

The
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Pocket Lawyer

STANLEY BERWIN



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Stanley Berwin

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To my darling wife Rosalie

Preface

I have endeavoured to assemble a collection of terms, concepts and phrases, some of which make the law mysterious to the layman and, in defining them, present a readable and practical guide to civil and commercial law. Hopefully the essential compression has not led to distortion. By its very nature the collection cannot be comprehensive, many of its subjects merit – and some have achieved – a book, or even two or more volumes in their own right.

A different system of cross-referencing has been used in *Pocket Lawyer* from that established in *The Economist Pocket Books* to date. To be complete, the cross-referencing would have meant an enormously complex and massive book. I trust readers will find their way around the book by using the references in the individual entries. This is fun to do and possibly more informative than following a disciplined cross-referencing system.

In the use of the words 'he/him' this book relies on the provisions of section 61 of the Law of Property Act 1925 whereby the masculine includes the feminine (and vice versa) unless the context requires otherwise.

The following abbreviations have been used:

The Act	The Companies Act 1985
DTI	Department of Trade and Industry
Secretary of State	The Secretary of State for the Department of Trade and Industry
Registrar	Registrar of Companies
FSA	Financial Services Act
Memorandum	Memorandum of Association
Articles	Articles of Association

This book reflects the law as at August 1986. Except where expressly stated, all references are to English law.

My thanks to those who have helped in the production of this book. There are many of them. In particular, my colleagues at S J Berwin & Co for their research, contributions, comments and forbearance; to my long-suffering secretary Christine Heywood, assisted by Claudia Bent; to Gavin Lightman QC for his comments; to Christopher Hutton-Williams of *The Economist* for the idea, and to Tony Sweeney and Mary Robinson of Basil Blackwell, for their editorship. Any omissions or mistakes are, unfortunately, all my own making.

Whether you are the kind of reader who likes to browse around or read from end to end, I hope very much that you will enjoy the *Pocket Lawyer*.

A

ABUSE OF PROCESS. The improper use of legal proceedings.

ACCEPTANCE CREDIT. A transaction in which a bank agrees to 'accept' bills of exchange of a fixed amount drawn on it, i.e. to pay their face value to whoever presents them at the end of a specified period, usually between 30 and 180 days.

It is normally used to finance the sale of goods, when it takes the form of an irrevocable letter of credit allowing the seller to draw a bill on the accepting bank for the relevant amount to be paid on maturity and production of documents relating to the goods. The seller can discount the bill immediately (sell it for cash at a discount): the obligation of the purchaser of the goods to put the bank in funds arises only on maturity of the bill.

An acceptance credit is not a borrowing in law, and is sometimes used to overcome borrowing restrictions imposed by the Articles. See **NEGOTIABLE INSTRUMENT**.

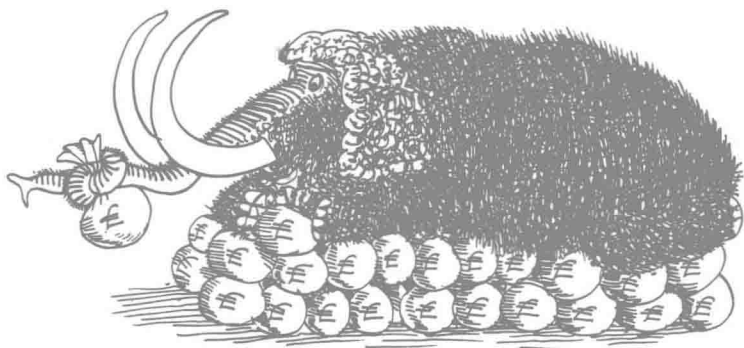
ACCOUNTING PERIODS. Companies are required under the Act to prepare their accounts by reference to 'accounting reference periods', which are normally periods of 12 months. The date is significant because it determines the time of the annual general meeting at which the accounts are presented. A company may shorten its accounting period as much and as often as it likes, but cannot extend it beyond 18 months nor normally, unless it is an overseas company, more than once every five years.

A company must also have an accounting period for the purposes of corporation tax and this cannot exceed 12 months. The accounting period ends with the accounting reference date, which is fixed either by the company, or failing that, by law, as 31 March. Where the company's accounting reference period is longer than 12 months, the profits are apportioned between the financial years (1 April to 31 March) in which it falls.

ACCOUNTING STANDARDS (SSAP). Otherwise known as statements of standard accounting practice. They describe methods of accounting approved by the leading accountancy institutions for all financial accounts. They are not a 'comprehensive code of rigid rules'. They vary from country to country and this has led to the introduction of international accounting standards which seek to achieve harmonization.

