THE CORPORATE ENTITY

1. INTRODUCTION TO COMPANY LAW

Companies are very common in commercial and litigation disputes; people do business through them.

a. Sources Of Law

The Companies Act 1993 is the main source of company law and has changed little since it was enacted. Alongside this is the more general law of common law and equity. The Act does not cover everything and is not designed to be a code, to take over and exclude general relevant rules of common law and equity. There are also other statutes relevant to company law, such as the Securities Act (offence to issue untrue company prospectus).

There is also a government body designed to oversee the securities market – Financial Markets Authority – this is designed to make sure that the money lending and borrowing industry is properly regulated. The Takeovers Act is relevant to company law, as is the Insolvency Act (where companies go into liquidation). There is the Receivership Act (which deals with failing companies), and the Corporations (Investigation and Management) Act – this allows companies to be put into statutory management.

Lastly there are the High Court Rules – the procedural rules that govern the way litigation is run in the court; a type of secondary legislation, or regulations. Some of these rules relate specifically to liquidations of companies.

b. What Is A Company?

A company means 'a company registered under the Companies Act 1993 – definition under the Act. The point is that to be a company it must be registered with the Companies Office. Under s10 more information is provided, where it states that a company must have a name, one or more shares and one or more shareholders, with either limited or unlimited liability for the obligations of a company. A company must have one or more directors. In reality, most companies will be more sophisticated than that, even smaller companies can have up to 3 or 4 directors with a handful of shareholders and 10,000 or more shares. There are some very small companies though, and this is sufficient.

> s10 A company must have-
> a. A name; and
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> b. One or more shares; and
>
> c. One or more shareholders, having limited or unlimited liability for the obligations of the company; and
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> d. One or more directors.

i. Limited Liability of Shareholders

The shareholders of the company, as well as owning the shares issued by the company, have either limited or unlimited liability. The majority of cases involve limited liability – you can tell this from the name of the company, e.g. if it says ltd. This goes to the heart of company law – this is the reason people form companies, so shareholders have limited liability for the obligations of the company. What it means is that any obligations the company incurs – contractual or as a result of a dispute – the shareholders are not liable for those obligations, it is the company itself or in certain circumstances the directors, who are liable to pay the obligations or do the things the company is obliged to do.

This is important, as when you are investing in a company you want to put money in and get back some benefits, yet you do not want to be in a situation where you part with money and are liable for failings as well. The concept of limited liability of shareholders makes investment more attractive. Without this concept, people would not likely invest so much in companies, and it would have a detrimental effect on the economy.

Section 15:

> Separate legal personality
> A company is a legal entity in its own right separate from its shareholders and continues in existence until it is removed from the New Zealand register.

Section 16:

> Capacity and powers

1) Subject to this Act, any other enactment, and the general law, a company has, both within and outside New Zealand, -

   a. Full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction; and

   b. For the purposes of paragraph (a) of this subsection, full rights, powers, and privileges.

2) The constitution of a company may contain a provision relating to the capacity, rights, powers, or privileges of the company only if the provision restricts the capacity of the company or those rights, powers, and privileges.

Sections 10-15 of the Act involve the basic concepts of Company Law. Under s15 a company gets separate legal personality – a company is an entity in its own right and does not depend on people existing within, it exists without such. Under s16 a company has the capacity and power to carry out any lawful act which a natural person could carry out, subject to the Act and general law. An example would be where a company can buy a car or fleet of cars – within their power as a separate legal entity to do. A company, though a separate person in law, is not a natural person, so they cannot make a will (s9 of Wills Act – only people who can make a will are natural people).

A company is just a legal structure – it is not a business. Companies do not necessarily do anything; many sit idle and do nothing. It is a legal structure through which a business can be operated; arguably it is the best legal structure to operate a business under, though it is not the only legal structure people can adopt to run a business.

Once a company comes into existence it will normally form legal relations with a third party; someone who is not a shareholder or director (someone unrelated to the company). A typical example of one of these relations would be a contract for the supply of goods, or a lease contract, or an employment contract – people who work for companies are normally employed by the company itself, not the director or shareholders of the company. If something goes wrong in the third party relationship, it is the company who is primarily responsible for losses and obligations, and certainly not the shareholders.

