

REMOVING A COMPANY DIRECTOR

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Preamble

It is not uncommon today to read in business times about sacking of directors for sundry reasons.

Can a company director (executive) be removed and / or be terminated and / or be dismissed by way of an ordinary resolution at a AGM / EGM or by way of a termination simpliciter and that is, by way of contractual termination?

What legal remedies or protection can a director have a recourse to in the event a company decides to remove him?

Definition and powers of company director

Section 4 of the Company's Act 1965 (CA 1965) defines a director as “*any person occupying the position of director of a corporation by whatever name called and includes a person with whose directions or*

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instructions the directors of a corporation are accustomed to act and an alternate or substitute director”

The foregoing section gives a wide scope of coverage to include even a shadow director or a defacto director in addition to an executive chairman or a managing director or a chief executive officer who are normally qualified by certain allotment of shares in the company.

Once directors are appointed they wield seemingly “unrestraint power” to run the company quite unlike other employees including general managers where the company dictates how and in what particular manner their job / work has to be carried out in their respective contract of service.

The articles of association provide clearly defined boundaries of powers to the directors which cannot be usurped by shareholders.

- For ***example in the case of John Shaw & Sons (Salford) Ltd v Shaw (1935), Grier LJ said shareholders cannot usurp the power which the articles of association have vested in the directors.***
- And again ***in Scott v Scott (1943) the court declared that a resolution in general meeting requiring directors to exercise the powers in a particular fashion will be inconsistent with the articles of association***

Section 128 of Company's Act 1965

Sub-section (1) provides that a director may always be removed from the board of directors by moving an ordinary resolution in a general meeting not withstanding anything that is stated in the company's articles

Prima facie, section 128 (1) of CA 1965 seems to be a very potent weapon in the hands of shareholders to corner and remove a director (executive) without impediments and without compliance to the principles of "just cause or reason" as enshrined in section 20 of the Industrial Relations Act 1967 (IRA 1967)

Prima facie, it appears that a course of action under section 128 (1) of CA 1965 against a director effectively precludes a director's remedies under section 20 of IRA 1967

Remedies available under Company's Act 1965 for a director facing impending removal

A director threatened with removal under section 128 (1) of the CA 1965 may have the following recourse and interlia;

Weighted voting rights; where the articles of association may provide such an affected director an upper hand in terms of weighted rights of votes during a resolution to remove him in a general meeting.

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For example, *in the case of Bushell v Faith (1970), the House of the lords held that a weighted voting provision in the articles was valid. Two sisters and a brother held equal shares in a property company which owned a block of flats in Southgate, North London. The sisters wished to remove the brother from the board of directors. Under normal circumstances this would not be a problem since both the sisters hold more than half the shares. But however, there was a provision in the articles of association which said that in a resolution to remove a director, the affected director's share would carry 3 votes each.*

Under section 66 of CA 1965, the rights of holders of preferential shares are to be set in the articles of association. Sub section (i) says , no company shall allot any preferential shares unless there is set out in its articles of association the **rights of the shareholders with respect tovoting**

Under the aforesaid circumstance, if the director who is threatened with removal holds preferential shares or even deferred / founder's share, then in all likelihood it may carry weighted voting rights which could be invoked to his advantage.

Special Notice required; the legal requirements under CA 1965 say that a special notice need to be circulated to all members including the affected director prior to a general meeting to decide on a resolution to remove him. Following this, the affected director is permitted to make representation in his defense to refute any purported charges or misfeasance so leveled against him. And again, just because a special notice is served, the board is not obligated to accept such an agenda. For example, *in the case of Pedley v The Inland Waterways Association Ltd*

(1977), Pedley a solicitor proposed the removal of the entire board. He served a special notice which the board rejected.

What about a director who has been successfully removed via section 128 (1) of CA 1965, are there still avenues of redress?

In answering the foregoing question let me cite the Court of Appeal case of Minister of Human Resources v John Hancock Life Insurance (M) Sdn Bhd, Civil appeal no. W-01-32-2003.

In this case, the court of Appeal in deciding on the jurisdiction of the industrial court to hear and decide on the removal of a CEO cum director who was removed by the Company pursuant to a shareholders resolution to remove him as director and CEO at an EGM, held that,

- The Industrial Court has the jurisdiction to hear and decide on the claimant's removal as director and CEO of the Company who was so removed pursuant to section 128 (1) of CA 1965 at a shareholders EGM
- The mode or method the Company so adopted to remove the claimant was totally irrelevant because it was still considered to be an **act** of the Company.
- The question as to whether the claimant, who was both a director and CEO, is a "workman under section 20 of the IRA 1967 was

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simply a mixed question of law and fact and the industrial court being the sole forum to decide on this matter.

The aforesaid decision of the court of appeal has the devastating effect of loading a truck with explosives and ramming against the shareholders fortress of section 128 (1) of CA 1965. Thus, the inevitable conclusion dictates that even the company directors cannot be removed without just cause or reason.