DIRECTORS' REMUNERATION[1]

I. INTRODUCTION:

The *amount* of remuneration to be paid to directors is a matter of internal management and will not be interfered with by the courts.[2] However, the law will concern itself with whether a director is *entitled* to remuneration. This article is an attempt to determine from the numerous cases in this area a director's rights in various situations in which he might claim to be paid.

II. HISTORICAL BACKGROUND:

The law relating to directors' remuneration was largely fashioned out of the relationship between the director and the company. Originally directors were regarded as trustees. This conception arose out of the position of directors of the old joint stock companies, which generally were unincorporated and depended for their validity on a deed of settlement vesting the company's property in the directors as trustees for the members. In such circumstances the director was a trustee in the fullest sense. This changed with the advent of the incorporated company which could hold property in its own name. The director is for most purposes now regarded as an agent of the company, and as such under the general law of agency owes fiduciary duties to his principal,[3] these duties no longer being defined by reference to those of a trustee. However, the director's general relationship to the company is by analogy with that of the trustee to the trust still regarded as fiduciary[4] and while the trustee origin of the modern director has disappeared its impact still remains in the area of directors' remuneration.

III. THE RIGHT TO BE PAID REMUNERATION:

Any person who accepts a trusteeship renders his services gratuitously unless he can show an authority to be paid, usually by a charging clause in the trust deed. Similarly, a director must show an authority to be paid, but the question which then arises is what must the director's authority be?

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1 This article is concerned with the fees paid to ordinary directors as such, and not with the salaries of executive directors. Directors may be offered share options, and receive pensions on retirement, but these questions do not fall within the scope of the article.

2 *Burland* v. *Earle* [1902] A.C. 83 at 93; *Normandy* v. *Ind. Coope & Co. Ltd.* [1908] 1 Ch. 84 at 103. However the court will interfere where the majority shareholders vote the directors excessive remuneration if that vote is an abuse of power and amounts to a fraud on the minority: see *Millers (Invercargill) Ltd.* v. *Maddams* [1938] N.Z.L.R. 490; Fletcher, "*Section 209: A Step Towards Shareholder Protection*" (1970) 5 V.U.W.L.R. 479 at 492.

3 For further discussion on the relationship between an agent and his principal see: S. J. Stoljar, *The Law of Agency,* Sweet & Maxwell, 1961.

4 For an example of this modern view see *Re City Equitable Fire Insurance Co.* [1925] 1 Ch. 407 at 426 per Romer J.; Keeton, "*The Director as Trustee*" (1952) 5 C.L.P. 11; Sealy, "*The Director as Trustee*" (1967) 25 Camb. L.J. 83.

In *Dunstan* v. *Imperial Gas Light and Coke Co.*[5] it was held that it is not to be implied from the mere fact that a person is a director that he has a right to be paid. A few years later Romilly M.R. in *York and North-Midland Railway Co.* v. *Hudson*[6] said a court will not allow a director to retain company money on the pretext that he has not been paid or that his services were worth more. And in *Hutton* v. *West Cork Railway Co.*[7] Bowen L.J. took the position further. He said:

> "But what is the remuneration of directors? . . . it is a gratuity . . . In some companies there is a special provision for the way in which the director should be paid, in others there is not. If there is a special provision . . . you must look to the special provision to see how to deal with it. But if there is no special provision their payment is in the nature of a gratuity."

The classic statement is contained in *In re. George Newman & Co.*[8] where Lindley L.J. relying upon the *York Rly Co.* case and *Hutton's* case said:

> "Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorised so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting".

This statement has been approved and relied upon many times.[9] That this rule is strict and can work hardship is illustrated by *Kerr* v.*Marine Products Ltd.*[10] Here K was appointed by the board as an overseas director. He proceeded overseas, performing his duties until he resigned. He then sued the company to recover fees due under the agreement and the company counterclaimed for fees already paid. The court expressing sympathy with the director held that the agreement was ultra vires the directors since the remuneration was authorised neither by the articles nor in any other way. Hence not only did K's claim fail but he was also bound to repay the Company fees already paid.

Therefore the general rule is that the director's services are rendered gratuitously; he has no right to fees unless payment is authorised either by the articles or by a resolution of the company in general meeting.[11] However, such authorisation is valid only if

5 (1832) 3 B. & Ad. 125; 110 E.R. 47.
6 (1845) 16 Beav. 485; 51 E.R. 866.
7 (1883) 23 Ch. D. 654 at 672.
8 [1895] 1 Ch. 674 at 686.
9 For a New Zealand example see: *H. J. Harris Ltd. (in liquidation)* v. *Harris* [1935] G.L.R. 377.
10 (1928) 44 T.L.R. 292; see also *Boschoek Proprietary Co. Ltd.* v. *Fuke* [1906] 1 Ch. 146.
11 In the case of a private company this may be done by an entry in the company minute book pursuant to s. 362 of the Companies Act 1955. For a more detailed discussion of this section see Part VII(C) below.

there is a present right to fees for past or future services. The authorisation will not be valid if it constitutes a *future* right to fees for past or future services — for here fees are a mere expectancy.[12]

IV. THE RIGHT TO RECOVER REMUNERATION:

(A) *What must be established?* A director's fees are gratuitous unless he establishes an authorised right to be paid. However this authorisation is not enough for the right to be enforceable. Here the director must establish a cause of action. But upon what must that cause of action be founded?

In *Dunstan's* case[13] Taunton J. held that to recover remuneration a director must show a contract.[14]

(B) *What amounts to a Contract?*[15] It is necessary to consider whether the articles or a resolution of the company amounts to a contract upon which a director can sue to recover remuneration.

(i) *The Articles:* s. 34 (1) of the Companies Act 1955, provides: ". . . the . . . articles shall . . . bind the company and the members thereof to the same extent as if they respectively had been executed as a deed by each member and contained covenants on the part of each member to observe all the provisions of the . . . articles".

This subsection has been the subject of several decisions which were discussed by Astbury J. in *Hickman* v. *Kent or Romey Marsh Sheepbreeders' Association.*[16] He held while articles do create rights and obligations between members and the company, no right given by an article to a person, whether a member or not, in a capacity other than that of a member, e.g. a director, can be enforced against the company. It is clearly established that the articles do not constitute a contract on which a director or a director/member could sue for remuneration.[17]

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12 An example of a present right to fees for future services is an article or resolution that provides "the remuneration of each director shall be $1000". An example of a mere expectancy of fees is an article that provides "The remuneration of the directors shall be determined by the general meeting".

13 Supra, n. 5.

14 This principle is illustrated by numerous other cases, e.g. see *In re George Newman & Co.* (1895) 1 Ch. 674; *Kerr* v. *Marine Products Ltd.* (1928) 44 T.L.R. 292; *Putaruru Pine & Pulp Co. (N.Z.) Ltd.* v. *MacCulloch* [1934] N.Z.L.R. 639 at 647 and 648.

15 When the director has a service contract with the company these questions will not arise because the director can sue for remuneration stated in that contract.

16 [1915] 1 Ch. 881 at 900.

