Re Blue Arrow plc [1987] BCLC 585

Vinelott J *held*:

> The petitioner claims that the affairs of the company are being conducted in a way unfairly prejudicial to some part of the members – that is herself – in that putting the resolution and the proposed amendments to the articles of association to the members, and if they are passed then removing her from the office of president, would be the culmination of the efforts of Mr Berry to exclude her.
>
> Mr Heslop, on behalf of the petitioner, has put forward three grounds in support of the petition. The first is that, it is said, her right to remain as president is a class right, and he referred me to a decision of Scott J in ***Cumbrian Newspapers Group Ltd*** v ***Cumberland & Westmorland Herald Newspaper & Printing Co Ltd*** [1987] Ch 1; (1986) 2 BCC 99, 227. I can see nothing in that case which supports the proposition that a right conferred on an individual by the articles of a company to remain as president until removed in general meeting, and which is unrelated to any shareholding, can, by any stretch, be described as a class right. A class right is a right attaching, in some way, to a category of the shares of the company. So far as that decision is material at all, it seems to me plainly against the submission advanced by Mr Heslop. The right claimed, to remain as president, falls, to my mind, quite clearly within the second category distinguished by Scott J and explained at p 99, 236 of the report. The article did not confer any right on the petitioner as a member of the company. She would in fact retain the right, even if she sold all her shares; and the office is not, in fact, an exclusive one.
>
> The second ground is that if the article is looked at in the light of the whole of the history, it becomes clear, it is said, that the petitioner has a legitimate expectation that she will remain president, unless and until she is removed by the machinery provided – that is by resolution of the members – and that an alteration to the articles which gives the power to the directors transgresses that legitimate expectation.
>
> As was pointed out by Hoffmann J in ***Re a Company No 00477 of 1986*** (1986) 2 BCC 99, 171, the interests of a member are not limited to his strict legal rights under the constitution of the company. There are wider equitable considerations which the court must bear in mind in considering whether a case falls within s 459, in particular in deciding what are the legitimate expectations of a member. If I may say so, I respectfully accept that approach, but it is to my mind impossible, on the face of the allegations in the petition, to apply it here. Of course, the petitioner had a legitimate expectation that the affairs of the company would be properly conducted within the framework of its constitution. I wholly fail to understand how it can be said that the petitioner had a legitimate expectation that the articles would not be altered by special resolution in a way which enabled her office to be terminated by some different machinery. No doubt there are cases where a legitimate expectation may be inferred from arrangements outside the ambit of the formal constitution of the company, but it must be borne in mind that this is a public company, a listed company, and a large one, and that the constitution was adopted at the time when the company was first floated on the USM. Outside investors were entitled to assume that the whole of the constitution was contained in the articles, read, of course, together with the Companies Acts. There is in those circumstances no room for any legitimate expectation founded on some agreement or arrangement between the directors and kept up their sleeves and not disclosed to those placing the shares with the public through the USM.
>
> As regards those first two grounds, therefore, I think that the petition, on its face, is so hopeless that the only right course would be to strike it out.

The Jenkins Committee and unfair prejudice

Section 994 of the Companies Act 2006 (previously s 459, CA 1985) results from recommendations made by the Jenkins Committee which advocated the repeal of s 210 of the 1948 Act and the substitution of new statutory arrangements. It is of value, therefore, to consider what sort of conduct the Jenkins Committee thought would be 'unfairly prejudicial'. It mentioned the following:

(a) directors appointing themselves to paid posts within the company at excessive rates of remuneration, thus depriving the members of a dividend or an adequate dividend – and indeed it was exactly this sort of scenario which caused the court to find unfair prejudice to a non-director member in ***Re Sam Weller*** [1989] 3 WLR 923;
(b) directors refusing to register the personal representatives of a deceased member so that, in the absence of a specific provision in the articles, they cannot vote, as part of a scheme to make the personal representatives sell the shares to the directors at an inadequate price;
(c) the issue of shares to directors and others on advantageous terms;
(d) failure of directors to declare dividends on non-cumulative preference shares held by a minority.

Obviously, some matters affect all the shareholders and not merely a minority, e.g. non-payment of dividends. However, the provisions as reworded by the Companies Act 2006 clearly now include acts affecting the members *generally*.

It is not clear, however, whether failure to pay a dividend would amount to unfair prejudicial conduct in every case. Much will depend upon the circumstances. It could be argued, for example, that ploughing back profits into building up the assets of the company was not in the circumstances of the case a breach of duty by the directors.

Illustrative case law

In ***Re a Company (No 004475 of 1982)*** [1983] 2 WLR 381 Lord Grantchester QC held that no prejudice arose under what is now s 994 of the Companies Act 2006 simply because the directors of a company refuse to exercise their power to buy the company's shares; nor because they fail to put into effect a scheme which would have entitled the petitioners to sell their shares at a higher price than they might have been able to otherwise; nor because they proposed to dissipate the company's liquid resources by investing them in a partly owned subsidiary. Lord Grantchester also said that it would usually be necessary for a member claiming unfair prejudice to show that his shares had been seriously diminished in value. However, in ***Re R A Noble (Clothing) Ltd*** [1983] BCLC 273, Nourse J said that the jurisdiction under s 994 was not limited to such a case and that diminution in the value of shares was not essential. In ***Re Garage Door Associates*** [1984] 1 All ER 434, Mervyn Davies J held that a member could present a petition for a winding-up on the just and equitable ground *and* petition for the purchase of his shares under ss 994–996. Such a procedure is not an abuse of the process of the court. (However, the current Practice Direction indicates that the two claims should not be made as a matter of course but only where there is a chance that one or the other will fail.)

With respect to the valuation to be placed on an individual's shareholding, a member cannot force other shareholders to buy him out at the proportionate share of the company's value which his investment represents (***Re Phoenix Office Supplies Ltd*** [2003] BCC 11). The issue of valuation was explored further in ***Sethi*** v ***Patel*** [2010] EWHC 1830 (Ch). The court ordered one of two shareholders in a company to buy the shares of the other where unfair prejudice was conceded for the purposes of a petition under s 994. The court also gave directions as to the basis on which the shares should be valued.

Re Phoenix Office Supplies Ltd [2003] BCC 11

This was an appeal against a decision of Blackburne J that by treating a director of a quasi-partnership company as if he had resigned as a director and refusing him access to certain financial information to enable him to ascertain whether an offer by the majority to buy his shares was fair, the majority's actions were unfairly prejudicial to his interests as a member under s 459 of the Companies Act 1985 and the majority was ordered to purchase his shares under s 461 valued as at the date of the court order at full value with no discount for the minority holding.

Held – allowing the appeal – (1) The unfair prejudice for which ss 459 and 461 provided a remedy was that suffered in the capacity of a company member but a partner in a quasi-partnership company who had not been dismissed or excluded could not require his partners to purchase his shares at a fair value simply because he had lost trust and confidence in them (dicta of Lord Hoffmann in ***O'Neill* v *Phillips*** [1999] BCC 600 applied).

