company's overall strategy or objectives, and will indicate the principles or factors which formed the basis for the pay policy. The policy report will also specify the impact on directors' pay if the company's performance is above, on or below target. A majority vote in favour of the policy is required before the policy is adopted.

Shareholders will also be given an 'advisory vote on implementation', that is, in relation to directors' remuneration actually paid in accordance with the policy adopted by the annual vote. If the vote fails, then the policy will return to the binding vote for re-approval in the subsequent year. This will ensure that the company's remuneration policy does not become a toothless document, but is in fact directly linked to the level of remuneration paid to directors.

Finally, 'exit pay' for any departing directors must also feature in the policy report and the corresponding votes mentioned earlier. This will ensure that directors do not receive substantial exit packages on leaving the company, which (unfortunately) seems to have been the case in recent years despite poor performance of companies and the markets in general.

To add support to these proposed legislative changes, the FRC is considering related changes to the Code. For example, if a vote reveals a significant dissenting minority, then the company should publish a public statement setting out how it will address such shareholder concern, thus holding directors to public account.

These reforms will be further supported by changes to narrative reporting, namely the production of strategic reports by companies (see 'Narrative reporting reforms', p 269). These will encapsulate a section on directors' pay, so that cross-references can be made between the key information contained in the report and the policy document on which the shareholders will vote.[25]

Finally, it is noteworthy that the FCA and PRA have in place a Remuneration Code,[26] which applies to around 2,700 firms within their ambit. The Code (the latest version of which came into force on 1 January 2011) reflects concerns that firms are taking unnecessary and unreasonable **(p. 278)** risk in the hope of increasing remuneration and bonuses. It mandates firms to implement remuneration policies which are in line with the overarching goal of harnessing 'sound and effective risk management'. Mandatory payment deferral and use of shares in lieu of cash payment are also featured in the Code.

➢ Questions

1. Are these changes too interventionist? Is the government placing too many limits on companies' freedom to set their own goals and policies, including how much they pay their directors?

2. What problems may arise when so much emphasis is placed on shareholder control? Is it realistic to expect shareholders, especially those with small shareholdings in many different companies, to play such an active role in monitoring directors? How should shareholder control measures be structured so as not to defeat the purpose of centralised management in the first place?

3. Is it congruent with the idea of 'enlightened shareholder value' that only shareholders get a vote on such matters as directors' remuneration? Should other stakeholders, for example the employees, also receive a vote? What practical disadvantages are likely to emerge if that is the case?

Further Reading

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Notes:

[1] It is important to be aware of the differences between executive and non-executive directors (see 'Balance of executive and non-executive directors', p 264); appointed, *de facto* and shadow directors, (see 'Directors' duties are owed by *de jure* and *de facto* directors', pp 331ff); alternate directors and nominee directors. These different categories are not mutually exclusive.

[2] These predecessor Codes are all available at www.ecgi.org/codes/all_codes.php#United%20Kingdom.

[3] www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-September-2012.aspx.

[4] The European Commission has established a European Corporate Governance Institute to encourage the coordination of national corporate governance codes: seewww.ecgi.org/. In the light of concerns raised on a European level in relation to the effectiveness of the 'comply or explain' mechanism, the FRC published a guideline providing an explanation and defence of the procedure: www.frc.org.uk/Our-Work/Publications/FRC-Board/Report-of-discussions-between-companies-and-invest.aspx.

[5] Available at: http://fshandbook.info/FS/html/handbook/LR.

[6] www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Developments-in-Corporate-Governance-2011-The-impa.aspx.

[7] See P Davies, 'Post-Enron Developments in the United Kingdom' in G Ferrarini et al (eds), *Reforming Company*

and Takeover Law in Europe (2004), p 183.

[8] A smaller company is one that is not included in the FTSE 350 throughout the year immediately prior to the reporting year.

[9] Although see *Langreen Ltd (In Liquidation), Re*, Ch D (Companies Ct) (Registrar Derrett) 21/10/2011, LTL 26/10/2011, Document No AC0130205, where, on the facts, the executives and non-executives were indistinguishable.