17 However three cases appear to derogate from this principle: In *Orten* v. *The Cleveland Fire Brick and Pottery Co. Ltd.* (1865) 159 E.R. 776 Martin B. held that an article that each director should receive £50 per annum amounted to a contract on the part of the company to pay that sum. This was not followed by Wright J. in *In re Peruvian Guano Co. ex parte Kemp* (1894) 3 Ch. 690. Similarly in *Re Richmond Gate Property Co. Ltd.* [1965] 1 W.L.R. 335 at 337 Plowman J. held that an article providing the remuneration of a

Finding difficulty in applying this rule consistently with justice the courts have in certain circumstances been willing to treat the articles as evidence of the terms of a separate verbal contract on which a director can sue to recover fees. The articles are regarded as an offer made by the company, and if the director acts on them, and the company are treated as having verbally agreed that he shall be employed on the terms in the articles.

Thus in *New British Iron Co., ex parte Beckwith*[18] Wright J. said:[19]

> "That article is not in itself a contract between the company and the directors . . . But where on the footing of that article the directors are employed by the company and accept office the terms of [the articles] are embodied in and form part of the contract between the company and the directors. Under the article as thus embodied, the directors obtain a contractural right to [their] remuneration."

This principle has been applied many times.[20]

It is submitted the principle will apply to an article that provides remuneration is to be fixed by the general meeting.[21] This appears to follow from the *Putaruru* case where it was held (relying on *Swabey's* case) that such an article forms part of the contract between the company and the director. But the Court, relying on *Loftus* v. *Roberts*[22] held that under such an article there is only a possibility of payment since the company has a discretion as to whether or not the director is to be paid, and therefore the article creates only an illusory promise upon which no claim to recover fees can be based.

It is suggested the courts have been willing to treat the articles as evidence of a verbal contract because as was held in *Re London*

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managing director was to be fixed by the board, created an express contract between the managing director and the company. This short judgment seems untenable in the light of the *Hickman* line of cases. In *In re Leicester Club and Country Race Course Co.; ex parte Cannon* (1885) 30 Ch. 629 Pearson J. held that directors are members of the company and it would therefore seem to follow that the articles constitute a contract between them and the company. But Pearson J. was only concerned with the question whether directors are members in ranking their claims against the company in liquidation. Moreover the case has subsequently been distinguished, e.g. *New British Iron Company, ex parte Beckwith* [1898] 1 Ch. 324; *Re A1 Biscuit Co.* (1899) W.N. 115.

18 (1898) 1 Ch. 324.

19 Ibid., at 326.

20 *Swabey* v. *Port Darwin Gold Mining Co.* (1889) 1 Megone 385; *Re International Cable Co.* (1892) 66 L.T. 253; *In re Anglo-Austrian Printing & Publishing Union, Isaac's case* [1892] 2 Ch. 159; *Salton* v. *New Beeston Cycle Co.* [1899] 1 Ch. 775; *Molineaux* v. *London etc. Insurance Co.* [1902] 2 K.B. 589; *Re J. N. Farrer Ltd.* [1937] Ch. 352 at 358. For a N.Z. authority see *Putaruru Pine & Pulp Co. (N.Z.) Ltd.* v. *MacCulloch* [1934] N.Z.L.R. 639.

21 We must distinguish between the article itself which provides that the directors' remuneration is to be determined by a resolution of the general meeting, and the actual resolution which fixes the directors' remuneration. It is the former that is being referred to here; the latter is discussed below.

22 (1902) 18 T.L.R. 532.

Gigantic Wheel Co.,[23] there is a presumption that where there is an authorised right to fees that right relates to payment for future and not past services. Thus such a contract is valid because there is good consideration, but where this presumption is rebutted, and the articles provide remuneration for past services, it is submitted the courts will not imply such a contract, because the consideration is past.

(ii) *A resolution of the company:*[24] In the *Putaruru* case the accounts presented at the first general meeting showed a profit and the company voted the board £1000 for their services for the past year. Subsequently it was found there had been a loss, not a profit. The directors resolved not to allocate their fees until finances permitted but a director brought action claiming his shares of the fees. Reed J. said:[25]

> "A resolution duly passed by the shareholders remunerating directors, [does] not in itself constitute a contract with the company."

He referred to *Re A1 Biscuit Co.*[26] where the articles provided that the directors were to receive remuneration as fixed at the statutory general meeting which was done. The company subsequently went into liquidation, but the directors were held entitled to prove for their remuneration. In distinguishing this case Reed J. said:[27]

> "The resolution clearly was to pay for future services and not for past services, for it was passed at the statutory general meeting . . . The services of the directors, therefore, were in pursuance of a definite contract by the company to pay for future services. It has no bearing on the present case where the resolution specifically provided for remuneration for past services."

It is submitted that the principle which emerges from the *Beckwith* line of cases also applies in this context and the courts will treat a resolution of the company as evidence of an oral contract on which the director can recover remuneration. But they will find such a contract only where the resolution relates to the remuneration of future services (*Re A1 Biscuit Co.*); no such contract can be established where the resolution authorises fees for past services (*Putaruru*). Although the courts have never said so, the rationale behind this approach (as in the case of basing a contract on the articles) appears to be that a resolution relating to future services creates a valid contract because it is based on good consideration, but a resolution

23 (1908) 24 T.L.R. 618; cited with approval by Reed J. in *Putaruru Pine & Pulp Co. (N.Z.)* v. *MacCulloch* [1934] N.Z.L.R. 639 at 648.

24 Such a resolution would invariably be pursuant to an article reserving the fixing of directors' remuneration to the general meeting since it is highly unlikely that the articles would in no way make provision for remuneration and that the question would depend entirely upon the general meeting.

25 [1934] N.Z.L.R. 639 at 647.

26 (1899) W.N. 115.

27 [1934] N.Z.L.R. 639 at 651.

relating to past services cannot create an enforceable contract because the only consideration is a past consideration.

(C) *An Alternative Approach:* Even if a director cannot establish a contract, an alternative approach to enforce his right to remuneration might possibly be available.

There is some authority for the view that each member has a general contractual right to have his company's affairs conducted in accordance with the articles.[28] Therefore Wedderburn suggests[29] that a member who is given special rights by the articles, e.g. a director, can enforce those rights by a suit to prevent the company from departing from its articles. Therefore a director who is a member of the company can in his capacity as a member bring an action compelling the company to abide by the articles which relate to his special rights to remuneration as a director. In this way a director could recover authorised remuneration without founding his action in contract.

But is Wedderburn's theory valid? The basis of his view that a member has a general right to see the articles are observed, has some authority albeit slim. It is submitted the proposition he extracts from this, that a member with special rights can indirectly enforce them, is dubious. Wedderburn considers *In Re Richmond Gate Property Co. Ltd.*[30] supports his view. Here the articles provided that the managing director's remuneration was to be determined by the board, among whom it was understood that he was not to be remunerated until the company got off its feet. The company went into liquidation and the managing director, who was also a member, lodged proof for his remuneration. This was rejected both by the liquidator and the Court. Wedderburn argues that just as the member might prevent the company from departing from the articles, so the company may prevent the member from doing so. Thus in the *Richmond* case the company could raise as a defence against the managing director the fact that he was a member and was seeking to act inconsistently with the articles which said the managing director's remuneration was to be fixed by the board. It seems strained to place this interpretation on the short judgment of Plowman J. for the language he uses does not suggest any such basis.

