

KEY FACTS COMPANY LAW



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 **HODDER**
EDUCATION

Directors

Appointment

- first directors appointed by subscribers to memorandum
- subsequent appointment in accordance with company's articles of association
- s 157 – a director must be at least 16 years of age

May be subject to disqualification

- Company Directors Disqualification Act 1986
- undischarged bankrupts

Contracts of service

- directors are not automatically employees
- terms of contract must be available for inspection by members: s 228
- terms of office longer than two years need approval from members: s 188

Termination of office

- retirement – by rotation
- resignation
- removal from office: s 168

DIRECTORS

Division of power between general meeting and board of directors

- Powers of management are usually delegated to the board of directors: Art 3 Draft Model Articles for both public companies and private companies limited by shares
- In such cases the general meeting has no power by ordinary resolution to give directions to the board or overrule its decisions
- Companies Act 2006 and Insolvency Act 1986 reserve certain powers to the general meeting
- Shareholders in general meeting may act if there is no competent board: *Barron v Potter* (1914)

11.1 Introduction

1. A company is an artificial person and as such can only act through agents.
2. Under s 154 of the Companies Act 2006 (CA 2006) every private company must have at least one director and a public company must have two. Every company must have at least one director that is a natural person.
3. There is no definition of a director, but s 250 CA 2006 provides that 'director' means any person carrying out the role of director, by whatever term described, and includes a 'shadow director'.
4. A shadow director is 'a person in accordance with whose directions or instructions the directors of a company are accustomed to act' (s 251(1) CA 2006).
5. The Act does not require companies to be managed by the directors, but Art 3 of the model articles for both public companies and private companies limited by shares provide that 'subject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company'.
6. Every company must keep a register of directors and, where relevant, company secretary at its registered office and must notify the Registrar of Companies of any changes within 14 days.

11.2 Appointment

1. Provisions relating to the appointment of directors, maximum and minimum numbers, quoracy, whether the chairman has a casting vote, and similar matters will be included in the company's articles of association.
2. CA 2006 introduced a new minimum age provision. Under s 157 a director must be at least 16 years of age on taking office. Under s 159 any existing director under 16 ceased to be a director when s 157 came into force.

11.2.1 Who appoints directors?

1. Under s 9(4)(c) CA 2006 the first directors are appointed by a statement in the prescribed form signed by the subscribers to the memorandum. The statement must also be signed by the directors to show that they consent to act in that capacity (s 12(3)).
2. Subsequent directors are appointed by members by ordinary resolution (*Woolf v East Nigel Gold Mining Co Ltd* (1905)).
3. Section 160 provides that in the case of a public company every director must be voted on individually unless it is agreed at the meeting, without anyone voting against the resolution, that the vote should be composite.
4. A company's articles of association may contain provisions for the appointment of directors. The model articles for private companies limited by shares (Art 17(1)) and public companies (Art 20) provide that directors may be appointed:
 - by ordinary resolution, or
 - by decision of the directors.

11.2.2 Defective appointment and disqualification

1. Section 161 provides that the acts of a director are valid even if there is a defect in his or her appointment or qualification. However, this section does not apply when there has been no appointment at all (*Morris v Kanssen* (1946)).
2. Certain persons may be disqualified from acting as directors:
 - anyone who is the subject of a disqualification order under the Company Directors Disqualification Act 1986;
 - it is an offence of strict liability, triable either way, for an undischarged bankrupt to act as a director without the leave of the court (*R v Brockley* (1994));
 - a sole director cannot also be the company secretary.

11.3 Termination of office

11.3.1 Retirement and resignation

1. Model articles for public companies, Art 21 provides:
 - all directors must retire at the first AGM, but may seek reappointment;

- one third of directors must retire by rotation each year, but may seek reappointment.
2. A director may resign by giving notice to the company which the company must accept. The articles may stipulate certain requirements, for example that notice must be in writing.

