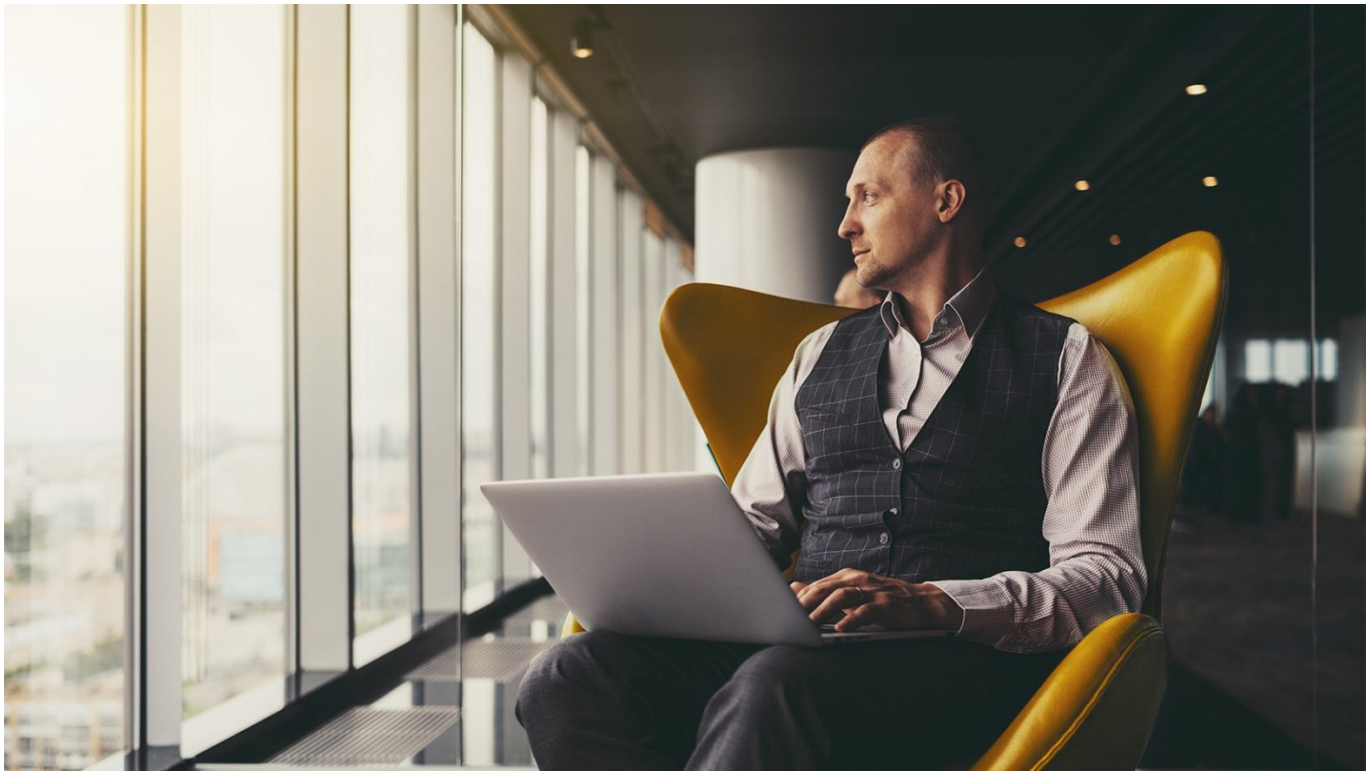
The different duties of a shareholder and director



Are you a shareholder and a director? It's important to understand the different duties involved and why a shareholders agreement may not protect you as much as you think it does.

Conflict between shareholder and director roles

In owner managed companies, where the directors are also shareholders, there is always the potential for conflict between the two roles. A 2013 court of appeal case (Griffith -v- Jackson [2013] EWCA Civ 89) shows how the court can sometimes struggle with resolving this conflict.

In simple terms what happened is party A and party B co-founded a company which held the voting shares in another company (C). A and B entered into a shareholders agreement that the voting shares would be used to appoint A as a director of C at each AGM of C.

This is what happened for a couple of years but then the other directors of C, including B, exercised a right under the articles of C to dismiss any director by written notice of all other directors. As a result A was not re-appointed.

A was understandably annoyed and brought a legal claim seeking enforcement of the shareholders agreement to prevent his removal as a director.

The Judge at first instance effectively held that B could not simply behave as if he had two hats which he could take on and off. When he was acting as a director he must have regard to the agreement he made as a shareholder and therefore it should be implied into that agreement a provision that B could not vote to remove A as a director.

The Court of Appeal disagreed. They pointed out that the agreement between A and B was silent on the question of whether B could join in with the other directors to serve a notice dismissing B. The agreement could still operate and have value (after all A had been re-appointed for two years) and on this basis it was a step too far to say that it was necessary to imply into it that rights held separately by B as a director must be curtailed.

The view of the Court of Appeal was that the approach of the Judge in the first instance was a re-writing of the agreement between A and B on the basis of one of several possibilities of what was intended between them. This was not a proper basis for implying terms into the agreement.

The result was that in this case the court upheld the idea that a party can wear different hats as a shareholder and a director and act differently depending on which hat they are wearing.

What can we learn from this?

However, it would be wrong to draw too many conclusions from this. The case turned on the drafting of the agreement between A and B. If this had been better drafted, even if it had not directly resolved the conflict between the right to be re-appointed as against the power to be dismissed, then it might well have been open to the court to find that it should have been implied into that agreement that B's power to dismiss A had been curtailed. Much will therefore depend on the facts of each case and the wording of agreements / articles of association.

The conclusion is that whilst agreeing something as a shareholder does not necessarily bar you from doing something contradictory as a director, taking such a course is an inherently risky one and may result in expensive litigation if that step prejudices another shareholder.

Contact us

Our experts are here to help, and should you find yourself in a similar situation or need advice please get in touch with our commercial disputes team.

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