➢ Note

In this context, see the reforms introduced by the UK Corporate Governance and Stewardship Codes (Chapter 5), and also note the common law limitations on the free exercise by shareholders of their votes (‘Limitations on the free exercise of members’ voting rights’, pp 213ff).

Reform of the law relating to general meetings

Both the CLR and a separate, earlier, Department of Trade and Industry (DTI) consultation document raised issues relating to the general meeting (especially the annual general meeting (AGM)) and members’ resolutions. These were accompanied in some (but not all) cases by recommendations for reform. It is perhaps best simply to list the most important of the questions upon which comments were invited, so that the perceived concerns are apparent:

(i) Many shares are now held by nominees, and with the growing use of CREST (see ‘Share certificates, uncertificated shares and dematerialised securities’, p 574), the proportion is bound to increase: what steps can, or should, be taken to see that the beneficial (ie the ‘real’) owners of the shares receive information from the company, and possibly also be permitted to attend meetings, to vote, etc? See CA 2006 ss 145–153.
(ii) Should CA 2006 require institutional investors to disclose how they have voted, the different types of shares they own or in which they have an interest? Would a voluntary regime be preferable? What is the reasoning behind the moves to compel disclosure, and the different methods of enforcing it? See the UK Stewardship Code for best practice in this area (‘Regulation of institutional investors by the UK Stewardship Code’, p 267).
(iii) Given that AGMs of public companies are usually only attended by a very small percentage of members, that those who do attend are often quite unrepresentative and that everything may well have been settled by proxies well in advance of the meeting, it seems clear that the AGM no longer serves its original democratic function as an occasion for general debate and decision-making on matters of company policy. Alternatively, any discussion may well be hijacked by ‘campaigners’ who have bought a few shares in order to gain publicity for their own separate agendas. Should the traditional AGM therefore be abolished? Is there a better replacement? Should some restrictions be put on the rights of institutional and ‘campaigning’ shareholders to speak? See CA 2006 ss 324–331, and ss 318–323 and 360B.
(iv) Should the law be changed so as to oblige companies to circulate members’ resolutions without charge? What are the advantages and disadvantages? See CA 2006 ss 292–295, especially s 294; and ss 314–317, especially s 316; ss 338–340B, especially ss 340, 340B.

(p. 206) Informal decision-making—the ‘*Duomatic*’ principle

Members may make decisions formally, by written resolutions (for private companies) or by vote in general meeting, as we have seen. As well, informal assent is possible. In principle, the informal procedures described later apply to both private and public companies. In practice, however, they are only ever likely to be relevant to private companies. The informal unanimous assent rule provides that a formal general meeting or written resolution is unnecessary if all the members entitled to vote on the matter informally assent to the transaction. It does not matter if the members’ assent is conveyed simultaneously at a meeting or is given at different times.[29]

***A company is bound in a matter* intra vires *by the unanimous but informal agreement of its voting members*.**

[4.15] Re Duomatic Ltd [1969] 2 Ch 365 (Chancery Division)

The liquidator of Duomatic claimed repayment of remuneration from one of the company’s directors, Mr Elvins, on the ground that the payments were not formally authorised by the company in general meeting.

BUCKLEY J: It is common ground that none of the sums which I have mentioned were authorised by any

resolution of the company in general meeting, nor were they authorised by any resolution of any formally constituted board meeting; but it is said on behalf of Mr. Elvins that the payments were made with the full knowledge and consent of all the holders of voting shares in the company at the relevant times, and he contends that in those circumstances the absence of a formal resolution by the company in duly convened meeting of the company is irrelevant. Alternatively, he relies on [the equivalent of CA 2006 s 1157 (power of the court to grant relief)]. …

In support of the first part of his argument Mr. McCulloch has relied on two authorities. The first was *In re Express Engineering Works, Ltd*. [1920] 1 Ch. 466 where five persons formed a private company in which they were the sole shareholders, and they sold to it for £15,000, which was in fact secured by debentures of the company, property which they had acquired for £7,000 a few days before. The contract for sale to the company and the issue of debentures was carried out at a meeting of the five individuals, who thereupon appointed themselves directors of the company. That meeting was described in the books of the company as a board meeting. The articles forbade any director to vote in respect of any contract or arrangement in which he might be interested; and in a winding up of the company the liquidator claimed that the issue of the debentures was invalid. In the Court of Appeal it was held, there being no suggestion of fraud, that the company was bound in a matter intra vires by the unanimous agreement of its members. Lord Sterndale M.R. in his judgment, at p. 469, referred to the earlier decision of the Court of Appeal in *In re George Newman & Co. Ltd*. [1895] 1 Ch. 674 and cited a passage from the judgment of Lindley L.J. in that case, at p. 686,[30] and went on himself to say that there were two differences between *Newman's* case and *Express Engineering Works*, first, the transaction in *Newman's* case was ultra vires, and, secondly, there never was a meeting of the corporators. Lord Sterndale M.R. in *In re Express Engineering Works Ltd*. [1920] 1 Ch. 466, 470, went on:

> 'In the present case these five persons were all the corporators of the company and they did all meet, and did all agree that these debentures should be issued. Therefore it seems that the **(p. 207)** case came within the meaning of what was said by Lord Davey in *Salomon v. Salomon & Co. Ltd*. [1897] A.C. 22,' and he quotes from Lord Davey. Lord Sterndale M.R. goes on: 'It is true that a different question was there under discussion, but I am of opinion that this case falls within what Lord Davey said. It was said here that the meeting was a directors' meeting, but it might well be considered a general meeting of the company, for although it was referred to in the minutes as a board meeting, yet if the five persons present had said, "We will now constitute this a general meeting," it would have been within their powers to do so, and it appears to me that that was in fact what they did.'

Warrington L.J. said, at p. 470:

> 'It was competent to them'—that is, the five corporators of the company—'to waive all formalities as regards notice of meetings, etc., and to resolve themselves into a meeting of shareholders and unanimously pass the resolution in question. Inasmuch as they could not in one capacity effectually do what was required but could do it in another, it is to be assumed that as business men they would act in the capacity in which they had power to act. In my judgment they must be held to have acted as shareholders and not as directors, and the transaction must be treated as good as if every formality had been carried out.'

Younger L.J. said, at p. 471:

> 'I agree with the view that when all the shareholders of a company are present at a meeting that becomes a general meeting and there is no necessity for any further formality to be observed to make it so. In my opinion the true view is that if you have all the shareholders present, then all the

> requirements in connection with a meeting of the company are observed, and every competent resolution passed for which no further formality is required by statute becomes binding on the company.'

In that case there were no non-voting shares, but Mr. McCulloch contends that the presence of the non-voting shares in the present case does not matter. If he can establish that those who were entitled to attend and vote at general meetings of the company in fact agreed to all or any of these payments, then he says that that is tantamount to a resolution passed at a general meeting of the company, and that the agreement of those persons is binding on the company in the same way as a resolution of a general meeting is binding on the company.

In *Parker and Cooper Ltd. v. Reading* [1926] Ch. 975, the second case relied upon by Mr. McCulloch, the directors of a company had created a debenture and proceedings were commenced to establish that the debenture and the resolution which authorised its issue and the appointment of a certain receiver under it were invalid. Astbury J. referred to *In re Express Engineering Works Ltd*. [1920] 1 Ch. 466 and to *In re George Newman & Co. Ltd*. [1895] 1 Ch. 674 and himself expressed this view [1926] Ch. 975, at p. 984:

> 'Now the view I take of both these decisions is that where the transaction is intra vires and honest, and especially if it is for the benefit of the company, it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously.'

Thus, the effect of his judgment was to carry the position a little further than it had been carried in *In re Express Engineering Works Ltd*. [1920] 1 Ch. 466, for Astbury J. expressed the view that it was immaterial that the assent of the corporators was obtained at different times, and that it was not necessary that there should be a meeting of them all at which they gave their consent to the particular transaction sought to be upheld. *In Parker & Cooper Ltd. v. Reading* [1926] Ch. 975, as in *In re Express Engineering Works Ltd*. [1920] 1 Ch. 466, no question arose about the position of any shareholders whose shares conferred no right of attending or voting at general meetings of the company.

(p. 208) … Mr. Wright, for the liquidator, has contended that where there has been no formal meeting of the company and reliance is placed upon the informal consent of the shareholders the cases indicate that it is necessary to establish that all shareholders have consented. He argues that as the preference shareholder is not shown to have consented in the present case, that requirement is not satisfied, and that the assent of those shareholders—that is to say, Mr. Elvins and Mr. East—who knew about these matters, and who did approve the figures relating to them in the accounts for the year ending April 30, 1963, is of no significance. It seems to me that if it had occurred to Mr. Elvins and Mr. East, at the time when they were considering the accounts, to take the formal step of constituting themselves a general meeting of the company and passing a formal resolution approving the payment of directors' salaries, that it would have made the position of the directors who received the remuneration, Mr. Elvins and Mr. Hanly, secure, and nobody could thereafter have disputed their right to retain their remuneration. The fact that they did not take that formal step but that they nevertheless did apply their minds to the question of whether the drawings by Mr. Elvins and Mr. Hanly should be approved as being on account of remuneration payable to them as directors, seems to lead to the conclusion that I ought to regard their consent as being tantamount to a resolution of a general meeting of the company. In other words, I proceed upon the basis that where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be. The preference shareholder, having shares which conferred upon him no right to receive notice of or to attend and vote at a general meeting of the company, could be in no worse position if the matter were dealt with informally by agreement between all the shareholders having voting rights than he would be if the shareholders met together in a duly constituted general meeting.

Also see *Re Halt Garage (1964) Ltd* **[5.03]**; *Re Horsley & Weight Ltd* **[4.30]**, CA; *Rolled Steel Products (Holdings) Ltd v British Steel Corpn* **[3.11]** and **[3.17]**; *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* **[7.39]**.

➤ Notes

1. Curiously, the *Duomatic* case has received greater recognition than it probably deserves, in that practising lawyers now commonly refer to the rule established by *Express Engineering* and later cases (all cited in *Duomatic*) as '*the Duomatic principle*', overlooking the fact that the principle had been established many decades earlier. Also see P Watts (2006) 122 LQR 15.

2. What type of informal consent is sufficient to trigger the application of the *Duomatic* principle remains topical. In *Schofield v Schofield* [2011] EWCA Civ 103, CA, Neil Schofield (representing the corporate holder of 99.9% of the shares in the company) unsuccessfully argued that he and Lee (his son and the owner of the remaining share) had agreed, informally, to treat as valid and effective a meeting which was called without the 14 days' notice required by CA 2006 ss 305(4) and 307(1), and at which (amongst other matters) Lee was dismissed as director and Neil was appointed sole director. The judgment of the Court of Appeal was delivered by Etherton LJ, and included this statement of the law:

> 32 What all the authorities show is that the Appellant must establish an agreement by Lee to treat the meeting as valid and effective, notwithstanding the lack of the required period of notice. Lee's agreement could be express or by implication, verbal or by conduct, given at the time or later, but nothing short of unqualified agreement, objectively established, will suffice. The need for an objective assessment was well put by Newey J in the recent case of *Rolfe v Rolfe* [2010] EWHC 244 (Ch) at [41], as follows:
>
> > '… I do not accept that a shareholder's mere internal decision can of itself constitute assent for *Duomatic* purposes. I was not referred to any authority in which it had been decided that a mere internal decision would suffice. Further, for a mere internal decision, unaccompanied by outward manifestation or acquiescence, to be enough would, as it seems to me, give rise **(p. 209)** to unacceptable uncertainty and, potentially, provide opportunities for abuse. A company may change hands or enter into an insolvency procedure; in either event, it is desirable that past decisions should be objectively verifiable. In my judgment, there must be material from which an observer could discern or (as in the case of acquiescence) infer assent. The law applies an objective test in other contexts: for example, when determining whether a contract has been formed. An objective approach must, I think, also have a role with the *Duomatic*principle.'
>
> 33 It is perfectly plain that objectively [on due assessment of the facts] there never was unqualified agreement by Lee to the validity of the meeting or the Company's business which was purportedly transacted during the course of it.

3. In *Hussain v Wycombe Islamic Mission and Mosque Trust Ltd* [2011] EWHC 971 (Ch), the question was whether the *Duomatic* principle could serve to validate the adoption of a revised constitution for the company, given that no meeting of the five original subscribers (whom the court found to be its only members) ever took place, and one of those subscribers (Mr Chouglay) had written a letter setting out his objections. HHJ David Cooke held that notwithstanding this letter, Mr Chouglay could be taken to have agreed to the adoption of the new constitution because:

> 37 Mr Chouglay clearly must have known following the submission of his letter that the constitution was nevertheless regarded as having been adopted. He must have known of the elections that were held the

same year, in reliance upon the terms of that constitution. And yet there is no evidence that he took any steps to protest or object, or to pursue his view that affairs would be better conducted without elections. Given the significance of this event in relation to the affairs of the mosques, the only inference that can be drawn from this silence, it seems to me, is that Mr Chouglay accepted that the Constitution had been adopted and the changes that it set out to make had become effective, notwithstanding his personal reservations about some of them. This inference from his conduct supports the hearsay evidence given by Mr Hussain and Mr Rashid, and I therefore find that Mr Chouglay also assented to the adoption of the 2001 constitution. It thus in my judgment became binding on the company by operation of the *Duomatic* principle.

➢ Questions

1. Before the adoption of the new constitution, what if Mr Chouglay had simply kept silent? Would silence have been a clearer indication of his objection than a courteous letter setting out his 'suggestions'?

2. Compare HHJ David Cooke's treatment of Mr Chouglay's silence following the adoption of the new constitution and the Court of Appeal's approach towards Lee's silence (and, indeed, Lee had attended the invalidly called meeting and voted on resolutions at the meeting). Is the court's general approach consistent? Also see *Re Bailey, Hay & Co Ltd* [1971] 1 WLR 1357.

3. Some companies include provision in their articles for members to pass resolutions informally without a meeting. Could such a provision state that a written resolution with a simple or 75% majority would be valid even if the detailed statutory procedure were not followed?

The principle can apply to shareholders' agreements.

[4.16] Euro Brokers Holdings Ltd v Monecor (London) Ltd [2003] EWCA Civ 105, [2003] 1 BCLC 506 (Court of Appeal)

The facts are immaterial.

MUMMERY LJ [He described the varied circumstances in which the principle applies:] … I see nothing in the circumstances of the present case to exclude the*Duomatic* principle. It is a **(p. 210)** sound and sensible principle of company law allowing the members of the company to reach an agreement without the need for strict compliance with formal procedures, where they exist only for the benefit of those who have agreed not comply with them. What matters is the unanimous assent of those who ultimately exercise power over the affairs of the company through their right to attend and vote at a general meeting. It does not matter whether the formal procedures in question are stipulated for in the articles of association, in the Companies Acts or in a separate contract between the members of the company concerned. What matters is that all the members have reached an agreement. If they have, they cannot be heard to say that they are not bound by it because the formal procedure was not followed. The position is treated in the same way as if the agreed formal procedure had been followed. The particular context for the application of the principle in this case is that cl 11(2) of the shareholders' agreement requires the notice to be issued by the board. That is a formal corporate procedure. It is irrelevant that the requirement is in a separate agreement entered into by the shareholders in EBFL, rather than in the articles. The shareholders entered into that agreement for the very same purpose as the contract between them constituted by the articles, namely to regulate the relationship between the shareholders in the governance of EBFL. As Neuberger J said in *Re Torvale Group Ltd* [1999] 2 BCLC 605 at 617:

> The articles constitute a contract, and if the parties to that contract, or if the parties for whom the

> benefit of a particular term has been included in that contract, are happy unanimously to waive or vary the prescribed procedure for a particular purpose, then … it seems to me that there is no good reason why it should not be capable of applying.

I fail to see why the agreement of the only two shareholders in EBFL to meet a call for capital without the need for a notice issued by the board of EBFL should not be as binding on them as if the call were made pursuant to a notice issued by the board, which would have happened had there been communication between the directors appointed by the members at a formal meeting and resolution of a properly constituted board. When the members of EBFL decided to respond to the capital call it did not matter to them that it had been communicated by Mr Pask rather than by the board.

[But see Note 7 in Further notes following the next extract, p 213.]

➢ Note

Also see *Franbar Holdings Ltd v Casualty Plus Ltd* [2010] EWHC 1164 (Ch), affirmed by the Court of Appeal in [2011] EWCA Civ 60 **[13.08]**.

An informal, unanimous agreement between members may be effective as an extraordinary or special resolution.

[4.17] Cane v Jones [1980] 1 WLR 1451 (Chancery Division)

In 1946, two brothers, Percy and Harold Jones, formed a company to run the family business. Each was a director and the shareholding was divided equally between members of Percy's family and members of Harold's family. The articles gave the chairman a casting vote at both directors' and shareholders' meetings; but Harold's daughter Gillian (the plaintiff, Mrs Cane) claimed that an agreement had been made between all the shareholders in 1967 which provided (inter alia) that the chairman should cease to be entitled to use his casting vote, so that Percy (who was currently chairman) did not have a decisive vote in the company's affairs. The court held that this was so, and that the informal agreement had had the same effect as a special resolution altering the articles. It was immaterial that the statutory obligation to register such resolutions had not been complied with. **(p. 211)**

> MICHAEL WHEELER QC (sitting as a deputy judge of the High Court): … the [*Duomatic*] principle is, I think, conveniently summarised in a short passage in the judgment in that case of Buckley J where he says, **[4.15]** at 373:
>
> > … I proceed upon the basis that where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.
>
> Applying that principle to the present case, Mr Weaver says that the agreement of all the shareholders embodied in the 1967 agreement had the effect, so far as requisite, of overriding the articles. In other words, it operated to deprive the chairman for the time being of the right to use his casting vote …
>
> For the first and third defendant, Mr Potts … answers … that on its true interpretation in relation to a special or extraordinary resolution the *Duomatic* principle only applies if there has been (i) a resolution, and (ii) a meeting; and that here he says, with some truth, there was neither a resolution nor a meeting of the

four shareholders …

[This argument]—namely that there must be a 'resolution' and a 'meeting'—does not appear to have been raised in any of the … reported cases which were convened with special or extraordinary resolutions. But it is not an argument to which I would readily accede because in my judgment it would create a wholly artificial and unnecessary distinction between those powers which can, and those which cannot, be validly exercised by all the corporators acting together.

For my part I venture to differ from Mr Potts on the first limb of his argument, namely that articles can *only* be altered by special resolution. In my judgment, s 10 of the Act is merely laying down a procedure whereby *some only* of the shareholders can validly alter the articles: and if, as I believe to be the case, it is a basic principle of company law that all the corporators, acting together, can do anything which is intra vires the company, then I see nothing in s 10 to undermine this principle …

Some light is also, I think, thrown on the problem by s 143(4) of the Act of 1948 [CA 2006 s 29(1)]. Section 143 deals with the forwarding to the Registrar of Companies of copies of every resolution or agreement to which the section applies; and sub-s (4) reads:

> This section shall apply to—(a) special resolutions; (b) extraordinary resolutions; (c) resolutions which have been agreed to by all the members of a company, but which, if not so agreed to, would not have been effective for their purpose unless, as the case may be, they had been passed as special resolutions or as extraordinary resolutions …

Paragraph (c) thus appears to recognise that you can have a resolution, at least, which has been agreed to by all the members and is as effective as a special or extraordinary resolution would have been …

I should add in passing that a copy of the 1967 agreement was never, as far as I am aware, sent to the Registrar of Companies for registration. It may be that there is a gap in the registration requirements of s 143. But be that as it may, the fact that the 1967 agreement was drafted as an agreement and not as a resolution, and that the four signatories did not sign in each other's presence does not in my view prevent that agreement overriding pro tanto—and so far as necessary—the articles of the company; in my judgment Mr Potts' first argument fails and … the chairman of the company has no casting vote at board or general meetings …

➢ Notes

1. The contention of counsel that the agreement of 1967 had the effect 'so far as requisite' of 'overriding' the articles, exposes the central weakness of the ruling in this case. There can be little doubt that the 1967 agreement was, essentially, nothing more than a shareholder agreement which (because of the doctrine of privity) could be enforced only by the immediate **(p. 212)** parties. The plaintiff was not such a party, having inherited her shares at a later date. It is difficult to reconcile the lax view taken of the importance of formalities in this case with the stricter approach of *Scott v Frank F Scott (London) Ltd* **[4.01]** and the *Bratton Seymour* case **[4.02]**.

2. This case was followed in *Re Home Treat Ltd* [1991] BCLC 705, in what was clearly a very indulgent ruling. The company, which was in administration, had carried on the business of a nursing home for many years without having power to do so under its objects clause. The administrator wished to continue to run the business with a view to selling it as a going concern. Harman J held that, since the company's only members had agreed to the change of activity, it must be deemed to have changed its memorandum under CA 1985 s 4. It is inconceivable that such a view would have prevailed a generation ago (see, eg, the ruling of the judge's father in *Re Introductions Ltd* **[3.02]**). Also see Note 7 in the following Further notes, p 213.

3. Now see CA 2006, which predictably provides that the articles may be amended by special resolution (s 21), but then includes in s 29(1), in terms that may well accommodate these cases, the resolutions and agreements that must be sent to the registrar (s 30). The implication is that these arrangements will serve to amend the articles.

➢ Questions

1. Did the judge in *Cane v Jones* rule that the agreement *was* a special resolution, or only that it was as good as one?

2. Suppose that Thomas, a stranger, bought out all Percy's family's shares and was appointed chairman, without any knowledge of the events of 1967. Would he have a casting vote? Could he rely on the equivalent of CA 2006 s 33 to enforce the 'articles'?

➢ Further notes

Some glosses may be added to this line of cases.

1. The *Duomatic* principle does not apply if the shareholders do not understand and appreciate the transaction or issue to which they are allegedly assenting: *Vinton v Revenue and Customs Commissioners* [2008] STC (SCD) 592.

2. The *Duomatic* principle not only applies to decisions which formally require special and extraordinary resolutions (*Cane v Jones* **[4.17]**), but also to decisions formally required to be taken by a group or class of shareholders (*Re Torvale Group Ltd* [1999] 2 BCLC 605), and to decisions by members to ratify breaches of directors' duties (*Progress Property Co Ltd v Moore* [2008] EWHC 2577 (Ch), and see **[10.15]**). (On this last matter, see 'Members decisions concerning directors' breaches', pp 235ff.)

3. In contrast with the rule for informal written resolutions introduced by CA 2006 s 288 (see 'What are the essentials of a "meeting"?', p 194), the informal consent of the members must be unanimous. See *Re d'Jan* **[7.20]**, where the principal shareholder held 99% of the shares and his wife 1%. He could not argue that there had been a unanimous informal members' resolution (ratifying his negligence), because, although his wife was likely to have supported him, the issue was never in fact raised.

4. The *Duomatic* principle was extended in *Shahar v Tsitsekkos* [2004] EWHC 2659 (Ch) so that the agreement of the beneficial owner of the shares is effective where the trustee can be compelled to vote in accordance with the beneficial owner's wishes. Note the limitation in *Rolfe v Rolfe* [2010] EWHC 244 (Ch), namely that if shares are held for more than one beneficial owner jointly, then the assent of *one* of a number of these owners will not suffice.

(p. 213) 5. Where a person holds some shares for himself and other shares as a trustee or executor, his assent will prima facie apply only in relation to his own shares, and not the shares he holds on trust for a beneficial owner, unless he intends or purports to be making a decision in relation to those shares: *Rolfe v Rolfe*[2010] EWHC 244 (Ch).

6. There are limits to the application of the principle, although these remain unclear. In *Re New Cedos Engineering Co Ltd* [1994] 1 BCLC 797, it was emphasised that the *Duomatic* principle cannot be invoked in order to enable something to be done informally which those concerned would not be competent to do, formally, at a general meeting (or, presumably, in some other specified formal manner). In *New Cedos* the number of registered members had been reduced to one, so that no 'meeting' complying with the company's articles could effectively be held. It was ruled that nothing done informally by this sole member was equivalent to a decision of the members reached at a meeting. (The rules on meetings have now changed: see 'What are

the essentials of a "meeting"?', pp 194ff.) Similarly, in *Re Oceanrose Investments Ltd* [2008] EWHC 3475 (Ch), approval by the sole member of a UK company to the terms of a proposed cross-border merger did not overcome the requirement for meeting under reg 13 of the Companies (Cross-Border Mergers) Regulations 2007.

7. Contrast these cases with the decision in *Wright v Atlas Wright (Europe) Ltd* [1999] 2 BCLC 301, CA. There the relationship between the common law principle and the statutory 'written resolution' procedure was discussed (although in *obiter dicta* since the events in question occurred before the written resolution procedure was first introduced by the Companies Act 1989 (CA 1989)). A service contract had been entered into between the company and Wright (the former managing director of the company) appointing him a consultant for life at an annual fee. The formalities prescribed by CA 1985 s 319 (the holding of a meeting at which certain documentation must be produced) (now see CA 2006 s 188, which is different) had not been followed, but the company's sole member was fully informed of the arrangement and had signed an agreement recording it. The court held that, since the purpose of s 319 was the protection of the company's members, they could override any formal (including statutory) requirements regarding the passing of resolutions at general meetings. The court was not deterred from taking this view by the very peremptory terms in which s 319, and especially subss (5) and (6), was expressed. However, it went on to express the view that where there was some other underlying intention of a statutory provision, such as the protection of creditors or, perhaps, future members, this would not be so; and so it was possible to distinguish the earlier decision in*Re RW Peak (Kings Lynn) Ltd* [1998] 1 BCLC 193, in which Lindsay J had held that unanimous members' consent, given informally, was not sufficient to bypass the statutory procedure for a repurchase of shares prescribed by CA 1985 s 164.

8. After earlier uncertainty, it is now established that there is a similar rule applying to directors' resolutions (see 'Acting as a board of directors: meetings and decisions', p 284).

Limitations on the free exercise of members' voting rights

General issues

The general meeting operates by majority rule. Sometimes decisions are taken by ordinary resolution; in more serious cases (such as changing the company's constitution), they **(p. 214)** are taken by special resolution. In either case, the dissenting minority will have changes forced upon them to which they have not agreed. This would not happen under normal contract rules. On the other hand, members know, when they take up shares, that their rights are subject to 'majority rule'. In these circumstances, what protections does the law offer to dissenting members against having their rights overridden by the majority? There are very few routes for redress, but the members may be able to complain that, in the circumstances:

(i) the impugned resolution is ineffective, as an objectionable exercise of power by the members. This ground of complaint relies on equitable control over the exercise by members of their voting rights. These controls, to the extent that they exist, appear to be enforced with more vigour in some circumstances (eg alteration of the articles and class rights) than in others, and to impose weak constraints in any event (see 'Members' personal rights', pp 250ff);
(ii) the company should be wound up on the 'just and equitable' ground: IA 1986 s 122(1)(g) (see 'Compulsory winding up on the "just and equitable" ground', pp 795ff);
(iii) the court should order a remedy (eg compulsory buy-out of the complainant's shares) to combat the unfair prejudice inflicted by the majority (CA 2006 s 994) (see 'Unfairly prejudicial conduct of the company's affairs', pp 681ff).

Only the first is dealt with in this chapter. The principles emerge from the cases.

A member's vote is a property right which, prima facie, may be exercised in the member's own interest and as he or she thinks fit. A member voting as such is under no fiduciary duty to the company, and this is true also of a director when voting as a member.

[4.18] Northern Counties Securities Ltd v Jackson & Steeple Ltd [1974] 1 WLR 1133 (Chancery Division)

The defendant company had given an undertaking to the court to use its best endeavours to obtain a Stock Exchange quotation for its shares, and to allot a certain number of these shares to the plaintiffs. It was necessary, under stock exchange rules, for the consent of the defendant company in general meeting to be obtained to the issue of shares. After the company had for more than a year failed to take any steps to comply with its undertaking, the plaintiffs moved for orders against the company and its directors: (i) that they should summon the required meeting; (ii) that they should send a circular to members calculated to induce them to vote in favour of the resolution, and warning them that the defeat of the resolution would amount to a contempt of court; and (iii) restraining the directors, as members, from voting against the resolution. The court granted orders that the meeting be summoned and that a circular be sent inviting the members to support the resolution, but ruled that neither the members generally nor the directors voting as members would be in contempt of court if they opposed the resolution.

WALTON LJ: Mr Price [counsel for the plaintiffs] argued that, in effect, there are two separate sets of persons in whom authority to activate the company itself resides. Quoting the well known passages from Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* **[3.24]** he submitted that the company as such was only a juristic figment of the imagination, lacking both a body to be kicked and a soul to be damned. From this it followed that there must be some one or more human persons who did, as matter of fact, act on behalf of the company, and whose acts therefore must, for all practical purposes, be the acts of the company itself. The first of such bodies was clearly the board of directors, to whom under most forms of articles … the management of the **(p. 215)** business of the company is expressly delegated. Therefore, their acts are the defendant company's acts; and if they do not, in the present instance, cause the defendant company to comply with the undertakings given by it to the court, they are themselves liable for contempt of court. And this, he says, is well recognised: see RSC, Ord 45, r 5(1), whereunder disobedience by a corporation to an injunction may result directly in the issue of a writ of sequestration against any director thereof. It is of course clear that for this purpose there is no distinction between an undertaking and an injunction: see note 45/5/3 in *The Supreme Court Practice* (1973).

This is, indeed, all well established law, with which Mr Instone [counsel for the directors] did not quarrel, and which indeed his first proposition asserted. But, continues Mr Price, this is only half of the story. There are some matters in relation to which the directors are not competent to act on behalf of the company, the relevant authority being 'the company in general meeting', that is to say, a meeting of the members. Thus in respect of all matters within the competence—at any rate those within the exclusive competence—of a meeting of the members, the acts of the members are the acts of the company, in precisely the same way as the acts of the directors are the acts of the company. Ergo, for any shareholder to vote against a resolution to issue the shares here in question to the plaintiffs would be a contempt of court, as it would be a step taken by him knowingly which would prevent the defendant company from fulfilling its undertaking to the court. Mr Price admitted that he could find no authority which directly assisted his argument, but equally confidently asserted that there was no authority which precluded it.

