

# Company law

## (I) Who have the control of the company

### Management Control:

In this case, Ian, Martin and Peter are directors and so they own the general power of managing the company by acting as the agents of the company.

By *Table A, Articles 82*, the directors may exercise all powers of the company not required by the ordinance or the articles to be exercised by the company in general meeting. Also, if the directors act within the powers given to them by *Art 82 (or by some similar article)*, the courts have generally upheld the view that the directors are not bound to obey resolutions passed by shareholders at a general meeting. This is because the articles constitute a contract by which the members agree that the directors will manage the company and they generally have no right to overrule BOD. As a result, the three directors can ignore resolutions of the general meeting on matters of management unless there is an amendment made in the articles (*Automatic Self Cleaning Filter Syndicate Co Ltd v Cuninghame (1906) UK.*)

However, there are some exceptional situations:

1. If the directors act beyond the powers given to them by the company's articles, the members may challenge the validity of their decisions (*Tang Kam Yip v Yau Kung School (1986)*).
2. The directors are unwilling or unable to act or exercise the powers vested in it, the members may do so. (*Marshall's Valve Gear Co Ltd v Manning Wardle and Co Ltd (1909) UK*)
3. The directors may seek the approval of the general meeting if it has acted or propose to act beyond its powers but within those of the company. The members may authorize the act by passing an ordinary resolution (*Grant v UK Switchback Railway Co (1888) UK*).
4. The board of directors may seek the approval of the general meeting if a director has acted in breach of his duty of care or his fiduciary duties. The general meeting may ratify his act provided it is intra vires and there is no forestall a takeover bid. (*Hogg v Cramphorn Ltd (1967) UK*)

### Ownership Control

In this case, as all shares are belonged to the same class, each share would then have the same voting rights attached. On the other hand, as each member has equal number of shares, so the ownership control of Goldies Ltd is equally divided between the five members (Martin, Ian, Peter, David and Lhynda) and no individual has absolute control.

However, Ian, Peter, David and Lhynda would have the majority of the votes (80% totally, more than 50%) and as a group, they would have control of the company over Martin who is just a minority shareholder in this case (20%).

For the members, besides the exceptional situations mentioned above needed to be approved by them, some decisions should also be made by them during the general meetings, such as alternation of the company's objects (S8), articles (S13) and name (S22), removal of directors (S157B) etc.

### **(II) Possibility for the business activity to be expanded to cover building work**

#### Under Object Clauses

In this case, *Object Clauses* can be used to explain the situation. *Object Clauses* is used to state the objects of a company in its memorandum aiming to limit its company's capacity to transact its business. If the company acted outside its objects as stated in the memorandum, the transaction was Ultra-Vires and void. Such contract is not enforceable by either party and could not be ratified by the company in general meeting. This ultra-vires doctrine is used to protect creditors and shareholders of the company.

However, after 10 Feb 1997, the Company Ordinance now provides that an object clause is optional (S5 (1A) (b)). But if the company proposes to apply for a license under S21 to dispense with the word "limited", the object must be stated. Also, the application must be made within 28 days of the resolution to alter the objects being passed, and notice of the application must be given to the Registrar (S8(3)). The alteration then has effect only in so far as it is confirmed by the court.

In this case, the Goldies choose to state its objects, which is providing decoration and refurbishment services and for any other purposes which the directors regard as being suitable for combination with this. As a result, it cannot carry on any business or exercise any power that is not authorized by its memorandum to carry on or exercise (S

5B (1) (a)). Furthermore, member of the company may bring proceedings to restrain the company from acting contrary to its objects or its articles (S 5B (2)). So, it cannot move into a new business involving building extension on flats and houses as it's beyond the objects stated.

### Passing special resolution

However, it can alternate its objects by passing special resolution, which is one passed by a majority of not less than three-quarters of such members are entitled to and vote in person or by proxy at a general meeting( four members' voting in this case). It can be done when the alternation is exercised "*bona fide* for the benefit of the company as a whole". As a result, it can alter the conditions of its memorandum with respect to the objects by adopting new objects which could lawfully have been contained in the memorandum at the time of its registration (S 8(1)). And, the notices must be given to all members to ensure that they are aware of the alteration.

In this case, all members want to expand the business activity except Martin. As each member has 20% voting rights, it can alter the object by passing special resolution (all others members' 80% of voting rights over Martin's 20% voting rights).

### (III) Legal significance of the articles in relation to Martin and Gina's appointment

The articles prescribe regulations for the internal management of a company. By *Lee Tak Samuel v Chou Wen-hsien*(1983), the court held that a company is entitled to include in its articles any provision it considered desirable in the regulation of its internal administration.

*Section 23* has the effect of creating two contracts:

- a contract between a company and each member, and
- a contact between each member and each other member, a contract among the members inter se( between themselves)

*The Companies (Amendment) Ordinance 2003* clarifies these contractual relationship that every member has a personal right to sue and enforce the terms of the memorandum and articles (s 23 (1A)).

#### Legal significance of the articles in relation to Martin's appointment

Supposing only the articles stated that Martin will be the sales director until 2005 but there is no employment contract between the Goldies and Martin, it does not provide the term of power for Martin to be sales director until 2005. So the other directors can just pass a special resolution to alter the articles so as to restrict the power of Martin, without in breach of the contract. In this case, Martin cannot sue the company in breach of the contract. (*Eley v Positive Life Assurance Co (1876) UK*).

However, under other circumstances, if there is an implied or express term defining the power of the sales director in the employment contract, then the other directors can't alter the articles by a special resolution. It is because it is implied that the employment contract also provides the term of power owned by Martin. As a result, the alteration of the articles will be a breach of contract between Goldies Ltd. and Martin, and Goldies Ltd. will be liable to compensate Martin for its breach.

#### Legal significance of the articles in relation to Gina's appointment

For Gina, she maybe able to argue that the articles form the basis of an independent contract so that the terms of the articles are incorporated expressly or implied into her contract with Goldies Ltd. Also, there is a separate agreement between Gina and Goldies Ltd that the company cannot deprive Gina of her appointment or amend the terms of her commission. As a result, any breach in the contract by changing the commission from 10% to 5% in the articles would entitle Gina to claim for damages against the company.

#### **(IV) Possibility of removing any directors under the articles**

##### **1. Removal by passing resolution:**

To remove a director, it requires passing Special Resolution, which means passing a

majority of not less than three-quarters of such members are entitled to and vote in person or by proxy at a general meeting under the *Company Ordinance (S 157B)*. It can be done when the alternation is exercised “*bona fide* for the benefit of the company as a whole”. But with the enactment of the *Companies (Amendment) Ordinance 2003*, an ordinary resolution, which means passing a simple majority, will be sufficient.

As a result it's possible to remove directors (other than a director of a private company holding office for life on 31 August 1984) by passing ordinary resolution before the expiration of his period of office although anything in the memorandum, articles, or in any agreement between him and the company.

In this case, the articles provides that “*in the event of a resolution being proposed at any general meeting for the removal from office of any director, any shares held by that director shall carry the right to five vote per share.*” As a result, if Martin (the director) is being removed, he will gain 5,000 voting rights at maximum and the other shareholders will have 4,000 voting rights at most totally. So it is impossible to remove any director under the company's articles as the director being removed always has 5,000 voting rights at maximum, so he/she must pass the ordinary regulation (by having 55.5% voting rights)

However, under *Company Ordinance*, in order to ensure that a director who is also a member cannot maintain himself in office against the wishes of the majority of shareholders, *S157B (5)* provides that no share may carry weighted voting rights, that is, a greater number of votes of a resolution to remove a director than it would carry in relation to the general matters to be voted on at a general meeting.

And, when *Company Ordinance* and the company's articles contradict each other, it should always judge according to *Company Ordinance*.

As a result, according to the *Company Ordinance*, the statement in the articles is not justified and all members, including the one being removed, should have 1,000 (20%) voting rights at most. So Ian, Peter, David and LhyndaIt together can have 4,000 votes at maximum while the Martin (the director being removed) can only have at most 1,000 shares. So it's possible to remove any directors by passing ordinary resolution.

## 2. Removal by alternation of qualification requirements of directors

On the other hand, the directors can be removed by alternation of requirements of qualifications of directors. When the alternation of the qualifications is “*bona fide* for the benefit of the company as a whole”, the company's articles can be altered to increase

or vary the grounds for disqualification. It can pass a special resolution and, the alteration is valid and can be used to remove the director.

#### **(V) Possible remedies might be seek by Martin**

##### 1. Removal by resolution

The memorandum and articles of association are physically contract between Goldies Ltd and the members (S23). Moreover, under S13, Goldies Ltd has the power to alter or add to its articles by special resolution (*Busheell Faith 1970*) if the alteration is “*bona fide* for the benefit of the company as a whole”.

##### Assuming presence of employment contract

First of all, supposing there is an implied or express term defining the power of the Martin as sales director in the employment contract, Goldies Ltd may be in breach of contract if the articles are altered in such a way that the contract can no longer be performed. In this case, the alteration of the articles amounts to a breach of contract between Goldies Ltd. and Martin. Goldies Ltd. will be liable to compensate Martin for its breach. (*South Foundries v Shirley (1940) UK*). Goldies Ltd is liable to compesnsate Martin for his loss. He could get back the remuneration that Goldies Ltd owed him.

If Martin was unable to claim damages in breach of contract, the alteration of the articles can be challenged via S168A by “unfair and prejudice” (*Re Bondwood Ltd 1990*). By S168A, Martin can apply to the court for relief against conduct that is unfairly prejudicial in relation to the running of Goldies Ltd. However, he should establish that unfairness and prejudice must coexist (*Re Taiwa Land Investment Co Ltd*). Moreover, the conduct complained of and its result must be subject to an objective test.

In this case, it is obvious that Martin would be able to establish that the majority shareholders are using their greater voting power which makes him unable to enjoy a fair participation in the affairs of Goldies Ltd. This can be showed by the alteration of the articles for removing him as the sales director until 2005 and adding a clause which required any member (Martin in this case) to sell his share if a majority of shareholders demand.

On the other hand, Martin may also claim a personal action as his rights as a member have been infringed. For example, he may bring a personal action to enforce his contract with Goldies if the act complained is “*ultra vires*” (expansion of the company’s

business), or those in control have not acted in accordance with the company's memorandum and articles.

In this case, there are several possible orders which the court may make. The court may make an order regulating the affairs of Goldies Ltd. in the future. The court can also restricting the doing or continuation of some act (e.g. requiring Martin to sell his shares in this case) an order altering Goldies's memorandum and articles.

#### Assuming absence of employment contract

However, if there is no employment contract between the parties, Martin can be removed and he cannot get the *prima facie* damages that would have been paid during the unexpired portion of a fixed-term contract.

#### 2. Removal by alteration of disqualification

Also, if the director is removed by alteration of qualification required of directors, an its for the benefit of the company, neither of the parties can complain if the articles are altered. As a result, no damage could be claimed. (*Shuttleworth v Cox Bros and Co(Miadenhead)Ltd(1972)UK*)