member approval is required (see below). In addition, the normal procedures relating to the appointment of the executive as a director must be followed.

In making the contract of appointment, the board must follow requirements of the company's articles (see below).

UK Safety Group Ltd v *Heane* [1998] 2 BCLC 208

The problem in this case arose because of a failure by the directors to observe provisions in the company's articles. In this connection, the directors of the company can in general terms bind the company and a third party in contractual rights and duties only if the provisions of the articles in regard to contractual agreements are followed.

The main relevant article of UK Safety provided as follows in terms of the appointment of directors to an executive office. 'Any such appointment, agreement or arrangement may be made upon such terms as the directors determine and they may remunerate any such director for his services as they think fit.'

It appeared that an agreement between Mr Nicholas Heane as sales and marketing director and UK Safety was made in effect by the chief executive of UK Safety, a Mr Newman, on his own initiative and not by following the relevant article of the company. In evidence he said that he did not feel it appropriate to discuss the terms at a board meeting but that the contract and its contents had been made known to, and approved by, the remuneration committee of the board – but not the full board.

Mr Heane resigned to set up another company, which was the second defendant and UK Safety was, in this action, seeking to enforce covenants in the alleged contract with Mr Heane restraining his activities after leaving the company and in particular restraining his use of confidential information.

The judge accepted that it may not be necessary for a board to meet formally in order to transact business. He said:

> I entirely accept [. . .] that it may not be necessary for a company to have a formal board meeting and, consistently with the decision in *Re Bonelli's Electric Telegraph Co, Cook's Claim (No 2)* (1874) LR 18 Eq 656 it may be possible for all the directors informally to consider the terms of a contract [. . .] That, however, is not what occurred in the present case. The initiative for the contracts came from Mr Newman himself.

He went on to hold that the agreement with Mr Heane was not binding on him and, therefore, the restraints were unenforceable.

Comment

It is all too easy for the directors of a busy company to neglect corporate formalities but this may result in unfortunate consequences for the company, such as in this case an inability to protect the company's confidential information.

The case also makes clear that if the appointment is to the office of director or executive director of a subsidiary approval by the group board is not enough. This, of course, does not mean that the matter of the appointment by the subsidiary should not be raised with the group board in order to satisfy corporate governance requirements.

The termination of the contract of service, of itself, does not terminate the directorship. It is therefore advisable for the contract of service of an executive director to provide that the director concerned will resign the directorship on termination of the contract of employment for any reason. That failing, the director would have to be removed under a provision in the articles, if any (there is no such provision in *Table A*) or under s 168 of the CA 2006.

Removal does not prevent the director concerned from bringing an action for damages for wrongful dismissal. As regards claims for redundancy before employment tribunals, directors who are employed under service contracts may have been engaged for a fixed term of two years or more and may have been required in the contract to waive the right to claim for redundancy.

However, from 1 October 2002 it has not been possible to make a contract of fixed-term employment where the right to a redundancy payment is waived (see Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034)).

It had been assumed that a director serving under a contract as an executive of the company could claim unfair dismissal. However in ***Cobley* v *Forward Technology Industries plc*** [2003] All ER (D) 175 the Court of Appeal ruled that the chief executive of a public listed company was not unfairly dismissed when the shareholders removed him from office by a resolution in general meeting. This effected his dismissal as CEO because his contract said that he could not continue as CEO unless he was also a director of the company. His dismissal was, ruled the court, 'for some other substantial reason' under s 98 of the Employment Rights Act 1996. The removal followed a successful hostile takeover and business reorganisations are capable of amounting to 'some other substantial reason'. The judgment notes that Mr Cobley had reserved his right to claim at common law for wrongful dismissal by breach of contract. This was not an issue before the Court of Appeal.

