Chapter 6 – Members

Alyn and Helen run a successful partnership. In 2009, they incorporate their business (Coles & Wilkins Ltd) and 500 shares are issued. Alyn and Helen each take 100 shares, 200 shares are taken by Simon and the remaining 100 shares are taken by Diane.

The company’s accounts are audited by Hywel. It is apparent that Hywel has been negligently auditing the company’s accounts and Alyn, Helen, Simon and Diane all believe that Hywel should be removed before his period of office has expired. Alyn is aware of the consensus and so writes a letter to Hywel informing him that his office is terminated and he is no longer the company’s auditor.

Simon and Diane rarely attend meetings and Alyn shows little interest in attending board and general meetings. Helen therefore tends to run the business by herself, and the other members appoint her to act as their proxy. She uses this power to alter the articles and to change the company’s name to Wilkins Ltd.

Given that Alyn never attends board meetings, Simon and Diane are of the opinion that he should step down as a director but Alyn refuses. Simon and Diane request that the directors call a general meeting to decide the issue, but Alyn and Helen refuse. Accordingly, Simon and Diane convene a meeting themselves (at their own expense) and invite Alyn and Helen to attend. The meeting takes place and, as Simon and Diane collectively hold 300 shares compared to the directors’ 200 shares, they contend that the resolution is passed and Alyn should vacate office. Alyn points to a provision in the company’s articles, which states that a director can only be removed if a special resolution is passed. Simon and Diane state that Wilkins Ltd should reimburse them for the costs of the meeting.

Discuss whether any breaches of the law have occurred and whether the decisions taken have followed the applicable procedures.

Introduction

- This problem question requires you to demonstrate a sound knowledge of some of the procedures by which a company is run.
- This question will require you to discuss several issues, namely:
  1. The validity of the auditor’s removal
  2. The validity of the alteration of the company’s name
  3. Whether or not the article provision requiring a special resolution to remove a director is valid.
Removal of auditor

- All of the members are of the opinion that the company’s auditor, Hywel, should be removed as he has been negligently auditing the company’s accounts. The Companies Act 2006 (CA 2006), s 510 provides that a company’s auditor can be removed at any time by passing an ordinary resolution at a meeting. Even though the company’s members are unanimous on the need to remove Hywel, no meeting was convened and no resolution was passed.
- The Duomatic principle (named after the case of Re Duomatic Ltd [1969]) would seem to aid the members of Coles & Wilkins Ltd. This principle provides that if all of the members entitled to vote on a matter are in agreement on that matter, then the agreement will be valid even if no meeting was convened and no resolution took place.
- However, the rule is not absolute. It will be noted that s 510 explicitly states that the ordinary resolution must be passed at a meeting. Although no authority exists, it is likely that where statute requires a meeting (namely where the removal of an auditor or director is sought), then the Duomatic principle cannot be used. Further, the CA 2006 imposes a number of rules in relation to auditor removal to ensure that a company cannot quietly remove a troublesome auditor. It would severely undermine these rules if the Duomatic principle could be used to remove an auditor.
- Accordingly, it is likely that Hywel’s removal is not valid and, if Coles & Wilkins Ltd wishes to remove him, it will need to convene a meeting and pass an ordinary resolution (which it would have no problem doing).

Alteration of company’s name

- The CA 2006, s 77 provides that a company may change its name by passing a special resolution, or by any other means provided for by the articles. In order for a valid name change to occur, a special resolution will need to be passed or the unanimous consent rule (discussed above) would need to be used.
- Should the special resolution route be taken, a meeting would need to be convened and a vote taken. A special resolution requires a majority of not less than 75 per cent. You are not told whether or not Helen has control of 75 per cent of the company’s votes, although the phrase ‘the other members appoint her to act as their proxy’ indicates that all the other members are happy for her to exercise their votes.
- If this is so, Helen would have no problem passing the requisite special resolution, or she could pass the vote using the unanimous consent rule discussed above.

Removal of Alyn

- Simon and Diane wish to remove Alyn from the board. The CA 2006, s 168(1) provides that a director (or directors) may be removed by passing an ordinary resolution. It is worth noting that removal by this method will not prevent Alyn from receiving any compensation due to him as a result of the removal (CA 2006, s 168(5)(a)). It is also worth noting that between them, Simon and Diane hold 300 of the company’s 500 shares (60 per cent).
Convening of meeting

- **Section 168(1)** provides that ‘A company may by ordinary resolution at a meeting remove a director....’ Accordingly, the resolution must be passed at a meeting and neither the written resolution procedure nor the unanimous consent rule could be used. Simon and Diane would therefore need to either convene a meeting or table a resolution at an upcoming meeting.

- Simon and Diane wish to convene a meeting. They request that the directors call a meeting, but the directors refuse. The CA 2006, s 302 vests the power to convene a general meeting in the directors, but s 303 grants members the power to request that the directors call a meeting provided that the members requesting the meeting meet one of two criteria, the relevant criterion here being that the members must represent at least 10 per cent of the company’s paid-up share capital. As Simon and Diane control 300 of the company’s 500 shares, this requirement should be easily met.

- **Section 304(1)** states that, once a valid request has been received, the directors must, within twenty-one days, call a general meeting. However, the directors have refused Simon and Diane’s request. **Section 305(1)** states that, if the directors refuse a valid request, then the members who requested the meeting can call a meeting themselves, which is what Simon and Diane have done.

- **Section 305(6)** states that the company must reimburse those members for any reasonable expenses incurred. Accordingly, Simon and Diane should be able to obtain a reimbursement from the company for the reasonable expenses involved in convening the meeting.

Article provision requiring a special resolution

- As Simon and Diane control 300 of the company’s 500 shares, they will be able to pass the ordinary resolution required by s 168. However, the company’s articles provide that, in order to remove a director, a special resolution is required. The question is which will take priority – s 168 or the articles.

- The CA 2006 will often state that all is required is a resolution, without specifying the type. Where this is the case, the resolution that is required will be an ordinary resolution, but the company will be free to require a higher majority (or unanimity) by inserting a provision in the articles to that effect (CA 2006, s 281(3)).

- However, the CA 2006, s 168(1) specifically states that an ordinary resolution at a meeting is required. Where the CA 2006 specifies that an ordinary or special resolution is required, then the articles cannot alter the majority required. You may point out s 168(5)(b) which states that s 168 does not derogate from any power to remove a director that exists outside s 168. However, it is likely that such a power cannot be used to deprive members of the power that exists under s 168 (the CA 1985, s 303(1) states this overtly, whereas the CA 2006 does not).