The phoenix syndrome (IA 1986, s 216)

The purpose of this section is to prevent a practice under which company directors may contrive to mislead the public by utilising a company name which is the same as or similar to one of a failed company of which they also were directors in order to conduct a virtually identical business.

The provisions used to prevent this forbid a director or shadow director of the failed company from being a director or shadow director of a company with the same or similar name and business to the failed company for five years. If they infringe the above rules, they commit a criminal offence and under s 217 of the IA 1986 are personally liable jointly and severally for the debts of the second company during the period for which they managed it. If they manage through nominees who are aware of the circumstances, the nominees are also jointly and severally liable with the directors and shadow directors.

The court can, as in ***Penrose* v *Official Receiver*** [1996] 2 All ER 96, give exemption from the above requirements and the business and its name can be sold by an insolvency practitioner and run by a new management. There is no objection to this.

Disqualification: can violation of s 216 be taken into account?

The High Court has ruled that when deciding whether to disqualify a director for unfitness under s 6 of the CDDA 1986 the court may take into account the unauthorised use of a liquidated company's name even though breach of s 216 does not appear in Sch 1 of the CDDA 1986. Schedule 1 was not exhaustive in terms of what the court could take into account (***In re Migration Services International Ltd*** [2000] 1 BCLC 666).

Directors and National Insurance contributions

The Social Security Act 1998 contains two powers to deal with problems caused by unscrupulous directors who fail to pay employees' National Insurance contributions, as follows: those found guilty of the new criminal offence could be imprisoned for up to seven years, or the NIC debt can be transferred to the fraudulent or negligent directors as a personal debt. (See s 64 of the Social Security Act 1998, inserting ss 121C and 121D into the Social Security and Administration Act 1982.)

Liability as a signatory, CA 2006, ss 82–85

Although the sanction of personal liability has been removed for failure to state the company's name correctly on cheques, such a failure is not devoid of civil consequences, though they are now visited wholly on the company.

Leave to act while disqualified

Section 17 of the CDDA 1986 gives the court power to grant leave to directors to act while disqualified. In ***Re Westmid Services Ltd, Secretary of State for Trade and Industry* v *Griffiths*** [1998] 2 All ER 124 the Court of Appeal gave guidance as to the exercise of the court's discretion under s 17. This includes:

- the age and state of health of the director;
- the length of time he has been disqualified;
- whether the offence was admitted;

- the general conduct before and after the offence;
- the periods of disqualification of the co-directors;
- the responsibilities that the disqualified director wishes to take on.

It can also be helpful to a submission to the court for leave to act if a professional such as a qualified accountant has joined or will join the board. A helpful case in ascertaining the attitude of the court in the matter of granting or refusing leave appears below.

Re China Jazz Worldwide plc [2003] All ER (D) 66 (Jun)

The director concerned had been disqualified for five years for unfitness in regard to his directorship of China Jazz. He was a part-time director and had been for less than two years. There was no remuneration. He was also employed as a director of four companies in the FM Group but could not carry on in view of the disqualification. His duties in China Jazz had been undertaken in his spare time. It was accepted that he had acted throughout with honesty and not for personal gain. He asked the High Court to grant him leave to continue acting as a director of the FM Group companies and to have an involvement in the management of other companies. His application was granted. The judge referred to relevant circumstances as follows:

- He had not been disqualified for *more* than five years. If he had it would have been unlikely that leave would have been granted.
- He had acted honestly. Leave will not normally be granted otherwise.
- The FM Group had procedures in place to ensure proper accountability. Leave is unlikely to be granted otherwise.
- There was evidence that the companies needed the services of the director and that he needed to continue his career. Although there is case law suggesting that these matters are not a requirement of granting leave *China Jazz* affirms that they are important and should be included in an application for leave in appropriate circumstances.

Comment

Those who have given disqualification undertakings can also apply to the court to cancel or reduce the period of disqualification. Presumably the above principles will guide the court in these applications.

Human rights and directors

The Human Rights Act 1998 came into force on 2 October 2000. It incorporates the European Convention on Human Rights into UK law. The major impact is to allow human rights issues to be brought before UK courts as distinct from a former requirement to take them to the European Court of Human Rights (ECHR) in Strasbourg. Importantly, UK courts are required to interpret legislation in a way that is compatible with Convention rights. The likely effect upon proceedings against directors is set out below.