Comment

Presumably therefore where the company can establish one of the reasons justifying dismissal under the 1996 Act, i.e. incapability, misconduct, redundancy, contravention of statutory provision or 'some other substantial reason' a claim for unfair dismissal will fail. Since removal from the board is a substantial reason as a 'business reorganisation' and presumably always will be the claim for unfair dismissal seems ruled out. The statutory defence of substantial reason does not apply in wrongful dismissal claims though misconduct does. Claims for wrongful dismissal can be brought before employment tribunals but there is a cap on the award of £25,000. There is no cap in claims before the County Court or High Court.

Employee/directors may claim a redundancy payment (if they have not contracted-out before 1 October 2002) or insolvency payment as a preferential creditor. The fees of an officeholder/director are not so protected. Director/employees are also covered by the Sex Discrimination Act 1975, the Race Relations Act 1976, the Equal Pay Act 1970, the Disability Discrimination Act 1995 and regulations relating to discrimination on the grounds of sexual orientation and religion or belief and employment legislation generally. The wider definition of 'employee' in the discrimination legislation brings within their scope directors who have a contract for services, as where they contract with the company to act as a consultant.

Directors' contracts of employment

As regards contracts of employment of directors, both public and private companies may not incorporate into any agreement a term under which a director's employment with the company or, if he is a director of a holding company, his employment with the group is to continue, or may be continued, except by the agreement of the members by ordinary (or written) resolution, for a period that exceeds five years, if during that period the company cannot terminate his contract by notice or his employment can be terminated by notice but only in specified circumstances.

A contract for services is included and so the provisions relating to contracts of employment cannot be circumvented by directors who enter into long-term consultancy arrangements instead of contracts of employment. These arrangements could nullify to a large extent the provisions of the CA 2006, s 168 in that directors could be removed from office under that section but long-term arrangements which they may have given themselves could involve massive compensation so that the company would, in practice, be unable to remove them.

The prohibition on long-term contracts applies to agreements between a director of a holding company and any of its subsidiaries. Thus a director is prevented from avoiding the provisions by entering into agreements with a company that is controlled by the company of which he is a director.

There are provisions to prevent avoidance of the long-term contracts rules by the device of entering into a series of agreements. Thus, if a director during the first year of a five-year contract which cannot be terminated by notice enters into a further five-year contract which cannot be terminated by notice, the period for which he is employed would be regarded as 10 years and, therefore, a term would be implied into both contracts making the employment terminable by reasonable notice.

The provisions do not apply if the agreement continues after five years, but once five years have passed, it can be terminated at the instance of the company by notice. In addition, a term longer than five years may be valid if it has been first approved by a resolution of the company and in the case of a director of a holding company, by a resolution of that company also. However, in such a case a written memorandum setting out the proposed agreement and incorporating the term regarding length, must be available for inspection by the members of the company at the registered office for not less than 15 days ending with the date of the meeting and also the meeting itself, or circulated in the case of a written resolution. Finally, the provisions do not apply to contracts given to the directors of a wholly owned subsidiary. The Act regards the subsidiary as a mere unit of management of the holding company so that the directors of these management units can have their conditions of service settled by the directors of the holding company. If a director of a wholly owned subsidiary is also a director of the holding company, any contract in excess of five years will be caught by the above provisions and will be affected unless one of the exceptions applies.

A contract which contravenes the above provisions is void and can be terminated by the company at any time after reasonable notice. Reasonable notice is not defined by the Act but in ***James* v *Kent & Co Ltd*** [1950] 2 All ER 1099 it was held to be an implied term of a company director's contract that he should be entitled to three months' notice.

Any term in the agreement, e.g. salary, which is distinct from the term relating to duration is valid and enforceable.

Sections 188–189 of the CA 2006 require member approval of long-term service contracts. Contracts under which a director is guaranteed at least two years of employment with the company of which he is a director or with any subsidiary of that company are required to be approved by members. The length of term was reduced from five years to two years for this requirement.