Moreover the theory is inconsistent with the well established *Hickman* line of case that special rights given by the articles cannot be enforced against the company. It also seems to overlook the rule in *Foss* v. *Harbottle* which denies to a member the right to complain of "mere irregularities" even if they contravene the articles. Wedderburn himself has admitted that, if the theory is accepted, these two principles

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28 In *Re H. R. Harmer Ltd.* [1959] 1 W.L.R. 62, this proposition was impliedly accepted by Jenkins L.J. at 85 and expressly accepted by Romer L.J. at 87.
29 [1957] C.L.J. 194; cont. [1958] C.L.J. 93; see also (1965) 28 M.L.R. 347, [1959] C.L.J. 37.
30 [1965] 1 W.L.R. 335.

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"are both seriously affected".[31] Even if his view is accepted, the member remains in a "schizophrenic" position; the articles are not a contract between him and the company directly governing his special rights, but only indirectly governing them.

(D) *Conclusions:* Assuming the director has authority to be paid, he can only recover his fees if he can show a contractual right to them. The articles or a resolution of the general meeting although not in themselves amounting to a contract will be treated by the courts as evidencing an oral contract on which a director can sue but only if they relate to the payment of fees for future services.

A director who is also a member may have a right to recover on a more radical basis (although in the writer's opinion this is dubious). Providing he has authority to be paid, the director may, in his capacity as a member, be able to bring an action to prevent the company derogating from the articles which relate to his special right as a director to remuneration.

V. RECOVERY ON A QUANTUM MERUIT:

Can an ordinary director who fails to establish a proper authorisation of his fees succeed in recovering a quantum meruit?

To recover on a quantum meruit a plaintiff must show that he rendered services at the request of the defendant; acceptance of the services raises the presumption that a request was made. However, a quantum meruit recovery is excluded, firstly where there is an express contract governing the remuneration,[32] and secondly if the plaintiff has expressly or impliedly indicated he will provide his services without remuneration.

The law relating to directors' remuneration provides that in the absence of a contrary direction the implication is that a director's services have been rendered gratuitously.[33] Therefore it is submitted an ordinary director[34] can never recover on a quantum meruit: because where he has a contractual right to remuneration different terms as to remuneration cannot be inferred in the face of that express contract; and where there is no contractual right to remuneration, the director's services are gratuitous.

Finally it should be noted that a person who acts as a director, although not duly appointed, is not entitled to a quantum meruit

31 (1965) 28 M.L.R. 347 at 350.

32 *Cutter* v. *Powell* (1795) 101 E.R. 573 at 576 per Lord Kenyon.

33 For a recent authority on this point see *Re Fergusson Homes Ltd.* unreported N.Z. Court of Appeal judgment of 12/4/1973.

34 It is clear that if a director renders services in a capacity other than as a director, and these are accepted by the company, a quantum meruit claim in respect of those services will succeed — *Craven-Ellis* v. *Cannons Ltd.* [1936] 2 K.B. 403. It seems from this case that an executive director who is employed on the basis of a void contract can recover on a quantum meruit because there is no contract barring the claim.

because he cannot show title to the position of director, in virtue of which he claims fees.[35]

VI. FROM WHAT FUNDS MAY REMUNERATION BE PAID?

Some companies run at a profit, others run at a loss or on borrowed money. Yet in all these situations the directors may do the same amount of work. Are they entitled to remuneration irrespective of the financial position of their companies?

If the directors derive their authority for remuneration from the articles the courts have held there is no general presumption that remuneration shall be paid out of profits only: *Re Lundy Granite Co., Lewis's* case.[36] Here the article authorised the directors to distribute among themselves a sum equal to one tenth of the profits, provided the annual remuneration of each director was not less than £100. The Court of Appeal held that although the company had not made a profit, the directors were entitled to retain remuneration drawn on the basis of the article since the clause authorised minimum fees of £100 and the reference to profits was only for measuring the quantum of remuneration when the profits enabled a more than usually liberal remuneration to be paid.

It is suggested that the courts have taken this approach because of the presumption that remuneration relates to future services and because in these circumstances the courts will hold an article to be evidence of a contractual right to that remuneration. However, were the article to provide remuneration for past services, it is suggested the presumption would be rebutted and remuneration would be payable only out of profits. Furthermore, the presumption is rebutted if the articles expressly provide that directors' fees are to be paid out of profits or that directors are not to be entitled to remuneration until certain profits have been realised.

Where the directors' authority to be paid is a resolution of the company, the courts have held directors to be justified in paying themselves if there were profits out of which payment could be made.[37] As Lindley L.J. said in *Re George Newman & Co. Ltd.*[38]

> "The shareholders of a meeting duly convened for the purpose can . . . remunerate directors for their trouble or make presents to them for their services out of assets properly divisible among the shareholders themselves . . . But to

35 *Woolf* v. *East Nigel Gold Mining Co. Ltd.* (1905) 21 T.L.R. 660.
36 (1872) 26 L.T. 673.
37 If there are no profits it seems from the decision of *Putaruru Pine & Pulp (N.Z.) Ltd.* v. *MacCulloch* [1934] N.Z.L.R. 639 that the resolution authorising remuneration for past services is ultra vires especially if based on an incorrect balance sheet showing a profit.
38 [1895] 1 Ch. 674 at 685; see also Reed J. in *Putaruru Pine & Pulp Co.* v. *MacCulloch* [1934] N.Z.L.R. 639 at 647; *Stroud* v. *Royal Aquarium etc. Society* (1903) 89 L.T. 243.

> make . . . them out of capital or out of money borrowed by the company is a very different matter. Such money cannot . . . be given away by them for nothing to their directors so as to bind the company in its corporate capacity."

But here the resolution related to past services. It is submitted that where the resolution relates to future services, and courts have shown a willingness to import a contract to pay for those services, the remuneration may be paid out of any of the company's funds. As Reed J. in the *Putaruru case* said:[39]

> "The shareholders cannot . . . bind the company in its corporate capacity to pay a sum voted as a present to the directors if there are no profits out of which it can be paid. Of course, if the remuneration is voted in respect of a definite and valid contract with the directors for payment for their services that restriction would not apply."

Thus it is submitted if there is an enforceable right to remuneration either under the articles or a resolution of the company, then, unless there is express provision to the contrary, the director can be paid out of any funds. But if the right is not enforceable, directors can be paid only out of profits. In practice the right to remuneration will be enforceable where the authorising article or resolution relates to future and not past services.

VII. METHODS OF FIXING REMUNERATION:

As has been shown a director's right to remuneration must be authorised either by the articles or by a resolution of the company. The authority is invariably found in the articles; the second method of authorising director's remuneration is often incorporated in the first.

Articles may be drafted in a variety of ways to fix directors' remuneration, but generally the method used will be one of the five discussed below. Often combinations and variations of these methods, and a different basis of payment for different directors, are used. Also the remuneration may be made conditional upon the happening of certain events, e.g. payment of a dividend; or that a time for payment be fixed by the board.[40]

(A) *A Fixed Sum to each Director:*

This type of article usually provides: "each director shall be paid out of the funds of the company remuneration at the rate of $X per annum". But this method is nowadays less common than

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39 [1934] N.Z.L.R. 639 at 647.