Mr Instone indicted Mr Price's argument as being based upon 'a nominalistic fallacy'. His precise proposition was formulated as follows: 'Whilst directors have special responsibilities as executive agents of the defendant company to ensure that the company does not commit a contempt of court, a shareholder, when the position has been put before the shareholders generally, who chooses to vote against such approval will not himself be in contempt of court.' …

In my judgment, these submissions of Mr Instone are correct. I think that in a nutshell, the distinction is this: when a director votes as a director for or against any particular resolution in a directors' meeting, he is voting as a person under a fiduciary duty to the company for the proposition that the company should take a certain course of action. When a shareholder is voting for or against a particular resolution he is voting as a person owing no fiduciary duty to the company and who is exercising his own right of property, to vote as he thinks fit. The fact that the result of the voting at the meeting (or at a subsequent poll) will bind the company cannot affect the position that, in voting, he is voting simply in exercise of his own property rights.

> Perhaps another (and simpler) way of putting the matter is that a director is an agent, who casts his vote to decide in what manner his principal shall act through the collective agency of the board of directors; a shareholder who casts his vote in general meeting is not casting it as an agent of the company in any shape or form. His act therefore, in voting as he pleases, cannot in any way be regarded as an act of the company …
>
> I now come to paragraph 4 of the notice of motion, which seeks an order restraining the individual respondents [ie the directors] and each of them from voting against the resolution. Mr Price says that, as the executive agents of the defendant company, they are bound to recommend to its shareholders that they vote in favour of the resolution to issue the shares, and hence, at the least, they cannot themselves vote against it, for they would thereby be assisting the defendant company to do that which it is their duty to secure does not happen. If, as executive officers of the defendant company, they are bound to procure a certain result if at all possible, how can they, as individuals, seek to frustrate that result?
>
> I regret, however, that I am unable to accede to Mr Price's arguments in this respect … I think that a director who has fulfilled his duty as a director of a company, by causing it to comply with an undertaking binding upon it is nevertheless free, as an individual shareholder, to enjoy the same unfettered and unrestricted right of voting at general meeting of the members of the company as he would have if he were not also a director …

(p. 216) See also *Pender v Lushington* **[13.19]**; *North-West Transportation Co Ltd v Beatty* **[4.33]**; *Burland v Earle* [1902] AC 83, PC; and *Peter's American Delicacy Co Ltd v Heath* **[4.26]**.

➢ Notes

1. *Halton International Inc (Holdings) Sarl v Guernroy Ltd* [2005] EWHC 1968 (Ch) reinforces this finding. The defendant, a member of the company, was given the power to exercise the votes of all other members for the purpose of raising fresh capital in any way he saw fit. The defendant member passed a resolution suspending the pre-emption rights of the other members which were inserted in the company articles, thereby increasing his voting rights in the selection of investors. The court held that the voting agreement did not give rise to any fiduciary duties on the part of the acting member. His actions were authorised by the agreement and were therefore upheld.

2. Similarly, in *McKillen v Misland (Cyprus) Investments Ltd & Ors* [2012] EWHC 521 (Ch), the court rejected an attempt to interpret a shareholders' agreement in a way which would impose fiduciary duties on shareholders.

3. The rule that a member owes no duties to the company and can exercise his rights entirely as he pleases, without regard to the effect of doing so upon the company, is not confined to the right to vote. In *Stothers v William Steward (Holdings) Ltd* [1994] 2 BCLC 266 it was applied to the right of a member (subject, of course, to any provision in the articles) to transfer his shares to a person of his choice. But where the articles do make special provision, the outcome may be different: see *Cream Holdings Ltd v Stuart Davenport* [2010] EWHC 3096 (Ch), in Note 4 following *Equitable Life Assurance Society v Hyman* **[4.03]**, p 186.

4. By contrast, and quite exceptionally, the courts have on rare occasions been prepared to order that a member's votes should be cast, or at least not cast, in a certain way—in effect, to restrain him from acting perversely.

In *Standard Chartered Bank Ltd v Walker* [1992] 1 WLR 561, a member with a minority holding of shares was ordered not to vote against a restructuring agreement where the consequence of his doing so would have been that the company would collapse and his shares (which had been charged to the company's banks) would become worthless.

Similarly, in *Theseus Exploration NL v Mining & Associated Industries Ltd* [1973] Qd R 81 an injunction was