The desirability of written contracts

As we have seen, executive directors can have a double function – one as an officer of the company and the other as an employee. However, the general attitude of the courts has been to

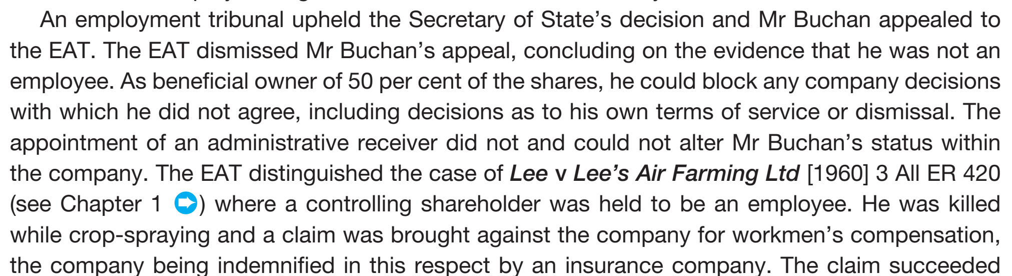
regard them as holders of an office rather than employees unless there is satisfactory evidence to the contrary (see ***Eaton*** v ***Robert Eaton Ltd and Secretary of State for Employment*** [1988] IRLR 83 and ***McLean*** v ***Secretary of State for Employment*** (1992) 455 IRLIB 14). These cases emphasise the general desirability of executive directors, particularly in small businesses, having written contracts of service. Where this is so, the court would normally recognise the employee aspect of the dual role and, in particular, allow claims to be made under s 166 of the Employment Rights Act 1996 to the Department of Trade and Industry (rebranded the Department for Business, Enterprise and Regulatory Reform) (DTI) for a redundancy payment if the business goes insolvent. The written contract of service should not exclude employment protection rights if it is for a fixed term. Once the DTI has made the payment, the remedies of the employee against the employing company are transferred to the Secretary of State for Trade and Industry for what they might be worth. The right of an employee to apply directly to the DTI thus becomes very important in an insolvency situation. However, this right only applies to employees and many directors of small family companies who are acting in an executive role but without written contracts of employment may find themselves without any financial recompense if the business fails.

Controlling members as employed directors

Before leaving the topic of directors as employees, it is worth mentioning that a director who has a controlling interest in the shares of a company may not be regarded as an employee of the company. Control is still a major factor in establishing a contract of employment and a majority shareholder is not, as a worker, subject to any effective control by the company (see ***Otton*** v ***Secretary of State for Employment*** (1995) 7 February, EAT 1150/94). More recent case law appears below. The provisions referred to above were then administered by the Department of Employment.

Buchan* v *Secretary of State for Employment (1997) 565 IRLB 2

Mr Buchan was one of two working directors of Croydon Scanning Centre Ltd. He was also the operator of the scanner and the sales manager and had a 50 per cent shareholding in the company. He worked full time for a salary of £35,000 pa and had an entitlement of five weeks' holiday per year. He had no written contract of service and no written record of his engagement or conditions of service. The company went into administrative receivership and Mr Buchan tried unsuccessfully to obtain from the Secretary of State a redundancy payment from the National Insurance Fund under ss 166 and 182 of the Employment Rights Act 1996. As we have seen, this course of action is available to an employee where, for example, the employer is insolvent and the whole or any part of a redundancy payment remains unpaid. If the Secretary of State makes a payment, he takes over the employee's rights and remedies in the insolvency.



An employment tribunal upheld the Secretary of State's decision and Mr Buchan appealed to the EAT. The EAT dismissed Mr Buchan's appeal, concluding on the evidence that he was not an employee. As beneficial owner of 50 per cent of the shares, he could block any company decisions with which he did not agree, including decisions as to his own terms of service or dismissal. The appointment of an administrative receiver did not and could not alter Mr Buchan's status within the company. The EAT distinguished the case of ***Lee*** v ***Lee's Air Farming Ltd*** [1960] 3 All ER 420 (see Chapter 1 ➡) where a controlling shareholder was held to be an employee. He was killed while crop-spraying and a claim was brought against the company for workmen's compensation, the company being indemnified in this respect by an insurance company. The claim succeeded

➡ See p. 10

but the EAT did not think it would have done if it had been made under employment protection legislation. Policy considerations were involved. Employment protection claims on insolvency are met by the state and not by a company backed up by an insurer.