(2) In ruling that a consequence of the quasi-partnership was that L was entitled to the full undiscounted value of his shares, the judge appeared to have proceeded on the basis that it had been P and O who had taken the initiative to sever the association rather than, as was the case, L. It was true that P and O refused to recognise L as a director after 14 September 2000, or to give him access to certain company information, but that was only after he had made plain that he wanted to sever all relationship with the company and them and to take the value of his shareholding with him. Accordingly it did not follow from the fact the company was a quasi-partnership that L was entitled to insist on leaving with an undiscounted value of his minority holding, and the judge was wrong so to find and, in large part on the basis of such finding, to conclude that P and O's denial of such entitlement amounted to unfair prejudice entitling L to relief.

(3) To the extent that L might have been unfairly prejudiced by lack of information as to the valuation of his interest in the company, his remedy under s 461(2)(b) would have been for the wrong done in failing to furnish that information, not for the refusal to acknowledge his claim for a 'put-option' for his shares.

(4) It was common ground that s 459 would afford protection to a member of a quasi-partnership company who had been unfairly excluded from participating in the management of the company. But that did not happen in the instant case; L made crystal clear in his resignation letter that he wanted to sever all connection with the company and start a new life, with a new job, elsewhere. In these circumstances it was impossible to place the instant case in that category of cases which typically qualified for relief under s 459, where a member who wished to participate in the management of a company was unfairly prevented from doing so.

(5) The issue was whether s 459 extended to affording a member of a quasi-partnership company who wished, for entirely his own reasons, to sever his connection with the company (and who de facto had done so) an opportunity to 'put' his shareholding onto the other members as its full undiscounted value when he had no contractual right to do so. There was no basis for concluding that s 459 could have such an effect. Further, L could not assert his rights as a director, by complaining of a failure on the part of his co-directors to supply him with financial information to which he was entitled as a director, in circumstances where it was plain that he had no intention whatever of discharging any of his duties as a director. The plain inference was that L was using his position as a director simply as an aid to achieving as high a price as possible for his shares. Even if unfair prejudice had been established by reason of the withholding of financial information to which L was entitled as a director, the remedy which the judge granted – a buy-out of his shares at their full, undiscounted, value – was wholly disproportionate to any possible prejudice suffered.

In ***Re Bird Precision Bellows*** [1984] 2 WLR 869 and again in ***Re London School of Electronics*** [1985] 3 WLR 474, Nourse J said that the removal of a member from the board was unfairly prejudicial conduct within what is now s 994, CA 2006. He made an order for the purchase of the shares of the petitioners in both cases by the majority shareholders and decided that in valuing the shares there should be no discount in the price because the holdings were minority holdings, unless the minority were in some way to blame for the situation giving rise to the alleged unfair prejudice. Indeed, Nourse J's approach for the valuation of shares has become a popular view.

Re Bird Precision Bellows [1984] 2 WLR 869

Nourse J:

> The question in this case is whether the price of shares in a small private company which were ordered to be purchased [. . .] should be fixed pro rata according to the value of the shares as a whole or should be discounted on the ground that they constitute a minority in number [. . .] Although both sections 210 and 75 are silent on the point, it is axiomatic that a price fixed by the court must be fair. While that which is fair may often be generally predicated in regard to matters of common occurrence, it can never be conclusively judged in regard to a particular case until the facts are known. The general observations which I will presently attempt in relation to a valuation of shares by the court under section 75 are therefore subject to that important reservation.
>
> Broadly speaking, shares in a small private company are acquired either by allotment on its incorporation or by transfer or devolution at some later date. In the first category it is a matter of common occurrence for a company to be incorporated in order to acquire an existing business or to start a new one, and in either event for it to be a vehicle for the conduct of a business carried on by two or more shareholders which they could, had they wished, have carried on in partnership together. Although it has been pointed out on the high authority to which I will soon refer that the description may be confusing, it is often convenient and it is certainly usual to describe that kind of company as a quasi-partnership. In the second category, irrespective of the nature of the company, it is a matter of common occurrence for a shareholder to acquire shares from another at a price which is discounted because they represent a minority holding. It seems to me that some general observations can usefully be made in regard to each of these examples [. . .]
>
> I would expect that in a majority of cases where purchase orders are made in relation to quasi-partnerships the vendor is unwilling in the sense that the sale has been forced upon him. Usually he will be a minority shareholder whose interests have been unfairly prejudiced by the manner in which the affairs of the company have been conducted by the majority. On the assumption that the unfair prejudice has made it no longer tolerable for him to retain his interest in the company, a sale of his shares will invariably be his only practical way out short of a winding-up. In that kind of case it seems to me that it would not merely not be fair, but most unfair, that he should be bought out on the fictional basis applicable to a free election to sell his shares in accordance with the company's articles of association, or indeed on any other basis which involved a discounted price. In my judgment the correct course would be to fix the price pro rata according to the value of the shares as a whole and without any discount, as being the only fair method of compensating an unwilling vendor of the equivalent of a partnership share [. . .]
>
> Next, I must consider the example from the second category of cases in which, broadly speaking, shares in a small private company are acquired. It is not of direct relevance for present purposes, but I mention it briefly in order finally to refute the suggestion that there is any rule of universal application to questions of this kind. In the case of the shareholder who acquires shares from another at a price which is discounted because they represent a minority it is to my mind self-evident that there cannot be any universal or even a general rule that he should be bought out on a more favourable basis, even in a case where his predecessor has been a quasi-partner in a quasi-partnership [. . .]
>
> In summary, there is in my judgment no rule of universal application. On the other hand, there is a general rule in a case where the company is at the material time a quasi-partnership and the purchase order is made in respect of the shares of a quasi-partner.

The dismissal of a member of a quasi-partnership from the post of director may amount to unfairly prejudicial conduct if it breaches a mutual understanding that the member in question would be a director (***Re Ghyll Beck Driving Range Ltd*** [1993] BCLC 1126; ***Brownlow*** v ***GH Marshall Ltd*** [2000] 2 BCLC 655; ***Shah*** v ***Shah*** [2010] EWHC 313 (Ch)). However, in ***Re R A Noble (Clothing) Ltd***, 1983 (see above), Nourse J decided that a director who had been excluded from management could claim unfair prejudice but not in the particular circumstances of the case because his exclusion was to a large extent due to his own disinterest in the company's affairs so that the other members of the board felt that they had to manage without him. Similarly, if such an alleged breach of mutual understanding (legitimate expectation) is undertaken with a view to protecting the company from that person's conduct which would prove detrimental to the company (***Grace*** v ***Biagioli*** [2005] EWCA Civ 1222) or that member's misconduct which would impact on the company's viability (***Woolwich*** v ***Milne*** [2003] EWHC 414 (Ch)), then the court will not regard such breaches as being unfair. More recently, the case of ***Re Phoenix Contracts (Leicester) Ltd*** [2010] EWHC 2375 (Ch) highlighted the fact that unfairly prejudicial conduct arose for the purposes of the s 994 CA where an individual, who was one of two shareholders and executive directors and was also an employee of a company, was suspended and later made redundant after he contacted a potential customer of the company and informed it that the company was being investigated by the Office of Fair Trading. The court held that he could not be criticised for his actions and his exclusion from the company was prejudicial to his interests as a shareholder.

