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Directors and the missing 'articles'

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ing terms:

'A director may not be removed by ordinary resolution, notwithstanding the terms of s.168 (1) of the Companies Act 2006, which shall have no application to these articles.'

Will the inclusion of such a provision be of any benefit to a 'non-member director' or a 'member-director'.

Change or no change

A conventional view is that s168 (1) has not effected any change in the law because:

(a) the term 'any agreement' in s168 (1) is sufficiently wide in meaning to include the statutory contract, whether constituted under s14 (1) or s33 (1);

(b) thus, any provision in the articles purporting to restrict the removal of a director by ordinary resolution would be of no effect, being overridden by s168 (1).

But, another, albeit unconventional, view is possible:

(a) the term 'any agreement' does not extend to the articles because the phrase 'any agreement between it and him' is a reference to 'him [the director]' only in his capacity as a director; it does not relate to an agreement between [it] the company and [him] the director in some other capacity, such as a member.

Therefore, the articles cannot be classified as falling within the term 'any agreement between it and him';

(b) it is a membership right to require the company to act in accordance with its articles, even if that has the effect of indirectly enforcing an article not relating directly to members qua members;

(c) thus, a member-director can enforce a provision in the articles purporting to restrict his removal by ordinary resolution, provided that he does so on the basis that he is suing in his capacity as a member to enforce a membership right. This approach would also assist a non-member director if there was a benevolent member prepared to intervene.

However, this second view flies in the face of the long established judicial approach encapsulated by Astbury J in *Hickman v Kent or Romney Marsh Sheepbreeders' Association* (1915) 1 Ch 881:

'An outsider to whom rights purport to be given by the articles in his capacity as such outsider, whether he is or subsequently becomes a member, cannot sue on those articles, treating them as contracts between himself and the company, to enforce those rights.'

It will be a brave litigant who will be prepared to challenge the general judicial approach, which has been to adopt the *Hickman* principle. However, commentators (for



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example, Lord Wedderburn) have justified a different approach, citing cases such as *Quinn & Axtens Ltd v Salmon* [1909] AC 442 in support.

Securing positions

It was not the intention of the legislation to make any change, but the point could have been put beyond doubt if the words within the square brackets had been included in s.168(1) as follows:

(1) A company may by ordinary resolution at a meeting remove a director before the expiration of his period of office, notwithstanding anything [in the company's constitution or] in any agreement between it and him.'

In practice, it is still prudent for member-directors wishing to avoid the impact of s.168(1) to negotiate weighted voting rights

for their shares on any ordinary resolution to remove them.

Further, those weighted voting rights should be extended to any special resolution proposing to remove such weighted voting rights, even though any such purported removal may constitute a variation of class rights requiring the member-director's consent.

In addition, the relevant points should be covered in a shareholders agreement. Nor should the new 'entrenching' provisions in s.22 of the 2006 Act be overlooked, but, as they are not due for implementation until 1 October 2009, they must be left for future consideration.

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