

Can a director go it alone? Very possibly not!

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Section 154 of the Companies Act 2006 specifically permits private companies to have a single director and s.20 of the Act provides that the Model Articles of Association apply if no other articles are registered. Small companies, and many SPVs with a sole director, regularly do not register any other articles so that the unamended Model Articles apply by default.

Two 2022 first instance judgments have considered the proper construction of the unamended Model Articles and- with conflicting reasoning - throw into question whether a sole director can effectively act and/or whether a sole director can effectively act if the company has ever had more than one director.

Confused? Read on. These judgments are significant and pending further clarification companies with sole directors should consider amending their Articles and/or appointing a further director. Ratification of previous decisions needs also to be considered. The ramifications of decisions by sole directors being found to be *ultra vires* and of lawyers acting for a company without proper corporate authority are obviously serious and wide-ranging.

The model articles

Article 7 of the Model Articles under the heading “*Directors to take decisions collectively*” provides as follows

“7(1) The general rule about decision making by directors is that any decision of the directors must be either a majority decision at a meeting or a decision taken in accordance with article 8.

(2) If –

(a) the company only has one director; and

(b) no provision of the articles requires it to have more than one director,

the general rule does not apply and the director may take decisions without regard to any of the provisions of the articles relating to directors’ decision-making”.

Stopping there, it is obvious that the articles must then be looked at to see if there is a provision requiring the company to have more than one director. Intuitively, one would not expect the unamended Model Articles, which contemplate that the company can have only one director, to have any provision requiring more than one director. Obviously, bespoke additional clauses might contain such a provision, but one would not expect the Model Articles to have such a provision.

What then of Article 11 which provides as follows:-

“Quorum for directors’ meetings.

11(1) ...

(2) The quorum for a directors’ meeting may be fixed from time to time by a decision of the directors, but it must never be less than two, and unless otherwise fixed it is two

(3) If the total number of directors for the time being is less than the quorum required the directors must not take any decision other than a decision ..[to appoint further directors or to allow shareholders to appoint further directors.”

Put simply is Article 11(2,) which provides that the quorum must never be less than two, a provision which requires more than one director?

Prior to the 2022 decisions, articles debating the issue recognised that an argument could be made that Article 11(2) requires more than one director. However, the perceived wisdom was that Article 11(2) should not be so construed; it was an

article that addressed the situation where as a matter of fact there were multiple directors but did not itself require multiple directors.

In February 2022, Richard Farnhill sitting as a Deputy Judge of the Chancery Division disagreed. In his judgment *In Re Fore Fitness Investments Holding Ltd* [2022] EWHC 191 (Ch) he expressed the view that “A provision in the articles requiring there to be at least two directors to constitute a quorum logically is a requirement that the company in question have two directors to manage its affairs”. The judge also rejected the submission “that reading Model Article 11(2) to require a company to have two directors creates a clash between s154 and the Model Articles” and specifically stated that in his view “amendment is required for the Model Articles to permit for a single director to run a company”.

His view was reinforced by Model Article 11(3) about which more later.

In *Fore Fitness* however the company’s Articles were not solely the unamended Model Articles. They also included bespoke Article 16 which provided that “The quorum for meetings of the Board shall be two Directors.” Given this additional bespoke clause it could certainly be said that the judge’s view of the effect of the unamended Model Articles was obiter. However, equally there can be little doubt that the Judge intended his comments cited above to be of general application to the unamended and stand-alone Model Article 11(2).

In July 2022 came ***Re Active Wear*** [2022] EWHC 2340 (Ch) where Deputy High Court Judge John Martin QC disagreed with the reasoning in the earlier case. His starting point was that as a matter of construction, “it appears to me plain that, under the terms of the unamended Model Articles, a sole director of a private company may take on his or her own any decision relating to the conduct of the affairs of the company. That, as it seems to me, is the unambiguous effect of Article 7”.

The Judge recognised that his view of the construction of Article 7 was “on the face of it” contrary to the view taken in ***Fore Fitness*** but concluded that the factor dictating the result in the earlier case was Additional Bespoke Article 16. The argument that Article 11(2) required two directors was rejected on the basis that “since the provisions relating to quorum are themselves contained in the section headed “Decision-making by directors” they are specifically disapplied by Article 7(1) in circumstances where there is only one director and there is no other provision requiring more than one director, as in the case of the Model Articles there is not.” In the Judge’s view the suggestion that Model Article 11(2) required two directors “would be to deprive Article 7(2) of any practical meaning” and that reading the Articles as a whole applying ordinary rules of construction “it cannot have been the intention that they would need to be amended (as the deputy judge seemed to suggest)...before Article 7(2) could operate at all.”

However, all is obviously not resolved. The status of any appeals from these decisions is unclear and the Court of Appeal’s case tracker facility does not show any. Until any appellate guidance, it is open to a first instance judge to disagree with ***Re Active Wear***, and in one of our recent hearings the Judge commented in passing that he regarded ***Fore Fitness*** and the bar on sole directors as plainly correct.

Secondly, in both judgments there was discussion of the impact of Article 11(3) and a recognition of a tension between that clause and Article 7(2). In ***Re Active Wear***, whilst affirming the power of a sole director to act, the Judge also accepted that “where the number of directors falls to one from a higher number... It is Article 11(3) that applies, Article 7(2) applying only where there has never been a greater number of directors than one.”

That comment was obiter; in ***Re Active Wear*** there had never been more than one director of the company. However, the suggestion appears to be that a sole director may not have authority to act under the Model Articles if, at any point in the history of the company, there has in fact been more than one director.

The current state of affairs is clearly unsatisfactory. Pending clarification, companies wishing to operate with a sole director should consider adding bespoke clauses expressly so permitting/amending Article 11. Alternatively, a further director could also be appointed by a sole director and/or by shareholder resolution to ensure that future decisions are not in doubt. Ratification of earlier decisions should also be carried out where possible.

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Poonam Melwani KC is Head of Quadrant Chambers. She is a commercial silk who practises across the full spectrum of commercial, insurance, energy and shipping law, providing advisory and advocacy services. Praised as "...always in demand, she is as good on her feet as she is adept at mastering complex legal, factual and expert material..." (Chambers UK) Poonam has been ranked as a 'Leading Silk' over many years by the Legal Directories and was shortlisted for Shipping Silk of the Year at the Chambers & Partners UK Bar Awards 2020. She represents clients in a wide variety of jurisdictions and arbitral regimes including ICC, LCIA, LMAA and ad hoc, as well as English High Court Litigation, mainly in the Commercial Court and the Appellate Courts.

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