In ***Re a Company (No 008699 of 1985)*** [1986] PCC 296, the High Court held that it was unfairly prejudicial to minority shareholders where, on a takeover bid for the company, the directors recommended acceptance of a bid by a company in which they had an interest while ignoring a much more favourable alternative offer.

In ***Re Mossmain Ltd*** (1986) *Financial Times*, 27 June, four persons agreed to form a company. Two of these were husband and wife. Because the husband had a restrictive covenant in a contract of employment which might be infringed if he became a member/director of the company, his shares were held by his wife for the duration of the covenant, he becoming an employee only for the time being. The wife was made a director. Later the husband was dismissed and his wife was removed from the board. Husband and wife petitioned under s 994 and the court held that the husband's name must be struck out of the petition. He did not qualify to petition since he was not a member as s 994 requires.

In ***Re a Company (No 007623 of 1984)*** [1986] BCLC 362 it was held that there was no unfair prejudice where the company made a rights issue to all members *pro rata* to their shareholding which the petitioner could not afford even though his interest in the company after the issue would be reduced from 25 per cent to 0.125 per cent. The company genuinely needed capital. The case can be contrasted with ***Clemens*** v ***Clemens Bros Ltd***, 1976 where the fresh issue of shares was not a rights issue offered to all members but to members *other* than Miss Clemens in order to reduce her voting power in the company.

In certain circumstances, serious mismanagement of a company may justify the court providing relief to a minority shareholder as per ***Re Macro (Ipswich) Ltd*** [1994] 2 BCLC 354, in which Arden J stated:

> All of these matters are within the responsibility of Thompsons as the companies' managing agent but they are attributable to the lack of effective supervision by Mr Thompson on behalf of the companies. It is this conduct of the companies' affairs by Mr Thompson which, in my judgment, is prejudicial in the respects I have mentioned. As the conduct is prejudicial in a

> financial sense to the companies, it must also be prejudicial to the interest of the plaintiffs as holders of its shares . . . In my judgment, viewed overall, those acts are sufficiently significant and serious to justify intervention by the court under s 461.

In ***Re London School of Electronics***, 1985 (see above), Nourse J held that there was no overriding requirement under what is now ss 994–996, CA 2006 that the petitioner should come to court with clean hands.

Finally, as seen in the case of ***Gamlestaden Fastigheter AB*** v ***Baltic Partners Ltd*** [2007] UKPC 26 (Privy Council), the remedy for unfair prejudice may be used to protect the interests of creditors.

Gamlestaden Fastigheter AB* v *Baltic Partners Ltd [2007] UKPC 26

Lord Scott of Foscote observed:

> Baltic is insolvent and the main issue for decision is whether it is open to a member of a company to make an unfair prejudice application for relief in circumstances where, as here, the company in question is insolvent, will remain insolvent whatever order is made on the application and where the relief sought will confer no financial benefit on the applicant *qua* member. The main relief now sought by Gamlestaden on its art 141 application is an order under art 143(1) ordering the directors to pay damages to Baltic for breaches of the duty they owed to Baltic as directors. But it is accepted that the damages, assuming the claim succeeds, will not restore Baltic to solvency. It will, however, if it does succeed, produce a considerable sum which will be available to Baltic's creditors. Gamlestaden, either itself or as representing its parent company Gamlestaden AB, is a substantial creditor. The indebtedness in question was a major part of Gamlestaden's investment in Baltic's business ventures. So, it is said, Gamlestaden has a legitimate interest, in the particular circumstances of this case, justifying the making of the art 141 application.
>
> The directors, however, applied to have the application struck out on the ground that it was bound in law to fail. They contended before the Bailiff of the Royal Court and before the Court of Appeal, and have repeated the contention before the board, that the alleged improprieties in the management of Baltic of which Gamlestaden complain cannot be shown to have caused Gamlestaden any financial loss in its capacity as shareholder. Its loss, if any, is suffered as a creditor. An application under art 141 (or under s 459 of the 1985 Act) is, it is argued, a shareholder's remedy, not a creditor's remedy. Once it becomes clear that the only benefit to be derived from the relief sought in an unfair prejudice application would be a benefit to the company's creditors, and that no benefit would be obtained by the company's shareholders, it becomes clear that the application is an abuse of process, cannot succeed and should be struck out. The learned Bailiff agreed and struck out the application. The Court of Appeal dismissed Gamlestaden's appeal. The point is now before the board for a final decision. It must be emphasised that, since this appeal arises out of a strike out of the art 141 application, the facts pleaded in support of the application must be taken as true (save for any that can be shown by incontrovertible evidence to be untrue). The Bailiff and the Court of Appeal approached the case on that footing and so must their Lordships.
>
> The point at issue depends, first, upon the scope of the power of the court under arts 141 and 143, properly construed, in dealing with the unfair prejudice application and, secondly, upon the particular circumstances that are relied on for bringing this application within that scope . . .
>
> The first question to be addressed, therefore, is whether an order for payment of damages to the company whose affairs have allegedly been conducted in an unfairly prejudicial manner can be sought and made in an unfair prejudice application. . . .
>
> There is nothing in the wide language of art 143(1) to suggest a limitation that would exclude the seeking or making of such an order: the court 'may make such order as it thinks fit for giving relief in respect of the matters complained of'.

That leaves the important issue regarding Baltic's insolvency. Here, too, it is appropriate to start by noting the breadth of the art 143(1) discretion conferred on the court. The court 'may make such order as it thinks fit for giving relief in respect of the matters complained of . . .'.

Bar the relatively trivial sum that Gamlestaden must have paid in subscribing for its 1,100 shares in Baltic, Gamlestaden's investment took the form of the provision of loans to Baltic to enable Baltic to fund SPK. Baltic was the corporate vehicle through which the joint venture enterprise of Gamlestaden and Mr Karlsten of investment in German commercial property was to be pursued. If mismanagement by the directors of that corporate vehicle has led to loss it seems to their Lordships somewhat artificial to insist that the qualifying loss, for art 141 (or s 459) purposes, must be loss which has reduced the value of the investor's equity capital and that it is not sufficient to show that it has reduced the recoverability of the investor's loan capital . . .

Mr Moss Q.C's . . . submission comes to this, that it is a fatal and insurmountable bar in any and every application for art 141 (or s 459) relief if the relief sought cannot be shown to be of some benefit to the applicant shareholder in his capacity as shareholder.

