that may be the reason why they took out the word "advertisement" because they clearly did not mean to impose the obligation upon anything which, while it might be an advertisement could not be described as an official publication." That seems to me to be quite clear.

By way of illustration Roxburgh J. suggested that a distinctive tea-pot in a window was an advertisement and not an official publication but if the price was put in the window it could well be difficult to decide whether or not this was now an official publication. In the circumstances of the case he reached the conclusion that the advertisement with which he was concerned was an official publication and unlawful unless the full name appeared .

As the above quotations indicate, whilst Roxburgh J. agreed that some advertisements were not official publications both he and counsel had difficulty in suggesting where the line should be drawn. Both "teapot" illustrations would, on the basis of *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists (Southern) Ltd*[2] and the famous "flick-knife case" *Fisher* v. *Bell*[3] amount in contractual terminology to mere "invitations to treat". Although the latter decision has been subjected to criticism, Lord Parker C.J. succinctly pointed out the distinction between a contractual offer and an invitation to treat, at p.399:

> It is clear that, according to the ordinary law of contract, the display of an article with a price on it in a shop window is merely an invitation to treat. It is in no sense an offer for sale, the acceptance of which constitutes a contract.

It is suggested that Roxburgh J's tentative view on the two "teapot" situations cannot be supported on the basis of any distinction imported from the realms of contract law, since both are invitations to treat. Further reference to contract law is not of much assistance. Generally an advertisement is not regarded as having any contractual consequences, i.e. it is not an offer which can be made into a binding contract. As pointed out in Cheshire and Fifoot's Law of Contract, 2nd N.Z. ed. (at p.23) if an advertisment was always an offer a merchant would need unlimited stocks since anyone could make a contract by his acceptance. Authority for this can be found in *Grainger & Son* v. *Gough*[4]. A circular or catalogue is a mere attempt to induce offers, not an offer itself. By way of contrast however in *Carlill* v. *Carbolic Smoke Ball Co.* [5] the Court of Appeal held that the terms of an advertisement were sufficient to amount to an offer.

These cases deal rather with representations as to goods and formation of the contract—this article is concerned with the advertisor rather than his goods. The cases do suggest, however, that any attempt to divide advertisements into official and non-official documents would be extremely difficult and the fields of company and contract law begin to overlap. In the ordinary course of events a would-be purchaser follows up an advertisement by calling at the premises of the advertisor. Here the advertisement has acted as an invitation and so long as the advertisor is complying with ss.1 (a) of s.116 at least "Ltd", in letters no matter how small, will appear over the door. Even if the purchaser is blinded by flashing neon signs as he steps towards the door he no doubt has constructive notice. Where however the purchaser mails his order in response to an advertisement which does not disclose that he is dealing with a company, there could well be no notice of this fact until after the contract is formed, i.e. until the goods are received, when compliance with ss.1 (c) require the corporate name on the invoice and receipt. A similar position obtains in the case of telephone orders to service companies. The modern company telephone receptionist, lacking the affinity of the legal office receptionist for the recitation of a breathtaking collection of names, will probably drop "Limited".

This question of notice will be dealt with shortly. To reach some conclusion on what the subsection covers it is submitted that the name that one sees on the side of a truck or van is a mere advertisement but the name in an advertisement in a catalogue, and perhaps in a magazine or newspaper may form part of an official publication. A final statement from Roxburgh J. in the *General Radio* case (supra) at p.486 is taken as a fair comment and summing up of the situation.

> I should now like to observe that, if it is possible for limited companies to insert advertisements of the character which I am now construing not only in a name which is not their corporate name but in a name which does not comprise the word "Limited" it would appear that the whole purpose of the last legislation with regard to the use of the word "Limited" is utterly stultified.

On the thesis that there is widespread non-compliance with the Act it remains to consider what effects, if any, flow from non-compliance.

By ss. 3, 4 and 5 both the company and its directors may be liable to £50 fines .Directors are also personally liable for faulty endorsements. This is quite clearly set out and does not require any discusion.

