Case No: CR-2022-001212

[2022] EWHC 2340 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Tuesday 26 July 2022

BEFORE:

DEPUTY HIGH COURT JUDGE JOHN MARTIN QC

IN THE MATTER OF:

ACTIVE WEAR LIMITED

AMIT GUPTA (instructed by Browne Jacobson LLP) for the Applicants
The Respondents did not appear and were not represented

JUDGMENT
(As Approved)

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(Official Shorthand Writers to the Court)

1. JUDGE MARTIN: This application raises for determination the validity of the purported appointment by its sole director of administrators of the respondent company. If the outcome is that the appointment was not valid, the court is asked to make orders having the effect of validating the appointment.

2. The company, Active Wear Limited ("AWL"), was incorporated under the provisions of the Companies Act 2006 on 1 June 2015. Although it had some initial success, by March 2022 it had become apparent that AWL could not survive in its existing state.

3. AWL has at all relevant times had only one director, the first applicant, Marion Rabate ("Ms Rabate"). On 22 April 2022 she executed documents purporting to appoint the second and third applicants, Hugh Francis Jesseman ("Mr Jesseman") and Claire Howell ("Ms Howell") as joint administrators of AWL. These documents were provided to Ms Rabate by Antony Batty & Company LLP, at which both Mr Jesseman and Ms Howell are licensed insolvency practitioners. It seems that little thought was given to the suitability of these documents, which appear to be standard form documents without suitable adaptation. In particular, the document purporting to appoint administrators takes the form of a minute of the meeting of the board of directors of AWL, reportedly chaired by a man and recording that a quorum was present. In reality, however, there was no meeting and the decision was taken by Ms Rabate alone in her capacity as sole director. The principal question arising on this application is whether or not she was entitled to do that.

4. The answer to that question depends on the proper construction of AWL's Articles of Association. Those articles are, under the default regime prescribed by section 20 of the 2006 Act, the Model Articles prescribed for private companies limited by shares by schedule 1 of the Companies (Model Articles) Regulations 2008. The Model Articles apply in their entirety. No amendment or adaptation was made when AWL was incorporated or subsequently. Of relevance to this application are the articles contained in Part 2 of the schedule, dealing with directors and consisting of articles 3 to 20. Part 2 is sub-divided into three sections defined by cross-headings: directors' powers and responsibilities (articles 3 to 6), decision-making by directors (articles 7 to 16) and appointment of directors (articles 17 to 20). The statutory instrument contains no provision stating that the cross-headings are not to be used as an aid to construction.

5. Article 3 provides that:

> "Subject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company."

6. Article 7, headed, "Directors to take decisions collectively," is of particular importance. It is in the following terms:

> "(1) The general rule about decision-making by directors is that any decision of the directors must be either a majority decision at a meeting or a decision taken in accordance with article 8.
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> (2) If -
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> (a) the company only has one director, and
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> (b) no provision of the articles requires it to have more than one director,
>
> the general rule does not apply, and the director may take decisions without regard to any of the provisions of the articles relating to directors' decision-making."

7. Article 8, headed, "Unanimous decisions," provides for decisions to be made "when all eligible directors indicate to each other by any means that they share a common view on a matter". Article 9 deals with calling directors' meetings, and article 10 deals with participation in directors' meetings.

8. Article 11, headed, "Quorum for directors' meetings," is again of relevance and is in the following terms:

> "(1) At a directors' meeting, unless a quorum is participating, no proposal is to be voted on, except a proposal to call another meeting.
>
> (2) The quorum for directors' meetings may be fixed from time to time by a decision of the directors, but it must never be less than two, and unless otherwise fixed it is two.

> (3) If the total number of directors for the time being is less than the quorum required, the directors must not take any decision other than a decision -
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> (a) to appoint further directors, or
>
> (b) to call a general meeting so as to enable the shareholders to appoint further directors."

9. Article 12 deals with chairing directors' meetings; article 13 deals with casting votes; article 14 deals with conflicts of interest; article 15 requires records of decisions to be kept; and article 16 gives the directors a discretion to "make any rule which they think fit about how they take decisions".

10. In construing these articles, it is relevant to have in mind that section 154 of the 2006 Act provides that a private company must have at least one director - in contrast with a public company, which must have at least two.

11. The approach to articles of association is not controversial. In *Cosmetic Warriors Ltd & Anor v Gerrie* [2017] EWCA Civ 324 it was made clear that the articles, being a statutory contract between the members and between each member of the company, must be construed in accordance with the ordinary principles that apply to the interpretation of any written contract. Those principles are conveniently found set out in the judgment of Lord Neuberger P, in the well-known case of *Arnold v Britton* [2015] UKSC 36, at paragraph 15:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean' … And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

12. Applying these principles, it appears to me plain that, under the terms of the unamended Model Articles, a sole director of a private company may take on his or her own any decision relating to the conduct of the affairs of the company. That, as it seems to me, is the unambiguous effect of Article 7. Where the company has only one director, as section 154(1) of the 2006 Act permits, and no provision of the articles requires it to have more than one director, as is the case under the Model Articles, paragraph 2 of Article 7 provides that the general rule, that is to say "the general rule about decision-making by directors", does not apply and the director may take decisions "without regard to any of the provisions of the articles relating to directors' decision-making". Apart from the general rule itself, the provisions of the articles relating to a director's decision-making are clearly those contained in the section headed, "Decision-making by directors," which define how decisions may be made.