Mr Moss supported his submission by reference, in particular, to the well-established rule that a shareholder cannot petition for a winding-up order to be made in respect of a company that is insolvent. The reason is that the petitioning shareholder cannot obtain any benefit from the winding-up. The company's assets will be realised; dividends may be paid to creditors but nothing, if the company is insolvent, will go to the members. The rule that Mr Moss prays in aid is a long-established one and one on which their Lordships cast no doubt. But there is a significant difference between a creditor's winding-up petition and an art 141 (or s 459) application. The former is seeking an order to put the company into an insolvent liquidation that will affect the interests of all creditors as well as of all members. It will involve the administration of the liquidation either by the Viscount [of the Royal Court of Jersey] (or, in England, the official receiver) and his officials or by a professional liquidator who, in carrying out his duties, will be an officer of the court. The liquidation, although from a financial point of view carried out for the benefit of creditors, is a public act or process in which the public has an interest. It seems to their Lordships quite right that a member with no financial interest in the process or its outcome should be denied *locus standi* to initiate the process.

Where relief is sought via an unfair prejudice application, on the other hand, the position is quite different. There is no public involvement or interest in the proceedings, other than the natural interest that may attend any proceedings heard in open court. The purpose of art 141, or of s 459, or of their counterpart in Hong Kong, is to provide a means of relief to persons unfairly prejudiced by the management of the company in which they hold shares. If the company is a joint-venture company and the joint venturers have arranged that one, or more, or all of them, shall provide working capital to the company by means of loans, it would, in their Lordships' opinion, be inconsistent with the purpose of these statutory provisions to limit the availability of the remedies they offer to cases where the value of the share or shares held by the applicant member would be enhanced by the grant of the relief sought. If the relief sought would, if granted, be of real, as opposed to merely nominal, value to an applicant joint venturer, such as Gamlestaden, in facilitating recovery of some part of its investment in the joint-venture company, that should, in their Lordships' opinion, suffice to provide the requisite *locus standi* for the application to be made.

Mr Moss placed reliance on ***Re J E Cade & Son Ltd*** [1991] BCC 360 where Warner J refused s 459 relief because the applicant was 'pursuing his interests as a freeholder of the farm and not his interests as a member of the company' (p 374C). But there was no counterpart in that case with the feature in this case that the loans made by Gamlestaden were made pursuant to and for the purposes of the joint venture to be carried on by Gamlestaden and Mr Karlsten via Baltic.

There are several cases in which judicial approval is given to affording a wide scope to s 459. Some of these were referred to by Robert Walker J in ***R & H Electrical Ltd*** (*supra*) . . . And in ***O'Neill* v *Phillips*** [1999] BCC 600 at p 612; [1999] 1 WLR 1092 at 1105 Lord Hoffmann said that: 'As cases like ***R & H Electrical Ltd* v *Haden Bill Electrical Ltd*** [1995] BCC 958 show, the requirement that prejudice must be suffered as a member should not be too narrowly or technically construed.'

In their Lordships' opinion arts 141 and 143 properly construed do not *ipso facto* rule out the grant of relief simply on the ground that the relief sought will not benefit the applicant in his capacity as

> member. In many cases such a feature might justifiably lead to the refusal of relief . . . Their Lordships do not accept that the benefit must be a benefit to Gamlestaden in its capacity as a shareholder but they do accept that there must, where the only purpose of the application is to obtain payment of a sum of money to Baltic, be some real financial benefit to be derived therefrom by Gamlestaden.
>
> In particular, in a case where an investor in a joint-venture company has, in pursuance of the joint-venture agreement, invested not only in subscribing for shares but also in advancing loan capital, the investor ought not, in their Lordships' opinion, be precluded from the grant of relief under art 143(1) (or s 461(1)) on the ground that the relief would benefit the investor only as loan creditor and not as member.
>
> In the present case the provision of loan capital to Baltic seems to have been mainly, if not wholly, made by Gamlestaden AB, rather than by Gamlestaden, although procured by Gamlestaden pursuant to its obligation to do so under its joint-venture agreement with Mr Karlsten. But their Lordships, in agreement with the view expressed by Robert Walker J in relation to similar arrangements made by the applicant for s 459 relief in the ***R & H Electrical Ltd*** case, conclude that that feature should not bar Gamlestaden from relief under art 141.
>
> Their Lordships take the view that the learned Bailiff and the Court of Appeal construed art 143(1) too narrowly and that this appeal against the strike-out of Gamlestaden's art 141 application ought to be allowed.

Minority petition for a just and equitable winding-up

The court has a jurisdiction under s 122(1)(g) of the Insolvency Act 1986 to wind up a company on the petition of a minority on the ground that it is 'just and equitable' to do so.

This ground is subjected to a flexible interpretation by the courts. In the context of minority rights, however, orders have been made where the managing director who represented the majority shareholder interests in his management of the company refused, for example, to produce accounts or pay dividends (***Loch*** v ***John Blackwood Ltd*** [1924] AC 783) and where, in the case of a small company, formed or continued on the basis of a personal relationship, involving mutual confidence and which is in essence a partnership, the person petitioning is excluded from management participation and the circumstances are such as would justify the dissolution of a partnership. This, it will be remembered, was the approach in ***Ebrahimi*** v ***Westbourne Galleries*** (see Chapter 1). However, since the enactment of the unfair prejudice provisions and following the case of ***Re a Company (No 002567 of 1982)*** [1983] 2 All ER 854 other matters have been brought to the fore. These are:

See p. 29

(a) that if the majority make an offer to buy out the shares of the director who has been removed at a fair price, e.g. to be decided on by the company's auditor, the court is not perhaps likely to wind up the company because the ex-director's capital is available by other means. No such offer was made in ***Ebrahimi*** v ***Westbourne Galleries*** [1973] AC 360;
(b) that even if no such offer is made the better approach these days might be by petition under the unfair prejudice provisions. The court can, as we have seen, order the purchase of the ex-director's shares, at a fair price, either by the other members or by the company in reduction of capital.

However, the procedure through just and equitable winding-up is not specifically repealed and there is no rule of law preventing that approach, and indeed it was held in ***Jesner*** v ***Jarrad*** (1992) *The Times*, 26 October, that a lack of unfair prejudice under s 944 (formerly s 459 of the CA 1985) will not prevent the court from winding-up a company on the just and equitable ground. In that case a family company was being run in good faith and without prejudice to the claimant who was a family member. Nevertheless, the claimant and his brother and the other members of the family had lost that mutual confidence required in what was really a quasi-partnership, and on the basis of the ***Westbourne Galleries*** case it was just and equitable that it should be wound up, given the disputes within the family as to how it should be run.

Further instances where the courts have considered that it was just and equitable to order the winding-up of the company include cases where the company was promoted fraudulently (***Re London and County Coal Co*** (1866) LR 3 Eq 355); situations where there was a 'deadlock'; where the management and conduct of the company are such that it is unfair to require the petitioner to remain a member (***Re Five Minute Car Wash Service Ltd*** [1966] 1 All ER 242); as well as cases where the company is a quasi-partnership and where there has been a sufficiently serious breach of mutual understanding not expressed on the company constitution (***Virdi* v *Abbey Leisure Ltd*** [1990] BCLC 342).

