REMOVAL OF A DIRECTOR UNDER S. 184 COMPANIES ACT 1948 (ENGLAND)

Pedley v. *Inland Waterways Association Ltd.* [1977] All E.R. 209

Since the case of *Bushell* v. *Faith* [1970] 1 All E.R. 53 giving a restricted interpretation of S. 184 of the English Companies Act 1948 (hereinafter the Act), another case has now arisen which serve to illustrate once more the ineffectiveness of S. 184. This case is *Pedley* v. *Inland Waterways Association Ltd.* [1977] 1 All E.R. 209.

In this case, the plaintiff (Pedley) sent to the defendant company (Inland Waterways Association Ltd) on the 29 October 1975 a notice which read:

> "As required by S. 184(2) Companies Act 1948, I give notice that I intend to propose at the Annual General Meeting of the Company on 29 November 1975 the following ordinary resolution: 'That all members of the Council be removed'."

The defendant company was a company limited by guarantee incorporated under the Act. It was common ground that the members of the council of management of the company were "directors" for the purposes of the Act. On the 1st November 1975 the plaintiff received a letter from the secretary of the defendant company saying that "your resolution cannot be accepted because section 140 of the Companies Act 1948 has not been complied with." An exchange of letters took place between the plaintiff and the secretary who held firmly to his view that the plaintiff's resolution "cannot be accepted." Consequently the plaintiff issued an originating summons (before the Annual General Meeting) claiming, *inter alia*, a declaration that the defendant company shall permit the plaintiff "to move, and the meeting [i.e. A.G.M.] to discuss and vote on, a resolution 'that all members of the Council be removed.' " (p. 213) The plaintiff did not apply for interlocutory relief hoping that the attitude of the council of management would change as a result of the initiation of the proceedings. The annual general meeting was held as planned. The plaintiff's motion was not on the Agenda and he made no attempt to move his resolution. Owing to this, he decided to continue with the proceedings he had started.

Although the plaintiff stated relief had become academic and hypothetical, Slade J. allowed the proceedings to continue on the basis of costs that has already been incurred and the practical relevance of the resulting decision in case the plaintiff might decide to repeat his act at the next Annual General Meeting. (p. 214) The argument of the plaintiff as found

by the learned judge was in five propositions: (1) In view of S. 184(1) [Equivalent to but not identical to S. 129(1) Malaysian Companies Act, 1965], the defendant company may by ordinary resolution remove a member of the council; (2) by the notice sent by the plaintiff, the plaintiff made it plain that his intended resolution was to remove the members of the council under S. 184 of the Act; (3) notice of the intention to move the resolution was duly given to the company not less than 28 days before the meeting at which it was to be moved, within the requirements of S. 142 [equivalent to but not identical to S. 153 Malaysian Companies Act 1965, hereinafter "the Malaysian Act"], (4) Since it was not practicable for the company to give its members notice of the resolution at the same time and in the same manner as it gave notice of the annual general meeting (the notices of that meeting already having been sent out) the defendant company, on receipt of the notice, was bound under S. 142 of the Act to give its members notice of the intended resolution 'either by advertisement in a newspaper having an appropriate circulation or in any other mode allowed by the articles, not less than twenty-one days before the meeting.'; (5) if the defendant company had carried out its said duty of giving notice of the intended resolution to its members, the business to be dealt with at the annual general meeting could and should properly have included the plaintiff's resolution (p. 215).

Slade J. decided in favour of the defendant company and dismissed the plaintiff's summons. His decision, however, was not as widely framed as the defendant company's argument i.e. that the company was under no obligation to give notice to its members of the plaintiff's resolution. Here, the headnote of the report appears to be misleading. Rather the learned judge summarised his decision (by what this writer feels is the correct *ratio decidendi* of this case) by saying:

> "I can find nothing in the context of S. 142 which would justify the conclusion that it is intended to confer on a single member the right to compel the inclusion of such a resolution in the agenda for a meeting, when such a member could not himself have effectively convened a meeting for consideration of the resolution." (p. 217).