Note Pike River Coal Mining Ltd, who was fined and sentenced for breaches of health and safety – here the directors and shareholders are not held responsible, but the company instead. This is limited liability in action. If some of the directors had been on site and involved in the day to day running of the company they may have been liable for the breaches of health and safety, but this would be due to their presence and work, not just because they are directors.

Directors of a company can be liable for company obligations. If a director of a company is involved in 'asset stripping' – deliberately taking asset s out of the company and putting them somewhere else, and this leads to a company not being able to pay tax, the director can be personally liable for that tax. This is because the director has done something specifically that gives rise to the liability, not just because they are a director. Another example of where they can be liable is in relation to building companies; they can be open to liability for negligent building work if they are involved in the work themself.

A director of a company is not an employee of the company. Although a director normally gets paid for the work they do as a director of a company, they are not employees but officers of the company. Their position is as a result of agreement with the company, rather than employment with the company.

So a company is a structure in its own right with the capacity to transact business for the benefit of the shareholders of a company, who are not liable for their obligations.

c. Fundamental Terms

i. Shareholders, share capital, shares and share register

Shareholders are the individuals who contribute some or all of a company's capital (known as share capital) in return for specified rights (referred to as shares).

Share: a chose in action – it is a bundle of rights. If you own a share you have a right to do certain things, e.g. recover your investment subject to the rules applying to the shares you have purchased. Another right is to receive a dividend of profits received by the company. Having a share gives you voting rights in some cases, for decisions over how the company is run.

Share Capital: money contributed to the company by shareholders. The money goes and is then owned by the company and used to run the business, subject to decisions by directors.

Share Register: every company has a share register – this is a document that is administered by directors and managers of the company, recording details of everyone who has shares and share interests in the company. This is for cases where when things go wrong a liquidator can determine who owns shares and how much they own.

ii. Shareholders in general meeting

Shareholders in general meeting are the collective group of shareholders of a company who, by statute, are given the power to make specified decisions.

iii. Dividends

Dividends are the distributions of profits made by the company to shareholders from time to time.

iv. Directors/Board of Directors

Directors are individuals appointed by a simple majority of shareholders in general meeting and as a collective group (the board of directors) have a statutory power to manage the business and affairs of a company.

v. Constitution

A company's constitution is a document that supplements the rules governing the operation of companies set out in the Companies Act 1993, as is permitted or provided for by the Companies Act. It may deal with all or any of the following: the rights, powers, duties and obligations of the company, individual shareholders, shareholders in general meeting, individual directors and the board of directors.

vi. Debt capital

Capital raised by companies through borrowings from third parties.

vii. Closely/widely held companies

The terms "closely held" and "widely held" refer to the number of shareholders that a company has. If a company is closely held, it has few shareholders. Widely held companies have many shareholders.

viii. Small to medium enterprises (SMEs)

The term small to medium enterprises, or SMEs, insofar as it applies to companies, refers to closely held companies. An SME is an enterprise that has fewer than 19 employees, few specialist staff and personal ownership and management (it is owned and managed by the same persons). In the company law context, personal ownership and management means that the same individuals are the company's shareholders and directors.

ix. Public issuer

Public issuers are entities that raise funds from the public in return for allotment/conferral of securities. The rules governing public issuers are presently found in the Securities Act 1978, the Securities Markets Act 1978, and the Financial Markets Authority Act 2011.

x. Public listed company

A publicly listed company is one that is a public issuer and is also a party to listing agreement with NZX, as a result of which members of public can buy and sell the issuer's securities on markets operated by NZX.

xi. Groups of companies/ Parent and subsidiary companies

Companies can operate as a group, and could involve a parent company which has subsidiary companies below them, e.g. subsidiary companies involving land, and one involving borrowing money – keeps them separate and together at the same time. If a company fails the HC can issue an order to treat all the companies as one, and not separate.