Finally, it is worth briefly mentioning that the 'winding-up' by the court commences on presentation of the petition (s 129(2)) and as soon as a prayer for winding-up has been made, the company becomes paralysed, resulting in the fact that no transactions relating to the company's property can be entered into after this point. Consequently, this is a drastic course of action and as such should be viewed as one of last resort for any minority shareholder. This is reinforced by the fact that the court, under s 125(2), may refuse to grant a winding-up order if it is of the opinion that (i) some other remedy is available to the petitioners; and (ii) the petitioners are acting unreasonably by seeking to have the company wound up instead of pursuing that other remedy.

There are other procedural limitations. A 'contributory' has standing to make an application to the court with a view to obtaining the winding-up of the company (s 124). According to s 79 of the Insolvency Act 1986, a contributory is any person who is liable to contribute to the assets of a company in the event of its being wound up.

As this is an equitable remedy, the petitioner must come with 'clean hands' (***Ebrahimi* v *Westbourne Galleries***), which may be contrasted with s 994 of the Companies Act 2006, whereby the petitioner does not have to come with 'clean hands'.

Essay questions

1 In certain areas the Companies Act 2006 and to a limited extent the Insolvency Act 1986 give special protection to minority shareholders with various holdings of shares. The most important of these statutory provisions seems to be s 994 of the Companies Act 2006 which gives any member the right to complain to the court on the ground that the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the concerns of the members generally or of some part of the members including himself.

(a) Explain and, by making reference to decided cases, illustrate the operation of s 994 of the Companies Act 2006.

AND

(b) Select TWO OTHER statutory examples of minority protection and in each selected area explain the size of holding and the rights given to a minority.

(*Glasgow Caledonian University*)

2 The directors of Merchanting Ltd, a very successful business, have allocated most of the profits to themselves as remuneration and as donations to a charitable institution established by the founder of the company. Sheila, a shareholder, wishes to challenge the amount of the directors' remuneration, to discontinue the charitable donations and to increase the dividends.

Explain how she could make her proposed challenge.

(*The Institute of Chartered Accountants in England and Wales*)

3 Give an account of the legal procedure which must be followed in order to effect the registration of a new public limited company which is entitled to do business.

(*The Association of Chartered Certified Accountants*)

4 '. . . I think that one useful cross-check in a case like this is to ask whether the exercise of the power in question would be contrary to what the parties, by word or conduct, have actually agreed. Would it conflict with the promises which they appear to have exchanged? . . . In a quasi-partnership company [these promises] will usually be found in the understandings between the members at the time they entered into association . . . 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.'

In the light of this statement, discuss the interrelationship between quasi-partnership companies and the remedy available under section 994 of the Companies Act 2006 for 'unfairly prejudicial' conduct. (*University of Hertfordshire*)

5 Sven is a minority shareholder in the Finnish Company Ltd. Alf, Bob and Carl are the Chairman, Managing Director and Export Director respectively and together they control the company. Sven complains that:

- The company has just sold a ten-acre site to someone (believed to be Alf's father) for half the price which the company paid for it a year ago.
- No dividend had ever been declared by the company since Sven acquired his shares in the company. Nevertheless, Alf and Bob regularly take £30,000 per annum as directors' remuneration.
- £50,000 compensation was paid to Carl's predecessor, Albert, to secure his early vacation from office.

Advise Sven as to the options available to him and his chances of success with regard to each complaint. (*University of Hertfordshire*)

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 The directors of Ouse Ltd have been selling off certain of the company's assets negligently at what the minority shareholders regard as too low a value. The directors have not made any gain themselves. What action can the minority shareholders bring on behalf of the company?

A An action could be brought on the basis that the directors acted *ultra vires*.
B The minority could apply to the court in the company's name for rescission of the contract.
C An action can be brought if the articles allow this.
D Under the rule in ***Foss* v *Harbottle*** no action can be brought.

2 Tom is the majority shareholder in Ribble Ltd and is also a director. Recently Tom sold freehold land belonging to the company to his wife who is also a director, and two months later his wife sold it to the local council at a profit of £30,000. The sale was ratified by an ordinary resolution. What action can the minority bring to recover the profit for the company?

A A derivative action under an exception to ***Foss* v *Harbottle***.
B A representative action against Tom on the ground of fraud.
C No action can be brought because the sale was ratified.
D No action can be brought on behalf of the company except by the majority shareholders.

3 Which of the following can petition the court for relief under CA 2006, s 994?

A The company.
B Members holding not less than 10 per cent in number of the company's issued shares.
C A member of the company.
D A creditor of the company.

4 A derivative action is one which is brought by:

A The company.
B A member of the company on behalf of all the other members.
C A member of the company on his own account.
D A member of the company on behalf of the company.

5 John has just formed a limited company. Which of the following details can John exclude from its business stationery?

A The names of all of the company's directors.
B The company's registered number.
C The full name of the company.
D The address of the registered office.

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

Suggested further reading

Acton, 'Just and Equitable Winding Up; the Strange Case of the Disappearing Jurisdiction', (2001) 22 Co Law 134

Chiu, 'Contextualising Shareholders' Disputes – a Way to Reconceptualise Minority Shareholder Remedies', (2006) Journal of Business Law (May), pp 312–38

Goddard, 'Closing the Categories of Unfair Prejudice', (1999) 20 Co Law 333

Goddard, 'Sections 459–461 of the Companies Act (1985): *Exeter City AFC Ltd and Fisher* v *Cadman*', (2005) Company Lawyer 26(8) 251

Hannigan, 'Section 459 of the Companies Act 1985 – A Code of Conduct for the Quasi-partnership?', (1988) LMCLQ 60

Paterson, 'A Criticism of the Contractual Approach to Unfair Prejudice', (2006) Company Lawyer, 27(7) 204

Prentice, 'Winding up on the Just and Equitable Ground: the Partnership Analogy', (1973) 89 LQR 107

Riley, 'Contracting out of Company Law: Section 459 of the Companies Act and the Role of the Courts', (1992) 55 MLR 702

Thomas and Ryan, 'Section 459, Public Policy and Freedom of Contract', (2001) 22 Co Law 177

Walters, 'Section 459: "Shareholder" or "Investor" Remedy?', (2007) Company Lawyer 28(10) 289

