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THE PROTECTION AFFORDED TO THIRD PARTIES WHEN CONTRACTING WITH COMPANIES: AN ANALYSIS OF THE TURQUAND RULE AND DOCTRINE OF CONSTRUCTIVE NOTICE

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1 INTRODUCTION

1.1 Context of the study

The enactment of the Companies Act, 71 of 2008 ('New Act') has led to the redundancy or modification of existing company law doctrines as well as the development of certain new corporate law concepts.[1] Two such company law principles, altered by the New Act, are the Turquand Rule ('Rule') and the Doctrine of Constructive Notice ('Doctrine'). The purpose of this research is to assess whether the aforementioned modifications better protect third parties when contracting with companies and, to the extent that this is not the case, how the New Act could be altered to better cater for issues identified in this research.

1.1.1 *Turquand Rule*

The Turquand Rule, also known as the *'indoor management rule*',[2] which is still relevant for the purposes of modern company law today, originated in *Royal British Bank v Turquand.*[3] In South Africa, this rule was adopted in *Mine Workers Union v Prinsloo*.[4] The principle behind the Rule is that a person dealing with a company, in good faith, is entitled to assume that all internal procedures of the company have been complied with and are carried out.[5]

The Doctrine of Constructive Notice and the Turquand Rule could, prior to the New Act, be considered to work in unison, in that the Turquand Rule was designed to

[1] Cassim FHI "The Companies Act 2008: An Overview of a Few of its Core Provisions" (2010) 22 *SA Merc LJ* at 157.
[2] Cain TE "The Rule of British Bank v Turquand in 1989" (1989) *Bond Law Review* at 272.
[3] 119 All ER 886.
[4] 1948 (3) SA 831.
[5] *Morris v Kanssen* [1946] 1 All ER 586 at 592.

temper the effects of the Doctrine of Constructive Notice.[6] The Turquand Rule allowed a bona fide third party to assume that all the internal formalities of a company had been complied with, thus mitigating the effects of the Doctrine of Constructive Notice.[7]

The Rule operated in both a narrow and a wide sense, in the narrow sense, the Rule examined whether or not the required person was appointed, in the wide sense, the Turquand Rule considered whether or not the correct internal procedures were followed in the appointment of such a person.[8] By way of example, if the articles contain a provision which permits the board to delegate their powers to any third party, the Turquand Rule will apply in the narrow sense only if the person has been appointed by the board, if, however, the appointment of the third party was made, but the validity of the appointment is disputed because a quorum (as an example) was not present, the Turquand Rule in the wide sense may also apply.

In both instances the company is unable to dispute, and a third party may assume, that the appointment of the third party was correctly performed, in the first instance, the bona fide third party could assume that they were contracting with the rightfully appointed person (narrow application of the Turquand Rule) and in the second, the third party could assume that all internal processes were correctly completed (wide application of the Turquand Rule).[9] Internal processes include, formal and procedural requirements deemed as inside actions of the company (*'indoor management'*).[10]

Were the Turquand Rule deemed to be part of estoppel, as is criticised below, in situations where the company had failed to comply with an internal formality, a third

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[6] Locke N "The Legislative Framework Determining Capacity and Representation of a Company in South African Law and its Implications for the Structuring of Special Purpose Companies" (2016) *SALJ* at 169.
[7] Cassim FHI *et al* (2012) at 181.
[8] Delport PA "Companies Act 71 of 2008 and the "Turquand Rule" (2011) *Journal of Contemporary Roman Dutch Law/Tydskrif Vir Hedendaagse Romeins-Hollandse Reg* at 136.
[9] Delport (2011) *THRHR* 136.
[10] Delport (2011) *THRHR* 137.

party may be unable to rely on estoppel thus allowing the company to escape liability.[11] In such instances, two problematic requirements of estoppel include (i) the representation needs to have been made by the company and (ii) the third party must have relied upon the representation.[12] In the example above, there had been no representation, the quorum requirement did not amount to a representation by the company that the requisite internal formality has been complied with nor had the company represented that the relevant third party, contracting on the company's behalf, had the authority to act.

If the company's constitution contains a provision permitting the delegation of powers, a third party contracting with the company is not entitled to assume that such powers have been delegated, the Turquand Rule permits a third party to assume that internal management has delegated this power to a person in general, absent ostensible authority, the Turquand Rule does not permit a third party from assuming that a specific person has been authorised to act.[13]

In so far as the narrow sense application of the Rule is concerned, an obiter dictum in a recent case, *Makate v Vodacom (Pty) Ltd*[14] stated that the Turquand Rule is merely an application of estoppel. Since the doctrine of estoppel requires a third party to have actual knowledge of a particular clause or provision, this obiter dictum was criticised by Cassim[15] who stated the following:

'In Royal British Bank v Turquand, the court made no reference to agency law, and nothing was said about ostensible authority or estoppel. Furthermore, in the leading South African case on the Turquand rule, Mine Workers' Union v Prinsloo, the Appellate Division held, in effect, that the Turquand rule is patently not part of estoppel. The Turquand rule in South African has been treated as a separate and

[11] Cassim FHI, Cassim MF "The Authority of Company Representatives and the Turquand Rule Revisited" (2017) *SALJ* 660.
[12] Cassim FHI, Cassim MF (2017) *SALJ* 660.
[13] Cassim FHI, Cassim MF (2017) *SALJ* 662.
[14] 2016 (4) SA 121 (CC).
[15] Cassim FHI, Cassim MF (2017) *SALJ* 658.

distinct company-law principle designed to regulate dealings with a company. As such it is not dependent on the requisites of estoppel.'

1.1.2 *Doctrine of constructive notice*

Under the Companies Act, 61 of 1973 ('Old Act'), section 63 required that both the memorandum and the articles of association be lodged with the Companies and Intellectual Properties Registration Office. The Doctrine of Constructive Notice deemed a person dealing with the company at that time to have knowledge of the aforementioned documents regardless of whether or not such documents had been read; this principle was laid down in the case of *Ernest v Nicholls*.[16]

The Doctrine was succinctly summed up by Slade J[17] as follows:

'*[T]he doctrine of constructive notice of a company's registered documents, such as its memorandum of association…does not operate against a company, but only in its favour. Put in the converse way, the doctrine of constructive notice operates against the person who failed to inquire, but does not operate in its favour. There is no positive doctrine of constructive notice; it is purely a negative one*.'

1.2 Research problem

In order to establish a connection with the outside world, some of the most important principles of company law have been deemed to include capacity and company representation, ensuring certainty for both a company and a third party when dealing with one another.[18] This has, unfortunately, not been the case in practice resulting in courts and academics confusing important concepts with one another.[19]

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[16] (1857) 6 HL Cas 401.
[17] *Rama Corporation Ltd v Proved Tin General Investments Ltd* [1952] 2 QB at 147, [1952] 1 All ER at 554.
[18] Delport PA (2011) *THRHR* 132.
[19] Delport PA (2011) *THRHR* 132.

As stated by Delport, the rights of the company and those of a third party contracting with a company must be balanced, this balance requires the synergy of the doctrines of disclosure, constructive notice and the Turquand Rule.[20]

1.2.1 *The Doctrine of Constructive Notice*

Two of the doctrines, abolished by the New Act, include the main and ancillary objects of a company as well as the Doctrine of Constructive Notice.

The Doctrine of Constructive Notice was abolished by section 19(4) of the New Act. This section states, subject to the provisions of section 19(5), discussed below, a person may not be regarded as having knowledge or having received notice of any company documents merely because such a document has been filed or is available for inspection at the company's offices.

Despite its abolition, section 19(5)(a) of the New Act retains a semblance of the Doctrine.[21] A person is regarded as having knowledge of any provisions of a company's MOI (as contemplated in section 15(2)(b)) which relate to restrictive conditions applicable to the company and any requirements for the amendment of any such condition.

Knowledge is inferred in terms of section 15(2)(c) of the New Act, where the MOI prohibits the amendment of any particular provision of the MOI. In terms of the New Act[22] if the company's MOI contemplates the inclusion of either a section 15(2)(b) or (c) restriction a prominent statement drawing attention to this fact must be included in the company's notice of incorporation and the expression 'RF' must be suffixed to the name of the company.

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[20] Delport PA (2011) *THRHR* 133.
[21] Cassim FHI *et al* (2012) at 179.
[22] Section 13(3).

In summary, the Doctrine, save in the following instance where third parties are deemed to have both notice and knowledge of the provisions of 'RF' companies to which either the Notice of Incorporation or Notice of Amendment drew their attention, was abolished. Cassim states that the Doctrine of Constructive Notice will continue, as a result, to *'haunt South African corporate law.'*[23]

1.2.1 *The Turquand Rule*

While not a new concept, section 20(7) of the New Act preserves[24] the common law Turquand Rule through its codification, or at least, partial codification.[25] Section 20(7) of Act 71 of 2008 states:

'A person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.'

Essentially, this section encapsulates the common law Turquand Rule and offers protection to a third party who is not a shareholder, director or prescribed officer.[26] Section 20(8) further states that subsection (7) must be construed concurrently with, and not in substitution for, any common law principle.[27]

The relief granted to a third party in terms of section 20(7) is narrower than that afforded under common law as the section 20(7) relief does not aid insiders dealing

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[23] Cassim FHI *et al* (2012) 180.
[24] Jooste R "Observations on the Impact of the 2008 Companies Act on the Doctrine of Constructive Notice and the Turquand Rule" (2013) *SALJ* at 469.
[25] Delport PA (2011) *THRHR*136.
[26] Section 20(7) Companies Act No. 71 of 2008.
[27] Jooste R (2013) *SALJ* 469.

with the company.[28] While narrower in relief, the section is broader in application in two respects:[29]

(i) it applies to all formal and procedural requirements as opposed solely to internal formalities; and
(ii) it applies to all formal and procedural requirements in terms of the New Act instead of requirements imposed by the Articles of Association.

This codification is, however, not without problems, such problems include (i) the preclusion of third parties invoking the Rule if such parties *ought reasonably* to have known of the company's non-compliance, (ii) the alignment of the codification with the underlying common law following, in terms of section 20(8) of the New Act, the preservation as opposed to the substitution of the common law,[30] and (iii) the definition of formal and procedural requirements and the applicability thereof to almost any provision of the New Act.[31]

1.3 Research objective

The purpose of conducting this research is to assess (i) whether the abolition of the Doctrine of Constructive Notice as well as (ii) the partial codification of the Turquand Rule each better protect third parties when contracting with companies.