11.3.2 Removal from office

1. Directors (either individually or as a board) may be removed by the shareholders by ordinary resolution (s 168 CA 2006).
2. Conditions for removal are that:
 - special notice must be given of a resolution to remove directors (s 168(2));
 - a copy must be supplied to the director who is the subject of the resolution;
 - note that in any company a resolution to remove a director before his term ends must be taken at a meeting;
 - the director is entitled to make representations in writing (which must be circulated to every member) and he is entitled to be heard at the meeting;
 - removal under s 168 does not deprive the director of any claim for compensation or damages payable in respect of loss of office.
3. The shareholders' right to remove directors as set out in s 168 applies notwithstanding any provision to the contrary in the company's constitution, but see *Bushell v Faith* (1969) where the House of Lords held that a weighted voting rights clause, which effectively prevented the removal of a director in a small private company, was valid.
4. Removal of a director under s 168 may incur liability for breach of any contract of service which may exist between the company and the director (*Southern Foundries v Shirlaw* (1940); *Shindler v Northern Raincoat Co Ltd* (1960); *Read v Astoria Garage (Sreatham) Ltd* (1952)).
5. In certain circumstances, especially in small closely-held companies, s 122(1)(g) Insolvency Act 1986 and s 994 CA 2006 have been used by directors threatened with removal: *Harman v BML Group Ltd* (1994); *Re Bird Precision Bellows Ltd* (1986) and see chapter 14.

11.4 Remuneration

1. Directors are not entitled to remuneration unless provided for in the constitution (*Hutton v West Cork Railway Co* (1883)).
2. Provision is usually made in the articles to pay directors: model articles for private companies limited by shares Art 19, and for public companies Art 23.

11.5 Directors as employees

1. Directors are not automatically employees of their companies. A director (especially an executive director) may have a separate contract of service with the company.
2. Whether a director is an employee or not is a question of fact (*Secretary of State for Trade and Industry v Bottrill* (1999)).
3. A copy of every director's service contract or a memorandum setting out the terms of the contract of service must be available for inspection by members (s 228).
4. A term in a director's contract which provides that the director shall be employed for more than two years which cannot be terminated by notice by the company must be approved by resolution of the members (s 188).

11.6 Division of power between general meeting and the board

11.6.1 General power of management

1. Companies will usually delegate powers of management to the board of directors. The extent of such powers is determined by the relevant articles in the articles of association.
2. Where the general management of the company is vested in the directors (as in Art 3 model articles for both private and public companies), the shareholders have no power by ordinary resolution to give directions to the Board or overrule their business decisions (*Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* (1906); *John Shaw & Sons (Salford) Ltd v Shaw* (1935)).

3. The right to litigate on behalf of the company is an aspect of management and as such is also vested in the board of directors (*Breckland Group Holdings v London & Suffolk Properties Ltd* (1989)). This can cause difficulty where the directors themselves have committed a wrong against the company.
4. Article 70 Table A Company Act 1985 states: 'Subject to the provisions of the Act, the memorandum and the articles and to any directions given by special resolution, the business of the company shall be managed by the directors who may exercise all the powers of the Company'. Article 70 also provides that no such direction shall invalidate any prior action of the directors.
5. The Companies Act 2006 model articles for both private companies limited by shares and public companies contain provisions similar in effect but more clearly expressed:
 - Art 3: subject to the articles, the directors are responsible for the management of the company's business, for which purposes they may exercise all the powers of the company.
 - Art 4(1): the members may, by special resolution, direct the directors to take, or refrain from taking, specified action.
 - Art 4(2): no such special resolution invalidates anything which the directors have already done.
6. The courts have taken a restrictive view of the power of members to direct the board and the members' reserve power contained in Art 4 of the model articles appears to be limited to specific instances rather than a general power to direct the board.
7. A company may restrict the powers of directors by provision in the articles. For example in *Salmon, Quin v Axtens* (1909) the articles gave a general power of management to the board of directors, but also gave a veto to one of two named directors on certain matters. It was held by the Court of Appeal (affirmed by the House of Lords) that the veto should be upheld and an ordinary resolution that sought to override it was ineffective.
8. A large number of powers are reserved to the general meeting by the Companies Act 2006 and the Insolvency Act 1986.

11.6.2 Default powers of the general meeting

1. The general meeting may ratify an act of the directors which is voidable as an irregular exercise of their powers (*Bamford v Bamford* (1970)).

2. The company in general meeting may act if there is no board competent or able to exercise the powers conferred on it (*Baron v Potter* (1914)).

11.6.3 Power and accountability

Directors have great powers. Chapter 10 and this chapter have dealt with some of these powers and some of the rules and principles of company law and corporate governance regulation designed to ensure that directors are accountable for their actions. The following chapters continue this theme in the context of directors' duties, shareholder remedies, takeovers and mergers and insolvency procedures.