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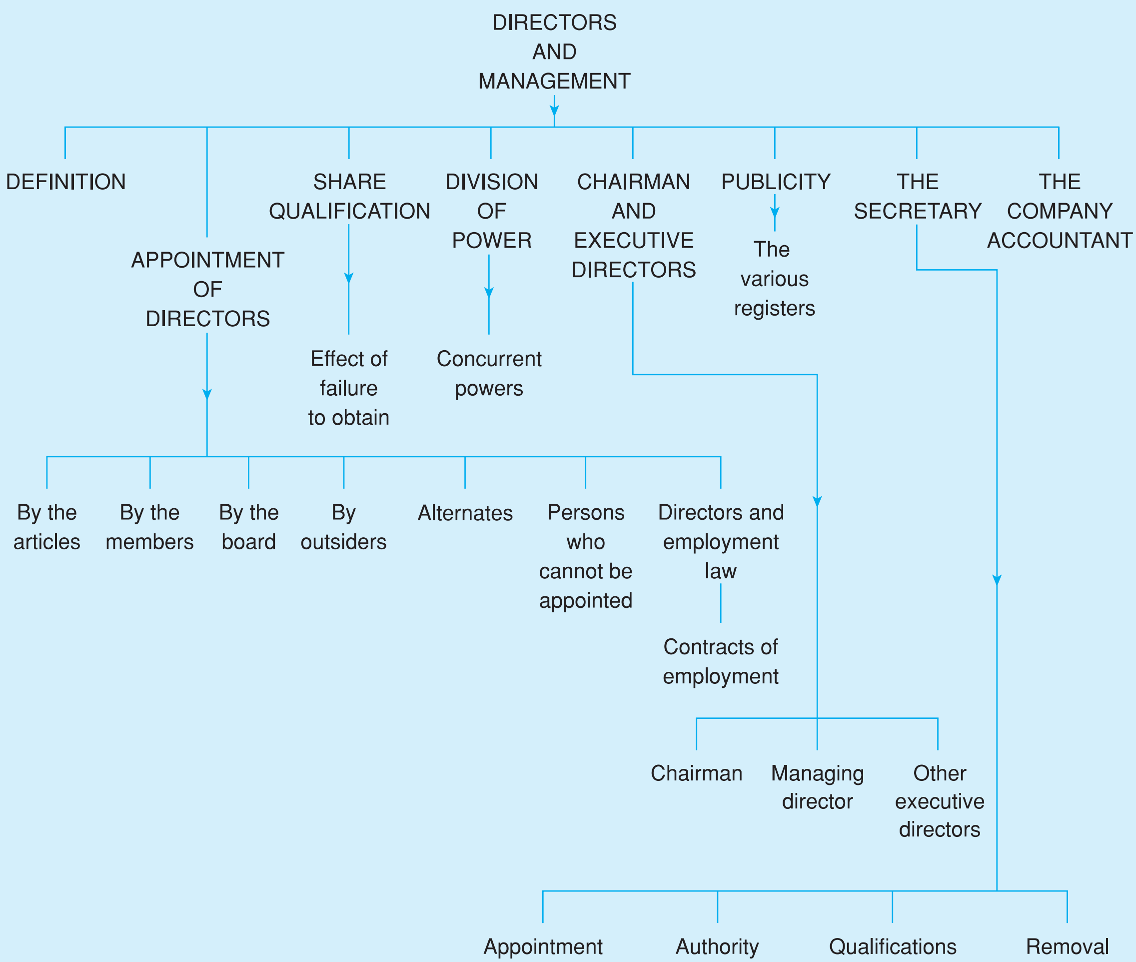
17 Directors and management – generally



The management of a company is usually entrusted to a small group of persons called directors, supported, in the main, by the company secretary and the company accountant. It should be noted that a private company does not have to have a secretary (CA 2006, s 270(1)). Part 10 of the CA 2006 sets forth the provisions with respect to directors.

A company must have a board of directors numbering at least two in the case of a public company; one will suffice in the case of a private company (CA 2006, s 154). The previous exception for public companies registered before 1 November 1929 (or before 1 January 1933 in Northern Ireland) has been eliminated.

See p. 664

See p. 95

See p. 618

Apart from this, the number of directors and the way in which they are to be appointed is left to be regulated by the articles. Given the fact that the articles of association used by the vast majority of companies, to date, will follow *Table A* (see Appendix 2), this chapter will continue to outline these provisions alongside those of the new Model Articles which apply to companies incorporated after 1 October 2009 (for further discussion see Chapter 4). *Table A* (replaced by the new Model Articles in newly incorporated companies) provides that unless otherwise determined by ordinary resolution, the number of directors (other than alternate directors) shall not be subject to any maximum but shall not be less than two. *Table A*, as well as the new Model Articles (see Appendix 1), provides, in effect, that the company may from time to time by ordinary resolution increase or reduce the number of directors, and determine in what rotation the increased number is to retire.

Definition

Although the persons managing the company are usually called directors, other names are sometimes used, e.g. managers, governors, or committee of management. In this connection it is important to note the provisions of CA 2006, s 250 which are that the term 'director' when used in the Act is taken to include any persons occupying the position of director by whatever name called. Thus a director is anyone occupying the role of director regardless of his title within the company. This could include a person not actually appointed to the board, i.e. a *de facto* director. Thus, CA 2006, s 162 provides that the acts of a director are valid regardless of any defect in his or her appointment and this must of necessity apply to *de facto* directors (or directors *in fact*). A director is also an officer of the company.

It was held in ***Re Sykes (Butchers) Ltd*** [1998] 1 BCLC 110 that a person who denied that he was a director and whose appointment had not been notified to Companies House could nevertheless be disqualified as a *de facto* director following various defaults, including a preference in which he paid off a bank overdraft with the company's money to the detriment of other creditors where he had guaranteed the overdraft. He then went on trading with the company in a situation of inevitable insolvency. The court said that it was difficult to lay down one decisive test of whether a person is a *de facto* director. All the relevant facts relating to an involvement in management must be considered.

However, in ***Secretary of State for Trade and Industry* v *Tjolle*** [1998] 1 BCLC 333 a woman who called herself a director was not regarded as such for the purposes of disqualification because, on the facts of the case, she had no involvement with anything financial and did not form part of the company's real governance.

Shadow directors

It should also be noted that s 251 extends certain provisions of the CA 2006 to a 'shadow director', being a person in accordance with whose directions or instructions the directors of a company are accustomed to act unless the directors are accustomed so to act only because the person concerned gives them advice in a professional capacity. Professional advisers such as accountants and lawyers are not, therefore, for that reason alone, shadow directors. However, those who give advice other than purely in a professional capacity may be included. In ***Secretary of State for Trade and Industry*** v ***Deverell*** [2000] 2 BCLC 133 the Court of Appeal gave a ruling that appears to extend the definition. The court said that the concepts of 'direction' and 'instruction' in the definition did not exclude the concept of the giving of advice. The company concerned was in the travel business. It went into voluntary liquidation owing creditors an estimated £4.46 million. Disqualification proceedings were brought against three of its directors and two of its advisers or consultants who were persons with experience in the travel business. The consultants were held to be shadow directors and disqualification orders could be made against them.

