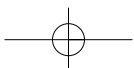
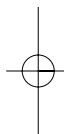
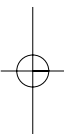


RATIONALITY IN COMPANY LAW

This collection of essays is a festschrift to honour Professor Dan Prentice who retired in 2008 from the Allen & Overy Professorship of Company Law in the University of Oxford. Dan Prentice has been deeply involved in corporate law from all perspectives: as a scholar, teacher, law reformer and practising member of Erskine Chambers. His interests cover the full range of corporate law, finance and insolvency. The occasion of his retirement from his professorship has afforded a number of leading corporate law experts from around the world, many of whom are his former students and colleagues, an opportunity to address some of the most important issues in corporate law today, in his honour.

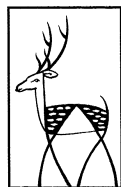
Corporate law has always been a fast-moving area, but the present pace of change seems quicker than ever. The Companies Act 2006, by some way the longest piece of legislation ever passed by the UK Parliament, is reshaping the landscape of domestic company law. At the same time, legislative and judicial developments at the European level in corporate and securities law are of unprecedented importance for corporate lawyers based in the UK. This outstanding series of papers addresses a number of the most important issues currently facing the subject, including the impact of the new Companies Act on directors' duties, shareholder litigation and capital maintenance; aspects of insolvency and banking regulation; the Capital Requirements Directive; and a new Convention on Intermediated securities. It will be essential reading for all those interested in the field.



Rationality in Company Law

Essays in Honour of DD Prentice

Edited by
John Armour
and
Jennifer Payne



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Preface

The chapters in this work are in honour of the long and distinguished career of Professor Dan Prentice. They cover an impressive range of topics in his chosen fields of company law, corporate finance and corporate insolvency, and they will attract many readers, both today and in the future. Some of those readers will have never met Professor Prentice. My role therefore is to introduce Professor Prentice, the man, his life and his work.

Imagine, now, a warm sunny day in Oxford at any time in the last 20 years or more. You have entered Pembroke College and found your way into the first quad. The flowers, especially the wisteria, are in full bloom. The porter points to a small window at the top of a stone building; you make your way up shaky, winding wooden stairs. At the top, there is a small dark wooden door leading to Professor Prentice's College study. Inside there are piles of paper on every surface, including the chairs. You have come to talk to him about one problem but he addresses you with vigour on several others, interspersed with some philosophical musings on the effect of the word processor on the quantity and quality of the writings of judges.

Here, working for many years in Pembroke College, is one of the few people who has been at the apex of his chosen subjects for several decades. Professor Prentice has made a huge contribution to scholarship in company law. He has written several books and many articles. His thinking has also been influential in legislative developments. He has mastered the protean subject of company law, which has grown exponentially, in particular through increased legislation and developments in case law. The legislation used to appear in a volume not much thicker than an average paperback but it is now printed by commercial publishers for practitioners on airmail paper in a volume the size of a large brick.

How did it all begin? Professor Prentice was brought up in Northern Ireland. He was an undergraduate at Queen's University, Belfast, where he obtained his first degree in law in 1963; he obtained a JD at the University of Chicago in 1964. From 1965 to 1968 he was an assistant professor at the University of Western Ontario in Canada. His first academic appointment was with the University of Indiana. He then became a lecturer at University College, London and stayed there until 1973. In his final year there he was also visiting professor at the University of Western Ontario in Canada. There, with Earl Palmer, he developed the first published teaching materials in Canada on corporate law. At about the same time, he produced an insightful article later published in the

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Canadian Bar Review comparing the corporate opportunity doctrine in England with the more liberal regime in Canada.¹

In 1973, Professor Prentice was elected to a fellowship in Law at Pembroke College, Oxford. He held this in conjunction with the newly created University lectureship in the Law of Companies and Business Associations. He was later also a reader in Company Law. As a fellow, he played his full part in undergraduate teaching, taking on not only company law and contract, but also trusts and land law. He conscientiously fulfilled all his College responsibilities, including that of Dean. His greatest skill was, however, in looking after the interests of postgraduate students. He continued to do this even after his election in 1990 as the Allen & Overy Professor of Corporate Law. He earned both gratitude and affection from his students. Moreover, he was always willing to give the College the benefit of his advice in facing the problems that came its way, including student-related issues with a legal component. In this and other ways, he gave strong support to his colleagues. Activities of this kind are often invisible to the outside world, but without them the College and the next generation would be much the poorer.

Professor Prentice has written extensively in the field of company law, and his work includes books, articles and chapters in books. He has also for many years been a contributor to a major work on contracts, namely *Chitty on Contracts*. From 1983, he was the contributor of the parts of this work dealing with corporations and unincorporated associations, and illegality and public policy, and since 1989 he has also been the contributor of the part of the work dealing with death and bankruptcy. In addition to all his own writing, Professor Prentice has also been for some years an assistant editor of the *Law Quarterly Review*.

But Professor Prentice is undoubtedly best known in the fields of company law, corporate finance and corporate insolvency. Following the enactment of the Companies Act 1985, the Department of Trade and Industry asked Professor Prentice (then Dr Prentice) to write a report on the legal and commercial implications of abolishing the *ultra vires* rule as it applied to companies, that is to say, the rule that a company had no capacity to enter into a transaction, which was outside the objects with which it was registered. This rule, although simple to state, had nightmarish implications. Professor Prentice produced an incisive and analytical report² within the required short space of time. He concluded that the doctrine of *ultra vires* no longer served a useful purpose, largely because it was defeasible at the discretion of the draftsman. In addition, although the consequences of an *ultra vires* transaction had been substantially modified by statute, the modification was materially incomplete. For example, a person dealing with a company in good faith was empowered by statute to enforce a transaction entered into by a company, even though it was *ultra vires*. By contrast, the

¹ D Prentice, 'Directors' Fiduciary Duties—The Corporate Opportunity Doctrine' [1972] *Canadian Bar Review* 623.

² D Prentice, 'Reform of the Ultra Vires Rule' (Consultation Document) (Department of Trade and Industry, London, 1986).

company had no power to enforce a contract which was *ultra vires*, though, if the company performed its part and conferred benefits on the other contracting party, it could recover compensation for the benefits that it had conferred.

Professor Prentice's opinion was that retention of the *ultra vires* rule did not provide any significant protection to either creditors or shareholders. Accordingly, he recommended that a company should have the widest capacity possible in its dealings with a third party. He further recommended that the doctrine of constructive notice should be abolished. He also proposed that the acts of the board of directors or a single director should be binding on the company, unless the other party had actual notice of a lack of authority or the other party was an officer or director of the company and had constructive or actual notice of lack of authority. Professor Prentice went on to deal with a number of other matters, such as whether companies should have to have objects clauses and whether further protection against gratuitous distributions was needed. He rejected the idea that any additional protection was needed for shareholders or creditors if his recommendations were adopted. He did not consider that his proposals would undermine the controls over charitable companies.

Following public consultation on Professor Prentice's report, the government introduced a bill which became the Companies Act 1989, and this included a number of amendments to the provisions of the Companies Act 1985 to mitigate the effect of the *ultra vires* doctrine, including amendments to abrogate the effects of the rule on third parties, except as regards the acts of a charitable companies. The 1989 Act also made provision for the abolition of constructive notice but this was not, in the event, implemented. Thus Professor Prentice's report paved the way for a major modernisation and simplification of company law. The 1989 Act additionally enabled shareholders to bring proceedings to restrain *ultra vires* acts and required directors to observe limitations flowing from the company's memorandum.

These reforms proved not to be the end of the story. The Company Law Review set up by the Department of Trade and Industry in 1998 to undertake a major review of the whole of company law in due course recommended a more radical approach, namely that companies should have unrestricted objects unless the company's articles otherwise provided. This recommendation was accepted by government and implemented in the Companies Act 2006. In consequence, the provisions enabling shareholders to bring proceedings to restrain *ultra vires* acts and imposing a duty on directors to observe limitations in the company's memorandum introduced by the 1989 Act became unnecessary and were not replicated. Despite these subsequent twists and turns, the fact remains that the foundation stones for reform of the difficult area of *ultra vires* were laid in Professor Prentice's report.

