Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Before the Hon. Mr Justice Binns-Ward

Case no: 498/2010

In the matter between:

BLUMERUS LODEWYK EZRA KHAN 1st Applicant

BARRY DEANE TILNEY 2nd Applicant

and

COMMUNICARE 1st Respondent

(Association incorporated under Section 21)
(reg no. 1929/001590/08)

COMMUNICARE CONSTRUCTION 2nd Respondent

(Association incorporated under Section 21)
(reg no. 1945/019203/08)

HERMANUS JOHANNES FOURIE 3rd Respondent

CORAM	:	The Honourable Mr Justice A G Binns-Ward
On behalf of Applicants	:	Adv. W.R.E. DUMINY SC
		Adv. M. JANISCH
Instructed by	:	Kritzinger & Co

On behalf of the Respondents	:	Adv. P.B. Hodes SC
		Adv. R.A. Brusser SC
Instructed by	:	Cliffe Dekker Hofmeyr Inc.
Date of Hearing	:	10 October 2011
Date of Judgment	:	21 October 2011

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JUDGMENT DELIVERED: 21 OCTOBER 2011

BINNS-WARD, J

[1] At the time material in the determination of this application the first and second respondents were associations not for gain incorporated as companies

limited by guarantee in terms of s 21 of the then obtaining 1973 Companies Act (Act No. 61 of 1973). The application concerns the validity of the election of directors of the companies at their annual general meetings, both held on 27 October 2009.

[2] The companies' articles of association provided for the retirement by rotation in each year of a third of the members of the board. The same persons sat on the respective boards of each company. The positions of four of the directors were affected. All four of them, being eligible, stood for re-election. Voting in the elections was conducted by way of a secret ballot. The use of that voting procedure enjoyed the unanimous assent of the members present at the meetings. The ballot resulted in the re-election of two of the four retiring directors. A majority of votes was cast against the re-election of the other two. The retiring directors, who, for as long as they held office as such, were also members of the companies in terms of the articles, had been excluded from voting in the election.

[3] Two of the members of the companies have applied in these proceedings to have the elections declared invalid and set aside. The relief in respect of each company is sought on identical grounds and on the same essential facts. The grounds on which the elections are impugned are threefold.[1] Firstly, it is contended that the retiring directors' exclusion from the ballot was contrary to the provisions of the companies' articles of association. Secondly, it is contended that the proxy given by the second applicant to one of his fellow members, who voted at the meeting, had been irregularly obtained and exercised. And thirdly, it was contended that voting by

[1] Some other grounds were advanced in the founding papers, but they had lost their viability by the hearing.

secret ballot, as distinct from by show of hands, as provided in the articles, also invalidated the election process.

[4] The first and second respondents disputed that the election had been attended by any vitiating irregularity; moreover, they contended that even if the election procedure had been irregular in any of the respects alleged, that did not give rise to a situation in which the court would intervene at the instance of the applicants. In this respect the respondents appeared in essence to rely on what is widely known as the rule in *Foss v Harbottle*,[2] which is to the effect that in general only the company, and not its members in their individual capacities, may institute litigious proceedings to right a wrong done in the course of its internal management.[3] The effect of the rule further manifests in the practice that a court will not intervene in respect of the irregular conduct or management of a company's affairs in circumstances in which it is open to the company in general meeting itself to correct, condone or ratify the irregularity. (However, as the judgment in *Foss v Harbottle* itself admits, the rule against shareholders litigating individually for the benefit of the company is not an inflexible one. In that regard Sir James Wigram V-C expressed himself thus (at 494 of the Hare report): '*If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord Cottenham in* ***Wallsworth v Holt*** *(4 Myl. & Cr. 635; see also 17 Ves. 320 per Lord Eldon) and other cases would apply, and the claims of justice would be found*

[2] After the judgment in *Foss v Harbottle* (1843) 67 ER 189; (1843) 2 Hare 461.
[3] The underlying rationale is frequently expressed in the statement that '*that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C*'.

superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.' The application of the rule has thus unsurprisingly been subject over time to various exceptions, some of which are well established.)

