[HIGH COURT OF AUSTRALIA.]

CARRIER AUSTRALASIA LIMITED . . APPELLANT;
DEFENDANT,

AND

HUNT . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 3.

MELBOURNE, *May* 22.

Rich, Starke, Evatt and McTiernan JJ.

Companies—Contract—Service agreement—Managing director—Appointment for term of years—Alteration of articles—Alteration of rights—Power of company—Wrongful dismissal—Companies Act 1936 (*N.S.W.*) (*No.* 33 *of* 1936), *sec.* 20.

By an agreement a company agreed to employ the respondent as managing director and the respondent agreed to serve the company as managing director "for the term and subject to the company's articles of association and the provisions hereinafter contained." It was provided by the agreement that the term of the employment should commence or be deemed to have commenced on 1st January 1937 "and subject to the provisions hereinafter contained shall continue until" 31st December 1941. The agreement contained a provision that "notwithstanding anything hereinbefore contained the company shall be at liberty to terminate the term by notice to that effect if the managing director ceases to be a director of the company." The articles of association of the company authorized the directors to appoint a managing director from their number and, subject to the provisions of any contract between him and the company, to dismiss him, and further provided that, if he ceased to hold the office of director, he should cease to be managing director. The articles also contained a provision that the office of director should *ipso facto* be vacated if the director were removed under art. 91; and art. 91 was in the following terms: "Subject to the provisions of any agreement for the time being subsisting the company may by extraordinary resolution remove any director before the expiration of his period of office." The company by special resolution amended art. 91 by deleting therefrom the words "Subject

to the provisions of any agreement for the time being subsisting." The company thereafter by extraordinary resolution removed the respondent from the board of directors and gave due notice of the termination of his agreement with the company. H. sued for damages for wrongful dismissal. The Supreme Court of New South Wales held, upon demurrer, that although the company had power to alter art. 91, as it did, the contract, upon its proper construction, did not give the company the right, by virtue of that alteration, to dismiss H. during his term of office.

On appeal to the High Court, *Rich* and *Starke* JJ. were of opinion that the appeal should be allowed and *Evatt* and *McTiernan* JJ. that it should be dismissed.

Shirlaw v. *Southern Foundries* (1926) *Ltd.*, (1939) 2 All E.R. 113, considered.

The court being equally divided, the decision of the Supreme Court of New South Wales (Full Court): *Hunt* v. *Carrier Australasia Ltd.*, (1938) 39 S.R. (N.S.W.) 12; 56 W.N. (N.S.W.) 5, was affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales Noel Percy Hunt claimed from Carrier Australasia Ltd. the sum of £20,000 damages for wrongful dismissal.

The plaintiff alleged in his declaration that contrary to the provisions of an agreement in writing bearing date 15th May 1937, made between himself and the defendant, the defendant had dismissed him from its service before the expiration of the term provided for in the agreement, and, as a result, he had been deprived of the salary he would have earned during the unexpired portion of the term and he was otherwise damnified.

In its fourth plea to the declaration the defendant set forth at length the provisions of the agreement referred to. The agreement recited, *inter alia*, that the plaintiff had for some time past been employed by the defendant as its managing director, and that it had been agreed that the employment should be reconstituted as from 1st January 1937, and witnessed that the defendant agreed to employ the plaintiff who in turn agreed to serve the defendant as managing director "for the term and subject to the company's articles of association and the provisions hereinafter contained." Those provisions, so far as material, were (clause 1) that the term of the employment should commence or be deemed to have commenced on 1st January 1937, "and subject to the provisions hereinafter contained shall continue until" 31st December 1941; (clause

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2) that "the company shall during the term pay to the managing director" (plaintiff) "as remuneration for his services a monthly salary calculated at the rate of £3,000 per annum"; (clause 4) the managing director (plaintiff) agreed that (*a*) "he shall devote the whole of his time, attention and skill to the business of the company and exercise his best endeavours to promote the company's welfare"; (*b*) he would not do any act, matter or thing whether during or after the term calculated to injure or prejudice the interests of the company or of its products or reputation; (*c*) he would not divulge any matter relating to the company's affairs or any secret or trade or manufacturing process; (*d*) he would not during the term or for a period of five years thereafter be engaged or interested directly or indirectly in any business in competition with the company or any subsidiary thereof; and (*e*) he would faithfully serve the company and would carry out his duties at Sydney or at such other place within the Commonwealth of Australia as the board of directors might from time to time reasonably determine; and (clause 7) "notwithstanding anything hereinafter contained the company shall be at liberty to terminate the term by notice to that effect if the managing director ceases to be a director of the company or if he be guilty of any grave misconduct or if he shall be absent therefrom without leave except through illness or accident, commit a breach of clause 4 hereof, or become bankrupt or enter into composition with his creditors or become physically or mentally unfitted to carry out his duties for a period of substantially two months."

