

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
10 MAY 1973
25 RUSSELL SQUARE
LONDON W.C.1

No. 25 of 1971

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES,
COURT OF APPEAL.

B E T W E E N

INGEBORG GERDA PETSCH Appellant
(Plaintiff)

AND

10 FREDERICK HUGH KENNEDY, IN-ERID PTY.
LIMITED and WENTWORTH DEVELOPMENTS
No. 2 PTY. LIMITED Respondents
(Defendants)

CASE FOR THE APPELLANT

RECORD

A. INTRODUCTION

- 1. By Originating Summons dated the 20th day of October 1970 the appellant commenced a suit in the Supreme Court of New South Wales in its Equitable Jurisdiction seeking certain injunctions and declarations. The suit came on for hearing before Street, J. on the 6th 13th and 16th November, 1970. On the 16th November, 1970 His Honour gave judgment and dismissed the suit. pp. 1-3
- 20 2. The Appellant appealed to the Supreme Court of New South Wales, Court of Appeal, and the Court of Appeal by majority (Jacobs and Holmes, JJ.A., Moffitt, J.A. dissenting) ordered that the appeal be dismissed. This is an appeal by leave of the Supreme Court of New South Wales from that order. pp. 104-118
- 30 3. The Appellant appealed to the Supreme Court of New South Wales, Court of Appeal, and the Court of Appeal by majority (Jacobs and Holmes, JJ.A., Moffitt, J.A. dissenting) ordered that the appeal be dismissed. This is an appeal by leave of the Supreme Court of New South Wales from that order. pp. 118-120
- 4. The Appellant appealed to the Supreme Court of New South Wales, Court of Appeal, and the Court of Appeal by majority (Jacobs and Holmes, JJ.A., Moffitt, J.A. dissenting) ordered that the appeal be dismissed. This is an appeal by leave of the Supreme Court of New South Wales from that order. pp.120-133
- 5. The Appellant appealed to the Supreme Court of New South Wales, Court of Appeal, and the Court of Appeal by majority (Jacobs and Holmes, JJ.A., Moffitt, J.A. dissenting) ordered that the appeal be dismissed. This is an appeal by leave of the Supreme Court of New South Wales from that order. p.134
- 6. The Appellant appealed to the Supreme Court of New South Wales, Court of Appeal, and the Court of Appeal by majority (Jacobs and Holmes, JJ.A., Moffitt, J.A. dissenting) ordered that the appeal be dismissed. This is an appeal by leave of the Supreme Court of New South Wales from that order. pp.135-160
- 7. The Appellant appealed to the Supreme Court of New South Wales, Court of Appeal, and the Court of Appeal by majority (Jacobs and Holmes, JJ.A., Moffitt, J.A. dissenting) ordered that the appeal be dismissed. This is an appeal by leave of the Supreme Court of New South Wales from that order. pp.160-161

RECORD

3. The suit concerns the purported disposal by Ingrid Pty. Limited the secondnamed respondent of what is, in effect, its entire undertaking.
- p.3 11.31-35
4. The secondnamed respondent is a proprietary company incorporated in New South Wales, and the appellant and the firstnamed respondent hold the whole of its issued capital equally between them. They are the only people who claim to be directors of it.
- p.4 11.2-11
5. The secondnamed respondent owns a valuable property at Darlinghurst, an inner suburb of Sydney, on which is erected a building known as "Farrell House". It carries on the business of a residential proprietor on that property. It was incorporated for the purpose of acquiring that property and the residential business is its sole undertaking. 10
- Ex 'A' pp. 163-169
6. On the 4th day of August 1970 the common seal of the secondnamed respondent was affixed to what purported to be a contract for the sale of Farrell House by the secondnamed respondent to the thirdnamed respondent, a property developer, (hereinafter called "Wentworth") for the sum of \$720,000.00. The seal was so affixed by the Secretary of Ingrid Pty. Limited, and counter-signed by the firstnamed respondent, at what purported to be a directors meeting of the company on the evening of the 4th day of August 1970. 20
- Ex 'E' pp. 189-192
Ex 'D' pp. 187-188
7. The appellant maintains that what occurred on the evening of the 4th day of August 1970 did not amount to a properly convened and constituted meeting of directors of the secondnamed respondent and that there was no valid and effective resolution for the sale of Farrell House. She also maintains that, in any event, the firstnamed respondent was not a director of the secondnamed respondent at the relevant time. For those reasons she contends that the secondnamed defendant is not bound to proceed with the sale and in the suit seeks a declaration to that effect, an injunction to restrain the parties from completing the sale (which remains uncompleted) and consequential relief. 30 40

RECORD

8. Wentworth was represented at what purported to be the directors meeting of the 4th day of August 1970. It was joined in the suit as a defendant.