[5] It seems to me, however, that it will be necessary to consider whether the application should be entertained at the instance of the applicants only if the retiring directors were indeed wrongly excluded from voting on the issue of their re-election, as alleged by the applicants, and disputed by the respondents. Counsel on both sides appeared to agree that this was cardinal issue in dispute between them. I shall therefore deal with that issue first.

[6] Obviously all the members of the companies were entitled to vote on the question of the appointment of directors. The question is whether the four retiring directors qualified as such at the time of the elections. The question falls to be answered in the main on the proper construction of article 15 of the articles of association. The articles of association of both companies follow the same wording. In this regard it needs to be noted that the members of the first and second respondents consisted of (i) the subscribers to their respective memoranda of association, (ii) the directors of the company and (iii) the persons who had been appointed by the directors as members in terms of article 2(c) of the articles of association. The memorandum of association of the first respondent was signed in May 1929, some 80 years before the annual general meeting under consideration. The company registration number of the second respondent (given inconsistently in the papers) suggests that it too was incorporated either in 1929 or 1945. It may thus reasonably be accepted that at the annual general meetings of 2009 the only

existing members would have been the directors then in office and those persons alive at that time who had been appointed as members under article 2(c).

[7] Article 15 provides insofar as currently relevant as follows:

ROTATION OF DIRECTORS

15. At the first annual general meeting of the company all the directors shall retire from office, and at the annual general meeting in every subsequent year one-third of the directors for the time being, or if their number is not three or a multiple of three, the number nearest to one third, shall retire from office, provided that the Director appointed by the Regional Government, shall not retire from office by reason of effluxion of time.

15.1 The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day, those to retire shall, unless they otherwise agree among themselves, be determined by lot.

15.2 A retiring director shall be eligible for re-election.

15.3 The company at the annual general meeting at which a director retires in manner (*sic*) aforesaid or at any general meeting may fill the vacancy office by electing a person thereto.

15.4 If at any meeting at which an election of directors ought to take place the offices of the retiring directors are not filled, unless it is expressly resolved not to fill such vacancies, the meeting shall stand adjourned and the provisions of articles 7.7 and 7.8 shall apply *mutatis mutandis* to such adjournment, and if at such adjourned meeting the vacancies are not filled, the retiring directors or such of them as have not had their offices filled shall be deemed to have been re-elected at such adjourned meeting unless a resolution for the re-election of any such director shall have been put to the meeting and negatived.

15.5 The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to retire from office.

15.6 Unless the members otherwise determine in general meeting any casual vacancy occurring on the board of directors may be filled up by the directors, but the director so appointed shall be subject to retirement at the same time as if he had become a director on the day on which the director in whose stead he is appointed, was last elected a director.

15.7 The directors shall have the power at any time, and from time to time, to appoint a person as an additional director who shall retire from office at the next following

> ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director

(It is apparent that the relevant part of article 15 substantively replicates the provisions of articles 66 to 71 of the standard articles set out in table A of schedule 1 of the 1973 Companies Act.[4] A consequence of the apparently indiscriminate adoption of parts, but not all, of the standard articles renders aspects of the companies' articles incoherent. Thus, for example, it is impossible to sensibly reconcile the provision in the introductory part of article 15 for a situation in which there might only be three or less directors in office with the requirement in article 11 that there shall be not less than eight directors. The resultant internal inconsistencies in the articles potentially complicate the interpretation of the document, but they do not appear to have any bearing on the determination of the narrow question currently under consideration.)

[8] Prior to the annual general meetings, the company secretary, reportedly at the request of one of the directors, Mr GJ Schröder, had sought advice from the

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[4] Articles 66-71 in Table A provide as follows:

> *Rotation of Directors*
>
> *66. At the first annual general meeting of the company all the directors shall retire from office, and at the annual general meeting in every subsequent year one-third of the directors for the time being, or if their number is not three or a multiple of three, the number nearest to one-third, shall retire from office.*
>
> *67. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day, those to retire shall, unless they otherwise agree among themselves, be determined by lot.*
>
> *68. A retiring director shall be eligible for re-election.*
>
> *69. The company, at the annual general meeting at which a director retires in the manner aforesaid or at any other general meeting may fill the vacancy by electing a person thereto.*
>
> *70. If at any meeting at which an election of directors ought to take place the offices of the retiring directors are not filled, unless it is expressly resolved not to fill such vacancies, the meeting shall stand adjourned and the provisions of articles 38 and 39 shall apply mutatis mutandis to such adjournment, and if at such adjourned meeting the vacancies are not filled, the retiring directors or such of them as have not had their offices filled shall be deemed to have been re-elected at such adjourned meeting unless a resolution for the re-election of any such director shall have been put to the meeting and negatived.*
>
> *71. The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to retire from office.*

companies' attorneys on a number of matters 'relating to the election of directors'. These matters included whether the retiring directors were entitled to participate in the election process. In the written advice that was furnished the attorneys observed, with reference to the articles, that '*no guidance is given as to precisely when at the meeting the resignation of directors is effective. An answer to this question is important, as it affects the further participation in the meeting by the directors who are deemed to have retired.....An appropriate way to deal with this is that the directors who are to retire remain in office as directors and members until the agenda item dealing with the retirement and appointment of directors. This appears to be the practical solution since it enables all the directors who were directors during any given year to participate in the discussions, and vote on the financial statements and minutes, for the period of their directorship. This approach is also consistent with past company practice.*'

[9] Despite the fact that the approach advised by the companies' attorneys does not appear in fact to have 'been consistent with past company practice', the meeting was conducted in accordance with this advice. Consequently, the retiring directors were excluded from the meetings when the item of business concerning the election of directors was reached on the meeting agenda. One of the directors thus excluded was the chairman of the boards, who, in terms of article 7.8, was required to 'preside as chairman at every general meeting of the company'.[5]

[5] Article 7.8 provides: '*The chairman, if any, of the board of directors shall preside as chairman at every general meeting of the company*'. Article 7.9 provides: '*If there is no such chairman, or if at any meeting he is not present within fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairman, the members shall elect one of their number to be chairman*'.

[10] The retiring directors removed themselves from the meetings on the basis of an explanation by the company secretary recorded as follows in the minutes of the meetings:

> The Company Secretary explained that one of the directors, GJ Schöder, (*sic*) had requested that legal advice be sought from the Company's attorneys....with regard to the election process, in particular on abstentions and block voting. The advice given was that retiring directors could not vote and should absent themselves from the meeting.

The minute proceeds '*He then requested the retired directors to recuse themselves from the meeting. [HJ Fourie, MN Skade, A Emmett and AW Houston left the meeting at this time]*'

[11] As counsel for the applicants pointed out, the advice given by the company secretary to the meetings did not convey the gist of the legal advice received with complete accuracy; in particular, it did not inform the meetings of the attorneys' opinion that it was not altogether clear from the articles at what stage the retiring directors actually vacated their office. This has some bearing, I think, on the determination of the validity of the submission by the respondents' counsel that the directors who left the meetings and did not participate in the voting did so of their own volition and that accordingly, the meetings having remained quorate, the consequences of their voluntary non-involvement in the voting does not give rise to a justiciable issue. A more realistic view of the evidence is that the retiring directors who left the meetings did so having been brought under the impression that they were required so to do, and that this occurred in circumstances in which they had not been given a reasonable opportunity to consider or interrogate the correctness of the legal advice to the companies as it had been described by the company secretary. My conclusion is that the retiring directors were effectively excluded from

participation in the election of directors. Their failure to have protested against that exclusion cannot properly be characterised as waiver or informed consent.

[12] In the circumstances it is evident that if the retiring directors were entitled to participate in the elections, the conduct thereof in their absence was irregular and in conflict with the companies' articles of association. It is impossible to say with any certainty what the results would have been had the excluded directors cast votes in the elections. Arithmetically, and taking account of the right of the chairman of the meetings to decide any draw with a casting vote, there was a possibility that all four of them might have been re-elected.