Comment

(i) The EAT followed this decision in a case heard contemporaneously with ***Buchan***, i.e. ***Ivey* v *Secretary of State for Employment*** (1997) 565 IRLB 2 where Mr Ivey was managing director owning 99 per cent of the company shares and also had a written contract. The two decisions were then followed in ***Heffer* v *Secretary of State for Trade and Industry*** (EAT 355/96) where it was held that an individual with a 70 per cent shareholding in the company was not an employee.

(ii) There was a further development in ***Fleming* v *Secretary of State for Trade and Industry*** (1998) 588 IRLB 10. The decision in ***Buchan*** had carried the suggestion that there was a rule of law that a controlling shareholder could never be an employee. That proposition was rejected by the Court of Session in ***Fleming***. The court held that the fact that a director holds a majority shareholding in the company is a relevant factor in deciding whether he is or is not an employee for the purposes of employment protection legislation but it is not in itself decisive. Nevertheless, the court held that Fleming was not an employee because, even though he worked alongside the company's employees, he was a majority shareholder and, in addition, had guaranteed the company's debts. The ***Fleming*** approach was also approved by the Employment Appeal Tribunal in ***Secretary of State for Trade and Industry* v *Bottrill*** [1998] IRLR 120 where Morison J said that the reasoning in ***Buchan*** and ***Ivey*** was 'unsound'.

(iii) The decision of the EAT was affirmed by the Court of Appeal in ***Secretary of State for Trade and Industry* v *Bottrill*** (1999) 615 IRLB 12. The Court of Appeal stated that whether or not a controlling shareholder could also be an employee can be decided only by having regard to all the relevant facts. His controlling shareholding is likely to be a significant fact in all situations and in some cases may be decisive. However, it is only one of the relevant facts and is not to be taken as determining the relationship without taking into account all the relevant circumstances.

(iv) Following ***Bottrill***, the EAT has ruled that a controlling shareholder of a company could be regarded as an employee even though he stood to gain if the company did well. The fact that he was a skilled entrepreneur was also irrelevant to the question of whether or not he was an employee. He had a contract of employment with the company that was not a sham and he had been treated and rewarded as an employee (see ***Connolly* v *Sellers Arenascene Ltd*** (2000) 633 IRLB 15).

(v) It seems that a director will be regarded as an employee where there is a written contract of employment and all the usual hallmarks of employment are present. Certainly the original, almost blanket, ban on controlling shareholders as employees has been considerably eroded.

Statutory employment claims

Directors are, in general, the best paid employees in a company and they have in the past shown little interest in claims for unfair dismissal because of the existence of a cap on the amount of compensation recoverable. This limit was increased under the Employment Rights (Increase of Limits) Order 2008 in force from February 2009, to £66,200. Since a claim for wrongful dismissal may be limited to the sum which the director would have received during the relevant period of notice, there may be more claims by directors of smaller companies for unfair dismissal where this can be sustained in the circumstances of the case.

However, in this context the decision of the Court of Appeal in *Cobley* and the comment thereto should be noted.

Directors' share qualification

The articles may require the directors to take up a certain number of shares as a share qualification. The general purpose of this is said to be that, since they are to manage the company's affairs on behalf of the other shareholders, they should have a stake in it themselves to induce them to act diligently to ensure the company's progress. However, since it is not possible to ensure that directors have a beneficial interest in their qualification shares it seems that no useful purpose is served by a requirement of qualification shares.

It is the duty of every director who is required to hold a share qualification, and who is not already qualified, to obtain the necessary shares within two months after his appointment, or such shorter time as may be fixed by the articles.

A *director must be entered on the company's register* as the holder of his qualification shares, but he need not hold them beneficially and could, for example, hold them on trust for others so long as his name appears on the register of members in respect of them. A director is not allowed to hold his qualification shares in the name of a nominee, since it would involve the company receiving notice of trust which is forbidden by CA 2006, s 127. A director is not qualified by holding a share warrant.

