if the provisions are not truly referable to the rights and obligations of members as such it does not operate as a contract. Moreover, the contract can be altered by a special resolution without the consent of all the contracting parties. It is also, unlike an ordinary contract, not defeasible on the grounds of misrepresentation, common law mistake, mistake in equity, undue influence or duress. Moreover … it cannot be rectified on the grounds of mistake.

Turning now to the present case, the question is whether the implied term of requiring members to contribute to maintenance of the amenities can be implied not on the basis of any language to be found in the articles, but on the basis of extrinsic circumstances. The question is, is it notionally ever possible to imply a term in such circumstances? I will readily accept that the law should not adopt a black-letter approach. It is possible to imply a term purely from the language of the document itself: a purely constructional implication is not precluded. But it is quite another matter to seek to imply a term into articles of association from extrinsic circumstances.

Here, the company puts forward an implication to be derived not from the language of the articles of association but purely from extrinsic circumstances. That, in my judgment, is a type of implication which, as a matter of law, can never succeed in the case of articles of association. After all, if it were permitted, it would involve the position that the different implications would notionally be possible between the company and different subscribers. Just as the company or an individual member cannot seek to defeat the statutory contract by reason of special circumstances such as misrepresentation, mistake, undue influence and duress and is furthermore not permitted to seek a rectification, neither the company nor any member can seek to add to or to subtract from the terms of the articles by way of implying a term derived from extrinsic surrounding circumstances. If it were permitted in this case, it would be equally permissible over the spectrum of company law cases. The consequence would be prejudicial to third parties, namely potential shareholders who are entitled to look to and rely on the articles of association as registered. Despite Mr Asprey's lucid and incisive argument, I take the view that on this ground alone the implication cannot succeed.

DILLON LJ and SIR CHRISTOPHER SLADE delivered concurring judgments.

➢ Notes

1. When determining the meaning of an amendment of the articles of association, the courts will not consider the effect which the alteration was intended to have, or circumstances in which the alteration was made, but the court will however add words to avoid absurdity, or imply a term which is strictly necessary proceeding from the express words of the articles viewed objectively in their commercial setting. The next case is an illustration.

2. In *Coroin Ltd, Re* [2011] EWHC 3466 (Ch), the court was prepared to admit some extrinsic background for the purpose of construing the articles in question. David Richards J **(p. 184)** held that it would be 'somewhat artificial to construe the articles in isolation from the shareholders' agreement (see 'Shareholders' agreement', pp 244ff) and from the background admissible to the construction of that agreement. Nor would it conflict with the reasons for the usual exclusionary rule to take account of the shareholders agreement and its background' [69]. Key to this approach were the facts that the articles were adopted pursuant to the shareholders' agreement; both documents were negotiated by and were intended to govern relations between the initial investors as members of the company; and the agreement was clearly intended to bind all present *and future* shareholders of the company (although the judge held it unnecessary to reach a final conclusion on this last point for the purpose of determining the issues in dispute).

***'Implied terms' in the articles.***

**[4.03] Equitable Life Assurance Society v Hyman [2002] 1 AC 408 (House of Lords)**

The relevant article (art 65) gave the directors a wide discretionary power to pay bonuses on its members' life assurance policies, and in exercise of this power the directors had paid some policyholders a larger bonus than others. This was contrary to 'guarantees' which had been given when certain of the members took out their policies. Lord Steyn said that the articles should be read as containing an implied term that the directors would not exercise their discretion 'in a manner which deprived the guarantees of any substantial value'.

> LORD STEYN: It is necessary to distinguish between the processes of interpretation and implication. The purpose of interpretation is to assign to the language of the text the most appropriate meaning which the words can legitimately bear. The language of article 65(1) contains no relevant express restriction on the powers of the directors. It is impossible to assign to the language of article 65(1) by construction a restriction precluding the directors from overriding GARs ['guaranteed annuity rate' policies]. To this extent I would uphold the submissions made on behalf of the Society. The critical question is whether a relevant restriction may be implied into article 65(1). It is certainly not a case in which a term can be implied by law in the sense of incidents impliedly annexed to particular forms of contracts. Such standardised implied terms operate as general default rules: see *Scally v Southern Health and Social Services Board* [1992] 1 AC 294. If a term is to be implied, it could only be a term implied from the language of article 65 read in its particular commercial setting. Such implied terms operate as ad hoc gap fillers. In *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, 137 Lord Wright explained this distinction as follows:
>
> > 'The expression "implied term" is used in different senses. Sometimes it denotes some term which does not depend on the actual intention of the parties but on a rule of law, such as the terms, warranties or conditions which, if not expressly excluded, the law imports, as for instance under the Sale of Goods Act and the Marine Insurance Act … But a case like the present is different because what it is sought to imply is based on an intention imputed to the parties from their actual circumstances.'
>
> It is only an individualised term of the second kind which can arguably arise in the present case. Such a term may be imputed to parties: it is not critically dependent on proof of an actual intention of the parties. The process 'is one of construction of the agreement as a whole in its commercial setting': *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, 212E, per Lord Hoffmann. This principle is sparingly and cautiously used and may never be employed to imply a term in conflict with the express terms of the text. The legal test for the implication of such a term is a standard of strict necessity. This is how I must approach the question whether a term is to be implied into article 65(1) which precludes the directors from adopting a principle which has the effect of overriding or undermining the GARs.
>
> **(p. 185)** The inquiry is entirely constructional in nature: proceeding from the express terms of article 65, viewed against its objective setting, the question is whether the implication is strictly necessary. My Lords, as counsel for the GAR policyholders observed, final bonuses are not bounty. They are a significant part of the consideration for the premiums paid. And the directors' discretions as to the amount and distribution of bonuses are conferred for the benefit of policyholders. In this context the self-evident commercial object of the inclusion of guaranteed rates in the policy is to protect the policyholder against a fall in market annuity rates by ensuring that if the fall occurs he will be better off than he would have been with market rates. The choice is given to the GAR policyholder and not to the Society. It cannot be seriously doubted that the provision for guaranteed annuity rates was a good selling point in the marketing by the Society of the GAR policies. It is also obvious that it would have been a significant attraction for purchasers of GAR policies. The Society points out that no special charge was made for the inclusion in the policy of GAR provisions. So be it. This factor does not alter the reasonable expectations of the parties. The supposition of the parties must be presumed to have been that the directors would not exercise their discretion in conflict with contractual rights. These are the circumstances in which the directors of the Society resolved upon a differential policy which was designed to deprive the relevant guarantees of any substantial value. In my judgment an implication precluding the use of the directors' discretion in this way is strictly necessary. The implication is essential to give effect to the reasonable expectations of the parties. The stringent test

applicable to the implication of terms is satisfied.

➢ Questions

1. Why did this case need to be decided as a matter of contractual interpretation of the articles, rather than a matter of (improper) exercise of discretion by the directors?

2. Lord Steyn clearly had in mind the distinction between 'constructional' implied terms and ones derived from extrinsic circumstances which he had put forward in*Bratton Seymour* (to which he did not refer). Is it clear from these two cases how the line is to be drawn? Also see *Attorney General of Belize v Belize Telecom Ltd*[2009] UKPC 10, [2009] BCC 433, PC (in the following Note 3).

## ➢ Notes

1. If the understanding between the founding members as to the basis on which a company is to be incorporated differs from the constitutional arrangements of the company when formed, this may be a reason for winding up the company on the 'just and equitable' ground (IA 1986 s 122, see 'Compulsory winding up on the "just and equitable" ground', pp 795ff). And a member whose 'legitimate expectations' are disappointed, even though they are not formally recorded as constitutional provisions or terms, may also be granted discretionary relief under CA 2006 s 994, on the ground of 'unfairly prejudicial' conduct: see 'Unfairly prejudicial conduct of the company's affairs', pp 681ff.

2. In Australia, on facts similar to *Scott v Frank F Scott (London) Ltd* **[4.01]**, the court has refused rectification but indicated that if new proceedings were brought it would be willing to give a remedy in the nature of specific performance ordering the defendant members to vote in favour of a special resolution to remedy the defect: *Simon v HPM Industries Pty Ltd* (1989) 15 ACLR 427, SC (NSW); *Re Freehouse Pty Ltd* (1997) 26 ACSR 662, SC (Vic).

3. Note the following observations by Lord Hoffmann about the process of implication in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10 (PC) (where the issue concerned the rights attaching to a 'Special Share' held by the government in a privatised telecommunications company):

> 16 Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve **(p. 186)** upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.
>
> 17 The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.
>
> 18 In some cases, however, the reasonable addressee would understand the instrument to mean something

else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.

4. In *Cream Holdings Ltd v Stuart Davenport* [2010] EWHC 3096 (Ch), the defendant was removed as a director and, pursuant to the articles, the removal brought about the deemed service of a transfer notice in respect of his shareholding (ie deeming his intention to sell his shareholding). The articles then provided procedures for the valuation and transfer of the shares, including the appointment of a third party valuer where the parties could not agree. The defendant obstructed these procedures, and the court held that terms should be implied into the procedures imposing an obligation to cooperate and a requirement not to withhold consent unreasonably to the nominated appointment. These implied terms were 'necessary [… and] represent the minimum machinery necessary to make these articles work' [58].

## Practical consequences of the constitutional allocation of powers

The division of powers between the members in general meeting and the board of directors, as determined by the company's articles, has important—and sometimes counter-intuitive—practical consequences for both organs. The next few cases are illustrative.

***Where the articles limit the powers of the company in general meeting, such articles cannot be disregarded even by a majority sufficiently large to alter the articles. A formal alteration must be made and then acted upon.***

**[4.04] Imperial Hydropathic Hotel Co, Blackpool v Hampson (1882) 23 Ch D 1 (Court of Appeal)**

The articles provided that the directors were to hold office for a period of three years and to retire by rotation. At a general meeting specially summoned for this and other purposes, resolutions were carried for the removal of two directors (who were not due for retirement under **(p. 187)** the articles) and the election of others in their place. The company in this action claimed a declaration that the directors had been validly removed. It was held that the articles could not be disregarded in this way.[16]

COTTON LJ: There is nothing in the Act or in the articles which directly enables a general meeting to remove directors; but the way it is put is this—that there is power in these articles, as there is power in the Act, by a meeting duly called to pass a resolution altering the articles; and it is said that here there was a resolution which would have been effectual to alter the articles that these directors whom the articles did not authorise to be removed should be removed. Now in my opinion it is an entire fallacy to say that because there is power to alter the regulations, you can by a resolution which might alter the regulations, do that which is contrary to the regulations as they stand in a particular and individual case. It is in no way altering the regulations. The alteration of the regulations would be by introducing a provision, not that some particular director be discharged from being a director, but that directors be capable of being removed by the vote of a general meeting. It is a very different thing to pass a general rule applicable to every one who comes within it, and to pass a resolution against a particular individual, which would be a*privilegium* and not a law. Now here there was no attempt to pass any resolution at this meeting which would affect any director, except those who are aimed at by the resolution, no alteration of the regulations was to bind the company to those regulations as altered; and assuming, as I do for the present purpose, as the second meeting seems to have been regular according to the notice, that everything was regularly done, what was done cannot be treated in my opinion as an alteration first of the regulations, and then under that altered regulation as a removal of the directors …

JESSEL MR and BOWEN LJ delivered concurring judgments.

Also see *Boschoek Pty Co Ltd v Fuke* **[4.31]**.

***Where the general management of the company is vested in the directors, the members have no power by ordinary resolution to give directions to the board or to overrule its business decisions.***

**[4.05] Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame [1906] 2 Ch 34 (Court of Appeal)**

Article 96 of the company's articles of association vested in the directors 'the management of the business and the control of the company' in terms similar to the 1985 Table A, art 70; and art 91(1) specifically empowered them to sell any property of the company on such terms and conditions as they might think fit. At a general meeting a resolution was passed directing the board to sell the company's undertaking to a new company formed for the purpose, but the directors disapproved of the proposed terms and declined to carry out the sale. It was held that the shareholders had no say in the matter, which was for the board alone to decide.

> COLLINS MR: This is an appeal from a decision of Warrington J, who has been asked by the plaintiffs, Mr McDiarmid and the company, for a declaration that the defendants, as directors of the company, are bound to carry into effect a resolution passed at a meeting of the shareholders in the company on 16 January …
>
> The point arises in this way. At a meeting of the company a resolution was passed by a majority—I was going to say a bare majority, but it was a majority—in favour of a sale to a purchaser, and the directors, honestly believing, as Warrington J thought, that it was most undesirable in the interests of the company that that agreement should be carried into effect, refused to affix the seal of the **(p. 188)** company to it, or to assist in carrying out a resolution which they disapproved of; and the question is whether under the memorandum and articles of association here the directors are bound to accept, in substitution of their own view, the view contained in the resolution of the company. Warrington J held that the majority could not impose that obligation upon the directors, and that on the true construction of the articles the directors were the persons authorised by the articles to effect this sale, and that unless the other powers given by the memorandum were invoked by a special resolution, it was impossible for a mere majority at a meeting to override the views of the directors. That depends, as Warrington J put it, upon the construction of the articles. [His Lordship read the relevant articles and continued:] Therefore in the matters referred to in article 97(1) the view of the directors as to the fitness of the matter is made the standard; and furthermore, by article 96 they are given in express terms the full powers which the company has, except so far as they 'are not hereby or by statute expressly directed or required to be exercised or done by the company', so that the directors have absolute power to do all things other than those that are expressly required to be done by the company; and then comes the limitation on their general authority—'subject to such regulations as may from time to time be made by extraordinary resolution'. Therefore, if it is desired to alter the powers of the directors, that must be done not by a resolution carried by a majority at an ordinary meeting of the company, but by an extraordinary resolution. In these circumstances it seems to me that it is not competent for the majority of the shareholders at an ordinary meeting to affect or alter the mandate originally given to the directors, by the articles of association. It has been suggested that this is a mere question of principal and agent, and that it would be an absurd thing if a principal in appointing an agent should in effect appoint a dictator who is to manage him instead of his managing the agent. I think that that analogy does not strictly apply to this case. No doubt for some purposes directors are agents. For whom are they agents? You have, no doubt, in theory and law one entity, the company, which might be a principal, but you have to go behind that when you look to the particular position of directors. It is by the consensus of all the individuals in the company that these directors become agents and hold their rights as agents. It is not fair to say that a majority at a meeting is for the purposes of this case the principal so as to alter the mandate of the agent. The minority also must be taken into account. There are provisions by which the minority may be overborne, but that can only done by special machinery in the shape of special resolutions. Short of that the mandate which must be obeyed is not that of the majority—it is that of the whole entity made up of all the shareholders. If the mandate of the directors is to be altered, it can only be under the machinery of the memorandum and articles themselves. I do not think I need to say more …
>
> COZENS-HARDY LJ delivered a concurring judgment.

## ➢ Notes

1. The decision in *Cuninghame*'s case marked the beginning of a departure from the traditional nineteenth-century view which regarded the members in general meeting as constituting 'the company' and the directors as their delegates or agents. This older view is well illustrated by the wording of s 90 of the Companies Clauses Consolidation Act 1845,[17] and the remarks of Cotton LJ in *Isle of Wight Rly Co v Tahourdin* (1883) 25 Ch D 320, CA, deciding a case under this section (which gave the directors general management power, but 'subject … to the control and regulation of any general meeting especially convened for the purpose'. The directors had succeeded at first instance in securing an injunction to restrain the holding of a general meeting which had been requisitioned by a number of shareholders. He said (at 329):

> We are of opinion that this injunction ought not to have been granted. It is a very strong thing indeed to prevent shareholders from holding a meeting of the company, when such a meeting is the only way in which they can interfere, if the majority of them think that the course taken by the directors, in a matter which is intra vires of the directors, is not for the benefit of the company …
>
> **(p. 189)** Directors have great powers, and the court refuses to interfere with their management of the company's affairs if they keep within their powers, and if a shareholder complains of the conduct of the directors while they keep within their powers, the court says to him, 'If you want to alter the management of the affairs of the company go to a general meeting, and if they agree with you they will pass a resolution obliging the directors to alter their course of proceeding.'

2. Three further points may be made about *Cuninghame*'s case:

(i) It is not the *law* that has changed between 1883 (the date of *Tahourdin*'s case) and today, so much as commercial practice. All that the courts have done is to recognise that practice. There is nothing in the law which would prevent a company from having a provision in its articles which gave supervisory powers in the widest terms to its members, or allowed them to override the director's decisions—indeed, art 70 (1985 Table A) itself has such a provision (but a special resolution is needed).

(ii) Article 70 (1985 Table A) uses the words 'the business of the company shall be managed by the directors …'. The ruling in *Cuninghame*'s case does not apply to decisions outside the company's business and its management. In *Re Emmadart Ltd* [1979] Ch 540, it was held that directors had no power under such an article to resolve to put their company into liquidation.

(iii) Until the revision of Table A in 1985, the wording of the article corresponding to art 70 was ambiguous: there was a power reserved to the company in general meeting to prescribe 'regulations' binding on the directors (see, eg Companies Act 1948 (CA 1948) Table A, art 80). But what was meant by 'regulations' in this context was never settled; and some commentators (eg Goldberg (1970) 33 MLR 177; Sullivan (1977) 93 LQR 569) argued that if due weight were given to this provision art 80 ought to be construed as giving the members power to override the autonomy apparently conferred on the directors by *Cuninghame*'s case. Their view was supported by the first-instance decision of Neville J in *Marshall's Valve Gear Co Ltd v Manning, Wardle & Co Ltd* [1909] 1 Ch 267. The problem is still very much a live one, for there are many thousands of companies that have articles in this old form. But all the indications are that a modern court would not go out of its way to restore the nineteenth-century position in the face of the shift in business practice over the last hundred years; and in *Breckland Group Holdings Ltd v London & Suffolk Properties Ltd* [1989] BCLC 100, Harman J expressed the view that *Marshall*'s case could not stand against the overwhelming weight of authority to the contrary.

3. Following *Cuninghame*'s case, the Court of Appeal in *Gramophone and Typewriter Co Ltd v Stanley* **[2.05]** declined to 'lift the veil' so as to identify a subsidiary with its holding company, partly on the ground that the control of the affairs of the subsidiary was assigned to its *directors*. The same approach was adopted in the cases which follow.

**[4.06] Quin & Axtens Ltd v Salmon [1909] AC 442 (House of Lords)**

The company's two managing directors, Salmon and Axtens, held between them the bulk of the company's ordinary shares. Article 75 of the articles provided that the business of the company should be managed by the directors, who might exercise all the powers of the company 'subject to such regulations (being not inconsistent with the provisions of the articles) as may be prescribed by the company in general meeting'. Article 80 stated that no resolution of a meeting of the directors having for its object (*inter alia*) the acquisition or letting of certain premises should be valid if either Salmon or Axtens dissented. The directors resolved to acquire and to let various properties, but Salmon dissented. An extraordinary general meeting was then held at which the members by a majority passed similar resolutions. The House of Lords, upholding the decision of the Court of Appeal, held that the members' resolutions **(p. 190)** were inconsistent with the articles and granted an injunction restraining the company from acting on them.

> LORD LOREBURN LC: My Lords, I do not see any solid ground for complaint against the judgment of the Court of Appeal.
>
> The bargain made between the shareholders is contained in articles 75 and 80 of the articles of association, and it amounts for the purpose in hand to this, that the directors should manage the business; and the company, therefore, are not to manage the business unless there is provision to that effect. Further the directors cannot manage it in a particular way—that is to say, they cannot do certain things if Mr Salmon or Mr Axtens objects. Now I cannot agree with Mr Upjohn in his contention that the failure of the directors upon the objection of Mr Salmon to grant these leases of itself remitted the matter to the discretion of the company in general meeting. They could still manage the business, but not altogether in the way they desired …
>
> LORDS MACNAGHTEN, JAMES OF HEREFORD and SHAW OF DUNFERMLINE concurred.

**[4.07] John Shaw & Sons (Salford) Ltd v Shaw [1935] 2 KB 113 (Court of Appeal)**

As part of the settlement of a dispute concerning sums owing to the plaintiff company by Peter, John and Percy Shaw (three brothers who were shareholders in, and directors of, the plaintiff company), the articles were altered so as to hand over all control of the financial affairs of the company and the management of its business to three independent persons known as 'permanent directors'. Two of the brothers, however, later failed to accept certain other provisions of the settlement, and as a result it was resolved at a meeting of the permanent directors that the present action should be instituted against them. But before the hearing of the suit the shareholders held an extraordinary meeting, at which a resolution was passed directing the board to discontinue the action forthwith. Du Parcq J disregarded the shareholders' resolution and gave judgment for the plaintiff company. The defendants appealed.

> GREER LJ: [This] cause of action, whether likely to succeed or not, was one in respect of which the permanent directors were, in my opinion, empowered to commence and carry on.
>
> I am therefore of opinion that the learned judge was right in refusing to dismiss the action on the plea that it was commenced without the authority of the plaintiff company. I think the judge was also right in refusing to give effect to the resolution of the meeting of the shareholders requiring the chairman to instruct the company's solicitors not to proceed further with the action. A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of powers vested by the articles in the directors is by altering their articles, or if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove.[18] They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of

shareholders …

[ROCHE LJ agreed, for other reasons, that the action had been competently brought, while SLESSER LJ, again for other reasons, thought that it had not. But he agreed, or 'inclined to the view', that the shareholders could not interfere with a power conferred by the articles on the permanent directors, except by altering the articles. The court unanimously held, however, that the defendants were entitled to succeed on the substantive issue of the case, and allowed the appeal.]

**(p. 191)** ➢ Note

These cases may be taken to have established that, where the directors in pursuance of a power conferred upon them have instituted litigation in the company's name, the members in general meeting may not interfere and direct that the proceedings be discontinued. But in the converse case, where the majority of members have instituted or consented to the institution of proceedings in the company's name, and the *directors* object to their being continued, the law is less clear. Certainly if the directors are themselves defendants or if the allegation is that they are party to a wrong against the company, the rule in *Foss v Harbottle* **[13.01]** appears to allow the majority members the ultimate say and even, where the directors are themselves majority members, to permit a minority member to bring a derivative action.

***The company in general meeting may act if there is no board competent or able (eg because of deadlock) to exercise the powers conferred upon it.***

**[4.08] Barron v Potter [1914] 1 Ch 895 (Chancery Division)**

The two directors of the company were not on speaking terms, so that effective board meetings could not be held. The plaintiff, Canon Barron, had requisitioned a members' meeting at which additional directors had purportedly been appointed. The defendant objected that the power to make such appointments was vested by the company's articles in the directors. It was held that, in view of the deadlock, the power in question reverted to the general meeting, and so the appointments were valid.

WARRINGTON LJ: [Having held that no proper board meeting had been held, continued:] The question then arises, Was the resolution passed at the general meeting of the company a valid appointment? The argument against the validity of the appointment is that the articles of association of the company gave to the board of directors the power of appointing additional directors, that the company has accordingly surrendered the power, and that the directors alone can exercise it. It is true that the general point was so decided by Eve J in *Blair Open Hearth Furnace Co v Reigart*[19] and I am not concerned to say that in ordinary cases where there is a board ready and willing to act it would be competent for the company to override the power conferred on the directors by the articles except by way of special resolution for the purpose of altering the articles. But the case which I have to deal with is a different one. For practical purposes there is no board of directors at all. The only directors are two persons, one of whom refuses to act with the other, and the question is, What is to be done under these circumstances? On this point I think that I can usefully refer to the judgment of the Court of Appeal in *Isle of Wight Rly Co v Tahourdin* [Note 1 following *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* **[4.05]**, p 188], not for the sake of the decision, which depended on the fact that it was a case under the Companies Clauses Consolidation Act 1845, but for the sake of the observations of Cotton and Fry LJJ upon the effect of a deadlock such as arose in the present case. Cotton LJ says: 'Then it is said that there is no power in the meeting of shareholders to elect new directors, for that under the 89th section the power[20] would be in the remaining directors. The remaining directors would no doubt have that power if there was a quorum left. But suppose the meeting were to remove so many directors that a quorum was not left, what then follows? It has been argued that in that case, there being no board which could act, there would be no power of filling up the

board so as to enable it to work. In my opinion that is utterly wrong. A power is given by the 89th section to the remaining directors "if they think proper so to do" to elect persons to fill up the vacancies. I do not see how it is possible for a non-existent body to think proper to fill up vacancies. In such a case a general meeting **(p. 192)** duly summoned for the purpose must have power to elect a new board so as not to let the business of the company be at a deadlock …'. Those observations express a principle which seems to me to be as applicable to the case of a limited company incorporated under the Companies (Consolidation) Act 1908 as to a case falling under the Companies Clauses Consolidation Act 1845, and moreover to be a principle founded on plain common sense. If directors having certain powers are unable or unwilling to exercise them—are in fact a non-existent body for the purpose—there must be some power in the company to do itself that which under other circumstances would be otherwise done. The directors in the present case being unwilling to appoint additional directors under the power conferred on them by the articles, in my opinion, the company in general meeting has power to make the appointment …

➢ Note

A similar decision was reached in *Foster v Foster* [1916] 1 Ch 532, where there was a dispute over which of two directors should be appointed managing director, there being three directors in all. Although the power to appoint was conferred by the company's articles upon the directors, another article forbade a director from voting in respect of any contract in which he was interested. It was therefore not possible to carry any motion, in view of the disqualification of one director and the opposition of another. Peterson J held that in these circumstances competence to deal with the matter reverted from the board to the general meeting.

➢ Questions

1. Warrington J's reasoning is based largely on the decision in *Tahourdin*'s case which, as he points out, depended on the Companies Clauses Consolidation Act 1845 (Note 1 following *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* **[4.05]**, p 188). Was he right to treat the case of a company registered under the Companies Acts as indistinguishable?

2. Suppose a situation the reverse of that in *Barron v Potter* **[4.08]**, where the members cannot act but there is a board of directors capable of functioning. Could the directors exercise powers reserved by the articles to the general meeting? If not, what could be done to resolve matters?

## Formal decision-making by members

Various practical issues are important in the mechanics of the exercise of power by the members. How are decisions taken? Must there be a meeting? What counts as a majority? How is this assessed if not all members vote or attend a meeting? What exactly are 'meetings'? Is a meeting needed if everyone agrees? Are ordinary and special resolutions managed differently in these respects? Many of the answers can be found in the Act; some are provided in a company's articles. The analysis and following cases illustrate some of the issues, although by no means all.

### General issues

A century or more ago, the companies legislation assumed that all members' decisions would be taken in formal meetings. These are called '*general meetings*' if all the members are entitled to attend, or '*class meetings*' if only one class of members is entitled to attend. This style of decision-making is still assumed to be the preferred mode for public companies (CA 2006 **(p. 193)** s 281). By contrast, CA 2006 assumes that written resolutions will be the

normal mode[21] for private companies (CA 2006 ss 281, 288–300), with the limited exception that a meeting is essential if the resolution is to remove directors (ss 281(2) and 168) or auditors (ss 281(2) and 510).

In addition to these formal statutory rules, the informal common law rule is that the *unanimous* decision of the members is effective as their decision, whether or not they meet together or write it down. This rule applies to both public and private companies (see s 281(4)(a), and *Attorney General v Davy* **[4.09]**).

There follows, in outline, a description of the first two formal modes of decision-making by the members (written resolutions and meetings). The third mode (unanimous assent) is covered in the next section (see 'Informal decision-making—the "*Duomatic*" principle', pp 206ff).

In addition to these formal and informal procedural rules, there are important legal constraints on the *way* in which members can exercise their votes in making decisions. These rules are considered in detail at 'Limitations on the free exercise of members' voting rights', pp 213ff.

### Voting majorities: ordinary and special resolutions

Most corporate decisions can be taken by simple majority (ie a majority of not less than 50%: CA 2006 ss 281(3) and 282), with each member having one vote per share unless the articles specify otherwise (s 284).[22] Such resolutions are called '*ordinary resolutions*'. On matters where there are added risks, either to the company or its members, CA 2006 may make a special majority essential (ie a majority of not less than 75%). These resolutions are called '*special resolutions*': CA 2006 s 283. They are required for decisions to amend the company's articles (s 21(1)), to disapply members' pre-emption rights when shares are issued (ss 569–571), to reduce share capital (s 641(1)), to redeem the company's own shares (s 716(1)), to resolve that the company be wound up voluntarily (IA 1986 s 84(1)), and so on. Indeed, when there is a particular risk that the minority may be treated unfairly, even though a special resolution has been passed, the dissenting minority may be given the additional protection of a right to request judicial review (eg ss 633 (variation of class rights), 721 (redemption of company's own shares)).

A company's articles cannot override the mandatory provisions of CA 2006, but they can often legitimately specify an even larger majority, or unanimity, for particular decisions.

As might be expected, ordinary and special majorities are assessed differently depending upon whether decisions are made by written resolution or at a meeting (ss 282 and 283). Decisions taken by written resolution must be passed by the required percentage of *all* members with voting rights. Decisions taken at a meeting need only be passed by the appropriate percentage *of those present and voting* either on a show of hands,[23] or by a poll (whether in person, by proxy or in advance (s 322A)). Clearly the outcome on a show of hands can be vastly different from the outcome on a poll. Individuals cannot automatically demand a poll; the demand has to be more representative of the views of the members. A poll can be demanded by a member or group of members meeting the minimum representative conditions set out in s 321(2), unless the company's own articles make more generous provisions (see Model Articles for private companies, art 44(2), and for public companies, art 36(2)). Some requirements for special resolutions in CA 2006 also specify more generous rules for calling for a poll.

**(p. 194)** ***Even if the rules are silent, at common law a corporate body may act by a majority vote given at a meeting of members duly summoned.***

**[4.09] Attorney General v Davy (1741) 2 Atk 212 (Lord Chancellor)**

The facts as given in the report were as follows:

> King Edward VI by charter incorporated twelve persons, by name, to elect a chaplain for the church of Kirton, in Lincolnshire. By another clause three of the twelve were to choose a chaplain to officiate in the church of Sandford, within the parish of Kirton, but with the consent and approbation of the major part of the inhabitants of Sandford.
>
> Upon a late vacancy, two of the three chose a chaplain, with the consent of the major part of the inhabitants of Sandford; the third dissented. The question was whether this was a good choice.

LORD HARDWICKE LC: It cannot be disputed that wherever a certain number are incorporated, a major part of them may do any corporate act; so if all are summoned, and part appear, a major part of those that appear may do a corporate act, though nothing be mentioned in the charter of the major part.

This is the common construction of charters, and I am of opinion that the three are a corporation for the purpose they are appointed, and the choice too was confirmed, and consequently not necessary that all the three should join; … it is not necessary that every corporate act should be under the seal of the corporation, nor did this need the corporation seal.

### Who can propose a written resolution?

As noted earlier, written resolutions provide an alternative to formal meetings for decision-making. In private companies only, written resolutions can be proposed by the directors (ss 288(3)(a) and 291), or by members holding 5% of the voting rights or some lower percentage if so specified in the articles (ss 288(3)(b) and 292(5)). There are clear rules for circulating written resolutions (ss 290–295) and agreeing them (ss 296–297). Public companies cannot use this statutory procedure.

### What are the essentials of a 'meeting'?

***To constitute a meeting, there must prima facie be more than one person present.***

Although see Notes 1 and 2, following the extract, indicating exceptions for single member companies.

**[4.10] Sharp v Dawes (1876) 2 QBD 26 (Court of Appeal)**

A meeting of a company governed by the Stannaries Acts[24] was summoned for the purpose, inter alia, of making a call (ie a demand from the company that members pay further unpaid amounts on their shares). It was attended by only one member, Silversides, and the secretary (who was not a member). The proceedings were conducted formally, as recounted in a notice sent to all members. The call was in due course made, and one member, Dawes, refused to pay it. It was held that the meeting was a nullity and the call was invalid.

LORD COLERIDGE CJ: This is an attempt to enforce against the defendant a call purporting to have been made under s 10 of the Stannaries Act 1869. Of course it cannot be enforced unless it was duly made within the Act. Now, the Act says that a call may be made at a meeting of a company **(p. 195)** with special notice, and we must ascertain what within the meaning of the Act is a meeting, and whether one person alone can constitute such a meeting. It is said that the requirements of the Act are satisfied by a single shareholder going to the place appointed and professing to pass resolutions … [The] word 'meeting' prima facie means a coming together of more than one person. It is, of course, possible to show that the word 'meeting' has a meaning different from the ordinary meaning, but there is nothing here to show this to be the case. It appears therefore to me that this call was not made at a meeting of the company within the meaning of the Act.

MELLISH LJ: In this case, no doubt, a meeting was duly summoned, but only one shareholder attended. It is clear that, according to the ordinary use of English language, a meeting could no more be constituted by one person than a meeting could have been constituted if no shareholder at all had attended. No business could be done at such a meeting, and the call is invalid.

BRETT and AMPHLETT JJA concurred.

## ➤ Notes

1. CA 2006 s 318(1) now provides that in the case of a company limited by shares or guarantee and having only