[HIGH COURT OF AUSTRALIA.]

MATTHEWS . . . . . APPELLANT
RESPONDENT,

AND

NEWPORT BLOCK AND TILE COMPANY PROPRIETARY LIMITED (IN LIQUIDATION) AND ANOTHER . . . . RESPONDENTS.
APPLICANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1950.

MELBOURNE, *Feb.* 20, 21; *April* 5.

Dixon, McTiernan, Williams, Webb and Fullagar JJ.

Company—Remuneration of managing director—Articles of association empowering directors to fix remuneration—"May be by way of salary or commission or participation in profits or by any or all of those modes"—Power to remunerate directors for "extra service" or "special exertions"—Resolution of directors that a lump sum be paid to managing director "in consideration of past services rendered"—Ambiguity—Validity—Managing director active in formation of company—Resolution at meeting before incorporation that, in consideration of his bringing the company into being, he be allotted fully paid shares in company when formed—Shares not allotted—Sum fixed by resolution equal to face value of shares—Power of director to vote on resolution in which he has an interest.

On 15th June 1946, at a meeting arranged by M. with a view to the formation of a company, it was decided that the company be formed and it was resolved that M. be allotted 1,500 fully paid shares (which were to be of £1 each) in consideration of his bringing the company into being. The proposed company was incorporated in 1947. Pursuant to its articles of association M. became its managing director and so continued until the company went into liquidation in 1949. In addition to M. two other directors, V. and R., were appointed. The articles of association provided:—"77. If any director being willing shall be called upon to perform extra service or to make any special exertions in going or residing abroad or otherwise for any of the purposes of the company the company by a resolution of the directors may remunerate the director so doing either by a fixed sum or a percentage of profits or otherwise as may be determined by the directors." "85. The remuneration of a managing

H. C. OF A. 1950.

MATTHEWS v. NEWPORT BLOCK & TILE CO. PTY. LTD. (IN LIQUIDATION).

director shall from time to time be fixed by the directors and may be by way of salary or commission or participation in profits or by any or all of those modes." " 88. Notwithstanding any rule of law or equity to the contrary no director shall become disqualified by his office from contracting with the company . . . but . . . no director shall as a director vote in respect of any contract or arrangement in which he is . . . interested . . . but this prohibition shall not apply to any contract by or on behalf of the company to give to the directors or any of them any security for advances by way of indemnity or to a settlement or set-off of cross-claims and it may at any time be suspended or relaxed to any extent by a general meeting. . . . Provided that the provisions of this article as to the power of a director to vote in respect of any contract or arrangement in which he is interested . . . shall not apply to the managing director." A meeting of directors was held on 30th September 1948. It appeared from the minutes of the meeting that " a motion of 15th June 1946 granting 1,500 fully-paid shares to " M. " was discussed in the light of the Registrar-General's ruling that such a grant could not be made under the terms of the resolution. After discussion it was " resolved that £1,500 be paid to M. " in consideration of past services rendered " and that payment be made in three equal annual instalments. The resolution was carried by the votes of V. and M., the other director, R., opposing it. Pursuant to the resolution £500 was paid to M. in November 1948. Subsequently the number of directors was increased, and a meeting of the directors, from which M. was absent, took place on 24th January 1949, when the company was about to go into liquidation. The unconfirmed minutes of this meeting prepared by the secretary stated, under the heading " Managing Director's Remuneration," that the resolution of 30th September 1948 was rescinded and " it was resolved that the managing director should retain the £500 paid to him in November 1948 as payment by the company for past services rendered."

Held :—

(1) By the whole Court, that the terms of the resolution of 30th September 1948 were not such as to bring it within the power given by the articles to remunerate the managing director for his services in that capacity, and it was therefore invalid ; (by *Dixon*, *McTiernan* and *Williams* JJ.) the purport of the resolution was to remunerate M. for what he had done before the incorporation of the company in bringing it into existence or, at least, to remunerate him for such services as well as his services in the capacity of managing director ; (by *Webb* J.) its purport was to give M. money for services before, as well as after, the incorporation of the company ; (by *Fullagar* J.) its purport and apparent intention were to remunerate M. for services rendered before the company was incorporated.

(2) By *Dixon*, *McTiernan* and *Fullagar* JJ. (*Williams* and *Webb* JJ. dissenting), that the resolution of 24th January 1949 was likewise defective ; it therefore did not give M. the right to retain the £500 which had been paid to him.

Decision of the Supreme Court of Victoria (*Dean* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

The Newport Block and Tile Co. Pty. Ltd. was incorporated in Victoria in 1947, mainly as the result of the efforts of Roy Matthews (now the appellant). At a meeting organized by him on 15th June 1946 it was decided to form the company with a capital of £10,000 divided into £1 shares and it was resolved that the appellant be granted 1,500 fully-paid shares in consideration of his bringing the company into being. Pursuant to the company's articles of association the appellant became its managing director on its incorporation, and he continued in that office until the company went into voluntary liquidation in 1949.

The capital of the company was £10,000, divided into 10,000 shares of £1 each.

Provisions in the articles of association (so far as here material) were as follows :—" 73. Until otherwise determined by a general meeting the number of directors shall not be less than two or more than seven." " 75. The remuneration of the directors shall from time to time be determined by the company in general meeting." " 77. If any director being willing shall be called upon to perform extra service or to make any special exertions in going or residing abroad or otherwise for any of the purposes of the company the company by a resolution of the directors may remunerate the director so doing either by a fixed sum or a percentage of profits or otherwise as may be determined by the directors and such remuneration may be either in addition to or in substitution for his or their share in the remuneration above provided." " 84. Roy Matthews shall be managing director of this company. He shall hold this office for a period of five years from the date of incorporation." " 85. The remuneration of a managing director shall from time to time be fixed by the directors and may be by way of salary or commission or participation in profits or by any or all of those modes." " 88. Notwithstanding any rule of law or equity to the contrary no director shall become disqualified by his office from contracting with the company . . . but . . . no director shall as a director vote in respect of any contract or arrangement in which he is . . . interested . . . but this prohibition shall not apply to any contract by or on behalf of the company to give to the directors or any of them any security for advances by way of indemnity or to a settlement or set-off of cross-claims and it may at any time be suspended or relaxed to any extent by a general meeting. . . . Provided that the provisions of this article as to the power of a director to vote in respect of any contract or

H. C. OF A. 1950.

MATTHEWS v. NEWPORT BLOCK & TILE CO. PTY. LTD. (IN LIQUIDATION).

arrangement in which he is interested . . . shall not apply to the managing director."