d. Companies And Other Business Structures

	Sole Trader	Partnership	Limited Partnership	Company
Governing legislation		Partnerships Act 1908	Limited Partnerships Act 2008	Companies Act 1993
Formation	No formal requirements	By agreement between the partners.	By the process specified in the LPA.	By the process specified in the CA 1993.
Participants	1	2 or more	2 or more (general partner(s) and special partner(s).	1
Separate legal personality	No	No	Yes	Yes
Ownership of capital	Sole proprietor	Partners	Limited partnership	Company
Contributors of capital	Sole proprietor	Partners	General and special partners	Shareholders
Constitution or agreement	Not required	Optional	Required	Optional
Management	Sole proprietor	Equal participation by partners.	General partners	Directors
Risk	Sole proprietor	Partners	Limited partnership and general partners	Company
Returns	Sole proprietor	Profit sharing between partners	Distributions approved by general partners,	Distributions to shareholders approved by directors.

Sole Trader: one person on their own doing business. There is no real legislation for sole traders – they are subject to the law but no specific Act dealing with people trading by themselves without being in a company. The major feature of a sole trader is that they are personally liable for all transactions within their business, e.g. obligations to pay tax, comply with regulations and standards etc. The risk for a sole trader is with themselves, so if anything goes wrong it is their responsibility.

Partnership: this is a common form of business structure, and common in legal practices – the word 'firm' means partnerships. Partnerships come under the Partnerships Act. Joint ventures can be a partnership as well. Fiduciary and equity law govern partnerships, and the main features are that the partners are personally liable for obligations they incur, as well as obligations incurred by their partners. A partnership is a structure you cannot hide behind. Whatever profits are made in partnership are divided between the partners in whatever proportion has been agreed on.

Limited Partnership: this is a new entity created under the Limited Partnerships Act 2008 – these act like a firm, but to some extend liability can be protected. There are very few limited partnerships in existence.

Company: as discussed. A company owns all its assets, and in the case of liquidation they will not go to directors, but sold to pay off debts such as wages etc.

2. FORMATION OF COMPANIES

The formation of companies is governed by s10-15 of the Act. A company is a separate entity but not an actual person. As such a company must be identifiable (since there is no person) and as such the company needs a name. The name must be appropriate, not confusing, defamatory or offensive. Every company is registered by name on the NZ Register – able to check whether or not a company exists and who the people behind it are.

i. Reservation Of A Company Name

The first step in incorporating a company is to devise the name of it and apply for that name to be reserved for them – *Name Reservation*. The reservation of such is controlled by s20-25 of the Act. Under s20 a name cannot be registered before reservation has occurred. Under s21 the proposed name must end with the words ltd, if the company is to be a limited company, and unlimited if it is to be an unlimited company. This shows the world what type of company it is, and the consequences of it.

To have a company name reserved an application must be made in the prescribed form, and after this the Registrar must consider it. under s22(2) there are four reasons why a Registrar must not accept a name; contravenes an enactment, identical or almost identical to an existing company, identical or almost identical to another name reserved, or if it is offensive. Once the proposed name is considered they must notify the applicant of the outcome. If the name is reserved, the applicant has 20 days to make a further application or registration of the name.

> s21 Name of company if liability of shareholders limited
>
> The registered name of a company must end with the word "Limited" or the words "Tapui (Limited)" if the liability of the shareholders of the company is limited.
>
> s20 Name to be reserved
>
> The Registrar must not register a company under a name or register a change of the name of a company unless the name has been reserved.
>
> s22 Application for reservation of name
>
> (1) An application for reservation of the name of a company must be sent or delivered to the Registrar, and must be in the prescribed form.
>
> (2) The Registrar must not reserve a name—
>
> (a) The use of which would contravene an enactment; or
>
> (b) That is identical or almost identical to the name of another company or another company under the Companies Act 1955; or
>
> (c) That is identical or almost identical to a name that the Registrar has already reserved under this Act or the Companies Act 1955 and that is still available for registration; or
>
> (d) That, in the opinion of the Registrar, is offensive.
>
> (3) The Registrar must advise the applicant by notice in writing—
>
> (a) Whether or not the Registrar has reserved the name; and
>
> (b) If the name has been reserved, that**[**, unless the reservation is sooner revoked by the Registrar,**]** the name is available for registration of a company with that name or on a change of name for 20 working days after the date stated in the notice.