13. There may be doubts about whether it was truly the intention of the legislature to exclude the provisions relating to conflicts of interest and recordkeeping, which are contained in articles 14 and 15; but those provisions are premised on the existence of a meeting, at which provisions for quora and voting are relevant, or on the unanimity or size of the majority who take a decision, and in the case of a company with only one director none of those can in their terms apply. Since the provisions relating to quorum set out in Article 11 are themselves contained in the section headed, "Decision-making by directors," they are specifically disapplied by Article 7(2) in circumstances where there is only one director and there is no other provision requiring more than one director, as in the case of the Model Articles there is not. On that basis, Ms Rabate's appointment of Mr Jesseman and Ms Howell was valid.

14. This view of the construction of Article 7 is, however, on the face of it contrary to the one taken by Mr Richard Farnhill sitting as a deputy judge of this division in *Re Fore Fitness Investments Holdings Ltd* [2022] EWHC 191 (Ch). This decision has given rise to the uncertainty principally prompting this application.

15. *Fore Fitness* arose out of unfair prejudice claims made under section 994 of the 2006 Act. When the company was incorporated it had only one director. At least one other director was subsequently appointed. By the time of the proceedings there was again only one director. That director caused the company to mount a counterclaim in the

unfair prejudice proceedings, and the question relevant for present purposes was whether the counterclaim was properly authorised.

16. The company's articles were a mix of the Model Articles and Bespoke Articles agreed between the parties. Articles 7 and 11 were taken from the Model Articles. Article 16 was a bespoke article which stated that the quorum for meetings of the board should be two directors. The relevant part of the judgment lies between paragraphs 20 and 23. It is necessary for me to read those:

> "20. Applying the principles in *Arnold* and *Wood*, the starting point is the language used by the parties. Bespoke Article 16 is clear in requiring two directors in order for there to be a quorum …
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> 21. Model Article 7(2) is also clear. It permits for a sole director to manage the company, but only in circumstances where no provision of the articles requires the company to have more than one director. Here, Bespoke Article 16.1 does require there to be multiple directors in order for board meetings to be quorate. Under Model Article 3, the role of the directors is to manage the company. To do this, under Model Article 7(1) they must act either through majority decision at a meeting or by unanimous decision under Model Article 8 (in which case the number of participating directors in the unanimous decision must still have been sufficient to form a quorum at a meeting). A provision in the articles requiring there to be at least two directors to constitute a quorum logically is a requirement that the company in question have two directors in order to manage its affairs. That is the purpose of the meetings. Bespoke Article 16.1 therefore does require there to be two directors and Model Article 7(2)(a) is, by its own terms, disapplied.
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> 22. That reading is reinforced by Model Article 11(3), which deals with what is to happen if a company does not have sufficient directors to represent a quorum. It empowers the remaining director or directors to take certain limited steps to resolve the ensuing impasse. On the respondents' case this provision would operate in a very odd manner. Assume, for the sake of argument, that the specified quorum is five directors. If the number of directors drops to between two and four, Model Article 11(3) applies and those directors can only act to restore their number to five. If the number drops further, to one, Model Article 7(2) takes over and the remaining director resumes full powers to run the company. Such an unusual outcome would require clear language to achieve. That language does not exist in the Model Articles, nor does it exist in the articles of the company.

> 23. I do not accept Mr Hilton's submission that reading Model Article 11(2) to require a company to have two directors creates a clash between section 154 and the Model Articles. Although section 20 provides that the Model Articles are to apply if no other articles are registered, nothing in section 20 requires a company to adopt them, whether in whole or in part. If a company is to be a single director company, section 154 permits that and section 20 permits the Model Articles to be amended to achieve that end."

17. It is, in my judgment, clear that the factor dictating the result in *Fore Fitness* was the existence of Bespoke Article 16. As interpreted by the deputy judge, it required there to be at least two directors in order for a valid decision to be made. That was so notwithstanding that there had originally been only one director. It is not necessary for me to say whether or not I would have reached the same conclusion as a matter of construction, but there is no clear parallel in the unamended Model Articles. To hold that Article 16 of the Model Articles requires there to be at least two directors for effective decision-making would be to deprive Article 7(2) of any practical meaning.

