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Directors and the missing ‘articles’

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ing terms:
‘A director may not be removed by ordi-

nary 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
affected any change in the law because:
(a) the term ‘any agreement’ in s168 (1) is suf-
ficiently wide in meaning to include the
statutory contract, whether constituted
under s14 (1) or s33 (1);
(b) thus, any provision in the articles pur-
porting 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 agree-
ment 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 arti-
cles, 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 pro-
vision 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 mem-
bership 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’ Associa-
tion (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 arti-
cles, treating them as contracts between him-
self and the company, to enforce those rights.’

It will be a brave litigant who will be pre-
pared to challenge the general judicial
approach, which has been to adopt the Hick-
man principle. However, commentators (for
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 expi-
ration 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 con-
sent.

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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