[28] Locke N (2016) SALJ 170.
[29] Locke N (2016) *SALJ* 171.
[30] Cassim FHI (2010) 22 *SA Merc LJ* 174.
[31] Locke N (2016) *SALJ* 171.

1.4 Research questions

1.4.1 *Main research question*

How do revisions arising from the New Act to the Doctrine of Constructive Notice and the Turquand Rule protect third parties when contracting with companies?

1.4.2 *Sub research question 1*

Has the statutory abolition of the Doctrine of Constructive Notice created greater protection for third parties or do traces of the Doctrine remain hidden within the New Act rendering the abolition ineffective?

1.4.3 *Sub research question 2*

Has the codification of the Turquand Rule, despite its conflicts with the common law Turquand Rule as well as any statutory limitations, improved third party protections when contracting with a company?

1.5 Motivation and significance of the research

The significance of this research in respect of company law is to identify whether the balance, envisaged under section 7 of the New Act, between a company and its stakeholders is cultivated and maintained through both the abolition and partial codification.

To the extent that third parties are worse-off than what they were under the Old Act this paper will seek to provide possible remedies.

1.6 Scope, limitations and delimitations of the research

As a starting point, this study will look at the historical development of both the Doctrine and the Rule by examining the common law through South African and English case law. Thereafter, the advantages and disadvantages of both under the old dispensation will be critically assessed by reviewing more recent case law and journal articles. Finally, both local and international legislation will be analysed to understand the changes made to the common law as well as the reasons therefore, to the extent required a comparative analysis will be done for this purpose.

This study will, as a result, be a literature review being solely library and internet based, drawing information predominantly from legislation, textbooks, case law and journal articles.

Companies are no longer restricted to a specific business activity.[32] Companies are conferred with all the legal powers and capacity of an individual except to the extent that a juristic person is incapable of exercising such powers or having such capacity or to the extent limited by the MOI.[33] Since the effect of section 19(1)(b) of the New Act is that the company will have unlimited legal capacity, save as may be limited by the company's MOI, this research will not analyse or discuss the legal capacity of a company. The *ultra vires* doctrine as well as the ambit of section 19(1)(b) of the New Act is thus excluded from the scope of this study.

Section 20(1)(a)(ii) prevents the company from escaping liability under the contract due to the company's directors or agents having lacked the requisite authority. While this provision affords a third party with some protection as it estops the company from relying on the company's lack of capacity as a defence,[34] this research will not examine directors' authority in any detail, save where internal company formalities are discussed for the purposes of analysing the Turquand

[32] Cassim FHI "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 *SA Merc LJ* at 302
[33] Section 19(1)(b) Companies Act No. 71 of 2008.
[34] Cassim FHI (2010) 22 *SA Merc LJ* 171.

Rule. Furthermore, as confirmed by Cassim,[35] in terms of South African law, the Turquand Rule is an independent rule relating to companies, independent of the general principles of agency law.[36]

Suffice to state that, in terms of section 20(5) of the New Act, the protections afforded to a third party contracting with a company will be of little effect to the extent that such a person is mala fides, the ambit of this section or the uncertainty surrounding its interpretation[37] will not be analysed in any detail.

The Doctrine continues to apply in instances when dealing with a personal liability company,[38] this application will not be discussed in the research.

[35] Cassim FHI, Cassim MF (2017) SALJ 658.
[36] *The Mine Workers' Union v Prinsloo* 1948 (3) SA 831 (A) and the *obiter dicta* in *Farren v Sun Service SA Photo Trip Management (Pty) Ltd* 2004 (2) SA 146 (C).
[37] Cassim FHI (2010) 22 *SA Merc LJ* 172.
[38] Cassim FHI *et al* (2012) 180.

2 THE DOCTRINE OF CONSTRUCTIVE NOTICE

2.1 Introduction

This chapter looks at the history of the Doctrine, the demise of the Doctrine, what led to the demise of the Doctrine in the New Act and whether the remaining aspects of the Doctrine render the abolition ineffective.

2.2 Existence of the Doctrine

Both the Doctrine as well as the Rule are explained by using the principle of publicity.[39] The principle of publicity (the doctrine of disclosure) is regarded as the most basic of the company law doctrines, deemed the 'flipside' of corporate legal personality.[40] Secrecy is substituted for the benefit of perpetuity as well as separate legal personality and liability.[41] Certain information, such as a company's Memorandum of Incorporation as well as, previously, its Articles of Association, were/are public documents open to inspection. The Doctrine of Constructive Notice deemed a person to have notice of the contents of the Articles of Association due to their publicity, this was in contrast to the Turquand Rule where a third party was protected against and not affected by internal irregularities.[42] Prior to the New Act, the doctrine of disclosure and the Doctrine of Constructive Notice were regarded as fundamental principles of South African company law.[43]

Before the New Act came into force, the authority of a company to enter into a contract with a third party was governed by two things (i) agency principles supplemented by the common-law Doctrine of Constructive Notice and (ii) the

[39] Naudé SJ "Company Contracts: The Effect of Section 36 of the New Act" (1974) 91 SALJ at 317.
[40] Delport PA (2011) *THRHR* 133.
[41] Delport PA (2011) *THRHR* 133.
[42] Naudé SJ (1974) *SALJ* 317.
[43] Cilliers HS *et al* (2000) at 190.

common-law Turquand Rule.[44] The Doctrine of Constructive Notice, in a nutshell, means that a person, in dealing with a company, cannot assert that he had no knowledge of the contents of the public documents of the company.[45] What this meant for a third party contracting with a company is that such a third party had no legal basis for a complaint if a transaction was held not to be binding because the transaction was in conflict with one of the company's public documents.[46]

Essentially, a person dealing with a company is deemed to have knowledge of the company's public documents.[47] The positive formulation of the Doctrine implies that a person may rely on a provision contained in a document regardless of knowledge thereof at the relevant time.[48] This was, however, misleading and not law,[49] it did not mean that an outsider could rely on a statement if such an outsider had not actually read the document.[50] In *Houghton & Co v Nothard, Lowe and Willis Ltd*, Sargant LJ said the following:

'In a case like this where that power of delegation had not been exercised, and where admittedly…the plaintiff…had no knowledge of the existence of that power and did not rely on it, I cannot for myself see how [he] can subsequently make use of this unknown power so as to validate the transaction.'

Slade J sums up the rule as follows, the Doctrine operates *solely* in a company's favour and not in favour of a person who failed to enquire, and instead operates to his detriment.[51] Instead of explaining the Doctrine as a person's deemed knowledge of public documents, a more accurate description of the Doctrine would be that a person, in dealing with a company, cannot rely on ignorance.[52]

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[44] Jooste R (2013) *SALJ* 464.
[45] Jooste R (2013) *SALJ* 464.
[46] Jooste R (2013) *SALJ* 464.
[47] McLennan JS "The Ultra Vires Doctrine and the Turquand Rule in Company Law – A Suggested Solution" (1979) *SALJ* 342.
[48] McLennan JS (1979) *SALJ* 342.
[49] McLennan JS (1979) *SALJ* 342.
[50] McLennan JS "Demise of the Constructive-Notice Doctrine in England" (1986) SALJ 558.
[51] [1952] 2 QB 149.
[52] McLennan JS (1979) *SALJ* 343.

The Doctrine of Constructive Notice is thus a negative doctrine, the Doctrine operates in favour of the company, it is not a positive doctrine which operates in favour of a third party dealing with a company.[53] A third party is not entitled to claim reliance upon an unusual provision in a company's constitution upon which he did not rely.[54] This, as is discussed later, is at odds with the statutory Doctrine of Constructive Notice which seemingly provides for a positive Doctrine in s19(4)[55] where the statute refers to the knowledge a person '*must not be regarded as having*'.[56]

In contracting with a company and inspection of its public documents a third party would be able to ascertain whether any limitations had been placed on the mandate of an agent, therefore, no reliance could be placed on estoppel since a party, contracting with a company, cannot contend that he was misled as to the extent of the agent's authority.[57] Olivier is of the view that outsiders wishing to rely on estoppel to enforce an agreement against a company would have been frustrated as such an outsider would not have been able to plead ignorance of a public document (which would have placed limitations on an agent's authority) regardless of whether a company held out that the agent had the requisite authority.[58]

2.3 Reason for the abolition of the doctrine

2.3.1 *Demise of the Doctrine in England*

The Doctrine has served no useful purpose in company law save for causing unfair prejudice to third parties contracting with companies.[59] The reason cited for this is

[53] Jooste R (2013) *SALJ* 468.
[54] *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 504.
[55] Companies Act, 71 of 2008.
[56] Jooste R (2013) *SALJ* 469.
[57] Oosthuizen MJ "Aanpassing van die Verteenwoordigingsreg in Maatskappyverband" (1979) *TSAR* at 5.
[58] Olivier E "Section 19(5) of the Companies Act 71 of 2008: Enter a Positive Doctrine of Constructive Notice? (2017) *Stell LR* at 617.
[59] McLennan JS (1986) *SALJ* 559, *In re Jon Beauforte (London) Ltd* [1953] Ch 131, [1953] 1 All ER 634.

that, the Doctrine was developed at a time when very few companies existed, it now being absurd to expect every person dealing with a company to read both the company's articles and memorandum.[60] The case of *In re Jon Beauforte (London) Ltd*[61] is illustrative of the Doctrine causing unfair prejudice to third parties contracting with companies.[62]

It seems, in *TCB Ltd v Gray,*[63] that the Doctrine has been removed from company law in the United Kingdom. While the article, discussed below, would not generally appear in South African articles of association, of importance is that a case would go the other way in South Africa, that is be invalid and not be enforceable by another party.[64] In the United Kingdom, the third party contracting with the company could, notwithstanding the contravention of the clause contained in the articles, enforce the contract, however, this would not have been possible in South Africa.[65]

One of the issues raised in this case was whether a clause, in the company's articles, requiring signature by a director, had been complied with. Instead of having been signed by the director, a debenture had, instead, been signed by a third party authorised to do so in terms of a power of attorney issued by the director. At common law, the debenture would have been invalid based on the principle *delegatus non potest delegare*. Section 9(1) of the European Communities Act 1972, however, altered this, stipulating the following:

'In favour of a person dealing with a company in good faith, any transaction decided on by the directors shall be deemed to be one which it is within the capacity of the company to enter into, and the power of the directors to bind the company shall be deemed free of any limitation under the memorandum or articles of association; and a party to a transaction so decided on shall not be bound to enquire as to the

[60] McLennan JS (1986) *SALJ* 559.
[61] [1953] Ch 131, [1953] 1 All ER 634.
[62] McLennan JS (1986) *SALJ* 559.
[63] [1986] 1 All ER at 587.
[64] McLennan JS (1986) *SALJ* 560.
[65] McLennan JS (1986) *SALJ* 560.

capacity of the company to enter into it or as to any such limitation on the powers of directors, and shall be presumed to have acted in good faith unless the contrary is proved.'

