Decision of the Court

The first issue that arises is this: the Plaintiff was appointed as the Managing Director/Chief Executive Officer of the first Defendant company. Does the Articles of Association of the first Defendant company or the Companies Act of 2009 require him to be a shareholder of the company?

Does being the Managing Director/Chief Executive Officer of a company make one also a shareholder of the company? The Articles of Association of the 1st Defendant nor the Companies Act of 2009 require that a director be a shareholder. Articles sometimes provide that the holding of the necessary shares is a condition precedent.

Management of a Company

Pg 449 Boyle & Birds' Company Law: Although the ------ Companies Act of 2009 requires that every company must have a director or directors, and although it attributes many functions to and casts many obligations on directors, it does not of itself prescribe how the business of the company is to be managed. Nor does it define the term 'director'. This and some other aspects of the law relating to directors and other officers are left to the articles which in practice will adopt or follow, with modifications, the relevant parts of Table A.

Appointment of Directors

The articles usually provide how the directors are to be appointed and in practice the first directors are normally either named in the articles or directed to be appointed by the subscribers to the memorandum. If appointment lies with the subscribers, then until they have made an appointment, a general meeting of the company must be held to perform any acts. Pg 450 of Boyle & Birds'.

Directors' qualification shares

The Companies Act 2009 does not require that a director be a shareholder, but articles may require it. Pg 451.

Articles sometimes provide that the holding of the necessary shares is a condition precedent to election, but it is more usual to require the obtaining of the qualification after appointment. The articles may also require that a director cannot act before acquiring his qualification. In this case, he must qualify before he acts and within a reasonable time. Pg 452.

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Remuneration of directors

Directors qua directors are not entitled as of right to any remuneration, whether upon a quantum meruit or otherwise; Re Geo Newman and Co [1895] 1 Ch 674 (CA). A 'director is not a servant; he is a person doing business for the company, but not upon ordinary terms. It is not implied from the mere fact that he is a director that he is to be paid for it'; Bowen LJ in Hutton v West Cork Rly (1883) 23 Ch D 654 at 671 (CA). However, this proposition may be qualified. First, the articles may provide for director's fees. Secondly, there may be a service contract between a director and his company which entitles him to a salary or other remuneration, in other words, a director is often an employee as well as holding the office of director. Further, if a director performs services which are not comprehended by the terms of any service contract (or where there is no service contract), he may claim quantum meruit.

However, where a managing director/executive director's appointed under article …or similar article, which confers on the board of directors the power to determine the managing director's remuneration, and the board have not determined his remuneration, the managing director will have no claim in quantum meruit; since he has agreed to serve the company on the basis of this provision in the articles, this excludes a quasi-contractual claim in quantum meruit; Re Richmond Gate Property Co [1965] 1 WLR 335 the contract of service in this case was not constituted by the articles but was a contract of service created by the conduct of the parties based on, or incorporating the articles – 'those were the terms on which he accepted office.' Pg 453 of Boyles'

The Members of Company

The law defines the members of a company in section 64 (1) of the Companies Act 2009 as the subscribers to a company's memorandum, who shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members. Subsection (2) of the same Act says that every other person who agrees in writing to become a member of a company, and whose name is entered in its register of members, shall be a member of the company. **(Comments)**

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Entry in the register of members

As stated above, the other persons who are members are those who have agreed to take shares and whose names are entered in the register; p 349 Boyle & Birds' Company Law. Even if they are not so entered, if there is complete agreement between them and the company, subject to the possibility of that agreement being rescinded by mutual consent, they will not escape liability, for the register can be amended under (section 359 company's act 1985 of England) while the company is a going concern, or under section …… of the Insolvency Act when the company is in liquidation. However, the entry in the register of the name of a person does not make him a member if he never agreed to become one, and his name can be removed in the same way.?????? pg 350 of Bird's. It is possible for the court to make an order for removing his name retrospectively in order to free him from liablility as a contributory, if that name has remained on the register when it should have been removed. (pg 350 Bird's). (Comments)

The simplest and most usual form of agreement to become a member is an application for and an allotment of shares. (p350 Bird's). But an agreement may be made in other ways; Re Nuneaton Borough Association Football Club [1989] BCLC 454 where the Court of Appeal held that the phrase 'agrees to become a member' in section 22 (2) is satisfied where someone assents to become a member. It does not require that there be a binding contract between the person and the company…… For instance, there may be contracts to take shares which are not in writing, for a person may agree with the company by word of mouth, or even by conduct, to become a member. An agreement for value to take up shares in a company, if called upon is enforceable notwithstanding the death of the person making the contract.