A meeting of directors took place on 30th September 1948. At that time, in addition to the appellant two directors had been appointed; they were the appellant's brother, Victor, and Mr. G. A. Reid. All three were present at the meeting. It appeared from the minutes of the meeting that a "ruling" of the Registrar-General, to the effect that the resolution before incorporation did not empower the allotment of shares to the appellant, was discussed and it was resolved that £1,500 be paid to the appellant "in consideration of past services rendered" and that payment be made in three equal annual instalments. The resolution was carried by the votes of the appellant and his brother, Reid dissenting. Pursuant to the resolution £500 was paid to the appellant in November 1948. Subsequently the number of directors was increased. A meeting of the directors was held on 24th January 1949. On this occasion the appellant was not present. The minutes of the meeting recorded, under the heading "Managing Director's Remuneration," that the resolution of 30th September 1948 was rescinded and it was resolved "that the managing director should retain the £500 paid to him in November 1948 as payment by the company for past services rendered." On 27th January 1949 an extraordinary general meeting of the members resolved that the company should be wound up. The minutes of the directors' meetings are set out more fully, together with other facts, in the judgments hereunder.

Under the *Companies Act* 1938 (Vict.) Alan Graeme Murray, the liquidator of the company, took proceedings against the appellant in the Supreme Court of Victoria to recover the £500 which had been paid to him and to have it declared that the company was not indebted to the appellant in the sum of £1,000 or any other sum.

Dean J., made the following declarations and order:—(*a*) A declaration that the resolution of 30th September 1948 to the effect that £1,500 be paid to the appellant was not authorized by any power conferred on the directors and was invalid. (*b*) A declaration that the company was not indebted to the appellant in the sum of £1,000 or any other sum by reason of the resolution. (*c*) An order for repayment of the sum of £500.

From this decision the appellant appealed to the High Court.

E. H. Hudson K.C. (with him *G. B. Gunson*), for the appellant. The resolution of 30th September 1948 was a valid exercise of the powers of the directors under article 85 or article 77 or both in conjunction. It conferred on the appellant a right to the £1,500 which

could not be taken away by any subsequent action by the directors. The resolution as recorded in the minute is complete in itself and is conclusive in the absence of ambiguity. There is no ambiguity in the terms of the resolution itself. In particular, there is no ambiguity in the words " past services rendered " ; their natural meaning is services rendered *to the company*. It would be wrong to approach the interpretation of the resolution with the assumption that the directors were not giving their attention to the exercise of the powers conferred by the articles. If any assumption is to be made, it should rather be in favour of the regularity and validity of what was done, unless some vitiating circumstance appears. No such circumstance is suggested by the resolution itself, and *Dean* J. was in error in going outside the terms of the resolution and looking to what he called the " history of the transaction "—that is, some of the surrounding circumstances. It was only by so doing that he found the " coincidence " between the sum of £1,500 and the face value of the shares mentioned in the pre-incorporation resolution and inferred that " the decision to pay £1,500 in cash . . . was intended to replace the agreement to allot shares . . . it was merely a substitution of cash for shares." Literally this would mean that the £1,500 in cash was intended to be paid to the appellant " for bringing the company into being." This is an unjustifiable and unreasonable inference. The resolution does not say so nor does its language justify the imputation of this intention to those who passed it. However, the judgment does not depend entirely on such a limited interpretation. It proceeds on the assumption that the pre-incorporation services were at least included in the consideration ; but even this is unwarranted. In this aspect the " coincidence " in relation to the sum of £1,500 is without significance ; at all events, it is not sufficient to displace the prima-facie meaning of the words of the resolution. If the intention was to reward services both before and after incorporation, one would have expected that a larger sum than £1,500 would have been resolved upon. It is true that the minute refers to " discussion " of the Registrar-General's ruling in relation to the allotment of shares ; but this affords no evidence to vary the prima-facie meaning of the language of the resolution. It does not follow that the directors, having been told that they could not allot the company's shares or pay its money for services before incorporation, did not consider the value of the services after incorporation and feel satisfied that they were worth £1,500. The amount is " remuneration " within the meaning of either article 85 or article 77. The words of article 85 relating to salary &c., are permissive merely ; they do not exclude

H. C. OF A. 1950.

MATTHEWS v. NEWPORT BLOCK & TILE CO. PTY. LTD. (IN LIQUIDATION).

the fixing of a lump sum. The fact that the appellant himself was one of the two directors who voted in favour of the resolution does not invalidate it; the proviso to article 88 gave him the right to vote. If the resolution of 30th September 1948 is invalid, the appellant is nevertheless entitled to retain the £500 by reason of the resolution of 24th January 1949. Regard may be had to the heading of the minute, "Managing Director's Remuneration"; but the words of the resolution, even apart from the heading, show that it is the managing director who is to retain the £500; that is to say, he is to retain it in his capacity as managing director, for his services rendered as such. This is so whether the expression "as payment . . . for past services rendered" relates back to the expression "£500" or attaches to the expression "paid to him in November 1948." The prior resolution had just been rescinded, so that, if nothing more took place, the appellant would have had no right to the £500 which had been paid to him and would be entirely unremunerated for his services as managing director. It seems clear from the minute itself that at that stage there was no intention of rewarding him for services prior to incorporation. This is reinforced, if one may look at the surrounding circumstances (and, if that was permissible in relation to the prior resolution, it must be equally so here), by the fact that the company was about to go into liquidation and it would be reasonable and proper to fix the managing director's remuneration pursuant to the articles. [He referred to *In re New British Iron Co.*; *Ex parte Beckwith* (1); *Glass* v. *Pioneer Rubber Works of Australia Ltd.* (2).]

