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Caroline Bradley

University of Miami School of Law, cbradley@law.miami.edu

Judith Freedman

Institute of Advanced Legal Studies

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REVIEW ARTICLE

Changing Company Law?

*Caroline Bradley** and *Judith Freedman***

J.H. Farrar, N. Furey, B. Hannigan, Farrar's Company Law, 2nd ed, London: Butterworths, 1988, lxiii + 680 pp, pb £22.50.

Sealy wrote in 1984 of 'a widespread concern among law teachers that company law has become unteachable'.¹ If that concern is justified, it may follow that it has become impossible to write a satisfactory company law textbook, and that it would therefore be unreasonable to criticise Farrar and his colleagues for not achieving the impossible. They have produced a book which the majority of students declare to be readable² and which seems to fill the gap created in the market for degree course level company law text books by the decision to update Gower's classic text through supplements rather than a new edition.³ It is not, however, unreasonable to question whether Farrar has made a contribution beyond filling a gap in the student market on a temporary basis. When the long awaited new edition of Gower is published, will it resume its pre-eminent position, or will it have been replaced?

Arguably, the authors of Farrar set themselves the wrong task. The constant developments in the law which affects companies and the consequent rumblings of change in company law teaching mean that what was needed was a completely fresh approach to the study of the law governing business entities rather than another traditional company law text book. What we have is a traditional textbook with some contextual material, at the expense, in places, of thorough case analysis.

Farrar's Company law is not (and does not claim to be) a blueprint for curriculum reform in the way that Gower's *Principles of Modern Company Law* was when first published in 1954. However, the authors' stated objectives are not unambitious; the back cover of the book claims that 'Its character is unique, combining as it does some elements of a traditional approach with a clear theoretical structure, contextual treatment and practical new perspectives.'

This is a good example of the type of work which legal publishers now appear to be encouraging, especially in fields where they feel there 'should' be a wide (and profitable) market; a kind of 'pick and mix' approach to legal writing, offering a wide menu from which the reader can make a personal selection. Yet ultimately, in its attempt to please all, this book fails to take a new direction and present a thesis of its own about its subject. It is essentially derivative and, like all works which aim to please everyone, risks satisfying no-one.

Like Farrar, Gower purported to write for practitioners and students and 'to discuss most of the important aspects of the subject'. However, the preface to the first edition

*London School of Economics and Political Science

**Institute of Advanced Legal Studies

1 Sealy *Company Law and Commercial Reality* (London: Sweet & Maxwell 1984) p9.

2 See Kelly 'Book Review' (1986) 20 *Law Teacher* 58.

3 See the results of a survey undertaken by Ian Snaith, Chairman of the SPTL Company Law Group, in 1989 on Company Law on Degree courses. Surveys were received and analysed from 24 institutions (universities and polytechnics) out of the 75 circulated with questionnaires. A detailed analysis of the results is to be published in *The Company Lawyer* this year. 27 individual responses were received: 19 of these (70.3%) named Farrar as 'the main textbook recommended', although some of these replies referred to more than one book.

of Gower also set out a clear structure and approach. The aim was 'to supply essential background material, and to emphasise the principles of common law and equity on which this branch of the law is still based, rather than the statutory provisions which supplement and amend them in detail'. It is hard for those who learned their company law after 1954 (including these reviewers) to judge how difficult this task was in 1954, since without Gower, their introduction to the subject would have been very different. Gower's book is often said to have established company law as a respectable academic subject in the universities and to have shaped the subject as we now know it.⁴

Gower's own preface to the first edition of his book shows that some of the problems he faced were the same as those encountered today; he seems to have been concerned primarily with the length of the book and the arrangement of the material. These problems have been exacerbated by the dramatic legislative and case law developments affecting companies since 1954. One of the major questions which a writer of a 'company law' textbook now has to consider is what 'company law' is today.

The second edition of Farrar has added to the material covered in the first a treatment of the new insolvency regime introduced by the Insolvency Act 1985 (and immediately replaced by the Insolvency Act 1986) and references to the new regulatory system introduced by the Financial Services Act 1986. There is, we are told, a new chapter on Administration Orders and Voluntary Arrangements. No doubt the authors are already preparing a third edition, since the wide-ranging Companies Act 1989 makes many major changes to company law, some of fundamental theoretical importance. In view of all these developments, it is surprising that Farrar is not much longer than Gower's fourth edition (published in 1979). But much has been lost as a result of the addition of all this new material: 10 pages on history as opposed to Gower's 36 pages, 13 pages on corporate personality compared with more than 40 pages in Gower. The new material is all important in its own way, but does it need to be included in this book, at the price of excluding what Gower described as background material and emphasis of principles?⁵

Perhaps it has become unrealistic to talk about the principles of common law and equity, given that most practising company lawyers spend their time steeped not only in their 'blue books' (Butterworth's Companies legislation) but also in their 'yellow books' (the International Stock Exchange's listing rules) and other forms of extra-statutory regulation in covers of a number of other hues. As 1992 approaches, numerous directives and regulations modifying UK company law flow from Brussels, often based on wholly different 'principles' which themselves rest upon economic, political, cultural and social conditions quite distinct from our own. What part do the principles of common law and equity have to play in this world? Can we any longer say, as Gower did in 1954, that statutory provisions 'supplement and amend the principles in detail' or are these detailed statutory provisions now the very stuff of company law?

This leads us into the deep waters of the definition of company law and, since *Farrar's Company Law* is undoubtedly intended primarily for students, into an investigation into the philosophy behind the teaching of company law.

Company Law Courses — Company Law Texts

Whether they like it or not, teachers of this subject are surrounded by students who take the subject because they believe it will be useful to them in their future careers. The reality is, all too often, that such students complete the course having learned little of practical value, and having been convinced that company law is difficult, thoroughly unexciting

4 See, for example, Rajak *A Sourcebook of Company Law* (Bristol: Jordans 1989), Introduction.

5 See preface to the first edition of Gower's *Principles of Modern Company Law* (London: Stevens & Sons Limited 1954).

and lacking in conceptual content. This is most likely to be the case where a course has attempted complete coverage of the life of every type of company from incorporation to liquidation, taking in detailed statutory rules on maintenance of capital and company charges, investor protection and insider dealing en route — the very type of course which purports to be directed at the budding practitioner and to prepare students for 'the real world'. Although it fails to prepare the student for anything other than the examination (or maybe a nervous breakdown), such a course could be called 'vocational'. No doubt its proponents would not disagree. Yet such evidence as is available⁶ suggests that very few courses of this nature exist within UK universities and polytechnics. A core of subjects such as corporate personality is covered by 75% or more of courses, but other topics such as financial assistance, distributable profits and receivership are apparently dealt with by only a quarter or fewer of company law teachers on degree courses. More common seems to be what could be called the 'traditional' course, which concentrates on those areas where case law is particularly important — minority protection, directors' duties and agency. Statutes are introduced as modifying influences, but the starting point is always the cases, and areas dominated by statute (such as financial assistance) are mentioned in passing. Taught well, this type of course focusses on the dynamics of the different interest groups concerned with the company and on the central task of company law in striking a balance between those interests. It need not be inconsistent with a 'law in context' approach; historical material,⁷ economic analysis and discussion of issues such as corporate social responsibility can all be grafted on to a traditional course without changing its fundamental nature. The danger is that such a course descends into nothing more than a burdensome list of cases full of irreconcilable dicta, and of articles delighting in these conflicts; a recipe for confusion and boredom in the case of the average student.

A traditional course can be, and often is, taught without reliance upon a textbook. Given the excellent company law case books available, notably Sealy's,⁸ with its thought-provoking questions and comments, this is manageable, but may well give the student an extremely fragmented and false picture of the subject. Indeed, Sealy expressly disavows the role of the 'stand-alone' case book.⁹ A case-study approach is necessarily one of segmenting the subject and company law cannot be segmented, even at the start. No one part is comprehensible without the others, since the underlying theme is one of relationships between different groups. To examine each group first in isolation and then attempt to put together the jigsaw makes no sense; one needs to start with some idea of the completed picture. For this, a narrative approach is essential, through lectures and seminars or through books. Farrar aims to serve this traditional type of course, albeit with some contextual and theoretical material, rather than a third and fundamentally different approach to teaching the 'subject'.

6 In this section, the reviewers have used the results of the survey undertaken by Ian Snaith, *op cit*.

7 The work of Ireland, Grigg-Spall and Kelly, claiming to provide a conceptual framework in a way in which contextualism, being atheoretical, cannot do, purports to 'lay the foundations for a more critical approach to company law' through the 'excavation of the specifically historical conditions and social relations which lead to the emergence of joint stock companies as a phenomenal form of industrial capital and the share as one of the phenomenal forms of money capital' (see 'The Conceptual Foundations of Modern Company Law' (1987) *Journal of Law and Society* 149). This approach too can be used successfully within a traditional course. It offers a new gloss on essentially familiar facts and cases and makes an excellent companion to a detailed case law approach to *Salomon v Salomon & Co. Ltd* [1897] A.C. 22.

8 Sealy *Cases and Materials in Company Law* (London: Butterworths, 4th ed. 1989); Hahlo and Farrar *Hahlo's Cases and Materials on Company Law* (London: Sweet & Maxwell, 3rd ed. 1987) is also a valuable case book containing more additional materials than Sealy's book but tending towards rather short extracts in some areas. See also Rajak *A Sourcebook of Company Law* (Bristol: Jordans 1989). This is densely packed with cases and materials as well as comments and questions, so closely printed that it can be difficult to disentangle one from the other — it is too early for a considered review of this book, although it does seem to provide a good number of extracts of a reasonable length.

9 See the preface to the first edition, Sealy, *op cit*.

A third approach would attempt to abandon the traditional classifications of company law. Topics such as 'corporate personality' would not appear in their own right, but would be dealt with, where relevant, within a thematic analysis which would separate the small private business from the listed company. In the case of the latter, it would emphasise a model of the company as a vehicle for the organisation of capital to be regulated in the public interest through insistence on disclosure, administrative action such as DTI investigations, the criminal law and extra-statutory regulation administered by specialist agencies such as the Take-over Panel.¹⁰ One can see the glimmerings of this 'new approach' in Hadden's *Company Law and Capitalism*,¹¹ which is, however, much in need of revision. Hadden's book deals with concepts within a structure which recognises the different sets of rules applicable to and appropriate for small and large companies which are, in economic terms, totally different types of entity. Farrar pays lip service to this division, and even includes chapters on 'Small incorporated firms' and 'Multinational companies', but does not sustain this separation of treatment because of the essentially traditional arrangement and classification used throughout the rest of the book. The thematic chapters provide short, sharp reminders of another perspective, but are too brief to cover the topics dealt with and are best regarded as reading lists, since references are cited very comprehensively in these chapters and throughout the book. Complete re-organisation of the material would be needed to integrate these themes into the substance of the book.

It is understandable that a textbook writer should hesitate to depart from traditional classifications, since this might mean that the book is only recommended as 'additional reading' (a fate which seems to have befallen Hadden's book, as Gower predicted).¹² Nevertheless, a radical re-organisation of the material to be covered in company law courses is becoming essential and is occurring already in a number of institutions.¹³ The most common route is to split off insolvency and securities regulation from company law courses, and to create additional optional courses in which such topics can be taught. This may well be necessary, but it is important that the remaining topics are not seen as a 'rump' through which a student must plod in order to be allowed to enter into more specialist courses. Here lies the opportunity for a major new approach which explores the core of company law: the underlying concepts and the social, political and economic background to the legal organisation of business forms, uncluttered by the more detailed approach which can be dealt with elsewhere.

Farrar does not provide the basis for this new type of course, but it does provide a far greater range of coverage and discussion than any other company law textbook available at present. It is important to see how this book measures up to its own objectives and not merely to carp that it has not revolutionised company law teaching, which it does not claim to do. It is not possible to examine the whole of this lengthy book in detail; we shall therefore focus on a few main areas.

'Law in Context'

Farrar's approach to company law involves an explicit acceptance of the value of a contextual approach. 'Economic theories of transaction costs, information and monitoring provide insights not only into incorporation but also the financing, management and growth of companies. They also help to explain why some companies merge and why some companies fail.' (at p7). Chapter 1 of the book begins by referring to economic theories about firms

10 On the extent to which corporations should be allowed to opt out of rules of corporate law, see, for example, 'Contractual Freedom in Corporate Law' 89 Col. L. Rev. No. 7 (November 1989) (Symposium issue).

11 Hadden, *Company Law and Capitalism* (London: Weidenfeld & Nicolson 1977).

12 Gower, 'Review of Company Law and Capitalism' (1973) 36 MLR 566.

13 See Snaith, *op cit* and Birds, 'The Teaching of Company Law', (1988) 9 Co Law. 2.

and their position in the economy.¹⁴ It is widely accepted that economic theories are useful as an aid to understanding corporate behaviour and structure,¹⁵ and the questions identified in Chapter 1 (see p4) are certainly important. For example, Farrar asks how the registered company works as a mechanism for allocating resources, how decisions are reached, and what procedures exist for monitoring management.¹⁶ The question of how profits are and should be shared is also important to the authors, a question on which many other commentators have focussed.¹⁷ This is a good place to start, but these issues are not followed through in the rest of the text.

After identifying questions of this sort, the book proceeds to list what are described as seven major economic themes in modern company law (at pp7–12). These are (1) increasing concentration and the growth of larger business units; (2) increasingly elaborate structures; (3) the separation between ownership and control of the firm; (4) the growth in institutional investment in ordinary shares in UK companies; (5) increasing government intervention in corporate affairs; (6) the growth of multinational enterprises, raising questions of international law; and (7) the international financial revolution, which Farrar describes as involving the reduction of money to a commodity in its own right (at p11). 'Now, more than at any time in the past', as Farrar puts it, 'the financial world in which companies operate is fluid and the changes fast moving. The effects of this on conventional concepts of company law are yet to be assessed.' (at p12).

Such questions are certainly important, but how well they are developed in what follows is unclear. There are many surveys of the literature in a given area without any comment. It is not sufficient to state that the implications of one of seven 'major . . . themes' of the book 'are yet to be assessed', without making an attempt at an assessment. The themes overlap: increasing concentration, the development of MNEs and increasingly elaborate corporate structures are not so separate as the book seems to suggest. This problem could be resolved by drawing out some of the implications of these themes, and by showing how the authors think they fit together. At the same time, other important themes are not identified at this point, most particularly, the implications of the Single Internal Market within the EEC for company law.

To be successful in its own terms, 'Law in Context' must solve the problem of integrating law and context. The second edition of Farrar is much better than the first in this respect, making more references to context throughout the text. However, it would be preferable were the book to refer to other social sciences as well as economics.¹⁸ To construct the context in terms of economics, in isolation from other social sciences, requires, at very least, an explanation of the particular value of this discipline.

Corporate Personality

Despite the addition of 'an extended discussion of limited liability' in the second edition,

14 Eg Coase 'The Nature of the Firm' (1937) 4 *Economica* (NS) 386, cited at p3.

15 See eg Easterbrook and Fischel 'Limited Liability and the Corporation' 52 *U Chi L Rev* 89 (1985), referred to at p67.

16 Investor protection can be seen as necessary in order to encourage investment in business. See eg Ralph K. Winter Jr. 'State Law, Shareholder Protection, and the Theory of the Corporation' 6 *J. Leg. Stud.* 251 (1977) at p276: 'So far as the capital market is concerned, it is not in the interest of management to seek out a corporate legal system which fails to protect investors'.

17 See, for example: Berle and Means *The Modern Corporation and Private Property* (New York: The MacMillan Company 1933) at pp333–357.

18 See eg Teubner 'Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person' 36 *Am. J. Comp. L.* 130 (1988); Smith *Corporations and Society* (London: Gerald Duckworth & Co. Ltd. 1974); Nichols *Ownership, Control and Ideology* (London: George Allen & Unwin Ltd. 1969); Hallis *Corporate Personality — A Study in Jurisprudence* (London: OUP 1930); Cooke *Corporation, Trust and Company* (Manchester 1950); Herman *Corporate Control, Corporate Power* (Cambridge: Cambridge University Press 1981).

(see the preface) the treatment of corporate personality remains disappointing. This should be of the essence in a book which takes in the economic analysis of corporate law, as indeed it must be to the traditional approach, and yet it is dealt with briefly, in a chapter of 13 pages, 5 of which are devoted to listing cases on piercing the corporate veil under the usual, tired old headings. It is one thing to explain, as Farrar does, that the courts have not been systematic in defining the circumstances in which the veil should be lifted; it would be more helpful to expose the poverty of judicial reasoning in this area by detailed case analysis, rather than to try to gloss over this unsatisfactory area in as few words as possible. A review of the way in which this problem is dealt with in other jurisdictions would also have been enlightening.

Instead, the headings are dealt with without conviction and in some instances in such a condensed way as to be worse than useless. It is not only inadequate but also misleading to state that 'the courts are prepared to disregard the separate legal personality of companies in the case of tax evasion or over-liberal schemes of tax avoidance without any necessary legislative authority. In such cases the courts dismiss the company as a mere sham'. If this were correct, the courts would not have needed to develop the far more sophisticated principle in *Furniss v Dawson*¹⁹ to counter an artificial avoidance scheme which in that case rested on the concept of separate legal personality.²⁰ The only authority given for this questionable statement is Gower, a device often resorted to in this book when the authors wish to avoid going into the sort of detail which would usually be included in a traditional textbook. In fact, while Gower's examples are statutory and correct, they do not support the wide statement made here. It is a pity that Philip Wylie was invited to write a separate chapter on the taxation of companies, which, although excellent, is unlikely to be read by most company law students, rather than to incorporate references to taxation, where appropriate, throughout the text.

The part of this chapter added since the first edition is promisingly entitled 'The Relationship of Legal Personality to Limited Liability', with brief reference to the US cases on inadequate capitalisation. There is enough to whet the appetite but no real exploration of the notion that the corporate form should be used only for legitimate purposes.²¹ Instead, what is offered is a potted version of an American article²² which is an excellent example of the difficulties encountered when trying to deal with the economic analysis of company law. For example, we read that 'The argument [in Meiners, Mofsky and Tollison that limited liability has no significant impact] is a variation on the theme of Coase's theorem that if transaction costs are zero the initial assignment of property rights will not depend on the ultimate use of the property'.

Yet we can find no other reference to Coase's theorem, and the sentence is unhelpful to those without prior knowledge of this area.²³ The aim may be to encourage students to explore this literature in more detail, but this treatment is more likely to scare them off. The difficulty is that simply to say that there are ways to deal with the allocation of risk other than by giving companies limited liability does not sound very profound; nevertheless, it is at least comprehensible. Here again the extensive references to the US literature are very useful and the authors should either have contented themselves with providing this information or re-organised and pruned their material so as to give adequate

19 [1984] AC 474.

20 See the discussion of this area in a comparative law context in Ward *et al.*, 'The Business Purpose Test and Abuse of Rights' 1985 BTR 68.

21 See Ward *et al.*, *op cit.*

22 Meiners, Mofsky and Tollison 'Piercing The Veil of Limited Liability' (1979) 4 *Delaware Journal of Corporate Law* 351.

23 In fact, although this is not the point the reviewers are seeking to make here, this sentence is rather baffling even to the initiated. Should it not read, 'the ultimate use of the property will not depend on the initial assignment of property rights'?

space for a considered discussion of the law and economics literature and, perhaps, a comment on how well it survives application to UK law.²⁴

Minority Protection

One of the main aims of the writers of company law textbooks seems to be to distill from statutes and decided cases the principles or rules which may be applied to all registered companies, from the smallest to the largest. Solicitors who are trained in company law by these textbooks attempt to apply principles developed by the courts in relation to one or two person companies to transactions involving the largest quoted companies. Courts, however, often distinguish between companies involved in a public market and those which are not.²⁵ This distinction is particularly important in the area of minority protection, because it is extremely unlikely that the courts will allow a derivative action by a shareholder in a company involved in a public market.

Corporate personality is the central issue in company law, and an understanding of minority protection is vital in appreciating the impact of corporate personality. What, precisely, is the nature of the relationships within a registered company, and how does the law protect them? These relationships, and the protection provided by the law, vary according to the nature of the company. In a large company, where there is a separation between ownership and control,²⁶ the ability of shareholders to monitor management is a real issue. The duties imposed on directors are supposed to prevent directors from acting against the interests of shareholders, but these duties are of little use if they are unenforceable by shareholders.

Farrar's treatment of minority protection makes little reference to the context in which the rules operate. Given that one of the questions posed at the beginning of the book refers to the monitoring of management, this is surprising. It is also surprising that a subject so central should be covered in only 30 pages out of 680. The book does draw attention to the difficulties shareholders encounter in bringing litigation to protect their interests, (see p381) and, in referring to section 459 of the Companies Act 1985 (the statutory remedy for unfairly prejudicial conduct), distinguishes between the positions of shareholders in small and large companies:

The interests of shareholders in public companies, on the other hand, are likely to be quite different and considerably more restricted. In these larger companies there is usually no underlying personal relationship, employment is rarely an issue and the shareholders are usually more interested in such matters as dividend yield, capital appreciation and possible take-over bids than the day-to-day running of the company. If they become dissatisfied then they can always sell their shares on the open market. (see p400)

However, this point is of wider importance in the consideration of minority protection. Farrar misses the opportunity to consider in depth, and in their economic context, the interests of shareholders in large and small companies.

The treatment of the subject is disappointing, relying, as in the chapter on corporate personality, on the accepted classifications, however inappropriate they now are. For example, the book refers to the traditional exceptions to the rule in *Foss v Harbottle*:²⁷ illegality or ultra vires, special majorities, personal rights and fraud on the minority (see

24 Other material of a theoretical nature taken from political theory and jurisprudence could have been used to shed light on legal personality; see Stokes, 'Company Law and Legal Theory' in Twining (ed), *Legal Theory and Common Law* (Oxford: Basil Blackwell 1986).

25 *Prudential Assurance v Newman Industries* [1982] Ch 204; *Re Blue Arrow plc* [1987] BCLC 585.

26 Berle and Means *The Modern Corporation and Private Property* (New York: The MacMillan Company 1933).

27 (1843) 2 Hare 461.

pp384–389). In dealing with fraud on the minority, Farrar identifies categories of potential fraud: the appropriation of corporate property, negligence, and abuse of power (see pp386–9). This treatment suggests that the categories work. In fact, it is not easy to predict on which side of the line separating fraud from unexceptionable behaviour a given case will fall: the cases are reminiscent of those in which judges ascertain property rights in a family home on the breakdown of the relationship.²⁸ The job of the textbook writer is to identify circumstances where the courts are prepared to intervene in relationships. The unfortunate result is that we end up with principles which are not principles.

There are other weaknesses in the chapter. For example, the treatment of the ultra vires/illegality exception to the rule in *Foss v Harbottle*²⁹ makes no reference to the proposed abolition of the ultra vires doctrine, although the chapter on the memorandum of association deals with the then proposed reforms.³⁰ In addition, there is no mention, in this context, of the decision in *Smith v Croft*³¹ that shareholders can restrain acts by the company but cannot bring an action after an ultra vires act has taken place, a distinction which is of importance. More detail, and more analysis of the cases would be desirable. In particular, the significance of ratification needs to be stressed: when the courts will allow ratification to prevent shareholder litigation is not made obvious. Instead, this chapter adopts a traditional approach, but is less convincing in its treatment of the law than other, more traditional, books.

Take-overs and Mergers

The chapter of the first edition of Farrar which dealt with take-overs and mergers was very technical. The second edition incorporates some of the contextual material which is missing from much of the rest of the book. Again, however, there are missed opportunities; although the chapter briefly refers to the idea of take-overs as a mechanism for disciplining corporate management (see p520), the chapter does not consider the conflicts of interest to which directors are subject in the take-over context.³² One of the reasons for the chapter is stated to be that it is exciting when rules are applied in the context of 'a fiercely contested battle between the bidder and the subject of the bid' (at p519). In reality, the battle is between the bidder and the target company's management in a hostile take-over. Another reason given for the chapter is that take-overs are interesting as a practical application of rules from different areas of company law. Take-overs are not unusual: most company law cases involve more than one legal point;³³ and the book as a whole would benefit from a wider appreciation of this fact.

The chapter is quite thorough, dealing, for example, with reconstructions, schemes of arrangement and compulsory acquisition, as well as with the provisions of the Take-over Code. Farrar also considers the impact of various rules on price support operations in share for share offers, including the prohibitions on companies buying their own shares and financial assistance, and the provisions of the Take-over Code dealing with disclosure

28 See, for example, Evans 'The Fall and Rise of the Remedial Constructive Trust?' 1989 *Conveyancer and Property Lawyer* 418 and the cases discussed there.

29 See p384.

30 See p99, and now see section 108 of the Companies Act 1989, inserting a new section 35(2) in the Companies Act 1985: 'A member of a company may bring proceedings to restrain the doing of an act which but for subsection (1) would be beyond the company's capacity; but no such proceedings shall lie in respect of an act to be done in fulfillment of a legal obligation arising from a previous act of the company'.

31 [1987] 3 WLR 405.

32 See, for example: Fischel 'Efficient Capital Market Theory. The Market for Corporate Control and the Regulation of Cash Tender Offers' 57 *Tex. L. Rev.* 1 (1978).

33 See, for example: *Rolled Steel Products v British Steel* [1984] BCLC 466; *Brady v Brady* [1988] 2 WLR 1308.

of interests in shares, and the criminal offence of market manipulation (see p529).³⁴ Unfortunately, there is no consideration in this chapter of issues where directors' conflicts of interest may be implicated, such as management buyouts, or insider dealing.

One of the aspects of take-overs which Farrar considers to be interesting is the impact of non-legal rules. The book states that '[c]ompany law is about the problems that arise in the regulation of companies', (at p525) and proceeds to explain that 'a knowledge of the extralegal regulatory solution to problems is not only important for its practical effect but forms a part of company law because it creates the context in which legal rules apply and represents a potential solution for the law to adopt.' This seems confused. It is true that non-legal regulation has had a significant impact on the development of the law; for example, insider dealing was regulated under the Take-over Code long before the Companies Act 1980 created criminal offences of insider dealing, and judges seem to have been influenced by the provisions of the Take-over Code.³⁵ However, Farrar seems to be suggesting that the provisions of the Code are law and are not law at the same time. The distinction between law and rules which are not law, if there is a real distinction here, is interesting and deserves more serious consideration.³⁶

Conclusion

Although Farrar is not perfect, it has advantages as a textbook. Most students seem to like it, and to find it readable, although it would be improved by the addition of a table of books and articles with the tables of cases and statutes, and by some work on the cross-referencing. The book is the work of three main authors and this seems to work well. Indeed, it is hard to imagine that any one person could write and keep up to date a book of this length single-handed. However, there are one or two troubling inconsistencies. For example, *Brady v Brady*³⁷ is shown in the index as a House of Lords case and referred to as such at p329 in the context of directors' duties, yet the chapter on the corporate constitution fails to reflect the House of Lords decision. This is very confusing for students, who might reasonably, though quite erroneously, assume that the House of Lords did not comment on the Court of Appeal's views on ultra vires in that case.³⁸ Although the reviewers have every sympathy for the authors in the battle to keep a company law textbook up to date, it does seem important for co-authors to develop some mechanism to prevent such discrepancies from creeping in.

It is unfair to criticise the book for not being perfect when it attempts a more difficult task than do most legal textbooks, but it is unfortunate that the book must sacrifice analysis in order to provide some context for the rules, and to be so broad in scope that it must sacrifice rigour in dealing with context in order to fit in so many of the rules. This may make some sense in terms of the economics of publishing, but there is insufficient detail for all of this material to be really useful.³⁹ The book is too derivative to be either a serious theory book or a serious black-letter law book. Although it is not revolutionary, it is a very useful basis for the teaching of company law, provided that it is supplemented with more detailed consideration of theoretical materials and cases.

34 The chapter refers to section 47(2) of the Financial Services Act 1986 as introducing a new market manipulation offence. The section had its origins in the common law offence of conspiracy to defraud. See, for example: *R v De Berenger* (1814) 3 M&S 67; *R v Aspinall* (1876) 11 QB 48.

35 See, for example: *Gething v Kilner* [1972] 1 WLR 337.

36 See, for example: Santos 'On Modes of Production of Law and Social Power' (1985) 13 *International Journal of the Sociology of Law* 299.

37 (1988) 4BCC 390 (HL).

38 See note 30 above.

39 cf the review by Field of Berle and Warren, (eds) *Cases and Materials on the Law of Business Organisation (Corporations)* (1948) 62 Harv. L. Rev. 160, 161: 'Considered as a teaching tool for a one-year course, this casebook seems like an effort to fit a size twelve foot into a size six shoe'.