Whether a person is or is not a shadow director is a matter of fact to be decided on the circumstances of the case, but some indications are: (a) being a signatory to the company's bank account and/or attendance at interviews with bank officials; (b) the ordering by the person concerned of goods and/or services for the company; (c) the signing of contracts and/or letters in the capacity of director; (d) attendance at meetings of the board; (e) possession of detailed information about the company.

The case of ***Secretary of State for Trade and Industry*** v ***Laing*** [1996] 2 BCLC 324 strengthens and points to the fact that it is not easy to persuade a court that a person has acted either as a shadow or *de facto* director. It is necessary to present to the court specific evidence of the alleged 'directions' given by the person concerned, plus evidence that they were acted upon by the company to satisfy the test for a shadow director and, for a *de facto* director, that there was a sufficient pattern of activities which could constitute acting as a *de facto* director. Thus in ***Laing***, one of the directors had actually signed a contract on behalf of the company but the court concluded that this was not enough to make him a *de facto* director. The evidence did not establish that he had continued to act as a director for a sufficiently long period of time after that act.

The significance of being a shadow director is that such persons are caught by certain statutory provisions in the same way as a formally appointed or *de facto* director. The provisions are:

(a) long-term service contracts;
(b) substantial property transactions;
(c) loans and similar dealings;
(d) interests in contracts made with the company;
(e) requirements relating to disclosures in the accounts;
(f) the rules relating to wrongful trading;
(g) entry on the register of directors and secretaries.

In addition, it is necessary for a company to keep, generally at its registered office, a copy of any service contract made with a shadow director (see later in this chapter).

The CA 2006 statutory duties will apply to shadow directors where, and to the extent that, the common law rules or equitable principles which they replace so apply (CA 2006, s 170(5)).

In other words, if there is a common law rule or equitable principle that currently applies to a shadow director, the statutory duty replacing that common law rule or equitable principle will also apply to the shadow director (in place of that rule of principle). However, where the rule or principle does not currently apply to a shadow director, the statutory duty replacing that rule or principle will not apply either. (For further discussion of directors' duties refer to Chapter 19)

See p. 378

Different types of director may exist on a single board. There may be full-time executive directors employed for their expertise under a contract of service, e.g. a finance director. Other non-executive directors may be appointed not to work full time under a contract of service, but to give general advice and business skill and experience to the board or the goodwill attached to their name. They may also carry out a service for the company below board level as in ***Buchan* v *Secretary of State for Employment*** (1997) 565 IRLB 2 where Mr Buchan who was a director of Croydon Scanning Centre Ltd was also the operator of the scanner and the sales manager.

Appointment of directors

Directors may be appointed in the following ways:

(i) By being named in the articles

This method is sometimes used for the appointment of the company's first directors as an alternative to following the procedure laid down in the articles.

(ii) By the subscribers to the memorandum

As we have seen, the subscribers (or subscriber in the case of a single-member company) to the memorandum, or a majority of them, may appoint directors; and again this method is sometimes used to appoint the first directors of the company.

However the first appointment is made, it is not effective unless the person concerned is named in the statement of officers which is required by CA 2006, s 12. This statement which is filed with other documents on incorporation must be signed by or on behalf of the subscribers (or subscriber) of the memorandum and must contain a consent signed by each of the directors named in it to act in that capacity. Any appointment by any articles delivered with the memorandum of a person as director is void unless he is named as a director in the statement.

CA 2006, s 12 replaces CA 1985, s 10 and makes two modifications: first, directors now have an option to withhold their home address from public access and, second, the requirement for private companies to have a secretary was eliminated.

(iii) By an ordinary resolution of the members in general meeting

In a public company the appointment of each director must be by a separate resolution, unless the meeting resolves with no dissentients that a composite resolution appointing several directors be put forward. This is to prevent the board from coercing members into voting for the appointment of an unpopular director by putting him up for election along with others who are more popular. The directors of a private company may by implication be appointed by a composite resolution and the written resolution procedure could be used (CA 2006, s 160).

In addition, subject to any restrictions in the articles, which would be improbable, all members of companies, whether public or private, can vote on a resolution for the election of directors whether they are themselves directors or not (see: Article 17 of the new Model Articles for private limited companies and Article 20 for public limited companies).

(iv) By the board of directors

The board may make appointments in two cases:

(a) to fill casual vacancies which may occur on resignation, disqualification, removal or death;
(b) to appoint *additional* directors up to a given maximum which may be set out in the company's articles. Any such appointment in excess of the permitted maximum is void.

Persons appointed in these two ways usually hold office until the next annual general meeting. However, if *Table A* applies the director concerned is not automatically eligible for re-election. The usual procedure under *Table A* requires that the director concerned be recommended by the board or that, before voting on the appointment the members have received, usually with the notice of the meeting, details of the person to be appointed which, if an appointment was made, would have to appear in the company's register of directors and secretaries. Private companies using the written resolution procedure would circulate the relevant information.

Table A, Reg 78 gives the members a concurrent power to appoint directors to fill casual vacancies and appoint additional directors, but this would involve the calling of a general meeting unless the written resolution procedure was followed. The new Model Articles for private companies is far more straightforward, with the process being covered by Article 17 (see Appendix 1).

See p. 618

Qualifications

No general qualifications are required in order to become a company director. However, the Institute of Directors has introduced a professional qualification for directors. They are called 'Chartered Directors', and are able to use the letters 'CDir' after their names. There is an examination and normally three years' board experience before obtaining the title. Candidates also need a proposer and two seconders, and undergo a one-hour interview. After reaching chartered status, directors have to submit to 30 hours of professional development courses each year. The Institute of Directors also has power to discipline directors who fail to keep up proper standards. The Institute is considering offering some form of accreditation for non-executive directors. The object of the qualification is to enable qualified directors to distinguish themselves from those without any recognised training, or from those who run smaller companies, who may call themselves directors but who do not attend formal board meetings with agendas and formal procedures as would be required in larger companies.

Contractual rights to appoint directors

If by a company's articles directors are to be appointed by the members in general meeting, the board cannot make a valid contract by which an outsider is empowered to appoint directors (***James* v *Eve*** (1873) LR 6 HL 335).

However, if the company is governed by *Table A* it seems that the board may delegate its power to appoint additional directors and this may prove useful when the board wishes, for example, to raise a loan or share capital from persons who are only willing to lend or invest if they can nominate a certain number of directors to the board to protect their interests.

If the articles expressly empower an outsider to appoint directors, the power to do so is undoubtedly valid, but whether the court would enforce the power by specific performance is doubtful. Generally, the court will not enforce contracts of personal service in this way.

However, if the company refuses to accept an appointee in these circumstances there is, of course, always the solution in a quasi-partnership company of asking for a winding-up. This method was adopted in the following case.