Public authority

The 1998 Act makes it unlawful for a public authority to conduct its affairs in a way that is incompatible with a Convention right. The expression 'public authority' is defined widely and

includes government departments and regulators such as the Financial Services Authority as well as courts and tribunals within the UK. The activities of these bodies insofar as they affect directors will provide the major impact in this area.

Right to a fair trial (Art 6)

Article 6 of the Convention gives a right to access to justice and a fair trial in civil and criminal matters by an independent and impartial tribunal within a reasonable time. Impact on directors here will certainly take the form of protection against self-incrimination. In ***Saunders* v *UK*** (1997) 23 EHRR 313 the European Court of Human Rights held that protection against self-incrimination was at the heart of fair procedure. Mr Saunders had been compelled to give BIS inspectors information regarding the takeover by Guinness, of which he was a director, of the Distillers Company. There were, among other things, allegations of market abuse in the form of loans to individuals to buy Guinness shares so as to increase the market price and make them more attractive to the shareholders of Distillers. When criminal proceedings were later brought against Mr Saunders, the prosecution sought to bring in the information as evidence but the ECHR decided that this would be contrary to Art 6.

It can be seen from the ***Saunders*** case that Art 6 extends to cover the use of statements made by the Financial Services Authority and the Serious Fraud Office acting under statutory powers, such as the Financial Services and Markets Act 2000. However, Art 6 does not apply where the BIS investigation is not 'adjudicative' in the sense that it reaches conclusions as to liability. Thus in ***Fayed* v *UK*** (1994) *The Times*, 11 October, a report by BIS inspectors into the takeover of the House of Fraser by the Fayed brothers stated that they lied about their origins, but the European Court of Human Rights held that the report was not unlawful under Art 6 because it was investigative rather than adjudicative, or administrative rather than judicial, and in any case the limits of acceptable criticism of business people involved in the affairs of large companies were wider than in cases involving private persons.

Article 6 also prohibits undue delay in investigating and determining proceedings. Thus, in ***EDC* v *UK*** [1998] BCC 370 the ECHR ruled that disqualification proceedings that had taken five years to conclude infringed Art 6 on the ground of unacceptable delay. In this context it is worth noting that Art 6 may apply to BIS investigations which also take many years to conclude.

The employment dimension

Employment law is thought by many to be the area of law where the 1998 Act will have most impact. Directors should be aware of these ramifications as managers of staff. The most significant rights of the Convention that are likely to be involved are in the following areas:

Prohibition of discrimination (Art 14)

The Convention may have the effect of widening the scope of discrimination in relation to sexual orientation, religion, age and sexual identity.

Right to respect for private and family life (Art 8)

This area will, it seems, have the greatest impact on the employer/employee relationship, involving access to medical records and employee surveillance.

Right to freedom of thought, conscience and religion (Art 9)

This may mean that employers will have to allow employees to hold controversial religious or political beliefs and to have time off for religious purposes. Such rights, however, are subject to the employment contract which, if freely negotiated, may exclude time off, as in ***Stedman* v *UK*** (1997) 23 EHRR CD 168 where the ECHR rejected a claim by a Christian required to work on Sunday on the grounds that she had signed a contract requiring her to work on that day.

Right to freedom of expression (Art 10)

Employers will be able to insist that confidential information about the business is not disclosed though 'whistleblowers' will be protected. It seems also that the employer will be allowed to place reasonable restrictions on the clothes worn by and hairstyles of employees as part of a dress code.

Essay questions

1 Melchester FC Ltd was incorporated by Albert Arkwright and Bertie Boozer in 1950. The company was set up to take over the running of Melchester FC, a Lancashire football club, who were founder members of the Football League. Arkwright, at the age of 70, is still a director and shareholder of the company. Bertie has since died with his shares passing on to his family who have recently sold out to Loadsamoney and two associates, all three becoming directors of the company.

Arkwright is deeply passionate about football and in particular has a strong affection for Melchester FC, having spent a great deal of his childhood and adult life associated with the club. Loadsamoney has expansionist plans for the club and is considering ways of merging Melchester FC with Ambridge United, a rival team, and also to start up a professional basketball team, both of which will require a heavy investment.