40 In *Caridad Copper Mining Co.* v. *Swallow* [1902] 2 K.B. 44 the directors were to be paid £200 per annum to be paid at such times as the directors might determine. It was held it was a condition precedent to the right of a director to remuneration that the time for payment should have been determined by the directors.

it was in the past so that only long established companies fix their directors' remuneration in this way. But even here there is a tendency to change the method.[41]

An article remunerating each director at $X per annum gives each director an absolute right to receive the specific sum once he has performed the services, without the necessity of going to the general meeting. Under these circumstances the courts have been willing to say the fixed sum becomes a debt due for which the director can sue.[42]

However some disadvantages surround this type of article. In times of inflation the specified sum may soon become unrealistic in comparison with the services rendered. Thus, if the directors wish to alter their rate of remuneration, they must alter the articles and this can only be done by a special resolution of the company (i.e. by a majority of three fourths of the members).[43] This inflexibility may not appeal to company directors.

(B) *A Fixed Sum for Division amongst the Directors:*

An article drafted on this basis will usually provide: "the remuneration of the board shall be $X per annum and such remuneration shall be divided among the directors in such proportions and manner as they may determine". Where this is so, it is clear a director cannot sue for his fees until the directors have made a formal division of the authorised sum.[44] But the directors may not be able to reach agreement on the mode of division. Thus an article in this form can create problems. To overcome these, a proviso is often inserted which permits the remuneration to be divided, e.g. equally in default of a division by the directors. Where this has been done a director may sue for his share if the board does not agree on a division.

As there is no contract between the directors inter se an action is not maintainable by a director against his co-directors for mandamus to compel them to divide the remuneration.[45]

The same considerations relating to variation of remuneration discussed above in Section (A) also apply here.

(C) *Determination by the Company in General Meeting:*

It is very common for the articles to provide: "the remuneration of the directors shall from time to time be determined by the company

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41 E.g. Art. 72 of the articles of New Zealand Breweries Ltd. provided that each director should receive £1000. In 1967 this was altered; art. 90 now provides that the board shall receive $37,000.

42 *Nell* v. *Atlanta Gold and Silver Consolidated Mines* (1895) 11 T.L.R. 407.

43 S. 24 of the Companies Act 1955; *Boschoek Proprietary Co. Ltd.* v. *Fuke* [1906] 1 Ch. 148 at 163.

44 *Morrell* v. *Oxford Portland Cement Co.* (1910) 26 T.L.R. 682; *Joseph* v. *Sonora (Mexico) Land and Timber Co.* (1918) 34 T.L.R. 220; *Moriarty* v. *Regents Garage & Engineering Co.* [1921] 2 K.B. 766 at 774 per Lord Sterndale M.R. and at 779 per Scrutton L.J.

45 *Dashwood* v. *Cornish & Others* (1897) 13 T.L.R. 337.

in general meeting". The model articles in Table A of the Companies Act contains such a clause.[46] The general meeting determines the remuneration by an ordinary resolution passed by a simple majority of which no special notice need be given but the resolution must be directly and specifically addressed to the question of directors' fees.

A company may resolve to fix the remuneration for either past or future services,[47] and may award the directors a salary, fees or a percentage of the company's profits; the members retain the power to vary the form or the amount of remuneration from time to time.

Care should be exercised to ensure that a proper quorum is present at the meeting, otherwise a resolution voting directors a remuneration will be invalid and the directors will be without authority to be paid. If such remuneration is in fact paid it may be recovered by the company as unauthorised.[48]

This type of article will not allow a director's remuneration to be determined in a way other than by the company in general meeting; for instance by the board.[49] But where a general meeting is not held or the directors fail to obtain the formal authorisation by a proper resolution of the company, the courts have been willing to hold under certain circumstances that some sort of informal approval is sufficient to authorise remuneration.

Where a general meeting has been held but no specific resolution relating to remuneration has been passed, it is clear that it is not sufficient to show in the accounts the sum taken by directors and to assert that acceptance by the company of the accounts constitutes a resolution authorising the directors' remuneration for the past year.[50] However, the cases show a resolution of the members approving the accounts may be sufficient authorisation, if all the members are aware that by being asked to approve the accounts, they are also being asked to approve the remuneration. Thus in *Felix Hadley & Co. Ltd.* v. *Hadley*[51] the directors' remuneration was to be fixed by the general meeting. A director received remuneration every year and, although it appeared in the accounts submitted to the general meeting, no resolution was passed. At the meetings which were attended by a vast majority of the shareholders the accounts were read and explained by the company accountant and then passed. No absent shareholder

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46 See art. 76. There has been an article to this effect in every Companies Act in New Zealand since 1882. Article 108 provides that the *board* of directors shall determine the remuneration of the managing director. While this method has generally been restricted to determining the remuneration of executive directors, there is a small but growing practice, especially among private companies, to fix the fees of ordinary directors by this method.

47 *Colhoun* v. *Green* (1919) 25 A.L.R. 127.

48 *Re J. Franklin & Son Ltd.* [1937] 4 All E.R. 43.

49 *Kerr* v. *Marine Products Ltd.* (1928) 44 T.L.R. 292.

50 *In re London Gigantic Wheel Co. Ltd.* (1908) 24 T.L.R. 618.

51 (1897) 77 L.T. 131.

cver complained. Under these circumstances Byrne J. held the remuneration was authorised.[52]

Similar considerations apply where no general meeting is held. In *Bobbie Pins Ltd.* v. *Robertson*[53] the three directors were also the only shareholders. The question of directors' fees was at no time dealt with by the general meeting but was decided at a directors' meeting and the amount disclosed in the accounts. The Court said that the applicable law was stated by Astbury J. in *Parker and Cooper* v. *Reading*[54] where he said:

> ". . . where a transaction is intra vires and honest, and especially if it is for the benefit of the company, it cannot be upset if the assent of all the corporators is given to it . . . it matters [not] in the least whether that assent is given at different times or simultaneously".[55]

Finlay J. therefore held that the directors' fees, although not authorised as strictly required by the articles, had nevertheless been paid with the concurrence of all the shareholders and were therefore valid. The same approach was recently taken in *In re Duomatic Ltd.*[56] where the company's affairs were conducted with extreme informality; the directors' remuneration was under the articles to be fixed by the general meeting but this was never done. Instead the directors drew sums according to their personal needs and at the end of each year the total sum was entered in the accounts as "directors' salaries". The accounts were duly passed and explained by the auditor. Buckley J. relying on the statement of Astbury J. in the *Reading* case held that the two directors who held all the voting shares had approved these payments at the time of passing the annual accounts, for their consent was tantamount to a resolution of the general meeting. It was irrelevant that a preference shareholder who had no voting rights did not know of the payments.

Therefore, if a general meeting is held but no resolution in respect of directors' fees is passed, the directors have a valid right to be paid if their remuneration is mentioned in the accounts and all the members know that by approving the accounts they are also approving the remuneration. However, where no general meeting is held, it seems that stricter requirements must be met before an authorised right to be paid can arise; the payment must be intra vires, honest and for the benefit of the company with the assent of all the members, so that assent is as binding as a resolution of the company.

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52 It seems a similar result might have been reached in *Kerr* v. *Marine Products Ltd.* (1928) 44 T.L.R. 292 had all the members agreed to K's appointment and remuneration.

53 [1950] N.Z.L.R. 301.

54 [1926] Ch. 975 at 984.

