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.

Managing director

It is usual to make one or more of the full-time directors managing director (or directors) and to give him powers relating to the management of the business which are exercisable without reference to the full board.

Before such an appointment can be made, the articles must so provide. *Table A* provides for the appointment of a member of the board to the office of managing director, and further states that he shall not be subject to retirement by rotation, but that he shall cease to be a managing director if for any other reason he ceases to be a director, e.g. where he is removed or becomes disqualified (***Southern Foundries* v *Shirlaw***, 1940, see Chapter 4). Thus, under *Table A*, a managing director must also be a director, as must the chairman of the board. *Table A* allows the directors to fix the managing director's remuneration and in Article 72 allows the board to delegate any of their powers to him, subject to a right to review these powers from time to time. Where the articles are in the form of *Table A*, then the managing director is not wholly independent of the board, as he will be if his powers are outlined expressly in the articles. In practice, *Table A* gives the board flexibility to give a managing director a specific portfolio of powers and review the situation from time to time.

See p. 94

The fact that Article 72 allows the board to delegate any of its powers to the managing director has given the holder of such office wide ostensible or usual authority as an agent on the assumption perhaps by the outsider that the relevant powers have been delegated. This means that the managing director may bind the company, at least in business contracts, even where he exceeds actual authority. However, the case of ***Mitchell & Hobbs (UK) Ltd* v *Mill*** [1996] 2 BCLC 102 decides that such ostensible or usual authority does not extend to instructing solicitors to commence an action on behalf of the company without the consent of the board.

It is worth noting that the new Model Articles for public and private limited companies do not make specific provision for the role of managing directors. However, it is arguable that the broad wording of Article 5, coupled with Article 19 for private companies or Article 23 for public companies, may permit companies to pursue a similar course of management of the company's affairs as that set down by Article 72 of *Table A* (see Appendix 1).

See p. 618

Appointment of directors to executive posts

Under *Table A* the directors may appoint one or more of their number to any executive office, e.g. finance director, under the company and may enter into an agreement or arrangement with any director for his employment by the company or for the provision by him of any services outside the scope of the ordinary duties of a director. Any such appointment, agreement or arrangement may be made on such terms as the directors determine, and they may remunerate any such director for his services as they think fit. Any appointment of a director to an executive office will terminate if he ceases to be a director but without prejudice to any claim for damages for breach of the contract of service between the director and the company. A director holding executive office is not subject to retirement by rotation.

Furthermore, the board may delegate to any director holding executive office such of their powers as they consider desirable to be exercised by him. Any such delegation may be subject to any conditions the directors may impose and either collaterally with, or to the exclusion of, their own powers may be revoked or altered. This extension of the power of delegation to directors holding executive office may well have increased their ostensible or usual authority (see further Chapter 6).

See p. 129

Publicity in connection with directors

Certain provisions of the Companies Act 2006 are designed to make available details regarding the executive of the company which may be of assistance to members and persons dealing with it. The following should be noted:

(a) The register of director

The company must keep at its registered office a register of directors and secretaries and must notify the Registrar of any changes within 14 days of the happening thereof (CA 2006, s 162).

The contents of the register as to directors are set forth in s 163 of the CA 2006 and include:

(i) present name and nationality;
(ii) any former name;
(iii) a service address which may be stated to be 'The company's registered office';
(iv) business occupation (if any);
(v) date of birth;
(vi) the country or state (or part of the United Kingdom) in which he is usually resident.

The register must be open to inspection by members free and to other persons on payment of a fee. Shadow directors are included in the above provisions.

CA 2006, s 165 covers the present status with respect to the use of directors' residential address which is a noted change from the CA 1985 position.

A service address must have a physical presence which excludes a Post Office box number but does not preclude the use of the company's registered office as the service address.

