



## **University of Huddersfield Repository**

Cockerill, Alan and Mendelsohn, James

Directors and the missing 'articles'

### **Original Citation**

Cockerill, Alan and Mendelsohn, James (2008) Directors and the missing 'articles'. Solicitor's Journal, 152 (2). ISSN 0038-1047

This version is available at <http://eprints.hud.ac.uk/id/eprint/1753/>

The University Repository is a digital collection of the research output of the University, available on Open Access. Copyright and Moral Rights for the items on this site are retained by the individual author and/or other copyright owners. Users may access full items free of charge; copies of full text items generally can be reproduced, displayed or performed and given to third parties in any format or medium for personal research or study, educational or not-for-profit purposes without prior permission or charge, provided:

- The authors, title and full bibliographic details is credited in any copy;
- A hyperlink and/or URL is included for the original metadata page; and
- The content is not changed in any way.

For more information, including our policy and submission procedure, please contact the Repository Team at: [E.mailbox@hud.ac.uk](mailto:E.mailbox@hud.ac.uk).

<http://eprints.hud.ac.uk/>

# Directors and the missing 'articles'

Ambiguous wording in the Companies Act 2006 could put directors at a greater threat from removal, say Alan Cockerill and James Mendelsohn

**IT IS WELL** known that directors are removable by ordinary resolution, regardless of anything in the articles. But will this still be the case under the Companies Act 2006? Section 168, Companies Act 2006, came into effect on 1 October 2007, replacing s.303, Companies Act 1985.

Section 168 (1) provides: 'A company may by ordinary resolution at a meeting remove a director before the expiration of his period of office, notwithstanding anything in any agreement between it and him.'

By contrast the 'old' s.303 (1) states: "A company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its articles or in any agreement between it and him."

## New wording

There are two differences between the subsection 168 includes the words 'at a meeting', absent from s.303, but omits the words 'in its articles or', which appear in s.303.

The inclusion of the words 'at a meeting' means that an ordinary resolution to remove a director can only be moved at a general meeting. The written resolution procedure is not available (s.288 (2) (a)). However, no change arises, because the written resolution procedure under the 1985 Act was not available either (see Sched. 15A, Part 1).

But there may be a different result in relation to the omission of the words "in its articles or" from s.168 (1).

Under s.303 it was not possible to exclude its operation by any provision in the articles. Of course, that did not prevent a member being given weighted voting rights to protect his position as a director on a resolution to remove him (*Bushell v Faith* [1970] AL 1099 HL). Such provisions will continue to be effective in relation to s.168 (1).

Now, in s.168 (1), there is no specific reference to the company's articles, which begs

the question as to whether the omission has effected a change in the law.

## The statutory contract

A company's memorandum and articles of association constitute what is commonly termed the 'statutory contract' between the company and its members.

The statutory contract is set out in s.14(1) of the 1985 Act.

According to a ministerial statement on 7 November 2007, s.14 (1) will be replaced by s.33 (1) of the 2006 Act on 1 October 2009. Section 33 (1) provides:

'The provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions.'

The explanatory notes to the 2006 Act state that no change in the law is intended.

The key question is whether the term 'any agreement' includes the statutory contract under s.14 (1) or s.33 (1). If it does in either case, then, to that extent, there has been no change in the law.

Let us assume that the articles of a private company include a provision in the follow-