55 In *Bateman Television Ltd.* v. *Bateman* [1971] N.Z.L.R. 453 Turner J. considered that the transaction must be honest if this principle is to be applicable.

56 [1969] 2 W.L.R. 114.

Probably the principal advantage in having the remuneration determined by the general meeting is that it allows for control by shareholders and furnishing them with an opportunity to review the amounts paid to the directors. But this has been undermined and the problems associated with obtaining a formal or informal approval of remuneration have been circumvented by companies introducing a variation to this form of article.

Nowadays most companies draft their remunerating article so that the shareholders in general meeting determine the remuneration and that once it is determined, that sum is to be payable in each subsequent year until it is altered by an ordinary resolution of the shareholders.[57] In the case of companies listed on the New Zealand Stock Exchange, the listing requirements provide that notice of the amount of a proposed increase should be given in the notice convening the meeting.[58] This type of article avoids the year by year shareholder control and permits the directors' remuneration to be altered to keep pace with inflation without the necessity of passing a special resolution.

Some of these problems may not necessarily arise in the case of a private company if a resolution is passed by signed entry in the minute book under s. 362(1).

Therefore where the remuneration of a director of a private company is to be fixed by the general meeting, questions of formal and informal approval can be rendered easier by an entry in the company's minute book.

However, many private companies carry on business with extreme informality and often the directors will draw fees without any authority whatsoever be it formal or informal approval or by entry in the company's minute book pursuant to s. 362.

In times of economic squeeze when many small private companies may be forced into liquidation or when corporate control falls into different hands, many shareholder/directors may be compelled to repay substantial sums to a company because they have drawn fees without authority.[59]

(D) *Payment by percentage of profits:*

Occasionally the director's remuneration is fixed by the articles of a stated percentage of the company's profits. This method is designed to encourage directors to enlarge the company's profits, if only out of self-interest. A share of profits may look innocuous when expressed as a percentage, but be disproportionate remuneration when calculated in cash. It is probably for this reason that the Stock Exchange prohibits listed companies from remunerating their directors

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57 E.g. art. 89 of the articles of the Wellington Gas Co. Ltd. In 1968 the company increased the director's fees from $4600 to $6000 by this means.

58 See section 4 para. 409 L/R 32 of the Listing Manual of the Stock Exchange Association of N.Z.

59 See *"How Limited is your Liability"*, P. J. McKinlay, 1968 Accountants Journal 103, where such cases are discussed.

(except working directors) by a percentage of the profits[60] and in accordance with this many companies make express provision in their articles prohibiting such remuneration. It is rare for a company to use this type of article alone. In practice it is mainly used in conjunction with another method of fixing remuneration, especially in respect of working directors.

(E) *Payment by Attendance:*

The articles may fix a specific fee which the directors are entitled to for attendance at each board meeting; or there may be a fee for attendance at so many of the board meetings for the year. If so, it is necessary for a properly authenticated record of each director's attendance to be kept, for it is upon the basis of such record that his remuneration will be determined. This form of payment is also rare but is occasionally used in conjunction with other methods.

Section 8 of the Companies Amendment Act 1901 provided that no director was to receive remuneration if he had been absent from directors' meetings for three months or more without leave of the board.[61] This provision was excluded from the Act when the legislation was revised in 1933.

(F) *Conclusions and Suggested Articles:*

It emerges from this discussion that different considerations apply to public and private companies. Therefore the draftsman of articles covering directors' remuneration must consider them separately. It is on this basis that the following attempt proceeds.

(i) *Private Companies:*

It is submitted that here the most suitable article would be one along the following lines:

> "The board of directors shall be paid out of the funds of the company by way of remuneration, a sum at the rate of $X per annum, and such sum shall be divided among them in such proportions and manner as the directors may determine and in default of such determination equally."

The advantages of this type of article are that where there is a sum fixed by the articles it is presumed to relate to the payment of future services and thus creates an enforceable right to the sum which may be sued for or claimed on a winding up.[62] This would not be so were it an article requiring the general meeting to fix the directors' remuneration because the resolution usually relates to the payment of past services.

While it can be argued that such an article gives flexibility in

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60 Section 4 para. 409 L/R 31 of the Listing Manual of the Stock Exchange Association of N.Z.

61 No similar provision was enacted in England because s. 8 was intended to deal with a local problem arising out of the mining boom of the turn of the century.

62 See Part XII below.

determining remuneration, it does not necessarily follow that in the case of a private company a fixed sum article gives inflexibility. In private companies the separation of management from ownership is rare so that the directors are also (and sometimes the only) shareholders. In these circumstances directors could easily alter the sum fixed in the article by a special resolution or by an entry in the company minute book pursuant to s. 362.

If a sum is fixed by the articles it is unnecessary to go to the general meeting each year. For where remuneration is to be fixed by the general meeting, this can be a real stumbling block, since private companies tend to conduct their business informally, and many directors draw fees without authority. A global sum appears preferable to a fixed sum per director since each of the directors may do differing amounts of work and their comparative value can be best determined by the directors themselves.

It may be desirable also to pay the directors a share of the profits, out of self interest and because the rate of tax would be lower. But this is hardly necessary as the directors in their capacity of shareholders would be able to take the additional remuneration in the form of dividends. Moreover, as earlier mentioned if the directors vote themselves a percentage of the profits in addition to their ordinary fees, this may amount to unreasonable remuneration and oppression of minority shareholders who are not directors. Furthermore the method ignores the existence of outside creditors who have an interest in ensuring that the company remains solvent.

(ii) *Public Companies:*

It is submitted an article in the following terms is the most suitable:

> "The board of directors shall be paid out of the funds of the company by way of remuneration at the rate of such sum per annum as the shareholders in general meeting shall determine and upon any sum being voted the same sum shall be payable in each succeeding year until altered by a resolution of the shareholders. No resolution altering the remuneration shall be passed unless due notice of the intention to propose the same shall be given in the notice convening the meeting and such notice shall specify the amount of any proposed alteration. The remuneration shall be divided among them in such manner and proportions as the directors may determine and in default of such determination equally between each director other than the chairman who shall be paid an additional sum at the rate of $X per annum. No remuneration of the directors shall be by way of commission on or percentage of turnover or dividends, nor except in the case of an Executive Director, of profits."

The primary consideration in determining directors' remuneration should be democratic shareholder control of management. In public

companies, especially large ones, this is feasible because management is separate from ownership. However the reality of this separation is weakened because invariably ownership is fragmented and shareholders have difficulty in acting as a unit. Moreover, at most meetings, directors will themselves hold considerable voting power by proxy. Nevertheless while justice in voting the directors' fees may not in fact be done, at least the machinery is there for it to be seen to be done. By reserving the question to the general meeting, flexibility in fixing directors' fees is retained so that inflation, etc., can be overcome by altering the sum by ordinary resolution. The resolution will usually relate to payment of past services and thus not amount to an enforceable right to fees which can be sued for or claimed on a winding up.[62] However in the case of public companies such claims are rare. Moreover the article provides that once the remuneration is fixed it authorises remuneration until altered. Therefore some pemanence is given to the directors' fees without their having to obtain year by year shareholder approval.

Payment by a percentage of profits is undesirable because it may be disproportionate remuneration when calculated in cash. Moreover, listed public companies are forbidden to remunerate their directors in this way. The proposed article conforms to other relevant Stock Exchange requirements.

