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Is It Possible To Appoint Executive Directors?

A company limited by guarantee and not having a share capital (CLG) is a form of company used by many organisations; charities, management companies, mutual organisations and sporting organisations. These CLGs are managed in the same way as other companies, namely by a board of directors. Other than CLGs who operate under a charitable tax exemption, there has been no prohibition on these types of companies from having executive directors, and in fact very many have executives on their boards of directors.

With the commencement of the new Companies Act 2014, there is now a question over whether in fact CLGs may appoint executive directors.

Previously a provision in the standard type Table A or C articles was adopted by most companies to expressly give them the power to appoint a director to any other office or place of profit under the company (other than auditor) in conjunction with his or her office of director for such period and on such terms as to remuneration and otherwise as the directors of the company may determine. This provision was then relied upon by companies to override the equitable principle that would otherwise apply to a director by reason of their fiduciary duties.

That standard type Table A Article is now incorporated in the Companies Act 2014 as Section 162. However, S162 is disapplied in the Act (Section 1172) in respect of CLGs raising the question whether by virtue of such disapplication a CLG can appoint executive directors. One school of thought is that the intention of the disapplication is to remove the right of a CLG to have executive directors. This may well have merit in aligning with the requirement for very many CLGs who wish to obtain charitable tax exempt status, that they do not appoint executives to the Board. However , accepting that view, one also has to have regard to the provisions of Section 159 of the Act giving power to appoint a managing director (howsoever described) and this has not been disapplied for CLGs suggesting that even if the disapplication of Section 162 of the Act means that CLGs cannot have or adopt such a power, it might still rely on Section 159 of the Act in respect of a managing director – this ambiguity is not helpful, of course, and it is somewhat illogical to suggest that a managing director/chief executive officer can be appointed to the Board, but not, for example, a chief financial officer/finance director or a Chief operations officer.

The alternative view, and one which we hold, and have Senior Counsel's opinion concurring with our view, is that the disapplication of Section 162 of the Act simply removes the statutory power, but as there is nothing in the Act expressly prohibiting executive directors of CLGs, it is open to a CLG to decide to include a power in the terms of Section 162 of the Act or any variation thereof it so choices, into its Constitution.

This logic would equally apply to any other provision of the Act disapplied which is not otherwise prohibited or overridden in the Act.

It should be noted, of course, that a Court has yet to be asked to give any guidance on this matter and, therefore, it is not possible to say with absolute certainty that our view would be upheld by a Court. However, and in light of Counsel's opinion on the point, we believe our interpretation of the point is the one more likely to be upheld.

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