(b) Trade catalogues and circulars

Every company registered on or after 23 November 1916 must state on all letter headings, on which the company's name appears, the names of all their directors *or none of them*. This does not apply to a name quoted in the text of a letter or to the signatory. Companies incorporated before 23 November 1916 do not come within these provisions and may, if they wish, show some and not all of the names of the directors.

(c) Register of directors' interests in shares and debentures

The provisions relating to this register were considered previously.

(d) Inspection of directors' service contracts

Every company must keep a copy of each of its directors' service contracts at its registered office or at its principal place of business in England, Scotland or Wales (depending on where it is registered), or the place where its register of members is kept.

If a director has no written contract, a written memorandum of the terms on which he serves must be kept instead. This means, in practice, that directors are given written contracts if they are employed (or executive) directors. There is little point in employing a director under an oral contract if it is necessary, as it is, to draft a written memorandum of its terms.

The copy or memorandum must show all changes in the terms of the contract made since it was entered into.

The company must notify the Registrar of Companies where the copies or memoranda of its directors' service contracts are kept unless they are kept at its registered office.

There is no need for a copy or memorandum to be kept if the contract has less than 12 months to run, or if it can be brought to an end by the company within that time without payment of compensation.

Members of the company may inspect such copies or memoranda without charge. If inspection is refused, the person wishing to inspect the contract may apply to the court which will make an order compelling inspection.

The intention of the above provisions is to assist members who wish to remove a director under s 168 of the CA 2006. This publicity enables members to see what the cost of removal will be.

The CA 2006 also provides that:

(i) A director's service contract with a subsidiary (or a memorandum of it if it is not in writing) must also be open for inspection.

(ii) The *contract* of a director who works with the company or a subsidiary wholly or mainly outside the United Kingdom need not be available for inspection. In such a case there need only be available for inspection a memorandum containing:
   (a) the director's name;
   (b) the name and place of incorporation of the subsidiary (if any) with which the contract is made; and
   (c) the provisions in the contract as to its duration.

(iii) Shadow directors, i.e. persons other than professional advisers, in accordance with whose instructions directors of a company are accustomed to act, are to be treated as directors for the purposes of this section.

The secretary

The CA 2006 sets forth a statutory basis for a company secretary. Part 12 of the CA 2006 deals with company secretaries and draws a distinction between the role of the secretary in the private company and the public company. There are common provisions that are applicable to both the private and public company secretary. The status of the company secretary has been greatly diminished under the CA 2006 for the private company.

A secretary owes fiduciary duties to the company which are similar to those of a director. Thus he must not make secret profits or take secret benefits from his office and if this happens he can be required to account for them to the company as a constructive trustee (***Re Morvah Consols Tin Mining Co, McKay's Case*** (1875) 2 Ch D 1).

The criminal law regards him as an organ of the company and a higher managerial agent whose fraudulent conduct can be imputed to the company in order to make it liable along with him for crimes arising out of fraud and the falsification of documents and returns.

Under CA 2006, s 270, a private company need not have a company secretary (though the new Model Articles do, nevertheless, make several references to the post of 'secretary'). Under CA 2006, s 271, a public company must have a secretary. CA 2006, s 273 sets forth the

qualifications of the secretaries of public companies. A public company must keep a register of secretaries. There is no requirement that a company secretary be a natural person.

Appointment

It is usual for the secretary to be appointed by the directors who may fix his term of office and the conditions upon which he is to hold office. *Table A* confers such a power upon the board together with the power to remove him. The secretary is an employee of the company. He is regarded as such for the purpose of preferential payments in liquidation (Insolvency Act 1986, s 175 and Sch 6). The secretary is also within the CA 2006, s 1173's definition of 'officer' of a company.

