Wood v *Odessa Waterworks Co* (1889) 42 Ch D 636

The articles of association empowered the directors with the approval of the general meeting to declare 'a dividend to be paid to the members'. The directors recommended that instead of paying a dividend, members should be given debenture-bonds bearing interest repayable at par, by annual drawings, extending over 30 years. The recommendation was approved by the company in general meeting by an ordinary resolution. The plaintiff successfully sought an injunction restraining the company from acting on the resolution on the ground that it breached the articles. Stirling J stated:

> . . . the rights of the shareholders in respect of a division of the profits of the company are governed by the provisions of the articles of association. By s 16 of the Companies Act 1862 (now s 33 of the Companies Act 2006), the articles of association 'bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act.' . . . Those articles provide that the directors may, with the sanction of a general meeting, declare a dividend to be paid to the shareholders. Prima facie, that means to be paid in cash. The debenture-bonds proposed to be issued are not payments in cash; they are merely agreements or promises to pay: and if the contention of the company prevails a shareholder will be compelled to accept in lieu of cash a debt of the company payable at some uncertain future period. In my opinion that contention ought not to prevail.

Hickman v *Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch 881

The defendant company was incorporated under the Companies Acts in 1895. The objects of the company were to encourage and retain as pure the sheep known as Kent or Romney Marsh, and the establishment of a flock book listing recognised sires and ewes to be bred from. The articles provided for disputes between the company and the members to be referred to arbitration. This action was brought in the Chancery Division by the claimant because the Association had refused to register certain of his sheep in the flock book, and he asked for damages for this. It also appeared that the Association was trying to expel him, and he asked for an injunction to prevent this.

Held – by Astbury J – that the Association was entitled to have the action stayed. The articles amounted to a contract between the Association and the claimant to refer disputes to arbitration. However, Astbury J, after accepting that the articles were a contract between a company and its members, went on to say:

> [. . .] No right merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as for instance, a solicitor, promoter, director, can be enforced against the company.

Comment

(i) It was held, by the Court of Appeal, applying ***Hickman***, in ***Beattie* v *E and F Beattie Ltd*** [1938] Ch 708, that a provision in the articles that disputes between the company and its members must be referred to arbitration did not apply to a person whose dispute was between the company and himself as director even though he was also a member.

(ii) In ***Pender* v *Lushington*** (1877) 6 Ch D 70, the chairman of a meeting of members refused to accept Pender's votes. The articles gave one vote for every 10 shares to the shareholders. This caused a resolution proposed by Pender to be lost. He asked the court to grant an injunction to stop the directors acting contrary to the resolution.

Held – Pender succeeded. The articles were a contract binding the company to the members.

Rayfield* v *Hands [1958] 2 All ER 194

The articles of a private company provided by Art II that 'Every member who intends to transfer his shares shall inform the directors who will take the said shares equally between them at a fair value'. The claimant held 725 fully paid shares of £1 each, and he asked the defendants, the three directors of the company, to buy them but they refused. He brought this action to sue upon the contract created by the articles without joining the company as a party.

Held – by Vaisey J – that the directors were bound to take the shares. Having regard to what is now s 14, the provisions of Art II constituted a binding contract between the directors, as members, and the claimant, as a member, in respect of his rights as a member. The word 'will' in the article did not import an option in the directors. Vaisey J did say that the conclusion he had reached in this case may not apply to all companies, but it did apply to a private company, because such a company was an intimate concern closely analogous with a partnership.

Comment

(i) Although the articles placed the obligation to take shares of members on the directors, Vaisey J construed this as an obligation falling upon the directors in their capacity as members. Otherwise, the contractual aspect of the provision in the articles would not have applied. (See ***Beattie* v *E and F Beattie Ltd*** [1938] Ch 708.)

(ii) The company's Art II was a pre-emption clause. Many such clauses use the expression 'may take the said shares'. If so, no contract is formed. The word 'may' indicates that there is an option whether to accept or not.

Eley* v *Positive Government Security Life Assurance Co (1876) 1 Ex D 88

The articles contained a clause appointing the claimant as solicitor of the company. The claimant was not appointed by a resolution of the directors or by any instrument under the seal of the company, but he did act as solicitor for some time and took shares in the company at a later stage. The company ceased to employ him, and he brought an action for breach of contract.

Held – by the Court of Appeal – that the action failed because there was no contract between the company and Eley under the articles. He was an outsider in his capacity as a solicitor, and presumably even though he was also a member, he could not enforce the articles since they gave him rights in his capacity as solicitor only, though his rights as a member to enforce the articles are not dealt with specifically in the judgment.

Comment

It was held by the court of first instance that a service contract on the terms set out in the articles was created because Eley had actually served the company as its solicitor. However, the contract was unenforceable because the articles contemplated his employment for an indefinite period of time, possibly longer than a year, and there was no written memorandum of the contract signed on behalf of the company as was then required by s 4 of the Statute of Frauds 1677. This statute is now repealed so that the case may have been decided differently today. This view is reinforced by the decision in ***Re New British Iron Co, ex parte Beckwith*** (see below) because surely when Eley took office he did so on the terms of the articles and had an implied contract based upon the terms of those articles. Thus, if a term as to tenure could be implied in the way that a term as to salary was in Beckwith, then Eley should have been able to sue for breach of the implied contract. Read's case (see below) suggests also the tenure of office may be based on the articles.

The articles and insider/outsider rights

The case of ***Salomon*** **v** ***Salomon*** has been described as both a blessing and a curse to modern company law. (Refer to suggested further reading at the end of this chapter.) Although the article is a little dated and the proposals for reform are not relevant, some good criticisms of the ***Salomon*** decision are offered. While the case confirmed the fact that, once registered, a company is a separate legal entity in the eyes of the law, it has also had a negative impact on the s 33 statutory contract.

Until ***Salomon***, it was generally accepted that the company format was an inappropriate vehicle for small commercial enterprises. Rather, such enterprises should adopt the partnership format. However, this case changed the corporate landscape forever. In essence, it encouraged the growth of small private companies, which over time evolved into the widely accepted genre of 'quasi-partnership' companies (***O'Neill*** **v** ***Phillips*** [1999] 2 BCLC 1). As the name suggests 'quasi-partnership' companies are operated internally on a basis far closer to that of a partnership than a 'pure' corporate structure. In other words, they contain a small number of shareholders some, or all, of whom have expectations as to their role in the company. This may include expectations such as being one of the directors. In ***O'Neill*** **v** ***Phillips***, Lord Hoffmann stated that:

> In a quasi-partnership company, there will usually be understandings between the members at the time they entered into the association. But there may be later promises, by words or conduct, which it would be unfair to allow a member to ignore. Nor is it necessary that such promises should be independently enforceable as a matter of contract. A promise may be binding as a matter of justice and equity, although for one reason or another . . . it would not be enforceable in law.