The modern trend is for articles of association not to require a share qualification for directors since it is now a generally held view that no useful purpose is served by the requirement. It does, of course, help to ensure a quorum at general meetings, though it carries a distinct risk that directors will become disqualified and therefore automatically vacate office, either by transfer, or during the currency of a takeover bid, where they have accepted an offer in respect of their own holdings.

It is almost certain that far more cases of disqualification occur than might be supposed and that when the fact comes to light the directors concerned merely buy sufficient shares and carry on as before. In fact, of course, having been disqualified, and thereby vacated office, they ought to be reappointed by the board or the members as the case may be, but probably very few are so reappointed and it is unlikely that CA 2006, s 162 can be relied upon. The section does admittedly provide that the acts of a director shall be valid, notwithstanding any defect that may afterwards be discovered in his appointment or qualification. However, it is possible that CA 2006, s 162 does not apply if there is no attempt at reappointment, though the rule in ***Turquand***'s case may be of assistance. An unqualified person acting as director may be fined for each day that he continues to act.

Division of power – directors and members

The board of directors and meetings of members of a company can between them exercise all of the company's powers. In a private company there is the option of a unanimous written resolution of members. The distribution of those powers as between the members and the directors is, subject to the provisions of the Companies Act, left entirely to the discretion of those who frame the articles of association.

The board's powers can be as broad or as narrow as is desired, but if *Table A*, Reg 70 applies, then this confers on the board all the powers of the company, except those which the

Companies Acts and the articles require to be exercised by the members. Under the new Model Articles, Article 3 confers the same powers for both public and private limited companies (See Appendix 1).

See pp. 618 and 635

The powers reserved to the members by the Companies Acts are mainly the power to alter the memorandum and articles, the power to alter share capital, the power to appoint auditors and remove directors and the power to put the company into liquidation (see Chapter 4). Additionally, *Table A* reserves to the members the power to fix the rights to be attached to a new issue of shares and to effect variations of such rights, the power to appoint directors and the power to declare dividends, though not in excess of the percentage recommended by the board, and to capitalise profits and reserves.

See p. 94

In addition, directors of public and private companies must have the authority of the members by ordinary resolution in general meeting, or written resolution, or of the company's articles, before they exercise a power of allotment of shares or grant rights to subscribe for, or convert securities into, shares. Furthermore, public and private companies must offer new shares to existing members before they are allotted to others. However, a private company may exclude this requirement by its memorandum or articles or by special (or written) resolution and a plc may achieve the disapplication of pre-emption rights by a special resolution of its members.

Concurrent powers

Certain powers, even though given to the directors, will be regarded as concurrent and exercisable by the members unless the articles make it clear that the power is exclusive to the directors. Thus a power for directors to appoint additional directors and to fill casual vacancies on the board or to fix the remuneration of the managing director will be treated as concurrent powers, unless the articles clearly show that it is to be exclusive to the directors (which *Table A* does not) and so resolutions passed by the members in respect of such matters will prevail over the directors' own decision. Although the directors have power to sue in the company's name, there is also a concurrent power in the members so that if the board decides not to sue in a particular case the members may by ordinary resolution resolve that the company shall sue.

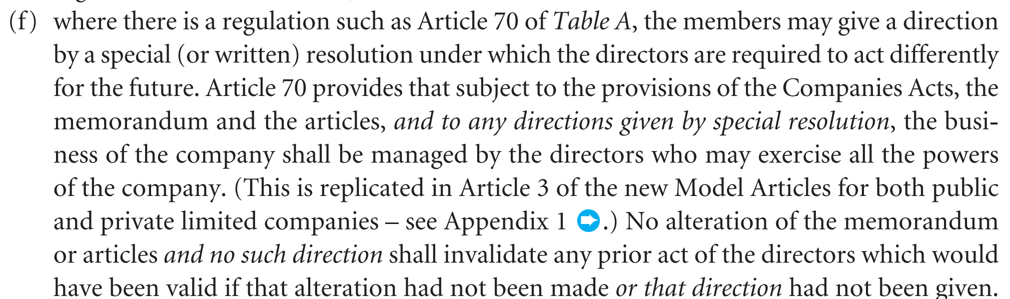
Control of the company's business

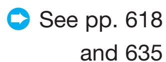
If the members are dissatisfied with the way in which the directors are running the company's business, there are the following ways in which the members can deal with the situation:

(a) by overriding decisions of the board by ordinary (or written) resolution where the power is concurrent. Thus if the directors have refused to bring a claim to court on behalf of the company the members may initiate it by ordinary (or written) resolution; or
(b) by altering the memorandum by special (or written) resolution to take away the company's capacity to continue the activity concerned; or
(c) by altering the company's articles by a special (or written) resolution so as to cut down the directors' powers; or
(d) by refusing to re-elect directors of whose actions they disapprove. The procedure would involve replacing the directors by others with different policies and this would require an ordinary (or written) resolution; or

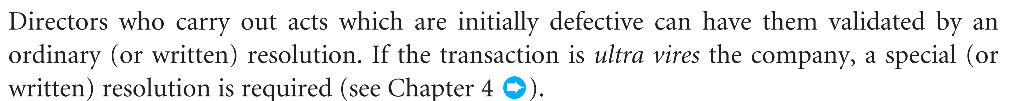
(e) by recourse to the provisions of CA 2006, s 169, which provides that a company may by *ordinary resolution* remove a director before the expiration of his period of office, notwithstanding anything in the articles or in any agreement between the company and him. Such a resolution requires *special notice* of 28 days to be given to the company of the intention to propose it. The section does not deprive a director so removed of any claim he may have for damages or compensation payable to him as a result of the termination of his appointment. The section would be satisfied by a majority of one, but a small minority would be unlikely to succeed in carrying such a resolution, and removal may be impossible if the directors have weighted voting rights on the resolution to remove them (***Bushell* v *Faith***, 1969). Company legislation does not allow the use of a written resolution by private companies for removal of directors.

In addition, ***Pedley* v *Inland Waterways***, 1977 decides that a minority wishing to remove a director must be of sufficient size to comply with CA 2006, ss 314 and 315 (if the directors are to be compelled to put a resolution on the agenda for removal at an AGM), or CA 2006, s 303 (if the directors are to be required to call an extraordinary general meeting to consider the removal);


(f) where there is a regulation such as Article 70 of *Table A*, the members may give a direction by a special (or written) resolution under which the directors are required to act differently for the future. Article 70 provides that subject to the provisions of the Companies Acts, the memorandum and the articles, *and to any directions given by special resolution*, the business of the company shall be managed by the directors who may exercise all the powers of the company. (This is replicated in Article 3 of the new Model Articles for both public and private limited companies – see Appendix 1.) No alteration of the memorandum or articles *and no such direction* shall invalidate any prior act of the directors which would have been valid if that alteration had not been made *or that direction* had not been given.


See pp. 618 and 635

Directors' irregular acts – validation


Directors who carry out acts which are initially defective can have them validated by an ordinary (or written) resolution. If the transaction is *ultra vires* the company, a special (or written) resolution is required (see Chapter 4).

See p. 94

Grant* v *United Kingdom Switchback Railways Co (1888) 40 Ch D 135

The articles of association of Thompson's Patent Gravity Switchback Railways Co (the second defendant) disqualified any director from voting at a board meeting in regard to any contract in which he was interested. The directors of Thompson's agreed to sell the company's undertaking to the United Kingdom Co (the first defendant) despite the fact that they were also the promoters of the purchasing company. An action was brought by a shareholder in Thompson's for an injunction to restrain Thompson's from carrying into effect the contract of sale on the grounds that they had no authority to enter into it since the articles prohibited a director from voting upon a contract in which he was interested, and here all the directors but one were interested. However, it appeared that a general meeting of the shareholders of Thompson's had been properly held and that they had passed an ordinary resolution approving and adopting the agreement and authorising the directors to carry it into effect.