Where the articles specify a procedure for admission to membership, this must be complied with; POW Services Ltd v Clare [1995] 2 BCLC 435.

If an agreement to take shares (not arising merely by subscribing to the memorandum) is brought about by misrepresentation, made either by the company or its agents, the member can, before a winding-up, obtain rescission of the contract, repayment of what he has paid, and removal of his name from the register. However, a contract procured by misrepresentation being only voidable and not void, if the company has gone into liquidation and other interests have come into existence, it is too late to set the contract aside, and

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the person remains member. **(see: on the effect of misrepresentation on a contract to subscribe for shares see 6.33 et seq)**

What is a shareholders'agreement?

A shareholders' agreement is essentially a contract between some or all of the shareholders in a company and frequently the company itself. The basic purpose of a shareholder' agreement is to provide how the company is to be managed and as far as possible, to prospectively address issues that might otherwise become divisive in the future if not agreed in advance.

What are articles of association?

The articles of association are a basic constitutional document of every company. In legal terms, articles of association automatically bind the company and its members though the members are only bound by the terms of the articles of association in their capacity as shareholders of the company and not in any other capacity. They contain various provisions concerning the internal regulation of a company.

The articles of association are registered with the Companies Registration Office, in this case, with the Corporate Affairs Commission; and any changes thereto must also be submitted to the Corporate Affairs Commission within a prescribed period. Accordingly, the articles of association of a company are public documents and are open to inspection by the public.

It is sometimes argued that article of association could be drafted to deal with matters which one would typically find in a shareholders' agreement. Whilst this is correct, there are certain important reasons why shareholders more often choose to regulate their relationship between one another as shareholders by means of a shareholders' agreement rather than by means solely of the articles of association.

There is frequently a lack of understanding of the role and importance of articles of association amongst shareholders of a company. Even where a shareholders' agreement is put in place, the article of association continue to play an important role in governing the internal regulation of a company. In practice you will find that where a shareholders' agreement is put in place, it is commonplace to modify the articles of association which were adopted on incorporation or frequently replace those articles so that they conform with the provisions in the shareholders' agreement which relate to the internal

management of the company. It is important that the shareholders' agreement and the articles of association are drafted in a manner to avoid inconsistencies arising between the two documents.

Alterations of Shareholders' Agreements and Inconsistencies with Articles of Association

A shareholders' agreement will generally speaking only be capable of alteration with the consent of all the parties to the agreement. It is open for the unanimous consent and this would be most common where one party (such as a venture capital investor) has superior negotiating power. In addition, the High Court has power under section ???? of the Companies Act … to vary or indeed terminate a shareholders' agreement.

Shareholders' agreement and articles of association should be drafted with a view to avoiding inconsistencies. In order to deal with the possibility that inconsistencies may arise between the two documents, it is normal to include in the shareholders' agreement a 'supremacy clause' which provides that in the event of conflict the provisions of the shareholders' agreement would prevail to decide the conflict.

If articles of association are amended, such amendment must be filed in the Companies Registration Office within a prescribed period and if the supremacy clause in a shareholders' agreement operates as a de facto variation of the articles of association, then there is an argument to the effect that the shareholders' agreement should be filed in the Companies Registration Office along with the articles of association.

As the shareholders' agreement may contain sensitive details that the parties to the shareholders' agreement may not wish to be made public, it would be most undesirable to be forced to file the shareholders' agreement in the Companies Registration Office. To avoid this, it is generally advised that the supremacy clause be drafted to provide that the parties to the shareholders' agreement agree between themselves as parties to the shareholders' agreement and that in the event of a conflict between the shareholders' agreement and the articles of association that they will agree to be bound by the interpretation in the shareholders' agreement and that they will use their voting powers as shareholders to amend the articles of association to remove the inconsistency.