These expectations may be evidenced in a number of ways – ranging from clauses in the articles of association to separate shareholders' agreements (mentioned below) and possibly a driving force behind s 17.

Today, this type of company is widely recognised and acknowledged as being a fundamental part of modern company law. However, a hundred years ago the development of this type of company led to many problems – the most significant of which centred on the use and 'misuse' of s 33 (or rather its equivalent section under previous Companies Acts).

As quasi-partnership companies became more popular, the members of these enterprises wished to evidence their expectations (e.g. to be a director) and as such wished to include additional clauses into the company's constitution to this effect. As noted above, s 21 provides the ideal method by which members may update the company's constitution. A General Meeting is called, at which a special resolution (75 per cent) is passed and the articles are duly amended. Everyone agrees because (usually) everyone is on an amicable and cooperative footing.

The problem arises when there is a dispute. At that point in time, the disgruntled individual will attempt to enforce his/her contractual right, under s 33, to be (as per the example above), a director of the company. An action is then brought before the courts to determine whether such a right may, or may not, be enforced.

This may not appear to be a particularly significant problem. However, in reality it is. Remember, the purpose of the articles of association is to regulate the internal affairs of a company (i.e. to provide detailed instructions as to how the company is to work/function). Furthermore, as Drury notes (see suggested further reading at the end of this chapter), one

must bear in mind that the lifespan of a company may be several hundred years. In the overall scheme of things, the issue as to who is entitled to be a director and/or company solicitor is irrelevant to the continued existence and operation of a company.

Therefore, a significant number of the clauses which were added to the articles of association over the years were irrelevant to the operation of the company in question. As such, the question needed to be asked as to whether or not the court should recognise such clauses as being valid and furthermore whether they should enforce these clauses. Two cases provide alternative views on this subject: ***Quin & Axtens* v *Salmon***; ***Eley* v *Positive Life***.

Salmon* v *Quin & Axtens Ltd [1909] 1 Ch 311

The memorandum of the company included among its objects the purchasing of real or personal property. By the articles the business was to be managed by the directors, but no resolution of the board to purchase or lease any premises of the company was to be valid unless two conditions were satisfied, namely notice in writing must be given to each of the two managing directors named in the articles, and neither of them must have dissented therefrom in writing before or at the meeting at which the resolution was to be passed. In August 1908 the board passed resolutions for the purchase of certain premises by the company, and for leasing part of the company's property. The claimant, who was one of the managing directors, dissented, but at an extraordinary general meeting of the company held in November 1908, resolutions similar to those passed by the board were passed by an ordinary resolution of the members. The claimant brought this action for an injunction to stop the company from acting on the resolutions as they were inconsistent with the articles.

Held – eventually by the House of Lords (see ***Quin & Axtens* v *Salmon*** [1909] AC 442) – an injunction would be granted.

Comment

The claimant sued on behalf of himself and other shareholders to prevent the majority and the company from acting contrary to the company's constitution. This is in line with the contractual right highlighted by Jordan CJ in ***Australian Coal and Shale Employees' Federation* v *Smith*** (1937) 38 SR (NSW) 48, as the 'shareholder's right to have the articles observed by the company'.

It is worth looking at Wedderburn (1957) 'Shareholder Rights and the Rule in ***Foss* v *Harbottle***', CLJ 193 in which he suggests that this judgment supports his view that every member has a personal right under the statutory contract (as it forms a contract between the company and its shareholders) to ensure that the company is run according to its articles of association. He goes on to suggest that a member could bring a personal claim to enforce this right, even though this may have the effect of enforcing a right conferred on this individual in a capacity other than as a member. However, the action must be brought in his/her capacity as a member. This is an interesting proposition and raises the question as to whether this case may be used to enable a solicitor who was also a shareholder indirectly to enforce a provision in the company's articles that he is to be the company's solicitor by saying to the company 'conduct business in accordance with the articles'. (See ***Eley* v *Positive Life***.) According to Prentice, though (see (1980) 'The Enforcement of Outsider Rights', 1 Co Law 179) only those articles 'definitive of the power of the company to function' have contractual effect. Another view offered by Goldberg is that 'a member of a company has . . . a contractual right to have any of the affairs of the company conducted by the particular organ of the company specified in the Act or the company's memorandum or articles'.

Another case which is relevant to this debate is ***Beattie* v *E & F Beattie Ltd*** [1938] Ch 708, which involved an action against an individual who was both a member and director of the company in question. The director sought to rely on a clause in the articles which required all disputes

between the company and a member to be referred to arbitration. The court held that the article did not constitute a contract between the company and the defendant director in his capacity as a director. Consequently, he was not entitled to rely upon the provision. The decision was affirmed by the Court of Appeal. The question is whether the outcome would have been different if the defendant director had been sued in his capacity as a member rather than that of director.

A solution was required which would alleviate the pressure on the courts to recognise and subsequently enforce additional clauses which had been validly (and legally) added to the articles of association, while at the same time ensuring that the articles remained focused on the internal regulation of the company, free of additional and irrelevant clauses. In the case of ***Hickman*** **v** ***Kent or Romney Marsh*** the courts attempted to reconcile the debate as to what could, or could not, be enforced under the s 33 statutory contract. In this case, Astbury J stated:

> First, no article can constitute a contract between the company and a third person; secondly, no right merely purporting to be given by an article to a person, whether a member or not, in a capacity other than that of a member, as for instance a solicitor, promoter or director can be enforced against the Company; thirdly, articles regulating the rights and obligations of the members generally as such do create rights and obligations between them and the company respectively.

The effect of this judgment is predominantly twofold. First of all, it poses the question as to who is attempting to enforce a provision contained within the articles of association. This essentially goes back to a privity of contract issue – the parties to the statutory contract are the company and the members (now clarified under the newly worded s 33 of the Companies Act 2006). As Astbury J observed:

> An outsider to whom rights purport to be given by the articles in his capacity as such outsider, whether he is or subsequently becomes a member, cannot sue on those articles treating them as contracts between himself and the company to enforce those rights. Those rights are not part of the general regulations of the company applicable alike to all shareholders and can only exist by virtue of some contract between such person and the company, and the subsequent allotment of shares to an outsider in whose fabour such an article is inserted does not enable him to sue the company on such an article.

Consequently, non-members cannot enforce the statutory contract, no matter how closely involved with the running of the company they may appear to the outside world (i.e. directors).

Secondly, it poses the question as to the type of right that the individual is attempting to enforce. It draws a distinction between those rights given to an individual in his/her capacity as a member and those rights given to a person in a capacity other than that of a member. It is this aspect of the judgment which introduced the concept of insider and outsider rights into company law. As Greene MR observed in ***Beattie*** **v** ***E and F Beattie Ltd*** [1938] Ch 708, 'the contractual force given to the articles of association by the section is limited to such provisions of the articles as apply to the relationship of the members in their capacity as members'.