D. I. Menzies K.C. (with him *G. H. Lush*), for the respondents. The onus is on the appellant to show that he is entitled to keep the £500 paid to him. If he does not show that it was by way of "remuneration" within the meaning of the articles, he fails to establish that it was authorized. To determine the legal effect of the resolutions which are in question here, the Court is not concerned merely to interpret the record in the minute book, as if the resolutions were written instruments; it is concerned with the actual proceedings at the meetings as evidenced by the minutes and any other evidence that is available, and it may have regard to the surrounding circumstances. The words of the articles are not apt to describe the fixing of "remuneration" for unspecified services. Article 77 does not support either of the resolutions on which the appellant relies. Neither from the resolutions themselves nor from the surrounding

(1) (1898) 1 Ch. 324.

(2) (1906) V.L.R. 754, at pp. 770, 771, 775.

circumstances does it appear that any particular services to which article 77 would apply were in contemplation. Article 85 necessarily requires that it is service in the office of managing director that must be regarded. Moreover, that article does not authorize the fixing of a lump sum, whether it be the £1,500 of the resolution of 30th September 1948 or the £500 of that of 24th January 1949. In that part of article 85 which provides that the managing director's remuneration " may be by way of salary or commission or participation in profits or by any or all of those modes," the words " or by any or all of those modes " are words of restriction ; they cover the various contingencies and mean that the remuneration is not to be determined in any other way. The lump sums in the resolutions were not by way of commission or participation in profits ; so, unless they are within the description of " salary," they are not authorized by article 85, and it is submitted that they are not by way of salary. In the *Oxford English Dictionary* " salary " is defined as a fixed payment made periodically to a person as compensation for regular work ; the wider meaning, " reward or remuneration for services rendered," is referred to but is described as obsolete. The lump sums here are plainly not within the definition. As to the resolution of 30th September 1948, the words " in consideration of past services rendered " leave it in doubt whether the £1,500 was by way of reward for services before or after incorporation or for both. Therefore it is not clear that the resolution was in exercise of any powers conferred by the articles, even if they have a wider meaning than is submitted on behalf of the respondents. The articles must, in any view, be confined to services after the incorporation of the company. Moreover this resolution is invalidated by the fact that the appellant voted on it (*Foster* v. *Foster* (1)). It is not saved by article 88. The proviso to that article does not empower the managing director to vote on a matter in which he is interested ; it qualifies, not the words saying that the director is not to vote, but the exceptions which follow those words. The intention is that the managing director is not in any circumstances to vote on a matter in which he is interested, although in certain circumstances other directors may do so. As to the resolution of 24th January 1949, it is not clear whether it means that the appellant is to retain the £500 " for past services rendered " or merely that he is to retain the £500 which, for past services, he was already paid. If the former is the meaning, the resolution is open to the objections already mentioned. If it means that he is to retain the £500 for no reason specified, it is still without

(1) (1916) 1 Ch. 532, at pp. 534, 535, 546.

H. C. OF A. 1950.

MATTHEWS v. NEWPORT BLOCK & TILE CO. PTY. LTD. (IN LIQUIDATION).

any support to be found in the articles. It is submitted, therefore, that the judgment of *Dean* J. is correct both as to the declarations and as to the order for repayment of the £500.

E. H. Hudson K.C., in reply, referred to *Mills* v. *Mills* (1); *Peninsular and Oriental Steam Navigation Co.* v. *Johnson* (2).

Cur. adv. vult.

April 5.

The following written judgments were delivered:—

DIXON J. The questions for decision upon this appeal concern the validity of a resolution of a board of directors for the payment of £1,500 to one of their number who was managing director and his right to retain £500 that was actually paid to him as an instalment of that sum.

The company was incorporated on 7th February 1947. Two years later, to be precise on 27th January 1949, an extraordinary general meeting of the members resolved that the company should be wound up voluntarily. It is a members' voluntary winding up. The appellant was the managing director. The articles appointed him to that office for five years. They provided that the directors should not be less than two nor more than seven and that their remuneration should from time to time be determined by the company in general meeting. As to the managing director, however, they made a separate provision. It was that his remuneration should from time to time be fixed by the directors and might be by way of salary or commission or participation in profits or by any or all of those means. The company was formed to manufacture and sell cement, building blocks and tiles. The appellant appears to have done a great deal of work in reference to the project before the registration of the company and to have been the person chiefly responsible for forming it. He is a builder and is one of the principal shareholders of a company carrying on the business of engineers at Newport, Victoria. A dozen people met at the latter company's place of business on 15th June 1946 and, according to the minutes of the meeting, the appellant "outlined the proposed prospective company." The meeting decided to form it, adopted its name, and fixed its proposed capital. It was then resolved that 1,500 fully paid shares be granted to the appellant in consideration of his bringing the company into existence.

The facts which really govern the decision of the appeal have been brought before the Court by means of the minutes of the

(1) (1938) 60 C.L.R. 150, at pp. 162, 163, 170, 185, 186.

(2) (1938) 60 C.L.R. 189, at pp. 207, 208, 233.

meetings of the members held before and after the registration of the company, and of the meetings of the directors after the board was appointed. Such facts are not proved or explained independently by oral evidence. Besides the appellant only two other directors were appointed at the first general meeting of the company. When this was done it was resolved on the appellant's motion that for the first year they should act in an honorary capacity but if in the second year it was decided to pay the directors, then the directors for the first year should receive the same remuneration. As to the 1,500 shares to be allotted to the appellant, notice was given of a proposal to make them deferred shares in respect of capital, but when an extraordinary meeting was afterwards called to consider the proposal, it was allowed to lapse. The annual meeting (that is, the second ordinary meeting of the company) was held on 12th March 1948. An attempt to increase the number of the directors failed and it remained at three. It was resolved, however, that they should receive a remuneration of twenty-five guineas per annum.

The minutes of a directors' meeting of 18th August 1948 state that a letter from the appellant was read requesting allotments of shares following the resolution carried at the meeting of 15th June 1946 but that it was agreed, in view of the Registrar-General's ruling concerning allotment of shares prior to incorporation, that the matter should be dealt with at the next meeting of directors.

The next meeting of directors took place on 30th September 1948. The minutes of the meeting say that the appellant (R. Matthews) was chairman and that the other two directors, Messrs. V. Matthews and G. Reid, were present. As one of the pieces of business arising from the minutes of the previous meeting the following is recorded—"A motion of 15th June 1946 granting 1,500 fully paid shares to Mr. R. Matthews was discussed in the light of the Registrar-General's ruling that such a grant could not be made under the terms of the resolution. After discussion it was moved by Mr. V. Matthews that £1,500 be paid to Mr. R. Matthews in consideration of past services rendered, and that payment be made in three equal instalments payable within one month of 1st October 1948, 1949, 1950. On a show of hands the motion was carried with one dissentient, Mr. G. A. Reid." The minutes proceed to record the transaction of two other pieces of business and then there is the following entry—"Mr. Reid indicated that he intended to open discussion on the matter of the salary of the Managing Director at the next meeting."

H. C. OF A. 1950.

MATTHEWS v. NEWPORT BLOCK & TILE CO. PTY. LTD. (IN LIQUIDATION).

Dixon J.

In the Supreme Court *Dean* J. has held that the resolution of the directors which the foregoing minute records must be understood as a decision to pay £1,500 to the appellant in cash and so to replace the agreement made before incorporation to allot shares and as thus substituting a mode of remuneration for the appellant's services which extended to the same services as those for which he was to receive the shares.

I agree in this view of the directors' decision. When the contents of the minute are studied in connection with the history of the matter it seems to me to be an almost inevitable inference that the payment of £1,500 was resolved upon in order to reward the appellant for the services he rendered before and in the course of the formation of the company, services for which it had been found that the 1,500 shares could not be allotted as paid up. This, I think, appears (1) from the fact that the resolution arises from a discussion of the abortive decision to allot 1,500 shares and the Registrar-General's objection to it; (2) from the identity of the amount of the face value of the shares and the sum of money; and (3) from the use of the expression "services rendered" without any limitation of the services to work done as managing director. I attach no weight to the later reference to Mr. Reid's indication that he intended to open discussion on the matter of the salary of the managing director. This reference does not show that the £1,500 was considered to be salary. The more natural meaning to give it is that Mr. Reid wished at that stage to have the current and future salary of the managing director considered. But in any view it does not suggest that the £1,500 was remuneration for services since incorporation only. Mr. Reid did not in fact raise the question at the next meeting nor did he raise it at any other meeting, unless he is considered to have done so by a motion for rescinding the foregoing resolution which he moved three days before the shareholders' meeting at which it was resolved that the company should be wound up. It will be necessary to discuss that resolution, but for the purpose in hand it is enough to say that I do not think that it contains anything which can retrospectively control or repel the conclusion I have stated concerning the decision on 30th September 1948 to pay the appellant £1,500 for services rendered. In my opinion the services intended at least included the services in promoting the company and they formed the chief reason for the payment. The resolution of the directors purports to authorize a payment to one of themselves and the burden is upon the director to show that it falls within some justification provided by the articles. Plainly the article to which I have

referred authorizing the directors to fix the managing director's remuneration will not justify payment of a sum in respect of services before, or in the course of, promoting the company. If, as I think, the minutes are fairly open to the inference which I have based upon them, in the absence of any evidence to rebut that inference, the appellant does not succeed in making out the justification. In any case there is some doubt whether on the construction of the article the managing director's remuneration must not take the form of either salary or commission or participation in profits or some or all of those forms. But that it is unnecessary to consider. There is another article (article 77) dealing with extra service or special exertions on the part of a director, but it will not sustain an attempt to reward a director for work done before the company was incorporated.

On these grounds I agree in the reasons given by *Dean* J. for declaring that the resolution of the directors of 30th September 1948 to the effect that £1,500 be paid to the appellant was not authorized by any power conferred upon the directors and was invalid. In this view the question whether the appellant was qualified to vote on the resolution does not arise, but I think that I should say that I am not satisfied as at present advised that the articles do enable a managing director to vote in respect of a contract or arrangement in which he is interested. The question depends on the application of a proviso to an article (article 88) which deals with the disqualification of a director from contracting with the company. The removal of the disqualification is accompanied by a condition that he shall not vote. To that condition some exceptions are specified of a very limited or qualified kind. Then follows a proviso that the " provisions of the article as to the power of a director to vote in respect of any contract or arrangement in which he is interested as aforesaid shall not apply to the managing director." It is not clear whether this proviso applies to the condition against voting or to the exceptions allowing a director to vote in the exceptional cases specified. I am inclined to the view that the latter interpretation is the correct one. The presumption is against giving a director power to vote for his own personal advantage and I think that such an ambiguity should be resolved by giving to the proviso that application which would avoid the result, particularly in the case of a managing director.

If this be the correct interpretation of the article it is enough to invalidate the resolution of 30th September 1948, even if, contrary to the opinion I have already expressed, a justification for it could

H. C. OF A. 1950.

MATTHEWS v. NEWPORT BLOCK & TILE CO. PTY. LTD. (IN LIQUIDATION).

Dixon J.

otherwise be found in the article authorizing the directors to fix the remuneration of the managing director.

In pursuance of the resolution an instalment of £500 was paid to the appellant by a cheque dated 8th November 1948. The cheque was drawn by the appellant himself and Mr. V. Matthews as directors on behalf of the company. The order of *Dean* J. directs the appellant to repay this sum to the liquidator and unless the appellant can make out an independent title to retain the money there can be no doubt that such an order is the necessary consequence of the decision that the resolution under which the sum was received is invalid.

The appellant, however, sets up a resolution of a directors' meeting of 24th January 1949. At that date there were four other directors besides the appellant and he was absent from the meeting and so did not vote. At the previous directors' meeting it had been resolved that a meeting of the shareholders should be held for the purpose of submitting a resolution that the company be wound up voluntarily. That meeting was fixed for 27th January 1949 and there the resolution for winding up was in fact adopted. The directors' meeting of 24th January 1949 was the last meeting of the board to be held and no minutes of the proceedings were confirmed. But minutes were prepared and placed in the minute book, presumably by the secretary and, according to an affidavit, they accurately set out the names of the persons present and the proceedings at the meeting. Under the heading "Managing Director's Remuneration" the following appears:—"A notice of motion from Mr. Reid for the rescinding of the resolution carried on 30th September 1948 allotting the Managing Director £1,500 was read and it was resolved that the resolution dated 30th September 1948 as per minute book 45 'that £1,500 be paid to Mr. R. Matthews in consideration of past services rendered, and that the payment be made in three equal instalments payable within one month of 1st October 1948, 1949, 1950' be hereby rescinded. Moved Mr. Reid seconded Mr. Blackwood. It was resolved that the Managing Director should retain the £500 paid to him in November 1948 as payment by the company for past services rendered. Moved Mr. Reid seconded Mr. Blackwood." In my opinion this resolution ought not to be understood as a determination by the directors pursuant to the article empowering them from time to time to fix the remuneration of a managing director. It is suggested that the resolution amounts to a fixing of the remuneration of the Managing Director at £500 for his work during the two years from the incorporation of the company to that date, the directors having decided

to recommend winding up. Support for the suggestion is sought (1) in the heading "Managing Director's Remuneration"; (2) in the description of the appellant as "Managing Director" in the more immediate references to him; and (3) in the collocation of words "as payment by the company for past services rendered."

I cannot find in these matters enough to warrant an inference that the directors had turned their attention to the new or independent question what, if any, remuneration ought the appellant to receive for his two years in office as managing director, without regard to his previous work in promoting the company. They appear to me to be slight and uncertain as indications of intention. The heading is simply the note of the secretary and in any case is as consistent with the view that he regarded the £1,500 or £500 as rewarding the appellant for all past services as with the view that it is as a reward for his services only since incorporation, as managing director. It is probably just an accident whether the appellant is referred to as Mr. Matthews or as the managing director. As to the collocation of words, it is not easy to say whether the phrase "as payment by the company for past services rendered" is to be attached to the words it immediately follows, viz. "paid to him in November 1948," or to the word "retain." In the former case they are merely descriptive of the nature of the payment made in November 1948 and have little or no bearing on the guise in which the sum is retained. Perhaps that is grammatically the more correct way of treating the phrase. But however that may be, it seems to me to be impossible to understand the words "for past services rendered" as meaning anything different from the same words in the resolution rescinded, the text of which is set out in the minute book above the actual resolution now under discussion. Everything points to these words referring to or extending to the period before the incorporation of the company.

The colour which Mr. Reid's two motions seem to me to bear is that of an attempt to ensure that in the intended liquidation the appellant did not receive another £1,000, while leaving him in possession of what under the rescinded resolution he had received. There is in my opinion nothing to evidence an intention to fix the remuneration of the managing director in the exercise of the power conferred by the article. There is nothing to suggest that the directors entertained any doubt as to the legal efficacy of the resolution of 30th September 1948. It had been adopted as an alternative to a proposal to allot fully paid shares to which objections on the grounds of legality had been made. More probably the resolution of that date was rescinded because it was believed that

H. C. OF A. 1950.

MATTHEWS v. NEWPORT BLOCK & TILE CO. PTY. LTD. (IN LIQUIDATION).

Dixon J.

it would or might confer on the appellant a legal title to another £1,000 in the liquidation. The burden is upon the appellant to establish a title to retain money received as a director from the company and he cannot discharge that burden except by adducing a resolution of the shareholders or a determination of the directors clearly exercising a power under the articles. An uncertain and equivocal resolution will not do. It would indeed be difficult to say that the resolution as shown in the secretary's minute amounted to a clear exercise of any power conferred on the Board by the articles.

In my opinion the decision of *Dean* J. is right and the appeal should be dismissed with costs.

McTIERNAN J. In my opinion this appeal should be dismissed. I agree with the reasons of my brother *Dixon*.

WILLIAMS J. Two questions arise on this appeal (1) whether the appellant is entitled by virtue of the resolution passed at the meeting of directors of the company held on 30th September 1948 to retain the sum of £500 paid to him by the company on 12th November 1948 and to prove as a creditor for £1,000; (2) if not, whether he is entitled by virtue of the resolution passed at the meeting of directors on 24th January 1949 to retain the above sum of £500. *Dean* J. answered both these questions in the negative.

The principal difficulty in the case arises from the gaps in the evidence. The material events happened at two meetings of directors of the company, one held on 30th September 1948 and the other on 24th January 1949. The first of these meetings occupied one hour twenty minutes, and the second three hours ten minutes, but the only evidence of the proceedings is the contents of the minutes. At the second meeting a notice of motion in writing was considered but this document is not in evidence.

The minutes of the meeting of directors held on 30th September 1948 state that "a motion of 15th June, 1946 granting 1,500 fully paid shares to Mr. R. Matthews was discussed in the light of the Registrar-General's ruling that such a grant could not be made under the terms of the resolution. After discussion it was moved by Mr. V. Matthews seconded Mr. R. Matthews that £1,500 be paid to Mr. R. Matthews in consideration of past services rendered, and that payment be made in three equal instalments payable within one month of 1st October, 1948, 1949, 1950. On a show of hands the motion was carried, with one dissentient Mr. G. A. Reid."

The words " past services rendered " are susceptible of more than one interpretation, and in such a case, even where there is a written contract, evidence is admissible to show what are the facts to which the words relate : *Goldshede* v. *Swan* (1) ; *Charrington & Co. Ltd.* v. *Wooder* (2). But no such evidence was tendered, and the Court must make such inferences as it can. The words are capable of referring to (1) services rendered by the appellant prior to the incorporation of the company, or (2) to his services as managing director since its incorporation, or (3) to his services before and since incorporation. All that we know is that the directors were discussing the difficulty that had arisen in giving effect to a resolution of a meeting of intending shareholders prior to the incorporation of the company that 1,500 fully paid shares should be granted to the appellant in consideration of his bringing the company into being. The subject matter of the discussion and the coincidence between the number of fully paid shares promised to the appellant and the sum of money authorized by the resolution led his Honour to infer that the past services referred to were the services of the appellant in bringing the company into being and therefore to services rendered prior to incorporation.

I agree with this inference and that the services cannot be confined to the services of the appellant since incorporation. There is no article of association authorizing the directors to make a payment to the appellant for the former services. In my opinion his Honour was right in holding that the resolution was invalid.

There were three directors present at this meeting and the resolution was carried by the voting of the appellant and his brother, the third director, G. A. Reid, dissenting. In the absence of clear authority in the articles, the appellant could not have voted on this resolution and I am by no means satisfied that article 88 is a sufficient authority. But it is unnecessary to pursue the point since the resolution fails on the other ground.

At a later stage of the meeting of 30th September 1948 Reid stated that he intended to open discussion on the matter of the salary of the managing director at the next meeting. The annual general meeting of the company was fixed for 8th November 1948, and Reid probably meant the first meeting of directors to be held after that, but before the meeting of 30th September closed it was resolved to hold a directors' meeting prior to the annual general meeting to discuss routine matters. At this meeting only the minutes of the previous meeting were received and the annual report approved.

(1) (1847) 1 Exch. 154.

(2) (1914) A.C. 71, at p. 77.

H. C. OF A. 1950.

MATTHEWS v. NEWPORT BLOCK & TILE CO. PTY. LTD. (IN LIQUIDATION).

Williams J.

At the annual general meeting four directors were appointed to act with the appellant, namely Reid, Jenkins, Blackwood and Murrie. Meetings of the new board were held on 22nd November and 6th, 13th and 20th December 1948, but there was no discussion with respect to the managing director's salary at any of these meetings. This may have been because differences had developed between the appellant and the new directors, and the future of the company was in doubt. At the meeting held on 20th December 1948 it was resolved that the secretary should call a meeting of shareholders for 18th January 1949 (later deferred until 27th January) for the purpose of proposing a resolution that the company should be wound up voluntarily.

The last meeting of directors was held on 24th January 1949. The directors present were Blackwood, Jenkins, Murrie and Reid. The minutes of the meeting contain the following entry—"*Managing Director's Remuneration*: A notice of motion from Mr. Reid for the rescinding of the resolution carried on 30th September, 1948 allotting the Managing Director £1,500 was read and it was resolved that the resolution dated 30th September 1948 as per Minute Book 45 'that £1,500 be paid to Mr. R. Matthews in consideration of past services rendered, and that the payment be made in three equal instalments payable within one month of 1st October 1948, 1949, 1950,' be hereby rescinded. Moved Mr. Reid seconded Mr. Blackwood. It was resolved that the Managing Director should retain the £500 paid to him in November, 1948 as payment by the company for past services rendered. Moved Mr. Reid seconded Mr. Blackwood." These minutes were never signed by the chairman of the meeting, but Jenkins swore in an affidavit filed in support of the summons that they accurately set out the proceedings at the meeting. Reid also swore an affidavit in support of the summons but did not mention the proceedings at this meeting. There must have been some discussion before these resolutions were passed, but it is not in evidence.

As the resolution of 30th September 1948 was invalid, it could be rescinded. If it had been valid, the resolution could not have been rescinded without the appellant's consent.

Two articles of association were relied upon by the appellant as authority for the passing of the second resolution. They are articles 77 and 85 but, in my opinion, the only possible article is article 85. This provides that the remuneration of a managing director shall from time to time be fixed by the directors and may be by way of salary or commission or participation in profits or by all of these modes. The word "remuneration" is a wider term

than " salary " and means a *quid pro quo* (*R.* v. *Postmaster General* (1)). " May " is a permissive word and the article does not mean that " salary," " commission " and " participation in profits " are the exclusive modes in which a managing director may be remunerated. They merely particularize some of the modes, and any other *quid pro quo* of benefit to the managing director would be included in " remuneration." If the true meaning of the second resolution is that the appellant was to retain the £500 as remuneration for his work done as managing director, I am of opinion that this is a form of remuneration authorized by article 85.

The difficulty is to ascertain the meaning of the resolution. It was moved by Reid who had opposed the resolution of 30th September 1948. It is evident that he would not agree to the appellant receiving a cash payment in substitution for the 1,500 fully paid shares. But it also seems that he was not opposed to the managing director receiving a salary for his work done as managing director. At the meeting of 30th September there was no suggestion that the company should go into liquidation, and the word " salary " would be most apt to describe a regular sum that would be payable in the future, although it was also made retrospective to include past services. But at the meeting of 24th January 1949 the liquidation of the company was imminent, and the only question that could arise would be whether it was fair and reasonable to remunerate the appellant for the work he had done as managing director in the past. The minutes of 24th January describe the business before the meeting as the managing director's remuneration. Obviously the directors were not prepared to appropriate £1,500 for this purpose, and it was necessary to rescind this vote before deciding upon his remuneration. I read the second resolution as meaning that as such remuneration the appellant should receive £500, and that this sum should be paid by authorizing the appellant to retain the sum of £500 paid to him in November 1948 as payment by the company for past services rendered. The whole of the words after the figures £500 are, in my opinion, descriptive of the sum that is to be retained. If, on the other hand, the words " past services rendered " are intended to describe the services to be remunerated, since the resolution relates to the managing director's remuneration and was passed on the eve of liquidation, they most naturally refer in these circumstances to the services rendered to the company by the appellant as managing director.

For these reasons I would allow the appeal with respect to the sum of £500.

(1) (1875) 1 Q.B.D. 658, at p. 663.

H. C. OF A. 1950.

MATTHEWS v. NEWPORT BLOCK & TILE CO. PTY. LTD. (IN LIQUIDATION).

WEBB J. In my opinion the heading of a minute of a meeting may be taken into consideration in determining the meaning and effect of the resolution which the minute records; otherwise if the minute of 24th January 1949 read "Remuneration of Managing Director: This was fixed at £500," the resolution would be meaningless and ineffective. The heading, like the rest of the minute, was written by the secretary who had a choice as to the form of the minute. Then taking the heading into consideration, the remuneration of the managing director was fixed at £500 and this was identified with the sum which the appellant had received under the resolution of 30th September 1948. Up to 24th January 1949 he had not received any remuneration as managing director, although he had done a great deal of work for the company after its incorporation. It was not suggested that £500 was too much for that work. Moreover the resolution of September 1948 was invalid because it gave money for services before, as well as after, incorporation. It is fair to assume that it was rescinded for this reason and that it was not intended to repeat the error in the rescinding resolution.

As to the scope of article 85, I am inclined to think that the £500 was not salary, but that in any event remuneration may properly be fixed under that article otherwise than by way of salary, commission or profits. If the article merely said that the remuneration may be by way of salary this affirmative statement would not in that context imply the exclusion of other modes of remuneration. The addition of commission and profits as modes, even the express provision for a combination of modes, does not, I think, change the purely affirmative nature of the provision.

I would allow the appeal as to the £500 referred to.

FULLAGAR J. By the order of *Dean* J., which is under appeal, it is declared (*a*) that the resolution of the directors of Newport Block & Tile Co. Pty. Ltd. of 30th September 1948 to the effect that £1,500 be paid to Roy Matthews is void, and (*b*) that the said company is not indebted to the said Roy Matthews in the sum of £1,000 or any other sum by reason of the said resolution. These two declarations were, in my opinion, rightly made. The relevant material before the Court consists solely of the minutes of three meetings of intending shareholders held before the incorporation of the company, and the minutes of a number of directors' meetings and general meetings held after its incorporation. A perusal of this record shows, I think, that it is impossible to dissociate the resolution of directors of 30th September 1948 from a resolution passed by intending shareholders before the incorporation of the

company. On 15th June 1946 a meeting of intending shareholders had resolved that 1,500 fully paid shares be granted to Mr. Roy Matthews "in consideration of his bringing into being the aforementioned company." After the incorporation of the company on 7th February 1947, the Registrar-General seems to have suggested certain difficulties about the allotment of the 1,500 shares to Mr. Matthews as fully paid shares. It is unnecessary to consider what was the nature of these difficulties or what might have been done to overcome them and give practical effect to the resolution of 15th June 1946. The matter was mentioned at a meeting of directors on 18th August 1948 but was deferred to the next meeting. At the next meeting, which was the meeting of 30th September 1948, the minutes indicate that the Registrar-General's "ruling" that 1,500 fully paid shares could not be "granted" to Mr. Matthews was discussed and it was resolved that £1,500 be paid to Mr. Matthews "in consideration of past services rendered." The only reasonable inference, to my mind, is that the cash sum of £1,500 was intended to be substituted for the 1,500 shares, and that the consideration for the cash sum was the same consideration as that for which it had been originally intended to allot the shares—that is to say, services rendered by Mr. Matthews before the incorporation of the company, or, in the words of the original resolution, his "bringing the company into being."

When once this position is reached, it becomes, I think, plain that the resolution of 30th September 1948 was beyond the authority of the directors of the company and could not bind the company. The powers of the directors depend, of course, upon the articles. Only two articles were cited as relevant, article 77 and article 85. Article 77 contains the usual provision authorizing the directors to remunerate specially any director who, "being willing, shall be called upon to perform extra service or to make any special exertions." It seems sufficient to say that this article is concerned only with remuneration for special services rendered by a director as a director. It cannot be read as authorizing payment for services rendered before the company was in existence and before it could have any directors. Article 85 provides that the remuneration of a managing director shall from time to time be fixed by the directors. As to this, it seems sufficient to say that, although Mr. Matthews was in fact managing director of the company by virtue of article 84, the resolution of 30th September 1948 did not purport to fix his remuneration as managing director. Its purport and apparent intention were to remunerate him for services rendered before the company was in existence and before it could have a

H. C. OF A. 1950.

MATTHEWS v. NEWPORT BLOCK & TILE CO. PTY. LTD. (IN LIQUIDATION).

Fullagar J.

managing director. It is not necessary, in my view, to consider any question of the construction of article 85, or to consider the question (which was argued before us) whether the resolution of 30th September is vitiated because it could not have been passed without the vote of Mr. Matthews himself. This latter question would depend on the construction of another article, article 88, which presents difficulties.

For these reasons, I am of opinion that the appeal in respect of the two declarations made by *Dean* J. fails. Another question arises, however, which I have found somewhat more difficult. The resolution of 30th September 1948 provided that the sum of £1,500 should be paid to Mr. Matthews by three equal annual instalments. The first instalment of £500 was in fact paid in November 1948; the other two had not fallen due when the company went into voluntary liquidation on 27th January 1949. *Dean* J. has ordered that Mr. Matthews repay to the company this sum of £500. If nothing material had taken place after 30th September 1948, it would follow from the first declaration that Mr. Matthews must repay the sum of £500 to the company. His position would simply be that he has received a sum of money which, as he must be taken to have known, was paid to him without the authority of the company. But something did take place after 30th September 1948 which may affect his obligation to repay what he has actually received.

On 24th January 1949 a meeting of directors was held at which Mr. Matthews was not present. The minutes of this meeting contain the following passage:—"*Managing Director's Remuneration*: A notice of motion from Mr. Reid for the rescinding of the resolution carried on 30th September, 1948 allotting the Managing Director £1,500 was read and it was resolved that the resolution dated 30th September, 1948 as per Minute Book 45 'that £1,500 be paid to Mr. R. Matthews in consideration of past services rendered, and the payment be made in three equal instalments payable within one month of 1st October, 1948, 1949, 1950', be hereby rescinded. Moved Mr. Reid seconded Mr. Blackwood. It was resolved that the Managing Director should retain the £500 paid to him in November, 1948 as payment by the Company for past services rendered. Moved Mr. Reid seconded Mr. Blackwood." Two other matters may be noted as possibly relevant. In the first place the minutes of the meeting of 30th September 1948 record that, shortly after but not immediately after the passing of the invalid resolution, "Mr. Reid indicated that he intended to open discussion on the matter of the *salary* of the managing director at

the next meeting." (The italics are mine.) In fact the meeting of 24th January was the fourth meeting after that of 30th September. In the second place, before the meeting of 24th January the directors had decided to call a meeting of shareholders for the purpose of considering a resolution that the company be wound up voluntarily. The argument for Mr. Matthews is that what is recorded in the passage quoted above is the result of the discussion foreshadowed by Mr. Reid on 30th September with regard to the *salary* of the managing director, and that what was really being done on 24th January was to annihilate everything that had been done by way of rewarding Mr. Matthews for pre-incorporation services, and then to authorize his retention of the £500 in another and different character, viz. as remuneration for his services as managing director since the incorporation of the company. It should be added that Mr. Matthews has not received any other remuneration in his capacity as managing director.

If the real effect of what was done on 24th January was what is stated above, I am strongly inclined to think that the second resolution of that day was within the authority of the directors under article 85. But I am unable to hold that that was what was really being done.

I agree with Mr. *Menzies* that our task in considering what took place on 24th January 1949 is not the task of construing a written instrument on which the rights of the appellant and the company depend. What we have to do is to ascertain the legal effect of spoken words, which depends on the intention they express. But—and this may or may not be unfortunate for the appellant—the only evidence of what was said is the written record contained in the minutes. The rights of the parties depend on the meaning of the resolutions passed and primarily on the meaning of the second resolution passed, though it is quite legitimate, in ascertaining that meaning, to consider anything that was said in the course of proposing, seconding and discussing the resolutions. The appellant is not entitled to succeed unless the Court is convinced that the true meaning of the second resolution is that he is to retain the sum of £500 in the character of remuneration for services rendered by him as managing director since the incorporation of the company and not at all by way of remuneration for services rendered before incorporation. I find it impossible to feel so convinced on the evidence.

The words "for past services rendered" occur twice in the relevant passage, and they must, unless good reason appears for taking a different view, receive the same meaning in each case. If

H. C. OF A. 1950.

MATTHEWS v. NEWPORT BLOCK & TILE CO. PTY. LTD. (IN LIQUIDATION).

Fullagar J.

the view which I have already expressed as to the effect of what was done on 30th September 1948 is correct, they refer, where they first occur, to pre-incorporation services. And they must refer to the same services where they last occur. It is necessary, therefore, if the argument for Mr. Matthews is to hold water at all, to read the words at the end of the second resolution as merely descriptive of the character in which the £500 was received when it was received, and as having no reference to the character in which it is to be retained. I feel great difficulty in so reading them: I do not think it is the natural construction. But, even if we so read them, the result is purely negative: there is still nothing in the resolution to give a new character to what is to be "retained." The only words which can possibly, so far as I can see, be regarded as giving a new character to the payment are the introductory words "Managing Director's Remuneration." But it is far from clear that those words were used in discussion at all: it is quite likely that they are no more than a "heading" chosen as appropriate by the secretary of the company and inserted for convenience of reference. In any case they are quite ambiguous. The word "remuneration" is just as appropriate to describe a reward for pre-incorporation services as to describe a reward for services rendered by a managing director as such. It was suggested that an inference could be drawn from the fact that the heading and the second resolution both refer to the "Managing Director," whereas the first resolution refers to "Mr. Matthews." But, even if there were otherwise anything in this suggestion, it seems to be completely neutralized by the first reference to the "Managing Director," which is in connection with the resolution of 30th September 1948. The two expressions appear to be no more than alternative designations of a person. I find it impossible to give to the words in question the very radical significance claimed for them. The whole minute, indeed, conveys to my mind the impression that the directors were not concerned at all with seeing that the managing director received any salary but were concerned simply with seeing that he did not get more than £500 of the £1,500 which had been originally voted to him.

It was suggested in argument that the resolution of 24th January should be interpreted *ut res magis valeat quam pereat*, or that the effect of what was done should be ascertained by having regard to the maxim *omnia praesumuntur rite esse acta*. It does not seem to me that either of these rules can help the appellant. He is simply, I think, in the position of a director who has received money from

his company and who must justify its retention. He cannot justify by means of a resolution of merely dubious import.

For these reasons I am of opinion that not only the declarations made by *Dean* J. but also his order that the sum of £500 be repaid to the company were correct. In my opinion, the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *W. H. Jones & Kennedy.*
Solicitors for the respondents: *Akehurst, Friend & Haack.*

E. F. H.