Arkwright objects to Loadsamoney's plans but finds himself outvoted on the board. Loadsamoney considers that Arkwright can no longer serve a useful purpose. He decides to remove him as director by securing an ordinary resolution at the next general meeting. Despite his removal, Arkwright is still able to raise objections as a shareholder. His objections, however, go unheard and he receives minimal co-operation from the board in response to his requests for information on the company's plans. Loadsamoney, annoyed with Arkwright's interference, decides to make an offer to Arkwright to buy out his shareholding at a price fixed by the board. Arkwright declines Loadsamoney's offer, but finds himself faced with a proposal, at an extraordinary meeting of the company, that the company's articles be changed so that any member can be requested by the board to transfer their shares to a nominated person at a fair value.

Advise Arkwright. (*University of Greenwich*)

2 'The combined effect of the Insolvency Act 1986 and the Company Directors Disqualification Act 1986 is to give a clear signal to directors that to allow their companies to continue trading and to incur debts at a time when the position is hopeless is both a costly and foolhardy thing to do. In particular, the temptation to use money owed to the Crown to keep their companies afloat must be avoided at all costs.'

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

3 D was appointed director and managing director of X Ltd. The terms of his service contract provided that he should hold office for eight years and this term was also stated in the articles of association of X Ltd. The other directors of the company decided that D should be removed from his directorship and managing directorship. They placed a resolution before the shareholders in general meeting that D be removed from office and it was duly passed. D was at that meeting and made a statement that he intended to take legal advice for he was certain that he could not be removed in breach of the articles of association and of his service contract. The directors of X Ltd have asked your advice.

You are required to draft a statement for the board of directors explaining whether the shareholders had the authority to pass the resolution and suggesting what legal redress D might have. (*The Chartered Institute of Management Accountants*)

4 Mini-mo Ltd is a registered company whose main activity is the production of animal feedstuffs. The company has a fully issued share capital of 10,000 £1 shares. The three directors, George, Sheila and Robert, each hold 1,000 shares and the remaining shareholders Emily and Maurice hold 5,200 and 1,800 shares respectively. The articles provide that in the event of a resolution being proposed at a general meeting for the removal of a director any shares held by that director should carry three votes per share. Maurice is a director of another company, Plucko Ltd, whose main activity is also the production of animal feedstuffs. The directors wish to alter the articles of the company to give them power to require any member who engages in any competing business to transfer his shares at a fair value to the directors' nominees. Emily agrees to support the proposed alteration.

(a) Advise the directors on the statutory procedures which must be observed to effect the change in the articles.

The articles are altered accordingly. Emily is then surprised to find that the three directors have appropriated and allocated Maurice's shares equally between themselves. She decides to take action to remove George, Sheila and Robert as directors.

(b) Advise Maurice as to whether he can successfully challenge the alteration to the articles.

(c) Advise Emily on (i) the procedures she must follow if she wishes to remove the directors from office, and (ii) her chances of success.

(*The Association of Chartered Certified Accountants*)

5 Harold was appointed managing director of Aire Ltd with a service contract for a term of four years. A group of shareholders is dissatisfied with Harold's conduct of the company's affairs and wishes to remove him from office.

Advise the shareholders. (*The Institute of Chartered Accountants in England and Wales*)

6 The following situations have arisen in the affairs of Harbottle Ltd:

(a) The company's managing director and founder member wishes to retire and move permanently to the south of France. For this purpose he needs capital. He owns 900,000 shares in the company which he needs to dispose of. Other members of the company are willing and able to purchase between them 600,000 of his shares. There is no other way of purchasing his remaining 300,000 shares without resorting to the company's capital. The directors propose to use the company's capital to purchase the shares.

(b) The company has a class of preference shares entitled to 8 per cent cumulative dividend. Dividends have not been declared for the last four years as the company has not been making significant profits. This year the company has made substantial profits large enough to pay the arrears of dividend. The directors propose to transfer the profits to reserve.

(c) The company owns a luxury villa in the south of France. Because of the property boom the villa has trebled in price. The directors of the company, however, resolve to sell the villa to the managing director's wife at its original price.

Discuss the legal validity of the above transactions. (*University of Plymouth*)

7 'A modern company secretary is not a mere clerk but an officer of the company with extensive duties and responsibilities and he has ostensible authority to sign contracts in connection with the administration side of a company's affairs.'

Discuss this statement. (*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 A director can be removed at a general meeting of his company. What kind of resolution is required?

A An ordinary resolution following special notice to the company.
B An ordinary resolution.
C A special resolution following special notice to the company.
D A special resolution.

2 The following directors of Julius Ltd have been disqualified for two years following their misconduct while directors of the company – Jane, Harry, Mary and James. Jane is now working as a secretary with Julius Ltd; Harry has taken a management consultancy appointment with Archer Ltd; Mary has formed a new company in a different kind of business; and James has returned to his accountancy practice and has recently accepted an appointment as an administrative receiver. Which one of them is complying with the disqualification order?

A James **B** Mary **C** Harry **D** Jane

3 The court is about to disqualify the directors of Blue Ltd for unfitness. How long may the order last?

A A maximum of 15 years with no minimum.
B A minimum of two years with a maximum of 15 years.
C A minimum of two years with a maximum of five years.
D A minimum of five years with a maximum of 15 years.

4 Unless the articles of a company carry a contrary provision directors must retire from office:

A Every five years but may be re-elected any number of times.
B Every three years with re-election any number of times.
C Every three years with re-election only three more times.
D Every five years with re-election only three more times.

5 Harry has been found guilty of persistent default in sending various documents and returns to the Registrar. What is the maximum period for which he may be disqualified?

A Five years **B** Ten years **C** Three years **D** Fifteen years

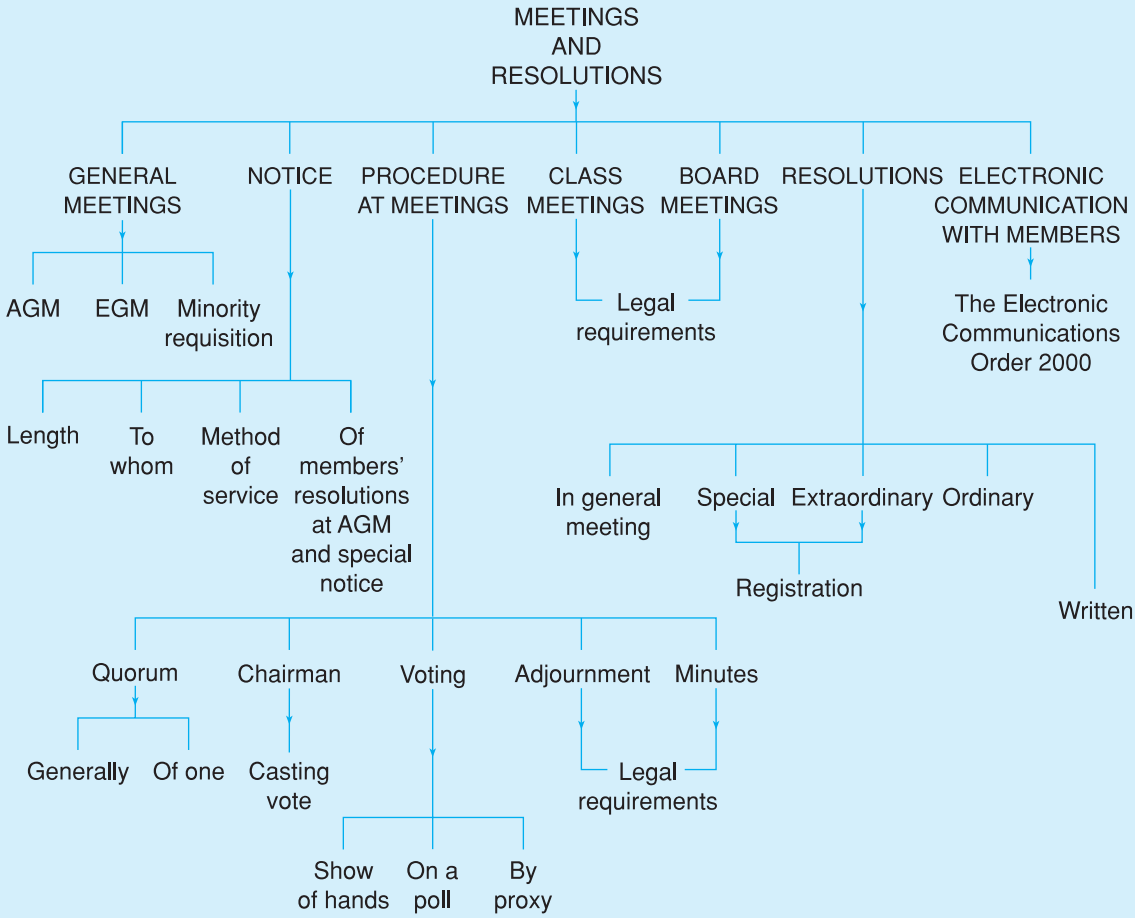
6 Joe has been found guilty of wrongful trading. What is the maximum period for which he can be disqualified?