Authority

The civil courts now recognise that the modern secretary is an important official who enjoys the power to contract on behalf of the company, even without authority. This is, however, confined to contracts in the administrative operations of the company, including the employment of office staff and the management of the office together with the hiring of transport (***Panorama Developments (Guildford) Ltd*** **v** ***Fidelis Furnishing Fabrics Ltd***, 1971, see See p. 129 Chapter 6). However, his authority is not unlimited. He cannot without authority borrow money on behalf of the company (***Re Cleadon Trust Ltd*** [1939] Ch 286). He cannot without authority commence litigation on the company's behalf (***Daimler Co Ltd*** **v** ***Continental Tyre and Rubber Co Ltd*** [1916] 2 AC 307). He cannot summon a general meeting himself (***Re State of Wyoming Syndicate*** [1901] 2 Ch 431) nor register a transfer without the board's approval (***Chida Mines Ltd*** **v** ***Anderson*** (1905) 22 TLR 27) nor may he without approval strike a name off the register (***Re Indo China Steam Navigation Co*** [1917] 2 Ch 100). These are powers which are vested in the directors.

Certain duties are directly imposed upon the secretary by statute. These include the submission of certain statutory declarations, e.g. before commencing business, in order to obtain See p. 2 a CA 2006, s 761 certificate (see Chapter 1), and the annual return; and also as an officer, the verification of certain statements, e.g. under s 131 of the Insolvency Act 1986 in relation to the statement of affairs to be submitted to the Official Receiver in a compulsory winding-up; under ss 22 and 47 of the same Act in relation to the statement of affairs to be submitted See p. 554 to an administrator and administrative receiver respectively (see further Chapter 25).

Qualifications of the secretary of a public company

CA 2006, s 273 updates the requirements of a public company secretary. It is the duty of the directors of a *public company* to take reasonable steps to secure that the company secretary or each joint secretary, where appropriate, has the requisite knowledge and experience and comes within one of the following categories:

(a) He has been the secretary of a public company for at least three out of the five years immediately preceding his appointment as secretary.
(b) He is a member of either the Institute of Chartered Accountants in England and Wales, or the Institute of Chartered Accountants of Scotland, or the Association of

Chartered Certified Accountants, or the Institute of Chartered Accountants of Ireland, or the Institute of Chartered Secretaries and Administrators, or the Chartered Institute of Management Accountants, or the Chartered Institute of Public Finance and Accountancy.

(c) In addition, he will be suitable if he is a barrister, or an advocate, or a solicitor who qualified in the UK. Furthermore, a person who 'by virtue of his holding or having held any other position or his being a member of any other body, appears to the directors to be capable of discharging' the duties and functions of a secretary is also acceptable.

Thus, the directors of a public company may appoint a person who does not hold any of the specified formal qualifications.

It would seem that the duty of the board in regard to the secretary's qualification is a continuing one. Thus, if the secretary, being a member of one of the professional bodies listed, was struck off, then the directors would probably have to reconsider his position.

The word 'person' in the above provisions includes a company.

Removal

Table A allows the directors to remove the secretary before his term of office has expired but, depending on the circumstances, the secretary will retain a right to sue for damages for breach of his contract, provided that this was a separate contract and not merely contained in the articles (see further Chapter 4).

See p. 94

Assistant and deputy secretary: joint secretaries

Statutory recognition of these offices is given by CA 2006, s 274, the relevant part of which provides 'Anything required or authorised to be done by or to the secretary may, if the office is vacant or there is for any other reason no secretary capable of acting, be done by or to any assistant or deputy secretary'.

Special articles may delegate the power to appoint assistant or deputy secretaries to the secretary. Otherwise the appointment and removal can be effected by the board in the same way as for the secretary but there is no need to notify appointment, removal or resignation to Companies House. Companies which have joint secretaries are required to give details of them in the register of directors and secretaries and notify Companies House of any appointments and changes in particulars within 14 days of the occurrence.

The company accountant

The accountant is an officer of the company. He owes a contractual duty to the company to prepare the accounts properly and like the auditor may, in some cases, owe a duty of care to third persons who act in reliance on his skill in their preparation. Seemingly, the accountant can acknowledge a debt on behalf of the company (***Jones* v *Bellgrove Properties*** [1949] 2 All ER 198).