Apart from the clear liabilities under the Act it is suggested that non-compliance could affect the company more generally in its everyday business. By everyday business it is not intended to suggest that a purchaser, who does not know or greatly care from whom he buys, is affected to any extent by not having notice that the company is limited and in turn he would have no reason to claim against the company. Indeed today with the growth of large companies and take-overs one may have little choice as to whom one deals with. It should, however, be remembered that an advertisement is equally read by people who deal with companies other than in the capacity of mere purchasers. Palmer's *Company Law* (N.Z. ed.) at p.259 poses the question, "Why this solicitude on the part of the Legislature as to publication of a company's name?" and responds with the answer "that the Legislature, whilst allowing limited liability, desired by this means to make the company itself continually bring to the notice of those who dealt or might deal with it the fact that it is limited". In other words a company purchases limited liability at the price of a continual obligation to publish the fact that it is limited. The converse of this would suggest that failure to publish means a company forfeits its protection of "limited liability" or more particularly that the directors having failed to see that the company carried out its obligations are personally liable. Whilst an individual is unlikely to be affected by the presence or absence of 'limited' the constant dropping of "limited" may be like the proverbial dripping that wears away a stone—that stone being the wariness of a businessman dealing with companies and individuals. Personal liability of directors is not an entirely novel conception but the suggested extension of it here where the failure may initially appear small may be a little shattering. The full implications of it would need greater examination which is outside the scope of the present article.

It is obvious that notice is of the essence of the foregoing discussion Following this question of notice further it should be remembered that the basis of registration of company documents is that all people might check on the company as it affects them. The doctrine of constructive notice further ensures that no person can take advantage of his own

failure to check. Before notice or constructive notice can be visited on any person however it is necessary that he be aware that he is dealing with a company. Following the previous argument it is suggested doctrines such as *ultra vires* could not protect companies who fail to put those with whom they deal on notice. Although this doctrine has both been criticised and fallen into decline as a result of extremely wide drafting of objects clauses, bearing in mind the growth of takeovers (and thus subsidiaries) it is not perhaps impossible that there will be a trend toward companies intended to further one object within an organization and not requiring wide objects.

A distinction is made within the *ultra vires* doctrine as to contracts *ultra vires* the company and those merely *ultra vires* the directors, the latter being capable of ratification. Various textbooks follow up this distinction by pointing out that in the case of the former the directors may be liable on their warrant of authority to contract for the company. This leads to the final suggestion as to effects and this depends on the fact that a contract can only be enforced by and against a company when the contract is duly completed in the corporate name. This can be a matter of no small moment when, for example, a company goes into liquidation for here a liquidator will repudiate debts not in the company name and the creditor will find himself prejudiced. If it is misleading advertising that has prejudiced the creditor it is suggested that liability should be visited on both the company and its directors. Directors could no doubt be pursued on the basis of a warrant of authority—in the case of the company itself the action would depend on a form of estoppel which prevented the company from denying that it was party to a contract.

It remains only to reach some conclusion. It has been suggested that there is at present clear and absolute failure to comply with the Act in some cases and in other cases there may be failure. The importance of the failures of course depends on the effects and these have only been lightly touched on. Professor Northey in his *Introduction to Company Law in New Zealand*, 4th ed. at p.7 comments:

> Limited companies, because the liability of members is limited by the memorandum, are not as good a risk from the point of view of creditors as unlimited companies, but it is curious to find that many people imagine that the word "Limited" as part of the name of a company is some sort of guarantee of its creditworthiness.

In the light of the suggested trend away from the word "Limited" we may have reached the situation where companies are so accepted that the warning light proposed by the Legislature is no longer necessary. So long as it is necessary however the dangers of non-compliance must be faced.

1 [1957] R.P.C. 471.
2 [1952] 2 Q.B. 795.
3 [1961] 1Q.B. 394.
4 [1896] A.C. 325
5 [1893] 1Q.B. 256.