A Fifteen years **B** Five years **C** Ten years **D** Three years

Answers to test your knowledge questions appear on p. 616.

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

21 Meetings and resolutions



A company may be required to hold certain meetings of shareholders, i.e. annual general meetings and ordinary meetings. The articles of a company provide for the holding of general meetings, the relevant provisions of *Table A* being in Regs 36 and 37.

Once the principles of meetings and resolutions in terms of paper communication have been grasped, the reader will find it necessary to refer to the material relating to the introduction of new technology in terms of changes to the law to allow electronic communication with shareholders.

General meetings of the company

1 Annual general meeting

The requirement for private companies to hold an annual general meeting has been abolished. Rather than holding a general meeting, private companies can use the written resolution procedure set out in Chapter 2 of Part 13 of the CA 2006. In relation to private companies which are not traded companies, the CA 2006 does not require them to hold annual general meetings. As the CA 2006 does not prohibit such a meeting, a company will only need to hold annual general meetings where required to do so by its articles. This issue will exist for private companies formed prior to 1 October 2007 who may wish to amend their articles or adopt new ones to avoid the requirement to hold annual general meetings. A private company that is a traded company is now required to hold annual general meetings.

CA 2006 makes separate provision for annual general meetings for public companies. Section 336 has a requirement that the annual general meeting of a public company must be held within six months of the end of a public company's financial year (that is in each period of six months beginning with the day following its accounting reference date) in addition to any other meetings held during the period. This replaces the requirement that not more than 15 months must elapse between the date of one annual general meeting and the next, but so long as a company holds its first annual general meeting within 18 months of its incorporation it need not hold it in the year of its incorporation or in the following year.

CA 1985, s 367 provided that, on the application of any member of a company, the Secretary of State had the power to call, or direct the calling of, an annual general meeting where the company had failed to hold an annual general meeting in accordance with section 366 of CA 1985. This provision has not been included in CA 2006.

There is no statutory provision which deals with the business which may be conducted at the annual general meeting and *Table A* contains no such provision.

A matter that may be overlooked arises as a result of the provisions of Sch 13, Part IV para 29 which states that the register of directors' interests must be produced at the commencement of the meeting and remain open and accessible during the continuance of the annual general meeting to any person attending the meeting. This has now been repealed in 2007 and not replaced.

The meeting is a safeguard for the shareholders in that it provides them with an opportunity of questioning the directors on the accounts and reports, which are usually, but not necessarily, presented to the annual general meeting, and on general matters. Moreover, it is a meeting which must be held whether the directors wish it or not, unless in a private company an elective resolution has been passed to dispense with the need to hold it.

2 General meetings

The CA 2006 does not refer to 'extraordinary general meetings' as such a general meeting which is not an annual general meeting should simply be referred to as a general meeting. The court has power under CA 2006, s 306 (formerly CA 1985, s 371) to call a general meeting if it is impractical to call one in the usual way, and the court may direct that one member of the company present in person or by proxy shall be deemed to constitute a valid meeting.

An example of the use of CA 1985, s 371 is to be found in the following case.

Re British Union for the Abolition of Vivisection (1995) *The Times*, 3 March

It appeared that in 1994 an EGM had been so disrupted that a near riot had broken out as a result of animosity between opposing factions within the Union and no business had been done. The Union's articles stated that no votes by proxy were allowed at AGMs or EGMs, but the committee members of the Union wished to change that provision, allowing proxies so that it would be possible for members to vote without actually attending the meeting. The committee members asked the court to direct them to hold an EGM at which only the 13 committee members would be present, i.e. 13 out of 9,000 members. The change to proxy voting could then be resolved upon at the meeting. The court made the necessary direction under s 371. It was clearly not practical to hold a meeting in the normal way or, in fact, at all.

Comment

(i) It may seem that the case is likely to apply in rather special and isolated situations but it could be useful as a precedent where, in a private family company, opposing factions within the family were making it difficult to do business. However, it should be borne in mind that the courts are unlikely to use the section to suppress genuine and orderly debate.