[13] Counsel were at one with each other, correctly, that the articles of association, which are determinative of the question under consideration, fall to be interpreted in the same manner as any other jural document, such as a contract or a statute (as to which, see e.g. *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) ([1995] 2 All SA 635) at 767E - 768E (SA)). In this regard the articles must be taken to have been intended to be a complete memorial, which limits the extent to which regard may be had, if at all, to extrinsic evidence in respect of its interpretation; cf. *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) ([2009] 2 All SA 523) at para 39. The construction of the document must also be approached with sensible regard to the business or practical result which the parties apparently sought to achieve by its production or adoption (*Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA) at para. [5]). 'Sophisticated semantic analysis' should not be permitted to negate an evident commercial or practical object that was evidently sought to be achieved by the provision which is being construed (*Lloyds of London Underwriting Syndicates 969, 48, 1183 and 2183*

v Skilya Property Investments (Pty) Ltd [2004] 1 All SA 386 (SCA) at para. [14]). With those general principles in mind, it is time to undertake the interpretation of the articles.

[14] The articles contain a requirement that the companies shall at all times have a minimum number of directors (article 11). Although article 11 does not employ the expression 'at all times', there is nothing in that article or any other provision of the document which countenances a situation in which the number of active directors should fall below that number in the ordinary course. The basis on which the annual general meetings were conducted, however, postulated a situation in which, assuming the number of directors had comprised the specified minimum of eight, there would be a time during the meetings – a hiatus - when the companies would be bereft of a third of the required minimum number of directors. It cannot be overlooked in this regard that in these particular companies one of the functions of incumbent directors is to function as members of the company. That function finds its core role in the conduct of the company in general meeting. Furthermore, if all the vacancies were not filled, as indeed happened, there would, if the attorneys' advice were sound, be a period thereafter during which the company would have to function without the required minimum number of directors until the situation could be corrected at the resumption of the annual general meeting in the circumstances provided for in article 15.4.[6] As pointed out by the applicants' counsel, the company's attorneys' construction of the articles also gave rise to the potential of a quorate meeting being rendered non-quorate midway through its business when the

[6] Such a situation would indeed have eventuated in the current case had only one, instead of two, of the four retiring directors been re-elected.

retiring directors are required to leave the meeting when the item of the election of directors is reached.

[15] I do not think that a proper reading of the articles supports any intention to create scope for those situations. Such an interpretation gives rise to the potential for results which could stultify the evident scheme of the articles; whereas the preferred approach in cases in which there is uncertainty is to apply a construction promoting reasonable business efficacy; see *Estate Milne v Donohoe Investments (Pty) Ltd and Others* 1967 (2) SA 359 (A) at 373A-B, following *Rayfield v Hands and Others* [1960] Ch. 1; [1958] 2 All ER 194.

[16] The following features, individually and collectively, point strongly against the correctness of the attorneys' advice:

1. The articles provide that the directors shall retire from office *at the meeting*. This confirms, in my view, that the retirement if it is to become effective shall become so at some stage during the meeting. Having regard to what I have just said about article 11, it seems that if a hiatus is to be avoided, the effective time would be upon the announcement of the results filling the vacancies that fall to be filled in terms of the operation of article 15. (I shall treat later[7] of the consequences if the vacancies are not filled, or if only some of them are filled.) Assuming all the vacancies arising by virtue of the scheme of rotational retirement were filled in the election, such announcement would coincide with the relinquishment of office by those directors not re-elected and their contemporaneous replacement by those persons elected to replace

[7] In sub-paragraph 4, below.

them. If voting took place by show of hands, as provided for in the articles, the result would be apparent immediately upon the completion of the election.

2. Article 15.2 provides that a *retiring* director is eligible for re-election. If the intention were that at the time of the election the director should already have vacated office, then the use of the adjective *retiring* would be inappropriate; the proper word to denote such an intention would have been *retired*. The expression *retiring director* connotes a director in the process of standing down or (applying the adjective as a gerundive, which does not seem inappropriate in the context) one having to retire, or who must retire; not one who has completed the act of standing down. The term 'retiring director' is repeated in article 15.4.