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Enforcement/Remedies

……bearing in mind that ultimately a shareholders' agreement is a contract one party can sue another party for damages of breach of contract or, in appropriate cases, for injunctive relief restraining certain actions that would be a breach of the shareholders' agreement or, less commonly, an injunction seeking a mandatory injunction requiring certain things to be done. Courts generally only grant injunctions in certain fairly limited circumstances and the most important consideration is that the court must be satisfied that damages would not be an adequate remedy for the plaintiff.

In: Southern Foundaries Ltd v Shirlaw [1940] AC 701 the court held that a company cannot be precluded from altering its articles of association thereby giving itself power to act under the provisions of the altered articles; but so to act may nevertheless be a breach of contract if it is contrary to a stipulation in the contract validly made before the "alteration" and the court awarded damages for wrongful dismissal of the managing director of the company even though the mode of dismissing was valid under the articles. There is also considerable opinion to show that the relief may also lie in terms of an injunction to restrain it possible breach of the shareholders agreement contract.

In: Vodafone International Holdings BV v Union of India (2012) 6 SCC 613 it was observed inter alia that a breach of a shareholders agreement which does not breach the articles is a valid corporate action but the parties agreed can get remedies under the general law for breach of any agreement and not under the Companies Act. In other words, even though the provisions of an affirmative vote are not incorporated in the articles, and though the action of the company in providing for a rights issue would be valid under the Companies Act, such an action will still be in breach of the shareholders agreement for which the aggrieved shareholder can pursue an action for breach of contract.

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The essence of restitution

The law of restitution is concerned with whether a claimant can recover a benefit from the defendant, rather than whether the claimant can be compensated for loss suffered. [pg 1632, paragraph 29-001, Chitty on Contracts vol 1 General Principles, London Sweet & Maxwell 2004] Lord Wright in: Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 61 espoused that " it is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep……" Restitutionary remedies can also be triggered where the defendant has obtained a benefit by the commission of a wrong; pg 1632 Chitty On Contracts supra; or where the claimant can bring a claim to recover property held by the defendant in which the claimant has a proprietary interest; Foskett v McKeown [2001] 1 AC 102.

The common law has not been alone in providing restitutionary remedies. In equity, such restitutionary remedies may involve restoring value to the claimant or the return of property obtained or its traceable substitute. Pg 1633 Chitty (supra) . In equity, restitutionary principles have been influential in many ways such as: 1) in the constructive trust, whereby a defendant is deemed to be a trustee of property for the claimant by operation of the law, so that the defendant as beneficiary is able to recover what is due to him; 2) there is the equitable remedy of an account of profits which involves the return of value to the claimant when the defendant has profited from the commission of an equitable wrong; 3) the equitable concept of unconscionability has proved important in the development of certain grounds of unjust enrichment, especially those relating to the exploitation of the claimant by the defendant.

Restitutionary remedies are available where the defendant has profited from the commission of a relevant wrong or where the defendant has interfered with the claimant's proprietary rights; [pg 1638 Chitty supra.]

It has been argued that the true basis of a number of situations in which restitution is granted is a principle by which the claimant's reasonable reliance on a defendant's words or conduct is protected; Fuller & Purdue (1936) 46 Yale LJ 52.

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Restitutionary remedies are available by reference to where the defendant has benefited from the commission of some form of wrongdoing such as certain torts, equitable wrongs and exceptionally for breach of contract. In such cases, the cause of action is founded on the wrongdoing rather than the unjust enrichment. Also, restitution may be awarded where the defendant has interfered with property in which the claimant has a legal or equitable proprietary interest. In such claims, the underlying cause of action is the vindication of the claimant's property rights rather than unjust enrichment; [pg 1642 Chitty.

What may give rise to a restitutionary claim? Fraud or deceit; inducing breach of contract.

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