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T E. Cain
Bond University

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Abstract
This short article is a postscript to that entitled 'The Rule in Royal British Bank v Turquand in 1989' in the December 1989 number of the Bond Law Review. In that article the position with regard to the rule in Royal British Bank v Turquand and sections 68A, 68C and 68D of the Companies Code was reviewed in the light of a number of recent decisions, including Registrar-General v Northside Developments Pty Ltd in the New South Wales Court of Appeal. It was noted that the decision in the Northside case was under appeal to the High Court of Australia and the conclusions set out in the article were subject to what the High Court had to say in that appeal.

Keywords
Royal British Bank v Turquand, Registrar-General v Northside Developments Pty Ltd,

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THE RULE IN ROYAL BRITISH BANK v TURQUAND IN 1990

by **T E CAIN**
Professor of Law
Bond University

Introduction

This short article is a postscript to that entitled 'The Rule in *Royal British Bank v Turquand* in 1989' in the December 1989 number of the Bond Law Review.[1] In that article the position with regard to the rule in *Royal British Bank v Turquand*[2] and sections 68A, 68C and 68D, of the Companies Code was reviewed in the light of a number of recent decisions, including *Registrar-General v Northside Developments Pty Ltd* in the New South Wales Court of Appeal.[3] It was noted that the decision in the *Northside* case was under appeal to the High Court of Australia and the conclusions set out in the article were subject to what the High Court had to say in that Appeal.

In the *Northside* case, the New South Wales Court of Appeal unanimously agreed that the rule in *Royal British Bank v Turquand* applied in the circumstances of the case and that the company was bound by the mortgage to which, without the authority of the other directors, the common seal was affixed by one director and his son who was not, but who purported to be, the secretary of the company. The director who signed was managing director of an associated company which would benefit from the mortgage. It was held that the mortgagee was not put upon enquiry and that the so-called 'forgery exception' to the rule did not apply. It appeared that the rule in *Turquand's* case was relevant where a company's seal was affixed to a document and that agency principles were relevant where a company's seal is not used. It was said that in Australia the rule is a special rule of company law and not just an illustration of agency principles, and that where a company has executed a document under seal the company is bound . If under its memorandum or articles it might have had power to enter into a transaction and if, where required, the seal is affixed in the presence of, and counter-signed by, persons who either by virtue of their offices or positions or the company permitting them to act in those offices or positions, might have had authority to be present and countersign the document.

1 (1989) 1 Bond LR 272.
2 (1856) 6 El & Bl 327; 119 ER 886.
3 (1989) 7 ACLC 52.

This article is prompted by the facts that the High Court of Australia[4] unanimously allowed the appeal against the decision of the New South Wales Court of Appeal and that, in doing so, the High Court removed some, but not all, the uncertainties left after the Court of Appeal's decision.

The Northside case in the Hight Court

Northside Developments Pty Ltd was incorporated for the purpose of holding certain land in Sydney. A mortgage of that land was executed in 1979, before the introduction of section 68A of the Companies (NSW) Code, by Northside in favour of Barclay Credit Corporation Holdings Pty Ltd, to secure a loan by Barclays to companies owned and controlled by Robert Sturgess, a director of Northside. The mortgage was executed under the common seal of Northside by Robert Sturgess, who also attested the affixing of the seal. Robert Sturgess' son, Gerard Sturgess, countersigned as 'company secretary'. Northside's articles were not complied with in that the other directors had not approved the execution of the mortgage and had not authorised the affixing of the seal or delegated power to Robert Sturgess. Further, Gerard Sturgess had not been appointed company secretary, although he had consented to act as such and a return of his purported appointment had been filed with the Corporate Affairs Commission. Barclays presumed that all was in order and the mortgage was registered, so that Barclays obtained an indefeasible title to the land. After default by the companies to which the loan was made, Barclays sold the land to a third party, who became registered as proprietor.

The High Court[5] unanimoulsy allowed the appeal against the decision of the New South Wales Court of Appeal[6] and held that the mortgage was not executed by Northside and the rule in *Turquand's* case did not apply. Three of the five judges held that the person in whose favour the mortgage was executed (Barclays) was put upon enquiry and failed to make enquiry and discover the irregularities. The other two judges held that the affixing of Northside's seal was a forgery but, if it had been necessary so to decide, they would have held that Barclays was put upon enquiry.

What is the Rule in *Royal British Bank v Turquand?*

Three of the five judges (Mason CJ and Brennan and Toohey JJ) in the *Northside* case in the High Court[7] approved the statement of the rule in *Turquand's* case[8] by Lord Simonds in *Morris v Kanssen*,[9] i.e. persons dealing with a company in good faith may assume that acts within its constitution and powers have been duly performed and are not bound to enquire whether acts of internal management have been regular. Hence the rule is known as the 'indoor management' rule. Dawson J approved

4 *Northside Developments Pty Ltd v Registrar-General* (1990) 64 ALJR 427.
5 (1990) 64 ALJUR 427.
6 (1989) 7 ACLC 52.
7 (1990) 64 ALJR 427.
8 (1856) 6 El & Bl 327; 119 ER 886.
9 [1946] AC 459 at pp 474 - 475.

a similar statement of the rule by Lord Hatherley in *Mahony v East Holyford Mining Co*[10] to the effect that "when there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company". Gaudron J approved a similar statement by Jervis CJ in *Royal British Bank v Turquand*.[11]

In what situations does the rule apply?

In *Northside* in the New South Wales Court of Appeal,[12] it appeared that the rule in *Turquand* only applies where a company seal is used and a contract entered into by the company itself, and not where a contract is entered into on behalf of a company by its agents. In the High Court,[13] Mason CJ expressly recognized these two situations but said that the rule applies in both. Other judges in the High Court[14] impliedly recognized the two situations and that the rule applies in both.

What is the basis of the rule in *Turquand's* case?

There is some uncertainty here. In *Northside*, Dawson J said[15] that the rule in *Turquand's case* is dependent upon the operation of normal agency principles; it operates only where on ordinary principles the person purporting to act on behalf of the company is acting within the scope of his actual or ostensible authority. Dawson J also said[16] that the organic theory, by which the act of affixing the seal of a company is an act, not simply of a agent, but of an organ of the company itself, merely extends the scope of an agent's capacity to bind a company and there must first be authority, actual or apparent. It is only then that a person may be regarded not only as the agent of a company, but also as the company itself - an organic part of it.

Toohey J said[17] that in its early history, the rule in *Turquand's* case may be seen as relieving those who dealt with companies of the obligation to ensure that there had been no irregularities in the internal management of the company in relation to such matters as the holding of meetings and the passing of resolutions. But where the question is whether an officer of the company has authority to bind the company by his actions, the context moves from one of indoor management to one of agency and the ordinary rules of agency then come into play. The indoor management rule is in effect a concession to the outsider in dealing with the company; it does not confer authority on an officer of the company to enter into a contract where that authority does not otherwise exist. Authority must actually exist to enter into the transaction in question,

10 (1875) LR 7 HL 869 at p 894.
11 (1856) 6 El & Bl 327; 119 ER 886 at pp 332 and 888 respectively.
12 (1989) 7 ACLC 52.
13 (1990) 64 ALJR 426 at pp 429, 430, 431, 432.
14 Brennan J at pp 437, 439 - 441, 445; Dawson J at pp 449 - 451.
15 (1990) 64 ALJR 427 at p 449.
16 (1990) 64 ALJR 427 at pp 450, 451.
17 (1990) 64 ALJR 427 at p 453.

or it must be found in principles of agency, as in the concept of ostensible authority. His Honour added that this was made clear by *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd*,[18] applied by the High Court of Australia in *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising etc Co Pty Ltd*.[19]

Mason CJ said[20] that in the area of the exercise of delegated powers generally the rule in *Turquand's* case came to be seen as a particular exemplification of the principles of the law of agency but that whether the application of the rule to instruments bearing the common seal of the company is also to be treated as an instance of the application of the law of agency is an unresolved question. The Chief Justice added[21] that *Freeman & Lockyer* says nothing about instruments executed under the common seal of a company and does not compel the conclusion that the rule in *Turquand's* case, in its application to instruments so executed, is a principle of the law of agency rather than an organic principle of the law relating to corporations. Further, several authorities are consistent with the notion that the principle applicable to such instruments is an organical principle of company law - affixing the common seal to an instrument is the mode of execution appropriate to a corporate assent stemming from a resolution of the board of directors, the administrative act then being that of the board which is the organ of the company which administers its affairs.

According to Brennan J,[22] the foundation of ostensible authority is estoppel and it is immaterial whether the acts of natural persons in executing an instrument which binds a company are invested with the character of acts of the company itself or with the character of acts done by an agent of the company. He noted that the statement of the general principles of estoppel by Diplock LJ in *Freeman & Lockyer*[23] was approved by the High Court in *Crabtree - Vickers*,[24] and provides the framework within which the 'indoor management' cases are to be placed.