18. Given my conclusion as to the meaning of the unamended Model Articles, it is strictly unnecessary for me to say more about the deputy judge's reasoning in *Fore Fitness*. There are, however, two areas where, in my respectful view, the reasoning may be faulted. First, in paragraph 22 the deputy judge posits a position where the articles specify a quorum of five directors. He then considers the position where the number of directors drops to between two and four, and finally where it drops to one. In the last of those cases, he appears to accept that the position would be that Article 7(2) would on the face of it take over and the remaining director would resume full powers to run the company. He then rejects that outcome as not justified by the language. It does, however, seem to me that that analysis takes no account of the saving words in Article 7(2)(b), which it will be recalled deal with the position when there is a provision in the articles requiring the company to have more than one director. Consistently with the view taken by the deputy judge of the construction of the Bespoke Article 16, it is on the face of it the position that if there had been a provision in the articles of the company stating that the specified quorum was five directors, it would have been necessary for the company to have, by that token, more than one director, and Article 7(2) (which would otherwise give a sole director the power to manage the affairs of the company) would be disapplied according to its own terms. I

accept, however, the implicit point that there is an apparent tension between Article 7(2) and Article 11(3) where the number of directors falls to one from a higher number; but in my judgment in that situation it is Article 11(3) that applies, Article 7(2) applying only where there has never been a greater number of directors than one.

19. Secondly, paragraph 23 of the deputy judge's judgment appears to take the view that Model Article 11(2) requires the company to have two directors. It will be recalled that that article states that the quorum for directors' meetings may be fixed from time to time by a decision of the directors but must never be less than two, and unless otherwise fixed, it is two. As I have indicated, my view is that Article 7(2) of the unamended Model Articles prevails over that provision. The purpose of Article 7(2) is to disapply the general rule about decision-making by directors, and Article 11(2) is precisely a rule about how directors may reach their decisions. It would, in my judgment, be wrong to read the unamended Model Articles as having the effect that the existence of the requirement in Article 11(2), that unless otherwise specified there must be two directors for the purposes of a quorum at a directors' meeting, has the effect of ruling out the operation of Article 7(2). Put the other way round, as I have already indicated, it seems to me that to treat the articles as having that effect would be to deprive Article 7(2) of any practical meaning. The articles must be read as a whole, and it cannot have been the intention that they would need to be amended (as the deputy judge seems to suggest at the end of paragraph 23 of his judgment) before Article 7(2) could operate at all.

20. Accordingly, for these reasons, it seems to me that, in circumstances where AWL was governed by articles consisting in their entirety of the Model Articles without alteration or amendment, Ms Rabate was in a position to take, in the wording of Article 7 itself, "decisions without regard to any of the provisions of the articles relating to directors' decision-making" and that, in its terms, means that she was entitled on her own to take the decision to appoint the administrators. Accordingly, I propose to declare that the appointment was valid.

21. There is, however, one further potential defect in their appointment to be addressed. The notice of appointment of the administrators was in the standard prescribed form. That form includes a statutory declaration which requires to be made in proper form.

The proper form is currently defined by a new insolvency practice direction made in September 2021 to take account of the Covid pandemic. By paragraph 9 and paragraph 10, the following arrangements are to be made:

> "9. Where Schedule B1 to the Act requires a person to provide a statutory declaration, a statutory declaration that is made otherwise than in-person before a person authorised to administer the oath may constitute a formal defect or irregularity. Pursuant to rule 12.64 it is open to the court, on objection made, to declare that such a formal defect or irregularity shall not invalidate the relevant insolvency proceedings to which the statutory declaration relates, unless the court considers that substantial injustice has been caused by the defect or irregularity which cannot be remedied by any order of the court.
>
> 10. Where a statutory declaration is made in the manner described in paragraphs 10.1-10.3 below then the defect or irregularity (if any) arising solely from the failure to make the statutory declaration in person before a person authorised to administer the oath shall not by itself be regarded as causing substantial injustice.
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> 10.1. The person making the statutory declaration does so by way of video conference with the person authorised to administer the oath;
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> 10.2. The person authorised to administer the oath attests that the statutory declaration was made in the manner referred to in 10.1 above; and
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> 10.3. The statutory declaration states that it was made in the manner referred to in para 10.1 above."

22. In the present case the statutory declaration made by Ms Rabate, which was made before a solicitor, contains by the attestation provisions the words "by remote". The evidence is that the swearing was conducted by a remote video conference hearing. But, contrary to the requirements of paragraph 10, the person authorised to administer the oath did not attest that that was the manner in which the statutory declaration was made and nor does the statutory declaration itself state that it was made in that manner. It is accordingly the case that the statutory declaration, which would in other circumstances require to have been made in person before the person authorised to administer the oath, is defective. The evidence is, however, that the video conference suffered from no technical defects, and it seems to me that there is no reason to

suppose that the procedure under which Ms Rabate made the statutory declaration was, in anything other than formal terms, defective. I accordingly propose to exercise the power given to me by rule 12.64 to declare that the formal defect in the making of the statutory declaration is not to invalidate the relevant insolvency proceedings, which is to say it is not to invalidate the administration or the appointment of the administrators.

23. Accordingly, as I have said, I propose to declare that the appointment of Mr Jesseman and Ms Howell is valid and that the acts done by them subsequent to their appointment are themselves valid.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge