

Model articles – are you quorate as a sole director?



A High Court case has shone a light on how the model articles work when there is a sole director and come up with an unexpected result. In summary, unless the model articles are modified there is an argument that a sole director does not have authority to act. As a result, decisions made by a sole director may be held to be invalid.

The case has been looked at by the High Court in another case, and the impact potentially watered down, but it still remains an issue for corporate and litigation lawyers to be aware of.

The analysis – Hashmi v Lorimer-Wing [2022] EWHC 191 (Ch) ('the Fore Fitness case')

The issue is the interplay between articles 7 and 11 of the model articles. Article 7 requires decision making to be by majority decision. This effectively requires a quorate meeting or a decision by all eligible directors who would have formed a quorate meeting.

Article 11(2) states that the quorum for directors meetings is a matter for agreement but should never be less than two directors.

It has been generally assumed by corporate lawyers that this quoracy requirement in article 11(2) is over-ridden by article 7(2) which states as follows:

"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."



This was based on an understanding that article 11(2) did not impose a minimum number of directors but instead just dealt with quoracy requirements if there was more than one director.

However, the judge in the Fore Fitness case looked carefully at the wording of the model articles and the interaction between the two articles in a wider context and concluded that Article 11(2) does require the company to have at least two directors. On that basis article 7(2) does not assist as there is an article requiring the company to have more than one director.

The problem

This is not how the model articles have generally been interpreted to date and it is likely that many companies with sole directors have simply adopted them in an un-amended form. If the judge's reasoning in the Fore Fitness case is correct then this means that the model articles do not work properly for sole directors.

On a day to day basis this technical legal point might not seem to matter. However, if things get contentious and there is any dispute with regard to a decision made by a sole director in the company you can expect that this point will be deployed as an argument that the decision is invalid. This could have serious consequences for the director and the company.

The effect of *Re Active Wear Limited* [2022] EWHC 2340 (Ch) ('the Active Wear case')

The issue was looked at again in the Active Wear case.

A slightly different conclusion was reached. Here the judge took the view that the Fore Fitness case did not establish a general rule that there was a problem with the model articles where there was a sole director because in the Fore Fitness case the model articles had been amended by the addition of a quoracy clause requiring two directors.

On that basis, in the situation where there were unamended model articles and only ever one director, it was held that there was no quoracy issue.

Can sole directors with unamended model articles now rest easy? Not quite.

Active Wear indicates a possible direction of travel by the judiciary to unravel the problems caused by Fore Fitness but the case does not take precedence over Fore Fitness. The analysis of the judge in Fore Fitness was not limited to cases where the model articles had been amended and accordingly this interpretation of the model articles still has potential force.

The solution

Unless this situation is resolved by a definitive judicial decision this still represents a risk for sole directors in companies who have adopted the model articles. To mitigate this risk companies could amend the model articles to confirm that there is no requirement for a minimum of two directors, or appoint another director, and if there are any concerns about historic decisions, ratify those decisions.

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