THE ULTRA VIRES DOCTRINE - DOES IT EXIST IN MALAYSIA ?

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A project-paper submitted in partial fulfillment of the requirements for the Diploma In Law at MARA Institute of Technology, Shah Alam, Selangor.

December 1985

PREFACE

A company is said to commit an ultra vires act if it does not act which the memorandum of association does not permit. IN Malaysia, to determine whether or not such an act is ultra vires consideration must be paid to the Malaysian Companies Act of 1965 particularly to Sections 19 and 20 and also to the Third Schedule of the same Act.

The object of this paper is mainly to examine whether the rule of ultra vires applies in our country.

This paper will be divided into these chapters. Chapter One will deal with the ultra vires doctrine - it serves as an introduction to the reader to the operation of the doctrine. Chapter Two will bring the reader to the Malaysian Companies' Act of 1965 where a discussion of Sections 19 and 20 and the Third Schedule will be made. The third and final chapter will deal with the consequences of an ultra vires before and after the Companies' Act came in operation. The chapter will also answer the question whether the ultra vires rule applies in our country.

CHAPTER ONE

i) INTRODUCTION

A company which owes its incorporation to statutory authority cannot effectively do anything beyond the powers expressly or impliedly conferred upon it by its statute or memorandum of association. Any act beyond that would be ineffective even if it were to be agreed upon by all members. A company, therefore, unlike a natural person has limited capacity. Any purported acts beyond the stipulated clause would be considered ultra-vires and be absolutely void.[1]

The purpose of this restriction is two-fold :
First, to protect investors in the company so that they may know the objects in which their money is employed; and secondly, to protect the creditors by ensuring that the company's funds, to which they look for payment, are not utilised for unauthorised activities.[2]

The term ultra vires is also used to describe the situation when the directors have exceeded the authority delegated to them. Compare this with the position when a company does an act outside its memorandum or article. The effects of these acts by the company are as follows respectively :

When a company exceeds its powers, it is not bound by its contracts because it lacks legal capacity to incur responsibility for it. Similarly, when the directors go beyond their powers, the company is not bound because their agents have exceeded their authority. However, unless the company's own powers are exceeded, no question of capacity arises and the company may ratify what the directors have done, and may be unable to set up the director's lack of actual authority when they have acted within their usual or ostensible authority.[3]

This distinction - that is, the ultra vires act of the company and that of its directors was only clearly distinguished is the case of Ashbury Railway & Iron Carriage Co. v Riche[4] in 1875. Here the House of Lords distinguished between contracts which were merely ultra vires the directors; being contracts beyond the powers delegated to them by the articles, and contracts ultra vires the company itself; being contracts beyond the company's powers in the memorandum. It was also decided in this case that ratification was impossible if the contracts entered were beyond the scope of the memorandum. This thus reversed the then prevailing rule that directors can ratiry the ultra vires transactions of their co-directors.

For the purpose of this paper, discussion and emphasis will be limited to the ultra vires transactions of the company itself in respect of its powers in the memorandum. The proceeding chapters of the paper will indicate the Malaysian stand in respect of this matter and to further illustrate and support the arguments put forward, the writer will also cite the authorities - which will be mainly cases.

ii) The Construction of The Objects Clause

a) The " Main Objects " Rule

Great care should be taken to see that the objects of the company being the most important part of the memorandum are stated in the fullest and clearest manner possible. This is due to the fact that a company cannot legally undertake any business not authorised by its memorandum. Even if the fullest support is given by shareholders, that support will not validate any act which is outside the powers of the company.[5] Directors undertaking any businesses outside the scope of the memorandum may become personally liable for any losses.

Likewise, inconvenience may also arise if the company's powers are too limited. In an attempt to solve this problem, companies have and still do insert general words such as " to do all such things as may be deemed incidental or conducive to the attainment of the above objects or any of them." The courts have decided that such words will only be held to cover operations of a similar nature to the business of the company. The authority for this is provided by the case of London Financial Association v Kelk.[6] In this case the objects clause ended with the words " and the doing of matters and things which may appear to the company to be incidental or conducive to the objects aforesaid or any of them."[7] In his judgement, Sir James Bacon, V.C. , held that the words had to be limited by reference to the objects of the company.

A word of caution was given by Lindley, L.J. , in the case of Re German Coffee Date Co.[8] regarding the interpretation of general words in a memorandum of association. His Lordship said :

> "... In construing this memorandum of association... in which there are general words, care must be taken to construe those general words so as not to make a trap for unwary people. General words construed lite-