While this would appear to provide quite an elegant solution to the problem outlined above, it nevertheless introduced a number of new problems/questions. These include:

(a) Can a judicial limitation be placed on a statutory provision? In other words, s 33 states that 'those provisions' within the company's constitution must be observed by the company and each member whereas the Hickman judgment states that only membership (insider) rights should be observed.

(b) Where does one draw the distinction between membership (insider) rights and non-membership (outsider) rights? It is an artificial line which has been the subject of considerable academic debate over the years. Equally, as with any rule, it is subject to exceptions. Indeed, there is a suggestion that Hickman may be 'side-stepped' in many instances through the identification of membership rights (see Gower and Davies (2008) *Principles of Modern Company Law*).

(c) With respect to quasi-partnerships, members may have entered into a commercial relationship and amended the articles of their companies in good faith so as to evidence the true basis of the internal management structure of their business. What is a member to do if, in the event of a dispute, the courts refuse to recognise and enforce this 'legitimate' right? If a member is provided with no forum in which to express a complaint or potential remedy then this will in turn have a negative impact on the corporate sector – after all, who would invest in a company which had no method of recourse in the event of a dispute over bona fide (legitimate) expectations? This will be discussed later in Chapter 18 and s 994 of the Companies Act 2006.

See p. 360

In order to appreciate the academic debate surrounding the s 33 statutory contract and the implications of the ***Hickman*** judgment, there is no substitute for reading the main academic articles. (Refer to the suggested further reading at the end of this chapter.)

A provision in the articles can become part of a contract between the company and a member or outsider in the following ways:

(a) where there is an express contract and a provision in the articles is expressly incorporated into that contract by a provision therein;

(b) where a provision in the articles is incorporated by implication arising out of the conduct of the parties, or where an express contract between the parties is silent on a particular aspect, e.g. in the case of a director, the length of his appointment. In such a case reference may be made to the articles in order to fill the gap, if those documents contain a relevant provision.

Re New British Iron Co, ex parte Beckwith [1898] 1 Ch 324

Beckwith was employed as a director of the company, relying for his remuneration on the company's articles which provided that the directors should be paid £1,000 per annum. In this action by Beckwith for his fees, it was *held* – by Wright J – that, although the articles did not constitute a contract between the company and Beckwith in his capacity as director, he had nevertheless accepted office and worked on the footing of the articles, and as such the company was liable to pay him his fees on that basis. Actually the company was liable on an implied contract, the articles being merely referred to for certain of its terms.

Read* v *Astoria Garage (Streatham) Ltd [1952] Ch 637

The defendant company was a private company which had adopted Art 68 of *Table A* of the Companies Act 1929. The articles provided for the appointment of a managing director, and said that he could be dismissed at any time and without any period of notice, if the company so resolved by a special resolution. The claimant's contract made in 1932 appointed him managing

director at a salary of £7 per week but said nothing about notice. The directors dismissed him on 11 May 1949 at one month's notice, and later called an extraordinary general meeting of the shareholders and got the necessary resolution. The special resolution was passed on 28 September 1949, and Read's salary was paid until that date but not afterwards. Read now sued for wrongful dismissal, suggesting that he ought to have had more notice because a person holding his position would customarily have more notice than he had been given.

Held – by the Court of Appeal – that since the claimant's contract was silent on the point, Art 68 was incorporated into the express contract. Once this was done, the notice he had been given was most generous and his claim therefore failed, his tenure of office being based on the articles.

Although the above decisions are concerned with a member enforcing or being bound by a provision in the articles which was personal to himself as a member (e.g. a right to the vote attaching to his shares as in ***Pender* v *Lushington***, 1877), the principles involved may go further than this. There is some authority for the view that each member has a right under the articles to have the company's affairs conducted in accordance with the articles; ***Quin & Axtens* v *Salmon***.

Finally, it is worth noting that such matters involving 'outsider rights' could be dealt with in a separate contract such as a shareholder's agreement, which we shall examine in the next section.

The effect of the Contracts (Rights of Third Parties) Act 1999

The above Act does not apply to the statutory contract between a company and its members in terms of the provisions in a company's constitution, as set out in s 33.

According to s 6(2) of the Act it specifically excludes its application so as to prevent third-party rights from arising. Thus, the decision in ***Eley* v *Positive Government Security Life Assurance Co***, 1876 still stands and would not or could not be affected by the 1999 Act.

Interpretation of the articles

As noted, section 33, CA 2006 provides that the articles form a contract between the company and its members. As such, when considering the interpretation of the articles, the traditional rules of contractual interpretation should apply. However, as also noted above, the articles form a unique type of statutory contract which is subject to certain limitations.

Scott* v *Frank F Scott (London) Ltd [1940] Ch 794 (Court of Appeal)

The company adopted as its articles of association *Table A* with certain modifications, and the whole of the share capital was issued to the three brothers in equal shares. The control of the company was in the hands of the ordinary shareholders, the preference shareholders only having a right of voting at a general meeting upon such questions as reduction of capital, winding-up of the company, sanctioning a sale of the undertaking or altering the regulations of the company so as to affect directly the rights of the preference shareholders. Frank Stanley Scott died on 10 September 1937, and his widow, who was the sole executrix of his will, became entitled

thereunder to all his preference and ordinary shares in the company. No question arose in regard to the preference shares, but she claimed the right to be placed on the register of members in respect of his ordinary shares. The two surviving brothers, however, claimed that under the articles of association, she was bound to offer to them her testator's ordinary shares and that they had the right to acquire them at par. She therefore commenced an action against the company and the two surviving brothers, in which she sought a declaration that she was entitled to have her name entered on the register of members of the company as the holder of 100 ordinary shares. The defendants in their counter-claim sought a declaration that, upon the true construction of the articles of association, the two brothers had the right to acquire from the plaintiff these 100 ordinary shares at par and, if the construction they asked the Court to put on the articles of association should not be the correct construction, then they sought rectification of the articles so as to give them the right to acquire these shares from the plaintiff at par. Luxmoore LJ stated:

> The next question which falls to be considered is whether the defendants are entitled to have the articles of association rectified in the manner claimed by them. Bennett J said he was prepared to hold that the articles of association as registered were not in accordance with the intention of the three brothers who were the only signatories of the memorandum and articles of association, and down to the date of Frank Stanley Scott's death the only shareholders therein. Bennett J, however, held that the Court has no jurisdiction to rectify articles of association of a company, although they do not accord with what is proved to have been the concurrent intention of all the signatories therein at the moment of signature. We are in complete agreement with this decision. It seems to us that there is no room in the case of a company incorporated under the appropriate statute or statutes for the application to either the memorandum or articles of association of the principles upon which a Court of Equity permits rectification of documents whether inter partes or not . . .