Not long before he became Allen & Overy Professor of Corporate Law, Professor Prentice agreed to become a joint general editor, with myself, of *Buckley on the Companies Acts*. The consulting editor was Lord Hoffmann, as he subsequently became. The original edition of this work was in 1872, and

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many of the early editions were by Lord Wrenbury. Some of the subsequent editions had been edited by none other than the late Sir Denys Buckley, later a Lord Justice of Appeal. It was a work of very great standing as a result of the careful authorship of these and other editors and it had a very distinctive style. It was a specialist work for a practitioner who already had some knowledge of the field. It was regularly used in the courts. We started by producing a special volume on the new Companies Act 1989. We then faced the daunting task of updating the text and incorporating the provisions of the Companies Act 1985 into the main text. The various parts of the legislation were distributed among a team comprising the general editors and distinguished contributors. Professor Prentice was responsible for the commentary on company charges, unfair prejudice, company investigations and other areas. It took a long time to update the work. The complete updated work was, however, published in loose-leaf form in 2000, and it has been regularly kept up-to-date since that date, largely through the efforts of Professor Prentice. It has been a privilege to be a general editor with Professor Prentice of this great work.

A further opportunity for collaboration occurred after I was appointed Chair of the Law Commission of England and Wales in 1996. It was not then the tradition of the Law Commission that the Chair should have a research team or undertake any law reform project. But the Department of Trade approached the Law Commission and asked it to carry out projects: first, in consultation with the Law Commission of Scotland, on shareholder remedies³ and later, jointly with the Law Commission of Scotland, on directors' duties.⁴ I led the Law Commission's work on each of these subjects up till the end of my period of office in January 1999. Professor Prentice was appointed a consultant to the Law Commission for both projects, and he and I had many long meetings discussing the recommendations that the Law Commission should make.

At the time that the Law Commission was carrying out this work, company law reform was overdue and a long way down the political agenda. It was not until some years later, following the final report of the Department of Trade and Industry's Company Law Review, that legislation was finally introduced. In the course of its passage through Parliament, the new Companies Bill itself made history by being the largest piece of legislation ever enacted by the Westminster Parliament. But some of the major changes made by this legislation were in the field of shareholder remedies and directors' duties, and the relevant provisions drew upon many of the recommendations made by the Law Commissions.

In addition to acting as a consultant to the Law Commission of England and Wales, Professor Prentice also acted as a consultant to the European Commission on the relatively obscure corporate entity known as the European Economic Interest Grouping, on group law generally and on another corporate

³ Law Commission, 'Shareholder Remedies' (Law Com No 246 Cm 3759, 1997).

⁴ Law Commission, 'Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties' (Law Com 261 Cm 4436, 1999) SE/1999/25 (Scot Law Com 173).

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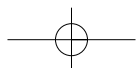
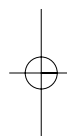
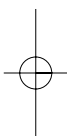
vehicle, the European public company. He has also served as a member of the Law Society's Company Law Committee and its Insolvency Law Committee for many years. He has been the editor of *Butterworths Company Law Cases* since they were first published in 1983. All these activities demonstrate the breadth of Professor Prentice's interests in company law. The skill with which he has carried out all these many roles has justly earned him high standing both among practitioners in company law and in the wider community concerned with this subject.

As will now be clear, Professor Prentice is a man of enormous energy. In 1982, Professor Prentice, having joined Lincoln's Inn, was called as a barrister. Despite all his other activities, Professor Prentice has also found some time to practise law and for this purpose joined Erskine Chambers (also my former Chambers). Erskine Chambers (of which I was once a member) have always been regarded as a leading set of Chambers in the field of company law. Professor Prentice saw the value of practice and used his experiences as a practitioner in developing his academic thinking. In addition to practising, Professor Prentice travels far and wide to give lectures, and attend lectures, on company law.

In 1965, Professor Prentice married Judith, who has enthusiastically supported him all these years. Professor Prentice has not allowed his scholarly interests to displace other interests in life or his enjoyment of time with his family, including now his young grandchildren.

This, then, is just a pen portrait of Professor Prentice, the man, his life and career. There is much more to recount in terms of his published work but this is not the place. Professor Prentice has had a long and distinguished career and he has more than earned a long and happy retirement. I make no assumption that his scholarship will be at an end when he gives up his Chair at the end of September 2008. Indeed it is much to be hoped that, if he wishes, retirement will just be a readjustment of focus and that he will, so long as he wishes, continue to write and to inspire, in the same way as he has no doubt inspired the remarkable contributions to this work.

The Rt Hon Lady Justice Arden DBE
April 2008



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