The learned judge's reasons for reaching this conclusion is highly original and interesting and therefore bears setting out in some detail. In fact it can be said that the decision was reached by a process of pure statutory interpretation by general principles, especially that some what elusive and equivocal principle – what is the intention of Parliament? The learned judge, did, however, find some implicit support for his decision in the case of *Ball* v. *Metal Industries Ltd.* (1957) SC 315 but by the same breath he also said he did not rely on this decision. (p. 217).

The basic ground which appear to this writer of the learned judge's decision lie in two tightly argued paragraphs which must be set out in full

in order to understand its full rigour. The learned Slade J. said at p. 216:

> "With respect to the plaintiff, I think that this submission involves a misconception as to the true construction and effect of S. 142. The question must in the end turn on the meaning to be given to the phrase in the section beginning with the words "and the company shall give its members notice of any such resolution. . .' on which the plaintiff's argument wholly depends. [Note that the Malaysian equivalent S. 153 has identical words] . There are two possible ways of reading this phrase, namely (a) as being merely intended to confer on the members of a company the right to receive notice, in the manner provided for by S. 142, of any resolution of which special notice is required and has been duly given and which is to form part of the agenda to be dealt with at the relevant meeting; or (b) as being intended to have two distinct consequences, namely (i) to confer on any individual member of a company, on giving the necessary 28 days' notice to the company, the right to have any resolution of which special notice is required, placed by the company on the agenda for the relevant meeting, that right being separate from and additional to the rights conferred on him by S.140 of the Act and any other similar rights conferred on him by the company's articles of association, and also, (ii) to confer on all other members of such company rights of the nature referred to in (a) above.
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> In my judgment the narrower construction, (a) above, is clearly the correct one. First, there appears to me no sensible reason why the legislature should have intended by S. 142 to confer on an individual member rights to compel the inclusion of a resolution in the agenda for a company meeting, being rights much more extensive than those conferred by S. 140, merely because the resolution happens to be a resolution for the removal of a director, falling within S. 184 or for the appointment of a director over the age limit, falling within S. 185, or for the supersession of an auditor falling within S. 160. On the contrary, I can see powerful reasons why this would not have been the intention of the legislature." (p. 216).

With the greatest of respect, the writer finds the "two possible ways" of reading the impugned phrase as argued in the first quoted paragraph difficult to understand. The main thrust of the learned judge's point seems to lie in the second paragraph of the above quotation, i.e. that the legislature could not have intended to confer a right on a individual which is 'more extensive' than that given by S. 140. (S. 140 (Malaysia S. 151) is the requisition section which confers a right on individual members of a company to compel the company, *inter alia*, to give members notice of an intended resolution for the next annual general meeting. But this section

has strict conditions like requiring the requisition by a certain number of members and so on). As such it is respectfully submitted that the attempted 'double' interpretation given to the impugned phrase is only a rationalisation of what in fact the learned judge really meant. A second comment that should be made at this juncture is that even if the narrower construction (a) is correct, what does this construction really mean? The said construction is that S. 142 is "merely intended to confer on the members . . . the right to receive notice . . . of any resolution of which special notice. . . has been duly given."

The question here is that since a right is given, surely too there must be an opportunity to vindicate this right in a court of law. In the writer's submission, the said right to receive notice cannot be said to exist in vacuo or be said to be that even though it is a right, the company still has no reciprocal duty to give the notice, an argument forwarded by the defendant company. In an earlier part of the judgment the learned judge said, "In the events which had actually happened, whether or not this failure *constituted a default* on the part of the company, no notice of the plaintiff's intended resolution had been given before the annual general meeting in the manner provided by art 15 or by S. 142 of the Act." (p. 214 emphasis added). This non-committal attitude on whether a default has occurred serves to illustrate that this so-called right to receive notice is actually a peculiar right, a right born out of the mind of the judge. In short, it is a right to the members without a reciprocal duty on the company.