3. The term 'vacancy office' in article 15.3 appears to be the result of an erroneous transposition of article 69 in Table A of schedule 1 to the 1973 Companies Act. It should be construed, consistently with the wording of the standard articles, as 'vacancy'. The word 'office' adds nothing to the import of the provision. In context the word 'vacancy' connotes nothing more than a position that falls to be filled at the meeting in consequence of the operation of article 15, i.e. the position of a *retiring* director. The import of the word 'vacancy' in clause 15.3 is thus distinguishable from the sense in which it is used in article 15.6 in the expression 'casual vacancy'. The former relates to a post that has to be filled because the relevant director is bound to retire at the meeting and for which, if he or she wishes to continue in office, he or she must make him or herself available for re-election, while the latter relates to a post that is empty because it has been vacated – in other words a post that

has no incumbent at the time it is filled. That there is no moment at which the vacancy referred to in clause 15.3 pertains to an empty position is illustrated by the proposition that when a retiring director is re-elected there is no hiatus between his or her terms of office as retiring director and as re-elected director. In this respect I find myself in respectful agreement with the analysis of Farwell J in *Walker v Kenns, Ltd* 1937 1 All ER 566 (CA) at 570-571, where, in treating of the effect of an article providing for the rotational retirement of directors, the learned judge said of retiring directors who were re-elected in the manner contemplated by articles 15.1 – 15.3 of the first respondent '*Had they, at that meeting, been re-elected, or, not being re-elected, had there been no resolution to fill up the vacated office, they would have remained directors, and there would have been no vacation of the office at all. If, on the other hand, the office is filled up by someone, or there is a resolution not to fill it up at all, then* [the retiring directors] *are bound to vacate office. Such vacation of office is brought about by the result of the articles...*'

4. The effect observed by Farwell J in *Walker* is confirmed by the import of article 15.4 read with article 15.5. Those provisions make it clear, I think, that in the event that there is no election to fill the positions of the retiring directors at the annual general meeting, or if any election that is held does not fill all the vacancies, the meeting stands adjourned, and if the positions are not filled upon the adjournment the retiring directors shall be deemed to have been re-elected. Thus, unless the first respondent resolved in general meeting to reduce the number of directors, the re-election of only two of the four retiring directors at the general meeting would mean that the positions of the two directors who had not been replaced remained unaddressed, hence the

> requirement for the unattended business to be despatched after an adjournment and the provision for the each of the affected directors to remain in office if not replaced at the resumption of the meeting, unless the company at that stage specifically resolved not to re-elect her. By the operation of those sub-articles, even a retiring director who had not offered him or herself for re-election might find him or herself remaining in office for another term. In the commentary on article 70 of the Table A articles in the 1973 Companies Act (which is the equivalent of article 15.4 of the first respondent's articles) the editors of *Henochsberg on the Companies Act*, Fifth Edition, also relying on *Walker*'s case, state '*There is no vacation of office by a director who retires but is re-elected or is deemed to have been re-elected in terms of an article such as art 70...*'.[8]

I have therefore concluded that on a proper construction of the relevant provisions of the first and second respondents' articles a seamless transition of directorships, whether by re-election, deemed re-election or replacement, as the case might be, is envisaged at the annual general meetings in respect of the vacancies created by the scheme of rotational retirement set up in terms of article 15.

[17] In my judgment it follows that the retiring directors were entitled to participate as members at the annual general meetings until and unless they were replaced as incumbents of their respective offices. In the result it is clear on the facts that the election of directors at the October 2009 annual general meeting was conducted in a manner materially inconsistent with the company's constitution and that the election was thus irregular.

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[8] *Henochsberg on the Companies Act* Fifth Edition vol 1 at p.1047.

[18] In consequence, it becomes necessary to examine the contention that the applicants lack standing to claim the relief they have sought – what was referred to during argument as 'the *Foss v Harbottle* defence'. In my view the applicants' claim is not one that falls within the purview of the rule in *Foss v Harbottle*. The majority rule principle, which is at the heart of the aspect of the rule which holds that a court will not in general interfere in the internal management of a company, cannot apply where the majority vote was, or may have been, determined by the improper exclusion from the meeting of a body of members whose votes, had they been allowed, might have determined a different result; cf *Pender v Lushington* (1877) 6 Ch. 70.

[19] The irregularity that attended the election of directors at the October 2009 annual general meetings is moreover not one that can be confirmed or ratified. In *Spiliopoulos and Another v The Hellenic Community and Others* 1938 WLD 160, at 163, Greenberg JP expressed the view that an act by a corporation which the majority of members would not be entitled to authorise could never be a matter of 'internal management'. That view was endorsed in this court by Friedman AJ (as he then was) in *Sorenson and others v The Executive Committee of the Tramway & Omnibus Workers' Union (Cape) and another* 1974 (2) SA 545 (C), at 552.

[20] A valid election of directors can occur only if all the members who were entitled to vote at the October 2009 meeting are allowed to exercise their vote. This would entail allowing all four of the directors who had been required to retire at the October 2009 annual general meeting to participate in the election as members, even though, while the results of the purported election at that meeting stand in the context of the manner in which the meeting was conducted, two of them no longer

qualify as members. In other words any meeting convened to endeavour to remedy the irregularity would have to be convened on the basis of an *a priori* acceptance of the invalidity of the election of October 2009. Any general meeting convened at this stage would not qualify as an adjourned annual general meeting within the contemplation of article 15.4. It is plain, in any event, from the company's opposition to the application that under its current *de facto* direction there is no inclination or willingness to accept the invalidity of the election of directors at the October 2009.

[21] This, therefore, is not a matter in which it is obvious a court will decline to intervene in respect of the irregular conduct or management of a company's affairs because it is open to the company in general meeting itself to correct, condone or ratify the irregularity. I express myself in this respect with a trace of ambivalence because the qualification to the application of the practice applied by the courts under the rule in *Foss v Harbottle*, which I illustrated with reference to quotation from Wigram V-C's judgment in paragraph [4], above, gave rise to a number of subsequent decisions which it is sometimes difficult to reconcile in a coherent body of law. Some of these decisions are explained by the provision to members in certain circumstances of a so-called derivative action and others by the recognition that rule does not constrain the assertion by a member of what might be called that member's personal or individual rights in terms of the articles of association. A number of the conflicting judgments are discussed in an insightful analysis by Colin Baxter in an article, '*Irregular Company Meetings*' [1976] JBL 323, to which I was referred by the respondents' counsel. See also L. van Rooyen *Die Bevoegdheid van n lid om nakoming van die maatskappykonstitusie af te dwing* 1986 TSAR 70 and 195 and Michael Blackman *Members' Rights against the Company and Matters of*

Internal Management (1993) 110 SALJ 473; and cf. *Prudential Assurance Co Ltd v Newman Industries Ltd and others (No 2)* [1980] 2 All ER 841 (Ch), ([1981] Ch 257]) at 860-875 (All ER) and the treatment of that judgment on appeal, reported under the same name at [1982] 1 All ER 354 at 359-365.

[22] Suffice it for present purposes to observe that the applicants relied heavily on the judgment in *Pender v Lushington* supra, whereas the respondents called in aid *MacDougall v Gardiner* (1875) 1 Ch. 13. Both these cases involved the unlawful usurpation of members' voting rights at a general meeting of a company. While the result in both cases may be accepted as having been correct, it is difficult, if not impossible, to reconcile them on *Foss v Harbottle* principles.

[23] In *Pender* it was held that a member of the company, '*whether he votes with the majority or the minority...is entitled to have his vote recorded – an individual right in respect of which he has the right to sue. That has nothing to do with the question like that raised in* ***Foss v Harbottle*** *and that line of cases. He has the right to say "Whether I vote in the majority or minority, you shall record my vote, as that is a right of property belonging to my interest in this company, and if you refuse to record my vote I will institute legal proceedings against you to compel you." What is the answer to such an action? It seems to me it can be maintained as a matter of substance, and that there is no technical difficulty in maintaining it.*' The plaintiff member and those other members whom he represented were granted an injunction to restrain the rejection of their votes on a motion that had been put to the company's general meeting.

[24] In *MacDougall* the refusal of the chairman of the general meeting of the company to allow a motion for the adjournment of the meeting to be determined by a

poll in circumstances contemplated by the articles in circumstances in which it was evident the adjournment would have been defeated had the poll been allowed formed the background to proceedings instituted by a member representing the holders of the majority of the votes that could have been cast in a poll for, amongst other things, a declaration that a refusal to grant a poll on the question whether the meeting should be adjourned was illegal and improper and for certain consequential relief. The proposal for the adjournment had been a device by the chairman of the meeting to avoid putting a motion by the plaintiff for the removal of a director of the company, a certain Colonel Gardiner, and his replacement by another. After the proposed adjournment was carried by a show of hands the chairman of the meeting left the room. The plaintiff and the holders of proxies which would have given a majority on a poll then continued with the meeting, putting the plaintiff in the chair, and purported to adopt a number of resolutions including one removing Gardiner and replacing him as a director. The consequential relief sought by the plaintiff included orders declaring that Gardiner had ceased to be a director and restraining him from purporting to act as such.

[25] The hearing of the proceedings instituted by the plaintiff in *MacDougall*'s case was delayed consequent upon a stay granted pending the determination of an intervening application for the winding up of the company. By the time that the matter came before the court, the party of members supportive of the plaintiff had obtained control of the company. Colonel Gardiner excepted[9] to MacDougall's petition on the grounds that it was excluded by the rule in *Foss v Harbottle*.

[9] The expression used in the Chancery Division was 'demurred'; a 'demurrer' being in the practice and procedures of that court in the nineteenth century in the nature of an exception.

[26] The exception was upheld. James LJ, who wrote the principal judgment, considered that any wrong that was done through the conduct of the general meeting in the manner described was a wrong to the company, and not to the members whose right to a determination by poll had been ousted. An important consideration in the learned judge's approach to the case was it presented on its facts a situation which a majority could remedy by its own initiative. That was even more clearly the approach adopted in the concurring judgment of Mellish LJ.

[27] I agree with the substance of the criticism levied in Baxter's article at the principal judgment of James LJ in *MacDougall* and with the writer's opinion that the right result was reached in the case on the independent reasoning of the third judge in the matter, Baggallay JA, who dismissed the petition on grounds unrelated to the application of the rule in *Foss v Harbottle* (but who did nevertheless, in addition, agree with the reasoning of James LJ). Baxter argues that that the application of the *Foss v Harbottle* rule in *MacDougall* was 'inappropriate'.[10] He explains his criticism thus '*There was no wrong to the company in that case and James LJ's contention that as meetings were always for some purpose of the company irregular meetings were always wrong to it was merely specious invention. Surely, the conclusion that such an irregularity was a wrong to the company can in real terms only rest on the supposition that those prejudiced by it were less wise than those who were not*'.[11]

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[10] This view is also taken by Lord Wedderburn in his article '*Shareholders' Rights and the Rule in Foss v Harbottle* [1957] Cambridge Law Journal 194 at 214 (the article is continued in [1958] Cambridge LJ 93) and by RJ Smith *Minority Shareholders and Corporate Irregularities* (1978) 41 Modern Law Review 147 at 160, but criticized by Blackman in his 1993 SALJ article (cited in para [21], above). Blackman argues that *MacDougall's* case is explained if it is accepted, as he contends, that an article permitting a poll to be demanded does not confer a right on a shareholder, it is a rule conferring a power on the company and its various organs. I am not persuaded by that argument. The right to demand a poll is one reserved to the members and its enforcement is not legally dependant on the will of the majority of the members.

[11] Colin Baxter, '*Irregular Company Meetings*' [1976] JBL 323 at 329.

[28] In my respectful view, the proper approach is that reflected in the judgment of Kekewich J in *Tiessen v Henderson* [1899] 1 Ch. 861 at 866 to the effect that the principle of majority rule that informs the application of the rule in *Foss v Harbottle* assumes that the subject matter of a vote in general meeting is dealt with in a manner that gives the principle fair scope to operate. That plainly was not the case in either *MacDougall* or *Pender.* Thus if the inherent assumption is not supported by the facts of the case, the rule finds no valid basis to apply. Furthermore, even if a basis for the rule to apply might be made out on the facts of a given case, English authority, consistently with the passage from the judgment in *Foss v Harbottle* quoted in para [4] above, indicates that '*the rule is not an inflexible rule and it will be relaxed where necessary in the interests of justice*' (per Jenkins LJ in *Edwards and Another v Halliwell and Others* [1950] 2 All ER 1064 (CA) at 1067).