The defendant company's articles of association in force at the date of the making of the agreement were annexed to the fourth plea. By those articles it was provided, so far as relevant, that the management of the business of the company should be vested in the directors (art. 103), whose qualification should be the holding of at least 250 shares in the company (art. 77). At ordinary general meetings one-third of the directors should retire (art. 85), and the company might fill up the vacated offices. The office of director should be *ipso facto* vacated if the director became (*a*) bankrupt, or (*b*) lunatic, (*c*) if he ceased to hold his qualification shares, (*d*) if he absented himself from board meetings for six months without leave and the board resolved that his office be vacated, (*e*) if by notice in writing to the

company he resigned his office, and (*f*) if he were removed under art. 91 (art. 82). A director might retire upon giving one week's notice in writing, and such resignation took effect upon the expiration of the notice or its earlier acceptance (art. 78). Subject to the provisions of any agreement for the time being subsisting the company might by extraordinary resolution remove any director before the expiration of his period of office and might by ordinary resolution appoint another qualified person in his place (art. 91). The directors might from time to time appoint one or more of their body to be managing director or managing directors of the company for a fixed term not exceeding five years and might from time to time (subject to the provisions of any contract between him or them and the company) remove or dismiss him or them from office and appoint another or others in his or their place or places. A managing director should be eligible for reappointment (art. 109). A managing director should not while he continued to hold that office be subject to retirement by rotation and he should not be taken into account in determining rotation of retirement of directors but if he ceased to hold the office of director he should *ipso facto* and immediately cease to be managing director (art. 110). The remuneration of a managing director should from time to time be fixed by the directors (art. 111); and the directors might from time to time entrust to a managing director for the time being such of the powers exercisable by the directors as they might think fit (art. 112).

After annexing the articles of association the fourth plea continued: "and the plaintiff entered upon the services under the agreement and thereupon and before the termination of the agreement by effluxion of time, the defendant company, by a special resolution, duly passed in accordance with law, amended art. 91 of the said articles by deleting therefrom the words 'subject to the provisions of any agreement for the time being subsisting' and thereupon the defendant company duly passed an extraordinary resolution at a duly convened extraordinary general meeting of the defendant company in the words following, namely: 'That Mr. Noel Percy Hunt (meaning the plaintiff) be and he is hereby removed from the board of directors of the company' and thereupon the defendant company gave due notice of the termination of the term of the

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said agreement in accordance therewith which is the alleged breach."

The plaintiff demurred to the fourth plea on the grounds : (*a*) that it confessed but did not avoid the breach mentioned in the declaration ; (*b*) that it did not allege any facts entitling the defendant to terminate the plaintiff's employment under the agreement ; and (*c*) that the facts alleged in the plea, even if proved, would not establish that the plaintiff ceased to be a director of the company within the meaning of clause 7 of the agreement.

The Full Court of the Supreme Court held that although the defendant company had power to alter art. 91 in the manner set forth above, there was nothing which conferred upon it the right, by virtue of that alteration, to remove the plaintiff as director during his five years' term of office as managing director. Judgment was accordingly given for the plaintiff on the demurrer : *Hunt* v. *Carrier Australasia Ltd.* (1).

From that decision the plaintiff, by leave, appealed to the High Court.

Dudley Williams K.C. (with him *A. R. Taylor*), for the appellant. The power under the articles as they existed at the date of the agreement, for the board of directors to appoint a managing director, was a power to appoint for a term subject to a condition that the contract would be automatically determined if and when during that term the managing director so appointed ceased to be a director of the company (*Bluett* v. *Stutchbury's (Ltd.)* (2)). The company did not contract itself out of its rights under the articles. The fact that the articles authorized the board to employ one of its number as managing director is not inconsistent with the right of the company to exercise its ordinary jurisdiction over the members of the board as directors (*Walker* v. *Kenns Ltd.* (3)). Whatever is done must be consistent with the powers conferred by the articles (*Nelson* v. *James Nelson & Sons Ltd.* (4)). Under the articles a director appointed by the board as managing director for a term remains liable to lose his directorship in the same manner as any other director, e.g., under arts. 82 and 91, except that, as provided by

(1) (1938) 39 S.R. (N.S.W.) 12 ; 56 W.N. (N.S.W.) 5.
(2) (1908) 24 T.L.R. 469.
(3) (1937) 1 All E.R. 566.
(4) (1913) 2 K.B. 471 ; (1914) 2 K.B. 770.

art. 110, he does not retire by rotation: See *Palmer's Company Precedents*, 15th ed. (1938), Part I., p. 693, and *Spender and Wallace* on *Company Law and Practice*, (1937), pp. 629, 630. The words "subject to the provisions of any agreement for the time being subsisting" in art. 91, meant subject to an agreement which provided that the company could not remove a director under art. 91. A contract with a managing director could not so provide because art. 110 provides for the only exemption from losing his seat a managing director has as compared with an ordinary director. The words relate to contracts between the company and outsiders, e.g., a debenture holder who appoints a director under art. 107, or a person who takes up shares on condition that he can appoint a director under arts. 4 or 42. If the words relate to contracts with a managing director, then the agreement now under consideration does not oust the operation of art. 91 because (*a*) it does not contain a provision that the company will not exercise its powers against the respondent as a director, and (*b*) on the contrary, it expressly provides that the term shall be subject to (i) the articles and (ii) the right of the company to determine if the respondent ceased to be a director. The words "subject to the articles" in the agreement incorporate under the agreement all the relevant articles and therefore cause the agreement to contain provisions which are in their nature inherently and necessarily alterable in the manner provided by sec. 20 of the *Companies Act* 1936 (N.S.W.). The words, therefore, mean subject to the articles as they exist from time to time during the term (*Shuttleworth* v. *Cox Brothers & Co. (Maidenhead) Ltd.* (1); *British Equitable Assurance Co. Ltd.* v. *Baily* (2); *Batu Pahat Bank Ltd.* v. *Official Assignee of the Property of Tan Keng Tin* (3)). Under art. 91, as duly altered by special resolution, the power of the company to remove any director—whether he had or had not a contract with the company—was made explicit. That article was so altered prior to the removal of the respondent.