[10] From 1 April 2013, this responsibility was taken over by the Financial Conduct Authority (FCA). This is the date on which the FSA was abolished, and its functions split between the Prudential Regulatory Authority and the FCA, with the Bank of England having an expanded role: see Financial Services Act 2012.

[11] www.fsa.gov.uk/pages/Library/Policy/guidance_consultations/2011/11_30.shtml.

[12] The 'Davies Report' at: www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf.

[13] See the FRC Feedback Statement on gender diversity at: www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Feedback-Statement-Gender-Diversity-on-Boards.aspx.

[14] www.bis.gov.uk/assets/biscore/business-law/docs/w/12-p135-women-on-boards-2012.pdf.

[15] www.parliament.uk/business/committees/committees-a-z/lords-select/eu---internal-market-sub-committee-b/news/gender-balance-inquiry-launch/.

[16] See J Farrar and M Russell, 'The Impact of Institutional Investment on Company Law?' (1984) 5 *Company Lawyer* 107; PL Davies, 'Institutional Investors in the United Kingdom' in T Baums et al (eds), *Institutional Investors and Corporate Governance* (1994); and John C Coffee Jr, 'Institutional Investors as Corporate Monitors: Are Takeovers Obsolete?' in JH Farrar (ed), *Takeovers, Institutional Investors and the Modernization of Corporate Laws* (1993).

[17] UK Corporate Governance Code, Sch C, Principles 3 and 1 respectively.

[18] www.frc.org.uk/getattachment/fa05e79c-22c6-4f8f-b5b3-2ab55ec41113/Consultation-Document-Revisions-tothe-UK-Stewards.aspx.

[19] www.bis.gov.uk/assets/biscore/business-law/docs/f/12-588-future-of-narrative-reporting-government-response.pdf.

[20] For companies with a Stock Exchange listing, the Code sets a standard of terms of one year or less.

[21] *Hutton v West Cork Railway Co* (1883) 23 Ch D 654, 672; *Guinness plc v Saunders* **[5.01]**.

[22] The 2006 Model Articles for private and public companies now reserve this decision to the directors, subject to the requirements of the Act, and any other terms in the articles.

[23] In *Hutton v West Cork Rly Co* (1883) 23 Ch D 654, 671.

[24] http://webarchive.nationalarchives.gov.uk/+/ http://www.bis.gov.uk/Consultations/executive-pay-shareholder-voting-rights.

[25] www.bis.gov.uk/assets/biscore/business-law/docs/f/12-588-future-of-narrative-reporting-government-response.pdf.

[26] http://fshandbook.info/FS/html/handbook/SYSC/19A.

6. The Board of Directors as an Organ of the Company

Chapter: **(p. 279)** 6. The Board of Directors as an Organ of the Company
Author(s): Len Sealy and Sarah Worthington
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Introduction

In the previous chapter we considered the scope of corporate governance as a means of mitigating the 'agency problems' arising from centralised management. In this chapter we continue with this general theme, but now focus attention on the mechanics of the board of directors, namely the appointment, removal and disqualification of directors, as well as their functioning as a board. The next chapter will then consider the functioning of directors as *individuals*, and will review the duties owed by directors under common law and Companies Act 2006 (CA 2006).

The relatively few legal rules relating to the appointment, tenure and remuneration of directors allow those who control a company considerable scope to look after their own interests, generally without any serious risk of being successfully challenged by the minority.[1] Even where the directors do not hold the majority of voting shares, the passive attitude of most members towards company general meetings and corporate decisions means that directors can often ensure they are re-elected when their terms expire, that their service contracts contain advantageous provisions and that directors' fees, salaries and perks are set at an attractive level.