[29] I find myself in broad agreement with the approach adopted by the court in *Pender.* It came down to this: in a matter in which a member's individual or personal rights as a member are threatened or infringed, the member has the right as an individual to seek an appropriate remedy. Lord Justice Jenkins (as he then was) stated the proposition thus in *Edwards* supra, at 1066-7, '*In my judgment, it is implicit in the rule* [in Foss v Harbottle] *that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general body of corporators or members of the company or association as opposed to a cause of action which some individual member can assert in his own right....The gist of the case is that the personal and individual rights of membership of each of them have been invaded by a purported, but invalid, alteration of the tables of contributions. In those circumstances, it seems to me the rule in* ***Foss v Harbottle*** *has no application at all, for the individual members who are suing sue, not in the right of the*

[corporation – a registered trade union in that case], *but in their own right to protect from invasion their own individual rights as members.*' See also *Prudential Assurance Co* supra, at 861 (All ER).

[30] The dichotomous categorisation of members' rights as individual or personal membership rights and corporate membership rights is well established. 'Corporate membership rights' are those which are subject to the effect of decisions of the majority of the shareholders if arrived at in accordance with the law and the articles and individual membership rights are rights with which the majority cannot interfere without the affected member's consent; cf. *C.L. Joseph v Jos And Anr,* AIR 1965 Ker 68. As the matter of *Pender* exemplifies, the member's rights to vote at a general meeting and have his or her vote counted would ordinarily fall within the category of individual membership rights.

[31] In the current case neither of the applicants was deprived of his right to vote in the election of directors at the October 2009. At first blush that might appear to support an argument that the current proceedings cannot be an assertion by them of their individual membership rights. I think, however, that would be to view the nature of the individual member's right to vote and have his or her vote counted too narrowly. The right to exercise a vote as a member goes limping if the effect of the vote is that it is not properly counted in the context of all the other votes that might be validly cast on the issue in question. In other words if the voting procedure admits votes that could not validly be cast, the vote that the member entitled to vote casts is devalued by a diminution of its effect as a proportion of the total[12]; likewise, if the votes of members entitled to vote are invalidly excluded, the effect of the vote of the

[12] This point was made by Greenberg JP in *Spiliopoulous* supra, at 166.

member allowed to cast a vote is adversely affected if the votes of the excluded members might have weighed with the member's vote in determining the result. The latter postulate appears to me to apply on the facts of this matter. This impels the conclusion that the individual membership right of the first applicant, at least, was adversely affected by the conduct of the election of directors in a manner at odds with the articles.

[32] This application, although instituted with reasonable expedition after the election in October 2009, only came to hearing in October 2011. I would have expected that at least one, perhaps two, annual general meetings of the company would have been held in the interim. The intervention of subsequent meetings and the effect of the election of directors at those meetings would have been a factor weighing against the exercise of the court's discretion in favour of the applicants at so great a remove from the impugned resolution, despite their otherwise meritorious case. When I raised this with the applicant's counsel I was informed from the bar that the respondents had in fact not held an annual general meeting since October 2009. This information was confirmed from the bar by the respondents' counsel. The composition of the boards of the two companies thus currently remains as determined at the October 2009 annual general meetings, with the exception of the position of one director (Mr Hardie) which has been the subject of litigation unrelated to the current proceedings.

[33] I am thus persuaded that the applicants are entitled on the first ground mentioned at the outset of this judgment[13] to an order setting aside the election of directors at the 2009 annual general meeting. In the circumstances, while

[13] At para [3].

harbouring some doubt about their validity, I have not found it necessary to determine the second and third grounds on which the applicants relied. The parties were agreed, reasonably so, that the costs of two counsel were justified.

[34] The following order will issue:

1. The resolutions pertaining to the election of directors of the first and second respondents, respectively, at the annual general meetings of those companies on 27 October 2009 are declared invalid and are set aside.

2. The first and second respondents are declared liable, jointly and severally, the one paying the other being absolved, to pay the applicants' costs of suit, including the costs of two counsel.

A.G. BINNS-WARD
Judge of the High Court