Weston K.C. (with him *Kitto*), for the respondent. The words "for the term" in one of the recitals in the agreement must be read with the words "hereinafter contained." The words "subject to

(1) (1927) 2 K.B. 9.
(2) (1906) A.C. 35, at pp. 38-40.
(3) (1933) A.C. 691.

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the company's articles of association" and "hereinafter contained" do not govern the agreement but govern the verbs "employ" and "serve." Therefore the term is to be five years and the words "subject to the company's articles of association" do not render the agreement as a whole or the term subject to them but merely indicate that the actual operation of the contract of employment and service was to be in accordance with the articles, e.g., art. 103, under which the management of the business of the company shall be vested in the directors and subject to their control, and art. 112. There is not any part of the agreement subjugated to the articles; the agreement is not subject to unilateral operation. Clause 7 of the agreement only empowers the termination of the employment by notice if the respondent ceased to be a director under the articles as existing at the date of the making of the agreement. The agreement should be construed as a commercial document. The proper construction of the agreement, read with art. 91, is that the provision that the respondent should be managing director is inconsistent with action which deprives him of his office as director. Clause 7 looks beyond the mere retention of the office and looks to the root of the contractual right to be employed in the service or, as an alternative, to receive damages for breach. The opening words of art. 91 as existing at the date of the agreement affect all agreements, including this agreement, which would be defeated by the removal of the director. In *Shuttleworth* v. *Cox Brothers & Co. (Maidenhead) Ltd.* (1) there was not any agreement independent of the articles. The alteration to art. 91 was not intended to, and does not, operate in respect of agreements made prior to such alteration. Alternatively, art. 82 should be construed as if art. 91 were wrongly altered (*Stirling* v. *Maitland* (2)).

Dudley Williams K.C., in reply. The position in this case is somewhat similar to the position which arose in *Reilly* v. *The King* (3).

Cur. adv. vult.

(1) (1927) 2 K.B. 9.
(2) (1864) 5 B. & S. 840, at p. 852; 122 E.R. 1043, at p. 1047.
(3) (1934) A.C. 176.

The following written judgments were delivered :—

RICH J. The plaintiff in this case sued the defendant for wrongful dismissal. The declaration in the action alleged an agreement to employ the plaintiff for a term certain and the repudiation of the contract by his dismissal before the expiration of the term. The defendant pleaded to this declaration and the plaintiff demurred to the fourth plea. On the hearing the Full Court of the Supreme Court of New South Wales gave judgment for the plaintiff. The plea sets out the contract of employment, a lengthy document, and goes on to allege an amendment of an article of association, art. 91, the effect of which would be to empower a meeting of shareholders by extraordinary resolution to remove the plaintiff from the office of director and then to allege that such a resolution was passed. According to the plea the special resolution amending art. 91 was duly passed in accordance with law ; and the ordinary resolution purporting to remove the plaintiff from the board of directors was duly passed at a duly convened extraordinary general meeting. Unless the facts stated in the plea are enough in themselves to show that either the special resolution or the extraordinary resolution was invalid they must, for the purpose of this demurrer, be taken to be valid and not void. The only material facts stated in the plea are (*a*) the text of the agreement, and (*b*) the text of the articles of association, i.e., apart from the nature of the resolutions themselves. The question on which the appeal depends is whether the plea in the circumstances answers the declaration and shows that the dismissal was not wrongful. This obviously depends, in the first instance, on the provisions of the agreement. The first provision, that upon which the plaintiff relies, is an agreement by the defendant " to employ the " plaintiff " who in turn agrees to serve the " defendant " as managing director for the term and subject to the company's articles of association and the provisions hereinafter contained." This, it is said, gives the plaintiff a fixed term which, as afterward appears in the agreement, would expire on 31st December 1941. But the appointment of a director to be managing director for a certain period does not postulate his continuance in his office of director. Then it was contended that the word " and " between the word " term " and the word " subject " shows that the term is

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not subject to the articles of association. But this cannot be intended because the same construction would make it appear that the term was not qualified by " the provisions hereinafter contained." The provisions, however, not only fix the length of the term but they contain one qualification upon which I think the whole case turns. Clause 7 of the agreement provides that " notwithstanding anything hereinbefore contained the company shall be at liberty to terminate the term by notice to that effect if " among other things " the managing director ceases to be a director of the company." Now it is quite clear that if the amendment of art. 91 was valid and if the resolution removing him from the board was duly passed he did cease to be a director of the company. If both these premises are granted then it would follow that his dismissal was not a breach of the agreement unless some implication can be discovered qualifying or limiting the general words I have quoted from clause 7 of the agreement. What I have said comes to this : that there are three points, one at least of which must be made good by the plaintiff before he can succeed. They are these : He must show either (*a*) that the amendment of art. 91 was invalid, or (*b*) that the resolution removing him from the board was invalid, or (*c*) that the general words of clause 7 of the agreement are subject to some unexpressed limitation which prevents them from applying to the particular circumstances in which the plaintiff ceased to be a director. I take these in order :—(*a*) Art. 91 was as follows : " Subject to the provisions of any agreement for the time being subsisting the company may by extraordinary resolution remove any director before the expiration of his period of office and may by ordinary resolution appoint another qualified person in his stead." It was assumed by the company that while the introductory words " Subject to the provisions of any agreement for the time being subsisting " stood, the company could not exercise the power given by art. 91 because it would be inconsistent with the agreement to do so. I doubt whether this assumption was right. The agreement did not say absolutely that the plaintiff was to remain the managing director until 31st December 1941. It said only that he was so to remain unless he ceased to be a director and he would cease to be a director if he were removed in the manner stated by art. 91. However, the

amendment was made on the assumption I have mentioned. I cannot see any grounds for treating it as invalid on this demurrer. We have recently dealt with a ground upon which a purported amendment of articles of association may be considered void (*Peters' American Delicacy Co. Ltd.* v. *Heath* (1)). The plea states no facts which justify such an application of the principles of law as there declared as would invalidate the resolution. The resolution amending art. 91 must, therefore, be treated as valid. (*b*) The extraordinary resolution removing the plaintiff from the directorate might, of course, be impeached on the same grounds as are dealt with in *Peters' Case* (1), but, again, there are no facts stated in the plea from which its invalidity is a proper conclusion. It is clearly within the power conferred by art. 91 unless the purpose corrupts it, and the purpose is not alleged. (*c*) On the general words of clause 7 the agreement was at an end as soon as the plaintiff was removed from the office of director. It is, of course, possible to imply conditions or restrictions on general words which make them inapplicable to a description of the case apparently falling within their express meaning. Where B's obligations to A are to terminate on the occurrence of a contingency which neither party is supposed to desire there may be an implication that B shall not bend his energies to bring it about. We are familiar with the cases governing the remuneration of commission agents by which their employer is impliedly restrained from preventing them earning their commission: Cf. *Prickett* v. *Badger* (2); *Inchbald* v. *Western Neilgherry Coffee, Tea and Cinchona Plantation Co. (Ltd.)* (3); *Burchell* v. *Gowrie and Blockhouse Collieries Ltd.* (4). May it be said that clause 7 is not to be applied where the company deliberately removes the plaintiff from the office so as to obtain the benefit of clause 7 itself? I find it difficult to introduce this implied restriction on its scope. The office of director has a tenure which must rest on the articles of association and subject to the articles upon the voting of a general meeting of the company. Articles may be amended by a three-fourths majority, and it is hard to see how the motive of the majority which votes to amend the articles and remove the plaintiff

(1) *Ante*, p. 457.
(2) (1856) 1 C.B.N.S. 296; 140 E.R. 123.
(3) (1864) 17 C.B.N.S. 732; 144 E.R. 293.
(4) (1910) A.C. 614.

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or at an election fails to elect him can be made the test of the application of clause 7. An implication cannot be made unless it appears clearly to be intended and clause 7 of the agreement prevents such an implication being made. The plaintiff is not suing for a breach of an implied promise that the defendant would not amend art. 91 and would not remove him from the office of director for the purpose of terminating his contract as managing director. He is suing the defendant company for wrongful dismissal. But in any case I do not think such an implied promise can be spelt out of the agreement.

For these reasons I am unable to agree with the decision of the Full Court and think that the appeal should be allowed.

Since writing this opinion my attention has been directed to the case of *Shirlaw* v. *Southern Foundries (1926) Ltd.* (1). The facts of that case were somewhat similar to the facts of the present case but in one important respect they differ. In the present case clause 7 of the agreement to which I have already referred expressly provides in effect that the company shall be at liberty to terminate the agreement if the managing director ceases to be a director of the company. I do not feel myself constrained to make the implication upon which the judgment of the majority of the court in *Shirlaw's Case* (1) was founded.

STARKE J. Appeal from the decision of the Supreme Court of New South Wales upon a demurrer by the respondent (plaintiff) to the fourth plea of the appellant (defendant) hereinafter called "the company."

By an agreement made in May 1937 the company agreed to employ the respondent as managing director and the respondent agreed to serve the company as managing director. The term of the employment was in effect for five years from 1st January 1937 subject to the company's articles of association and to the provisions of the agreement. One of the provisions of the agreement was, so far as material, in these words: "Notwithstanding anything hereinbefore contained the company shall be at liberty to terminate the term by notice to that effect if the managing director ceases to be a director of the company." The articles of association of the

(1) (1939) 2 All E.R. 113.

company, which was incorporated in 1932 under the *Companies Act* of New South Wales, authorized the directors to appoint one or more of their body to be managing director for a fixed term, not exceeding five years, and from time to time subject to the provisions of any contract between him and the company to remove or dismiss him from office and appoint another in his place (art. 109). The articles also provided that a managing director should not, whilst he continued to hold that office, be subject to retirement by rotation but if he ceased to hold the office of director then he should *ipso facto* and immediately cease to be a managing director (art. 110). The articles further provided that the office of director should be *ipso facto* vacated if he were removed under art. 91 (art. 82). Art. 91 was in these words: "Subject to the provisions of any agreement for the time being subsisting the company may by extraordinary resolution remove any director before the expiration of his period of office and may by ordinary resolution appoint another qualified person in his stead."