Held – The Court has no jurisdiction to rectify the articles of association of a company even if those articles do not accord with what is proved to have been the concurrent intention of the signatories at the moment of signature.

Due to the fact that the model articles are prescribed in subordinate legislation (SI 2008/3229), they must be interpreted in accordance with the Interpretation Act 1978. If additional articles are adopted alongside the model articles then these provisions should also be interpreted in accordance with the Interpretation Act 1978 (***Fell* v *Derby Leather Co Ltd*** [1931] 2 Ch 252). The courts will not consider the effect which the additional or amended articles were intended to have (***Rose* v *Lynx Express Ltd*** [2004] EWCA Civ 447), though it will add words so as to avoid absurdity (***Folkes Group plc* v *Alexander*** [2002] EWHC 51 (Ch)). Equally, the court will not exercise its power to imply terms into the articles so as to provide business efficacy to a scheme which the shareholders had in mind but which may not be readily apparent from the wording of the articles (***Bratton Seymour Service Co Ltd* v *Oxborough*** [1992] BCLC 693). However, the court will seek to construe the words used in the articles so as to give them reasonable business efficacy (***Holmes* v *Keyes*** [1959] Ch 199).

Shareholders' agreements

It is worth noting the increase in shareholders' agreements which often, in private companies, supplement the articles of association and which, it is suggested, have been included within the meaning of a company's constitution under the new Companies Act 2006: s 29.

A shareholders' agreement operates as a binding contract and deals with the rights and duties of members of a particular company to which it applies. It may be made by all members of the company, or be limited to a portion of them. Equally, given the fact that this is a traditional contract, individuals who are not shareholders in that particular company may be a party to the agreement if it is felt appropriate. The agreement can be made orally and does not need to be in writing, though of course this will impact on the practicability of an individual's ability to rely upon it should the need arise.

Such an agreement may be made at any time during the lifetime of a company, but it is most commonly made when a new company is established, thereby establishing areas of agreement between those involved. An excellent example of where one may find such an agreement is in a quasi-partnership company. However, it should be stressed at the outset that to be truly effective as a constitutional document, all members of the company should be made parties to the agreement.

The main benefit to be derived from a shareholders' agreement is the fact that it is not restricted in the same way as the articles of association (i.e. limited to the enforcement of membership rights). Therefore, if members wish to agree between themselves some matter which is unrelated to their membership rights, they may enter into this type of agreement to that effect. For example, in ***Wilkinson* v *West Coast Capital*** [2005] EWHC 3009 (Ch), a shareholders' agreement provided (a) in Clause 5 that specific actions could only be pursued by the company if 65 per cent of the shareholders provided their consent; and (b) in Clause 7 that the shareholders should use all reasonable and proper means to promote the interests of the company. The combination of these two clauses meant that shareholder-directors are to use their vote so as to prevent the company from pursuing certain opportunities and thereby preventing them from being classified as 'corporate opportunities' and subsequently enabling them to pursue them themselves. A minority shareholder unsuccessfully brought an action under s 994, CA 2006 on the grounds that this was unfairly prejudicial conduct.

Equally, given the fact that shareholder agreements are governed by common law, their terms can only be altered if there is 100 per cent agreement by those who signed the contract. This differs to the alteration of the articles, which under s 21(1) only requires a special resolution (75 per cent). Furthermore, as per ***Russell* v *Northern Bank*** (below), the courts appear to accept the existence of shareholders' agreements, providing them with a degree of legitimacy, power and scope.

Another significant advantage of such an agreement is that the contents remain private and the agreement does not have to be registered at Companies House along with the other formal constitutional documents. Therefore, the shareholders' agreement is not available for public inspection.

The key problem with these agreements is that they, in effect, create another branch of the company's constitution. As such, it is not surprising that the Companies Act 2006 has sought to include shareholder agreements within the meaning of the constitution of the company.

If there is a dispute between shareholders, it will often be the case that the shareholders' agreement will be referred to first, between the constitutional documents. This could cause a problem, however, if there is a conflict between the terms of the articles and the terms of the external agreement. The key case concerning shareholder agreements is ***Russell* v *Northern Bank***.

Russell v *Northern Bank Development Corporation Ltd* [1992] 1 WLR 588

Five individuals agreed to refrain from voting to increase the company's share capital, unless all parties agreed to the increase (in writing). Subsequently, the company sought to increase capital, but one member of the agreement was against this increase. In court, he argued that the fellow members were acting contrary to the terms of the membership agreement. The other members of the agreement counter-claimed by saying that by enforcing the terms of the shareholders' agreement, the court would in effect restrict the court from acting within its statutory power.

The House of Lords (reversing the decision of the Court of Appeal) stated that shareholders' agreements were valid and enforceable. Lord Jauncey provided a quotation from Lord Davey in ***Welton* v *Saffery*** [1897] AC 299, who stated:

> Of course, individual shareholders may deal with their own interests by contract in such a way as they may think fit. By such contracts, whether made by all or only some of the shareholders, would create personal obligations, or an exception personalis against themselves only, and would not become a regulation of the company, or be binding on the transferees of the parties, or upon new or non-assenting shareholders.

Comment

Although, strictly speaking, the judgment says that a company may not be bound by one, it is without doubt that the company (practically speaking) is restricted, as it is the members who guide the company. Potentially, a member of a company could obtain an injunction to prevent other members of the company (party to a membership agreement) to restrain from allowing the company to perform an act, which it is statutorily able to do.

In ***Euro Brokers Holdings Ltd* v *Monecor (London) Ltd***, 2003 the court applied the ***Duomatic*** principle to such a shareholders' agreement. The principle which is derived from the decision in ***Re Duomatic*** [1969] 2 Ch 365 states that the informal and unanimous assent of all the company's shareholders can override formal requirements as where a particular course of action requires a meeting and resolution of the shareholders, either under statutory provisions or because of the requirements of the company's articles, and no such meeting and/or resolution has been held or passed or written resolution made.

Nevertheless, if there is evidence that the shareholders were unanimously agreed on the matter, the court may accept the resulting transaction as valid.

Euro Brokers Holdings Ltd v *Monecor (London) Ltd* [2003] 1 BCLC 506

So far as the facts of *Euro Brokers* are concerned, the matter in issue was a call made on the company's two shareholders requiring them to advance more capital. The finance director made the call by means of an e-mail though the shareholders' agreement required that the call be made by a notice from the board. Nevertheless, both shareholders regarded the call as valid and agreed to send the sums required to the company. Later, one of the shareholders failed to forward the full amount. Under the shareholders' agreement this triggered a right in the other shareholder to acquire the shares of the defaulter at an agreed price. The defaulter was not prepared to accept this situation and challenged the validity of the call in terms that it had not been made by the formal notice of the board. This defence was rejected by the Court of Appeal. The shareholders had accepted the call in the manner in which it was made and the Duomatic principle could therefore be applied. In consequence, the defaulting shareholder could be required to sell his entire holding to the claimant.