Gaudron J thought[25] that the doctrine of apparent or ostensible authority is no more than an example of an estoppel. She, too, referred to the judgement of Diplock LJ in *Freeman & Lockyer*. Like the doctrine of apparent or ostensible authority, the rule in *Turquand's* case may have its genesis in estoppel or in notions similar to those which underlie estoppel and the rule ought now to be seen as grounded in notions akin to those which underpin the law of estoppel.

Thus it seems that Dawson and Brennan JJ, at least, believe that the basis of the rule in *Turquand's* case, in both its applications, is ordinary agency principles and that the basis of the doctrine of ostensible authority is estoppel.

18 [1964] 2 QB 480 (CA).
19 (1975) 133 CLR 72.
20 (1990) 64 ALJR 427 at p 430.
21 (1990) 64 ALJR 427 at p 432.
22 (1990) 64 ALJR 427 at pp 437, 438.
23 [1964] 2QB 480 (CA) at p 503 - 505.
24 (1975) 133 CLR 72 at p 78.
25 (1990) 64 ALJR 427 at p 455.

The policy behind the rule

According to Mason CJ in the *Northside* case,[26] it is important that the rule in *Turquand's* case gives sufficient protection to innocent lenders and other persons dealing with companies, thereby promoting business convenience and leading to just outcomes. The formulation and application of the rule has been developed to protect and promote business convenience, which would be at hazard if persons dealing with companies were under the necessity of investigating their internal proceedings in order to satisfy themselves about the actual authority of officers and the validity of instruments; on the other hand, an over extensive application of the rule may facilitate the commission of fraud and unjustly favour those who deal with companies at the expense of innocent creditors and shareholders who are the victims of unscrupulous persons acting or purporting to act on behalf of companies.

In short, the object of the rule is to protect innocent outsiders dealing with companies, and promote business convenience, and at the same time protect innocent creditors and sharholders.

The enquiry exception to the rule

In effect, all five judges in *Northside* in the High Court[27] agreed that there is an exception to the rule in *Turquand's* case,[28] namely, where the nature of the transaction is such as to put the third party upon enquiry, e.g. it is such as to excite a reasonable apprehension that the transaction is entered into for purposes apparently unrelated to the company's business, and he fails to make enquiry or the company fails to satisfy the enquiry. There is no reason why a third party should be entitled to rely on the formal validity of an instrument in such a case. It is not possible to give specific guidance as to the circumstances in which the nature of a transaction will be such as to put a person dealing with the company upon enquiry. So much depends upon the circumstances of the particular case, notably the powers of the company (if relevant), the nature of its business, the apparent relationship of the transaction to that business, and the actual or apparent authority of those acting or purporting to act on behalf of the company. Much will also depend upon representations about the transaction made by such persons. Where the person dealing with a company is put upon enquiry, he cannot rely on the 'indoor management' rule, but must satisfy himself that the relevant officers and agents of the company had the company's authority to execute the instrument.

The transaction in the *Northside* case was apparently unrelated to the purpose of the company's business and was one from which the company appeared to gain no benefit. Consequently, the person dealing with the company was put upon enquiry. Since such person made no enquiry the rule in *Turquand's* case did not apply and the company was not bound by the transaction.

26 (1990) 64 ALJR 427 at p 434. See also per Brennan J at pp 439, 445.
27 (1990) 64 ALJR 427
28 (1856) 6 El & Bl 327; 119 ER 886.

Northside had no association with Robert's companies and there was no apparent connection between them. The only links between them were that Robert was a director of Northside and of his companies, Gerard was the secretary of Robert's companies and acted as the secretary of Northside, and Northside and Robert's companies had their registered offices at the same address.

The mortgage of Northside's land was given to Barclays not for the purposes of Northside's business nor for Northside's benefit but to secure the debts of Robert's companies. Barclays was put on enquiry and failed to make enquiry.

Is there a forgery exception to the rule

As already stated, two of the five judges in *Northside*[29] held that the affixing of the company's seal to the mortgage was a forgery and therefore the rule in *Turquand's* case[30] had no application. Those judges were Dawson and Toohey JJ.

Mason CJ said[31] that it might be that forgery is not a a true exception to the rule in *Turquand's* case and that cases such as *Ruben v Great Fingall Consolidated*[32] can be explained on the footing that the forged document was not put forward as genuine by an officer acting within the scope of his actual or apparent authority or that the third party was put upon enquiry. It was not necessary to resolve this question but, if there is a forgery exception, it has a limited area of operation.

Brennan J said[33] that the word 'forgery' is used in two senses. In *Ruben*, there was a forgery in the strict sense, i.e. an instrument bearing a false seal or signature and, since the rule is founded on estoppel, it does not cover a forgery in that sense. There is said to be a forgery in a looser sense where an instrument bearing a genuine seal and genuine signatures is executed without the authority of a company as, for example, in *Kreditbank Cassel GmbH v Shenkers.*[34] Where the seal and the signatures are genuine, the question is simply whether the company gave actual or ostensible authority to the persons who affixed the seal, attested sealing or countersigned the instrument, to do so.

Dawson J, with whom Toohey J agreed, said[35] that the rule in *Turquand's* case does not apply where a document sealed or signed on behalf of a company is a forgery. He went on to say that forgery is not confined to a seal or signature which is counterfeit and referred to *Ruben* and *Kreditbank Cassell.* Where there is a counterfeit signature or seal, i.e. a forgery in the strict sense, the forgery is a nullity, to which the 'indoor management' rule does not apply. If a company represents a counterfeit signature of seal as genuine, it may be estopped from denying its authenticity. There is also a forgery - in the looser sense - where there

29 (1990) 64 ALJR 427.
30 (1856) 6 El & Bl 327; 119 ER 886.
31 At p 431 *et seq.*
32 [1906] AC 439.
33 At p 443 *et seq.*
34 [1927] 1 KB 927 (CA).
35 At pp 447, 449 *et seq.*

is no counterfeit signature or seal but a person without actual or ostensible authority signed or affixed the seal.

Neither Robert nor Gerard had actual authority to mortgage Northside's land and the company had not held either of them out as possessing authority. It seems that the company did not hold out Gerard as being its secretary and, even if it did, the office of secretary would not carry with it apparent authority to mortgage the company's land. Robert was an individual director, a position which did not carry with it ostensible authority to act on behalf of the company. Accordingly, there was forgery in the looser sense and the rule in *Turquand's* case did not apply.

The result is that there is a forgery exception to the rule in *Turquand's* case, i.e. the rule does not apply where a document executed on behalf of a company is a forgery. If the document bears a false seal or signature, there is a forgery in the strict sense and the companyis not bound unless the company represents the seal or signature as genuine, in which case the company is estopped from denying its authenticity. If the document bears a genuine seal and genuine signatures but is executed by a person without actual or ostensible authority, there is a forgery in a looser sense and the company is not bound.

Other questions

1. To what extent can a person dealing with a company rely on a provision in the articles, e.g. one authorising delegation of a power to an officer actng on behalf of the company with whom he deals?

   If the outsider was unaware of the provision, it seems that he cannot rely on it, at least where the contract is not one of a kind which a person occupying the position which the agent was permitted to occupy would normally be authorised to enter into on behalf of the company.[36]

   If the outsider was aware of the provision, it seems that he cannot rely on it unless there is something more than the mere existence of the provision - it must be established independently that the person purporting to represent the company had actual or ostensible authority to enter into the transaction. The existence of an article under which authority may be conferred, if known to the outsider, is a circumstance to be taken into account in determining whether that person is being held out as possessing that authority.[37]

2. As to the statutory return regarding Gerad's purported appointment as company secretary, signed by Robert, although it was not necessary to deal with the matter, Gaudron J observed[38] that if a company allows an inaccurate return to be filed with the Corporate Affairs Commission, it is estopped from asserting that the matters set out therein are untrue.

36 *Northside* case (1990) 64 ALJR 427, per Mason CJ at p 431, and per Brennan J at p 443.
37 Per Dawson J at pp 448, 449.
38 (1990) 64 ALJR 427, at p 457.

Mason CJ was of the opinion[39] that in the *Northside* case there was material on which Barclays would have been justified in assuming that Gerard was the secretary of the company - the company appeared to have held him out as such and his signature was on the mortgage in the capacity of secretary, accompanying that of Robert, who was a director.

On the other hand, Dawson J thought that the company had not held Gerard out as being its secretary, but that even it it had, the office of secretary would not carry with it apparent authority to mortgage the company's land.[40]

The importance of the rule in *Turquand's* case today

As stated in the December 1989 number of the Bond Law Review,[41] and as shown by *Australian Capital Television Pty Ltd v Minister for Transport and Communications*,[42] there remains scope outside section 68A of the Companies Code for the development of the rule in *Turquand's* case. Cases can arise in which section 68A cannot apply but the rule can. The *Australian Capital Television* case shows that under section 68A only assertions by the company (or the person who has acquired title to property from the company) that the document in question is not sealed in accordance with the articles can be disregarded - an assertion by a third party cannot.

What if sections 68A and 68D had applied in the Northside case?

In the *Northside* case the mortgage was executed in 1979, before the introduction of sections 68A and 68D of the Companies Code on January 1, 1984. What would the position have been if the mortgage had been executed after January 1, 1984?

Prima face, section 68A(1) would have entitled Barclays to make certain assumptions in relation to the mortgage of Northside's land, and Northside would not have been allowed to assert that the matters entitled to be assumed were not correct. The relevant assumptions set out in section 68A(3), are (a) that Northside's articles had been complied with - presumably that would have entitled Barclays to assume that Northside's board of directors had authorised the use of the common seal; (b) that Gerard had been duly appointed secretary of the company and had authority to exercise the powers and perform the duties customarily exercised or performed by a secretary of a company carrying on business of the kind carried on by the company - presumably that would not have entitled Barclays to assume that Gerard or, indeed, Robert, had apparent authority to encumber Northside's land; (c) that the mortgage was duly sealed by Northside.

39 At p 431.
40 At p 452.
41 (1989) 1 Bond LR 272.
42 (1989) 7 ACLC 510.

Section 68A(4) provides that a person is not entitled to make the above-mentioned assumptions if (a) he actually knows, or (b) his connection or relationship with the company is such that he ought to know, that the matter in question is not correct. Barclays had no actual notice that Northside's articles had not been complied with or that Gerard had not been appointed secretary of the company. Was Barclay's connection with Northside such that they ought to have known? According to *Lyford v Media Portfolio Ltd*[43] section 68A(4)(b) refers to knowledge which a person ought to have by reason of his connection or relationship with the company and not to knowledge which he ought to have because something in the particular transaction would put a reasonable person on enquiry. Assuming that to be so, it seems that section 68A(4)(b) would not have disentitled Barclays from making the assumptions.

Section 68D would entitle Barclays to make the assumptions notwithstanding that Robert or Gerard was acting fraudulently in relation to the execution of the mortgage or had forged (in the looser sense of the word) the mortgage.

Accordingly, it seems that Northside would have been bound by the mortgage.

Summary

1. In Australia, as a result of the *Northside* case in the High Court, the rule in *Turquand's* case is that persons dealing with a company in good faith may assume that acts within its constitution and powers have been duly performed and are not bound to enquire whether acts of internal management have been regular.

2. It seems that the rule applies in two situations. The first is where the common seal of the company is used and a transaction is entered into by the company itself; the second is where the transaction is entered into on behalf of the company by its agents.

3. It is unclear what the basis of the rule is. There is some authority for the proposition that in the first application the rule is a special rule of company law. However, there is also authority to the effect that this application, as well as the second application, involves normal agency principles. The object of the rule is to protect innocent persons dealing with companies, and promote business convenience, whilst at the same time protecting innocent creditors and shareholders.

4. There is an exception to the rule where the nature of the transaction is such that the person dealing with the company is put upon enquiry and fails to make enquiry or the company fails to satisfy the enquiry.

5. There is a 'forgery exception' to the rule and the word 'forgery' is used in two senses, a strict sense and a looser sense. It is used in the strict sense where the seal which is affixed to a document is not the company's seal or the signatures on the document are not those of the persons whose signatures they purport to be. In such cases, the document is a nullity and the company is not bound by it. When the word 'forgery' is used in the looser sense, the seal and signatures on a document are genuine, and the question is simply whether the company has given actual or ostensible authority to do so to the persons who affixed the seal, attested the sealing or countersigned the instrument. When there is a forgery in the strict sense, the rule does not apply unless the company represents the counterfeit signature or seal as genuine, in which case it may be estopped from denying its authenticity. There was a forgery in the looser sense in *Northside* and the rule did not apply because the company had not held either Robert or Gerard out as having authority to mortgage its land, and had not held Gerard out as being its secretary.

6. A person dealing with a company cannot rely on a provision in the articles, e.g. one authorising delegation of a power to an officer, as conferring apparent authority on the officer, if the outsider was unaware of the provision and the contract is not one which such an officer would normally be authorised to enter into on behalf of the company. If the outsider was aware of the provision, he cannot rely on its mere existence - it must be established independently that the officer had actual or apparent authority to enter into the contract.

7. Despite the introduction of section 68A of the Companies Code, the rule in *Turquand's* case is still important in a limited number of cases. Cases can arise in which section 68A cannot apply but the rule can. However, where section 68A applies, it must prevail over the rule so far as it does not merely state the common law and the result may be different from the result if the rule had applied.

43 (1989) 7 ACLC 271 (SC of WA).