The company by a special resolution duly passed amended art. 91 by deleting therefrom the words "Subject to the provisions of any agreement for the time being subsisting." The company thereafter by extraordinary resolution removed the respondent from the board of directors of the company and thereupon gave due notice of the termination of the agreement already mentioned.

The question upon the demurrer is whether these allegations raised by the plea constitute a good answer to the respondent's declaration alleging that before the expiration of the term of his service he was wrongly dismissed. Judgment for the respondent on the demurrer was given by the Supreme Court of New South Wales and an appeal has now been brought by the appellant pursuant to leave granted to it by this court.

In my opinion the agreement already referred to gives the respondent a fixed term of employment, namely, five years, but subject to the articles of association and the provisions of the agreement. The power under art. 109 to remove or dismiss the respondent from his office as managing director was not acted upon and, indeed, would not have justified his removal or dismissal, for the power is made expressly subject to the provisions of the agreement and therefore

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to his fixed term of five years. It is clear enough that if the respondent ceased to be a director of the company then his employment as managing director terminated upon the giving of the notice required by clause 7 of the contract if not automatically under art. 110 (*Bluett* v. *Stutchbury's (Ltd.)* (1)).

But under art. 82 a director *ipso facto* vacates his office if he is removed under art. 91. Art. 91, however, in its original form, only permitted of the removal of a director before the expiration of the period of office " subject to the provisions of any agreement for the time being subsisting." The agreement, according to the construction I have adopted, gave the respondent a fixed term of employment as managing director. The power conferred by arts 82 (*f*) and 91 was subject to the provisions of any agreement for the time being subsisting which, in my opinion, would include an agreement with a managing director (*Nelson* v. *James Nelson & Sons Ltd.* (2)). The company, however, duly and in accordance with the company's articles altered art. 91 and deleted the words " subject to the provisions of any agreement for the time being subsisting " : Cf. *Shuttleworth* v. *Cox Brothers & Co. (Maidenhead) Ltd.* (3). The power of removal under art. 91 was not, therefore, subject to the provisions of any agreement for the time being subsisting.

But still the removal of the respondent, though effective in law, might nevertheless be a breach of the agreement. That depends, I think, upon the intention of the parties as gathered from the language of their agreement. Art. 91, as altered, enlarged the power of the company and enabled it to remove a director from his office without the restrictions theretofore existing. The alteration did not, as in *Shuttleworth's Case* (3), add another ground for vacation of office, but it removed the restriction from the power of removal. The company acted under its power and removed the respondent. He in fact and in law ceased to be a director of the company. But then clause 7 is explicit : the company shall be at liberty to terminate the managing director's term by notice to that effect if he ceases to be a director of the company.

(1) (1908) 24 T.L.R. 469. (2) (1913) 2 K.B. 471.
(3) (1927) 2 K.B. 9.

But the recent decision, *Shirlaw* v. *Southern Foundries (1926) Ltd.* (1) (*MacKinnon* and *Goddard* L.JJ., *Greene* M.R. dissenting), requires consideration. In that case a company had appointed a managing director to hold office for the term of ten years. The articles of association of the company, when the managing director was appointed, provided that the directors might appoint one or more of their body to be a managing director, that he should not be subject to retirement by rotation, but that he should be subject to the same provisions as to resignation and retirement as those applicable to the other directors but subject to the provisions of any contract between him and the company and there was a general power to remove any ordinary director. It is not quite clear on the report whether there was any provision in the articles that the managing director should *ipso facto* and immediately cease to be a managing director if he ceased to hold the office of director from any cause (See *Palmer's Company Precedents*, 15th ed. (1938), part 1, p. 693), but at all events it was argued that the articles meant that anyone holding the office of managing director ceased to be managing director if he ceased to hold office as a director. The company amended its articles. By the new articles the Federated Foundries Ltd. (which had become the beneficial owners of all or practically all the shares in the company) was empowered to remove any director of the company and it was also provided that an appointment as managing director should determine if he ceased from any cause to be a director. The majority of the Court of Appeal held that there must be implied in the agreement with the managing director a term that the company would not so alter its articles as to put it in the power of itself or anyone else to determine the contract and consequently that the termination of the managing director's position as a director of the company constituted a breach of contract. In my opinion that decision does not govern the present case. The critical distinction is that the agreement relied upon in this case is made subject to the provisions of the company's articles of association, which are alterable, and subject also to the express provisions of clause 7, which is not expressed to be subject to the terms of existing contracts, and that implication is not "so obvious" to my mind "that it goes without saying."

(1) (1939) 2 All E.R. 113.

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The articles of the company are at the basis of the agreement. "In other words," as *Atkin* L.J. said in *Shuttleworth's Case* (1), "it is a contract made upon the terms of an alterable article, and therefore neither of the contracting parties can complain if the article is altered."

The appeal should, therefore, be allowed, the judgment below set aside, and judgment entered for the defendant on demurrer.

EVATT J. The question whether a managing director of a limited company can obtain legal redress for the termination of a contract purporting to confer a long term appointment upon him depends upon all the circumstances of the particular case and especially upon the conditions of the particular contract. The fact that the company has a statutory power to alter its articles is always a circumstance to be taken into account, for while "a company cannot break its contracts by altering its articles," still "care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered" (per *Lindley* M.R., *Allen* v. *Gold Reefs of West Africa Ltd.* (2)).

In the present case the plaintiff's right to security of tenure in his office of managing director was exceptionally well entrenched. His written agreement with the company recited the fact that he had an appointment for a "term." The duration of that term was fixed with precision by clause 1. He agreed to a restrictive covenant which bound him for the duration of the said term and for five years thereafter, and the only power possessed by the company to terminate the term was contained in clause 7 and arose in the event of the plaintiff's "ceasing to be" a director of the company or being guilty of grave misconduct, &c.

At the time when the contract was made, the plaintiff's tenure was also safeguarded by the articles of association. First, by art. 109, the directors, having been given express power to appoint one of their body to the post of managing director for a fixed term not exceeding five years, were authorized to remove or dismiss such managing director from time to time, but only "subject to the provisions of any contract between him and the company." Further,

(1) (1927) 2 K.B., at p. 26. (2) (1900) 1 Ch. 656, at p. 673.

by art. 91, the company was authorized by extraordinary resolution to remove any director ; but this authority was also made " subject to the provisions of any agreement for the time being subsisting."

What happened in the particular case appears from the facts admitted in the pleadings. The articles of association were altered so as to make the company's power by extraordinary resolution to remove a director no longer subject to the terms of existing agreements. Then by extraordinary resolution the plaintiff was removed from the board of directors, and finally the plaintiff's contract was " terminated."

I am clearly of opinion that, having regard to the exceptional character of his long term agreement, the plaintiff became entitled to recover damages at law for repudiation thereof.

Dealing with the general form of article in *Palmer's Company Precedents*, 11th ed. (1912), Part I., p. 738 (now 15th ed. (1938), Part I., at pp. 692, 693), giving power to the directors both to appoint a managing director for a fixed term and to remove or dismiss him from office, *Swinfen Eady* L.J. said : " It is obvious that an article in that form, where there is power to appoint for a fixed term with power to remove or dismiss, means power to remove or dismiss subject to the terms of the existing contract between the managing director and the company " (*Nelson* v. *James Nelson & Sons Ltd.* (1)). In such a case the power to remove or dismiss when exercised is *intra vires* the directors in the sense that the act of the directors binds the company and makes their act its act. But, as *Swinfen Eady* L.J. suggests, the officer is not necessarily deprived thereby of his remedy for breach of contract. The terms of the particular contract are, therefore, of crucial importance.

In the present case the position of the plaintiff was even stronger than in the case mentioned, for the power to remove or dismiss him was expressed as subject to the terms of any contract, and similarly the power to remove a director by extraordinary resolution was made subject to the terms of any subsisting agreement.

The provision in the plaintiff's contract that the company could terminate his term if, *inter alia*, he " ceased to be " a director bears a superficial resemblance to article 110 which, while expressly

(1) (1914) 2 K.B. 770, at p. 781.

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exempting the managing director from liability to retirement by rotation, declared that if he ceased to hold the office of director he should also cease to be a managing director. I am of opinion that clause 7 did not confer upon the company the power of terminating the plaintiff's five year term in the event of a cesser of office procured for the sole purpose of shortening his term of appointment and as a result of the company's unilateral act.

But for the alteration effected in art. 91, the attempted removal of the plaintiff from the office of director might possibly have been regarded as a nullity equivalent in result to a removal by the office boy; for the words "subject to the provisions of any agreement for the time being subsisting" seem to me to amount to more than a mere reminder that an alteration of the article may amount to a breach of contract. The words more naturally refer to a limitation upon power. The same reasoning applies to the condition imposed in art. 109, action under which, if taken in disregard of a subsisting contract, might possibly have been treated as void.

As art. 91 was formally altered, these questions of *ultra vires* do not arise. By that alteration the defendant armed itself with power to remove the plaintiff from the position of director. But having regard to the interpretation which I place upon the plaintiff's contract, the company's subsequent exercise of the power of removal meant only this, that the final act of "terminating" the plaintiff's contract was indubitably the act of the defendant, leaving the plaintiff at liberty to pursue his action for damages for breach.

In the result the admitted facts show that through acts which were all *intra vires* its appropriate agency, the company repudiated the contract subsisting with the plaintiff and must be held responsible in damages accordingly.

The appeal should be dismissed.

Since the above opinion was written, I have been referred to the judgment of the Court of Appeal in *Shirlaw* v. *Southern Foundries (1926) Ltd.* (1). That case supports the conclusion here reached. Moreover, according to the editor of the *All England Reports*, the decision seems to express the general view of the profession on the point. In reference to a further editorial comment it may be pointed out

(1) (1939) 2 All E.R. 113.

that the present case is quite different from *Bluett* v. *Stutchbury's (Ltd.)* (1). There an agreement with the managing director for a term was held to be *ultra vires* the directors because it plainly conflicted with an article which required the election of directors in rotation by the company in general meeting. But here, when the agreement was made, the articles conferred upon a managing director immunity from the obligation to retire in rotation and they also expressly contemplated that long term agreements could be made. Therefore the agreement with the plaintiff was *intra vires* the directors and bound the company.

McTIERNAN J. The appellant, which is an incorporated company, is the defendant in an action brought by the respondent to recover damages from it for breach of contract. The contract is pleaded in the company's fourth plea. It was entered into between the company and the respondent under an authority conferred on the directors of the company by art. 109 of its articles of association. The contract was made on 15th May 1937, the respondent then being a director of the company. The contract provides that " the company agrees to employ the managing director who in turn agrees to serve the company as managing director for the term and subject to the company's articles of association and the provisions hereinafter contained." One of these provisions is that : " The term of employment shall commence or be deemed to have commenced on the first day of January one thousand nine hundred and thirty-seven and subject to the provisions hereinafter contained shall continue until the thirty-first day of December one thousand nine hundred and forty-one." By clause 7 it is provided that : " Notwithstanding anything hereinbefore contained the company shall be at liberty to terminate the term by notice to that effect if " (*inter alia*) " the managing director ceases to be a director of the company." After setting out the provisions of the contract, the plea annexes a copy of the company's articles of association. Art. 109 provides that the directors may from time to time appoint one of their body to be managing director for a fixed term not exceeding five years and may from time to time, subject to the provisions of any contract between

(1) (1908) 24 T.L.R. 469.

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him or them and the company, remove or dismiss him from office. Art. 110 concludes with the provision that if the managing director cease to hold the office of director he shall *ipso facto* and immediately cease to be a managing director. Art. 91 provides that: "Subject to the provisions of any agreement for the time being subsisting the company may by extraordinary resolution remove any director before the expiration of his period of office and may by ordinary resolution appoint another qualified person in his stead." Art. 82 provides that the office of director shall *ipso facto* be vacated if (*inter alia*) he be removed under art. 91. After setting out the terms of the contract and the articles of association, the fourth plea proceeds: "the plaintiff entered upon the services under the said agreement and thereupon and before the termination of the said agreement by effluxion of time the defendant company, by a special resolution, duly passed in accordance with law, amended art. 91 of the said articles by deleting therefrom the words "subject to the provisions of any agreement for the time being subsisting" and thereupon the defendant company duly passed an extraordinary resolution at a duly convened extraordinary general meeting of the defendant company in the words following namely:—'That Mr. Noel Percy Hunt' (meaning the plaintiff) 'be and he is hereby removed from the board of directors of the company' and thereupon the defendant company gave due notice of the termination of the term of the said agreement in accordance therewith which is the alleged breach." The respondent demurs to the plea on the grounds that: (*a*) the said fourth plea confesses but does not avoid the breach mentioned in the declaration; (*b*) it does not allege any facts entitling the defendant to terminate the plaintiff's employment under the agreement therein mentioned; (*c*) the facts alleged in it, even if proved, would not establish that the plaintiff ceased to be a director of the company within the meaning of clause 7 of the said agreement.

If the removal of the respondent from the office of director did not make him cease to be a director in a way contemplated by the contract, it was a repudiation of the contract by the company to give the respondent notice putting an end to the term for which it promised to employ him as its managing director. The question which arises is whether under the contract the company had the

right to exclude the respondent from the office of managing director by removing him from the board of directors. The contract does not expressly reserve to the company the right to dismiss the respondent at its pleasure from the office of managing director at any time during the term of the contract. The company assumes that, notwithstanding its promise to employ the respondent for a fixed term, it had not bound itself by the contract not to put him out of the office of director at its pleasure during the term of the contract, although the result of doing so was his automatic exclusion from the office of managing director in which the company agreed to employ him. It is clear that when the company removed the respondent from the office of director it made impossible the performance of its promise to employ him for the term stipulated in the contract and prevented him from performing his promise to serve the company as a managing director for that term. The removal of the respondent from the board of directors, was, therefore, a repudiation by the company of its promise unless the company reserved to itself by the contract the right to remove the respondent from the board whenever it thought fit to do so : See *Ogdens Ltd.* v. *Nelson* (1). The company relies upon the provision in the contract that it is subject to the articles of association, as a condition reserving to it that right. When a contract with a company is outside the articles of association, it is not an implied term of the contract that the company has the right to exercise any power which it has under the articles to alter or put an end to contracts, to alter or put an end to that contract (*Nelson* v. *James Nelson & Sons Ltd.* (2)). On the other hand, if the respondent's appointment as managing director had been made subject to the articles *simpliciter*, the contract, if any, between him and the company would have depended on alterable articles.

In the present case, however, the contract contains provisions which stand outside the articles, but it also provides that it is subject to the articles. If the provision that this contract is subject to the articles of association means that the company reserves to itself the right to exercise whatever power it had at the date of the contract, or might afterwards acquire by amending the articles, to put an end to its obligations under those terms of

(1) (1905) A.C. 109.

(2) (1914) 2 K.B. 770.

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the contract which stand outside the articles and the respondent's rights under those terms, the effect of the contract is that the company promised to employ the respondent for a fixed term but at the same time reserved to itself the right to destroy the basis of that promise, which was the retention by the respondent of the office of director. If that is the meaning of the provision that the contract is to be subject to the articles of association, the promise to employ the respondent as a managing director for a fixed term is nugatory. It would be inconsistent with the expressed provisions of the contract which gave the respondent a fixed term of employment to imply in the provision making the contract subject to the articles a term that the company is to have the right to make the respondent cease to be a director at any time and in that way to terminate his employment as managing director. In my opinion, that term should not, therefore, be implied in the contract.

At the date of the contract art. 91 contained a restriction which, if it applied to the present contract, made the contract subject to articles under which, in fact, the company did not have the power to remove the respondent from the office of director. It was contended on behalf of the appellant company that this restriction does not apply to the present contract because under this agreement the respondent became a managing director, whereas the restriction applies only to agreements under which the office of director is held. But it was also contended, in effect, on behalf of the company, that, even if the restriction did extend to the present contract, the provision that the contract is subject to the articles meant that the company was to have the contractual right to do at any time during the term of the contract whatever it might have the power to do under its articles of association. If that view of the meaning of the provision is right, it is clear that the company had the contractual right to remove the respondent from the office of director when it amended the article, although it did not have that contractual right when it entered into the contract. The condition of the contract that it is to be subject to the articles does not, in my opinion, mean that the parties agreed to leave room in the contract for additions to the contractual rights of the company commensurate with any additions it might lawfully make to its powers as a corporation by amending

the articles of association. If the condition has that meaning, the provisions of the contract standing outside the articles, under which the respondent was promised a fixed term of employment subject to the contract, would be merely tentative, if not entirely otiose. Rather than imply in the contract a term reserving to the company the right to exercise its powers to remove the respondent from the board of directors during the term of the contract, it is necessary, in order to give " business efficacy " to the provisions of the contract outside the articles, to imply a term binding the company not to exercise such powers. I agree with the view expressed by *Jordan* C.J. (1) that " subject to the articles " does not mean " subject to a right in the company so to alter the articles as to enable the company to free itself from the obligations of the contract." " If it did," the Chief Justice continued, " then if the articles had contained no provision for removal at all, the phrase would have justified the introduction into the articles of a provision for removal applicable to directors who are managing directors, and the subsequent removal of such a director pursuant to the new article. By virtue of the deletion of the portion of art. 91 now in question, it has been, in effect, sought to produce this result. I am of opinion, however, that the presence in art. 91 of the words which have been deleted did not make any difference to the effect of that article. They served as a reminder that the power conferred by the articles is one the exercise of which may involve the risk of committing a breach of contract. All that their deletion has achieved has been to remove the reminder."

I agree with these observations. The company did not assist itself to escape from its obligations under the contract by amending art. 91. The company may thereby have armed itself with the undoubted power of removing the respondent from its board of directors and it may be that this power was well exercised. But the obligation of the company under the contract remained notwithstanding the alteration or the exercise of the power. This obligation was renounced by the company when it frustrated the contract by removing the respondent from office as a director.

The contract was made under art. 109 which provides :—" The directors may from time to time appoint one or more of their body to be managing director or managing directors of the company for a fixed term not exceeding five years and may from time to time

(1) (1938) 39 S.R. (N.S.W.), at p. 17 ; 56 W.N. (N.S.W.), at p. 6.

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(subject to the provisions of any contract between him or them and the company) remove or dismiss him or them from office and appoint another or others in his or their place or places. A managing director shall be eligible for re-appointment." It appears, therefore, by virtue of this article that in making the contract subject to the articles, the company, indeed, expressly bound itself to the respondent not to dismiss him from the office of managing director in violation of the contract. The right of the company to put an end to the term of the contract is that reserved by clause 7. One condition upon which the right is expressed to arise is: "if the managing director ceases to be a director." These words do not imply that the company has the right to frustrate its express promise to employ the respondent for a fixed term by causing him to cease to be a director and thereby suffer the loss of the qualification which the articles require that a managing director should possess in order to entitle him to stay in that office.

This is not a case like *Bluett* v. *Stutchbury's (Ltd.)* (1). I agree with the ground of difference taken by *Jordan* C.J. (2): "This is not a case," he said, "like *Bluett* v. *Stutchbury's (Ltd.)* (1), where the person appointed for a term as managing director by the board took his chance of being able to obtain the suffrages of the shareholders at the periodical elections of directors, so as to acquire from time to time the directorship which was necessary to qualify him for his employment."

The reasons of the majority in *Shirlaw* v. *Southern Foundries (1926) Ltd.* (3) support the conclusion that in the present case the company committed a breach of the contract by removing the respondent from the office of director.

I am of opinion that the fourth plea is no answer to the declaration and that the judgment for the plaintiff (the respondent) on the demurrer should be affirmed and the appeal dismissed.

The court being equally divided in opinion (Judiciary Act 1903-1937, *sec.* 23 (2) (*a*)) *the appeal is dismissed with costs.*

Solicitors for the appellant, *Minter, Simpson & Co.*

Solicitors for the respondent, *F. G. Parker & Andrew.*

J. B.

(1) (1908) 24 T.L.R. 469.

(2) (1938) 39 S.R. (N.S.W.) at p. 18.

(3) (1939) 2 All E.R. 113.