Finally, it is necessary to proceed to the "powerful reasons" why the legislature did not intend by S. 142 to confer a right on a member to compel inclusion of his intended removal resolution.

The learned judge said that if the plaintiff's submission is correct, at least in theory a company could receive hundreds of notices of intentions to move resolutions of the nature under discussions (eg. removal of director, the non appointment of retiring auditors and appointment of an over-age director) perhaps from many different members and relating to many different directors. The company would be bound at its own expense to give its members notice of each and every one of such resolutions. "The potential practical inconveniences that could follow if this submission were correct, at least in the case of large public companies, require little elaboration." (p. 216.) The writer would respectfully say here that it is not an everyday occurrence that members of large public companies would wish to remove its directors and if such an intention were to arise, it would inevitably be based on sound grounds, in which event the intention of the legislature should be to help the member to remove the defaulting director as quickly and conveniently as possible with of course having given him a chance to defend himself pursuant to S.

184. It may even be argued that it is better to invoke the machinery of S. 184 so as to allow a particular director to clear himself of any accusations that may be hurled at him.

The next 'powerful reason' for the learned judge's finding is that Ss. 142, 160, 184 and 185 of the Act when read together show the general intention of the legislature that a special machinery must be provided for the removal of directors, the appointment of over-aged directors and the supersession of auditors. The crucial phrase in S. 142 "is merely part and parcel of this machinery and is designed to make certain that members have at least 21 days notice of any resolution falling within these special categories. . .. While from the point of view of a member of a company S. 140 may be regarded as an enabling provision, S. 142 is merely protective, not an enabling provision." (p. 217). On this ground, the writer would humbly suggest that even though the special machinery exist, that machinery would not be brought to work if in the first place the company has a right to stifle an intended resolution *ab initio*.

In summary, *Pedley* v. *Inland Waterways Association Ltd.* is a boon to the Board of Directors. If the majority of them are desirable of getting rid of a particular director, they would allow an intended removal resolution to take its full course via. S. 184 and S. 142. However, if the directors gang up to protect one of themselves, they would now quite confidently ignore the intended resolution and advise the aggrieved minority shareholder to proceed via the difficult and expensive path of S. 140 and S. 142 together with S. 184.

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NOTES ON LEGISLATION

MAJORITY AND THE PROPERTY AND INHERITANCE STATUTES

The purpose of this short note is to discuss a number of important amendments to property and inheritance statutes which Parliament passed in the last few years in order to lower the age of majority in them from twenty-one to eighteen years. The amendment Acts are the Trustee (Amendment) Act 1974, the Distribution (Amendment) Act 1975 and the Wills (Amendment) Act 1976. The change in the age of majority in the revised Probate and Administration Act 1959 (Revised 1972) is also dealt with.

The stage was set in 1971 when the Age of Majority Act was passed. Sections 2 and 4 of this new Act read as follows:

"2 Subject to the provisions of section 4 the minority of all males and females shall cease and determine within Malaysia at the age of eighteen years and every such male and female attaining that age shall be of the age of majority"

"4 Nothing in this Act shall affect

(a) the capacity of any person to act in the following matters, namely, marriage, divorce, dower and adoption;

(b) the religion and religious rites and usages of any class of persons within Malaysia;

(c) any provision in any other written law contained fixing the age of majority for the purpose of that written law"

The effect of s.4(c) is that if a statute contains a provision specifying a particular age as the age of majority then that provision and not s.2 of the Age of Majority Act 1971 is to prevail. On the other hand if there is no provision in a statute fixing a specific age as majority then the age as provided by s.2 would operate.

This Act repealed the Age of Majority Act 1961 which had fixed a different age of majority, namely, the ages of eighteen and twenty-one years, for Muslims and non-Muslims, respectively. At the time the Age of Majority Bill 1971 was debated in Parliament the Attorney-General told the Dewan Rakyat, that the purpose of this important new legislation was to remove this anomaly and to provide for a uniform age of majority for Muslims and non-Muslims.[1]

[1] Proceeding of the Dewan Rakyat 17th March 1971 at p. 1354.