Some of the external regulatory controls include:

(i) Controls over the appointment and dismissal of directors: CA 2006 gives members certain guaranteed rights, by far the most important being the absolute right to dismiss directors by ordinary resolution (s 168), although even this can be rendered ineffective by defensive voting arrangements. CA 2006 does little to impose eligibility criteria on potential directors.
(ii) Controls over the particular division of powers between the board of directors and the members: see 'Dividing corporate powers between members and directors', pp 179ff for the general issues, including the rule that changes to the constitution are reserved to the members (s 21), and at 'Permitted reductions of capital', pp 513ff and 'Variation of class rights', pp 563ff for particular examples in the context of capital reductions and class rights.
(iii) Legal duties imposing minimum standards on directors' performance of their management functions: see Chapter 7 on directors' duties.
(iv) Controls over the structure and composition of the board of directors and its subcommittees: CA 2006 imposes few requirements, but public listed companies are subject to the 'comply or explain' regulations in the Code.
(p. 280) **(v) Public disclosure of information** about the company's directors and their activities: CA 2006 provides for public registers of directors, annual accounts, directors' reports, etc, subject to certain exemptions for smaller companies.
(vi) Service contracts and remuneration packages: CA 2006 provides for disclosure to, and members' approval of, most of these arrangements.
(vii) Disqualification of unfit directors, with criminal sanctions and banning for defined periods: see Company Directors Disqualification Act 1986 (CDDA 1986), 'Directors' disqualification', pp 294ff.

Appointment of directors

Apart from providing that a public company must have at least two directors and a private company at least one (CA 2006 s 154), and stipulating that vacancies on the board of a public company shall not normally be filled by a

single resolution appointing a number of candidates *en bloc* (s 160), the Act has little to say about the appointment of directors; and so the matter is left to the articles of the particular company.

On eligibility, in a departure from preceding law, CA 2006 allows persons over the age of 70 to act as directors of public companies without members' approval, and establishes a new *minimum* age qualification for all directors of 16 (s 157). In addition, CA 2006 stipulates that at least one natural person must act as director of a company (s 155(1)).

A company's articles typically provide that the first directors will be appointed by the subscribers to the memorandum and that thereafter directors will be elected by the members in general meeting[2] and that a proportion, such as one-third, should retire every year but be eligible for re-election. Casual vacancies are usually filled by co-option by the remaining directors. In small companies, by contrast, the directors will very likely be appointed on a permanent basis by the articles themselves, as in *Lee's Air Farming Ltd* **[2.04]**.

In the absence of any provision in the articles, the general meeting has inherent power to appoint directors by ordinary resolution.[3] If the articles give exclusive power of appointment to a specific person or group (eg the board of directors or the vendor of a business), then the power of appointment of the general meeting is displaced, although the general meeting does have the power to change the articles.

The power of the majority to appoint directors must 'be exercised for the benefit of the company as a whole and not to secure some ulterior advantage' (see *Re HR Harmer Ltd* in the Note following *Scottish Co-operative Wholesale Society Ltd v Meyer* **[13.24]**, p 685). This seems to require the general meeting to act for proper purposes.[4] Also see 'Limitations on the free exercise of members' voting rights', pp 213ff.

A company's articles may legitimately confer the right to appoint the directors (or one or more of them) on a third party, such as a majority member, or the sole trader whose business was incorporated. This power may be given directly, or attached to a special class of shares (on classes of shares, see 'Classes of shares and class rights', pp 556ff).

(p. 281) If the articles do not provide for such a right in third parties, then its creation by contract may be difficult. When the members alone have the right to appoint, then the directors cannot by agreement with a stranger give the latter a power to appoint a director. Where both groups have power to appoint directors, then one group (or a subset of that group) cannot by contract usurp the powers of the other. In any event, the members have the ultimate right to dismiss any directors of whom they disapprove by ordinary resolution, and without cause (CA 2006 s 168, see 'Removal of directors', pp 284ff).

The appointment of a person as a director of a company does not take effect unless the person properly agrees to the appointment. If someone has been appointed, but is wrongly prevented from acting, there is authority suggesting that the director (or any member) may bring an action to enforce the right to act: *Pulbrook v Richmond Consolidated Mining Co* **[6.01]**). Where someone who has not been properly appointed is acting as a director, a member may sue to restrain him from continuing to act. Any acts already undertaken, however, are likely to be effective as against third parties (see CA 2006 s 161 and 'Defective appointments and the validity of acts of directors: CA 2006 s 161', p 283).