As in the case of private companies, and for the same reason it seems preferable to award a global sum rather than a sum for each director.

VIII. SPECIAL REMUNERATION: TRAVELLING AND OTHER EXPENSES:

A director may have to incur travelling accommodation and other expenses; he may also be required to perform additional services. What are his rights to remuneration in these respects?

(A) *Special Remuneration:*

As in the case of a director's ordinary fees he has no right to be paid special remuneration for extra services unless he has some authority, nor may he recover such remuneration unless he can base his action on a contract. It is therefore common[63] to find included an additional article drafted in the following or similar terms:

> "If any director being willing, shall be called upon to perform extra services, or to make any special exertions in going or residing abroad, or otherwise for any of the purposes of the company, the company shall remunerate such director, either by a fixed sum or otherwise as may be determined by the directors, and such remuneration may be either in addition to

63 No such provision however is found in Table A.

or in substitution for his share in the ordinary remuneration."[64]

In *Nelberg* v. *Konnel Steamship Co.*[65] Barry J. pointed out that this type of article is not mandatory in the sense that every special service must be paid for by the company, the determination by the directors relating only to the amount of remuneration. He said the true construction is that the article applies only where the director is "called upon" to perform the special service by a resolution of the board, and cannot be invoked where a director has been casually asked by another director to act. If the directors fail to determine the question, the company has no authority to pay the special remuneration.[66] This was the position in the *Nelberg* case where an article in this form was considered. Barry J. said:[67]

> "I am wholly satisfied that a determination by the directors as to the method and amount of payment is a condition precedent to an action for any sum claimed to be payable to a director under this article."

It must be clearly made out that the services are special, i.e. beyond those ordinarily required from a director for, as was held in *Lockhard* v. *Moldacot Pocket Sewing Machine Co.*,[68] when services are rendered to a company by one of its own directors, the presumption is that they are not special services. If the article provides that the company in general meeting is to fix the additional remuneration, shareholder control will prevent the board from paying unnecessary fees to directors, under the guise of additional remuneration, without the approval of the general meeting.

(B) *Travelling and other expenses:*

The law in this area was comprehensively discussed in *Young* v. *The Naval, Military and Civil Service Co-operative Society of S.A. Ltd.*[69] Here Farwell J. observed that directors, being both agents and trustees for the company, are entitled to be indemnified against all losses and expenses properly incurred by them in the performance of their office. He held that this right arises by the implication of a contract from the relations between themselves and the company and therefore depends on the particular relationship that exists since differing contractual terms may be implied from different relations. He concluded that an unpaid director is entitled to complete indemnity for travelling and other expenses, but in the case of a paid director, the question becomes — what outlay does his

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64 This type of article is intended to authorise payment to ordinary directors, who from time to time are requested to perform duties over and above their usual duties. It is not intended to authorise the salaries of executive directors, since they usually enter into a service contract with the company setting out the terms and conditions of their service, including salary.

65 [1958] 2 Lloyd's Rep. 560.

66 It follows that had there been such an article in *Kerr's* case (44 T.L.R. 292) the appointment and remuneration would have been valid.

67 [1958] 2 Lloyd's Rep. 560 at 574.

68 (1889) 5 T.L.R. 307.

69 [1905] 1 K.B. 687.

remuneration cover? Since it is the main part of the ordinary business of a director to attend board meetings his expenses in attending those meetings are included in his ordinary remuneration notwithstanding that he may live many miles from the company's offices.

Therefore, to be reimbursed for expenses, a director must have authority either under the articles or by a resolution of the company and for this proposition Farwell J. cites *Re George Newman*[70] and held that the director could not recover his travelling and hotel expenses as the only authority he had was a resolution of the board. This case was followed in *Marmor Ltd.* v. *Alexander*.[71]

An article authorising special remuneration is insufficient to cover travelling and hotel expenses; as is an article indemnifying a director against costs and expenses incurred by him in the exercise of his duties.

Thus, in summation: an unpaid director is entitled to complete indemnity for his travelling and other expenses, but if a director receives remuneration for his ordinary service, this prima facie covers travelling and other expenses, unless he can show authority to be paid those expenses either under the articles or a resolution of the company. Many companies therefore provide in their articles a clause which states:

> "The directors shall be entitled to be paid their reasonable travelling and hotel and other expenses incurred in consequence of their attendance at board meetings, and otherwise in the executive of their duties as directors.

Article 76 of Table A is to similar effect.

IX. EFFECT OF NON-APPOINTMENT, NON-QUALIFICATION OR VACATION OF OFFICE:

What are the director's rights to remuneration where there is a defect in his appointment or where he fails to obtain the necessary qualification, or where he vacates his office but continues to act as a director?

(A) *Non-Appointment:*

A director who is not properly appointed is not a director in law. He therefore cannot claim the remuneration to which a director is entitled although he believes himself to be validly appointed and actually serves the company. This is illustrated by *Woolf* v. *East Nigel Gold Mining Co. Ltd.*[72] where the articles provided that directors were to be appointed by a meeting summoned by the subscribers to the memorandum but, because proper notice of the meeting had not been given, the court held the plaintiff had not been appointed a director and rejected his claim.

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70 Supra, n. 8.
71 [1908] S.C. 78.
72 (1905) 21 T.L.R. 660.

(B) *Non-Qualification:*

Often the articles require a director to hold a specified share qualification. Where this is so, the question may arise whether a director is entitled to remuneration if he acts without, or before acquiring, the requisite shares.

It is clear from *Brown and Green Ltd.* v. *Hays*[73] that if the article requires the director to possess the shares at the time of his appointment and he does not, he cannot subsequently receive remuneration for services he purported to render as a director since he is not validly appointed. On the other hand, there have been a number of cases where directors have been allowed to retain fees although they failed to obtain their qualification shares. The courts have been able to reach this result because the articles either expressly or impliedly entitled the director to act before qualifying. Thus in *Re International Cable Co. Ltd.*[74] the articles provided that the qualification of directors should be the holding of 100 shares. In a claim for remuneration by directors who did not hold the full number of qualification shares, Stirling J. implied into the articles the term that a director had a reasonable time to acquire the shares and might act before he was qualified. He considered that a reasonable time would vary from case to case; if the director did not acquire the qualification within a reasonable time the company might: allot the qualification shares to him; and recover damages (if any) in an action founded on his breach of duty; possibly also the company might require him to cease from acting; or by an ordinary resolution determine that the rights and remedies not be put into force at once.

In other cases the articles may expressly provide a period within which the director is to obtain his qualification shares and that he may act and be remunerated for his services within that period.[75]

The Legislature however, has to a degree checked judicial development in this area. Section 185(i) of the Companies Act provides:

> ". . . it shall be the duty of every director . . . to obtain his qualification within two months after his appointment, or such shorter time as may be fixed by the articles."

Thus, if a director is required to hold shares, he may act and receive remuneration as a director for a period up to, but no longer than, two months, notwithstanding that the courts may be able to imply (or there is expressed) a longer period within which to act without qualification. If at the end of the period of two months he still does not hold the necessary shares, the company (as mentioned above) has various rights and remedies. It may in turn, however, resolve to suspend them and may subsequently be estopped from enforcing them.