A typical shareholders' agreement may include:

- Undertakings and agreements from prospective shareholders before the company is formed.
- Matters that it would be inappropriate to put on the public record such as confidentiality undertakings and non-competition restrictions, the right of certain shareholders to appoint directors and dispute resolution.
- Protection of minority shareholders if required. Thus, although alteration of the articles requires a special resolution, i.e. a 75 per cent majority of votes, a shareholders' agreement can require written consent from all shareholders so protecting those with minority holdings.
- Internal management issues which the members wish to keep off the public record, e.g. who should be entitled to appoint a director, choice of bankers, and the policy of the company on loans and borrowing together with cheque signatories.

Finally, it is worth noting in relation to the protection of minority shareholders under s 994, CA 2006, that a shareholders' agreement will carry a considerable amount of weight in terms of the court determining whether or not 'unfairly prejudicial' conduct has occurred. Refer to Chapter 16 for further discussion of this point See p. 312.

Essay questions

1 Discuss how the Companies Act 2006 approaches the notion of a company's constitution with specific reference to the change in approach taken since the Companies Act 1985.

Explain how the Model Articles can be utilised. (*University of Hertfordshire*)

2 Success Limited has been trading profitably for 10 years, with capital provided by each of its four directors and their families. The directors consider that the company could be even more profitable, if it were able to make a public issue of securities, and they are advocating the re-registration of the company as a public limited company. However, some of the members are not enthusiastic, as they believe that there are disadvantages to trading as a public company.

Explain to the members the advantages and disadvantages of trading in the form of a public company, and the statutory procedure for re-registration of a private limited company as a public limited company. (*Napier University*)

3 (a) Section 33 of Companies Act 2006 provides that the company's constitution constitutes an agreement between the company and its members as if they have signed and sealed a contract to abide by its provisions.

Comment.

(b) A, B and C are members of X Ltd. The company has now discovered that C is also a major shareholder in a rival company. It is causing concern that C might be extracting information about X Ltd's business which could confer unfair advantage on its rival. X Ltd wishes to alter its articles of association so as to require any member competing with X Ltd, to sell his or her shares as required to any person or persons named by the directors of the company, or to the directors themselves.

Advise X Ltd. (*University of Plymouth*)

4 'The company's constitution forms a contract between a company and its members. This contract is, however, an unusual one, limited both in its scope and permanence despite the best efforts of the Companies Act 2006 to clarify matters.'

Discuss. (*The Institute of Chartered Secretaries and Administrators*)

Test your knowledge

Four alternative answers are given. Select ONE only. Circle the answer which you consider to be correct. Check your answers by referring back to the information given in the chapter and against the answers at the back of the book.

1 Fred bought some shares in Tyne Ltd on 1 February 20XX. To whom does Fred become bound in contract?

A The company only.
B The members of Tyne on 1 February 20XX.
C Tyne and those who are at present its members.
D Tyne and those who were members of Tyne on 1 February 20XX.

2 The Model Articles will apply automatically except where it is excluded or modified by special articles of association in the case of:

A private companies limited by shares only.
B public companies limited by shares only.
C all companies limited by shares.
D all limited companies.

3 The articles of association of a company on a paper incorporation must be signed by:

A each one of the directors.
B a majority of the directors.
C all the subscribers to the memorandum.
D one of the subscribers to the memorandum.

4 Under the Companies Act 1985, the capital clause of a company limited by shares was contained in the memorandum. Where is it located under the 2006 Act?

A The memorandum of association.
B The company's constitution as defined by s 17 of the 2006 Act.
C A statement of capital and initial shareholdings.
D It is no longer required under the 2006 Act.

The answers to test your knowledge questions appear on p. 616.

Suggested further reading

Goldberg, 'The Enforcement of Outsider Rights under the Section 20 Contract', (1972) 35 MLR 362

Goldberg, 'The Controversy on the Section 20 Contract Revisited', (1985) 48 MLR 158.

Gregory, 'The Section 20 Contract', (1981) 44 MLR 526

Kahn-Freund, 'Some Reflections on Company Law Reform', (1944) 7 MLR 54

Prentice, 'The Enforcement of Outsider Rights,' (1980) 1 Co Law 179

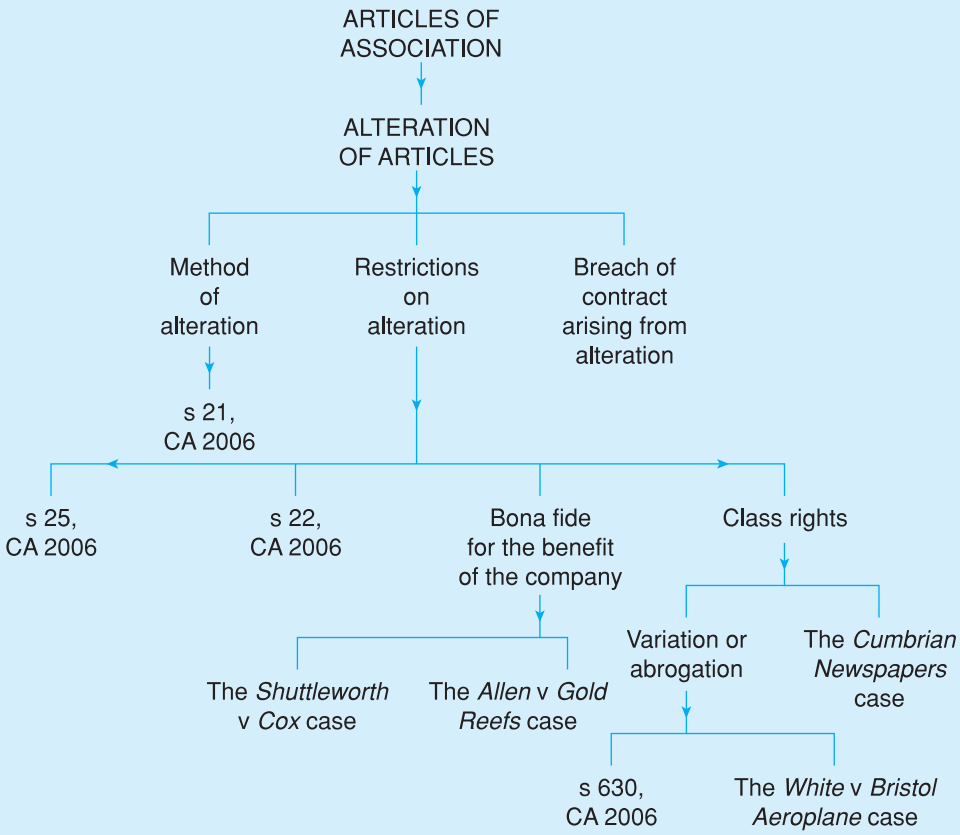
Rixon, 'Competing Interests and Conflicting Principles: An examination of the Power of Alteration of Articles of Association', (1986) 49 MLR 446

Sealy, ' "Bona Fides" and "Proper Purposes" in Corporate Decisions', [1989] Monash University Law Review 16

Wedderburn, 'Shareholder Rights and the Rule in ***Foss*** **v** ***Harbottle***', (1957) CLJ 193

Visit **www.mylawchamber.co.uk/keenancompany** to access study support resources including practice exam questions with guidance, weblinks, legal newsfeed, answers to questions in this chapter, legal updates and further reading.

5 The constitution of the company – altering the articles



The articles of association may be amended by a special resolution in general meeting (s 21 of the Companies Act 2006). A copy of the revised articles must be sent to the Registrar 'not later than 15 days after the amendment takes effect' (s 26(1)). If the company fails to comply with this requirement, then under s 26(1) an offence is committed by the company and every officer of the company who is in default. Section 27(1) goes on to note that the Registrar may give notice to the company to comply with this requirement within 28 days of issue. Continued failure by the company to comply may result in a civil penalty of £200 in addition to criminal proceedings (s 27(4)).

The important point to appreciate is that any member of a company enters into a contract, the terms of which may be amended by the company in general meeting at any time in the future. While this may appear to go against the most basic principles of contract law, it is important to remember that this is a statutory contract by virtue of s 33 of the Companies Act 2006. Indeed, as noted in ***Greenhalgh* v *Arderne Cinemas***, 1951 by Evershed MR '[. . .] when a man comes into a company, he is not entitled to assume that the articles will always remain in a particular form'. If one takes time to reflect on the situation and to bear in mind the observations of Drury (see the suggested reading at the end of the chapter), the company represents a separate legal entity whose existence will, in most instances, extend far beyond either the involvement or life expectancy of the current members. As such, the company is subject to specific decision-making processes (in this instance s 21) that enable it to respond to its environment and to update its constitution accordingly (***Shuttleworth* v *Cox***, 1927). Indeed, this is reinforced by the case of ***Russell* v *Northern Bank***, 1992, in which the House of Lords stated that 'a provision in a company's articles which restricts its statutory power to alter those articles is invalid'. Any contract by a company which purports to agree that its articles will not be amended in the future will not be enforced by the courts.

Punt* v *Symons & Co Ltd [1903] 2 Ch 506

GG Symons was given the power, under articles 95 and 97 of the company's articles, to appoint and remove directors. This power would continue to exist after his death for exercise by his executors. A separate agreement stated that the company would refrain from amending these articles in the future. In time, the relationship between the executors and the company's directors deteriorated, resulting in a proposal to amend the articles by way of a special resolution. The executors sought an injunction to prevent this action. In this regard, Byrne J said:

> The first point taken is that passing the resolution would be a breach of the contract which was entered into with the testator; and that the plaintiffs as executors are entitled to enforce the terms of the agreement by restraining any alteration of the articles. I think the answer to this argument is – that the company cannot contract itself out of the right to alter its articles, though it cannot, by altering its articles, commit a breach of contract. It is well established as between a company and a shareholder, the right not depending upon a special contract outside the articles, that this is the case. It has not been, so far as I know, the precise subject of reported decision as between a contractor and a company where the contract is independent of and outside the articles; but in the case of ***Allen* v *Gold Reefs of West Africa*** Lord Lindley, then Master of the Rolls, says: 'The articles of a company prescribe the regulations binding on its members: Companies Act, 1862, s 14. They have the effect of a contract (see s 16); but the exact nature of this contract is even now very difficult to define. Be its nature what it may, the company is empowered by the statute to alter the regulations contained in its articles from time to time by special resolutions (ss 50 and 51); and any regulation or article purporting to deprive the company of this power is invalid on the ground that it is contrary to the statute: ***Walker* v *London Tramways Co***. The power thus conferred on companies to alter the

> regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association . . . I am prepared to hold that in the circumstances of the present case the contract could not operate to prevent the article being altered under the provisions of s 50 of the Companies Act, 1862, whatever the result of that alteration may be.'
>
> *Held* – On this particular point the executors failed and the court refused to enforce the terms of the contract preventing an amendment of the articles. However, they did succeed on another point, which related to the directors' misue of power in terms of issuing new shares so as to dominate the General Meeting.

This process of amendment is subject to the principle of majority rule; a topic that will be discussed later in Chapter 17 See p. 334, but which raises the immediate concern of how this process is governed so as to ensure that the majority may not take advantage of their position to the detriment of a minority within the company. First of all, s 25(1) provides that a member will not be bound by an alteration of the articles if it requires him to subscribe for more shares than the number currently held, or in any way increases his liability to contribute to the company's share capital.

Secondly, even though the general rule is that a company cannot restrict its power to amend its articles, s 22 of the Companies Act 2006 permits members to entrench provisions within the company's articles. In other words, the articles may contain provisions which may be 'amended or repealed only if conditions are met, or procedures complied with, that are more restrictive than those applicable in the case of a special resolution' (s 22(1)). For example, this may include the consent of a particular member of the attainment of a higher percentage of the members in general meeting than that required for a special resolution. However, given the potential impact that entrenched provisions within a company's constitution may have, s 22(3) goes on to state that such provisions may be amended subject to the agreement of all the members of the company or by order of the court. In addition, under s 23, the Registrar must be given notice of the existence of entrenched provisions as well as of their removal from the articles of association. Section 24 also requires the company to submit a statement of compliance with the entrenched provisions whenever it amends its articles.

Third of all, as stated in ***Allen* v *Gold Reefs of West Africa Ltd*** [1900] 1 Ch 656 by Lindley MR, there is the suggestion that members must exercise their votes 'bona fide for the benefit of the company as a whole'. As such, this case would appear to indicate that the court jurisdiction to regard an alteration of the articles as invalid unless it is made for the benefit of the company as a whole. The court does not in fact look solely at the company as it is at the time of the action (which would be a subjective test) but tries to see the company in equilibrium. That is to say the court envisages the company in a hypothetical situation in which shares and voting power are evenly distributed among the members, and assumes that members will vote independently of each other and not, as it were, combine to coerce other members. Having viewed the company in this situation, the court then decides on the validity of the alteration. This is an objective test and is really the only one the court can adopt. If it were to test the validity of the alteration against the present state of the shareholding, then the day after the resolution was approved the shareholding may alter and there may be a shift in the centre of power in the company. Rather than cope with so many imponderables, the court decides the question by putting the company into a state of equilibrium (hypothetically at least) and then looking at the alteration.

However, the objective test is not altogether satisfactory and can sometimes operate unfavorably towards particular shareholders. The difficulty is that the court sometimes assumes, probably rightly, that those who are managing the company's affairs and, on occasion, a majority of the shareholders, know better than the court what is for its benefit. Thus shareholders may sometimes feel that they have not been dealt with fairly and yet the court will accept the alteration to the articles as valid and for the benefit of the company as a whole (see ***Greenhalgh* v *Arderne Cinemas***).