Essay questions

1 The articles of association of a public limited company provide as follows:

A101 'the directors shall appoint a person to hold the office of company secretary at their discretion but subject to the provison that any such appointment must be made for a period of at least five years from the date of appointment'.

(a) Does the inclusion of A101 in the articles really mean that the directors can appoint anyone to the office of secretary?

(b) What could a secretary do if he were appointed and then removed from his office before the expiration of the five-year term? (*The Chartered Institute of Management Accountants*)

2 'If powers of management are vested in the directors, they and they alone can exercise these powers . . .' *per* Greer LJ in ***Shaw* & *Sons (Salford) Ltd* v *Shaw*** (1935).

Discuss the above statement in relation to the powers of the shareholders in general meeting. (*The Institute of Chartered Accountants in England and Wales*)

3 Write notes on TWO of the following:

(a) the name clause of the memorandum;

(b) the transfer of shares;

(c) variation of class rights;

(d) promoters. (*The Institute of Chartered Secretaries and Administrators*)

4 Name FOUR ways in which the facility to purchase its own shares may be useful to a company and briefly outline the safeguards provided by the legislature when using this facility. (*Kingston University*)

5 Detail the contents of the memorandum of association of a public limited company and state the importance of having a registered office. (*The Institute of Company Accountants*)

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 Jones is a director of Shannon Ltd which is a subsidiary of a public company. At what age will Jones have to vacate office and seek re-election at the next annual general meeting?

A No age limit **B** 75 **C** 70 **D** 65

2 Fred is a director of Bray Ltd and holds 500 shares in that company. His wife is also a director and holds 400 shares. He has two children – John, aged 19 and Jane, aged 15 – who hold 50 shares each. What is the maximum number of shares which Fred must disclose as his shareholding?

A 1,000 shares **B** 550 shares **C** 950 shares **D** 500 shares

3 The register of directors and secretaries of a company must be available to inspection by:

A Members without charge and other persons on payment of a fee.
B Members only.
C Members and other persons without charge.
D Members and other persons on payment of a charge.

4 The register of directors and secretaries contains particulars of directors and secretaries. In the case of a director these must include his:

A Usual residential or confidentiality service address.
B Usual residential and business address.
C Usual business address only.
D Usual residential address only.

5 The managing director of a company has usual or ostensible authority to bind the company by transactions he enters into on its behalf. Which of the following statements represents the limit of this authority?

A All commercial matters which relate to the running of the business.
B All activities of the company whether commercial or not.
C Such commercial activities as the company may direct in general meeting.
D Such commercial activities as the board may delegate to him.

6 Madonna was employed as a hair stylist by Manecut Ltd. She entered into an agreement not to compete with Manecut for six months after leaving the company's employment. That agreement is a reasonable restraint of trade. Madonna left and formed a company called Topcut Ltd and began to trade in hair styling 100 yards away from the Manecut branch at which she had worked. Will Manecut Ltd be able to get an injunction to prevent Madonna and Topcut Ltd from trading?

A No, since Topcut has a separate legal entity.
B No, since a company is not liable for the acts of its shareholders.
C Yes, because the Topcut company was formed as a device to cover up Madonna's trading.
D Yes, because Topcut is engaged in fraudulent trading.

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

Suggested further reading

Keay, 'Company Directors Behaving Poorly: Disciplinary Options for Shareholders', [2007] JBL 656

McGlynn, 'The Constitution of the Company: *Mandatory Statutory Provisions* v *Private Agreements*', (1994) 15 Co Law 301

Williams, 'Disqualifying Directors: A Remedy Worse Than the Desease', (2007) 7 Journal of Corporate Law Studies, 213

