

# Interpreting the americans with disabilities act

[Business](#), [Company](#)



## **Introduction**

The courts have been notoriously strict<sup>[1]</sup> in their interpretation of “variation” of class rights both under s. 630 of the Companies Act 2006 and under its predecessor, s. 125 of the 1985 Act<sup>[2]</sup>. Case law under s. 630 is yet to develop so it is to the historical interpretation of “variation” which must be examined taken with, as Gower and Davies point out, a presumption that the courts will continue in the same vein as there is nothing in s. 630 which permits a radical departure from s. 125<sup>[3]</sup>.

The above statement is mostly true as the central concerns which have been exposed by the section in subsequent Acts, namely that where the courts have perceived the formal rights of shareholders to be unaffected they have been unmoved by any adverse effect on the value of the class rights to hold that the “variation” protection applies, have been balanced by the ability of a company to amend its articles to circumvent or amend the “variation” protection mechanisms, the s. 22 entrenchment mechanism and s. 633 review applications. A balance needs to be struck between the protection of class rights and the proper conduct of business and s. 630 does achieve this albeit with some imperfections such as the status of preference shareholders in unquoted companies.

The purpose of s. 630 is to protect shareholders who belong to a certain class, giving them, in the words of Gower & Davies, a “veto over the change proposed, even if the company’s constitution provides them with no right to vote on the issue”<sup>[4]</sup>. Thus when any proposal to alter the articles may vary their class rights<sup>[5]</sup> either the consent of that class of shareholders is

required, usually with an extraordinary 75% majority at a separate meeting of that class[6] unless the articles specify otherwise, or a written resolution having the support of 75% of holders of the nominal value of that class[7] is required in order for the proposal to have any validity. The statute provides the default position but as will be examined later s. 630 (2) of the 2006 Act allows the companies' articles to set either a higher or a lower standard.

The concerns arise where the class is adversely affected by the proposals but not to the degree which the courts would consider constitutes a "variation" for the purposes of the 2006 Act or in that companies articles of association: thus the narrow interpretation mentioned above could be cited as an example of how the section could be bypassed altogether. If it is only the value of the rights and not the rights themselves which are adversely affected then the courts have been unwilling to extend the protection afforded by s. 630 or in the articles and shareholders are deprived of their veto to prevent such changes[8]. The classic example of this would be the House of Lords decision in *Adelaide Electric Co v Prudential Assurance*[9] where the payment of dividends being moved to Australia along with the business resulted in a lesser payment given the relative strengths of the Australian and British currencies of the time but the underlying right, to receive the dividend, was unchanged.

Permitted variation of one class of share affecting another indirectly has also exposed reluctance by the courts to increase the scope of the term "variation". In *Greenhalgh v Arderne Cinemas*[10] a subdivision of one class of shares deprived the holder of one class of his power to block a special

resolution. Lord Greene MR, delivering the leading judgement, said that the preference shareholders in light of the wording of the articles “ are affected, as a matter of business. As a matter of law, I am quite unable to hold that, as a result of the transaction, the rights are varied; they remain what they always were.”[11] However, he also conceded that if the right of one vote per share was changed this would constitute a variation but in the present case it had remained constant throughout despite the subdivision[12]. Nevertheless, the court held that this could not come under the meaning of “ variation” and echoes to some extent the decision in *White v Bristol Aeroplane*[13] where an increase in one class of shares was also held to fail the variance test in respect of another class “ notwithstanding that the result was to alter the voting equilibrium of the classes”[14].

Although on the face of matters this would seem to be a major concern Lord Greene’s rationale makes sense in that his solution is clearly designed to protect businesses from being vetoed every time they make an approved decision which would affect the class rights of other shareholders. Logically speaking it would be a barrier if in a free market society every time one set of class rights were varied and another was affected albeit indirectly that class would have a veto on the proposal: this would stifle business and freedom to contract.

Another main concern is preference shares but this has been alleviated somewhat by a contractual solution called the “ spens formula”[15]. The case of *Dimbula Valley (Ceylon) Tea Co v Laurie*[16] saw a capitalisation of undistributed profits realised in a bonus issue to ordinary shareholders. The

effect of this was to deny the preference shareholders future profits on winding up or reduction. The court held this did not constitute a variation of the preference shareholders' rights where they were non-participating with respect to dividends but participating with respect to capital[17]. The converse situation to the above, in *House of Fraser v AGCE Investments Ltd*[18], saw the preference shareholders being deprived of valuable dividend rights. Gower and Davies have highlighted this as being unfair on the preference shareholders though they do point out that under the "spens formula" preference shares which are non participating in a winding-up are protected by the provision of a guarantee that any redemption or return of capital will be linked to "the average quoted market price of the shares in the month before"[19]. They conclude though by warning that this contractual solution applies only to listed companies. Consequently preference shareholders in unquoted companies remain a concern in that the ratios of *Dimbula Valley* and *House of Fraser* will still expose them to risk either losing valuable dividend rights or denying them the participation in the profits on winding-up or reduction.

Finally there are issues of ranking to be discussed. The courts have flatly rejected any moves to invalidate a proposal which either ranks new share issues on an equal basis with existing shares or which ranks new ordinary preference shares ahead of ordinary shares but behind existing preference shares[20]. Of course the latter case would be different if the new shares were to be ranked ahead of both existing preference and ordinary shares and that would indeed constitute a variation under the companies'

Memorandum of Association which stated:

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“ cl. 5...indicated that the preferences conferred on the holders of preference shares were to be preserved, and only modified, affected, varied, extended or surrendered with the sanction of an extraordinary resolution of the members of the class”.

It is important to note that many cases above do not default to the statutory position but include protection against variations in their respective articles of associations or memorandums of association which can be more demanding, for example, in terms of the level of approval required. Such provisions balance out many of the concerns addressed above in respect of the courts' interpretation of the term “ variation” though it should be noted that such clauses cannot impose a lower standard of procedure. S. 630(2) of the 2006 Act notes that the default rules contained in the statute may be superseded by provision for variation contained in the articles of association. S. 630(5) provides further protection however by ensuring that any alteration of the variation procedure itself in the articles attracts the protection for class rights.

Thus any concerns that a company could simply alter a high variation procedure to a much lower one by as. 21 procedure are defeated by the inclusion of s. 630(5). Gower and Davies do sound a cautionary note here though: “ This [a simple s. 21 alteration of the variation procedure] will not be possible as a result of s. 630(5), unless, presumably, the articles themselves expressly provide a less demanding way of amending the variation procedure than the default rule in the statute”[21]. So it is possible for a company to escape many of the provisions of s. 630 but they must still

deal with the narrow interpretations given to variation regardless of the actual wording they choose.

Palmer[22] made some observations on both *White v Bristol Aeroplane Co* and *John Smith's Tadcaster Brewery Co Ltd* as being examples where the interpretation of the articles was unsatisfactory. He expresses some scepticism about the construction of the word "affected" but notes that firstly s. 630 is of little help where the articles contain such wording and secondly that there may be a remedy available in the form of the unfairly prejudicial conduct remedy[23].

The Court of Appeal in *John Smith's Tadcaster Brewery* noted that more explicit wording would be needed to allow the clause in the articles protecting preference shareholders to be extended to a bonus issue to ordinary shareholders. Many articles do include specific protection of preference shareholders. In *Northern Engineering Industries Plc, Re*[24] a clause in the articles which stipulated that a reduction in capital would require the consent of the company's preference shareholders was upheld and enforced when a proposal to cancel their shares was tabled[25].

Finally under s. 630(3) and s. 633 a company could firstly conceivably make use of the entrenchment mechanism of s. 22 in light of s. 630 being "without prejudice to any other restrictions on the variation of rights" and secondly also apply to a court to review a majority decision. S. 22 empowers a company to set an even higher bar for amendments to the variation procedure in the articles, the example given by Gower and Davies being raising consent levels to 100%.

S. 633 provides a further safeguard in that it enables a court review of the majority's decision[26]. The criteria for review is quite high though, requiring that dissenting members of a class hold 15% of the shares of that class and that they exercise the right to challenge within 21 days. Once the application is made the variation does not have any effect until it is either confirmed or cancelled in light of the courts decision on whether there has been unfair prejudice to the shareholders' in question[27].

In conclusion the interpretation of " variation" in the Companies Act s. 630 is very narrow yet the statement is mostly true because any concerns which the section has exposed have been alleviated by the review procedure under s. 633, the ability of companies' to alter their articles and the s. 22 entrenchment mechanisms. Problems persist with preference shareholders in unquoted companies but the inclusion of carefully worded protection in the articles goes some way to ending any notable concern and striking the correct balance between the protection of holders of class rights and the protection of business practice.

## **Part 2**

(a)The question here is covered by the Sale of Goods Act 1979. S. 19(1) empowers the seller to make a reservation of title and is a logical consequence of the rule that property in the goods passes when the parties intend it to pass. The clause in our contract is an " all sums" clause which was held to be valid in *Armour v Thyssen*[28] in the House of Lords. The reference to indebtedness means that the property will remain with the seller until all such debts and obligations owed to the seller are discharged.



Atiyah[29] points to the two requirements here for such a clause to operate: The pallets of paper have not yet been touched and they are on Wye's premises: the conditions have been fulfilled.

The purchase price has been paid and the contract concluded under s. 27 of the 1979 Act but we do not have any information regarding any other outstanding debts or obligations upon Wye. Obviously if there was any kind of security or charge this would have to be discharged before any thoughts of selling the property on could be entertained. Assuming there are no outstanding debts and the purchase price has been fully paid then title in the property has passed to Wye and accordingly the option open to Linda is to sell the paper for a good price.

If there are still debts outstanding then s. 25(1) of the 1979 Act may be of assistance: a buyer in possession of goods which are still owned by a seller may give good title to those goods to a third party purchaser, provided that the third party is in good faith and has no notice of the rights of the seller in the goods. This section can effectively defeat the retention of title clause in the original contract. Regarding the final part of the clause: the contract not being registered in the Registrar of Companies is no barrier to any subsequent sale as noted by s. 62(4) of the 1979 Act and Atiyah[30].

(b) The legal position regarding John is contained in s. 11 of the Company Directors Disqualification Act 1986[31]. Breach of this section attracts criminal liability as well as potentially attracting personal liability for the company's debts though as Gower and Davies note this may not be of much use given that John probably has little funds[32]. Most importantly this

matter is an automatic disqualification and he can be removed from the payroll with immediate effect thus minimising his potential claim as a preferential creditor on the liquidation.

Martin has been acting in the management of Wye Ltd even though he has been prohibited from doing so under s. 1(1)[33]. Ss13 and 14 outline the criminal penalties but more important in Martin's example is the personal liability for debts and liabilities of the company incurred while he was in breach of the order under s. 15(1)(a). This could be a very good way minimising the debts to be paid back though it would depend on the time he has been managing in breach of the order.

(c) There is no formal contract between the two parties here. The essentials of English contract law need firstly a promise, secondly consideration for that promise and thirdly the offeror's promise must be made to induce the consideration (Elliot contract law). The half-hearted promise made by Barchester could well be unenforceable as an unequivocal promise is required. If we can prove that there is a contract in place then Linda can sue the law school for breach of contract since they have clearly not fulfilled their part of the contract.

The promise made by Barchester is one which looks to the future and could be interpreted as a statement of intention. If there is any element of misrepresentation then there would be a clear breach of contract and Linda would be able sue them to swell the assets of the Wye Limited.

(d) Does this charge have to be registered? It is secured over the property of Wye and would come under s. 860(7)(a) of the 2006 Act. The requirement to keep a register of all charges created by the company is found under s. 876(2) of the Companies Act 2006.

S. 876(3) and (4) state that a fine will be imposed if there has been failure to comply with this requirement but the case of *Wright v Horton* demonstrates that the validity of the charge will not be affected in any way. Care has to be taken with the timing of the registration as well as it must have been registered within 21 days of the creation of the charge: failure to do so would render the charge invalid against the liquidator of the company. The loan of ? 150, 000 would then be immediately payable under s. 874(3) should any part be void. As for the unsecured creditors trying to claim the prescribed part s. 176A of the Insolvency Act 1986 confirms that they are entitled to this and recent case law *Airbase (UK) Limited*[34] has established that neither fixed or floating charge holders may share in the prescribed part.

Linda should register the charge in Wye's own register as quickly as possible to avoid a fine. The charge over property could well come under a substantial property transaction under the Companies Act 2006 s. 190 as the asset here (the warehouse) could be worth over ? 100, 000. If this is true then the transaction is voidable at the instance of the company as shareholders must give their consent.

(e) The Insolvency Act 1986 governs floating charges. That the ? 75, 000 was paid 37 minutes before the execution of the charge document is not important. The timing of the floating charge may be significant though as s.

245 of the 1986 Act will strike down any charge to an unconnected person within 12 months of a winding up order. This suggests invalidity of this floating charge as it was created within 10 months of the winding up date although arguably it could slip outside of the technical insolvency dates. Linda should challenge the floating charge under s. 245.

There is also no mention of its registration as required by part 25 of the Companies Act 2006. s. 860(1) of the 2006 Act requires floating charges to be registered at Companies House within 21 days of creation. If there has been no registration then this security is void against Linda the liquidator anyway.

The absence of a negative pledge clause means that the floating charge will rank behind fixed securities made real rights before attachment of the floating charge. So Bee Bank plc will be at a disadvantage when the floating charge crystallises. Furthermore, competing floating charges rank in order of registration. The floating charge, if registered, will already have crystallised due to the liquidation and will have already had the effect of depriving Wye Ltd of all the assets under the floating charge although ranking behind fixed securities which are real rights. Again since the registration of the floating charge is the responsibility of Wye Ltd the loan would be immediately payable if the charge was later held to be invalid under s. 874(3).

(f) This is a creditors voluntary winding up under the Insolvency Act 1986. There could, by piercing the corporate veil, be liability for the directors if the company sold to was a company which was controlled or owned by a director in this transaction and was a sham company[35]. It all depends on the

nature and composition of the company which has received the corporate assets in question and indeed the inclination of the court in question.

The assets belong to the company and liquidators have a duty to ensure that the interests of creditors are protected under s. 107 of the 1986 Act. If an asset has been sold at below value either in the six months before liquidation or 2 years if a connected person, the liquidator can challenge the transfer and claim against the recipient and/or the directors, making the transaction void. S. 238 (4)(b) is the relevant section[36].

The timing aspect comes close to the wire: it should be noted that the date of the winding up order is 15th October 2010 and the date of the sale is 23rd April 2010 which places this transaction just under 6 months before the winding up of the company so whether the person is connected or not is irrelevant. The relevant date though is when the company is technically insolvent which is presumably long before the winding-up order is granted. Regardless, this transaction, if it should transpire that it was sold for an under value, can be voided by Linda and she can make a claim against the director(s) involved. The property might be able to be returned and vested in the company under s. 241 but there are safeguards for third parties acquiring in good faith and this is not guaranteed. If the person sold to was a connected person with knowledge then the antique clock will be vested in the company again.

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Statute

Companies Act 2006 & 1985 Sale of Goods Act 1979

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money or money's worth, of the consideration provided by the company."