(ii) Section 371 is not available to sort out disputes between shareholders simply because they have equal shareholdings. It is available for quorum disputes as where A and B are the only shareholders in Boxo Ltd and, say, A will not attend general meetings so that there is no quorum and business cannot proceed. In such a case the court can, under s 371, authorise a valid meeting with only B present. However, if the problem is deadlock as where A and B each own 50 per cent of the voting shares and business cannot proceed because A votes one way and B another, s 371 is not available to enable the court to make an order allowing B to outvote A or vice versa (see ***Ross v Telford*** [1998] 1 BCLC 82). Such a deadlock will, unless it can be resolved by agreement between the parties, generally result in the liquidation of the company.

(iii) The decision in *Ross* may be contrasted with ***Re Whitchurch Insurance Consultants Ltd*** [1993] BCLC 1359 where the shareholdings were unequal. The issued capital was 1,000 shares, of which the husband held 666 and the wife 334. Their personal and business relationship had broken down. The wife would not attend board and general meetings so that there was no quorum and the husband could not remove his wife from the board. The court ordered that a general meeting be held without the wife because otherwise a minority shareholder would prevent the majority shareholder from exercising majority power.

In addition, an auditor has the right to requisition a meeting on his resignation. Under CA 2006, s 518 where a resigning auditor has given a statement of the circumstances connected with his resignation (in accordance with s 519), that auditor is entitled to call on the directors of the company to convene a general meeting for the purposes of receiving and considering an explanation of those circumstances (see Chapter 23), and a meeting must be called by a plc if there is a serious loss of capital pursuant CA 2006 s 656 (see Chapter 8).

See p. 504
See p. 162

Convening of general meetings

General meetings are normally convened by the board of directors (CA 2006, s 302), though, as noted above, the court has power to do so in certain circumstances. CA 2006, s 306 gives the court power to order a meeting of the company and to direct the manner in which that meeting is called, held and conducted. The court can order a general meeting on its own motion or on the application of any director or any member who would be entitled to vote at the meeting: section 306(2). If the articles contain provisions relating to the directors' ability to call general meetings, these cannot supersede CA 2006 by preventing the board from calling general meetings.

The company secretary or other executive has no power to call general meetings unless the board ratifies his act of doing so (***Re State of Wyoming Syndicate*** [1901] 2 Ch 431).

As regards the time and place at which the meeting is to be held, this is in general terms a matter for the directors. However, it must be reasonably convenient for the members to attend and this probably prevents general meetings being held overseas. In addition, the directors must act in good faith when they call a meeting. Thus, in ***Cannon* v *Trask*** (1875) LR 20 Eq 669 the directors called the annual general meeting at an earlier date than was usual for the company to hold it in order to ensure that transfers of shares to certain persons who opposed the board would not be registered in time so that they would be unable to vote. An action for an injunction to stop the meeting succeeded. It should also be noted that once the directors have called the meeting they cannot postpone it and the meeting may be held even though the directors try to postpone or cancel it (***Smith* v *Paringa Mines Ltd*** [1906] 2 Ch 193). With the consent of the majority of those present and voting it could, however, once held, be adjourned.

Rights of minorities to requisition general meetings

The articles of a company usually provide that, apart from annual general meetings, meetings of the company can be convened by the directors whenever they think fit. The directors are, therefore, seldom under any obligation to call general meetings at which minority grievances can be put forward. However, under CA 2006, s 303 *et seq.* (formerly CA 1985, s 368) members holding not less than one-tenth of such of the company's paid-up capital as carries voting rights at the general meetings of the company can requisition a meeting. Thus, where a company has 200,000 £1 A ordinary shares, 50p paid, and (say) 50,000 B ordinary shares of £1 each, fully paid, and all the shares carry voting rights, the requisitionists must have paid up on their shares, whether A or B ordinary, one-tenth of £150,000, i.e. £15,000. Where the company does not have a share capital, members of the company representing not less than one-tenth of the total voting rights of all the members having a right to vote at general meetings of the company may make a requisition. The required percentage becomes 5 per cent in the case of a private company in which more than 12 months has elapsed since the end of the last general meeting (s 303(3)).

The requisitionists must deposit at the company's registered office a signed requisition stating the objects for which they wish a meeting of the company to be held. The directors must then convene a *general meeting*, and if they have not done so within 21 days after the deposit of the requisition, the requisitionists, or any of them representing more than one-half of their total voting rights, may themselves convene the meeting so long as they do so within three months of the requisition. The requisitionists can recover reasonable expenses so