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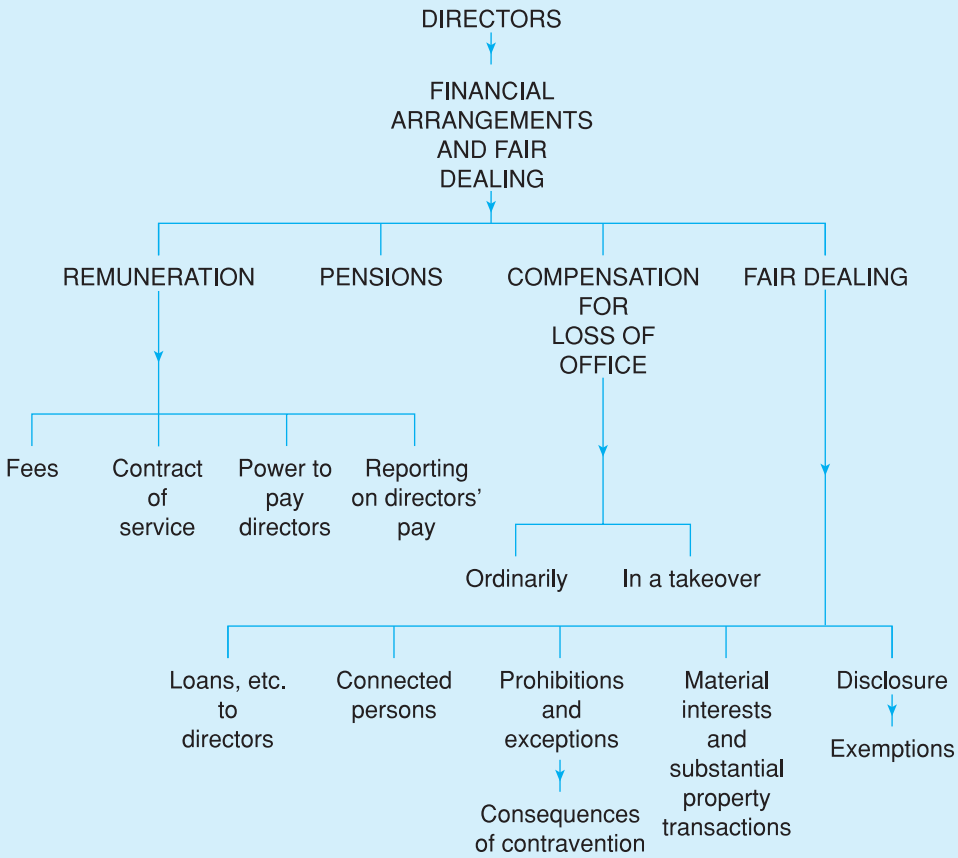
18 Financial arrangements with, and fair dealing by, directors



In this chapter we shall first consider those provisions of company law which relate to payments to directors, e.g. by way of remuneration and compensation for loss of office. Consideration will then be given to requirements relating to transactions with directors and persons connected with them which provide a legal safeguard against directors abusing their position in the company.

Remuneration

Fees

If a director is to receive remuneration by way of fees, the articles must expressly provide for it, and in the absence of such provision, no remuneration is payable even if the members resolve in general meeting that it shall be (***Re George Newman & Co*** [1895] 1 Ch 674). Their proper procedure is to alter the articles or give the director concerned a contract so that he no longer relies on fees.

The Model Articles for Private Companies Limited by Shares, the Model Articles for Private Companies Limited by Guarantee and the Model Articles for Public Companies set forth the regulations concerning directors' remuneration in their respective Article 19 for the two kinds of private companies and Article 23 for public companies. Directors may undertake any services for the company that the directors decide. Directors are entitled to such remuneration as the directors determine: (a) for their services to the company as directors, and (b) for any other service which they undertake for the company. A director's remuneration may (a) take any form, and (b) include any arrangements in connection with the payment of a pension, allowance or gratuity, or any death, sickness or disability benefits, to or in respect of that director. Unless the directors decide otherwise, directors' remuneration accrues from day to day. Unless the directors decide otherwise, directors are not accountable to the company for any remuneration which they receive as directors or other officers or employees of the company's subsidiaries or of any other body corporate in which the company is interested.

Article 20 of the Model Articles for private companies and Article 24 for public companies governs directors' expenses in that the company may pay any reasonable expenses which the directors properly incur in connection with their attendance at: (a) meetings of directors or committees of directors, (b) general meetings, or (c) separate meetings of the holders of any class of shares or of debentures of the company, or otherwise in connection with the exercise of their powers and the discharge of their responsibilities in relation to the company.

Table A provides that the remuneration of the directors shall from time to time be determined by the company in general meeting. It should be noted that a provision in the articles is not enough; there must also be an authorising resolution by the company in general meeting (***In Re Duomatic Ltd***, 1969, see Chapter 17). A written resolution will suffice. The ability to fix the fees of directors is not within Reg 70 of *Table A* (delegation of powers to board) (see ***Foster* v *Foster*** [1916] 1 Ch 532). However, special articles could allow the directors to fix their own remuneration by a specific provision.

See p. 334

Directors are not entitled to any remuneration unless the articles so provide and if they pay themselves remuneration out of the company's funds they may be compelled to restore it, even though they believed that the payment was permissible (***Brown and Green Ltd* v *Hays*** (1920) 36 TLR 330). The directors cannot evade the rule by appointing themselves to salaried posts within the company. If they do, the appointment is valid but it appears that the

director would not be entitled to the salary applicable to the post (***Kerr* v *Marine Products Ltd*** (1928) 44 TLR 292). *Table A* provides for the payment of directors' expenses of office.

Where there is a provision for remuneration, it is *payable whether profits are earned or not* (***Re Lundy Granite Co*** (1872) 26 LT 673), and in a winding-up the directors rank for their remuneration with ordinary creditors and are not deferred, though they are not preferential creditors, except in respect of a salary which may be payable to them as where they occupy a non-board managerial position, e.g. a company secretary, in addition to membership of the board.

Whether a director who vacates office before completing a year in office is entitled to a proportionate part of his yearly remuneration will depend upon the wording of the articles. Where *Table A* applies (replaced by the new Model Articles in newly incorporated companies), there is no problem since under *Table A* directors' remuneration accrues from day to day so that they are entitled to a proportionate part of yearly remuneration.

If the director works for the company without a contract, he can recover a sum of money for his service under a *quantum meruit* but this remedy is not available where the director has a contract which has used inappropriate words.

Craven-Ellis* v *Canons Ltd [1936] 2 KB 403

The claimant was employed as managing director by the company under a deed which provided for remuneration. The articles provided that directors must have qualification shares, and must obtain these within two months of appointment. The claimant and other directors never obtained the required number of shares so that the deed was invalid. However, the claimant had rendered services, and he now sued on a *quantum meruit* for a reasonable sum by way of remuneration.

Held – by the Court of Appeal – he succeeded on a *quantum meruit*, there being no valid contract.

Re Richmond Gate Property Co Ltd [1964] 3 All ER 936

The company was incorporated on 19 January 1962, and a resolution for a voluntary winding-up was passed on 20 September 1962, a declaration of insolvency being filed. Walker, one of the two joint managing directors, lodged proof of a salary claim which the liquidator rejected. Walker was appointed on terms that he should receive 'such remuneration as the directors may determine', and in fact no remuneration was fixed. He claimed £400 either in contract or on *quantum meruit.*

Held – by Plowman J – the liquidator was right in rejecting the proof. There was no claim under the contract which was only for 'such remuneration as the directors may determine' and none had been so determined. Moreover, the existence of an express contract in regard to remuneration automatically excluded a claim on a *quantum meruit*.

Comment

Although the decision seems harsh and represents the law, in this case there had been an understanding that until the company got on its feet, which it never did, no remuneration should be paid.

Contract of service

Remuneration by way of contract of service is governed by different rules. *Table A* provides that service contracts may be made by the board with individual directors thus ousting the general