Held – by the Court of Appeal – that the contract was valid and an injunction was refused.

The directors cannot cure acts which are in breach of their fiduciary duty to the company by obtaining an ordinary resolution of the members in general meeting if they control the voting at general meetings (***Cook* v *Deeks***, 1916, see Chapter 15) or possibly control general meetings in fact, even though they do not have a majority of voting shares (***Prudential Assurance* v *Newman***, 1980, see Chapter 14).

See p. 289

See p. 276

A unanimous written resolution would presumably cure such acts in the sense that there would be no member wishing to object. However, in a situation of insolvency the creditors, through an insolvency practitioner, may wish to contest the validity of a written resolution as a cure for the directors' breach of duty.

Delegation of powers by the directors

The well-known maxim of the law of agency – '*delegatus non potest delegare*' (a delegate cannot delegate) – applies to directors, so that they cannot delegate their functions and powers to others without the permission of the members or the articles. Articles do usually allow delegation of powers to a committee of the board (as per *Table A* and the new Model Articles), though such delegation is revocable even if made for a fixed period of time (***Manton* v *Brighton Corporation*** [1951] 2 All ER 101). *Table A* also allows delegation to any managing director or any director holding any other executive office of such of the directors' powers as they consider desirable to be exercised by him.

In addition, *Table A* also allows the board to employ agents and professional persons to carry out any functions which the board may itself carry out. In many respects this is covered by Article 5 of the new Model Articles for public and private companies – see Appendix 2).

See p. 664

Board unable or unwilling to act

This situation may arise in the following circumstances:

(a) Where the act is beyond the powers of the board

Authority for the transaction must be sought from the members in general meeting and the authorisation may be given by ordinary (or written) resolution.

The members may authorise directors to do an act which is outside the directors' own powers, but within the company's power, by passing an ordinary (or written) resolution either before or after the directors' act (*per* Bowen LJ in ***Grant* v *United Kingdom Switchback Railways Co***, 1888, see above). In such a situation the members can, of course, revoke or vary the authority by ordinary (or written) resolution at any time. It is only necessary to amend the articles if the members wish to add the particular power to the powers of the board.

(b) Lack of quorum at board meetings

Directors may be unable to exercise the powers given to them by the articles because they have become so few in number that they cannot constitute a quorum, or because so many of them are, in a legal sense, interested in the transaction in question and are consequently disabled from voting by the articles, that a quorum of competent directors cannot be found.

As regards quorum, *Table A* empowers the remaining directors to fill vacancies so as to make up a quorum (this is replicated in Article 11 of the new Model Articles). If there are no directors at all, or if the remaining directors are unwilling to fill the vacancies, the members may exercise their powers until a board is properly constituted.

When a quorum of competent directors (i.e. directors who are not interested in the transaction) cannot be found, the board's powers temporarily revert to the members who may then authorise the remaining directors to act either in advance of their acting or by ratification afterwards.

(c) The proper purpose rule

If directors are unable to exercise their powers in a lawful manner because to do so would be a breach of their duty to exercise those powers for the purpose for which they were given, i.e. for the benefit of the company (alternatively expressed as the proper purpose rule), the members may by ordinary (or written) resolution ratify what the directors have in fact done (***Bamford*** v ***Bamford*** [1969] 2 WLR 1107), and it would seem that they may also authorise the directors in advance to do the act in question (***Bamford*** v ***Bamford***, 1969, *per* Russell LJ). It appears from cases such as ***North-West Transportation Co Ltd*** v ***Beatty*** (1887) 12 App Cas 589 that the directors are not under any legal duty to abstain from voting in order to achieve ratification or authorisation.

If there is no such ratification or authorisation by the members and the act of the board contravenes the proper purpose rule, it is invalid.

It is important to note that directors may fall foul of the proper purpose rule even when they are exercising a power for the benefit of the company.