Allen* v *Gold Reefs of West Africa Ltd [1900] 1 Ch 656

The articles originally gave the company a lien on partly paid shares. The claimant was the only member with fully paid shares but he also owed calls on certain other partly paid shares which he owned. The company altered its articles to give itself a lien on fully paid shares, thus putting itself in a position where it could refuse to transfer the claimant's fully paid shares unless and until he had paid calls owing on his partly paid shares. It was held that the alteration was valid and for the benefit of the company, even though the claimant was the only person practically affected at the time by the alteration. Lindley MR stated:

> Wide as the language of [s 33 Companies Act 2006] is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed. But if they are complied with I can discover no ground for judicially putting any other restrictions on the power conferred by the section than those contained in it.

Comment

While this would initially appear to question the bona fides of the company, given the fact that only one shareholder was affected by this alteration of the articles, it is important to realise that the altered articles were intended to apply to all holders of fully paid shares, it just so happened that the complaining shareholder was the only holder of fully paid-up shares at that time who was in arrears of calls.

Greenhalgh* v *Arderne Cinemas Ltd [1951] Ch 286

The articles of the company originally required any member who wished to sell his shares to offer them to his fellow members before selling them to a stranger. A majority group of the shareholders procured an alteration enabling a member to sell his shares without first offering them to his fellow members if the company so resolved by ordinary resolution. The purpose was so that the majority could sell their shares to an outsider, a Mr Sheckman, for 6s per share and so give Mr Sheckman a controlling interest. Mr Greenhalgh, a minority shareholder, objected to the alteration although Mr Sheckman was prepared to pay 6s per share to any shareholder of the company, including Mr Greenhalgh.

Held – by the Court of Appeal – that the alteration was valid even though its immediate effect was to enable the majority group to sell their shares to outsiders without first offering them to the minority shareholders, though the minority shareholders, not being able to pass an ordinary resolution, were still bound to offer their shares to the majority group before selling elsewhere.

Comment

(i) Perhaps the alteration of the articles could be justified in this case under the objective test adopted by the courts since the hypothetical member might benefit equally with any other member in the future by the extension of his power to sell his shares to strangers. Furthermore, the alteration represented a relaxation of the very stringent restrictions on transfer in the article which had existed before the change.

(ii) In earlier litigation between the same parties [1946] 1 All ER 512 what would now be 10p ordinary shares had one vote per share and so did each 50p ordinary share. Greenhalgh held 10p shares and controlled 40 per cent of the vote and could block special resolutions. The holders of the 50p shares procured an ordinary resolution (as company legislation requires), to subdivide each 50p share into five 10p shares with one vote each, thus reducing G's voting power. It was held that the voting rights of the original 10p shares had not been varied. They still had one vote per share.

The result of the objective test which the court uses is that most alterations are allowed, though if the court feels that a decision is oppressive of the minority then it may set aside such a resolution (***Clemens* v *Clemens Bros Ltd*** [1976] 2 All ER 268).

Clemens* v *Clemens Bros Ltd [1976] 2 All ER 268

A majority shareholder in a company has not an unfettered right to vote in any way he pleases; that right must be exercised fairly and so as not to cause injustice to other shareholders. The plaintiff held 45 per cent of the issued share capital of a family company, the remaining 55 per cent being held by her aunt, who was also a director of the company. A scheme was proposed by the directors whereby the company's issued share capital would be increased and some new shares would be issued to the directors (other than the aunt) the balance being placed on trust for long-service employees. The effect of the scheme was that the plaintiff's shareholding would be reduced to under 25 per cent. Despite the plaintiff's objections, the scheme was approved, by reason of the aunt's majority shareholding. The plaintiff thereupon sought to have the restrictions set aside as oppressive of her. Foster J noted:

> There are many cases which have discussed a director's position. A director must not only act within his powers but must also exercise them bona fide in what he believes to be the interests of the company. The directors have a fiduciary duty, but is there any similar restraint on shareholders exercising their powers as members at general meeting? . . .
>
> I think that one thing which emerges . . . is that in such a case as the present Miss Clemens is not entitled to exercise her majority vote in whatever way she pleases. The difficulty is in finding a principle, and obviously expressions such as 'bona fide for the benefit of the company as a whole', fraud on a 'minority' and 'oppressive' do not assist in formulating a principle.
>
> I have come to the conclusion that it would be unwise to try to produce a principle, since the circumstances of each case are infinitely varied. It would not, I think, assist to say more than that in my judgment Miss Clemens is not entitled as of right to exercise her votes as an ordinary shareholder in any way she pleases. To use the phrase of Lord Wilberforce [***Ebrahimi* v *Westborne Galleries Ltd***], that right is 'subject . . . to equitable considerations . . . which may make it unjust . . . to exercise it in a particular way'.

Held – Setting aside the resolutions, that whatever other purposes there may have been behind the scheme, there was an irresistible inference that it was designed in order to diminish the plaintiff's voting rights; that accordingly the aunt had used her majority voting power inequitably.

Similarly, alterations which give the company power to expel members without cause are not acceptable to the court. However, expulsion is allowed where it would benefit the members as a whole, as where the member expelled is competing with the company or defrauding it.

Dafen Tinplate Co Ltd v *Llanelly Steel Co (1907) Ltd* [1920] 2 Ch 124

The principal shareholders of the defendant company were other steel companies, and it was hoped that the member companies would buy their steel bars from the defendants, though there was no contract to this effect. In the main the member companies did buy their steel from the defendants, but the claimant company began in 1912 to get its steel from a concern called the Bynea company in which the claimant had an interest. The defendant company then sought to alter its articles to expel the claimant company. The alteration provided that the defendant company could by ordinary resolution require any member to sell his shares to the other members at a fair price to be fixed by the directors. The claimant sought a declaration that the alteration was void.

Held – by Peterson J – that the claimant company was entitled to such a declaration. The power taken by the articles was a bare power of expulsion, and could be used to expel a member who was not acting to the detriment of the defendant company at all. Therefore, whatever its merits in the circumstances of the case, it could not be allowed.

Comment

This power of expulsion was to be written in the articles and would last indefinitely. In addition, it would permanently discriminate between shareholders of the same class and as such could not benefit the future hypothetical member and was therefore void.

Sidebottom v *Kershaw, Leese & Co* [1920] 1 Ch 154

The defendant company, which was a small private company, altered its articles to empower the directors to require any member who carried on a business competing with that of the company, to sell his shares at a fair price to persons nominated by the directors. The claimant was a member of the defendant company, and ran mills in competition with it, and this action was brought to test the validity of the alteration in articles. The court of first instance found for the claimant, regarding the alteration as a bare power of expropriation, though there was no dispute that the price fixed for the purchase of the shares was fair.

