

Gower's Principles of Modern Company Law

Fourth Edition

L. C. B. Gower

Stevens

GOWER'S
PRINCIPLES OF
MODERN COMPANY LAW

FOURTH EDITION

BY

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PREFACE

THIS new edition has been prepared under difficulties not wholly of our own making. We originally embarked upon it shortly after the 1973 Bill failed to reach the statute book and got down to it in earnest when the 1976 Act did. In the light of recent history we were not diverted from our task by the promises of comprehensive new legislation or by the proposals for piecemeal reform in the stream of Green and White Papers and consultative documents which began to flow from the Department of Trade. Our aim was to ensure that there was a new edition before the beginning of the academic year 1979-80 and the greater part of a revised text was set up in galley proof in good time to achieve this. But then it really did look as if important (though still not comprehensive) legislation was imminent. A draft Companies Bill was published in July 1978 and introduced in the Commons in a slightly amended form early in the following Session. It received a Second Reading and was generally expected to complete all stages in both Houses by the summer of 1979. In these circumstances we allowed ourselves to be convinced by the argument of unripe time and decided to delay final revisions until after it was enacted. In that, of course we were wrong, for at the end of March the Bill suffered the same fate as that of 1973. Too late we had to revert to our original plan. Although the new edition cannot now appear before the beginning of the next academic year there is every hope that, thanks to the remarkable efforts of the publishers and printers, it will be on sale so shortly thereafter as not seriously to inconvenience those students and teachers who wish to use it that session.

This, however, has meant that the edition is not all that we could have wished. The revision of the galleys was undertaken in less than two months and of the page proofs in three weeks—and traces of the midnight oil will probably be apparent. We have thought it essential to deal not only with the law as it now is but as it is likely to be in a year or so. As a regrettable result, the book has again grown in length. For this and for its imperfections I can only crave indulgence and promise that should I live long enough once again to see English company law in a reasonably steady state I will try to ensure that a future edition is both shorter and better.

In forecasting what the law will soon be we assumed that the legislation promised in the Queen's Speech would bear a close resemblance to the 1978 Bill, an assumption which proved to be justified as regards those

parts of it which implement the EEC Second Directive. Which of the other clauses will eventually be salvaged it is still too early to say. So soon as the Bill now before Parliament is enacted, we propose to publish a short supplement which will substitute references to its sections and indicate those clauses of the 1978 Bill which have not yet been enacted, but which, if promises are fulfilled, will be incorporated in a revised form in a second Bill in 1980-81.

This edition makes substantial changes both of arrangement (notably in Part II) and of substance. Among these are the elevation of what was formerly an appendix to Chapter 3 to a separate Chapter 4, "The Future of Company Law." In this, what traditional company lawyers may consider disproportionate space is devoted to the EEC directives and draft directives and to the debates on industrial democracy and worker directors. In our view the time has passed when company lawyers can regard "common market law" as an alien discipline; nor do we believe that the pressure for industrial democracy will go away, however much some may wish it would. The discussion of lifting the corporate veil now follows immediately upon that on the consequences of incorporation—most teachers of company law, I think, prefer to deal with the two topics together. *Ultra vires* and liabilities of the company for the acts of its officers have also been treated together in the re-written Chapters 8 and 9—a change rendered essential by section 9 of the European Communities Act 1972. Chapter 10, on raising and maintaining capital, has been largely re-written in the light of the rules in the EEC Second Directive. The treatment of insider dealing has been expanded and moved to Chapter 25. The copious references in this Chapter to the relevant clauses of the 1978 Bill and, in Chapter 24, to the Bill's proposed code of directors' duties will not, I hope, prove to be otiose; the new Government's 1980-81 Bill can hardly ignore these topics or, in the light of all the discussion that has taken place over so many years, produce completely different solutions.

Although a heavy burden of work has been undertaken by all three of my colleagues, and especially by Professor Easson who nobly continued with the initial revision despite his translation to a Chair in Canada, the views expressed and the way they are expressed are my sole responsibility. Each of my co-editors would dissent from some of these views and each of them has suffered, and borne with commendable patience and good humour, my pruning and mangling of his prose. My excuse is not that I believe myself to be more likely to be right or regard my literary style as superior to theirs but simply that someone's views have to prevail and that, if the book is to retain what was said to be one of its qualities—readability—it must present a consistent style.

To my fellow editors I am deeply indebted. And each of us is in turn indebted to many others too numerous to mention. I personally must,

however, extend particular thanks to those who have wrestled with manuscript in my illegible handwriting—and especially to Miss Sheila Evans and Mrs. Margaret Williams—and to Miss Diana Marshallsay who has always been able and willing to produce at the drop of a hat from the University of Southampton's unrivalled collection of Parliamentary Papers, any publication, ancient or modern, that I have sought, however vague or inaccurate my recollection of its description or provenance.

The text is revised to March 31 of this year. References to the 1978 Companies Bill are to the Bill as introduced and not to the Draft in Cmnd.7291 or as it was amended during the uncompleted Committee stage. References to "the Act" are to the Companies Act 1948, unless the context otherwise requires.

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July 1979

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PREFACE TO THE FIRST EDITION

COMPANY LAW, to those who specialise in it, is among the most fascinating of legal subjects. But its fascination is not always readily apparent to general practitioners or to the students of law, economics, and accounting who try to master its intricacies. Indeed, they often regard it as technical and dull. This, perhaps, is because they find difficulty in viewing it in its historical and economic context and in grasping its underlying principles. This book has been written in an attempt to meet their needs. Its aim is to supply essential background material, and to emphasise the principles of common law and equity on which this branch of the law is still based, rather than the statutory provisions which supplement and amend them in detail.

The book is not intended to be an exhaustive treatise on every branch of company law. In particular, no attempt is made to deal fully with the procedure on a winding-up—a subject which requires a volume to itself or a large share of a volume on bankruptcy. It is concerned with the living law of living companies, in sickness and in health. But within these limits I think it is true to say that it discusses most of the important aspects of the subject. While it emphasises principles, it is not intended to be mainly theoretical; on the contrary, an attempt has been made to concentrate on those principles which are still important in practice and to explain their purpose and how they operate. For this reason, and because of the discussion of certain problems which are ignored elsewhere, it is hoped that the book may be found useful by practitioners (lay and legal) as well as by students.

No attempt has been made to deal with systems of company law other than the English. On the other hand, attention is drawn to developments elsewhere (particularly in the U.S.A.) when these have seemed illuminating either by way of contrast or as pointers towards the possible solution of questions as yet unsolved in England. In general the footnotes have not been burdened with detailed references to American authorities as these can be readily found in any of the standard texts or casebooks.

I hope that students will not be repelled by its length, unorthodox arrangement, or price. The length is partly deceptive, for much of Part I and II is background material, not readily available elsewhere, which is essential for a proper understanding of the subject but which, once understood, will not need to be memorised in detail. Moreover, I have tried

throughout to bear in mind that readability is even more important than brevity, which can sometimes be attained at too great a price.

Arrangement has been my greatest problem, and I must crave the reader's indulgence for having failed to solve it. The fact is that no one has yet discovered a method of arranging this subject which is wholly satisfactory. In essentials my attempted solution is to answer the following questions in the order stated: What is a company and how did it attain its present shape? (Part I). What are the consequences of trading as an incorporated company? (Part II). How is a company formed and floated? (Part III). What is the nature of investors' interests in a company? (Part IV). How are investors and creditors protected? (Part V). But sometimes logic has been sacrificed to convenience; thus prospectuses are dealt with wholly in Part III, rather than in Part V. Many will think that it would have been preferable to consider the formation and flotation of companies before discussing the consequences of so doing, thus reversing the order of Parts II and III. But adopting, as I have tried to do, a functional rather than a structural approach, it seemed to me better to indicate why one should want to form a company before discussing how to do so. Those who think otherwise will, I hope, find Part III intelligible if read first; indeed, within the limits indicated by cross-references, every part is intended to be self-contained and self-explanatory.

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