There are guidelines to determining if names are identical or almost such. Words such as 'the' and 'limited' are disregarded. The word 'and' and '*&*' are treated the same, e.g. cannot have *x and x* and *x & x*. Numbers and geographical locations can change such, e.g. Rangiora Glass Ltd and Christchurch Glass Ltd. The same principles apply when it comes to identical or almost identical to another name reserved.

Once a name is reserved by the Registrar the next step is for it to be registered under s11-14. Under s11 there is a right to apply to the Registrar to have t reserved, s12 deals with the mechanics of application; in prescribed form and accompanied with written consent form those named as directors of the company, consent from shareholders, evidence it has been reserved and a certified concept of the company constitution (if there is one). Once an application has been received the Registrar is bound to register the company immediately. A certificate of incorporation must be issued, and under s17 this is evidence all requirements of registration has been met and the company is incorporated as the date in the certificate states. Under s15 the company gets separate legal status and only ceases to exist when removed by the Registrar.

St Johns – discusses how companies come into existence.

> s24 Direction to change name
>
> (1) If the Registrar believes on reasonable grounds that the name under which a company is registered should not have been reserved, the Registrar may serve written notice on the company to change its name by a date specified in the notice, being a date not less than 20 working days after the date on which the notice is served.
>
> (2) If the company does not change its name within the period specified in the notice, the Registrar may enter on the New Zealand register a new name for the company selected by the Registrar, being a name under which the company may be

registered under this Part of this Act.

(3) If the Registrar registers a new name under subsection (2) of this section, the Registrar must issue a certificate of incorporation for the company recording the new name of the company, and section 23(4) of this Act applies in relation to the registration of the new name as if the name of the company had been changed under that section.

What happens where a name is reserved and then subsequently registered in circumstances where it arguably shouldn't have been? In this situation s24 comes into play. Under s24 the registrar has to power to require a company to change its name, if in their view on reasonable grounds their name should not have been reserved in the first place. The Registrar receives companies to change their names on a regular basis, especially from companies in conflict with others who have similar names to themselves. Usually, unless a glaring mistake has been made, the Registrar will not order companies to change their names.

In these situations the person making a request has a right of appeal under s370 to the HC (judicial review of the Registrar's decision not to order a change). The right of appeal is also available to a company who has been ordered to change their name.

This situation gave rise to the Paint Factory case: second company came along and called themselves the 'Paint Factory *Palmerston North*'. The original Paint Factory applied for the second to change their name and they went to the HC. The HC held the name was not identical due to the words '(PM)' – enough to distinguish the practice.

The legislative policy behind s24 is that, as well as not being offensive and defamatory, company names should not be confusing to the general public; able to distinguish them from other companies.

s370 Appeals from Registrar's decisions

(1) A person who is aggrieved by an act or decision of the Registrar under this Act may appeal to the Court within 15 working days after the date of notification of the act or decision, or within such further time as the Court may allow.

(2) On hearing the appeal, the Court may approve the Registrar's act or decision or may give such directions or make such determination in the matter as the Court thinks fit.

Guidelines issued by the Registrar of Companies (see www.companies.govt.nz).

Identical or almost identical

Certain words and phrases can be disregarded when determining whether names are identical or almost identical. The words and phrases are:

The definite article ("the") when it is the first word in a name.

The following words appearing at the end of a name:

- 'Limited'
- 'Tapui (Limited)'
- 'Unlimited'

The following abbreviations whenever they appear in a name:

- '&' for "'and'
- 'no' for 'number'
- 'co' or 'coy' for 'company'
- 'N.Z.' or 'NZ' for 'New Zealand'
- 'Bros' for 'Brothers'

The typeface and case (upper or lower) of letters, accents, spaces between letters and punctuation marks

Identical has the ordinary meaning of the same in every respect. *Almost Identical* is more difficult to define but the Registrar's policy is that it means a name in which the key words and/or the order in which they appear make that name virtually indistinguishable from another. Each name reservation will be considered in light of its own individual circumstances.

In general, a; year marker - for example, '(2010); number - for example, 'No. 1' or; geographic marker - for example, '(Nelson); is sufficient to distinguish one name from another. For the purposes of determining whether two names are

almost identical, names containing a marker will not be almost identical to those without. For example, 'Clothing Company Limited' and 'Clothing Company (2010) Limited' are not almost identical.

Improper use of symbols and numbers

Generally the only symbols that may be used in a company name are those that are used in the proper context – for example, The $2 Shop Limited. Numbers that are used in a name are likely to be accepted where they act as a year marker or a numerical marker. For example, XYZ No. 1 Limited and XYZ No. 2 Limited or XYZ (2202) Limited and XYZ (2009) Limited.

The use of plurals

Plurals, that is adding the letter 's' to the end of a word, is not enough to make a name significantly different.

Where, in the Registrar's opinion, the name is offensive

Companies Act 1993, s 22(2)(d), i.e. obscene, contrary to public policy, or likely to offend any particular section of the community or any particular religion.

ii. Incorporation

s11 Right to apply for registration

Any person may, either alone or together with another person, apply for registration of a company under this Act.

i. Registration

Order of St John Northern Regional Trust v Gemini 10 Ltd at [19-20] (Hugh Williams J):

"Company" is defined in s 2 of the Companies Act 1993 as a "company registered under Part 2 of this Act" or a re-registered company. In Part 2, s 11 gives any person the right to apply for "registration of a company under this Act", the formal requirements for which appear in s 12. And s 13 provides that as soon as the Registrar receives a properly completed application for registration the Registrar must register it and the issue of certificate of incorporation. Section 14 provides that the issue of certificate of incorporation is "conclusive evidence" that all the statutory requirements for registration have been completed and, "on and from the date of incorporation" the company is "incorporated under this Act". Every company, once registered, "continues in existence until it is removed from the New Zealand register" (s15).

It is therefore clear that, in human terms, registration is the corporate equivalent of parturition and, once issued, the certificate of incorporation is the rough equivalent of a birth certificate. However, unlike humans, companies have perpetual existence and, unless removed from the register, a death certificate is never issued for them.

s12 Application for registration

(1) An application for registration of a company under this Act must be sent or delivered to the Registrar, and must be—

(a) In the prescribed form; and

(b) Signed by each applicant; and

(c) Accompanied by a document in the prescribed form signed by every person named as a director, containing his or her consent to be a director and a certificate that he or she is not disqualified from being appointed or holding office as a director of a company; and

(d) Accompanied by—

(i) A document in the prescribed form signed by every person named as a shareholder, or by an agent of that person authorised in writing, containing his or her consent to being a shareholder and to taking the class and number of shares specified in the document; and

(ii) If the document has been signed by an agent, the instrument authorising the agent to sign it; and

(e) Accompanied by a notice reserving a name for the proposed company; and

(f) If the proposed company is to have a constitution, accompanied by a document certified by at least one applicant as the company's constitution.

(2) Without limiting subsection (1) of this section, the application must state—

(a) The full name and address of each applicant; and

(b) The full name and residential address of every director of the proposed company; and

(c) The full name and residential address of every shareholder of the proposed company, and the number of shares to be issued to every shareholder; and

(d) The registered office of the proposed company; and

(e) The address for service of the proposed company.

s13 Registration

As soon as the Registrar receives a properly completed application for registration of a company, the Registrar must—

(a) Register the application; and

(b) Issue a certificate of incorporation.

s14 Certificate of incorporation

A certificate of incorporation of a company issued under section 13 of this Act is conclusive evidence that—

(a) All the requirements of this Act as to registration have been complied with; and

(b) On and from the date of incorporation stated in the certificate, the company is incorporated under this Act.

3. COMPANY CONSTITUTIONS AND SHAREHOLDER AGREEMENTS

i. The Company Constitution

A company constitution is a document that contains a series of provisions which taken together, govern the internal operation of the company, such as the relationship between the individual shareholders and the company, and the shareholders within themselves. These are public documents, and are required to be published on the companies office website.

i. The role of a company constitution

The basic purpose of it is to limit the extent to which the law regulates the internal structures of the company, directors, shareholders, and the rights and individual power that they have. Companies normally adopt a constitution at the beginning of incorporation, and if this is not done they can do so at any other later time (s32(1)), unless if they have become deregistered, or if they go into liquidation.

There are three sections relevant to the role of a company constitution.

s26 No requirement for company to have constitution.

A company may but does not have to have a constitution.

This is a change from previous legislation where it was compulsory. This gives rise to questions of what happens if a company chooses not to have a constitution. In this instance s28 will apply;

s28 Effect of Act on company not having constitution.

If a company does not have a constitution, the company, the board, each director, and each shareholder of the company have the rights, powers, duties, and obligations set out in this Act.

So where there is no constitution the Act will operate as a default position instead. Under s28 it is not just the Companies Act which will direct the rights, powers, duties and obligations, but all law dealing with companies in existence, so it will cover the common law and equity as well.

Most companies will have a constitution because:

- Some of the default rules in Act may be unsuitable.
- Some rules in Act only apply if expressly adopted by a constitution.
- It is a mechanism by which rules other than those found in Act may be adopted.

Most companies have a constitution because it suits their needs better than what is provided under the general law. Most companies want to limit the extent to which the Act governs their operations. E.g. under s84 there is a provision

that shares in a company are freely transferable (if you are a shareholder you can sell your shares to anyone). This could lead to difficulties, especially in small companies (not so much a problem in a large company). Small companies normally have a constitution incorporating s39 – restriction of transferring of shares; must sell to other shareholders before offering to anyone else (can lead to disputes over prices of shares). Small companies may also want a constitution to place restrictions on the extent that the company can be funded by debt or share capital.

> s27 Effect of Act on company having constitution.
> If a company has a constitution, the company, the board, each director, and each shareholder of the company have the rights, powers, duties and obligations set out in this Act except to the extent that they are negated or modified, in accordance with this Act, by the constitution of the company.

If a company chooses to have a constitution then s27 will apply. This allows the constitution of the company to negate or modify the effect of the Act and general law on the operation of the company, though limits on such are imposed by the Act itself – so you cannot defeat the overall intention of the Act by adopting provisions into the constitution.

ii. Contents of a constitution

> s30 Contents of constitution
> Subject to section 16(2) of this Act, the constitution of a company may contain—
> (a) Matters contemplated by this Act for inclusion in the constitution of a company:
> (b) Such other matters as the company wishes to include in its constitution.

Section 30(a) is a reference to matters contemplated by the presumptive and optional provisions in Act (provisions within the Act). On the fact of it, 30(b) apparently refers to matters of corporate governance AND commercial arrangements affecting the company, insiders and outsiders (provisions outside the Act). The issue is whether all such matters have the status of statutory rules conferred upon them by the Act. This is the subject of s 31 of the Act. Section 16(2) aims to stop constitutions avoiding the general aims of the Act.

One example could be a provision dealing with appointments of employees – a constitution can involve restrictions on the classes of person's or individuals of those who can be employed (something outside the company). Another provision would be supply arrangements (could be important for company to get a type or quality of product, so a compulsory supply arrangement could be included).

Provisions in the Act may be classified as mandatory, optional or presumptive. Mandatory provisions must be included in the constitution of every company – some don't bother putting them in since they are mandatory, though other do include them for reference. Presumptive provisions are those sections in the Act which apply unless the constitution expressly modifies them or negates them (excludes them). So many provisions will apply, unless the company states they do not or states a different way that they do. Optional provisions only apply unless expressly adopted. An optional provision can be adopted and modified.

We can normally tell which is what by looking at the words used to describe the provisions;

Presumptive

> s37 Types of shares – (1) Subject to the constitution of the company, different classes of shares may be issued in a company.

Optional

> s59 Acquisition of company's own shares – (1) Subject to section 52 of this Act, a company may purchase or otherwise acquire shares issued by it if it is expressly permitted to do so by its constitution.

Mandatory

> s109 Management review by shareholders – (1) Notwithstanding anything in this Act or the constitution of the company, the chairperson of a meeting of shareholders of a company must allow a reasonable opportunity for shareholders at the meeting to question, discuss, or comment on the management of the company.