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73 (1920) 36 T.L.R. 330.
74 (1892) 66 L.T. 253.
75 See, e.g. *Salton* v. *New Beeston Cycle Co.* [1899] 1 Ch. 775.

(C) *Vacation of Office:*

Here the principles are clear. If a director vacates office, for example, by failure to be re-elected or by becoming interested in a contract with the company, but nevertheless continues to act as a director, he is not entitled to remuneration from the date of vacating his office until the defect is cured, or he is re-elected. This principle is illustrated by *In re Consolidated Nickel Mines Ltd.*,[76] and by *The Bodega Co. Ltd.*[77]

Where the duties of directors are diminished by the sale of the company's undertaking but there still remains something for them to do, there is no "vacation of office" so as to disentitle them from recovering their fees, especially where the shareholders and the creditors, knowing the position of the company, are willing that the directors remain in office and that the company should not be wound up — *In re Consolidated Nickel Mines Ltd.*[76] It is submitted however that where the undertaking has been sold and winding up is all that remains to be done, and the directors fail in their duty to take this step and continue to act, they have "vacated office" and are not entitled to remuneration. If directors are appointed receivers at a salary and the company subsequently goes into liquidation, they do not vacate office and are not disentitled from receiving remuneration up to the time of liquidation; the remuneration paid to them as directors is a payment for doing whatever there is to be done by them as directors and the remuneration paid to them as receivers is a payment made to them for doing what they have to do as receivers — *In re South Western of Venezuela (Barquisimeto) Railway Co.*[78]

X. WAIVER OF REMUNERATION:

The directors of a company which is experiencing hard times frequently forego their remuneration until the position has improved.[79] Occasionally, however, a director may claim his remuneration and the question will arise whether there has been a legally binding release of the claim upon which the company can rely against the director.

The authorities are obscure and not altogether consistent. The first in point of time is *Lambert* v. *Northern Railway of Buenos Ayres Co.*[80] where Mallins V.C. speaking obiter, took the view that an agreement by the directors to waive remuneration was a mere nudum pactum and unenforceable. In *Morrell* v. *Oxford Portland Cement Co. Ltd.*[81] however, Lawrence J. ascribed a wide effect to

76 [1914] 1 Ch. 883.
77 [1904] 1 Ch. 276.
78 [1902] 1 Ch. 701.
79 This assumes that the directors have an authorised right to be paid, whether in respect of past or future services.
80 (1869) 18 W.R. 180.
81 (1910) 25 T.L.R. 682; see also *Salton* v. *New Beeston Cycle Co.* [1899] 1 Ch. 775 where Cozens-Hardy J. held that a resolution of the directors to forego remuneration did not bind a director subsequently claiming his fees. The director's claim was dismissed on other grounds.

the *Lambert* case, saying it was there held that a waiver of fees was a nudum pactum which did not prevent a director subsequently recovering those fees.

In *In re Northern and London Bank, McConnell's claim*[82] the directors resolved in February not to receive remuneration until a dividend on the ordinary shares was paid. In December the company went into liquidation, no dividend having been paid. In liquidation a director sought to claim his remuneration down to the winding up. Wright J. in rejecting the claim expressed the view that *Lambert's* case was not a direct authority for the proposition that a waiver of director's fee is a nudum pactum, and that Mallins V.C.'s statement was only directed to the case where remuneration had already been earned. He pointed out that in the case before him there was nothing due to the directors at the time of the resolution. The agreements between the directors and the company were still open and unperformed, and thus the directors could at that time under the form of a resolution, make a new contract with the company varying the several contracts which they had made in accepting office. This had in fact been done. This case is therefore an authority for the proposition that an agreement by directors to waive future remuneration can be enforced by the company. But this proposition may be questioned. While consideration is given by each director (i.e. the waiving of his right to fees, and thus each director can establish a binding agreement as against his co-directors), the new contract to work without remuneration is unsupported by consideration moving from the company.

The question was again considered in *West Yorkshire Darracq Agency Ltd.* v. *Coleridge*[83] where a director sued for fees which he had foregone pursuant to an agreement between all the directors and the liquidator of the company. Horridge J., without citing either *Lambert's case* or *McConnell's claim,* concluded that because the liquidator was a party to the agreement he obtained the benefit of the consideration which each director gave his co-directors by waiving his right to fees, and therefore the agreement was binding equally on the directors and on the company through the liquidator. The claim therefore failed.

On this view the absence of consideration does not render the agreement unenforceable by the company, provided the company is a party to it. The waiving of remuneration is not however usually made the subject of a formal agreement with the company, but is often effected by resolution of the directors. Whether the resolution constitutes an agreement to which the company is a party turns on whether the directors may, under the articles, exercise all the powers of the company.

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82 [1901] 1 Ch. 728.
83 [1911] 2 K.B. 326.
84 [1937] 2 All E.R. 361.

A different approach was taken in *Re William Porter & Co. Ltd.*[84] Here the directors resolved in February 1934 that no fees should be paid from October 1933. Subsequently the company went into liquidation and a director claimed arrears of remuneration down to the time of liquidation. Simonds J. held that on the facts there was no binding agreement between the company and the directors to forego fees. Nevertheless he went on to hold that the director could not claim his fees now because the resolution was not merely an act of benevolence, but was intended to induce the company to carry on business, from which it might otherwise have abstained; the directors were estopped from denying the validity of their waiver of fees.[85]

But is this approach correct? Simonds J. does not distinguish between the waiver of fees already earned and the waiver of fees not yet earned. It is submitted the waiver in respect of the fees already earned between October 1933 and February 1934 was not binding because under the rule in *Foakes* v. *Beer*[86] payment of a lesser sum (i.e. no remuneration) in satisfaction of a greater is no satisfaction of the whole (i.e. the fees already earned). In respect of the waiver of fees earned after the resolution in February 1934, however, it is submitted Simonds J. is correct. The relevant authorities are *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[87] and *Ajay* v. *Briscoe*,[88] on the basis of which, it is suggested that a director who has waived his right to payment for future services will be estopped from denying the validity of the waiver if the company acts on the waiver and alters its position.[89] The company is unable to regain that position if it is given notice of revocation of the waiver.

Conclusions:

If a director waives his right to future remuneration, and subsequently sues for arrears, he will be estopped from asserting his claim if the company can establish that it acted and relied upon the decision to forego remuneration, but he will not be estopped against claiming fees already earned at the date of the waiver. If the company cannot raise estoppel, the question will turn on whether there is a binding contract between the directors and the company. On this point, the authorities seem to establish that an agreement by directors to forego *future* fees is binding and enforceable by the company (*McConnell's Claim*); and that no agreement by directors to forego *past* fees is binding and enforceable by the company if it is a party

85 This approach had previously been hinted at by Wright J. in *McConnell's Claim* where he said the resolution of the board had been communicated to the shareholders, but that there was no evidence they acted on it.

86 (1884) 9 App. Cas. 605.

87 [1947] K.B. 130.

88 [1964] 1 W.L.R. 1326.

89 The N.Z. courts appear to require the additional element of detriment; see *P.* v. *P.* [1957] N.Z.L.R. 854; *McCathie* v. *McCathie* [1971] N.Z.L.R. 58. Thus there could be difficulties where subsequent to the directors' waiver, the company makes a profit.

to that agreement; if the agreement is constituted by a resolution of the directors, the company in law becomes a party to it — *Coleridge's case*. The difficulty of consideration surrounding these cases could be avoided if the company takes a release under seal from the directors but this is rarely done.

If there is held to be neither estoppel nor binding agreement nor a release under seal, and a director sues the company for fees previously waived, then, because an agreement by the directors annually to forego remuneration binds each director, such a claim would be a breach of that agreement upon which the other directors could sue, or seek an order restraining the claimant. Finally, a resolution by the directors to waive their future fees, can be validly rescinded so as to entitle them to remuneration from the date of the rescinding resolution — *Re Consolidated Nickel Mines Ltd.*[90]

XI. THE EFFECT OF THE LIMITATION ACT:

Often when a company is going through bad times, the directors while unwilling to waive their fees altogether, will permit their authorised remuneration to stand over until the company's position improves. The Limitation Act 1950 may however prevent them from later recovery.

Under s. 4(1) of this Act, the right to recover a debt is barred if six years have elapsed from the date on which it was created. Sections 25(4) and 26(2) of the Act however provide that the right to recover a debt may be kept alive if the debtor makes a written acknowledgement of the debt, in which case the six period runs from the date of acknowledgement. The question in respect of directors' remuneration is what amounts to an acknowledgement within the meaning of the Act?

It is clear from *Jones* v. *Bellgrove Properties Ltd.*[91] that the balance sheets of a limited liability company constitute an acknowledgement of a right of action against it to recover a debt. But different considerations apply when a director seeks to rely on the balance sheets as an acknowledgement of his right to recover his remuneration. A company cannot make an acknowledgement in writing because it has no hand; it can make an acknowledgement only by an agent. A director is an agent of the company, but in *In re The Coliseum (Barrow Ltd.)*[92] Maugham J. held that while the directors could bind the company in an acknowledgement to an outside creditor by signing balance sheets, they could not in the same manner bind the company in an acknowledgement to themselves, because they have an interest in the matter. Moreover under s. 159 of the Companies Act every company balance sheet must be signed on behalf of the board by

90 [1914] 1 Ch. 883.
91 (1948) 65 T.L.R. 451.
92 [1930] 2 Ch. 44.

two directors, and therefore a balance sheet would not amount to an acknowledgement of a director's right to recover remuneration. On the other hand the director's right to recover may be kept alive by an acknowledgement in another form, e.g. by a letter from the company secretary.

Thus where directors are willing to allow their fees to stand over for the benefit of the company, they should ensure either the money does not remain outstanding for more than six years, or that within the six year period there is an adequate acknowledgement.

XII. CLAIMS ON A WINDING UP:

Generally any person to whom the company is indebted is a creditor, and where the company is wound up the debt is admissible for proof. But can a director who is owed arrears of remuneration prove for the arrears on a winding up of the company? To be successful he must show first, that he has a contractual right to the remuneration so as to constitute an enforceable debt and secondly that the money is owed to him in his capacity as a creditor and not as a member.

The first requirement is discussed in Part IV; the courts will infer an enforceable right to remuneration where the director's authority to be paid relates to future services. As to the second, s. 211 (1) (g) of the Companies Act is relevant, especially where the director holds qualification shares and is therefore a member. It provides:

> "A sum due to any member of a company in his character of a member, by way of dividend, profits or otherwise, shall not be deemed to be a debt of the company payable to that member in a case of competition between himself and any other creditor not a member of the company."

Hence if directors' fees are due to the director as a member he is postponed to general creditors.

In *Re Leicester Club and County Racecourse Company, ex parte Cannon*[93] Pearson J. held that remuneration was due to the director in his character as a member, because the articles required the directors to hold qualification shares and if a director ceased to be a member he vacated his office. This case was followed in *Re Iceland Sulphur and Copper*.[94] However *ex parte Cannon* has been distinguished in several subsequent cases and can no longer be considered good law. These cases, the first of which was *Re Dale and Plant Ltd.*,[95] held

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93 (1885) 30 Ch. D. 629.

94 (1886) 2 T.L.R. 509.

95 (1889) 43 Ch. D. 255; see also *Re New British Iron Co. ex parte Beckwith* [1898] 1 Ch. 324; *Re A1 Biscuit Co.* (1899) W.N. 115; *Re Dover Coalfield Extension Co.* [1907] 2 Ch. 76; *Re Cinnamond Park & Co.* (1930) N.I. 47 and in N.Z. in *In Re Universal Supply Co.* (1908) 27 N.Z.L.R. 961.

that a director's enforceable right to remuneration does not arise from his membership of the company in holding qualification shares; the director is entitled to his remuneration by reason of the contract that will be inferred between him and the company, and it is therefore a debt due to him as a creditor. This obligation as a member of the company by reason of his shares is a distinct and separate obligation. Moreover, directors are creditors with respect to their remunerations notwithstanding that by virtue of s. 211 (2) they are liable to contribute on a winding up of the company as if they were members.[96]

Therefore where a director has an enforceable right to remuneration, he may claim as a creditor in competition with other creditors in a winding up of the company, notwithstanding that the articles require the director to be a member by holding qualification shares.

While it is clear the director may prove as a creditor, is he to be treated as a preferred creditor in respect of the unpaid remuneration? Section 308 (1) (a) of the Companies Act provides:

> "In a winding up there shall be paid in priority to all other debts —
>
> (a) All wages or salary of a servant or worker . . ."

But s. 308 (2) provides that the sum to which priority is given does not exceed $400. To be a preferred creditor the director must thus be a worker or servant of the company.[97] *In Re Ashley & Smith Ltd.*[98] Sarjant J. held that some of the points to be considered in determining whether a person is a servant are, whether he works at the office of the company; whether he works exclusively for the company; whether he is bound to render services generally or only in a particular class of service; and also whether he might perform the service practically as he pleased. The weight of authority is that on this basis an ordinary director is not a servant[99] and therefore directors' fees would not be given priority under s. 308 but would rank as unsecured debts.

L. M. P. FIRN*

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96 *Re Central De Kapp Gold Mines Ltd.* (1900) 69 L.J. Ch. 18.

97 There is ample authority that an executive director falls within the scope of this section in respect of salary earned as an executive. However we are concerned with the ordinary director and his ordinary fees. Furthermore the question should be distinguished from that considered in Part X: whether for the purposes of the Property Law Act, directors' remuneration is "salary".

98 [1918] 2 Ch. 378 at 383.

99 E.g. *Hutton* v. *West Cork Railway Co.* (1883) 23 Ch. D. 654 at 672; *Re George Newman & Co.* [1895] 1 Ch. 674; *Re Newspaper Proprietary Syndicate Ltd.* [1900] 2 Ch. 349; *Moriarty* v. *Regents Garage and Engineering Co.* [1921] 1 K.B. 423 at 446; *Woolf* v. *East Nigel Gold Mining Co.* (1905) 21 T.L.R. 660;*Normandy* v. *Ind, Coope & Co. Ltd.* [1908] 1 Ch. 84 at 104; *Re Lee, Behrens & Co. Ltd.* [1932] 2 Ch. 46 at 53; *In Re Leicester Club and County Race Course Co. ex parte Cannon* (1885) 30 Ch. D. 629.

* LL.B.(Hons.).