Ex.D. p.187
11. 18-20

9. The secondnamed respondent originally filed a submitting appearance in the suit but that appearance was withdrawn and it has taken no further part in the proceedings.

B. MATERIAL FACTS

10 10. Ingrid Pty. Limited, the secondnamed respondent, was incorporated on the 11th July 1967. The original subscribers to the company were Miss Petsch, the appellant, and Mr. F. H. Kennedy, the firstnamed respondent. The Articles of Association of the company are, so far as is material, in the form set out in Table A of the Fourth Schedule to the Companies Act 1961 of New South Wales.

p.3 11.24-
27

Ex.A. pp.
167-168
Ex.A. p.169

20 11. There are 25,000 issued shares of \$1.00 in the capital of Ingrid Pty. Limited. 12,500 of those shares are and have at all material times been held by Miss Petsch, and the other 12,500 are and have at all material times been held by Mr. F. H. Kennedy.

p.3 11.32-34

30 12. The sole business of Ingrid Pty. Limited at all material times since its incorporation has been the ownership and management of a residential building known as "Farrell House" situated at 7/13 Farrell Avenue, Darlinghurst. That property was originally purchased under a contract of sale dated the 30th May 1967 in which Miss Petsch was shown as purchaser on behalf of a company to be formed. Subsequently the company was incorporated and executed a novation agreement dated the 24th July 1967 under which it became the purchaser of "Farrell House".

p.4 11.2-11

40 13. Although on the evidence Miss Petsch and Mr. F. H. Kennedy are in some disagreement about their respective roles in the management of the business of Ingrid Pty. Limited, it is clear that at all material times Miss Petsch has acted

RECORD

- p.4 ll. 11-17
p.19 ll.13-20
p.4 ll.18-20
- p.36 ll.3-4
p.62 ll.30-33
p.79 l.15-p.80
l.15
- p.4 ll.35-41
Ex.D p.170-171
- Ex.D pp.170-188
- p.4 l.46 to p.5 l.1
- Ex.A. p.169
- as its managing director and that she has played the major role in the day to day management of the company's residential business. She claims, and Mr. Kennedy denies, that she has in fact controlled the affairs of the company since its incorporation.
14. Miss Petsch and Mr. F. H. Kennedy have lived together for about fourteen years. Mr. Kennedy was 67 years of age at the time of the institution of the suit, and suffers from a disease which affects his powers of recollection in ways which he described in his evidence. 10
15. At a meeting held shortly after the incorporation of the company in 1967, the appellant, the firstnamed respondent, and the firstnamed respondent's brother Mr. G. W. Kennedy, were appointed directors of Ingrid Pty. Limited. Mr. G. W. Kennedy has never taken any part in the management of the affairs of the company and has never held any share in the capital of the company. It is not claimed by any party that he was a director of the company at any material time after 1968. 20
16. The Minute Book of Ingrid Pty. Limited contains no record of any election or appointment of directors of the company subsequent to July 1967. The appellant asserts, and no party denies, that there was never any resolution passed at any meeting of the company subsequent to the 14th July 1967 re-appointing the appellant and the firstnamed respondent directors of the company. 30
17. The Articles of Association of Ingrid Pty. Limited have at all material times contained the following provisions :
- "63. The number of the directors and the names of the first directors shall be determined in writing by the subscribers of the memorandum of association or a majority of them. 40
- "64. At the first annual general meeting of the company all the directors shall

- " retire from office, and at the annual general meeting in every subsequent year one-third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest one-third shall retire from office. A retiring director shall be eligible for re-election.
- 10 "65. The directors to retire in every year shall be those who have been longest in office since their last election, but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.
- 20 "66. The company at the meeting at which a director so retires may fill the vacated office by electing a person thereto, and in default the retiring director shall if offering himself for re-election and not being disqualified under the Act from holding office as a director be deemed to have been re-elected, unless at that meeting it is expressly resolved not to fill the vacated office or unless a resolution for the re-election of that director is put to the meeting and lost."
- 30

18. At all material times the appellant and the firstnamed respondent have acted as de facto directors of Ingrid Pty. Limited. Ex.D pp.170-188.
Ex.1 pp.195-197
19. For some months prior to August 1970 Wentworth, through its representative, a Mr. Wynyard, had been seeking to purchase Farrell House. Mr. Wynyard initially approached Miss Petsch with an offer, but she told him she would not sell for less than a figure which he was not prepared to pay. She also expressed to him a reluctance to sell the property at all. p.5 11.7-20
p.8111.36-40
p.82.11.9-26
p.83 11.24-30
p.88 11.28-41
p.89 1.7to p.90.1.5.
p.94 1.42 to
p.95 1.42
p.96 1.30 to
p.97 1.5.
pp.56-60.
- 40 20. After a time Mr. Wynyard took up his negotiations with Mr. F. H. Kennedy, and apparently reached agreement with Mr. Kennedy as to a sale price.

RECORD

Ex.A. p.168

p.21

p.4 11.25-34

p.64 11.25-28

p.74 1.30

p.45 1.31to

p.46 1.2.

p.47 11.14 -

33

p.51 11.37-40

pp.81-84

p.86 11.34-39

pp.93 to 97

p.97 11.10-19

p.99 - 11.13-

14

p.99 1.41 to

p.100 1.12

pp.49-53

p.60 11.35-40

pp. 61-64

pp.65-67

pp.49-53

p.60 11.35-40

pp.61-64

pp.65-67

21. The Solicitor who originally acted for Miss Petsch and Mr. Kennedy upon the incorporation of Ingrid Pty. Limited was a Mr. Bruce Evans. The company's accountant, who was in charge of the keeping of its formal records, was a Mr. Bennell.

22. As was well known to Mr. Kennedy, Mr. Wynyard and Mr. Bennell, Miss Petsch was convinced, as a result of something that she believed Mr. Evans had told her at the time of the incorporation of the company, that Farrell House could never be sold without her consent. Whatever her reasons for this belief, there is no doubt that she not only held it firmly, but expressed it vehemently and frequently whenever a discussion as to the proposed sale of the property came up. Associated with this was a view which she strongly held that she had been the moving party in forming the company and acquiring the property and that she had a moral right to veto its sale.

10

20

23. As at early August 1970, Messrs. Kennedy and Wynyard had reached agreement upon a sale price for Farrell House, and Mr. Bennell knew of the negotiations that had taken place and himself approved of the sale. It was known, however, that there would be great difficulty if not impossibility, in procuring the consent of Miss Petsch to the transaction.

24. In those circumstances a strategem was conceived by Mr. Kennedy, after taking legal advice and discussing the matter with Mr. Evans or Mr. Bennell or both of them, whereby it was hoped that a sale of the property would be forced upon Miss Petsch. It was decided that a "meeting" of the "directors" of Ingrid Pty. Limited, to be attended by Mr. Bennell as secretary of the company, and by Mr. Wynyard as representative of the proposed purchaser, would be held at the home unit occupied by Miss Petsch and Mr. Kennedy at about 8 p.m. on the evening of the 4th August 1970. This home unit was located away from "Farrell House." It was also deliberately decided that no notice of that meeting should be given to Miss Petsch, and that at the meeting Mr. Kennedy should take the chair, and, if necessary, exercise the casting vote

30

40

which the Chairman of Directors was given by the Articles of Association of the company.

25. On the evening of the 4th August 1970, Miss Petsch returned home to the unit at about 8.p.m. and when she arrived she found Mr. Kennedy and Mr. Wynyard in the lounge room. Mr. Kennedy told her that Mr. Bennell would be coming soon to arrange for the sale of Farrell House. Miss Petsch stated then, for the first of many times on that evening, that Farrell House could not and would not be sold without her consent. She became upset, and went into a bedroom. Shortly afterwards Mr. Bennell arrived and she was called out to meet him. She came out, greeted him, and then burst into tears and went back into the bedroom. After a time she returned to the lounge room and there then transpired what was claimed to be a meeting of the directors of Ingrid Pty. Limited.

pp. 5 - 6
pp. 19-20
pp.21-23
pp.34-39
pp.42-49
pp.50-53
pp.63-78

26. There is disagreement upon the evidence, which will be analysed below, as to what next occurred. There is, on the other hand, also a substantial measure of agreement. Mr. Wynyard was not called as a witness in the proceedings, but both Mr. Bennell and Mr. Kennedy agreed that the following hour and a half was occupied by attempts by Mr. Wynyard to persuade Miss Petsch to agree to the sale and repeated assertions by her that there was no power in anyone to arrange for the sale without her consent coupled with lengthy digressions upon the subject of her personal association with Mr. Kennedy. After this went on for the time mentioned Mr. Kennedy purported to cause the common seal of the company to be affixed to the contract of sale it being stated in evidence by both Mr. Kennedy and Mr. Bennell that he purported to move and pass a resolution exercising his casting vote as Chairman. It also appears from the evidence that on the same occasion Mr. Kennedy affixed the common seal of the company to a memorandum of transfer of the subject property in anticipation of completion.

p.100 1.16
pp. 5 - 6
pp. 19-20
pp.21-23
pp.34-39
pp.42-49
pp.50-53
pp.63-78

C. THE PRINCIPAL ISSUES

27. The main issues which were dealt with before Street, J. and in the Court of Appeal were:

RECORD

- (a) Was there on the 4th August 1970 a properly convened directors meeting at which was passed a valid resolution that Ingrid Pty. Limited enter into the subject contract for the sale of Farrell House?
- (b) Was Mr. Kennedy as at the 4th August 1970 a director of Ingrid Pty. Limited?

28. Wentworth argued before Street, J. and the Court of Appeal that, if the second of the above issues were resolved in favour of the appellant, she would nevertheless fail in the suit, in whole or in part, because of the principles known as the Rule in Turquand's Case concerning protection of outsiders from irregularities in the internal management of a company. However, no similar argument was addressed concerning the first issue. 10

29. Street, J. and the majority of the Court of Appeal held against the appellant on both issues. Moffitt, J.A. held that the appellant should have succeeded on the first issue and that she should therefore have succeeded in the suit. His Honour did not deal with the second issue. 20

D. THE ISSUE AS TO THE MEETING AND RESOLUTION.

30. There was, on the admitted facts in this case, a deliberate attempt to foist upon Miss Petsch, without any notice, a meeting of directors and to force upon her, by means of a dubious claim on the part of Mr. Kennedy to have a casting vote, a resolution to dispose of the company's undertaking. This conduct was expressly deprecated by Street, J. and Jacobs, J.A. and was described by Moffitt, J.A. as a "discreditable manoeuvre". The question is whether it succeeded. 30

p.117 ll.16-21
p.130 l.30
p.135 l.38

31. Mr. Kennedy admitted in cross-examination that Miss Petsch was given no notice of the meeting. He also admitted that the decision that she be given no notice was his decision, taken deliberately, after legal advice, because it was feared that if she had notice she might not have attended the meeting. 40

p.64 ll.3-14

32. It was argued for the respondents in the Courts below that no injustice was done to Miss

Petsch by failing to give her notice, for the reason that there was nothing she could have done to prevent the sale even if she had notice. Leaving aside the legal relevance of that proposition, its correctness as a matter of fact is denied by the appellant. Apart from anything else, if Miss Petsch had been given notice of what was proposed she might have taken legal advice, and it is at least possible on the facts that she would have been advised, for one thing, that she did not have to submit to the claim by Mr. Kennedy to be Chairman of Directors and to have a casting vote.

10
20
33. All the Judges who considered the matter in the Courts below accepted the proposition that notice of a meeting of directors of a company must be given if the meeting is to be valid and that one director cannot force a meeting upon another director simply because they happen to be physically present at the same place and at the same time. (Barron -v- Potter, 1941 1 Ch. 895; Gower "Modern Company Law", 3rd Edn. 138.) Street, J. said:

p.115 ll.
11-33

30
40
"Notice must always be given of any meeting of directors of a company. This general proposition does not necessarily require written notice substantially in advance of a meeting of directors of a company such as the present, that is to say, a company with but two shareholders who are also the only directors. But mere coincident physical presence of all directors does not constitute a formal directors meeting Notice of a meeting to be held instanter (such as was given to Miss Petsch on the night of the 4th August) would ordinarily be insufficient if objected to by the recipient. In the absence of agreement, express or acquiescent, by all directors to hold a meeting instanter the law requires the notice to be reasonable, subject always to any specific provision in the Articles."

34. The Judges who decided the case against the appellant in the Courts below on this issue,

RECORD

all did so on the basis that she, by her conduct, waived her right to notice.

35. There was no evidence, and it was never suggested, that the appellant expressly waived her right to notice, and the question, then, was whether what she did and said on the occasion amounted in law to a waiver.

36. The evidence in the suit was given on affidavit and orally. The witnesses called were the appellant, Mr. Kennedy, and Mr. Bennell. Mr. Wynyard was not called as a witness nor was any explanation given as to the failure to call him. Street, J. held that all of the witnesses were witnesses of truth. He expressly found that the appellant was an honest reliable witness and said:

pp.105-106

p.106 11.13-
14

p.105 1.47

"I regard her as a witness of credit."

His Honour made one qualification to his general acceptance of the appellant's evidence (a qualification in her favour), pointing out that during the course of her cross-examination she had on a number of occasions answered without demur questions which were put to her on the basis that what took place on the night of the 4th August 1970 was a meeting. His Honour said that he did not consider it fair to hold that against her, and expressly refused to draw any inferences adverse to her case from that fact. His Honour also accepted Mr. Kennedy as an honest witness, pointing out, however, that he suffered from a disease which affected his powers of recollection and to that extent the reliability of his evidence was somewhat impaired.

pp.105-106

37. The witness upon whose evidence Street, J. placed greatest reliance, however, was Mr. Bennell, the Accountant, who was the Secretary of the Company. The appellant does not quarrel with His Honour's acceptance of Mr. Bennell as a witness of truth, but respectfully submits that His Honour failed to give sufficient attention to important discrepancies between the affidavit evidence of Mr. Bennell and the oral evidence that he gave when being cross-examined. The appellant generally submits, with respect that it

is only in the judgment of Moffitt, J.A. that there is to be found a sufficient analysis of the evidence in the case, with proper regard being had to the difference between general conclusions of fact stated in a summary way in affidavit form and an elaboration of the actual facts upon which the general conclusions were based in the course of oral evidence.

10 38. The relevant evidence may be summarised as follows:

- (a) At about 8 p.m. on the evening in question Miss Petsch arrived at the home unit in which she lived with Mr. Kennedy. pp. 5-6
pp.19-20
pp.21-23
- (b) On her arrival she found present there Mr. Kennedy and Mr. Wynyard. pp.34-39
pp.42-49
pp.50-52
pp.63-78
- (c) Well knowing the purpose for which Mr. Wynyard would be there she became upset and went into the bedroom.
- 20 (d) After a short time Mr. Bennell arrived and she was called out of the bedroom to greet him. She did so, became upset again and returned to the bedroom.
- 30 (e) After a short time Miss Petsch went out to the lounge-diningroom of the home unit and saw the three gentlemen seated around a table. There is a disagreement on the evidence as to where she then seated herself. There is also contradictory evidence as to what was then said by Messrs. Kennedy and Bennell. The evidence in question was directed to showing that an announcement was made by Mr. Kennedy that a directors meeting was then convened, and there is evidence, particularly in affidavit form, which would support a conclusion that such an announcement was made. However, when all the evidence, and in particular the oral evidence is considered in detail it falls short of establishing that fact.
- 40 (f) It appears on the evidence that the following hour and a half was occupied by

RECORD

Mr. Wynyard and Miss Petsch. Mr. Kennedy "handed over" to Mr. Wynyard in an obvious last attempt to overcome Miss Petsch's opposition to the sale and Mr. Wynyard, speaking on behalf of the proposed purchaser, endeavoured to persuade her of the advantages of the proposed transaction. Miss Petsch for her part remained unyielding. According to Mr. Kennedy "she ranted and raved". According to all the witnesses, she repeatedly asserted that there was no power in anyone to force a sale on her, and she spoke of what Mr. Kennedy described as "the irrelevance of the meeting." She also spoke at length upon her personal relationship with Mr. Kennedy. 10

(g) The next thing that happened is, it is submitted, of great importance and a very different account of it is given in the affidavits from what appears in the oral evidence. On any view of the matter, the discussion between Mr. Wynyard and Miss Petsch was terminated after about 1½ hours and Mr. Kennedy said: "I move that the offer made by Wentworth Developments No. 2 Pty. Limited be accepted". Miss Petsch who was then sitting either in a lounge chair or at the table said something which is recorded in the "Minutes" of the "meeting" as a vote against the motion. It is also stated by Mr. Bennell in his affidavit to be an expression of opposition to the motion. Mr. Bennell, however, in his oral evidence puts quite a different complexion upon it. The evidence is as follows : 20 30 40

p.47 11.16-33

"Q. What was the next thing that anyone said?" "A. Miss Petsch immediately said she objected to selling Farrell house. 40

Q. What were the actual words? She said 'You can't sell it without my consent'?
A. Yes she did say that.

Q. What was the next thing that anyone said? A. Mr. Kennedy then stated

that, as Chairman of the company, he had a casting vote and he would then exercise this right as Chairman.

Q. What was then said? A. Miss Petsch again objected.

Q. What did she say? A. I think she said 'You can't sell Farrell House without my permission'.

10 Q. What was the next thing that was said?
A. Mr. Kennedy said that as he had the casting vote he declared the motion carried."

(h) Subsequently the common seal of the company was applied, not only to the contract the subject of the alleged resolution, but also to a memorandum of transfer of the subject property which had been prepared and brought along to the meeting.

pp.47-48

39. It is submitted :

20 (a) that the conduct of the appellant described above does not amount in law to a waiver of her right to notice of the directors meeting;

(b) that Street, J. and the majority of the members of the Court of Appeal were in error in drawing the inference that the appellant acquiesced in the holding of the meeting without notice or otherwise gave such agreement as was necessary to abandon her right to notice.

30

E. THE ISSUE AS TO WHETHER THE FIRST RESPONDENT WAS A DIRECTOR

40. The facts relating to this aspect of the matter may be shortly stated and are not in dispute:

(a) Ingrid Pty. Limited was incorporated on the 11th day of July 1967.

p.3.

(b) The subscribing shareholders were Miss Petsch and Mr. F. H. Kennedy and they have at all

"A" p.168
p.3

RECORD

material times each held half of the issued capital.

- Ex.D pp.170-188 (c) The Minutes of Meetings of the Company are all in evidence as Exhibit "D"
- pp. 170-171 (d) At a meeting of subscribers of the Company held on the 14th day of July 1967 it was resolved that the first directors be Mr. F. H. Kennedy, Miss Petsch and Mr. G. W. Kennedy.
- p.172 (e) At a meeting of directors held on the same day it was resolved that Mr. F. H. Kennedy be appointed Chairman of Directors and that Miss Petsch be appointed Managing Director. 10
- p.3 ll.34-35 (f) Mr. G. W. Kennedy never took up his qualifying share (cf. Table A Article 71).
- p.180-188 (g) The first annual general meeting of shareholders was held on 30th December 1968. Neither at that meeting nor at any subsequent general meeting was any business whatever transacted concerning the occupancy by the directors of their office. No person ever expressly offered himself for election or re-election as a director. 20
- Ex. D pp.170-188 (h) At all material times, Miss Petsch and Mr. F. H. Kennedy signed reports as directors, signed bank authorities, met as directors and declared dividends and otherwise acted as directors. 30
Ex. 1 pp.195-197

41. The appellant submits that in those circumstances Mr. F. H. Kennedy did not hold office as a director of Ingrid Pty. Limited on the 4th August 1970. (cf. Article 64; In re Great Northern Salt and Chemical Works, 1890 44 Ch. D. 472). It is not material to consider whether or not Miss Petsch was maintained in her office by virtue of Article 91.

42. The Respondents answered this submission in the Courts below by relying upon the provisions of article 66. 40

Street, J. held that Article 66 did apply to keep Mr. F. M. Kennedy in office, on the basis that he impliedly offered himself for re-election at each annual general meeting and was therefore deemed to have been re-elected. His Honour based this conclusion upon the fact that at all material times the affairs of the company were conducted on the basis that Mr. Kennedy was a director and, in particular, on the fact that the general meetings "were conducted and concluded on the basis that the directors were continuing in office".

pp. 110-115

10

This view was supported by Jacobs, J.A. (with whom Holmes, J.A. agreed). Jacobs, J.A. held that no express offer for re-election is necessary for the purposes of Article 66 and that all that is necessary is that the director by his words or by his conduct at or prior to the meeting in question shows that he is prepared to continue in the office of a director.

pp.131-133
p.134

20

43. It is respectfully submitted that there is no evidence to support a finding that Mr. Kennedy offered himself for re-election as a director expressly or impliedly, and that the process of reasoning employed above amounts to the use of a fiction. The question becomes one of imputation rather than implication.

44. It is submitted that the history of Article 66 is instructive:

30

(a) Table A of the Companies Act 1862 of the United Kingdom included an article in the following form:

"62. If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week, at the same time and place, and if at such adjourned meeting the places of the vacating directors are not filled up, the vacating directors, or such of them as have not had their places filled up, shall continue in office until the

40

RECORD

ordinary meeting in the next year, and so on from time to time until their places are filled up."

- (b) In Great Northern Salt & Chemical Works (supra) Stirling, J. said of the article in the above form:

"But it seems to me that that portion of Article 62 might very fairly be read as being a clause of the nature which is commonly described as directory only, and that the meaning of it is, that if for any reason either the first meeting, or the adjourned meeting at which the election of directors ought to take place does not proceed validly to fill up the places of the vacating directors, then they are to continue in office." 10

- (c) In Spencer -v- Kennedy (1926 1 Ch. 125) the relevant article was in the following form: 20

"82. If at any meeting at which an election of directors ought to take place the places of the vacating directors are not filled up, the meeting shall stand adjourned till the same day in the next week at the same time and place, and, if at the adjourned meeting the places of the vacating directors are not filled up, the vacating directors or such of them as have not had their places filled up, shall be deemed to have been re-elected at the adjourned meeting." 30

The headnote in the report of that case which read, inter alia,:

"semble art. 82 only applies to a case where the retirement of a director by rotation and the necessity for his re-election or replacement is entirely lost sight of at the annual meeting" 40

was later criticized as inaccurate in Holt v. Catterall & Ors., 1931 47 T.L.R. 332.

(d) In Robert Batcheller & Sons Limited -v- Batcheller (1945 1 Ch. 169) the relevant Article was in the following form:

10 "93. Subject as herein provided, if at any meeting at which an election of directors ought to take place the places of the retiring directors, or some of them, are not filled up, the retiring directors, or such of them as have not had their places filled up, shall, if willing to act, be deemed to have been re-elected."

20 In that case it was held that the Article operated to keep in office retiring directors even when they had stood for re-election and failed to secure it. That decision was disapproved and not followed by the Court of Appeal in Grundt-v-Great Boulder Proprietary Mines Limited (1948 1 Ch. 145) where the relevant Article was in the following form:

30 "102. If at any general meeting at which an election of directors ought to take place the place of any director retiring by rotation is not filled up, he shall, if willing, continue in office until the ordinary meeting in the next year, and so on from year to year until his place is filled up, unless it shall be determined at any such meeting on due notice to reduce the number of directors in office."

(e) Incidentally, the decision in Grundt -v- Great Boulder Proprietary Mines Limited is no doubt the origin of the concluding words in Article 66 in the present case.

40 45. The concept of a retiring director "offering himself for re-election", as an express condition of the operation of articles such as Article 66, is of relatively recent origin. It is found, for example, in Article

RECORD

92 of Table "A" of the Companies Act, 1948 of the United Kingdom. A comparison of Article 66 with some of the forms of article set out above suggests that the requirement that the retiring director shall offer himself for re-election as a condition precedent to his continuing in office goes further than mere inaction, or even willingness to continue in office.

46. It is submitted that in the present case Mr. Kennedy did nothing which could fairly be described as "offering himself for re-election" and that consequently Article 66 did not operate to maintain him in office. 10

F. THE RULE IN TURQUAND'S CASE

47. If the appellant succeeds upon the issue as to whether the first respondent was a director at the relevant time, then the question will arise whether the thirdnamed respondent can resist at least certain of the orders sought in these proceedings upon the basis of what is commonly known as the rule in Turquand's Case (Royal British Bank -v- Turquand, 1856 6 E & B. 327; see also Mahony -v- East Holyford Mining Co. 1875 L.R. 7 H.L. 869). 20

48. The primary rule is that any outsider dealing with a company is deemed to have notice of its public documents and any act which is clearly contrary to those documents will not bind the company unless subsequently ratified by the company acting through its appropriate organ. But if, so far as can be checked from the public documents, everything appears to be regular, the outsider is entitled to assume that all internal regulations of the company have been complied with, unless he has actual knowledge to the contrary, or there are suspicious circumstances which put him on enquiry as to the existence of any irregularity in the affairs of the company (Gower - Modern Company Law, Third Edition, Chapter 8; Underwood Ltd. -v- Bank of Liverpool (1924) 1 K.B. 775; Liggett (Liverpool) Ltd. -v- Barclays Bank (1928) 1 K.B. 48; Houghton & Co. -v- Northard Lowe and Wills (1927) 1 K.B. 246). 30 40

49. When there are such suspicious circumstances, the outsider must satisfy himself that the person or persons with whom he is dealing has or have the actual authority of the company to embark upon the transaction being negotiated.

50. It is submitted that in the present case -

- 10
- (1) The Appellant's assertion to Mr. Wynyard before the meeting of 4th August, 1970, and at the meeting, that the company could not sell the property without her consent (which was correct if Mr. Kennedy was not a director and is arguably correct even if he were a director);
 - (2) The history of the negotiations prior to the meeting; and
 - (3) The extraordinary circumstances of the meeting at which Mr. Wynyard as Wentworth's representative was present;

20 were such that they put Wentworth on enquiry. Accordingly, not having made any enquiries, as the evidence shows, Wentworth cannot claim the protection of the rule.

51. In addition, the modern interpretation of the rule requires any outsider to establish a representation by the appropriate organ of the company, that the person upon whose authority the outsider relies, had authority to bind the company.

30 It is submitted that, in the instant case, there was no representation by Ingrid Pty. Limited to Mr. Wynyard as to the authority of Mr. Kennedy to bind the company without the concurrence of the Appellant.

G. CONCLUSION AND REASONS

40 53. The Appellant, Ingeborg Gerda Petsch therefore respectfully submits that the Appeal should be allowed and that declarations and orders should be made as sought in the originating summons for the following among other reasons, namely :

RECORD

- (a) That there was no valid resolution of any meeting of the Directors of Ingrid Pty. Limited that the company enter into the contract of sale referred to in the originating summons or that the common seal of the company be affixed to such contract;
- (b) That the firstnamed respondent was not a Director of Ingrid Pty. Limited at the time of the affixing of the common seal to that contract.

10

R. G. HENDERSON

A. M. GLEESON

No. 25 of 1971

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH
WALES COURT OF APPEAL

B E T W E E N

INGEBORG GERDA PETSCH Appellant

AND

FREDERICK HUGH KENNEDY,
INGRID PTY. LIMITED and
WENTWORTH DEVELOPMENTS
No. 2 PTY. LIMITED Respondents

CASE FOR THE APPELLANT

ROYEX
COWARD CHANCE
~~St. Swithins House,~~
~~Walbrook~~ *ALDERMANBURY SQUARE*
London ~~E.C.4.~~ *E.C.2V YRD*
Solicitors for the Appellant