In his judgement, Sir Nicolas Browne-Wilkinson V-C said that the purpose of the section was to enable people, dealing with a company in good faith, not to be adversely affected by any limits on the company's capacity or its internal management rules, allowing such people to deal with a company through its directors. The manner in which this is done is twofold, the section deems all transactions authorised and secondly, allows directors to bind companies without further authority effectively abolishing the Doctrine.[66]

Section 9(1) of the European Communities Act 1972 was, mainly enacted to abolish the Doctrine, it was accepted that the defects of the subsection resulted in it having failed its intended purpose.[67] This abolishment was done in accordance with article 9 of the EEC Council Directive 68/151, [68] which stated the following:

9(1) Unless acts by organs of a company exceed the powers conferred by law on an organ, such acts shall be binding upon a company despite such acts not being within the company's objects.

Member States could, however, provide that where a company is able to prove that a third party knew the act was outside the ambit of the objects of a company or could not have been unaware thereof, the company should not be bound. Mere disclosure of the statutes was considered insufficient proof.

9(2) Whether the powers of the organs of a company have been limited by virtue of statute or through the decision of a competent body, despite disclosure thereof, those limitations could never be used in reliance against third parties.

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[66] McLennan JS (1986) *SALJ* 560.
[67] McLennan JS (1986) *SALJ* 560.
[68] McLennan JS (1986) *SALJ* 560.

This directive was re-enacted as s35 of the Companies Act 1985 and substituted by s108 of the Companies Act 1989.[69] Effectively, s35A made it unnecessary for third parties to inspect any restrictions on the authority of directors if such restrictions were contained in the company's documents.[70] Essentially, s35A was intended to give effect to Article 9(2) which stated that limitations on the powers of company organs can never be relied upon against third parties, even if such limitations had been disclosed.[71]

Prior to this provision being enacted, the issues of *ultra vires* and lack of authority were governed by the common law.[72] In terms of the common law, the Doctrine of Constructive Notice meant that anyone dealing with a company was deemed to have knowledge of the company's public documents, such public documents included both the Memorandum and Articles of Association.[73] At the time of developing these common law concepts, the courts primary focus was the protection of members and creditors of the company.[74] Payne is of the view that this doctrine, while leaving third parties vulnerable, did little to protect members and creditors.[75]

Article 9(1) was implemented by s35 which sought to abolish the ultra vires doctrine, third parties no longer needed to concern themselves with the contents of a company's objectives clause.[76] The first directive afforded third party protection which was at odds with the second directive.[77] The reason for this, as cited by Payne, is that the breadth of protection afforded to third parties was unclear and

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[69] Delport P "European Community Directives on the Harmonization of Company Law and United Kingdom Company Law: A Status Report" (1992) *SA Merc LJ* at 200.
[70] Cassim FHI (1998) 10 *SA Merc LJ* 305.
[71] Payne J "Company Contracts and Conundrums: When is a Board Not a Board and When is a Director Not a Person" (2004) ECFR 240.
[72] Payne J (2004) *ECFR* 240.
[73] Payne J (2004) *ECFR* 240.
[74] Payne J (2004) *ECFR* 240.
[75] Payne J (2004) *ECFR* 240.
[76] Payne J (2004) *ECFR* 241.
[77] Payne J (2004) *ECFR* 240.

narrower than that specified in the directive.[78] Section 35A was introduced to thus provide greater security to third parties.[79]

Section 711(A)(1) of the Companies Act 1985, which applies in circumstances where the third party is not protected by s35(A), effectively abolished the Doctrine of Constructive Notice, it stated that a person will not be taken to have notice of any matter merely because it is disclosed or made available for inspection.[80] An important qualification to the abolition was introduced in s711A(2), where unusual circumstances, known to a third party, eliciting a duty, by the third party, to make further enquiries.[81] This duty arose in the case of *AL Underwood Limited v Bank of Liverpool and Martins; AL Underwood Limited v Barclays Bank*.[82]

The Doctrine was also considered in the case of *Smith v Henniker-Major,*[83] where a director of the company was the third party.[84] This case too dealt with limitations to the scope of s35(A), where third parties who acted on the company's behalf are not protected by the ambit of this section.[85]

The abolition of the Doctrine of Constructive Notice in so far as it pertains to a bona fide third party, was the most important change brought about by this directive in English Law.[86]

At least until the 1970's South African company law has closely followed the United Kingdom, thereafter, there was a slight divergence as a result of the work done by the Van Wyk de Vries Commission[87] which preceded the current New Act.[88] Upon the implementation of directives of the European Community the divergence was

[78] Payne J (2004) *ECFR* 242.
[79] Payne J (2004) *ECFR* 242.
[80] Cassim FHI (1998) 10 *SA Merc LJ* 304.
[81] Cassim FHI (1998) 10 *SA Merc LJ* 304.
[82] [1924] 1 KB 775.
[83] [2002] BCC 544 (Ch D) and [2002] 2 BCLC 655 (CA).
[84] Payne J (2004) *ECFR* 236.
[85] Payne J (2004) *ECFR* 236.
[86] Delport P (1992) *SA Merc LJ* at 200.
[87] Report of the Commission of Enquiry into the Companies Act RP45/1970 and RP31/1972).
[88] Delport P (1992) *SA Merc LJ* at 209.

greater as traces of European company law could be found in English company law.[89] This suspended any benefit derived by South African company law, South African company law became reliant on a less active South African company law environment.[90]

2.3.2 *Abolition of the Doctrine in South Africa*

The change in s36 of the Old Act was prompted by late Mr Justice Van Wyk de Vries ('Van Wyk de Vries Commission') being tasked with looking into the objects and powers of a company.[91] While the *ultra vires* doctrine will not be discussed, the continued application of the Doctrine of Constructive notice is apparent in the revised section: *'No act of the company shall be void by reason only of the fact that the company was without capacity or power so to act or because the directors had no authority to perform that act on behalf of the company by reason only of the said fact and, except as between the company and its members or directors, or as between its members and its directors, neither the company nor any other person may in any legal proceedings assert or rely upon any such lack of capacity or power or authority.'*

Despite the continued application of the Doctrine of Constructive Notice to the Articles of Association and thus the whole arrangement of directors' powers contained therein;[92] its application, pursuant to section 36, has been slightly curtailed with regard to a company's Memorandum.[93]

Naudé, is of the opinion that the Van Wyk de Vries Commission intended to design a provision where the question as to a person's knowledge was irrelevant,[94] the issue of knowledge, however, in the author's view, should not have been made

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[89] Delport P (1992) *SA Merc LJ* at 209.
[90] Delport P (1992) *SA Merc LJ* at 209.
[91] McLennan JS "Time for the Final Abolition of the Ultra Vires and Constructive Notice Doctrines in Company Law" (1997) *SA Merc LJ* at 333.
[92] Naudé SJ (1974) 91 *SALJ* at 333.
[93] McLennan JS "Demise of the Constructive-Notice Doctrine in England" (1986) *SALJ* at 560.
[94] Commission of Enquiry into the Companies Act, Main Report RP 45/1970 §27.26.

irrelevant.[95] Naudé goes further to state that the effect of doing so is that the operation of the Doctrine has been abolished in this respect only. The author further criticises the revision stating that, pursuant to the revision of section 36, a contract would still be valid where both the third party as well as the director knew the transaction fell outside the ambit of the company's capacity or powers, this permitting possible collusion between the third party and a director.[96]

Naudé highlights three implications arising from the revised section:[97]

(i) the Doctrine, while, in the author's view, not abolished, no longer applies to any statement relating to the company's objects or powers as set out in its memorandum;
(ii) the main object of the company is thus ignored resulting in possible personal liability being incurred by directors; and
(iii) the over protection of a third party at the company's expense.

It can be said that the first part of the revised section has destroyed the requirement that a company have the necessary capacity and powers to contract.[98] This as a result of actual knowledge becoming irrelevant on the part of a third party.[99]

Despite its inept and clumsy drafting,[100] s36 was replicated in the 2008 Companies Bill.[101] McLennan was of the view that sections 20(1), 33 and 34 of the Bill eliminated the Doctrine of Constructive Notice in South Africa in so far as it pertained to the Memorandum.[102]

In order for a contract with a company to be valid, two requirements need to be met (i) capacity and (ii) authority,[103] from the discussion above, the enquiry into a

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[95] Naudé SJ (1974) 91 *SALJ* at 324.
[96] Naudé SJ (1974) 91 *SALJ* at 325.
[97] Naudé SJ (1974) 91 *SALJ* at 325.
[98] Naudé SJ (1974) 91 *SALJ* at 330.
[99] Naudé SJ (1974) 91 *SALJ* at 330.
[100] McLennan JS "Contract and Agency Law and the 2008 Companies Bill" (2009) Obiter 144 at 145.
[101] Final version B61D-2008, adopted by the National Assembly on 19 November 2008.
[102] McLennan (2009) *Obiter* 146.
[103] Naudé SJ (1974) 91 *SALJ* at 315.

company's capacity has been removed pursuant to the revision of section 36, essentially, acts *ultra vires* the company are not void,[104] however, it is submitted, that the second, being the authority of the person acting on the company's behalf, remains.[105]

Section 36 states the following, '*No act of the company shall be void by reason only of the fact that the company was without capacity or power so to act or because the directors had no authority to perform that act on behalf of the company by reason only of the said fact…'* (emphasis added). The *said fact*, it is submitted, means that fact that the company was without capacity or power so to act, Naudé is of the view that this does not mean the abolition of the person acting on the company's behalf's authority.[106]

The author goes further to state, in summary, that where the act falls within the power and capacity of a company an inquiry must still be made as to whether the authority requirement has been satisfied.[107] The result being that third parties, dealing with a company, will be deemed to know the provisions of a company's Articles of Association in so far as they deal with the powers of directors, this partial destruction, the author criticises has led to '*anomalous situations*'.[108]

Initially, reliance was solely placed on the first requirement as a lack of capacity was fatal to any contract.[109] Following the revision of s36 the limitation of a company's capacity and powers had no effect, had the following phrase not been inserted '*by reason only of the said fact'* every *ultra vires* contract would be questioned on the basis that the director's authority had been exceeded merely because the transaction was beyond the company's powers.[110]

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[104] Naudé SJ (1974) 91 *SALJ* at 315.
[105] Naudé SJ (1974) 91 *SALJ* at 331.
[106] Naudé SJ (1974) 91 SALJ at 331.
[107] Naudé SJ (1974) 91 *SALJ* at 332.
[108] Naudé SJ (1974) 91 *SALJ* at333.
[109] Naudé SJ (1974) 91 *SALJ* at 332.
[110] Naudé SJ (1974) 91 *SALJ* at 332.