Galloway v ***Hallé Concerts Society*** [1915] 2 Ch 233

The defendant society was registered in 1899 as a company limited by guarantee without the addition of the word limited to its name, as being formed for the promotion of art and with the intention that its profits should be applied in promoting its objects without payment of dividends to its members. Its object was the promotion of concerts known as the 'Hallé Concerts' in Manchester. Under the provisions of the memorandum each member was to contribute on a winding-up such amount as should be required to pay the company's liabilities, not exceeding £5 per member. Article 7 of the company's articles provided that each member should be liable to contribute, and should pay on demand to the society, any sum or sums not exceeding in the aggregate £100 (called the contribution) as and when called. The claimants, Galloway and Holt, were members of the society but disagreed with certain of its policies. They objected to calls being made upon them in respect of the contribution and had not paid previous calls made, although one such call had been recovered by the society in a county court. On 31 March 1915, the committee of the society resolved to call up the whole of the contributions of Galloway and Holt, but no corresponding call was made on the other members. The claimants sought a declaration that the resolution was invalid and the call unenforceable.

Held – by Sargant J – there is an implied condition of equality between shareholders in a company, and it is generally improper for directors to make a call on part of a class of members without making a similar call on all the members of the class. Further, even if the articles give power to discriminate, the fact that the members are dilatory in paying previous calls would not be sufficient reason for enforcing a discriminatory power in the articles.

Comment

(i) It should be noted that the act of making the call was not in any sense beyond the powers of the directors and was even in a sense exercised for the benefit of the company because, having called up the whole of the share capital of Galloway and Holt, they could have been sued once and for all for its recovery if they had not paid it. However, in spite of the fact that the directors had the

power and were probably motivated in the company's benefit, the power was not exercised for the proper purpose and was struck down for this reason.

(ii) More commonly perhaps the proper purpose rule is used where the directors have used their powers for a purpose which does not benefit the company as in the *Rolled Steel* case (see Chapter 6).

See p. 129

(d) Dissension between members of the board

If directors are unable to act because of a dissension between themselves, the members may exercise the powers of the board until a board is elected which can act. However, the dissension must result in deadlock before the members can intervene. It must, for example, be shown either that so many directors persistently absent themselves from board meetings that a quorum cannot be found, or that the dissenting parties have equal voting power at board meetings and resolutions cannot therefore be passed.

(e) Powers of the court

Where the board is unable to act because the directors are so few in number that a quorum cannot be found, or because of deadlock between the directors, the court may appoint a receiver of the company's business to manage it until a competent board can be constituted. Furthermore, if the power of the board which the members wish to have exercised is one which the court can conveniently exercise itself, the court may exercise the power and give any decision which the board could have given (see ***Re Copal Varnish Co Ltd*** [1917] 2 Ch 349 where the court exercised a power to approve the transfer of shares).

The chairman and executive directors

Consideration will now be given to the special position of the chairman and executive directors.

Chairman

Companies are not required by the law to appoint a chairman and, given the fact that the requirement for a private company to hold an Annual General Meeting (AGM) has been abolished by the Companies Act 2006, there would appear to be little need for a chairman to control proceedings (see further Chapter 19).

See p. 379

However, a chairman is appointed. *Table A* gives the board specific power to appoint a chairman of the board and states that the chairman of the board shall preside as chairman of general meetings, though provisions are made in each case for the chairman's absence and in practice a deputy chairman is often appointed. This approach has been repeated in Article 12 of the new Model Articles for private and public limited companies – see Appendix 1).

See p. 618

The chairman is normally regarded as a non-executive director even though he may be closely involved with the affairs of the company. Where he is in receipt of fees and is not employed at a salary but is concerned solely with running the board and representing the company as a figurehead, he is properly described as a non-executive director. However, he may not qualify as an 'independent' director where such independence may be required. There is in recent times a tendency to refer to non-executive directors as 'outside directors' and in many cases the chairman would not truly fit that description.