ACCOUNTS. A balance sheet and profit and loss account made out to the accounting reference date in the case of a company, and consolidated in the case of a group in accordance with the Act. They must also comply with accounting standards. They are required to show a true and fair view of the company's profit or loss and state of affairs and must be filed with the Registrar. See ACCOUNTING PERIODS.

ACCUMULATIONS. Accretions of interest or other income produced by a particular fund. Until 1800 a person could direct that income should be accumulated for the whole of the perpetuity period; there was nothing to prevent 'compulsory hoarding on a mammoth scale'. As a result limitations were introduced under which a direction to accumulate was valid only if limited to precise periods of time. Any one of six periods can be chosen, the most common being a term of 21 years from the making of a disposition.



ACCUMULATION AND MAINTENANCE TRUST. A trust under which income is accumulated unless used for the maintenance, education or benefit of a beneficiary. There must be at least one beneficiary who will have the right to receive the income or capital at or before the age of 25. Used to save inheritance tax and reduce income tax. A gift to such a trust will be liable to inheritance tax only if made within seven years of the donor's death.

ACTING IN CONCERT. There is no such term in English law. The concept was introduced in the City Code to ensure that a shareholder could not evade his obligations either to make a compulsory bid or to limit his share purchases by acting with others. It therefore treats as a single shareholder persons who actively cooperate through the acquisition by any of them of shares in a company to obtain or consolidate control of that company.

The Code also categorizes persons who are presumed to be acting in concert unless the contrary is established: where now the maxim that a person is innocent until he is proved guilty? These categories include a company with other companies in the same group and their associated companies; a company with its directors, their close relatives and related trusts; and financial advisers with their client and certain discretionary investment accounts.

In a similar vein the Rules Governing Substantial Acquisitions of Shares require two or more persons acting by agreement or understanding to have their own holdings and acquisitions aggregated and treated as held by one person.

The Act treats directors, certain members of their families and trusts as one in relation to prohibitions upon dealing in share options, and the disclosure of shareholdings.

The obligation imposed by the Act to disclose an interest in the voting shares of a public company may arise from an agreement between two or more persons, which includes provision for the acquisition by any one or more of them of interests in that company's shares: the agreement need not necessarily be legally binding. See **DISCLOSURE OF INTEREST IN SHARES.**

ACTION. The pursuit of a right or claim in judicial proceedings.

ADMINISTRATION ORDER. A new procedure instituted by the Insolvency Act 1985 which may salvage a distressed company. The effect of the order is to bar any creditor taking legal proceedings to recover his debt and a secured creditor from enforcing his security without leave of the court. The order may be made by the court where the company is, or is likely to become, insolvent, but there are reasonable prospects of a return to profitability or a more advantageous realization of assets than by winding up. See **ADMINISTRATOR.**

ADMINISTRATIVE LAW. Professor Wade wrote that the primary purpose of administrative law is to keep the powers of government within their legal bounds so as to protect the citizen against their abuse. 'The powerful engines of authority must be prevented from running amok.' It is a body of general principles which govern the exercise of the powers and duties of government and public authorities. Even when a public authority acts without bad faith, it may abuse the power given to it by Parliament or subordinate legislation and the law can provide essential remedies, e.g. judicial review.

ADMINISTRATIVE RECEIVER. See RECEIVER.

ADMINISTRATOR. A person appointed under an administration order by the court, with powers to manage the affairs, business and property of a company, to dismiss and appoint directors and to call meetings of shareholders and creditors. The office was created by the Insolvency Act 1985 which regulates his conduct and functions.

The administrator must protect the company's assets, and submit proposals for the company's future for the approval of creditors. If the proposals are supported he has the task of putting them into effect.

ADMIRALTY. Formerly the High Court of Admiralty, now part of the Queen's Bench Division of the High Court, with jurisdiction relating to ships, cargo and aircraft. See *IN REM*.

ADVANCE CORPORATION TAX ('ACT'). The tax payable by a company when it pays a dividend; the amount is a fraction of the dividend (currently $\frac{29}{100}$), which is permitted to be set off against main-stream corporation tax for an accounting period. ACT is payable 14 days after the quarter in which the dividend is paid. The adroit finance director will ensure that an extra three months' credit is obtained by paying dividends just after, rather than just before, the end of a quarter.

An individual shareholder is regarded as having paid basic rate income tax of an amount equal to the ACT paid on his dividend.

ADVOCATES, FACULTY OF. A corporate body founded in 1532

consisting of barristers in Edinburgh. All barristers in Scotland are known as advocates.

AFFIDAVIT. A written and sworn or affirmed declaration made before a person authorized to administer oaths used as proof or testimony of the facts it contains.

AFFIRMATION. A non-religious form of solemn declaration equivalent to a statement upon oath.

AG (AKTIENGESELLSCHAFT). The West German and Swiss form of public company, which may be contrasted with the GmbH which is the form of private company.

The shares of a West German AG are usually in bearer form and held in collective deposit by specialist depositary banks. A peculiar consequence is that the votes in respect of those shares are exercised by the banks in accordance with their own views, unless the owner gives specific contrary instructions.

A distinctive feature of the West German AG is its two-tier system of management: its board of directors (*Vorstand*) is itself subject to the control of a supervisory board (*Aufsichtsrat*) which appoints the directors and generally represents the interests of the shareholders in relation to the directors.

AGENCY. Is one of the basic legal concepts of Anglo-Saxon countries; without its existence much of modern commercial and financial activity would grind to a halt. The relationship exists when the principal consents to an intermediary, the agent, acting on his behalf in concluding a transaction with a third party. The principal becomes bound as if he and the third party had entered into the transaction themselves. The agent generally no longer has anything to do with the matter. The underlying idea is that a person need not always act personally to change his legal position: he may use the services of someone else.

The relationship is consensual: an agent agrees or consents to act under the control or direction of the principal. It is usually fiduciary, as the agent agrees to act for and on behalf of the principal. The agent is in no sense a proprietor entitled to the profits, nor is he expected to carry the risks.

An agency can arise by:

- express agreement: whether a legally binding contract or not; or
- implied agreement: where the court will infer the relationship from the conduct or situation of the parties; or
- estoppel: where a person represents by words or conduct that another person is his agent – he is not allowed to deny the agency to a third party dealing in good faith with the person held out as agent; or
- operation of law: under the doctrine of agent of necessity; or
- ratification: where the agent has no authority but purports to act on the principal's behalf and the principal later ratifies what the agent has done.

The only time it is necessary to have a written appointment is if the agent is to execute a deed, such as a lease of land, when he must be appointed by a power of attorney.

As a general rule, whatever a person has power to do himself he can do through an agent; but he cannot do through an agent what he cannot do himself. Thus, an infant can bind himself through an agent in respect of the purchase of necessaries; a company can only act or contract through an agent on matters within the normal objects of the company. See BREACH OF WARRANTY OF AUTHORITY.

AGENCY OF NECESSITY. There may be circumstances in which it is impracticable for an agent to communicate with his principal and action must be taken to safeguard the principal's property. Where the agent does so bona fide in the interests of the principal, an agency of necessity will arise even if the agent has exceeded his authority. For example, the master of a ship in times of emergency may contract for urgent repairs and bind the ship-owner to the contract.

The courts will not readily extend the doctrine to a person who is not already an agent.

AGENT. The functions that an agent can perform are restricted only by the imagination of man. In law he is not always what he is called in ordinary commercial parlance. For example an 'exclusive agent' is usually a relationship between seller and buyer and no contractual relationship arises between the appointor of the so-called 'agent' and third parties. A person is, in law, an agent only if

he is employed to affect the legal relations of his principal and a third party.

An agent has many obligations to his principal. He must carry out his duties with reasonable care, skill and diligence; act personally and disclose to his principal all material facts. He must not disclose confidential information, accept a bribe, or make a secret profit out of his position.

The personal interests of an agent must not be allowed to conflict with the interests of his principal, even after the agency has ended, if the agent makes use of knowledge acquired while acting as agent.

An agent can claim an indemnity from his principal against all liabilities or expenses properly incurred on his principal's behalf, but has no right to any remuneration unless it has been expressly agreed or can be implied from the nature of the agent's services.

Subject to the terms of any agreement, where the principal receives the benefit of contracts with people introduced by the agent after termination, no commission is payable to the agent. Some foreign laws entitle an agent to claim compensation from his principal for the goodwill which he has created and which continues to accrue to the principal after termination of the agency.

Generally, any contract made by an agent with the authority of his principal, may be enforced by or against the principal whether or not his name was disclosed at the time of the contract; the agent is not required to disclose that he is acting as agent, but if he does not he may incur personal liability. See BREACH OF WARRANTY OF AUTHORITY, CONFLICT OF INTEREST and UNDISCLOSED PRINCIPAL.

AGREEMENT. Some agreements, in particular guarantees and those relating to land, are not enforceable unless made or evidenced in writing. Apart from these, an agreement can be made in writing or by word of mouth, but will not be legally binding unless the essential elements of contract are present. If made under seal it is known as a deed.

Legal warning: evidence required to prove an oral contract can be onerous.

ALTERNATE DIRECTOR. A person, whether a director or not, who is appointed by a director to act for him at any board meeting he is

unable to attend. The Articles must permit the appointment and must be strictly complied with. In the usual case an alternate director is not a director as such, although he may be given that status by the Articles. However, if he actively directs a company's affairs, he may become a shadow director.

AMALGAMATION. See RECONSTRUCTION AND AMALGAMATION.

AMERICAN BAR ASSOCIATION. A private voluntary association of which over one-half of the attorneys in the USA are members. Influential. A person cannot be licensed as an attorney unless he has graduated at a law school accredited by the ABA.

AMERICAN DEPOSITARY RECEIPT. The route through which most non-US companies have issued equity in the USA. ADRs are receipts held by large depositary banks (such as Morgan Guaranty, Chase Manhattan and Irving Trust) which represent underlying shares. Through this system, dividends are paid to US investors in dollars; and dividend payments, annual reports and key news releases are distributed by one source, the depositary, who is the shareholder of record. Morgan Guaranty has 90 per cent of the ADR market. Both large and small issues have been completed from \$278 million for British Telecom to a \$4 million issue for Universal Money Centres plc of the UK. It is not necessary to have a new issue of shares nor to be a listed company in order to have ADRs.

AMERICAN LAWYER, THE. The *Private Eye* type magazine of the US legal profession. Sometimes scandalous, often revealing and widely read.

AMERICAN RULE, THE. The name given to the usual position that the cost of a US attorney is a non-recoverable expense of litigation, as it is deemed to be 'one of the incidents of (US) citizenship'. In the UK costs are in the discretion of the court, but normally follow the outcome of a case.

ANNUAL GENERAL MEETING. The general meeting of shareholders held once in each calendar year by a company. It is convened by the directors on not less than 21 days' written notice. Anything

that can be done at an extraordinary general meeting can be done at an AGM.

The tendency is for the number of members present to be in inverse proportion to the company's success: the better a company does, the fewer attend.

ANNUAL REPORT. See **DIRECTORS' REPORT.**

ANNUAL RETURN. A form filed by a company with the Registrar within 42 days after its annual general meeting giving details of its registered office, share capital, register of members and debenture holders, secured borrowings, directors and secretary.

ANTICIPATORY BREACH. A breach of contract caused by the repudiation of obligations before they are to be performed. Such a repudiation occurs when a person indicates by words or conduct that he does not intend to honour his obligations when they fall due. It entitles an innocent party to an immediate cause of action, but he has an option: he can either wait until the day for performance arrives, or immediately treat the contract as discharged and sue for damages. If he waits and refuses to accept the breach as a discharge of contract, the contract remains in being for the future on both sides and each party has the right to sue for damages for present and future breaches.

It is not unknown for intervening circumstances to operate against an innocent party who waits; for the measure of damages will depend upon values at the time designated for performance, not at the date of repudiation.

ANTI TAKE-OVER DEVICES. Dependent upon one's perspective, the UK is an infant and the USA mature, or vice versa, in the use of defences against the unwelcome take-over. In the UK, principles of company law, regulations of The London Stock Exchange and the City Code all impinge on the freedom of action of directors of a listed company involved in take-overs: they cannot enter into transactions which could result in an offer being frustrated or shareholders being denied the opportunity to accept or reject an offer.

This is not so in the USA where the business judgment rule enables directors to employ defensive tactics, without reference to shareholders. The most prominent are the 'white squire'

technique of issuing new shares to a friendly person; the sale or grant to a friendly party of options over valuable assets, grotesquely known as 'crown jewels'; 'poison pills' and 'shark repellents', which are conditions attached to shares to make them unappealing.

The white knight is a defence not a device. The City Code allows confidential information to be given to a preferred offeror. The hostile offeror is not entitled, by asking in general terms, to receive all the information given to his competitor.

ANTITRUST. A term generally used for agreements or actions which are likely to interfere with competition in the market or which are discriminatory against certain parties thus affecting free competition.

The USA used to take its antitrust law quite seriously. The Sherman Act of 1890, which is the fundamental antitrust statute, was spoken of by the Supreme Court as the 'Magna Carta of free enterprise . . . as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our personal freedoms.'

Any person injured in his business or property by an antitrust violation of the Sherman Act can recover three-fold the damages sustained, plus the costs of the suit, including an attorney's reasonable fee: a significant exception to the American Rule. Violation is also a criminal offence which can attract substantial fines (up to \$1 million for a company) and imprisonment. Any agreement violating antitrust laws is illegal and cannot be enforced.

A violation under the Sherman Act arises under section 1 which prohibits contracts, combinations or conspiracies in restraint of trade or commerce and section 2 which prohibits monopolization, a combination or conspiracy to monopolize or attempts to do so in any part of the trade or commerce or the foreign commerce of the USA. Monopolization means having sufficient economic power to control prices and exclude competitors.

Although the Sherman Act applies to mergers and acquisitions, the principal US law governing them is the Clayton Act, which makes them unlawful where their effect may be substantially to lessen competition or tend to create a monopoly in any