Re A & B C Chewing Gum Ltd [1975] 1 All ER 1017

The petitioners, Topps Chewing Gum, held one-third of the ordinary shares in A & B C on the basis of a shareholders' agreement that they should have equal control with the two Coakley brothers, Douglas and Anthony, who were directors of and held a two-thirds interest in the ordinary shares of A & B C. In order to achieve equality of control, the company adopted a new set of articles which allowed Topps to appoint and remove a director representing them in A & B C, and for board decisions to be unanimous. On the same day Topps, the Coakleys and A & B C signed and sealed the shareholders' agreement setting out the terms referred to above. Topps appointed Douglas Coakley to represent them but later removed him and appointed John Sullivan, their marketing director. Douglas and Anthony Coakley refused to accept the change so that Topps were effectively prevented from participating in management.

Held – by Plowman J – that it was just and equitable that the company be wound up under what is now s 122(1)(g) of the Insolvency Act 1986. The Coakleys had repudiated the relationship in the agreement and the articles. The case was one of expulsion and *Westbourne Galleries* (see

See p. 29

Chapter 1) applied. It is interesting to note that in applying *Westbourne Galleries* Plowman J took the view that Lord Wilberforce's judgment spoke of entitlement to management participation as being an obligation so basic that if broken the association must be dissolved, even though it is not a company arising out of a partnership.

Comment

(i) Although Plowman J purported to be applying the equitable principles of *Westbourne*, he was in fact merely enforcing the petitioner's contract rights set out in the shareholders' agreement. He could have granted an injunction to prevent the breach of that contract by the Coakley brothers, a less drastic remedy than winding the company up.

(ii) Also less drastic, if return of share capital was required, would be an application to the court by petition for unfair prejudice. It will be recalled that in Chapter 14 we gave cases in which the courts had decided that in a private company, such as this was, it was part of the interest of a member (such as Topps) to have a place on the board. Presumably this ruling would be applied to a corporate member in terms of entitling the company to have a nominee on the board where this has been agreed.

Alternate directors

These can be useful if the director has many outside commitments which may from time to time result in prolonged absences from the board. The appointment of an alternate can solve problems relating to quorum, cheque-signing and so on. There is no statutory authority for a director to appoint an *alternate* to act in his place in the event of his absence and alternate directors can only be appointed if the articles so provide. *Table A* provides that any director (other than an alternate director) may appoint any other director, or any other person approved by the directors and willing to act, to be an alternate director and may remove from office an alternate director so appointed by him. (This procedure is replicated in the new See p. 618 Model Articles for public limited companies – see Appendix 1). An alternate director is entitled to receive notice of all meetings of directors and of all meetings of committees of directors of which his appointer is a member, to attend and vote at any such meeting at which the director appointing him is not personally present, and generally to perform all the functions of his appointer as a director in his absence but is not entitled to receive any remuneration from the company for his services as an alternate director. But it is not necessary to give notice of such a meeting to an alternate director who is absent from the United Kingdom.

An alternate director ceases to be an alternate director if his appointer ceases to be a director, but, if a director retires by rotation or otherwise but is reappointed or deemed to have been reappointed at the meeting at which he retires, any appointment of an alternate director made by him which was in force immediately prior to his retirement continues after his reappointment. Any appointment or removal of an alternate director is by notice to the company signed by the director making or revoking the appointment or in any other manner approved by the directors. Finally, and save as otherwise provided in the articles, an alternate director is deemed for all purposes to be a director and is alone responsible for his own acts and defaults and is not deemed to be the agent of the director appointing him.

An alternate director is a director of the company in his own right and his particulars should be lodged with the Registrar if he is not already a director of the company. All the other provisions relating to directors in company legislation apply to an alternate including, for example, disclosure of interests in shares and debentures and material contracts.

Persons who cannot be appointed

This is to some extent a matter for the articles and they may, for example, provide that a minor or an alien shall not be appointed a director of the company. *Table A* does not contain any such restrictions, but the following statutory provisions apply.

(i) Age limit

CA 2006, s 157 requires that a person may not be appointed director of a company unless he has attained the age of 16. One may be appointed director below the age of 16. However, one may not serve as director until the age of 16 is reached. CA 2006, s 158 provides for certain exceptions to s 157 of the CA 2006. CA 2006, s 159 requires that a person already a director but is not the age of 16 as of the date CA 2006, s 157 comes into force (1 October 2008) must cease to be a director. There is no statutory maximum age limit for a director.

(ii) Bankruptcy

The Company Directors Disqualification Act 1986, s 11 makes it an offence for an undischarged bankrupt to act as a director of a company unless the court gives him the necessary permission to act. If he has such permission, he may take up an appointment unless the articles forbid his appointment with or without permission, in which case he cannot take the appointment. *Table A* provides that a director who becomes bankrupt vacates office. The article does not prevent the appointment of a director who is already bankrupt, but such an appointment would not normally be made since the director could not act in that capacity.

The offence created by s 11 is one of strict liability which means that it does not require a guilty mind. Therefore it is no defence for the director concerned to claim that he or she did not realise that management functions were being performed.

Thus, in ***R* v *Doring*** (2002) 33 LS Gaz R 21 the defendant said in her defence that she was only concerned with publicity and design in regard to the products of Cabouchon Europe Ltd of which she was a director. She said that she did not hire or fire staff or make financial decisions or contracts on behalf of the company. The judge directed the jury that since the offence was strict they were not required to consider whether the defendant had acted dishonestly in carrying out her duties (which she had not) but only whether her acts looked at objectively amounted to being concerned in the management of the company. The jury found her guilty and she was sentenced to 120 hours of community service. Her appeal to the Court of Appeal was dismissed.

(iii) Persons disqualified by court order

The court *may*, and in some cases under s 6 of the 1986 Act *must*, make a disqualification order. This is an order to the effect that a named person may not (unless the court gives leave) perform any of the following activities during the period specified by the order:

(a) be a director (or liquidator, or administrator receiver, or receiver and manager) of a company;
(b) be concerned with or take part in, directly or indirectly, the promotion, formation or management of a company (s 1 of the 1986 Act).

The 1986 Act requires the Registrar of Companies to keep a register of all persons against whom disqualification orders are made and they remain on the register for the period in which the order is in force. The register is open to inspection by members of the public.

(iv) Articles of association

Further disqualifications may be imposed by a company's articles. Neither *Table A* nor the Model Articles impose such disqualifications, merely specifying the grounds on which directors will vacate office. Thus, unless there are such express provisions, a person is not disqualified merely because he is a minor or an alien and a company may be a director of another company.

(v) Directors

Section 155 of the CA 2006 states that a company must have at least one director who is a natural person.

Directors and employment law: generally

Directors may be fee-paid supervisors acting in some ways as trustees for the shareholders, or senior executives or managers who work the whole time as directors of the company and who sometimes combine this with the giving of a professional service to the company, as in the case of an accountant who takes up an appointment as finance director. Under *Table A* directors are allowed to enter into service contracts which may be made by the board. They then become known as executive directors.

Under Article 70 of *Table A* the directors are empowered to enter into a service contract with an executive director, provided that the term is not for more than five years when 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.