The relevance of the discussion above is the fact that the laws of agency still need to be applied in conjunction with both the Doctrine of Constructive Notice as well as the Turquand Rule, the Doctrine thus remains of importance in respect of the authority of directors to bind the company.[111]

Following the Van Wyk de Vries Commission, McLennan was of the view that a further need to reform the application of the Doctrine was recognised in 1985 in the statement issued by the Standing Advisory Committee on Company Law:[112]

'The artificial and obsolete doctrine of constructive notice was expressly kept out of close corporation law…but is alive and well in company law. It is time to destroy this artificiality with its potentially unfair implications in company law as well.'

Sections 19(4) and (5) of the New Act, deal with the Doctrine, these sections for completeness sake state the following:

'(4) Subject to subsection (5), a person must not be regarded as having received notice or knowledge of the contents of any document relating to a company merely because the document –

(a) has been filed; or
(b) is accessible for inspection at an office of the company.'

'(5) A person must be regarded as having notice and knowledge of –

(a) any provision of a company's Memorandum of Incorporation contemplated in section 15(2)(b) or (c) if the company's name includes the element "RF" as contemplated in section 11(3)(b), and the company's Notice of Incorporation or a subsequent Notice of Amendment has drawn attention to the relevant provision, as contemplated in section 13(3); and

[111] Naudé SJ (1974) 91 *SALJ* at 333.
[112] McLennan JS (1986) *SALJ* at 560.

(b) the effect of subsection (3) on a personal liability company.'

As stated previously, save in certain instances, sections 19(4) as read with section 19(5) abolish the Doctrine of Constructive Notice.[113]

In the circumstances set out in section 19(5) it appears as though a positive doctrine may now be provided for by section 19(4).[114] This is at odds with the common-law Doctrine of Constructive Notice which, instead of precluding third parties from alleging ignorance of a company's documents, it requires third parties to have notice and knowledge of the relevant provisions in the MOIs of RF companies.[115] Consequences of a positive doctrine may be significant,[116] Olivier provides the following example in support of this:

The authority of a company's agents is automatically limited in the event that a company's capacity is limited. Outsiders must be deemed to have notice and knowledge of the limitations to an RF company's capacity. If an *ultra vires* contract is concluded by such a company with an outsider it may be that the common-law position in respect of liability towards the outsider is affected by section 19(5)(a). If section 19(5)(a) can be relied on by persons other than the company it may be conceivable that an agent can escape liability arguing that the outsider was deemed to have knowledge of the company's capacity and the corresponding limitation of authority.[117] If a third party is deemed to know an agent lacked the requisite authority, such an outsider may find it difficult to prove intentional and negligent misrepresentation of authority. In addition, a third party could not prove that he was induced by misrepresentation and, as a result, there can be no argument as to implied warranty of authority. A claim based on either delict or implied warranty of authority would be defeated if an agent were able to rely on Constructive Notice.[118]

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[113] Jooste R (2013) *SALJ* 468.
[114] Jooste R (2013) *SALJ* 469.
[115] Olivier (2017) *Stell LR* 621.
[116] Olivier (2017) *Stell LR* 621.
[117] Olivier (2017) *Stell LR* 621.
[118] Olivier (2017) *Stell LR* 622.

McLennan is of the view that a limitation on a company's capacity is a 'special condition' as envisaged in section 15(2)(b) of the New Act as such anyone dealing with a company is deemed to be aware of the limit on its capacity.[119] McLennan is further of the view that this interpretation negates subsections 19(1)(b)(ii) and (5).[120]

It is submitted by Jooste that the knowledge which a person is not regarded as having applies solely to the documents which relate to a company, this excludes the provisions of the New Act, thus a third party is required to have positive notice of these provisions.[121] Unlike the common law Doctrine, the revised statutory Doctrine may be of assistance to a third party and not only operate in favour of the company as was previously the case.[122] The intention of the common-law Doctrine of Constructive Notice was never to benefit any person apart from the company itself.[123] This has been supported by both Naudé[124] and McLennan[125] who are in agreement that apart from the company, no other party could place reliance on the Doctrine of Constructive Notice and that the rule could not be used by a third party to establish a claim nor by an agent to escape liability.

The knowledge (a person must not be regarded as having) refers only to contents of any document relating to the company as opposed to provisions of the New Act, the principle '*ignorance of the law is no excuse'* remains.[126]

Of importance is the fact that, due to the abolition of the Doctrine, the common-law Rule as well as its codification in section 20(7) of the Act will now, unlike in the past, apply even where a special resolution is required as an internal formality. The abolition of the Doctrine removes the previous legal obstacle in applying the Rule or section 20(7) to a special resolution in order to validate a managerial act.[127] This

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[119] McLennan JS (2009) *Obiter* 150.
[120] McLennan JS (2009) *Obiter* 151.
[121] Jooste R (2013) *SALJ* 469.
[122] Jooste R (2013) *SALJ* 469.
[123] Olivier E (2017) *Stell LR* 618.
[124] Naudé SJ (1974) 91 *SALJ* 317.
[125] McLennan JS (1979) *SALJ* 342-343.
[126] McLennan JS (1979) *SALJ* 342-343.
[127] Cassim FHI *et al* (2012) at 186.

is because there is no longer Constructive Notice of any special resolution filed by a company with the Companies Commission.[128]

[128] Cassim FHI *et al* (2012) at 186.

3 THE TURQUAND RULE

3.1 Introduction

This chapter examines the common law Rule, the codification thereof, the conflicts arising therefrom and the implications thereof.

3.2 Common Law Turquand Rule

Originally designed to mitigate the effects of the Doctrine, the Rule was historically formulated as an exception to the Doctrine.[129] The Rule was derived in the case of *Royal British Bank v Turquand*[130] and then later adopted and applied in South Africa in *Mine Workers' Union v Prinsloo*.[131] In the former case, the company's articles of association authorised the board to borrow money on the proviso that it was approved by an ordinary resolution of the shareholders. Money was borrowed from the Royal British Bank without the requisite approval, unbeknown to the Royal British Bank. The court held, despite the fact that the board had failed to comply with the Articles of Association, that the company was bound by the terms of the loan.[132] In summary, the approval was an internal formality, the Bank, acting in good faith, was entitled to assume that the formality had been complied with.[133]

Essentially the Rule tempers the effects of the Doctrine in that it protects third parties, who are not aware of any of the internal irregularities affecting their contracts with a company, by entitling them to assume that all internal formalities, such as quorum requirements, notice periods, voting procedures and the like, have been complied with.[134] The Rule precludes a company escaping liability on the

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[129] Cassim FHI *et al* (2012) 181.
[130] (1856) 6 E & B 327; 119 ER 886.
[131] 1948 (3) SA 831 (A).
[132] (1856) 6 E & B 327; 119 ER 886.
[133] Cassim FHI *et al* (2012) 182.
[134] Cassim FHI *et al* (2012) 181.

basis that some internal formality or procedure was not complied with in an otherwise valid contract, thus the Rule applies to all internal managerial irregularities.[135] A third party, in relying on the Rule, must not know or suspect that an internal formality has not been complied with.[136] This was confirmed in the case of *Morris v Kanssen*[137] where the court held that a person in dealing with a company cannot, for his own benefit, assume that internal formalities have been correctly carried out when in fact a further investigation which ought to have been done would have revealed otherwise. Even in instances where a third party is suspicious that an internal irregularity may have occurred, reliance cannot be placed on the Rule.[138]

Two essential points about the Turquand Rule had been clearly established in 1927: (i) the Turquand Rule did not derogate from the common law principles of agency law and (ii) the Rule had no positive application.[139] The Rule was a negative one, designed to temper the effects of the negative Doctrine of Constructive Notice.[140] The Turquand Rule was not *'some kind of magic formula which operated above and beyond the common law of agency.'*[141]

The essential nature of the Turquand Rule was to temper the operation of the Doctrine of Constructive Notice, in that, third parties, dealing with a company, were bound to read its statutes but do no more.[142] McLennan regarded the Turquand Rule to be a form of ostensible authority or estoppel, stemming from the *Turquand*[143] case where the company was bound by the ostensible authority of its directors as opposed to their actual authority which was ruled out.[144] The author shares the sentiment expressed by Thompson[145] that the Turquand Rule does not

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[135] Cassim FHI *et al* (2012) 182.
[136] Cassim FHI *et al* (2012) 182.
[137] [1946] AC 459 at 475.
[138] *Northside Developments (Pty) Ltd v Registrar-General* (1980) 8 ACLC 611 at 619.
[139] McLennan JS (2009) *Obiter* 148.
[140] McLennan JS (2009) *Obiter* 148.
[141] McLennan JS (2009) *Obiter* 148.
[142] McLennan JS "Section 228 of the Companies Act and the Turquand Rule" (2005) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)* 306.
[143] (1856) 6 E & B 327; 119 ER 886.
[144] McLennan JS (2005) *THRHR* 306.
[145] Thompson "Company law doctrines and authority to contract" (1955-1956) *University of Toronto LJ* 257.

exist as a positive rule of law, it is merely an acknowledgement, when dealing with apparent authority, that Constructive Notice apply solely to the Memorandum and Articles of Association and not extend to procedural and internal matters such as quorums and resolutions.[146] Based on the expressed sentiment, the Turquand Rule, as opposed to being a positive rule of law, is merely an expression of the apparent authority doctrine.[147] As such, the Rule should be formulated on the basis that a company cannot escape liability for the acts of ostensible agents purely on the basis of the company's internal rules and regulations being contravened.[148]

The Rule affords protection to third parties and/or outsiders who are unaware of internal formalities and procedures, as such, directors and other insiders may not rely on the rule.[149] A distinction was drawn in *Hely-Hutchinson v Brayhead Ltd*[150] between a director acting in their capacity as such and an outside director contracting with the company, the court held that only in the latter instance should the Turquand Rule be applicable.

The Rule is, however, an independent rule of company law the general principles of agency law are not applicable.[151] In both English[152] and Australian law, however, the common-law Turquand Rule is not regarded as independent, being inextricably linked to estoppel and ostensible authority.[153] In terms of sections 128-129 of the Australian Corporations Act, a third party dealing with the company may make certain important assumptions, some of these include (i) the fact that the company's constitution has been complied with, (ii) a director has been duly appointed or (iii) a director has all the powers generally exercised by a director of a similar company.[154]

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[146] McLennan JS (2005) *THRHR* 306.
[147] Thompson (1955-1956) *University of Toronto LJ* 257.
[148] McLennan JS (2005) *THRHR* 306.
[149] Cassim FHI *et al* (2012) 183.
[150] [1967] 3 All ER 98 (CA).
[151] Cassim FHI *et al* (2012) 184.
[152] *Freeman & Lockyer v Buckhurst Properties (Mangal) Ltd* [1964] 1 All ER 630 (CA).
[153] Cassim FHI *et al* (2012) 184.
[154] Cassim FHI, Cassim MF (2017) *SALJ* 661.

These assumptions may only be made if the third party does not know or suspect that the assumption is incorrect.

In the Australian case, *Northside Developments (Pty) Ltd v Registrar-General*[155] Brennan and Gaudron JJ adopted the approach that estopple formed the basis of the Turquand Rule.[156] Since the statutory formulation of the Rule, the common-law Turquand Rule has not been further developed in Australia.[157] Australian case law is not binding in South Africa, it is, at best, persuasive.[158]

In the United Kingdom, the Turquand Rule has been codified by section 40 of the United Kingdom Companies Act.[159] The protection afforded to third parties in terms of this legislation is not only supplemented but exceeds that afforded to third parties under the common law Rule.[160] In essence, this section states that the power of the board to bind the company is deemed to be free of any limitation under the company's constitution.[161] There is no obligation on a person dealing with a company to enquire about any limitations of the directors.[162] Even if a third party knows that an act is beyond a director's powers or beyond their authority such a person is not regarded as acting in bad faith solely for that reason.[163] This is in contrast to the common-law Rule which is negated by knowledge, surpassing the protection afforded to third parties by the common-law Rule.[164]

Under South African law, the Turquand Rule imposes liability on companies where only compliance with internal formalities is missing.[165] It has been treated as a separate and distinct company law principle not dependant on the principles of

[155] (1990) 2 ACSR 161 (HC of A).
[156] Cassim FHI, Cassim MF (2017) *SALJ* 658.
[157] Cassim FHI, Cassim MF (2017) *SALJ* 658.
[158] Cassim FHI, Cassim MF (2017) *SALJ* 658.
[159] Cassim FHI, Cassim MF (2017) *SALJ* 661.
[160] Cassim FHI, Cassim MF (2017) *SALJ* 661.
[161] Section 40(2)(*b*)(i) of the United Kingdom Companies Act, 2006.
[162] Cassim FHI, Cassim MF (2017) *SALJ* 661.
[163] Section 40(2)(*b*)(iii) of the United Kingdom Companies Act, 2006.
[164] Cassim FHI, Cassim MF (2017) *SALJ* 662.
[165] Cassim FHI, Cassim MF (2017) *SALJ* 658.

estoppel,[166] this was decided in the *Mine Workers' Union v Prinsloo* case where it was held that the Turquand Rule is patently not part of estoppel, the Rule may be relied on even where there is no actual knowledge of the document or actual knowledge of the relevant internal formality.[167] This is in sharp contrast of the '*reliance*' on the representation which is an essential element of estoppel.[168]

There is, however, a school of thought in South Africa that the modern formulation of the common law Turquand Rule relieves a person raising estopple against a company from a duty to enquire, aside from this relief, all the usual requirements of estopple must be fulfilled.[169]

In the recent case, *Makate v Vodacom (Pty) Ltd*[170] the issue of whether the Turquand Rule is an independent rule of company law or whether it forms part of the doctrine of estopple was raised. In an obiter dictum the court held that the Turquand Rule is merely an application of estoppel.[171] This view has been criticised by Cassim, who is of the view that this has the potential to create confusion, uncertainty and undesirable practical ramifications.[172] Seemingly, Wallis AJ took cognisance of the fourth requirement of ostensible authority laid out in *Freeman & Lockyer v Buckhurst Properties (Mangal) Ltd*[173] suggesting that the Turquand Rule is a mere *adjunct* of the rules of estoppel, operating only if the requirements of estoppel are satisfied.[174] The weight of authority in South African law is against this approach.[175]

Numerous qualifications temper the scope and ambit of the Turquand Rule in South Africa.[176] These include the following: (i) a third party who knows of the company's

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[166] Cassim FHI, Cassim MF (2017) *SALJ* 658.
[167] 1948 (3) SA at 849.
[168] Cassim FHI, Cassim MF (2017) *SALJ* 659.
[169] Jooste R (2013) *SALJ* 465.
[170] 2016 (4) SA 121 (CC).
[171] Cassim FHI, Cassim MF (2017) *SALJ* 643.
[172] Cassim FHI, Cassim MF (2017) *SALJ* 643.
[173] [1964] 1 All ER 630.
[174] Cassim FHI, Cassim MF (2017) *SALJ* 648.
[175] Cassim FHI, Cassim MF (2017) *SALJ* 657.
[176] Cassim FHI, Cassim MF (2017) *SALJ* 662.

failure to comply or is put on an inquiry due to suspicious circumstances is barred from relying on the Rule;[177] (ii) the Turquand Rule does not apply to an insider in a position to know whether or not internal requirements have been complied with such as a director, where the transaction is so intimately connected with the position it would be impossible to treat the director as if he had no knowledge;[178] (iii) a person contracting with the company is not entitled to assume that powers have been delegated by virtue of the fact that delegation is permitted in the constitution;[179] and (iv) the Turquand Rule does not apply to forgeries.[180]

Given the qualifications listed above, Cassim is of the view that the Turquand Rule should not further be limited by treating the Rule as part of estoppel.[181]

3.3 Codification of the Turquand Rule

Where internal company requirements are laid down by statute as opposed to the company's documents, the Turquand Rule did not apply.[182] This was decided by Cleaver J in *Farren Sun Service SA Photo Trip Management (Pty) Ltd,*[183] Cleaver J held that the Turquand Rule did not operate in the context of section 228 of the Old Act, a third party could not assume that a section 228 disposal had been approved by a general meeting, such a disposal could not be enforced until such time as the disposal had been consented to or ratified by the shareholders.[184] Cleaver J had intended for the ordinary meaning conveyed by the words of section 228 to prevail, the object of section 228 was to protect shareholders, the application of the Turquand Rule in this instance would nullify section 228 and

[177] *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] Ch 246 (CA); *Morris v Kanssen* [1946] 1 All ER 586 at 592; *Burnstein v Yale* 1958 (1) SA 786 (W); *Houghton v Northard Lowe & Wills Ltd* [1927] 1 KB 246.
[178] [1946] AC 459 at 475.
[179] *Houghton v Northard Lowe & Wills and Wolpert v Uitzigt Properties* 1961 (2) SA 257 (W).
[180] Cassim FHI, Cassim MF (2017) *SALJ* 662.
[181] Cassim FHI, Cassim MF (2017) *SALJ* 662.
[182] Jooste R (2013) *SALJ* 466.
[183] 2004 (2) SA 146 (C) para 10.
[184] Jooste R (2013) *SALJ* 466.

defeat its intention.[185] An opposing view was held in an obiter dictum by Van Zyl J, he stated that when looking at the intention of the legislature, no regard should be had to public policy or public interest and, as such, a *bona fide* third party should not be adversely affected should the internal procedures of a company not be correctly followed.[186]

In 2006, section 228 was amended such that approval was no longer required by members in a general meeting to that of a special resolution.

The applicability of the Turquand Rule in the context of section 228 was addressed in the recent case *Stand 242 Hendrik Potgieter Road Ruimsig v Göbel No,*[187] where the court concluded that the Rule played no part in the application of section 228 based on the fact that the application would deprive shareholders of their protection.[188] The court, aware of the provisions of the New Act,[189] disagreed with the view taken by the legislature.[190] In this case, the Supreme Court of Appeal agreed that the protection afforded to shareholders should trump that afforded to third parties dealing with a company.[191] In the *Stand 242* case the court confirmed that the Turquand Rule does not apply in respect of the requirements laid down by the legislature, while s20(7) of the New Act expressly includes both formal and procedural requirements set out by the New Act.[192] It has thus been questioned whether s20(7) could be invoked by an outsider to presume compliance with shareholder protection mechanisms where certain matters are subject to shareholder approval by special resolution.[193]

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[185] 2004(2) SA 146 at 155 C, Cleaver J quoted here from L Hodes 'Disposal of assets – s228' 1978 *The South African Law Journal* F-6 and f-13.
[186] *Levy v Zalrut Investments (Pty) Ltd* 1986 (4) SA 479 (W) at 157D.
[187] 2011 (5) SA 1.
[188] 2011 (5) SA 1 at 5F.
[189] The New Act as well as the Bill upon which the New Act was based, although not in force, were in the public domain a while before the judgement in *Stand 242*.
[190] Jooste R (2013) *SALJ* 475.
[191] Jooste R (2013) *SALJ* 475.
[192] Van der Linde K "The validity of company actions under section 20 of the Companies Act 71 of 2008" (2015) *TSAR* 833 at 841.
[193] Van der Linde K (2015) *TSAR* 841.

A number of academics have commented on the similarity between the Turquand Rule and s20(7) of the New Act,[194] McLennan describes it as *'evidently a rendering of the Turquand Rule'*[195] and Cassim a *'statutory Turquand Rule'.*[196] Section 20(7) codifies what was previously regarded as the common-law Turquand Rule.[197] This codification appears to be a 'statutory Turquand Rule', which seems to preserve the common law Rule.[198] The following two similarities are noted: (i) both prevent the reliance by a company on non-compliance with certain requirements, upholding a fiction that there has been compliance and (ii) protection is reserved for third parties acting in good faith and without knowledge of the non-compliance.[199]

This section states that a person (other than a director, prescribed officer or shareholder), dealing with a company in good faith, is entitled to presume that the company has complied with both formal and procedural requirements in terms of the Act, the company's MOI as well as any rules of the company, unless such a person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.

By excluding a director, shareholder and prescribed officer from the protection offered in section 20(7) afforded to a third party, the codification encapsulates the common law which is based on the premise that a director, prescribed officer or even shareholder ought to have known of the company's non-compliance.[200]

Section 20(8) of the Act preserves the common law Turquand Rule in that it provides for the concurrent construction of the section with the common law as opposed to a substitution thereof, this is problematic, as will be discussed below, in that section 20(7) is not properly aligned with the common-law formulation of the

[194] Van der Linde K (2015) *TSAR* 841.
[195] McLennan JS (2009) *Obiter* 152.
[196] Cassim FHI *et al* (2012) 184.
[197] Cassim FHI *et al* (2012) 184.
[198] Jooste R (2013) *SALJ* 469.
[199] Van der Linde K (2015) *TSAR* 841.
[200] Cassim FHI *et al* (2012) 185.

Rule,[201] furthermore, section 20(7) and the common-law Rule seem to conflict in certain respects.[202] The wording concurrently with and not in substitution for are indicative of the co-existence of the statutory rule and common-law principle, the common law is thus not eclipsed in any way.[203] There is now both a common-law as well as a statutory indoor management rule.[204]

3.4 Discrepancies, inconsistencies and conflicts

The following conflicts between the common law Rule and the codification thereof are noted by Jooste:[205]

(a) The statutory Turquand Rule protects the innocent third party where the requirement in question is laid down by the Act.[206] The common law Turquand Rule, did not apply in such instances as was evidenced in both the *Stand*[207] and *Farren*[208] cases when it came to the disposal of the whole or a greater part of the company's assets, done for the protection of minority shareholders. Jooste is of the view that, since the special resolution requirement is aimed at the protection of shareholders, the common law Turquand Rule would not apply if the requirement is not met in all instances where special resolution is required.[209] Jooste is not sure, however, whether in instances where the transaction is void, the statutory Turquand Rule would be of any protection.[210]

(b) In terms of the common law, a third party dealing with a managing director can only assume that authority has been delegated to such a managing

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[201] Cassim FHI *et al* (2012) 185.
[202] Jooste R (2013) *SALJ* 469.
[203] Jooste R (2013) *SALJ* 469.
[204] Jooste R (2013) *SALJ* 469.
[205] Jooste R (2013) *SALJ* 470.
[206] Jooste R (2013) *SALJ* 470.
[207] 2011 (5) SA 1.
[208] 2004 (2) SA 146.
[209] Jooste R (2013) *SALJ* 470.
[210] Jooste R (2013) *SALJ* 470.

director if delegation is permitted by the company's constitution.[211] This is in contrast to the statutory Turquand Rule which, arguably, deems such delegation a 'formal' or 'procedural' requirement to which the statutory Turquand Rule would be applicable.[212]

The issue regarding formal and procedural requirements was considered in the *One Stop*[213] case where the court held that *'formal and procedural requirements*' must be construed *'consistently with the conventional scope of Turquand*'.[214] The judgement was based on the following: where the authority of a director was subject to prior shareholder approval, such approval was deemed a formal or procedural requirement.[215] This is in contradiction to the second interpretation offered by the authors of *Henochsberg*[216] where it is suggested that based on the words, *'the company in making a decision in the exercise of its powers'*[217] that the provision deals with the company's capacity.[218] This interpretation is, however, negated as it would overlap with s20(1) which already affords protection to a third party.[219] Van der Linde is of the view that formal and procedural requirements must be those required for a company decision.[220] Van der Linde further states that required resolutions cannot be assumed to have been taken when no attempt has been made at adopting a resolution.[221]

(c) The third conflict between the common and statutory Turquand Rule relates to insiders, section 20(7) does not protect directors, prescribed officers or

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[211] Jooste R (2013) *SALJ* 470.
[212] Jooste R (2013) *SALJ* 471.
[213] 2015 (4) SA 623 (C).
[214] Van der Linde K (2015) *TSAR* 841.
[215] Van der Linde K (2015) *TSAR* 841.
[216] Delport P and Vorster Q, *Henochsberg on the Companies Act 71 of 2008* see 98.
[217] Section 20(7), Act No. 71 of 2008.
[218] Van der Linde K (2015) *TSAR* 841.
[219] Van der Linde K (2015) *TSAR* 842.
[220] Van der Linde K (2015) *TSAR* 842.
[221] Van der Linde K (2015) *TSAR* 842.

shareholders. The common law Turquand Rule did, in certain circumstances, offer protection to insiders when the vulnerability of such insiders was similar to that of outsiders.[222] Circumstances in which the protection of insiders arose was evidenced in the case of *Hely Hutchinson v Brayhead Ltd,*[223] in addition, directors to the extent that they had not acted for a company on a matter could also invoke protection.[224]

(d) Finally, the common law Rule will not protect a third party who either knew or suspected that an internal formality had not been complied with whereas the statutory Rule goes further and excludes a third party who reasonably ought to have known.[225] Cassim is of the view that the test is now an objective one, weakening the presumption that third parties may make regarding internal compliance, thus narrowing the common law Rule.[226]

Delport is of the view that the common-law Rule has not been entirely codified by the Act, he cites the following reasons:[227]

(a) Insiders such as directors, prescribed officers and shareholders are expressly excluded by section 20(7), while the common law position allowed for the protection of an insider.[228] Delport is of the view that this exclusion creates an institutional rather than a functional category.[229] He criticises the logic for the exclusion as a debenture holder (a holder of securities other than shares) could conceivably be granted voting rights, he would not be an insider *per se* and thus s20(7) could apply provided such a third party is *bona fide.*[230]

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[222] Jooste R (2013) *SALJ* 471.
[223] [1968] 1 QB 549.
[224] Jooste R (2013) *SALJ* 471.
[225] Jooste R (2013) *SALJ* 472.
[226] Cassim FHI *et al* (2012) at 185.
[227] Delport PA (2011) *THRHR* 136.
[228] Delport PA (2011) *THRHR* 136.
[229] Delport PA (2011) THRHR 136.
[230] Delport PA (2011) *THRHR* 136.

(b) The legislated version of the Turquand Rule, allows a third party to presume that a company has complied with all formal and procedural requirements in making a decision or in the exercise of its powers.[231] It presumes that there was a *decision* and such a *decision* was properly taken, the legislated version does not presume that the decision was in fact taken.[232] The common law Turquand Rule principle states the following (i) an outsider may assume that all the company's internal matters are regular and (ii) the company is prevented from resiling from the contract.[233] It is thus not clear whether the second part is covered, ie whether the company is prevented from resiling from the contract.[234]

Delport criticises the fact that a bona fide non-insider is only protected from provisions in the New Act, the MOI and any rules,[235] agreements between shareholders, the company and directors (this excludes an agreement referenced in section 15(7) of the New Act) as well as resolutions restricting the powers of directors do not offer a safe haven.[236]

(c) A non-insider is not protected if such a person knew or reasonably ought to have known of any failure by the company to comply with an internal requirement. Knowledge is defined in section 1 of the New Act to mean actual knowledge but also includes instances where a person reasonably should have acquired the knowledge, which requirement is mirrored in section 20(7). Delport defines this as the '*double reasonableness test*'

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[231] Delport PA (2011) *THRHR* 136.
[232] Delport PA (2011) *THRHR* 137.
[233] Delport PA (2011) *THRHR* 137.
[234] Delport PA (2011) *THRHR* 137.
[235] Section 20(7), Act 71 of 2008.
[236] Delport PA (2011) *THRHR* 137.

which, in his view, coupled with extended definition of knowledge in section 1 operates to the detriment of the non-insider.[237]

When looking at the knowledge requirement, from the following cases, *Howard v Patent Ivory Manufacturing Co*[238] where it was held that a person who has knowledge of an internal irregularity could not rely on the Rule, *Mine Workers' Union v Prinsloo*[239] and *Morris v Kanssen*[240] where the court held that a person cannot presume that things are correctly done to their own advantage, in terms of the common law Rule, a person who knew or suspected that an internal formality or procedure had not been complied with would not be protected.

Section 20(7) goes much further and stipulates that a person who reasonably ought to have known is excluded by the protection offered. This is an objective test, weakening the assumption which may be made by third parties in assuming that internal procedures and formalities have been complied with.

In Delport's view, additional confusion is created by section 20(8) which retains the common law Turquand Rule.[241] This for the following reasons: firstly, the Turquand Rule and section 20(7) apply concurrently, however, since the scope of the Rule and section 20(7) differ[242] this leads to uncertainty.[243] Secondly, since the Rule is inextricably linked to the Doctrine,[244] the Rule cannot apply following the abolition of the Doctrine.[245] Thirdly, it can be argued that the Rule will only apply where Constructive Notice is expressly retained, such as in the case of an *RF* company or personal liability company.

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[237] Delport PA (2011) *THRHR* 137.
[238] (1888) 38 ChD 156.
[239] 1948 (3) SA 831 (A).
[240] [1946] AC 459.
[241] Delport PA (2011) *THRHR* 137.
[242] Discussed in detail above.
[243] Delport PA (2011) *THRHR* 138.
[244] *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) at 494B.
[245] Delport PA (2011) *THRHR* 137.