Held – by the Court of Appeal – that the evidence showed that the claimant might cause the defendant company loss by information which he received as a member, and as the power was restricted to expulsion for competing, the alteration was for the benefit of the company as a whole and was valid.

Comment

(i) It was obviously in the interest of the company as a whole and of the 'hypothetical member' that the company's trade secrets should not be available to its competitors.

(ii) As Lord Sterndale MR made clear in his judgment in this case, the power of compulsory purchase of shares is valid if contained in the original articles. Such a provision would not be set aside on the 'benefit' ground; the concept is applicable only to changes in the articles as ***Phillips* v *Manufacturers' Securities Ltd*** (1917) 116 LT 290 decides.

(iii) Lord Sterndale MR also made the following comment:

> Now it does not seem to me to matter as to the validity of this altered article, whether it was introduced with a view to using it against the plaintiff firm or not, except to this extent, that it might be that if it had been introduced specifically for the purpose of using it against the plaintiffs' firm some question of bona fides might possibly have arisen, because it might have been argued that it was introduced to do them harm, and not to do the company good [. . .] I come to the conclusion that the directors were acting perfectly bona fide; that they were passing the resolution for the benefit of the company; but that no doubt the occasion of their passing it was because they realised in the person of Mr Bodden that it was a bad thing to have members who were competing with them.

Shuttleworth* v *Cox Brothers & Co (Maidenhead) Ltd [1927] 2 KB 9

The company's articles provided that Shuttleworth and four other persons should be permanent directors of the company, to hold office for life, unless disqualified by any one of the events specified in Art 22 of the company's articles. These events were bankruptcy, insanity, conviction of an indictable offence, failure to hold the necessary qualification shares, and being absent from meetings of the board for more than six months without leave. The company conducted a building business, and Shuttleworth, on 22 occasions within 12 months, failed to account for the company's money which he had received on its behalf. The articles were altered by adding another disqualifying event, namely, a request in writing by all the other directors. Having made the alteration, the directors made the request to Shuttleworth, and he now questioned the validity of his expulsion from the board.

Held – by the Court of Appeal – that the alteration and the action taken under it was valid, because it was for the benefit of the company as a whole since Shuttleworth was defrauding it. Shuttleworth also claimed that no alteration of the articles could affect his contract with the company, but the Court of Appeal held, on this point, that since part of his contract (the grounds for dismissal) was contained in the articles, he must be taken to know that this was in an alterable document and he must take the risk of change.

However, there are also cases which would appear to run contrary to the ***Allen* v *Gold Reefs*** 'bona fide' principle: ***North-West Transportation Co* v *Beatty*** (1887) 12 App Cas 589; ***Burland* v *Earle*** [1902] AC 83; ***Goodfellow* v *Nelson Line*** [1912] 2 Ch 324. (See also: ***Northern Counties Securities Ltd* v *Jackson & Steeple Ltd*** [1974] 1 WLR 1133 below.) In these instances, the courts have stated that votes are proprietary rights which the owner may exercise according to his own interests, even though these may run contrary to the interests of the company itself. Consequently, it is important to note that the shareholders' power to vote is not to be likened to the power exercised by directors which is in turn fiduciary in nature. Rather, shareholders are free to vote in whatever manner they wish to do so.

The issue is rather one whereby such proprietary rights are subject to review by the courts so as to ensure that a majority does not exploit its position against a minority within the company. In other words, the courts are adopting a very fine balance between respecting the freedom of shareholders to use their proprietary rights within the context of majority rule in the company, while at the same time ensuring that this system does not lead to an abuse of position or exploitation of minority shareholders. Indeed, this is reflected in Lord Hoffman's discussion of the area in the recent Privy Council case of ***Citco Banking Corporation NV* v *Pusser's Ltd*** [2007] UKPC 13, in which he approved passages from both ***Allen* v *Gold Reefs*** as well as ***Shuttleworth* v *Cox*** and emphasised the subjective nature of the bona fide test and stated that the court is only justified in interfering when there is evidence impugning the honesty of the shareholders or where

no reasonable shareholder could consider the proposed amendment to be beneficial to the company. (For further discussion on this point see Williams (2007) 'Bona Fide in the Interest of Certainty', CLJ 500.)

Fourthly, where the rights of different classes of shareholders are contained in the articles, then, as noted above, s 33 would appear to permit these rights to be changed by way of a special resolution of the members of the company. However, this is another area in which the law aims to protect minorities within a company from the potential oppression of majority rule. As such, the general principle is that rights attaching to a class of shares should not be altered by the holders of another class of shares without gaining the consent of the class in question for the alteration to take place. This is covered by s 630 of the Companies Act 2006 which states that rights attached to a class of a company's shares may only be varied (a) in accordance with provision in the company's articles for the variation of those rights; or (b) where no such provision exists then by way of a special resolution passed at a separate general meeting of the holders of that class sanctioning the variation, or by consent in writing (s 630(2),(4)).

It should also be noted that according to s 633, the holders of not less than 15 per cent of the issued shares of the class, who did not vote for the variation, may apply to the court within 21 days of the consent of the class being given, whether in writing or by resolution, to have the variation cancelled. Once such an application has been made, usually by one or more dissentients on behalf of the others, the variation will not take effect unless and until it is confirmed by the court.

See p. 144

As will be examined further in Chapter 7, an issue which is frequently explored is whether the issue of further shares, which do not remove the current rights of a particular class but simply enjoy the same rights as the existing ones (effectively expanding the class and, as such, diluting the voting power of the original holders of that class of shares), may amount to a variation of class rights; ***White* v *Bristol Aeroplane Co Ltd*** [1953] Ch 65. This is also an area in which s 633 may prove useful to those shareholders who suddenly find their position diluted within a particular class and outvoted on a s 630 resolution.

Northern Counties Securities Ltd* v *Jackson & Steeple Ltd
[1974] 1 WLR 1133

The defendant company has agreed to use its best endeavours to allot a certain number of shares to the plaintiffs resulting from a Stock Exchange quotation for its shares. However, it was necessary for the company to gain consent via its General Meeting. After a period of inactivity the plaintiffs successfully gained an order from the court against the company. Nevertheless, the court emphasised that fact that even though a General Meeting must be called, together with a circular inviting members to support the resolution, the members could not be compelled to vote in favour of the resolution and would not be in contempt of court if they opposed it. Per Walton LJ:

> Mr Price 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 L.C. in ***Lennard's Carrying Co Ltd* v *Asiatic Petroleum Co Ltd*** [1915] AC 705, 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 a 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 body of directors, to whom under most forms of articles – see article 80 of Table A, or article 86 of the defendant company's articles which is in similar form – the management of the business of the company is expressly delegated. Therefore, their acts are the defendant company's acts; and if they do not, in the