The appointment of *managing directors* and other *executive directors* is usually a question for the board.[5] Of course, to be eligible the appointee must be a director, appointed by the customary constitutional process; and if removed as a director for any reason, the appointee will automatically lose his management or executive office as well (see 'Removal of directors', pp 284ff).

While properly appointed, directors can insist on their right to act.

[6.01] Pulbrook v Richmond Consolidated Mining Co (1878) 9 Ch D 610 (Chancery Division)

A director was required by the company's articles, by way of qualification for the post, to hold 'as registered member in his own right' shares to the nominal amount of £500. Pulbrook had granted an equitable mortgage over his qualification shares, and delivered to the mortgagee an unregistered transfer. The directors, on learning of this, refused to allow him to sit on the board. Jessel MR held: (i) that he still held the shares 'in his own right'; and (ii)

that he had suffered an individual wrong for redress of which he could sue in his own name.[6]

> JESSEL MR: In this case a man is necessarily a shareholder in order to be a director, and as a director he is entitled to fees and remuneration for his services, and it might be a question whether he would be entitled to the fees if he did not attend meetings of the board. He has been excluded. Now, it appears to me that this is an individual wrong, or a wrong that has been done to an individual. It is a deprivation of his legal rights for which the directors are personally and individually liable. He has a right by the constitution of the company to take a part in its management, to be present, and to vote at the meetings of the board of directors. He has a perfect right to know what is going on at these meetings. It may affect his individual interest as a shareholder as well as his liability as a director, because it has been sometimes held that even a director who does not attend board meetings is bound to know what is done in his absence.
>
> Besides that, he is in the position of a shareholder, or a managing partner in the affairs of the company, and he has a right to remain managing partner, and to receive remuneration for his service. It appears to me that for the injury or wrong done to him by preventing him from attending board meetings by force, he has a right to sue. He has what is commonly called a right of action, and those **(p. 282)** decisions which say that, where a wrong is done to the company by the exclusion of a director from board meetings, the company may sue and must sue for that wrong, do not apply to the case of wrong done simply to an individual. There may be cases where, by preventing a director from exercising his functions in addition to its being a wrong done to the individual, a wrong is also done to the company, and there the company have a right to complain. But in a case of an individual wrong, another shareholder cannot on behalf of himself and others, not being the individuals to whom the wrong is done, maintain an action for that wrong. That being so, in my opinion, the plaintiff in this case has a right of action.
>
> [His Lordship then ruled that he still held the qualification shares 'in his own right', and so had been properly elected a director. He accordingly granted an injunction.]

➢ Notes

1. It is probably impossible to square all the remarks in this judgment either with the *ratio decidendi* of *Hickman*'s case **[4.37]** or with the view (commonly associated with Lord Wedderburn: see his article in [1957] CLJ 194 at 212) that every member of a company has a right to have the provisions of the corporate constitution observed. (On these questions, see further 'Members' personal rights', pp 250ff and 'General issues', pp 635ff.) The difficulties can be highlighted by supposing that in this case the company's articles did not require a director to hold shares, and that the excluded director held none.

2. Also, on the issue of whether this director held shares 'in his own right', making him a member of the company, note the different outcome in *Enviroco Ltd v Farstad Supply A/S* [2011] UKSC 16, where the shareholder had granted a *legal* mortgage over its shares, so the mortgagee became the registered owner. In these circumstances the mortgagor was no longer a 'member' of the company (CA 2006 ss 736, 736A(6) and (7)), and so, in this case, there was no longer a parent/subsidiary relationship, and the 'subsidiary' was no longer protected by a contractual indemnity clause which covered the parent and its affiliates.

Eligibility for appointment as a director

The age restrictions imposed by CA 2006 have been mentioned (see 'Appointment of directors', p 280). The general law also prevents bankrupts and certain classes of individuals from acting as directors, and a company's own articles can impose further restrictions.

But, in addition, a significant aspect of the control of companies in the general public interest lies in the prohibition

of certain people (as a class, or specifically) from acting as company directors. Under the CDDA 1986, the courts may make disqualification orders against individuals or the Secretary of State may accept undertakings in lieu of such orders (see 'Directors' disqualifications', pp 294ff).

Further restrictions (subject to some limited exceptions) have been imposed by the Insolvency Act 1986 (IA 1986) s 216 to prevent the '*phoenix syndrome*'. The goal is to prevent directors (including shadow directors, see '"Shadow directors": s 251', pp 312ff) of companies that have gone into insolvent liquidation from being directors (or in any way promoting, managing or being involved in a company or unincorporated business, whether or not as directors) that uses the same or substantially the same registered business or trading name as that used by the insolvent company during the 12 months preceding insolvency. Breach of this restriction is an offence punishable by fine or imprisonment (IA 1986 s 216). In addition, the individual may be personally liable for the debts and liabilities incurred by the company during the period that he or she is involved in its management (IA 1986 s 217). Liability is strict and ignorance is no defence.

(p. 283) Defective appointments and the validity of acts of directors: CA 2006 s 161

Despite all the preceding rules on appointment of directors, the acts undertaken by those acting as directors are generally valid even if the appointment is flawed. This means that third parties dealing with the company are generally protected, and the company's remedy is to take action, if appropriate, against those responsible for the appointments and those acting improperly as directors.

CA 2006 s 161 replaces the more limited provision in the Companies Act 1985 (CA 1985) s 285, which was typically supplemented in the articles by wider terms such as those now appearing in CA 2006 s 161 (see, eg, Companies (Tables A to F) Regulations 1985 (SI 1985/805) Table A, art 92). This rule supplements the protective provisions discussed earlier in the context of corporate contracting (see 'Statutory provisions protecting third parties (outsiders) from the consequences of constitutional limitations on corporate capacity', pp 85ff). Third parties could only rely on CA 1985 s 285 if they had acted in good faith. The material words in the new section are identical, so presumably the same limitation will apply, even though the provision itself is silent on the issue.

Despite the breadth of the wording in CA 2006 s 161, the limitations read into its predecessor may continue to apply. In particular, defective appointment cases used to require that there must, at some stage, have been a *purported* appointment of the person to the role of director. As Lord Simonds put it in *Morris v Kanssen*:[7]

> There is, as it appears to me, a vital distinction between (a) an appointment in which there is a defect or, in other words, a defective appointment, and (b) no appointment at all. In the first case it is implied that some act is done which purports to be an appointment but is by reason of some defect inadequate for the purpose; in the second case, there is not a defect, there is no act at all. The section does not say that the acts of a person acting as director shall be valid notwithstanding that it is afterwards discovered that he was not appointed a director.

Publicity and the appointment of directors: CA 2006 ss 162 and 167

Under CA 2006, the company must: (i) register particulars about its directors with the registrar at Companies House (s 167); (ii) keep its own register of directors (ss 162–164); and (iii) keep its own register of directors' residential addresses (s 165). (Public companies must also keep a register of secretaries: ss 275, 277–279.)

It is not clear why companies still need to maintain their own registers of directors, open for inspection by members for no fee and to others for a fee, when most people searching the records prefer the anonymity of Companies House.

The separate register of residential addresses (not open for inspection) is a 2006 change, introduced because directors' addresses need no longer be filed at Companies House. Indeed, CA 2006 now contains several

provisions protecting the privacy of directors' residential addresses (see ss 240–246). The change reflects a growing concern for the safety of directors and their families, especially after some of the tactics used by campaigners, particularly against directors of companies involved in the use of animals in biomedical research.

(p. 284) The company and its defaulting officers (including shadow directors, see '"Shadow directors": s 251', pp 312ff) are liable to fines on conviction for any failure to comply with these provisions.

Additional publicity is required about directors of public companies, especially details of salary, qualifications and experience, that appear in annual reports for the company.

Acting as a board of directors: meetings and decisions

Absent special provisions, the general rule is that a board is expected to act by majority resolution on decisions taken at board meetings. After some early doubts, it was established that the informal and *unanimous* agreement of the directors is, for all ordinary purposes (but not for all purposes—see 'Removal of directors', p 284), equivalent to a resolution passed at a duly convened meeting: see *Runciman v Walter Runciman plc* [1992] BCLC 1084 at 1092; *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316, CA. (Recall that the same rule applies to members, see *Cane v Jones* **[4.17]**)

In practice, most companies have articles containing specific provisions for various forms of decision-making, so overriding the general law on meetings and unanimous assent. The articles typically allow for 'meetings' to take place without all the directors being in the same place, so long as they can communicate with each other, and it does not matter how that is done (see Model Articles, art 10 (private companies) and art 9 (public companies)). The articles may also allow directors to record their consent in writing (see Model Articles art 8 (private companies) and arts 17 and 18 (public companies) on consent to a *unanimous* decision only; indeed, the Model Articles for private companies go further, and allow for unanimous decisions regardless of how the directors communicate their common assent to each other (art 8)). Generally the votes of interested directors will not count towards the necessary majority (art 14 (private companies) and art 16 (public companies)).

As already noted, if the articles do not make the necessary provisions, the general law rule that unanimous informal decisions of the directors are binding may need to be relied upon. However, in *Guinness plc v Saunders* **[5.01]**[8] the Court of Appeal declined to accept that a *statutory* requirement of disclosure to a 'meeting of directors' (CA 1985 s 317(1) in that case; now see CA 2006 s 177) could be deemed to have been complied with simply because every individual member of the board knew of the matter. Fox LJ said ([1988] 1 WLR 863 at 868) that disclosure to 'a meeting of the directors of the company' is 'a wholly different thing from knowledge of individuals and involves the opportunity for positive consideration of the matter by the board as a body'. (For further discussion, see 'Duty to exercise independent judgement: CA 2006 s 173', pp 350ff.)

In addition, it is well established that a meeting cannot be held informally against the will of a dissenting director (*Barron v Potter* [1914] 1 Ch 895).

Removal of directors

Both CA 2006 and a company's articles provide mechanisms for the termination of appointments of directors. The trigger may be dissatisfaction with the director's performance; but, equally, it may simply be part of the company's process of management renewal, as with **(p. 285)** directors' retirement by rotation.[9] The court may also force the termination of a director's appointment (see 'Directors' disqualification', pp 294ff). In addition, a director may simply resign.

Here, forced removal by the members or by the board is considered; voluntary retirement and resignation is not.

Removal by the members

CA 2006 ss 168–169 provide wide powers for the removal of directors, by ordinary resolution, before the expiration of the director's period of office and notwithstanding anything in any agreement between the company and the

director (s 168(1)).[10] Special formalities (including special notice) must be observed and a director is guaranteed certain protections (eg the right to protest his or her removal).

The statutory requirement for a meeting is mandatory. The *Duomatic* principle (**[4.15]**) of effective unanimous informal assent or informed acquiescence without a meeting is not appropriate in this context. This is because the formal procedure is designed to protect the impugned directors, not the voting members, and so it can only be waived by those directors. See *Re New Cedos Engineering Co Ltd* [1994] 1 BCLC 797; *Wright v Atlas Wright (Europe) Ltd* [1999] 2 BCLC 310 at 314–315.

CA 2006 s 168 does not derogate from any other powers that might exist apart from this section (s 169(5)(b)). This means that all articles, including those that provide for dismissal of directors without the special protections inherent in s 168, remain valid (eg see later, on dismissal by the board). Nor does the section deprive the director of any compensation or damages payable in respect of the termination of the appointment as director or of any appointment terminating with that as director (s 168(5)(a)).

The intended impact of CA 2006 s 168 can sometimes be neutered, however. It is possible, although only in private companies, to put in place weighted voting rights that can make it impossible for the ordinary members to use the powers in s 168: see *Bushell v Faith* **[6.02]**. Such weighted voting is inappropriate in public companies, and impossible in listed companies (the London Stock Exchange would refuse listing).

Special voting rights may protect directors against removal under CA 2006 s 168.

[6.02] Bushell v Faith [1970] AC 1099 (House of Lords)

Bush Court (Southgate) Ltd had capital of £300 in £1 shares, with 100 shares held by Faith and each of his sisters, Mrs Bushell and Dr Bayne. Article 9 of the articles of association provided: 'In the event of a resolution being proposed at any general meeting of the company for the removal from office of any director, any shares held by that director shall on a poll in respect of such resolution carry the right to three votes per share …'. Faith was thus able to record 300 votes and outvote his sisters, who recorded 200 votes between them, by demanding a poll on a motion to remove him from office. Ungoed-Thomas J held that art 9 was invalid because it infringed the Companies Act 1948 (CA 1948) s 184 (the equivalent of CA 2006 s 168), but his decision was reversed on appeal. The House of Lords (Lord Morris of Borth-y-Gest dissenting) upheld the effectiveness of the article. **(p. 286)**

> LORD DONOVAN: My Lords, the issue here is the true construction of s 184 of the Companies Act 1948 [CA 2006 s 168] and I approach it with no conception of what the legislature wanted to achieve by the section other than such as can reasonably be deducted from its language.
>
> Clearly it was intended to alter the method by which a director of a company could be removed while still in office. It enacts that this can be done by the company by ordinary resolution. Furthermore, it may be achieved notwithstanding anything in the company's articles, or in any agreement between the company and the director.
>
> Accordingly any case (and one knows there were many) where the articles prescribed that a director should be removable during his period of office only by a special resolution or an extraordinary resolution, each of which necessitated inter alia a three to one majority of those present and voting at the meeting, is overridden by s 184. A simple majority of the votes will now suffice; an ordinary resolution being, in my opinion, a resolution capable of being carried by such a majority. Similarly any agreement, whether evidenced by the articles or otherwise, that a director shall be a director for life or for some fixed period is now also overreached.
>
> The field over which s 184 operates is thus extensive for it includes, admittedly, all companies with a quotation on the Stock Exchange.
>
> It is now contended, however, that it does something more; namely that it provides in effect that when the ordinary resolution proposing the removal of the director is put to the meeting each shareholder present shall have one vote per share and no more: and that any provision in the articles providing that any

shareholder shall, in relation to *this* resolution, have 'weighted' votes attached to his shares, is also nullified by s 184. A provision for such 'weighting' of votes which applies generally, that is, as part of the normal pattern of voting, is accepted by the appellant as unobjectionable: but an article such as the one here under consideration which is special to a resolution seeking the removal of a director falls foul of s 184 and is overridden by it.

Why should this be? The section does not say so, as it easily could. And those who drafted it and enacted it certainly would have included among their numbers many who were familiar with the phenomenon of articles of association carrying 'weighted votes'. It must therefore have been plain at the outset that unless special provision were made, the mere direction that an ordinary resolution would do in order to remove a director would leave the section at risk of being made inoperative in the way that has been done here. Yet no such provision was made, and in this Parliament followed its practice of leaving to companies and their shareholders liberty to allocate voting rights as they pleased. …

LORDS REID and UPJOHN delivered concurring opinions.

LORD GUEST concurred.

LORD MORRIS OF BORTH-Y-GEST (dissenting): Some shares may … carry a greater voting power than others. On a resolution to remove a director shares will therefore carry the voting power that they possess. But this does not, in my view, warrant a device such as article 9 introduces. Its unconcealed effect is to make a director irremovable. If the question is posed whether the shares of the respondent possess any added voting weight the answer must be that they possess none whatsoever beyond, if valid, an ad hoc weight for the special purpose of circumventing s 184. If article 9 were writ large it would set out that a director is not to be removed against his will and that in order to achieve this and to thwart the express provisions of s 184 the voting power of any director threatened with removal is to be deemed to be greater than it actually is. The learned judge thought that to sanction this would be to make a mockery of the law. I think so also.

➢ Notes

1. As Lord Donovan observes, companies with a listing on the Stock Exchange may not circumvent CA 2006 s 168 by provisions in their articles, for this is forbidden by the Listing Rules. *De facto*, therefore, we have one regime for listed companies and another for all other companies.

(p. 287) 2. One important consequence of CA 2006 s 168 is that a member or group of members together holding more than half of the shares in a company may remove the board and replace it with directors of their own choice.[11] For this reason, a takeover bid is usually made conditional upon acceptances being received which will take the bidder's holding to at least 51% of the voting shares.

3. 'Weighted voting' is not the only technique by which a director may be made irremovable, or virtually so. The draftsman of the company's articles in *Bushell v Faith*could have achieved much the same position if its shares had been divided into three classes (eg 100 'A' shares, 100 'B' shares and 100 'C' shares) and it was provided that each class of share should carry the exclusive right to appoint one director. Each member would then have had the protection of the rules relating to class rights (see 'Variation of class rights', pp 563ff). Alternatively, the three members could have entered into a shareholders' agreement which guaranteed each of them a permanent seat on the board: see *Russell v Northern Development Corporation Ltd* **[4.34]**, in which the precedent of *Bushell v Faith* was of considerable weight.

4. Where there are no mitigating class rights, a majority shareholder is entitled to exercise his or her voting rights to appoint and remove directors. In support of that, the court may grant an order under CA 2006 s 306 (see Chapter 4) convening a general meeting in circumstances where the majority shareholder's voting entitlement is being neutered by the minority shareholder's refusal to attend meetings, thus denying a quorum: *Smith v Butler* **[3.14]**.

➢ Questions

1. The members can use CA 2006 s 168 to dismiss a director 'without cause' (ie even if the director is performing perfectly properly and effectively). Why should the members have this right? Are there any disadvantages?

2. In *Russell v Northern Development Corporation Ltd* **[4.34]**, the *company* could not bind itself by contract in a way that made it impossible for the company to alter its capital as permitted by the Act. Presumably a *company* could not bind itself in a way that made exercise of the rights in CA 2006 s 168 impossible. And yet in both these instances the company's rights can only be exercised by the members in general meeting. Given this, do shareholders' agreements and weighted voting rights make a mockery of the Act, or is the appropriate analysis a little more subtle?

Dismissal by the board

Articles often provide that the office of director is to be vacated if all the other members of the board make a written request for the director's resignation, although the Model Articles (both private and public) make no such provision.

Like all powers held by directors, exercise of this power is subject to the directors' duties to act for proper purposes, in good faith to promote the success of the company, and in a way that does not involve unacceptable conflicts of interest (see Chapter 5). But, subject to that limitation, the courts appear loath to allow this power to be further limited unless by explicit agreement: *Dear v Jackson* [2013] EWCA Civ 89.

➢ Question

An early suggestion (since dropped) for Model Articles for Private Companies gave power to the directors to terminate the appointment of one of their number only 'with cause'. Why should the dismissal power of the board of directors be more limited than that of members in general meeting?

(p. 288) Directors acting after their office is vacated

If directors continue to act after their office is vacated, for whatever reason, their acts will generally continue to bind the company: see CA 2006 s 161(1)(c) and s 161 generally. Also see 'Agency and authority in corporate contracting', pp 95ff, on a company's dealings with third parties.

Rights of directors on termination of appointment

Compensation claims for loss of office

Recall that directors have no entitlement to remuneration and generally no claim to any kind of tenure unless specifically provided for by contract. Even then, they cannot specifically enforce their rights to remain in office; they can only claim damages for breach.[12]

If there is a contract between the director and the company, then dismissal from office under CA 2006 s 168 may be a breach of that contract by the company. This will be the case if the contract is for a fixed period which has not expired, or if the director is entitled to a period of notice. Alternatively (or in addition), dismissal of a person from the office of director may breach a second contract between the director and the company if the director can