Finally, it appears as though the legislature may have taken an opposite view to that of the courts.[246] This, on the basis that if section 20(7) read with section 20(8) has the effect that a person, when acquiring all or the greater part of the company's assets, may assume that the requirement pertaining to a special resolution has been complied with, the court, aware of this provision,[247] in its decision in *Stand 242*[248] disagreed, stating that the protection of shareholders should trump that of a third party when dealing with a company. The same view was followed in *Farren's*[249] case where shareholders were afforded a greater protection than third parties.

[246] Jooste R (2013) *SALJ* 475.
[247] Both the Act, as well as the Bill, while not in force, were in the public domain before the judgement in *Stand 242*.
[248] *Stand 242 Hendrik Potgieter Road Ruimsig (Pty) Ltd and another v Göbel No and Others* 2011 (5) SA 1 (SCA).
[249] *Farren v Sun Service SA Photo Trip Management (Pty) Ltd* 2004 (2) SA 146 (C).

4 THIRD PARTY PROTECTION

As discussed above, in accordance with the old Doctrine of Constructive Notice, a third party contracting with a company had no legal basis for a complaint if a transaction was held not to be binding because the transaction was in conflict with one of the company's public documents.[250] This was tapered by the common-law Turquand Rule which allowed for a third party, dealing with a company in good faith, to assume that the acts of a company had been properly and duly performed without an obligation to make any inquiries in respect thereof.[251]

4.1 The Doctrine of Constructive Notice

Prior to 1 May 2011, the Doctrine of Constructive Notice served the sole purpose of protecting the interests of a company and was utilised by a company to defend itself.[252] It was essentially a rule which allowed companies to avoid contractual liability.[253]

Olivier is of the view that the abolishment of the Doctrine of Constructive Notice should be commended for its logical simplicity as well as for the protection it provides to third parties dealing with companies.[254] Even if an agent's authority was excluded in the company's documents, a company may be bound to an agreement on the basis of estoppel or '*agency by representation*'.[255]

As discussed above, section 19(5)(a) of the New Act seemingly introduces a statutory doctrine of Constructive Notice in 'RF' companies.[256] Olivier submits that restrictive conditions should only refer to conditions which limit the purpose, powers

[250] Jooste R (2013) *SALJ* 465.
[251] Jooste R (2013) *SALJ* 465.
[252] Olivier (2017) *Stell LR* 618.
[253] Olivier (2017) *Stell LR* 618.
[254] Olivier (2017) *Stell LR* 619.
[255] Olivier (2017) *Stell LR* 620.
[256] Olivier (2017) *Stell LR* 620.

or activities of a company as opposed to conditions which limit the authority of the company's agents.[257]

4.2 The Turquand Rule

The Turquand Rule is used as a means to protect bona fide third parties from internal irregularities which may affect the validity of their contracts with the company.[258] In *Mahony v East Holyford Mining Co Ltd*[259] the House of Lords held that the Turquand Rule limits the enquiries that an outsider is required to make when dealing with a company.

Business convenience has been offered as a justification for the Turquand Rule.[260] Transactions would be burdensome if third parties were continuously required to enquire whether internal formalities had been complied with in order to authorise an agent to undertake a transaction on a company's behalf.[261]

Treating the Turquand Rule as an independent rule of company law is discussed briefly in the preceding chapters. To retain its independency would practically mean that a company would be bound to a contract on the basis of either (i) the Turquand Rule or (ii) ostensible authority.[262] The scope of the Turquand Rule would be widened in that a third party could rely on the Turquand Rule regardless of whether the requirements of estoppel had been met or not.[263] If, on the other hand, estoppel is not independent, if the Turquand Rule were to apply a company would not be bound to a contract unless a third party was able to prove the requirements of estoppel, increasing the burden on a third party and reduce third party protection.[264] Two of the most problematic requirements in proving estoppel are the following

[257] Olivier (2017) *Stell LR* 620.
[258] Cassim FHI, Cassim MF (2017) *SALJ* 656.
[259] (1875) LR 7 HL 869.
[260] Cassim FHI *et al* (2012) 188.
[261] Cassim FHI *et al* (2012) 188.
[262] Cassim FHI, Cassim MF (2017) *SALJ* 660.
[263] Cassim FHI, Cassim MF (2017) *SALJ* 660.
[264] Cassim FHI, Cassim MF (2017) *SALJ* 660.

(i) the representation must have been made by the company and (ii) the third party must have relied on the representation.[265]

When considering third party protection, of importance is whether s20(7) trumps s20(4) which states the following:

'One or more shareholders, directors or prescribed officers of a company, or a trade union representing employees of the company, may apply to the High Court for an appropriate order to restrain the company from doing anything inconsistent with this Act.'

This consideration is of relevance when a third party intends acquiring the whole or a greater part of the assets of a company. In this instance, the requirement of a special resolution is aimed at the protection of shareholders, on this basis, the common-law Turquand Rule would not apply if the requirement was not met.[266] There are also a number of instances outlined in the New Act where a transaction is void in the absence of a special resolution,[267] it follows that in such instances the common-law Turquand Rule cannot apply, however, it is arguable that there is a conflict between such sections and section s20(7).[268]

[265] Cassim FHI, Cassim MF (2017) *SALJ* 660.
[266] Jooste R (2013) *SALJ* 470.
[267] Sections 44(5) and 45(6), Companies Act 71 of 2008.
[268] Jooste R (2013) *SALJ* 470.

5 CONCLUSION AND RECOMMENDATIONS

5.1 Recommendation: Turquand Rule

The problems which have arisen in the codification of the Turquand Rule have been exacerbated by the fact that the common-law principles relating to company representation have been retained increasing uncertainty for the company and a third party in the application of the Turquand Rule.[269]

Jooste is of the opinion that if s20(7) were to take precedence over the common law the wording of s20(8) would have been different, alternatively, the Act would have included a section dealing with the resolution of a conflict as was done in s5(5) and s5(6).[270] The relationship between both the statutory and the common law Turquand Rule calls into question the purpose of the codification being either (i) an intention to change the law or (ii) the creation of an awareness and understanding of the common-law. The latter would imply that the common-law would supersede the statutory codification in the event of conflict.[271] This is in line with the presumption that legislation should be interpreted in such a way that changes the common law as little as possible.[272] The following was said by Wessels J:[273]

'It is a well-known canon of construction that we cannot infer that a statute intends to alter the common law. The statute must either explicitly state that it is the intention of the legislature to alter the common law, or the inference from the ordinance must be such that we can come to no other conclusion than that the legislature did have such an intention.'

[269] Delport PA (2011) *THRHR* 138.
[270] Jooste R (2013) *SALJ* 472.
[271] Jooste R (2013) *SALJ* 472.
[272] Jooste R (2013) *SALJ* 473.
[273] *Casserley v Stubbs* 1916 TPD 310 at 312.

There is no definite alteration of the common-law by sections 20(7) and 20(8), nor is the only conclusion one that the legislature intended for s20(8) to take precedence over the common-law Rule.[274]

A solution proposed by Jooste is that the legislature revisit the relevant provisions of the New Act with a view to either repeal or amend them in order to provide clarity.[275] The optimal approach in Jooste's view would be to repeal both sections 20(7) and 20(8) and allow the common law as well as any development thereof to address the matter.

A further criticism of the codification is that the presumption contained in s20(7) should, as is the case with the common-law Rule, be irrebuttable.[276] An irrebuttable presumption would preclude a company from rebutting the presumption thus affording the third party greater protection when a formal or procedural requirement has not been complied with.[277]

Van der Linde suggests that in trying to reconcile s20(7) with the Turquand Rule, a narrower field of application needs to be recognised, this would avoid the conclusion, which has to date caused some problems, that important shareholder protection mechanisms in a company dealing with an outsider become irrelevant.[278]

Issues regarding representation and the Rule have been effectively solved in foreign jurisdictions as is further discussed below. Delport suggests that sections 17 and 54 of the Close Corporations Act[279] be used as a base to effectively and efficiently solve issues regarding representation and the Turquand Rule.[280] Section 17 states, briefly, that no person shall be deemed to have knowledge of

[274] Jooste R (2013) *SALJ* 473.
[275] Jooste R (2013) *SALJ* 475.
[276] Jooste R (2013) *SALJ* 473.
[277] Jooste R (2013) *SALJ* 473.
[278] Van der Linde K (2015) *TSAR* 843.
[279] 69 of 1984.
[280] Delport PA (2011) *THRHR* 138.

any particulars merely if they are publicised, where section 54 permits the binding of the corporation by its members.

A balance needs to be drawn by the courts between the interests of third parties acting in good faith with the company, the company and the stakeholders (directors and shareholders), this is done in terms of section 7 of the New Act.[281]

In terms section 128(4) of the Australian Corporations Law 2001 a third party is not entitled to assume that internal formalities have been complied with if such a person knew or suspected that such an assumption was incorrect. It has been suggested, that a similar provision should have been adopted by section 20(7) of the Act.[282] A possible advantage is, however, that pursuant to section 20(8) a third party may still look to the common law Rule.[283]

Sections 18(1) and 18(2) of the Canada Business Corporations Act have been commended;[284] these sections exclude reliance by an insider who, by virtue of his position or relationship with the company, ought to have knowledge to the contrary.

5.2 Recommendation: Doctrine of Constructive Notice

Olivier states that legislation should be interpreted and applied in a way which gives effect to the purposes thereof, such a purpose he advances is the development of the South African economy through responsible management.[285] In addition, he states that while outsider protection is not an express purpose of the New Act, since third party protection fosters confidence in the economy, it is at least as important as shareholder protection.[286]

[281] Cassim FHI, Cassim MF (2017) *SALJ* 663.
[282] Cassim FHI *et al* (2012) 186.
[283] Cassim FHI *et al* (2012) 186.
[284] Cassim FHI *et al* (2012) 186.
[285] Olivier (2017) *Stell LR* 621.
[286] Olivier (2017) *Stell LR* 621.

He proposes that section 19(5) not be interpreted so as to create a positive doctrine of Constructive Notice.[287] A positive interpretation would conflict with the common-law Doctrine by possibly removing two causes of action which a third party could rely upon against a purported agent for loss resulting from an unauthorised contract, prejudicing third parties.[288]

As a possible solution to the interpretation of section 19(5)(a) he suggests that if an RF Company complies with all formal requirements a third party, engaging with a company, may not allege ignorance of the contents of the relevant clauses.[289] The statutory Doctrine of Constructive Notice should remain a negative rule denying outsiders the ability to claim ignorance of a clause of which they are deemed to have notice, thus complying with the common-law Doctrine.[290] Agents should not be permitted from escaping liability through evoking the Doctrine, this should remain reserved for companies wanting to protect themselves from liability.[291]

McLennan, recommended that the approach adopted by the framers of the Close Corporations Act[292] be used to rid company law of these nineteenth-century doctrines.[293] It was proposed that sections 33, 34 and 36 of the Old Act be repealed and that the Close Corporations Act be adapted to the Old Act resulting in the following new section, among others:[294]

'(2) No constructive notice of company documents

No person shall be deemed to have knowledge of any particulars merely because such particulars are stated, or referred to, in any document regarding a company

[287] Olivier (2017) *Stell LR* 621.
[288] Olivier (2017) *Stell LR* 621.
[289] Olivier (2017) *Stell LR* 623.
[290] Olivier (2017) *Stell LR* 623.
[291] Olivier (2017) *Stell LR* 623.
[292] 69 of 1984.
[293] McLennan JS (1997) *SA Merc LJ* 335.
[294] McLennan JS (1997) *SA Merc LJ* 335.

registered by the Registrar or lodged with him, or which is kept at the registered office of a company in accordance with the provisions of this Act.'

McLennan goes further to suggest that the same model as the Close Corporations Act be used, this would have the effect of future questions relating to authority of company agents being resolved by the common law rules pertaining to agency.[295]

5.3 Conclusion

It is respectfully submitted by the author that both the abolition of the Doctrine as well as the partial codification of the Rule are half-hearted measures taken by the legislature. By allowing a semblance of the Doctrine to remain in 'RF' companies and requiring that the statutory Turquand Rule to be read in conjunction with, as opposed to, in substitution for the common-law Rule the legislature has shown its indecisiveness in dealing with these two issues.

Regardless of the criticism levied against the legislature by the author above, the diluted version of the Doctrine offers far more protection to a third party than was the previous position under the Old Act and on that basis is to be commended and should not be regarded as completely ineffective.

In so far as codifying the Turquand Rule is concerned, the number of discrepancies, inconsistencies and conflicts highlighted in the research above, offer a third party far more uncertainty than protection. The legislature seemingly affords greater protection to third parties contracting with companies,[296] however, this differs to the approach taken by the courts recently. As discussed above, in both the *Stand*

[295] McLennan JS (2009) *Obiter* 153.
[296] Jooste R (2013) *SALJ* 475.

242[297] and in *Farren's*[298] case the court agreed that the protection of shareholders is more important than that of third parties contracting with a company.[299]

It is submitted that in order to create certainty the Doctrine, in its entirety, should have been abolished and that the codification of the Turquand Rule to be read in substitution for as opposed to in conjunction with the common-law, alternatively that the provisions pertaining to the Turquand Rule be repealed in their entirety allowing for the common law to develop.

[297] 2011 (5) SA 1 (SCA).
[298] 2004 (2) SA 146 (C).
[299] Jooste R (2013) *SALJ* 475.

6 BIBLIOGRAPHY

6.1 Preliminary List of Sources

6.1.1 *Legislation*

Close Corporations Act, 69 of 1984

Companies Act, 61 of 1973

Companies Act, 71 of 2008

European Communities Act, 1972

6.1.2 *Case law*

a. *South Africa*

Burnstein v Yale 1958 (1) SA 786 (W)

Casserley v Stubbs 1916 TPD 310

Farren v Sun Service SA Photo Trip Management (Pty) Ltd 2004 (2) SA 146 (C)

Houghton v Northard Lowe & Wills and Wolpert v Uitzight Properties 1961 (2) SA 257 (W)

Inter-Continental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industria Ltd 1979 (3) SA 740

Levy & others v Zalrut Investments (Pty) Ltd 1986 (4) SA 479 (W)

Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC)

Nieuwoudt v Vrystaat Mielies (Edms) Bpk 2004 3 SA 486 (SCA)

One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd 2015 (4) SA 623 (C)

Stand 242 Hendrik Potgieter Road Ruimsig (Pty) Ltd and another v Göbel No and Others 2011 (5) SA 1 (SCA)

The Mine Workers' Union v Prinsloo 1948 (3) SA 831 (A)

Tuckers Land and Development Corporation (Pty) Ltd v Perpellief 1978 (2) SA 11 (T)

b. ***United Kingdom***

AL Underwood Limited v Bank of Liverpool and Martins; AL Underwood Limited v Barclays Bank [1924] 1 KB 775

Bell Houses Ltd v City Wall Properties Ltd [1996] 2 All ER 674 (CA)

Freeman & Lockyer v Buckhurst Properties (Mangal) Ltd [1962] 2 QB 480 (CA), [1964] All ER 630

Hely-Hutchinson v Brayhead Ltd [1967] 3 All ER 98 (CA)

Houghton & Co v Nothard, Lowe and Wills Ltd [1927] 1 KB 246 (CA)

Howard v Patent Ivory Manufacturing (1888) 38 ChD 156

In re Jon Beauforte (London) Ltd [1953] Ch 131, [1953] 1 All ER 634

Mahony v East Holyford Mining Co Ltd (1875) LR 7 HL 869

Morris v Kanssen [1946] 1All ER 586 at 592

Morris v Kanssen [1946] AC 459

Rama Corporation Ltd v Proved Tin General Investments Ltd [1952] 2 QB 147, [1952] 1 All ER 554

Rolled Steel Products (Holdings) Ltd v British Steel Corporation [1985] 3 All ER 52

Royal British Bank v Turquand (1856) 6 E & B 327; 119 ER 886

Smith v Henniker-Major [2002] BCC 544 (Ch D) and [2002] 2 BCLC 655 (CA)

TCB Ltd v Gray [1986] 1All ER 587

c. ***Australia***

Northside Developments (Pty) Ltd v Registrar-General (1980) 8 ACLC 611

6.1.3 *Books*

Cassim FHI *et al* (2012) *Contemporary Company Law*: Juta

Cilliers HS *et al* (2000) *Corporate Law 3rd Edition*: Butterworths

Davies D *et al* (2006) *Company Law and other Business Structures in South Africa*: Oxford University Press

Delport P and Vorster Q, *Henochsberg on the Companies Act 71 of 2008*

6.1.4 *Journal articles*

Cain TE “The Rule of British Bank v Turquand in 1989” (1989) *Bond Law Review* 272

Cassim FHI “The Companies Act 2008: An Overview of a Few of its Core Provisions” (2010) 22 *SA Merc LJ* 157-175

Cassim FHI “The Rise, Fall and Reform of the Ultra Vires Doctrine” (1998) 10 *SA Merc LJ* 293

Cassim FHI, Cassim MF “The Authority of Company Representatives and the Turquand Rule Revisited” (2017) *SALJ* 639

Delport PA “Companies Act 71 of 2008 and the "Turquand" rule” (2011) *Journal of Contemporary Roman Dutch Law/Tydskrif Vir Hedendaagse Romeins-Hollandse Reg* 135-138

Delport P “European Community Directives on the Harmonization of Company Law and United Kingdom Company Law: A Status Report” (1992) *SA Merc LJ* 198

Jooste R “Observations on the Impact of the 2008 Companies Act on the Doctrine of Constructive Notice and the Turquand Rule” (2013) *SALJ* 464

Leacock SJ “Rise and Fall of the Ultra Vires Doctrine in United States, United Kingdom, and Commonwealth Caribbean Corporate Common Law: A Triumph of Experience over Logic” 2006 5 *DePaul Business & Commercial Law Journal* 67

Locke Natania “The Legislative Framework Determining Capacity and Representation of a Company in South African Law and its Implications for the Structuring of Special Purpose Companies” (2016) *SALJ* 160

McLennan JS “The Ultra Vires Doctrine and the Turquand Rule in Company Law - A Suggested Solution” (1979) *SALJ* 329

McLennan JS “Demise of the Constructive-Notice Doctrine in England” (1986) *SALJ* 558

McLennan JS “Time for the Final Abolition of the Ultra Vires and Constructive Notice Doctrines in Company Law” (1997) *SA Merc LJ* 333

McLennan JS “Contract and Agency Law and the 2008 Companies Bill” (2009) *Obiter* 144

McLennan JS “Section 228 of the Companies Act and the Turquand Rule” (2005) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)* 304

Naudé SJ “Company Contracts: The Effect of Section 36 of the New Act” (1974) 91 *SALJ* 315

Naudé SJ “’n Nuwe Benadering tot die Funksie van Maatskappydoelstellings” (1971) *SALJ* 505

Olivier E “Section 19(5) of the Companies Act 71 of 2008: Enter a Positive Doctrine of Constructive Notice?” (2017) *Stell LR* 614

Oosthuizen MJ “Aanpassing van die Verteenwoordigingsreg in Maatskappyverband” (1979) *TSAR* 1

Payne J “Company Contracts and Conundrums: When is a Board Not a Board and When is a Director Not a Person” (2004) 1 *European Company and Financial Law Review (ECFR)* 235

Sealy LS “The Disclosure Philosophy and Company Law Reform” (1981) *Company Lawyer* 53

Thompson AR “Company Law Doctrines and Authority to Contract” (1955-1956) 11 *University of Toronto LJ* 248

Van der Linde K “The validity of company actions under section 20 of the Companies Act 71 of 2008” (2015) *TSAR* 833

Yeats JL “The Drafters Dilemma: Some Comments on the Corporate Laws Amendment Bill, 2006” (2006) 123 *SALJ* 601

6.1.1 *Other*

First Council Directive of 9 March 1968 (68/151/EEC), *Official Journal of the European Communities*

Commission of Enquiry into the Companies Act, Main Report RP 45/1970

6.2 Definitions and abbreviations

Doctrine	Doctrine of Constructive Notice
MOI	Memorandum of Incorporation
New Act	Companies Act, 71 of 2008
Old Act	Companies Act, 61 of 1973
Rule	Turquand Rule
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal