



IN THE PRIVY COUNCIL

No. 25 of 1971

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 -

FREDERICK HUGH KENNEDY, INGRID
PTY. LIMITED and WENTWORTH
DEVELOPMENTS NO.2 PTY. LIMITED
Respondents
(Defendants)

RECORD OF PROCEEDINGS

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

Roxey
COWARD CHANCE,
~~St. Swithin's House,~~
~~Wellbrook, SILVERMINDERY SQUARE~~
London, ~~EC4N 3BU.~~ EC2V 7RD
Solicitors for the
Appellant.

LINKLATERS & PAINES,
Barrington House,
59/67 Gresham Street,
London, EC2V 7SA.
Solicitors for the
Third Respondent.

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 -

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

Respondents
(Defendants)

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL

No. 25 of 1971

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 -

FREDERICK HUGH KENNEDY, INGRID
PTY. LIMITED and WENTWORTH
DEVELOPMENTS NO.2 PTY. LIMITED
Respondents
(Defendants)

RECORD OF PROCEEDINGS

No. 1

ORIGINATING SUMMONS - 20th
October 1970

In the Supreme
Court of New
South Wales

No.1

IN THE SUPREME COURT)
OF NEW SOUTH WALES) No. 1433 of 1970.
IN EQUITY)

Originating
Summons

20th October
1970

BETWEEN: INGEBORG GERDA PETSCH
Plaintiff

AND: FREDERICK HUGH KENNEDY,
INGRID PTY. LIMITED and
WENTWORTH DEVELOPMENTS
NO. 2 PTY. LIMITED
Defendants

L E T FREDERICK HUGH KENNEDY of Unit 81, 17 Wylde
Street, Potts Point in the State of New South Wales,
INGRID PTY. LIMITED a company duly incorporated in
and in accordance with the laws of the said State
and having its registered office at Care of Chown
Bennell & Co., Chartered Accountants, 34 Hunter
Street, Sydney, and WENTWORTH DEVELOPMENTS NO. 2

In the Supreme
Court of New
South Wales

No.1

Originating
Summons

20th October
1970
(continued)

PTY. LIMITED a company duly incorporated in and in accordance with the laws of the said State and having its registered office at 13th Floor, 15 Bent Street, Sydney, appear before this Court holden before the Honourable Robert Marsden Hope a Judge of the Supreme Court sitting in Equity at No.2 Court 1st Floor Phillip House 119 Phillip Street, Sydney, on Friday, the 23rd day of October, 1970 at the hour of ten thirty o'clock in the forenoon or so soon thereafter as this cause can be heard wherein the abovenamed Ingeborg Gerda Petsch of Unit 81, 17 Wylde Street, Potts Point in the said State, Residential Proprietor, is applying to the Court for the following declarations and orders:

1. That the firstnamed defendant may be restrained from holding himself out as a director of the secondnamed defendant. 10
2. That it may be declared that the first-named defendant is not a director of the second-named defendant. 20
3. That it may be declared that the secondnamed defendant is not bound by the alleged contract bearing date the 4th day of August 1970 for the sale of "Farrell House" 7-13 Farrell Avenue, Darlinghurst, from the secondnamed defendant to the thirdnamed defendant.
4. That the firstnamed defendant may be restrained from affixing the common seal of the second-named defendant to any Memorandum of Transfer of the land the subject of the said alleged contract of sale without the approval of the plaintiff and from taking any other steps to perform or complete the said alleged contract of sale. 30
5. That the firstnamed and thirdnamed defendants may be ordered to pay the plaintiff's costs of this suit.
6. That the plaintiff may have such further or other relief as the nature of the case may require. 40

The abovenamed defendants are required to appear before this Court on the day and at the hour

abovementioned and in default of their so doing such order will be made and proceedings taken as appear to the Court just and expedient. The abovenamed defendants are further required to enter an appearance to this suit at the office of the Master in Equity together with an address for service before they are heard in Court.

In the Supreme Court of New South Wales

No.1

Originating Summons

20th October 1970 (continued)

DATED this 20th day of October, 1970.

DAVID J. NICHOLAS
for Chief Clerk in Equity

10 This Summons is taken out by HUGH HOURIGAN of Messieurs Frank W. Lee, Hourigan & Brooks, 133 Pitt Street, Sydney, Solicitor for the abovenamed Ingeborg Gerda Petsch of Unit 81, 17 Wylde Street, Potts Point.

No. 2

No.2

AFFIDAVIT OF INGEBORG GERDA
PETSCH - 19th October 1970

Affidavit of Ingeborg Gerda Petsch

20 ON the 19th day of October One thousand nine hundred and seventy INGEBORG GERDA PETSCH of Unit 81, 17 Wylde Street, Potts Point in the State of New South Wales, Residential Proprietor, being duly sworn makes oath and says as follows:

19th October 1970

1. I am the abovenamed plaintiff.

30 2. Ingrid Pty. Limited, the secondnamed defendant, was incorporated in and in accordance with the laws of the State of New South Wales on the 11th day of July, 1967. Exhibited to me at the time of swearing this affidavit and marked "1" is a true copy of the Memorandum and Articles of Association of the said Company.

See Exhibit A

3. There are 25,000 issued shares of \$1 each in the capital of Ingrid Pty. Limited. I am the holder of 12,500 of those shares, and the other 12,500 are held by the firstnamed defendant. There has never been any other shareholder in the Company.

4. I am and have since the 14th day of July 1967

In the Supreme
Court of New
South Wales

No.2

Affidavit of
Ingeborg
Gerda Petsch

19th October
1970
(continued)

been the Managing Director of Ingrid Pty. Limited. The sole business of the Company at all 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 by me under a contract of sale dated the 30th May 1967. Subsequently, however, the Company was incorporated and executed a novation agreement dated the 24th July 1967 under which it became the purchaser of "Farrell House". The major part of the financial assistance necessary to enable the Company to enter into the transaction was provided by me, and at all times since the incorporation of the Company I have played the principal role in the management of this business.

10

5. The firstnamed defendant and I have lived together for fourteen years. He is at present sixty-seven years of age. Although he was appointed Chairman of Directors of the Company on the 14th July 1967 he has never played an active part in the day to day management of the Company's affairs.

20

6. Since the incorporation of the Company its books have been kept by an accountant, Mr. Bennell, of Chown Bennell & Co. He at present has in his possession the Minute Book containing minutes of meetings of directors and shareholders of the Company. Exhibited to me at the time of swearing this my affidavit and marked "2" is a bundle of documents which are copies of all of the minutes of meetings entered in the said Minute Book of the Company.

30

Exhibit X

7. As appears from the said minutes, at a meeting held on the 14th July, 1967, the firstnamed defendant, his brother Mr. G.W. Kennedy, and I were appointed directors of the Company. The said 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. At the same meeting the firstnamed defendant was appointed Chairman of Directors and I was appointed Managing Director.

40

8. As appears from the said minutes, there has never been any subsequent resolution passed at any meeting of the company re-appointing the firstnamed

defendant a director of the Company.

9. I am personally familiar with the signature of the firstnamed defendant, and I say that the signature "F.H. Kennedy" appearing at the foot of the minutes in Exhibit "2" is in every case the signature of the firstnamed defendant.

10. About six months ago I was approached by a Mr. Wynyard, who told me he was a representative of the Home Units Pty. Limited group of companies, and that his group would be interested in purchasing "Farrell House". Since that time there have been a number of discussions between Mr. Wynyard, and myself, with respect to the possible sale of "Farrell House" to Mr. Wynyard's company. By the beginning of August of this year I had informed Mr. Wynyard that I was not prepared to be a party to such sale on the terms he was offering, but the firstnamed defendant informed me that he wanted such a sale to proceed. This led to serious arguments between the firstnamed defendant and myself.

11. On the evening of the 4th August, 1970 at about 8.00 p.m. I returned home to Unit 81, 17 Wylde Street, Potts Point where the firstnamed defendant and I are living. When I went into the lounge room of the unit I saw that the firstnamed defendant and Mr. Wynyard were there sitting at a table, and that there were various documents on the table. The firstnamed defendant said to me: "Mr. Bennell will be coming soon". I said: "What for?" The firstnamed defendant said: "To arrange for the sale of Farrell House". I said, "Fred, Farrell House is not going to be sold without my consent". I had not been informed that there was going to be any company business discussed or transacted on that evening, and no one suggested that I had been so informed.

12. I was feeling very upset, and went into another room and lay down. A short time later the door bell rang and the firstnamed defendant called out: "Ingrid, come in and see Mr. Bennell". I went into the lounge room and greeted Mr. Bennell but then left the room immediately. The firstnamed defendant called out: "Come back and sit down". I went into the room and sat in a chair at a corner of the table. There were papers on the table and Mr. Wynyard said to me: "Now,

In the Supreme
Court of New
South Wales

No.2

Affidavit of
Ingeborg
Gerda Petsch

19th October
1970
(continued)

In the Supreme
Court of New
South Wales

No.2

Affidavit of
Ingeborg
Gerda Petsch

19th October
1970
(continued)

Ingrid, I want to show you our plans". I said:
"Mr. Wynyard, you have shown me them before and I
have told you before that Farrell House cannot be
sold without my consent". I was referring to the
fact that I had said to both Mr. Wynyard and to the
firstnamed defendant on a number of occasions
previously: "I was advised by Mr. Evans" (the
solicitor who formed the Company) "that Farrell
House can never be sold without my consent".

13. Mr. Wynyard then said to me: "Now, Ingrid,
here is the new purchase price. We made it out for
\$720,000." I said: "I have told you from the start
you are wasting your time. Farrell House cannot be
sold without my consent. That is what Mr. Evans
told me." I then got up from the chair and sat in
an armchair in the corner of the room. I saw one
of the men place a stamp on a document and the
firstnamed defendant signed it. I said: "What are
those papers?" One of them said: "That is a
contract". I repeated: "Farrell House is not
going to be sold without my consent. It cannot be
sold without my consent." Shortly afterwards Mr.
Bennell and Mr. Wynyard left.

10

20

14. I have seen the "minutes of meeting of
directors held at 17 Wylde Street, Potts Point on
Tuesday, 4th August, 1970 at 8.00 p.m.", part of
Exhibit "2" to this my affidavit. I say that I
was given no notice of any such meeting, that I
did not participate in it, that no motion such as
appears in the minutes was put, that I was not
asked to vote for or against any resolution, and
that I did not hear anybody else vote for or
against any resolution.

30

SWORN by the abovenamed)
deponent on the day and)
year first abovementioned) (Sgd.) I. Petsch
at Sydney, Before me:)

(Sgd.) A.H. Green J.P.

A Justice of the Peace

No. 3

AFFIDAVIT OF HUGH HOURIGAN
- 20th October 1970

In the Supreme
Court of New
South Wales

No.3

Affidavit of
Hugh Hourigan

20th October
1970

ON the 20th day of October One thousand nine hundred and seventy HUGH HOURIGAN of 133 Pitt Street, Sydney in the State of New South Wales, Solicitor, being duly sworn makes oath and says as follows:-

1. I am the Solicitor for the abovenamed plaintiff.

10 2. On the 21st August, 1970 I wrote to the third-named defendant a letter a true copy of which is annexed hereto and marked "A". On the same day I wrote to Messrs. T.G.D. Marshall Landers & Co. a letter a true copy of which is annexed hereto and marked "B".

3. Annexed hereto and marked "C" is a true copy of a reply dated the 27th August, 1970 which I received from Messrs. T.G.D. Marshall Landers & Co.

20 4. Annexed hereto and marked "D" is a true copy of a letter dated the 28th August, 1970 which I received from Messrs. Freehill Hollingdale & Page, the Solicitors for the thirdnamed defendant. Exhibited to me at the time of swearing this my affidavit and marked "1" is the enclosure which came with the said letter from Freehill Hollingdale & Page.

30 5. Annexed hereto and marked "E" is a true copy of a reply which I wrote, dated the 3rd day of September, 1970, to the said letter from Freehill Hollingdale & Page.

6. Annexed hereto and marked "F" is a true copy of a letter dated the 28th September, 1970 which I received from T.G.D. Marshall Landers & Co., together with the copy notice enclosed with the said letter. Annexed hereto and marked "G" is a true copy of a letter which I wrote to Messrs. T.G.D. Marshall Landers & Co. on the 12th day of October, 1970.

40 SWORN by the deponent at
Sydney on the day and year
first hereinbefore written,
Before me:

HUGH HOURIGAN

(Sgd.) A.H. Green.
A Justice of the Peace

In the Supreme
Court of New
South Wales

EXHIBIT A TO AFFIDAVIT OF HUGH HOURIGAN
- Letter, Frank W. Lee, Hourigan & Brooks
to Third Respondent - 21st August 1970

No.3

Exhibit A to
Affidavit of
Hugh Hourigan -
Letter, Frank
W. Lee,
Hourigan &
Brooks to Third
Respondent

21st August
1970

FRANK W. LEE, HOURIGAN & BROOKS
Solicitors,
133 Pitt Street, Sydney

Our Ref: H/H

21st August, 1970.

The Secretary,
Wentworth Developments No. 2 Pty Ltd.,
13th Floor, 15 Bent Street,
S Y D N E Y.

10

Dear Sir,

We act for Miss Petsch, the Managing Director
of Ingrid Pty. Limited. The sole shareholders in
that Company are our client and a Mr. Kennedy.
According to our instructions the sole director
of the Company is our client.

We believe that Mr. Kennedy has purported to
commit the Company to sell its property "Farrell
House" to your Company. According to our
instructions Mr. Kennedy is not and has not since
30th December, 1968 been a director of the Company.
He retired on that date pursuant to Article 64 of
the Company's Articles of Association and according
to our client (and the Company's Minute Book) was
never re-elected. Our client, being Managing
Director, did not retire (see Article 91) and has
continued to hold office. A third person has
been said to be a director of the Company but he
has long since been disqualified through having
failed to take up the necessary qualifying share
(see Article 71).

20

30

Our client maintains that, for a number of
reasons, the alleged contract of sale with your
Company is invalid and does not bind the Company.
Our present instructions are to put you on notice
that Mr. Kennedy is not a director of the Company
and is not authorised to execute documents on its
behalf or to affix its common seal.

40

We are further instructed that unless your Company undertakes within three days that it will not attempt to proceed with the purchase we are to commence proceedings for an injunction without further notice.

In the Supreme Court of New South Wales

No.3

Exhibit A to Affidavit of Hugh Hourigan - Letter, Frank W. Lee, Hourigan & Brooks to Third Respondent

21st August 1970

(continued)

This is the annexure marked "A" referred to in the Affidavit of HUGH HOURIGAN sworn at Sydney the 20th day of October, 1970,
Before me:-

(Sgd.) A.H. Green.
A Justice of the Peace

10

EXHIBIT B TO AFFIDAVIT OF HUGH HOURIGAN - Letter Frank W. Lee, Hourigan & Brooks to T.G.D. Marshall Landers & Co. - 21st August 1970.

No.3

Exhibit B to Affidavit of Hugh Hourigan - Letter Frank W. Lee, Hourigan & Brooks to T.G.D. Marshall Landers & Co.

FRANK W. LEE, HOURIGAN & BROOKS
Solicitors
133 Pitt Street, Sydney

21st August, 1970

21st August 1970.

Messrs. T.G.D. Marshall Landers & Co.,
Solicitors,
251 George Street,
SYDNEY 2000

ATTENTION MR. BRUCE EVANS

20

Dear Sirs,

We act for Miss Petsch the Managing Director of Ingrid Pty. Limited.

As you may be aware the shares in the Company are held equally by Miss Petsch and a Mr. Kennedy.

We understand that Mr. Kennedy, who holds himself out as a director of the Company, has purported to instruct you to act on its behalf in a conveyancing matter arising out of an alleged contract of sale by the Company to Wentworth Developments No. 2 Pty. Limited of its property known as "Farrell House".

30

In the Supreme
Court of New
South Wales

This is the annexure marked "C" referred to in
the Affidavit of HUGH HOURIGAN sworn the 20th
day of October, 1970, at Sydney,

No. 3

Before me:

(Sgd.) A.H. Green.

A Justice of the Peace

Exhibit C to
Affidavit of
Hugh Hourigan
Letter T.G.D.
Marshall
Landers & Co.
to Frank W.
Lee Hourigan
& Brooks

27th August
1970

(continued)

No. 3

EXHIBIT D TO AFFIDAVIT OF HUGH HOURIGAN
Letter, Freehill, Hollingdale & Page to
Frank W. Lee, Hourigan & Brooks -
28th August 1970

Exhibit D to
Affidavit of
Hugh Hourigan
Letter, Freehill
Hollingdale &
Page to Frank
W. Lee, Hourigan
& Brooks.

28th August
1970

FREEHILL, HOLLINGDALE & PAGE
Solicitors & Notaries
Park House,
187-191 Macquarie Street,
SYDNEY

10

In reply quote
JLF

28th August, 1970

Messrs. Frank W. Lee, Hourigan & Brooks,
Solicitors,
133 Pitt Street,
SYDNEY 2000

20

Dear Sirs,

Your letter of 21st August, addressed to our
client, Wentworth Developments No. 2 Pty. Limited
has been handed to us for reply.

We would advise that our client holds a
binding contract for the purchase of the property
known as "Farrell House" 7-13 Farrell Avenue,
Darlinghurst from Ingrid Pty. Limited and intends
to rely on its rights under the contract. A

30

copy of the contract is enclosed. You will, of course, appreciate that the internal affairs of Ingrid Pty. Limited are something with which our client is not concerned.

10 However, in view of the fact that you allege in your letter that Miss Petsch is the only director of Ingrid Pty. Limited we are concerned to know whether your letter is written on behalf of Miss Petsch alone or purports to be written on behalf of Ingrid Pty. Limited.

If your letter is written on behalf of Ingrid Pty. Limited our client would have to consider its position, as if your letter is written with the authority of the company it might amount to a repudiation of the contract.

Yours faithfully,
FREEHILL, HOLLINGDALE & PAGE

(Sgd.)

20 This is the annexure marked "D" referred to in the Affidavit of HUGH HOURIGAN sworn the 20th day of October, 1970, at Sydney,

Before me:

(Sgd.) A.H. Green.
A Justice of the Peace

EXHIBIT E TO AFFIDAVIT OF HUGH HOURIGAN
Letter, Frank W. Lee, Hourigan & Brooks to
Freehill Hollingdale & Page -
3rd September 1970

30 FRANK W. LEE, HOURIGAN & BROOKS
Solicitors,
133 Pitt Street, Sydney

Our Ref: HH/bc

3rd September, 1970

Messrs. Freehill, Hollingdale & Page,
Solicitors,
187-191 Macquarie Street,
SYDNEY 2000

In the Supreme
Court of New
South Wales

No. 3

Exhibit D to
Affidavit of
Hugh Hourigan
Letter, Freehill
Hollingdale &
Page to Frank
W. Lee, Hourigan
& Brooks

28th August
1970

(continued)

No. 3

Exhibit E to
Affidavit of
Hugh Hourigan
Letter, Frank W.
Lee Hourigan
& Brooks to
Freehill,
Hollingdale &
Page.

3rd September
1970.

In the Supreme
Court of New
South Wales

Dear Sirs,

We acknowledge receipt of your letter of
28th August.

No.3

Exhibit E to
Affidavit of
Hugh Hourigan
Letter, Frank W.
Lee Hourigan
& Brooks to
Freehill,
Hollingdale &
Page.

We respectfully disagree with the whole of
the second paragraph of your letter.

As to the third and fourth paragraphs of your
letter, we would advise that our letter was written
on behalf of Miss Petsch alone. That is not to say
however, that we may not at some future time be
instructed by Ingrid Pty. Limited to act in
relation to the matter and, of course, our client
instructs us that Messrs. T.G.D. Marshall Landers
& Co. do not have proper instructions to represent
the Company.

10

3rd September
1970
(continued)

Yours faithfully,
FRANK W. LEE, HOURIGAN & BROOKS

Per: (Sgd.) H. Hourigan

This is the annexure marked "E" referred to in the
Affidavit of HUGH HOURIGAN sworn the 20th day of
October, 1970, at Sydney,

20

Before me: (Sgd.) A.H. Green.
A Justice of the Peace

Exhibit F to
Affidavit of
Hugh Hourigan
Letter, T.G.D.
Marshall Landers
& Co. to Frank
W. Lee, Hourigan
& Brooks

EXHIBIT F TO AFFIDAVIT OF HUGH HOURIGAN
Letter T.G.D. Marshall, Landers & Co. to
Frank W. Lee, Hourigan & Brooks - 28th
September 1970

T.G.D. MARSHALL, LANDERS & CO.
Solicitors & Notaries

251-253 George Street,
S Y D N E Y

30

28th September
1970

BE.JC

28th September, 1970.

Messrs. Frank W. Lee, Hourigan & Brooks,
Solicitors,
133, Pitt Street,
S Y D N E Y

Dear Sirs,

Re: Ingrid Pty. Limited

In the Supreme
Court of New
South Wales

No.3

We refer to our letter of the 27th August last and now enclose copy of Notice by Wentworth Developments No. 2 Pty. Limited that it elects to complete the Contract of Sale upon the expiration of four weeks from the date thereof.

Exhibit F to
Affidavit of
Hugh Hourigan
Letter, T.G.D.
Marshall
Landers & Co.
to Frank W.
Lee, Hourigan
& Brooks

10 We are informed by Mr. F.H. Kennedy the Chairman of Directors of the Company that the notice will be complied with.

Yours faithfully,
T.G.D. MARSHALL, LANDERS & CO.

Per (Sgd.) BE

28th September
1970
(continued)

Encl.

EXHIBIT F TO AFFIDAVIT OF HUGH HOURIGAN
Notice dated 25th September 1970 enclosed
in letter, T.G.D. Marshall, Landers & Co.
to Frank W. Lee, Hourigan & Brooks - 28th
September 1970

Exhibit F to
Affidavit of
Hugh Hourigan
Notice dated
25th September
1970 enclosed
in Letter,
T.G.D.Marshall,
Landers & Co.
to Frank W.
Lee, Hourigan
& Brooks

20 TO: Ingrid Pty. Limited,
8th Floor,
34 Hunter Street,
SYDNEY 2000

AND TO: Its Solicitors:
Messrs. T.G.D. Marshall, Landers & Co.,
251-253 George Street,
S Y D N E Y 2000

28th September
1970

30 TAKE NOTICE that WENTWORTH DEVELOPMENTS NO.2 PTY.
LIMITED elects to complete the Contract for Sale of
Land made on the fourth day of August 1970 for the
sale by Ingrid Pty. Limited to Wentworth Developments
No. 2 Pty. Limited of the property described in the
Schedule hereto.

AND FURTHER TAKE NOTICE that this Notice is given
pursuant to the provisions of Special Condition
1(c) of the said Contract for Sale of Land.

In the Supreme Court of New South Wales

No.3

Exhibit F to Affidavit of Hugh Hourigan Notice dated 25th September 1970 enclosed in Letter, T.G.D.Marshall, Landers & Co. to Frank W. Lee, Hourigan & Brooks

28th September 1970 (continued)

AND FURTHER TAKE NOTICE that WENTWORTH DEVELOPMENTS NO. 2 PTY. LIMITED shall require completion of the said Contract upon the expiration of four (4) weeks from the date of this Notice and that in this respect time is of the essence of the said Contract.

DATED this 25th day of September, 1970.

THE SCHEDULE HERETO

ALL THAT piece or parcel of land situate in the City of Sydney Parish of Alexandria and County of Cumberland being the whole of the land contained in Certificate of Title Volume 7249 Folio 81 and being part of Lot 1 in Deposited Plan 9403 and land adjoining containing an area of one rood 30 1/4 perches having a frontage to Farrell Avenue of approximately 150'4" and a depth of 136' together with the improvements erected thereon and known as "Farrell House", 7-13 Farrell Avenue, Darlinghurst.

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THE COMMON SEAL of WENTWORTH DEVELOPMENTS NO.2 PTY. LIMITED was hereunto affixed by authority of the directors and in the presence of:

(Sgd.) ? Director Common Seal Affixed.

20

(Sgd.) C.E. LUXFORD Secretary

This and the preceding page is the annexure marked "F" referred to in the Affidavit of HUGH HOURIGAN sworn at Sydney the 20th day of October, 1970, Before me:

(Sgd.) A.H. Green. A Justice of the Peace

EXHIBIT G TO AFFIDAVIT OF HUGH HOURIGAN
Letter, Frank W. Lee, Hourigan & Brooks to
T.G.D. Marshall, Landers & Co. - 12th
October 1970

In the Supreme
Court of New
South Wales

No.3

FRANK W. LEE, HOURIGAN & BROOKS
Solicitors,
133 Pitt Street, Sydney.

Our Ref: HH/NH

12th October, 1970.

Exhibit G to
Affidavit of
Hugh Hourigan
Letter, Frank
W. Lee,
Hourigan &
Brooks to
T.G.D. Marshall
Landers & Co.

12th October
1970

10 Messrs. T.G.D. Marshall, Landers & Co.,
Solicitors,
251-253 George Street,
S Y D N E Y.

Dear Sirs,

Re: Ingrid Pty. Limited

We have received your letter dated the 28th
ultimo.

20 Unless we hear from you to the contrary we will
take it that the second paragraph of your letter is
to be understood by us as a statement of Mr. Kennedy's
intention to affix the Common Seal of the Company to
a Memorandum of Transfer pursuant to the alleged
contract of sale at the expiration of the time
specified in the notice and we shall act accordingly.

Yours faithfully,
FRANK W. LEE, HOURIGAN & BROOKS

Per: (Sgd.) H. Hourigan

30 This is the annexure marked "G" referred to in the
Affidavit of HUGH HOURIGAN sworn at Sydney this
20th day of October, 1970,

Before me:-

(Sgd.) A.H. Green.
A Justice of the Peace

In the Supreme
Court of New
South Wales

No. 4

AFFIDAVIT OF FREDERICK HUGH
KENNEDY - 30th October 1970

No.4

Affidavit of
Frederick Hugh
Kennedy

30th October
1970

ON the 30th day of October, One thousand nine hundred and seventy FREDERICK HUGH KENNEDY of Unit 81, 17 Wylde Street, Potts Point in the State of New South Wales being duly sworn makes oath and says as follows:-

1. I am the firstnamed Defendant. I crave leave to refer to the affidavit of Ingeborg Gerda Petsch sworn herein the 19th October, 1970. 10

2. In answer to paragraph 4 of that affidavit I say that the original contract of sale dated 30th May 1967 for the purchase of "Farrell House" was entered into by the plaintiff as trustee for the company to be formed. Produced and shown to me at the time of swearing this my affidavit and marked "FHK 1" is the original contract for the purchase of "Farrell House" and the novation agreement relating to it. Prior to the entering in of that contract the formation of the company which is the secondnamed defendant herein had been discussed between the plaintiff and myself although I do not now recall precisely the words used. The contract was drawn with the purchaser as "a trustee for a company to be formed" because of the contemplated formation of the secondnamed defendant. I say that the statement in that paragraph that the major part of the financial assistance necessary to enable the company to enter into the transaction was provided by the plaintiff is incorrect. Prior to the original contract being entered into I paid \$2,000.00 deposit to the agents for the vendors. Two mortgages, the first mortgage for \$60,000.00 and the second mortgage for \$30,000.00 were negotiated prior to the purchase, so that \$90,000.00 of the purchase money was provided by mortgagees. The second mortgage was negotiated by me with Australian Guarantee Corporation Limited, a company with whom I had contacts dating from the time when my brother had been a manager of that company. The first mortgage was from a mortgagee who already held a mortgage on the property and who was willing to substitute a new mortgage for it. The negotiation leading to the agreement to provide this mortgage was carried out partly by me with the 20 30 40

agents for the vendor. The balance of the purchase price over and above the amount advanced on these two mortgages was provided to the company by the plaintiff and myself in equal shares. We each advanced \$25,000.00 to the secondnamed defendant to enable it to complete the purchase. \$25,000.00 of this (\$12,500.00 from each of the plaintiff and myself) remains on loan to the company and the other \$25,000.00 of the original advance has been applied in paying up the 12,500 shares that have been issued to the plaintiff and the 12,500 shares that have been issued to me.

10

3. In further answer to paragraph 4 of that affidavit and in answer to paragraph 5 of that affidavit I say that the plaintiff manages the part of the business of the secondnamed defendant which is the day to day running of the residential. I manage its financial affairs, take care of the payment of its bills and in general do the banking for the company.

20

4. In answer to paragraph 13 of that affidavit I say that the plaintiff frequently said on many occasions, "'Farrell House' cannot be sold without my consent". I did not hear her say at the meeting referred to in that paragraph the words "that is what Mr. Evans told me". In further answer to paragraph 13 of that affidavit and in answer to paragraph 14 of the affidavit I say that the affidavit of Keith Albert Bennell sworn herein the thirtieth day of October 1970 correctly sets out what happened at the meeting on the 4th August 1970, save that it is my recollection that Mr. Bennell said as soon as we sat down, "Is this a duly convened directors' meeting?" and that I answered "Yes". At the time of this question and answer Miss Petsch was in the room sitting beside me at the same table as the rest of us and she made no comment. I do not recall Miss Petsch saying the words "I don't know what you are signing, as it won't have any effect" which are set out in paragraph 5 of Mr. Bennell's affidavit. It is also my recollection that Miss Petsch sat beside me at the table for most of the meeting and was only in the armchair for a short time. The armchair in which she sat was, at the time, a distance of between four feet and six feet from me. Apart from these variations the affidavit of Mr. Bennell accords entirely with my recollections of what took place at the meeting. I am certain that I

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In the Supreme
Court of New
South Wales

No.4

Affidavit of
Frederick Hugh
Kennedy

30th October
1970
(continued)

In the Supreme
Court of New
South Wales

No.4

Affidavit of
Frederick Hugh
Kennedy

30th October
1970
(continued)

See Exhibit
No.1

said "I move that the offer made by Wentworth Developments No.2 Pty. Limited be accepted." I am also certain that Miss Petsch then said, "If this means you're selling 'Farrell House' I am against it" and I am certain that I then said "Well, as I am the chairman of the company and I have a casting vote I'll exercise my casting vote as chairman and vote in favour of the motion" and that I then said, "I declare the motion carried".

5. I say that Miss Petsch and myself have lived together for over fourteen years and although from time to time there have been minor arguments on domestic issues between us during this time we have been generally close and there has been no extended period when we were not on friendly terms. We are at the present time on quite friendly terms despite the present litigation. The company affairs have generally been run on an informal basis, we discuss company business when it arises without having any formal meetings. These discussions can take place at any time and in any place and I recall on occasions discussing company business at breakfast with Miss Petsch. From the time of the incorporation of the company up to the present time she has treated me as a director of the company. By way of illustration of this I refer to the bank authority by which the company's account at its bank was commenced which is still in force. The cheques drawn on the company's account have always been signed by Miss Petsch and myself and still are signed by us both. Produced and shown to me at the time of swearing this my affidavit and marked "FHK 2" is a photostat copy of a cheque drawn on the company's account signed by us both. Cheques signed in this manner have been drawn by the company as required since the commencement of its account with the bank. I crave leave to refer to the directors' statement dated 21st September 1969 attached to the copy of the accounts for the company for the year ending 30th June 1969 which is in the Minute Book of the Company. I say that the signature first appearing under that statement is my signature and the signature appearing immediately below it is the signature of the plaintiff. I say that the plaintiff signed such statement after I had already signed it. On one occasion at the time of signing the company's accounts and I think it was the occasion of the signing the accounts above referred to I said jokingly to the plaintiff, "You had better be careful

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in signing these, we could go to gaol if they are false", or words to that effect. She did not raise any objection or question as to my being a director at the time of signing the accounts and the first suggestion she has made or which has been made on her behalf that I am not a director of the firstnamed defendant was only made after the commencement of these proceedings.

In the Supreme Court of New South Wales

No.4

Affidavit of Frederick Hugh Kennedy

30th October 1970 (continued)

10 SWORN by the Deponent)
FREDERICK HUGH KENNEDY)
on the day and year) F.H. Kennedy
first hereinbefore)
written, before me,)

Leone Bortzell J.P.
A Justice of the Peace.

No. 5

No.5

AFFIDAVIT OF KEITH ALBERT BENNELL
- 30th October 1970

Affidavit of Keith Albert Bennell

20 ON the 30th day of October One thousand nine hundred and seventy KEITH ALBERT BENNELL of 150 Tyron Road East Lindfield Chartered Accountant, being duly sworn makes oath and says as follows:

30th October 1970

1. I am the Secretary of the secondnamed Defendant. Produced and shown to me at the time of swearing this my Affidavit and marked "KAB 1" is the book containing minutes of directors meetings and general meetings of the secondnamed defendant.

30 2. On the 4th August, 1970 I went to Unit 81, 17 Wylde Street, Potts Point, shortly before 8 p.m. The firstnamed defendant (hereinafter called "Mr. Kennedy") opened the door to me and took me into the living room of the Unit. This room contained a dining room table, some chairs around the table and some armchairs as well as other furniture. When I went into the living room with Mr. Kennedy the only other person there was Mr. Wynyard whom I understand to have some connection with the third-named defendant, but I am not aware of my own knowledge of what this is precisely. I had not met

In the Supreme
Court of New
South Wales

No.5

Affidavit of
Keith Albert
Bennell

30th October
1970
(continued)

Mr. Wynyard before and I was introduced to him by Mr. Kennedy when I entered the room. Immediately after introducing me Mr. Kennedy left the room for a few moments and returned with the Plaintiff, Miss Petsch. Almost as soon as she saw me Miss Petsch started crying and left the room. Mr. Kennedy waited for a few moments then left the room and returned very shortly afterwards with Miss Petsch. Up to that time no business had been discussed between any of us. Mr. Kennedy, Miss Petsch, Mr. Wynyard and myself then sat on chairs at the dining room table. 10

3. As soon as we were seated Mr. Kennedy said "This is a directors' meeting to consider the sale of 'Farrell House'". He then said "I have received an offer for 'Farrell House' from Wentworth Developments No. 2 Pty. Limited" and he was at this time holding some documents in his hand. He then said "This is the offer and there is the contract". He then summarised the offer referring to the document in his hand and then turned to Mr. Wynyard and said "will you explain the offer in detail?". Miss Petsch then said "I do not want to sell 'Farrell House'". 20

4. A long discussion then followed lasting almost one and a half hours. Most of the discussion took place between Mr. Wynyard and Miss Petsch. I do not recall the conversation fully. Mr. Wynyard explained the offer at great length. I recall him producing some plans and saying "there is an alternative scheme if we cannot acquire 'Farrell House' - we can by-pass 'Farrell House'". Miss Petsch took part in the discussions relating to the offer but frequently in answer to points made by Mr. Wynyard Miss Petsch talked at length about her early personal relationship with Mr. Kennedy. After the discussion had progressed some distance Miss Petsch left her chair at the table and sat in an armchair a few feet away from the table but continued to take part in the discussion from the armchair. At a later stage in the evening she returned to the chair at the table and sat by Mr. Kennedy but I do not recall at what stage, precisely this move back to the table occurred. 30 40

5. Shortly before 9.30 p.m. Mr. Kennedy said, "I move that the offer made by Wentworth Developments No. 2 Pty. Limited be accepted". At the time

EXHIBIT A TO AFFIDAVIT OF KEITH ALBERT
BENNELL, CONTRACT FOR SALE, 4th August 1970

In the Supreme
Court of New
South Wales

No.5

Exhibit A to
Affidavit of
Keith Albert
Bennell,
Contract for
Sale

4th August 1970
(continued)

Approved by the Law Society of N.S.W.
and the Real Estate Institute of N.S.W.

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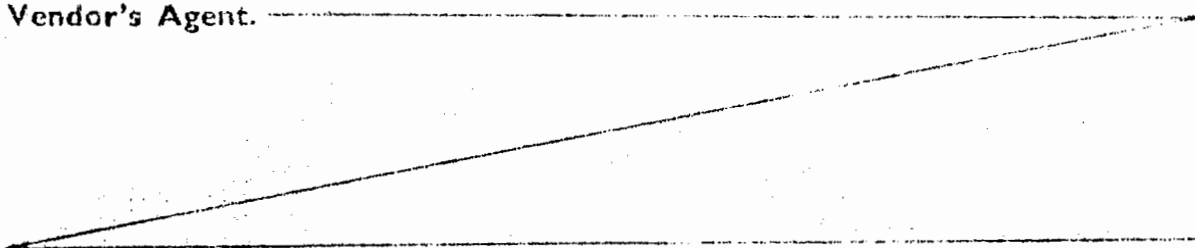
Contract For Sale of Land

by

* Private Treaty

Public Auction

Vendor's Agent.



Description of Property.

ALL THAT piece or parcel of land situate in the City of Sydney
Parish of Alexandria and County of Cumberland being the whole
of the land contained in Certificate of Title Volume 7249
Folio 81 and being part of Lot 1 in Deposited Plan 9403 and
land adjoining containing an area of one rood 30 1/2 perches
having a frontage to Farrell Avenue of approximately 150'4"
and a depth of 136' together with the improvements erected
thereon and known as "Farrell House", 7-13 Farrell Avenue,
Darlinghurst.

This is the Annexure marked "A" referred to in the Affidavit of
Keith Albert Bennell,
Sworn the 30th October, 1970.
Before me: *F Whitteman JP*

~~AUCTION CONDITIONS~~ Upon a sale by Auction: (a) The highest bidder shall be the Purchaser. In case of any
dispute the property shall be put up again at any former bidding and no bidding shall be retracted.
(b) The sale is subject to a reserve price and the right to bid is reserved on behalf of the Vendor.
(c) Upon the fall of the hammer, the Purchaser shall sign the following agreement, the conditions of which, with
~~these conditions, are the conditions of the sale by auction.~~

AGREEMENT made the *4th* day of *AUGUST* 1970 BETWEEN

INGRID PTY. LIMITED

(herein called Vendor) of the one part AND

WENTWORTH DEVELOPMENTS NO. 2 PTY. LIMITED

(herein called Purchaser) of the other part WHEREBY the Vendor agrees to sell and the Purchaser agrees to purchase, if
more than one as "JOINT TENANTS / TENANTS IN COMMON IN THE FOLLOWING SHARES

with joint and several liability under this Agreement, the property above described (herein referred to as "the property") for
the sum of *SEVEN HUNDRED & TWENTY* ~~SIX HUNDRED & TWENTY~~ THOUSAND DOLLARS *\$720,000* ~~(\$600,000)~~

upon and subject to the following terms and conditions:— (subject to Special Condition 2

1. The Purchaser shall upon the signing of this Agreement pay as a deposit to the Vendor's Agent herein named *hereof*
holder the sum of

which shall be accounted for to the Vendor upon receipt of an order from the Purchaser or his Solicitor authorising such
payment. The deposit may be paid by cheque but if any such cheque is not duly honoured on presentation the Purchaser
shall immediately and without notice be in default under this Agreement.

1. The balance of the purchase price shall be paid in the manner set forth in the First Schedule hereto. Any moneys
payable to the Vendor hereunder by the Purchaser or the Agent shall be paid to the Vendor's Solicitor or as he may direct
in writing.

2.—The title to the property is under the *REAL PROPERTY ACT

~~CROWN LANDS ACT OR OTHER ACT RELATING TO CROWN LAND UNDER WHICH
THE PROPERTY OR PART OF IT IS HELD, viz:~~

1.—AS TO LAND UNDER THE REAL PROPERTY ACT, the Vendor shall furnish particulars of title sufficient to
enable the Purchaser to prepare the transfer and the Purchaser shall not be entitled to an abstract of any document affecting
the title. Any instrument in respect of which a caveat is entered on the register, shall if in the possession of the Vendor or
of any mortgagee of the property, be produced to the Purchaser or his Solicitor free of charge.

4.—AS TO LAND UNDER THE CROWN LANDS ACT, the Vendor shall furnish a proper abstract of his title but shall not be
obliged to abstract the Crown Grant unless there be no other good root of title with which to commence title for the
purpose provided for in the provisions stipulated in this contract or to abstract, produce, execute or produce or procure

Vendor's full name, address and occupation

Purchaser's full name, address and occupation

*Delete words not applicable

*Delete words not applicable

...to produce any deeds or documents in support of the title or verification of the abstract when ... in the possession of the Vendor or of any mortgagee of the property. No objection shall be made to the execution of any document under a power of attorney authorising such execution.

§ - AS TO LAND HELD UNDER ANY ACT RELATING TO CROWN LANDS:

- (a) The Vendor shall furnish particulars of title sufficient to enable the Purchaser to prepare the title.
- (b) In respect of documents of title which are not in a statutory form prescribed under the Act under which the land is held the Vendor shall furnish an abstract of his title. His obligation in relation to the abstract of title and to deeds and documents shall be limited in the same way as is provided in clause 5 (d) in respect of land under old system title.
- (c) As to any land in respect of which the title is a certificate of title the Vendor shall at his own expense produce the certificate of title or an official letter stating that such certificate was issued.
- (d) The Vendor shall apply for any necessary consent of the Minister of Lands or other prescribed authority to the transfer of the property or any part of it whether still under Crown tenure or not and pursue such application and shall pay all costs and fees (greater than those of the Purchaser's Solicitor in respect hereof). The Purchaser shall promptly join in the application as may be necessary. If such consent is refused or other party may reasonably be unwilling to comply with, that party may give to the other notice in writing that the conditional consent is unacceptable to him and thereupon the consent shall be deemed to have been refused.
- (e) Land held under any purchase tenure is sold *SUBJECT TO FREE FROM the balance of purchase money at the date hereof, interest and other money payable to the Crown to complete the purchase. Where the sale is subject to the payment of such money by the purchaser and postponed debt shall be paid by the Vendor and interest on the balance of purchase money shall be apportioned as an outgoing under clause 9 of this agreement. The current year's rent payable for land held under any leasehold tenure shall be apportioned similarly and rent to become payable to the Crown after the date of completion shall be paid by the Purchaser who shall covenant with the Vendor to pay such rent and any money which he is liable to pay hereunder in respect of the land under a purchase tenure.

6.—The said abstract or particulars shall be furnished within a reasonable time after written request made by the purchaser or his solicitor and may be furnished by the Vendor without such request

7.—The Purchaser shall be deemed to have waived all objections or requisitions which he has not made and delivered to the Vendor or to the Vendor's Solicitor within 21 days from the delivery of the said abstract or particulars. Within 28 days from delivery of the said abstract or particulars, or, in any case where a consent as mentioned in clause 5 (d) of this agreement is required to the transfer of the whole or part of the property, within 14 days of the Purchaser or his Solicitor being notified of the granting of such consent, the Purchaser shall at his own expense tender to the Vendor or to his Solicitor for execution the appropriate assurance of the property.

8.—No error or misdescription of the property shall annul the sale, but compensation if demanded in writing before completion, but not otherwise, shall be made or given as the case may require, the amount to be settled in case of difference by an arbitrator appointed by the parties by mutual agreement or failing agreement nominated by the President for the time being of the Law Society of New South Wales. Clause 14 of this agreement shall not apply to any such claim for compensation.

9.—The Vendor shall be entitled to the rents and profits, and shall pay or bear all rates, taxes and outgoings up to and including the date of completion from which date the Purchaser shall be entitled to and shall pay or bear the same respectively and any necessary apportionment thereof shall be made and adjusted on completion. Where the Vendor has paid or is liable to pay land tax on the property for the year current at the date of apportionment, whether to the Commissioner of Land Tax or to a predecessor in title, the amount which shall be apportioned as land tax under this clause shall be such sum as would have been payable by the Vendor for land tax if the property had been owned and was the only land owned by him at midnight on the 31st October then last past. Rates postponed pursuant to Section 160C of the Local Government Act 1919, as amended, shall not be apportioned under this clause unless express provision for the apportionment of such postponed rates is made in this agreement.

10.—No objection or requisition or claim for compensation shall be made by the Purchaser in respect of any of the following matters:

- (a) the ownership or location of any boundary fence or wall separating the property from any adjoining land or the existence of a "give and take" fence as part of the boundary of the property.
- (b) any water supply or sewerage or drainage service to the property being a joint service to any other property, the water supply sewerage or drainage pipes or connections for the property passing through other land or the water supply sewerage or drainage pipes or connections for any other land (not being mains or pipes of any water sewerage or drainage authority) passing through the property.
- (c) any wall being a party wall.
- (d) any exception reservation or condition contained in any relative Crown Grant.
- (e) the existence of the easements and restrictive covenants affecting the property which are noted in the Second Schedule hereto.
- (f) the fact that the property is in a Mine Subsidence District under the Mine Subsidence Act 1961, or any consequence of it being so situated, if the fact is stated in the Second Schedule hereto.

11.—The Vendor shall not be bound to contribute to the erection of or cost of erection of any dividing fence or wall between the property and any adjoining land owned by the Vendor. If so required the Purchaser shall include in his conveyance or transfer a restrictive covenant on his part in such form as the Vendor shall reasonably require, for the benefit of any adjoining land of the Vendor, binding himself and his successors in title, which will exempt the Vendor and his successors in title other than purchasers on sale, from liability to make or pay any such contribution.

12.—The property is sold
*with vacant possession
*with vacant possession
The Vendor agrees to give the benefit of possession to the Purchaser at the date of completion.

13.—The requirements, existing at the date of this Agreement, of any valid notice given by any competent authority or by an owner or occupier of land adjoining the property, necessitating the doing of work or expenditure of money on or in relation to the property or the footpaths or roads adjoining the same, must be fully complied with by the Vendor prior to completion and any such requirements not existing at the date of this Agreement must subject to completion of this Agreement be complied with by the Purchaser who shall indemnify the Vendor in respect thereof. Nothing herein contained shall relieve the Vendor from liability in respect of any work done prior to the date of this Agreement upon the property or upon any footpath or road adjoining the same and the Vendor agrees to indemnify the Purchaser against all liability in respect thereof notwithstanding the completion of this Agreement. If, without default of the Purchaser, this Agreement is rescinded, the Vendor shall repay to the Purchaser any amount expended by the Purchaser in complying with any such requirement which was in the nature of capital expenditure or has resulted in a benefit to the Vendor.

14.—If the Vendor shall be unable or unwilling to comply with or remove any objection or requisition which the Purchaser has made and shall not waive within fourteen days after the Vendor has given him notice of intention to rescind this Agreement, the Vendor, whether he has or has not attempted to remove or comply with such objection or requisition, and notwithstanding any negotiation or litigation in respect thereof, and whether the Purchaser has or has not taken possession shall be entitled by notice in writing to rescind this Agreement.

15.—If the Purchaser defaults in the observance or performance of any obligation imposed on him under or by virtue of this Agreement, the deposit paid by him hereunder, except so much of it as exceeds 10% of the purchase price, shall be forfeited to the Vendor, who shall be entitled to terminate this Agreement and thereafter either to sue the Purchaser for breach of contract or to sell the property as owned and the deficiency (if any) arising on such resale and all expenses of and incidental to such resale or attempted resale and the Purchaser's default shall be recoverable by the Vendor from the Purchaser as if paid and provided that proceedings for the recovery thereof be commenced within 12 months of the termination of this Agreement. The Vendor may retain any amount paid by the Purchaser on account of the purchase other than the deposit paid in full under this clause as security for any deficiency arising on a resale or for any damages or compensation payable or otherwise by way of account for the resale or for any amount payable from a Purchaser who has been in possession of the property or receipt of the proceeds of the resale or for any amount payable to him for the Purchaser's default provided that proceedings for the recovery of such amount or compensation be commenced within 12 months of the termination of this Agreement.

[Handwritten signature]

*Delete words not applicable.

†Insert "completion" "this agreement" or other agreed date.

*Delete words not applicable
†Insert "completion" "this agreement" or other agreed date.

~~For should it be established prior to completion that at the date of this Agreement the property was affected by any town and country planning Scheme or interim development prepared or prescribed under the provisions of the State Planning Authority Act or Part XIA of the Local Government Act 1919 or otherwise than as stated in the Fourth Schedule hereto or was affected by any Residential District Proclamation under Section 369 of the Local Government Act 1919, or by any existing proposals for re-alignment widening or siting of a road by the competent authority otherwise than as disclosed in the said Fourth Schedule, either party shall be entitled to rescind this Agreement by notice in writing to the other~~

In the Supreme
Court of New
South Wales

No.5

Exhibit A to
Affidavit of
Keith Albert
Bennell,
Contract for
Sale

4th August 1970
(continued)

17.—If, before transfer of title, the Purchaser is given the benefit of possession of the property then, until transfer of title

- (i) he shall not let or part with possession of the property or make any structural alteration or addition to the same
- (ii) he shall
 - (a) keep the property in good repair, having regard to its condition at the date of possession and permit the Vendor or his agent at all reasonable times to enter and view the state of repair
 - (b) keep all buildings insured against fire as the Vendor may reasonably require and deliver the policy and renewal receipts to the Vendor
 - (c) punctually pay all rates and taxes on the property and any necessary apportionment shall be made at the date provided in clause 9 or the date of possession whichever is the earlier
 - (d) comply with the provisions of all statutes and regulations applicable to the property

If the Purchaser shall make default in any of these obligations the Vendor may, without notice make good the default and without prejudice to his other rights may recover from the Purchaser as a debt the cost of so doing with interest thereon at 8% per annum until repayment and such amount and interest shall until repayment be a charge on the property.

18.—Where the balance of the purchase price is payable by instalments before transfer of title

- (a) If default by the Purchaser in payment of any instalment of the purchase price or interest hereunder shall continue for four weeks the balance of the purchase price then owing with accrued interest shall immediately without notice to the Purchaser become due and payable.
- (b) The Purchaser is not required to tender the assurance as stipulated in Clause 7 hereof but shall tender it within 14 days after making the final payment hereunder.

19.—If this Agreement is rescinded under any of the provisions of clauses 5 (d), 14 or 16 hereof such rescission shall be deemed to be a rescission ab initio, and

- (a) the deposit and all other money paid by the Purchaser hereunder shall be refunded to him;
- (b) neither party shall be liable to pay the other any sum for damages, costs or expenses;
- (c) if the Purchaser is or has been in occupation or in receipt of the rents or profits of the property he shall account for or pay to the Vendor the net rents or profits received or a fair occupation rent for the property until the date of rescission but the Vendor shall give the Purchaser credit for any interest paid by the Purchaser and any resulting balance payable by the Purchaser may be deducted by the Vendor from the deposit and other moneys before returning the same to the Purchaser.

20.—Where herein used, words importing the singular number or plural number shall include the plural number and singular number respectively, and words importing the masculine gender shall include the feminine or neuter gender.

21.—(a) Service of any notice or document under or relating to this Agreement

- (i) may be effected as provided in Section 170 of the Conveyancing Act 1919
- (ii) shall be sufficient service on a party if effected on his solicitor in any manner provided in that Section
- (b) A notice given or document signed and served on behalf of any party hereto by his solicitor shall be deemed to have been given or served by that party personally.

22.—Schedule III of the Conveyancing Act 1919 shall not apply to this Agreement.

SPECIAL CONDITIONS

See Annexure hereto.

SPECIAL CONDITIONS

In the Supreme
Court of New
South Wales

No.5

Exhibit A to
Affidavit of
Keith Albert
Bennell,
Contract for
Sale

4th August 1970
(continued)

1. UNLESS the Purchaser has within 6 weeks from the date hereof posted notice in writing to the Vendor of the intention of the Purchaser not to proceed with this Contract, completion shall take place upon whichever is the earlier of the following, and in this respect time shall be of the essence of this Contract :-

- (a) The expiration of 12 weeks from the date hereof;
- (b) The expiration of four weeks from the Purchaser giving notice in writing to the Vendor that the Purchaser has obtained approval in a form satisfactory to the Purchaser from the Council of the City of Sydney to its plans for development of property in and around Farrell Avenue, Darlinghurst, Sydney;
- (c) The expiration of four weeks from the Purchaser giving Notice in writing to the Vendor that the Purchaser elects to complete this Contract notwithstanding that it has not received the approval referred to in paragraph (b) above.

In the event of the Purchaser posting Notice of its intention not to proceed with this Contract as contemplated above this Contract shall thereupon be voided ab initio and both parties released from all obligations hereunder.

2. NOTWITHSTANDING the purchase price hereinbefore shown, if before the date provided for completion the Vendor produces to the Purchaser a valuation of the property by each of Richard Stanton & Sons Pty. Limited, L.J. Hooker Limited and Richardson & Wrench Limited, and the average of the valuations made by such parties and produced to the Purchaser is in excess of the purchase price hereinbefore shown then the Purchaser will pay to the Vendor the amount of such average in lieu of the purchase price hereinbefore shown.

3. IF Miss Ingeborg Gerda Petsch gives written notice to the Purchaser prior to completion of this Contract that she desires to have occupation of the property for the purpose of continuing to carry on the business now conducted thereon and executes prior to such completion a Licence in a form acceptable to the Purchaser, the Purchaser will permit Miss Petsch to have such occupation without payment of any occupation fee for the purpose of carrying on such business until the Purchaser gives her written notice that it requires the property for demolition. During the period of such Licence Miss Petsch will not be required to pay Council and Water Rates or any Land Tax payable in respect of the property. It is agreed that such Licence shall provide that Miss Petsch shall have the right, exercisable within fourteen days from the giving of notice by the Purchaser that he requires the property for demolition to remove all furnishings fittings and building materials on the property.

--- ooo ---

EXHIBIT B TO AFFIDAVIT OF KEITH ALBERT BENNELL,
MEMORANDUM OF TRANSFER, 4th August 1970

In the Supreme
Court of New
South Wales

No.5

Exhibit B to
Affidavit of
Keith Albert
Bennell,
Memorandum of
Transfer

4th August 1970

R.P. 13

Fees:—
\$ c

Longment —

Endorsement —

\$



This is the Annexure marked "B" referred to in the Affidavit of Keith Albert Bennell Sworn the 30th Day of October, 1970. Before me: *F Whitman JP*

New South Wales

MEMORANDUM OF TRANSFER

(REAL PROPERTY ACT, 1900)

IN, INGRID PTY. LIMITED

(herein called transferor)

being registered as the proprietor of an estate in *fee simple* in the land hereinafter described, subject, however, to such encumbrances, liens and interests as are notified hereunder, in consideration of SEVEN HUNDRED AND TWENTY THOUSAND DOLLARS (\$720,000.00) (the receipt whereof is hereby acknowledged) paid to it by

Wentworth Developments No. 2 Pty. Limited do hereby transfer to

WENTWORTH DEVELOPMENTS NO. 2 PTY. LIMITED a Company duly incorporated and having its registered office at 15 Bent Street, Sydney.

(herein called transferee)^d

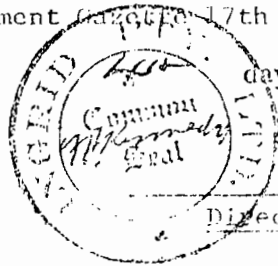
ALL such its Estate and Interest in ALL THE land mentioned in the schedule following:—

County	Parish	Reference to Title			Description of Land (if part only) ^e
		Whole or Part	Vol.	Fol.	
CUMBERLAND	ALEXANDRIA	WHOLE	7249	81	

ENCUMBRANCES, &c., REFERRED TO^f

Covenant in Memorandum of Transfer No. A458614.
Interest of Council of the City of Sydney in the strip of land 13 feet wide and irregular shown on the plan in the said Certificate of Title and created by re-alignment notified in the Government Gazette 17th June 1927 Folio 2861.
Otherwise nil.

Signed at *Sydney* the *4th* day of *August*, 1970.
THE COMMON SEAL of INGRID PTY. LIMITED was hereunto affixed by Director in the presence of:



Signed *[Signature]* Secretary

† Accepted, and I hereby certify this Transfer to be correct for the purposes of the Real Property Act.

THE COMMON SEAL of WENTWORTH DEVELOPMENTS NO. 2 PTY. LIMITED was hereunto affixed by authority of the Directors and in the presence of:

Secretary

Director Transferee(s)

If signed by virtue of any power of attorney, the original power must be registered in the Miscellaneous Register, and produced with each dealing, and the instrument of non-revocation on back of form signed by the attorney before a witness.

N.B.—Section 117 requires that the above Certificate be signed by each Transferee or his Solicitor or Conveyancer, and renders any person falsely or negligently certifying liable to a penalty, also to damages recoverable by parties injured. Acceptance by the Solicitor or Conveyancer (who must sign his own name, that of the Transferee is permitted only when the signature of the Transferee cannot be obtained without difficulty, and when the instrument does not impose a condition on the transferee under which the instrument contains some special covenant by the Transferee or is subject to a mortgage, encumbrance or lease, and the transferee must accept personally.

Alterations should be made by erasure. The words rejected should be scored through with the pen, and those substituted written over them, the alteration being certified by signature or initials in the margin, or noticed in the attestation.

EXHIBIT C TO AFFIDAVIT OF KEITH ALBERT BENNELL,
AUTHORITY. 14th August 1970

In the Supreme
Court of New
South Wales

No. 5

Exhibit C to
Affidavit of
Keith Albert
Bennell
Authority

This is the Annexure marked
"C" referred to in the
Affidavit of Keith Albert
Bennell.
Sworn the 30th day of October
1970. Before me:

(Sgd.) F. Whiteman J.P.

14th August
1970

10 AUTHORITY

To: Mr. Evans,
Messrs. T.G.D. Marshall Landers & Co.,
Solicitors,
251 George Street,
SYDNEY. 2000.

INGRID PTY. LIMITED hereby directs and authorises
you to:-

- 20 (i) Complete the Memorandum of Transfer today
executed by the Company in favour of
Wentworth Developments No. 2 Pty. Limited
(Wentworth) in respect of the land in
Certificate of Title Volume 7249 Folio 81
by inserting the date and the consideration
payable to this Company calculated in
accordance with the Contract of today's
date in respect of the above land; and
- 30 (ii) To hand the completed Memorandum of Transfer
and the said Certificate of Title to
Wentworth or its Solicitor upon receipt of
a Bank cheque for the consideration so pay-
able.

DATED this 14th day of August, 1970

(sic)

<p><u>THE COMMON SEAL</u> of <u>INGRID</u> <u>PTY. LIMITED</u> was hereunto affixed by authority of the Directors and in the presence of:</p>	}	<p>COMMON SEAL INGRID PTY. LIMITED (Sgd.) F.H. Kennedy <u>Director</u></p>
---	---	--

(Sgd) K.A. Bennell
Secretary

In the Supreme Court of New South Wales

AFFIDAVIT OF KEITH WILDON HODGSON - 2nd November 1970

No. 6

Affidavit of Keith Wildon Hodgson

2nd November 1970

ON the second day of November One thousand nine hundred and seventy KEITH WILDON HODGSON of 36 Kamilaroy Road, Pymble in the State of New South Wales, Company Director being duly sworn makes oath and says as follows:-

1. I am a Director of Richardson & Wrench Pty. Limited, Real Estate Agents and Valuers of 109 Pitt Street, Sydney. 10

2. I am a Fellow of the Commonwealth Institute of Valuers and a Valuer of the Valuers Division of the Real Estate Institute of New South Wales. I have been practising as a Valuer for the past 20 years and have given evidence of valuation in the Supreme Court and lesser Jurisdictions on many occasions. I have carried out valuations throughout the Commonwealth and I am particularly well informed on valuations in the Kings Cross and City of Sydney area. 20

3. Produced and shown to me at the time of swearing this my Affidavit and marked "KWH 1" is a valuation of the premises known as Farrell House numbered 7-13 Farrell Avenue, Kings Cross.

SWORN by the abovenamed Deponent) (Sgd)
KEITH WILDON HODGSON on the day }
and year first abovementioned } Keith W. Hodgson
at Sydney, before me: }

(Sgd.) S.V. Wise 30

A Justice of the Peace

NO. 7

TRANSCRIPT OF EVIDENCE BEFORE HIS HONOUR
MR. JUSTICE STREET - 6th and 13th
November, 1970

In the Supreme
Court of New
South Wales

IN THE SUPREME COURT)
OF NEW SOUTH WALES }
IN EQUITY }

No. 1433 of 1970.

CORAM: Street, J.

FRIDAY, 6th NOVEMBER, 1970

No. 7

Transcript of
Evidence
before His
Honour Mr.
Justice Street

PETSCH v. KENNEDY & ORS.

6th & 13th
November 1970

- 10 MR. HENDERSON, Q.C. with MR. GLEESON appeared for the plaintiff.
MR. HORTON appeared for the first defendant.
No appearance for the second defendant.
MR. DEANE, Q.C., with MR. BEAUMONT appeared for the third defendant.

(Originating summons dated 20th October 1970).

(Memorandum and Articles of Association tendered and admitted as Ex. A).

- 20 (Affidavit of plaintiff, 19th October 1970, read by Mr. Gleeson. First sentence of par.4 objected to by Mr. Horton; third and fourth sentences objected to by Mr. Deane. First, third and fourth sentences rejected).

- 30 HIS HONOUR. I note that the plaintiff's charge against the third defendant is that at the time of the alleged meeting of directors of the second defendant on 4th August 1970 the third named defendant had notice of the defects in the calling of that meeting and that no motion authorising the entry of the company into the alleged contract was passed.

The plaintiff also charges that, by reason of the fact that the first defendant was not a director, any motion that was passed was not a matter of internal management.

(Contract, 30th May 1967, tendered and admitted as Exhibit B).

In the Supreme
Court of New
South Wales

No. 7

Transcript of
Evidence
before His
Honour Mr.
Justice Street

6th & 13th
November 1970
(continued)

(Agreement, 24th July 1967, tendered and admitted as Exhibit C).

(In par. 5 of affidavit of plaintiff of 19th October 1970 "He has never played an active part ..." objected to by Mr. Deane: admitted).

(Minute Book tendered and admitted as Exhibit D).

(Par.8 of affidavit of plaintiff of 19th October 1970, objected to by Mr. Deane; rejected. In par.14 the words "I did not participate in it" objected to by Messrs. Deane and Horton; admitted).

10

(Affidavit of H. Hourigan of 20th October 1970 read by Mr. Gleeson).

(Contract, 4th August 1970, and copy tendered and admitted as Exhibit E).

(Transfer, 4th August 1970, tendered and admitted as Exhibit F).

(Affidavit of K.A. Bennell of 30th October 1970 read by Mr. Horton).

20

(Affidavit of K.W. Hodgson of 2nd November 1970, sought to be read by Mr. Horton, objected to by Mr. Henderson and rejected).

(Affidavit of F.H. Kennedy of 30th October 1970 read by Mr. Horton. Par.2 objected to by Mr. Henderson. First sentence admitted. Second sentence admitted. In the portion commencing "Two mortgages, the first mortgage for \$60,000..." the portion "with the agents for the vendor" admitted; the remainder of paragraph rejected. Par.3 objected to by Mr. Henderson; "manage its financial affairs" rejected. Par.4 objected to by Mr. Henderson. In the sentence beginning "In further answer to par.13 of that affidavit and in answer to par.14 of the affidavit..." the following portion, namely, "I say that the affidavit... 4th August 1970 save that" rejected. Sentence beginning "Apart from these observations" rejected).

30

40

(Copy of bank authorities and cheque tendered by Mr. Horton; objected to by Mr. Henderson; admitted and marked Exhibit 1).

In the Supreme
Court of New
South Wales

No. 7

Transcript of
Evidence
before His
Honour Mr.
Justice Street

6th & 13th
November 1970
(continued)

FREDERICK HUGH KENNEDY
Sworn examined as under:

Evidence for
First
Defendant
Frederick
Hugh Kennedy
Examination.

MR. HORTON: Q. What is your full name?
A. Frederick Hugh Kennedy.

Q. Where do you reside? A. 17 Wylde Street,
Potts Point.

Q. You are the first-named defendant in this suit?
A. Yes.

Q. You have sworn an affidavit in this suit?
A. That is right.

Q. I want to take you to 4th August 1970 when
something took place at Unit 81, 17 Wylde Street
Do you recall that evening? A. Yes.

Q. Do you remember Miss Petsch coming home that
evening? A. Yes.

20 Q. Who was present in the unit when Miss Petsch
arrived? A. Mr. Wynyard.

Q. Were you present? A. Yes.

Q. Do you recall Mr. Bennell coming at all that
evening? A. Yes.

Q. Take your mind to when Mr. Bennell arrived.
Where was everyone when Mr. Bennell arrived?
A. Mr. Wynyard was in the dining room and I
think Miss Petsch was in her bedroom.

In the Supreme
Court of New
South Wales

No. 7

Transcript of
Evidence
before His
Honour Mr.
Justice Street
Evidence for
First
Defendant
Frederick
Hugh Kennedy
Examination

6th & 13th
November 1970
(continued)

- Q. Did you have any conversation with Miss Petsch immediately after Mr. Bennell arrived?
A. I do not remember the exact words but I indicated to her we were going to have a meeting, a director's meeting.
- Q. Was this in the bedroom? A. In the hall.
- Q. You indicated to her you were going to have a meeting and she was in the hall. What happened then, did she go into the dining room? A. "Come in and meet Mr. Bennell". 10
- Q. What happened then. You were still in the hall when you said that? A. Yes.
- Q. So far as you can do you understand what is meant by direct speech. That is you use the words actually used by the parties? A. Yes.
- Q. So far as you can go back to this conversation in the hall with Miss Petsch. You told us you said "Come and meet Mr. Bennell." What else was said? A. We immediately went into the lounge room. 20
- Q. Was anything else said in the hall apart from "Come and meet Mr. Bennell"? A. No.
- Q. Is the lounge room and dining room the same room? A. Yes.
- Q. You went into the lounge room. What was said then? A. I think Mr. Bennell said "Is this a duly constituted board meeting" and I said "Yes".
- Q. Where were you at the time. Were you sitting at the table? A. Yes. 30
- Q. Who else was present at that time? A. Mr. Wynyard.
- Q. And Mr. Bennell? A. Yes.
- Q. Where was Miss Petsch? A. She was sitting at the head of the table.
- Q. Is this a dining table you are talking about? A. Yes.

Q. You were all sitting at the table at this time?
A. Yes.

Q. What was said after that? A. My memory is that bad now, I can hardly remember anything.

Q. To the best of your recollection? A. What was the question again?

Q. You remember you were sitting at the table and you said that according to your recollection Mr. Bennell said "Is this a duly constituted meeting" and you said "Yes". I asked you what was said after that? A. I think Miss Petsch went into a long oration.

10

Q. Can you remember what she said. Her actual words at all? A. No.

Q. Can you remember the subject matter of what she was talking about? A. She just said she did not want to sell Farrell House.

Q. Did that long oration last a long time? A. Yes, she did most of the talking.

20

Q. Who else was talking? A. Mr. Wynyard and Mr. Bennell, if they could get a word in, because it was somewhat difficult because she won't stop talking.

Q. She was talking about not wanting to sell Farrell House? A. Yes.

Q. Do you recall after she had finished that long oration what was said by anyone? A. Mr. Wynyard got the plans out and laid them on the table to see how they could instigate their scheme without Farrell House but he said they did not want to do it.

30

Q. As near as you can, the precise words used?
A. That is as near as I can.

Q. Throughout this where was Miss Petsch, still at the table? A. Yes, all the time.

Q. Do you recall her leaving the table at all on this evening? A. Yes, she sat in a lounge chair for a little while, but I think that was after all the talking had been done.

In the Supreme
Court of New
South Wales

No. 7

Transcript of
Evidence
before His
Honour Mr.
Justice Street

6th & 13th
November 1970

Evidence for
First
Defendant

Frederick
Hugh Kennedy

Examination
(continued)

In the Supreme
Court of New
South Wales

No. 7

Transcript of
Evidence
before His
Honour Mr.
Justice Street

6th & 13th
November 1970

Evidence for
First
Defendant

Frederick
Hugh Kennedy

Examination
(continued)

- Q. How far away from the table was this lounge chair she sat in? A. About four feet.
- Q. How long did this meeting last, approximately? A. Over an hour.
- Q. Could you take your mind towards the end of the meeting. Did you say anything? A. Well, Mr. Wynyard read out the terms of their offer and I said "I move that the offer be accepted".
- Q. When you said Mr. Wynyard read out the terms of the offer, do you recall what those terms were? A. Yes. He mentioned the price of \$720,000. 10
- Q. What was the offer relating to? A. To the land only.
- Q. What land? A. The land on which Farrell House stands.
- Q. So he read out his offer. Do you recall anything more about the words of that offer or is that all you recall? A. He read the letter out. I suppose somebody has got a copy of the letter here. 20
- Q. Did you see a copy of the letter at that time? A. No.
- Q. What did you say in relation to that offer after he finished reading it out? A. After some minutes Miss Petsch still raised an objection.
- Q. After the offer had been read out who spoke first, you or Miss Petsch? A. I did.
- Q. What did you say? A. I said "I move that the offer be accepted". 30
- Q. What was said then by anyone? A. Miss Petsch said she did not want to sell and I said "Well, I will have to exercise my casting vote in favour of the motion."
- Q. What was said then. Where was Miss Petsch when this was happening? A. At the head of the table.

- Q. What was said then? A. When do you mean?
- Q. The last thing you told us you said was "I will have to exercise my casting vote"? A. Yes.
- Q. Was anything said by anyone after that?
A. No, I do not think so.
- Q. Was that the end of the meeting then? A. We put the company stamp on the document and I signed it and Mr. Bennell signed as secretary.
- 10 HIS HONOUR: Q. Who put the company stamp on?
A. I did, or Mr. Bennell.
- MR. HORTON: Q. When you talk about the company stamp and you put it on, what did you put it on?
A. On the contract.
- Q. (Shown Ex.E). Would you look at the back of that document. Do you see two seals, two stamps? A. Yes.
- Q. Do you see one with the name of Ingrid Pty. Limited on it? A. Yes.
- 20 Q. Is that what you are talking about when you say you put the company stamp on? A. Yes.
- Q. There are two signatures under that. Is one of them your signature? A. Yes.
- Q. Whose is the other signature? A. Mr. Bennell.
- Q. When was that signed by you? A. During the meeting.
- Q. Did you see Mr. Bennell sign it? A. Yes.
- Q. When did he sign it? A. Almost immediately afterwards.
- Q. After what? A. After I signed it.
- 30 Q. When you put the stamp on where was Miss Petsch?
A. Sitting at the head of the table.
- Q. Where were you? A. I was up the other end of the table near Mr. Bennell. I had to go out of the room to get the seal out of the other room where it was kept in a drawer.

In the Supreme
Court of New
South Wales

No. 7

Transcript of
Evidence
before His
Honour Mr.
Justice Street

6th & 13th
November 1970

Evidence for
First
Defendant

Frederick
Hugh Kennedy

Examination
(continued)

In the Supreme
Court of New
South Wales

No. 7

Transcript of
Evidence
before His
Honour Mr.
Justice Street

6th & 13th
November 1970

Evidence for
First
Defendant

Frederick
Hugh Kennedy

Examination
(continued)

- Q. At the time you put the seal on she was at one end of the table and you were at the other?
A. That is right.
- Q. How long was the table? A. About six feet.
- Q. When you signed this contract where was she?
A. Still at the head of the table.
- Q. Where were you? A. At the other end of the table.
- Q. When Mr. Bennell signed, do you remember where she was? A. Still sitting there. 10
- Q. Was Mr. Bennell still there when you signed it? A. Yes, of course he was or otherwise he would not have signed it.
- Q. (Shown Ex.F). Do you see that stamp on that document? A. Yes.
- Q. Do you know when that was put on? A. Yes.
- Q. Did you put a stamp on any other document at this particular meeting, other than the contract?
A. Not that I remember.
- Q. Do you see any signatures on that? A. Yes. 20
- Q. Is one of those signatures yours? A. Yes.
- Q. Do you recall when you put that signature on?
A. No.
- Q. After you had put the stamp on the contract and signed the contract do you recall anything else happening at that meeting? A. No.
- Q. Did the meeting end and the people go away then? A. Yes.

(Witness stood down).

KEITH ALBERT BENNELL
Sworn, examined as under :

In the Supreme
Court of New
South Wales

No. 7

MR. HORTON: Q. What is your full name?
A. Keith Albert Bennell

Transcript of
Evidence
before His
Honour Mr.
Justice Street

Q. Where do you reside? A. 150 Tyron Road,
East Lindfield.

6th & 13th
November 1970

Q. You are a chartered accountant? A. Yes.

Evidence for
First Defendant

Q. You are the deponent of an affidavit sworn
in these proceedings? A. Yes.

Keith Albert
Bennell

Examination

10

CROSS-EXAMINATION.

Cross-
examination.

MR. DEANE: Q. How long have you been an
accountant? A. Qualified accountant since
approximately 1946.

Q. I presume during those years you have
attended innumerable meetings of company boards?
A. Yes.

20

Q. On the night of 4th August when this meeting
of Ingrid Pty. Limited took place, you went
to the meeting knowing that the question of the
sale of Farrell House was to be considered?
A. Yes.

Q. Would it be true to say that from your
experience you knew that the ordinary way for a
decision to be taken by directors was for a
resolution to be proposed? A. Yes.

30

Q. Would you agree that from your experience
you were aware that in the case of a Table A
Company the ordinary way for a resolution to be
passed or rejected where there were two directors
present was for the chairman of directors to
exercise his casting vote? (Objected to;
rejected).

In the Supreme
Court of New
South Wales

No. 7

Transcript of
Evidence
before His
Honour Mr.
Justice Street

6th & 13th
November 1970

Evidence for
First Defendant

Keith Albert
Bennell

Cross-
examination
(continued)

- Q. Have you any doubt at all that at this meeting a resolution was proposed by Mr. Kennedy to the effect that Farrell House be sold to Wentworth Developments No.2 Pty. Limited (Objected to; allowed).
- Q. Have you any doubt at all as to that? A. I have no doubt at all.
- Q. And have you any doubt that that resolution, having been proposed, Miss Petsch expressed her opposition to it? A. That is correct. 10
- Q. And would it be true to say that you have no doubt at all that Mr. Kennedy then stated that he exercised his casting vote in favour of the resolution? A. That is so. That is the fact.
- Q. At this meeting did Miss Petsch at any stage at all say "This is not a meeting of directors"? A. I do not recollect her saying so. She may have said so.
- Q. You cannot recall her saying anything to that effect? A. No. 20
- Q. Did she ever say to Mr. Kennedy "You are not even a director of the company"? A. No, I do not recollect her saying that either.
- Q. You would remember it if she said it? A. Yes.
- Q. Did she say to Mr. Kennedy "You are not the chairman of the company" A. No.
- Q. Did she say to Mr. Kennedy when he exercised his casting vote "You have not got a casting vote"? A. I do not recollect her saying that. 30
- Q. And of course if she had said it you would recollect it? A. Yes.
- MR. HENDERSON: Q. I show you Ex.E, the contract that was signed that night? A. Yes.
- Q. The signature on the bottom left hand corner is your signature? A. That is so.

Q. And the signature within the seal of Ingrid Pty. Ltd., is that of Mr. Kennedy? A. That is right.

Q. Was the other seal already in place? A. I think it was. Q. That document was produced by Mr. Wynyard, I take it? A. Yes.

Q. Was it actually already signed. You see there is a seal with signatures on it in respect of Wentworth Developments? A. I think it was already signed.

Q. Will you look at the signature within Wentworth Developments. Are you able to read that signature? A. No, I am sorry, I do not know.

Q. Are you familiar with Mr. Wynyard's signature? A. No, not at all.

Q. Did Mr. Wynyard say anything about the signatures on that document? A. No.

Q. How was Mr. Wynyard introduced to you? A. When I arrived at the flat just about eight o'clock that evening Mr. Kennedy took me into the living room. Mr. Wynyard was seated and he introduced him to me as Mr. Wynyard of Wentworth Developments.

Q. He did not say anything about his particular capacity? A. No, I do not think so.

Q. Was Miss Petsch present at that stage? A. No.

Q. She was outside the room? A. Yes.

Q. How long were you and Mr. Kennedy and Mr. Wynyard together before Miss Petsch came in? A. No longer than about two or three minutes.

Q. Mr. Kennedy went out to get her? A. That is right.

Q. She came in and what was then said? A. Well, I said Good evening to her and she was emotionally upset and she immediately left the room.

In the Supreme
Court of New
South Wales

No. 7

Transcript of
Evidence
before His
Honour Mr.
Justice Street

6th & 13th
November 1970

Evidence for
First Defendant

Keith Albert
Bennell

Cross-
examination
(continued)

In the Supreme
Court of New
South Wales

No. 7

Transcript of
Evidence
before His
Honour Mr.
Justice Street
6th & 13th
November 1970

Evidence for
First Defendant

Keith Albert
Bennell

Cross-
examination
(continued)

- Q. She started to cry? A. Yes.
- Q. You knew her before? A. Yes.
- Q. You had seen her since 1967? A. Yes. In our office in a professional capacity.
- Q. Had you known her before 1967? A. No.
- Q. How long was she in the room before she left on that occasion? A. No more than about half a minute. She just said hullo and cried.
- Q. And went out and Mr. Kennedy followed her out? A. Yes. 10
- Q. How long was it before they came back? A. No more than two or three minutes.
- Q. When she came back did she appear composed? A. Yes, she had recovered somewhat.
- Q. Somewhat? A. She had been very upset and she came back and she calmed down.
- Q. She was less upset? A. Yes.
- Q. What was the first thing that was said by anybody after she came back? A. We all took our places at the table and Mr. Kennedy said it 20 was a meeting to discuss the offer that had been received for the sale of Farrell House.
- Q. You did not say to him "Is this a duly constituted meeting"? A. I may have said so, but - well, I am sorry I cannot recollect whether I said that or not. I understood it to be a directors' meeting and we took our seats.
- Q. There was no notice of meeting produced to you at all? A. No.
- Q. You did not at any stage suggest to Mr. Kennedy that there should be a notice of meeting in respect of this transaction? A. No. 30
- Q. You knew this transaction was to be discussed on that occasion, did you? A. Yes. I only knew that day.

- Q. When you came there, you came there for the very purpose of being present at the discussion?
A. That is so.
- Q. And I suppose implementing any decisions that were made that required your co-operation as secretary? A. That is so.
- Q. You did not suggest there should be a notice, to Mr. Kennedy? A. No.
- 10 Q. He did not suggest to you "I have given Ingrid notice"? A. No, there was no mention of notice at all.
- Q. What was the next thing said after it was said this was a directors' meeting to consider the sale of Farrell House? A. Mr. Kennedy produced a contract and mentioned the consideration and then passed the proceedings over to Mr. Wynyard who was asked to explain in full detail.
- 20 Q. So it was Mr. Kennedy who said - what did he say. He produced this contract, this very document? A. Yes.
- Q. A single document or two of them? A. As far as I can recollect there was only the one document.
- Q. What did he say? A. He said that the company had received this offer for the sale and mentioned the consideration.
- Q. Yes. A. He mentioned some of the terms and then he asked Mr. Wynyard to explain in full detail to Miss Petsch.
- 30 Q. Do you remember what terms Mr. Kennedy mentioned?
A. I think from memory he mentioned that the company could retain all the revenue from the property until such time as it was ready to be demolished.
- Q. How long did it take him to mention the terms before he handed over to Mr. Wynyard? A. I did not take very long at all. No more than about two minutes.
- 40 Q. What you have just said is all he said, is it? A. To my recollection, yes.

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- Q. What did he say when he handed the meeting over to Mr. Wynyard? A. From recollection he said "Would you please explain in full the details of the proposed offer - of the offer."
- Q. What was the next thing said by anybody? A. Mr. Wynyard just - I do not remember his exact words but he just explained the consideration and the fact that the revenue would remain with the company, rates and taxes would be paid by his company, and that Ingrid Pty. Limited would have full use of the premises until it was ready to be demolished. 10
- Q. How long did his explanation take? A. It took quite a long while.
- Q. This was an explanation he gave uninterrupted by anybody? A. No, Miss Petsch did interrupt him on numerous occasions.
- Q. What did she say? A. She was very emphatic she did not want to sell the property. She also went into great details of her relationship with Mr. Kennedy. 20
- Q. Was this while Mr. Wynyard was explaining? A. Yes.
- Q. What else did she say? A. She said she thought they may receive a better offer and she referred to an offer which she said she received at one stage.
- Q. Did she say who it was from? A. I do not recollect. She may have said so, but I do not recollect the name of the firm. 30
- Q. Did she say how much it was? A. Yes, she mentioned 1.5 million dollars.
- Q. As far as her interruptions were concerned, she constantly asserted, did she not, that the property could not be sold without her consent? A. Yes, she said that.
- Q. Did she explain why it would not be sold without her consent? A. Yes. She said that she had been led to believe that it could not be sold without her consent. 40

- Q. Did she say by whom? A. She mentioned Mr. Evans' name, yes.
- Q. You said Mr. Wynyard's explanation of the offer lasted some time and was interrupted by Miss Petsch? A. Yes.
- Q. Interrupted by anybody else? A. No.
- Q. Did you ask any questions? A. I might have asked one or two, but not very many.
- 10 Q. What were they about? A. More or less to get further explanations of some of the remarks he had made about the offer. I also did comment on the taxation position as far as Ingrid was concerned, from the company's point of view.
- Q. You put those things to Mr. Wynyard, did you? A. No, I put it to the meeting actually. Explained the benefits to the company.
- Q. Did anybody else say anything while Mr. Wynyard was explaining the offer? A. No.
- 20 Q. When Mr. Wynyard finished explaining his offer what was the next thing that anybody said? A. The discussion had taken approximately an hour and a half and at the end of an hour and a half Mr. Wynyard had exhausted all his persuasive powers and Mr. Kennedy then put the motion to accept the offer.
- Q. What persuasion did Mr. Wynyard use in the course of his offer? A. He just explained that it was a very generous offer - it was virtually a cash deal.
- 30 Q. Of a very large sum of money? A. Yes.
- Q. Did Miss Petsch sit there all the time at the table? A. Not at the table no. She sat on one of the lounge chairs for a while.
- Q. Did she remain looking towards the table or back to the table, or what? A. No, she was at the side of the table.
- Q. Where was she facing? A. Parallel to the table, The table was in one position and she was sitting here, facing parallel to it.

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- Q. What clothes was she wearing? A. I am sorry, I don't recall.
- Q. No recollection of that at all? A. No.
- Q. After Mr. Wynyard's discussion came to an end Mr. Kennedy said something, did he? A. Yes, he formally moved that the offer be accepted.
- Q. What did he say? A. "I move that the offer made by Wentworth Developments No.2 Pty. Limited be accepted."
- Q. Where was Miss Petsch at that stage? A. I am not sure. She may have been still sitting in the lounge chair or she may have come back to the table. 10
- Q. Do you recall what time it was? A. Approximately half past nine.
- Q. What was the next thing that anyone said? A. Miss Petsch immediately said she objected to selling Farrell House.
- Q. What were the actual words. She said "You can't sell it without my consent"? A. Yes, she did say that. 20
- 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." 30
- Q. What was the next thing that was said? A. Mr. Kennedy said, as he had the casting vote, he declared the motion carried.
- Q. What was the next thing that was said or happened? A. He said he would apply the seal to the contract and the form of transfer, which he did. He then requested myself as secretary also to sign it.

- Q. Where was the seal of the company at the beginning of the meeting? A. I brought the seal along from the office with me.
- Q. You have always had custody of that, have you? A. Yes.
- Q. So that the seal was in the room? A. Yes.
- Q. Then what happened? Did he put it on, or did you? A. No, he put it on.
- 10 Q. Was there any discussion as to where it should be put on? A. No, I don't think so, I might have pointed out to him to put it on a particular spot.
- Q. And he signed it? A. He signed it first, and I signed it.
- Q. Did he request you to sign? A. Yes, he formally asked me to sign it.
- Q. How often was the seal used that night? A. It was put on three documents.
- 20 Q. What were they? A. This contract, a form of transfer and the authority to act to a firm of Solicitors.
- Q. Only on three documents? A. Yes.
- Q. There was no separate motion about affixing the seal? A. No, there was no special motion.
- Q. In respect of any of the three documents? A. No.
- Q. And there was no special reference to the transfer? A. No, no formal reference.
- 30 Q. And no formal reference to the authority? A. No.
- Q. What was the order of the signing of the three documents? A. The contract, transfer and the authority. They were signed in that order.
- Q. Did Mr. Kennedy sign each document before you signed any? A. No. As he sealed and signed each document he passed it over separately and I signed each one separately.

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- Q. You signed it as he was signing the next one, did you? A. Yes.
- Q. When he asked you to sign, did he ask you only once to sign? A. Yes.
- Q. What were the words he used? A. "Will you please sign as signatory?"
- Q. Was the transfer produced to you already complete except for signatures? A. Yes.
- Q. Except for the seal and the signatures, and, I suppose, the date? A. Yes. 10
- Q. There was no typing done there that night? A. No.
- Q. Who actually produced the transfer? A. I think it was Mr. Wynyard.
- Q. When you first saw it it was in his possession was it? A. Well, the documents were together initially. I think he produced the three documents and they were given to Mr. Kennedy.
- Q. You have told us already that when you went to that meeting you knew that the question of the sale of Farrell House to Wentworth Developments No. 2 Pty. Limited was to be discussed? A. Yes. 20
- Q. You had had some discussion with Mr. Kennedy about this? A. Well actually the first I knew about the meeting was on that particular day when I had a telephone call from Mr. Evans, who asked me to attend a meeting that evening to discuss the sale and he asked me to take along the seal of the company with me. 30
- Q. You had known that a sale was under discussion for some time? A. Yes, this had been discussed with me over a period of several months.
- Q. And you knew that Miss Petsch was opposed to it before you went there? A. Yes.

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- Q. You knew that she took the view that this place was worth more than any offer that had been received so far, apart from anything she had received? A. No. The only time I heard that said of it - that it was worth more - was during the evening when she mentioned she had received an earlier offer.
- Q. But you knew that she was opposed to the sale?
A. Yes.
- 10 Q. Had you discussed it with her at all? A. No.
- Q. Had you discussed it with Mr. Kennedy?
A. Very briefly.
- Q. How long before? A. It would be at least a week or a fortnight before.
- Q. And was the figure that was under discussion then disclosed to you? A. It was mention of a figure, \$60,000 less - -
- Q. \$660,000? A. \$660,000.
- 20 Q. On that occasion the fact of Miss Petsch' opposition was mentioned, wasn't it? A. Yes, I knew that she opposed it at that time.
- Q. Had you discussed the sale at all with Mr. Kennedy before that date? A. Not in detail.
- Q. You knew there were negotiations going on?
A. Yes.
- Q. And you knew that the sum was a big sum? A. Yes.
- Q. And you knew that Wentworth Developments was interested - or their group? A. Yes.
- 30 Q. You made no suggestion about having a formal meeting of directors - calling one formally?
A. No.
- Q. You knew that the sum involved was at least \$660,000? A. Yes.
- Q. And you knew that Miss Petsch was opposed to it?
A. Yes.

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- Q. And you went along expecting the sale to go through - the contract to be accepted by the company on Mr. Kennedy's casting vote? A. Yes.
- Q. It was all cut and dried wasn't it? A. Well, not exactly, because the decision was not made until 1½ hours after the meeting started. I formed my own opinion that it was in the best interests of Mr. Kennedy, and the company and Miss Petsch at the meeting. If I had not thought that I would not have signed, as secretary. 10
- Q. You formulated that conclusion yourself? You had had discussions with Mr. Evans about this? A. Not in detail, no.
- Q. You had a conversation with him on that day, asking you to attend the meeting? A. Yes.
- Q. You had had other conversations with him hadn't you? A. Yes, brief conversations.
- Q. And you gathered the impression I suppose, that he also thought it was in the interests of the company? A. Yes. 20
- Q. And would you have taken the view that if what had happened here did in fact happen and you disapproved of the sale that you would refuse to sign? A. Yes.
- Q. On what basis? A. Because there were two equal partners in the company in my opinion.
- Q. Yes? A. The main grounds given by Miss Petsch during that evening against the sale was personal grounds - personal relationship with Mr. Kennedy. 30
- Q. That it could not be sold without her consent? A, No. Just their personal relationship.
- Q. What did she say? A. She just went back to the earlier relationship between her and Mr. Kennedy.
- Q. Yes? A. And looked upon the property as her own - that hers was the dominant interest in the property and that she did not want to sell it - she would not sell it, no matter what price was offered to her. 40

- Q. You were aware, were you not, that there was a deliberate decision not to give Miss Petsch any notice of this meeting that night, but to hustle the meeting through? A. I knew nothing about that.
- Q. You knew nothing about that? You were asked to take the seal along? A. I was asked to go along to the meeting with the seal.
- 10 Q. You knew that the sum involved was a very large sum? A. Yes.
- Q. And involved the sale of the totality of the assets of the company for practical purposes? A. Yes.
- Q. You knew Miss Petsch was opposed to it? A. Yes.
- Q. Opposed to the sale. Had you yourself seen any valuations of the property? A. No.
- Q. And you went along, knowing that the transaction would be approved? A. Not exactly, no.
- 20 Q. Not exactly? Did you think that Mr. Kennedy would not approve of it? A. I knew he would approve of it.
- Q. You knew that he claimed to have a casting vote? A. Yes.
- Q. And you knew that he would use it? A. Yes.
- Q. And you knew that if he exercised his casting vote the transaction must be approved? A. I also knew I need not sign the document if I didn't wish to sign it.
- 30 Q. On what basis? A. As secretary of the company.
- Q. Do you take the view that a secretary of a company can refuse to put his signature on a document in the face of a valid resolution? A. I think he can make up his own mind, yes.
- Q. On what basis? A. If he feels an injustice is being done.

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- Q. And you had seen no valuations of this property? A. No.
- Q. You knew that the price that was being put forward was a vast advance on what had been paid two or three years before? A. Yes.
- Q. And that is all you knew? A. I knew there had been an offer some months previously for approximately \$200,000.
- Q. And this was a vast advance on that? A. Yes.
- Q. And on that basis you felt that you, as secretary, and not part of the board - that you, as secretary, would have been entitled to refuse to put your signature to the document if you had wished? A. Yes. 10.
- HIS HONOUR:** Q. Who had the custody of the minute book, Mr. Bennell? A. My Office.
- Q. Did you take the minute book with you that night? A. Yes.
- Q. And did you make some pencil notes of what happened at the meeting? A. Yes. 20
- Q. For the purpose of later preparing the formal minute? A. Yes.
- Q. Did you keep the pencil notes that you made? A. No, I did not.
- Q. May I take it that the minute itself was later typed out in your office - the minute that appears in the book? A. It was typed up the next morning.
- Q. And were any copies of it made? A. Yes. I sent a copy around to Mr. Evans' office. 30
- Q. Mr. Evans was the company solicitor, was he? A. Yes.
- Q. Was any suggestion made this night at this meeting about the company's solicitor checking the contract before the company signed it? A. No, I don't think so.

(Witness retired and excused).

(Originating summons stood over to 13th November, 1970. Existing injunction continued until further order.)

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IN EQUITY

No. 1433 of 1970

CORAM: STREET, J.

PETSCH v. KENNEDY & ORS.

Frederick Hugh Kennedy
Cross-examination.

SECOND DAY: FRIDAY 13th NOVEMBER, 1970

10 FREDERICK HUGH KENNEDY

On former oath.

HIS HONOUR: You are still on your former oath, to tell the truth, do you understand, Mr. Kennedy?

WITNESS: Yes.

CROSS-EXAMINATION

MR. DEANE: Q. Mr. Kennedy, you have given some evidence about a meeting that took place on 4th August, 1970. Do you remember that? A. Yes.

20 Q. What was your belief at that time as to your position with the company, Ingrid Pty. Limited (objected to by Mr. Henderson; question not pressed).

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- Q. You are aware, are you not, that in these proceedings a suggestion has been made that you may not be the chairman of directors of Ingrid Pty. Limited? A. Well, there are the two of us in it - only two of us - so if you are going to have directors, two would be eligible.
- Q. Will you answer my question, please? You are aware, are you not, that in these proceedings the suggestion has been made that you may not be the chairman of directors in Ingrid Pty. Limited. You are aware of that, aren't you - that that suggestion has been made? A. I understand so, yes. 10
- Q. When was the first occasion upon which you became aware that anybody at all suggested that you may not be chairman of directors of Ingrid Pty. Limited? A. ~~There was never any doubt about it.~~
- HIS HONOUR: That is not an answer to the question. That should be struck out, Mr. Deane. 20
- MR. DEANE: Q. You said in answer to my question, Mr. Kennedy, that there was never any doubt at all about your being chairman of directors? A. Yes.
- Q. When was the first occasion upon which you became aware that somebody was suggesting that you might not be chairman of directors? A. That was from Mr. Bruce Evans.
- Q. Was that after the meeting had taken place? A. Yes. 30
- Q. Indeed, it was some weeks after the meeting, was it? A. It would not be very long afterwards. It would probably be within a fortnight.
- MR. HENDERSON: Q. Mr. Kennedy, when did you first meet Mr. Wynyard? A. It would be about May or June, I would think.
- Q. May or June 1970? A. Yes.
- Q. And where did you meet him? A. At the office of Home Units Pty. Limited. 40

Q. At Home Units Pty. Limited? A. Yes.

Q. How did you come to go to Home Units Pty. Limited? A. Because we had the offer from them.

Q. Was it a written offer? A. Yes, it was a written offer.

Q. Have you the written offer still in your possession? A. Yes, it is in here (indicating attache case).

10 Q. It is in there, is it? A. Yes.

Q. Would you produce that document? A. Yes (document produced).

Q. And that letter, I think you are aware, was dated 4th March, 1970? A. Yes.

Q. And I think you have had other correspondence with Home Units Pty. Limited? A. Yes.

MR. HENDERSON: I call for that correspondence (document produced by witness).

20 Q. Have you had more than this one letter? Have you had more than this? A. No.

Q. After you received the first of these letters, Mr. Kennedy, you communicated with Mr. Wynyard, did you? A. Yes.

Q. And I suppose you told him that you thought you would have difficulty with Miss Petsch, did you not? A. No, I did not mention Miss Petsch.

HIS HONOUR: Q. You didn't - A. I didn't mention Miss Petsch.

MR. HENDERSON: Q. You didn't mention Miss Petsch? A. No.

30 Q. You received a letter dated 20th March addressed to you personally, did you not, making an offer for the shares that you held in Ingrid Pty. Limited? A. Yes.

Q. Is that right? A. Yes, that is right.

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- Q. How often had you seen Mr. Wynyard or spoken to Mr. Wynyard between the receipt of the first letter and the receipt of the second letter? A. I would have no idea.
- Q. You would have no idea? A. No.
- Q. Would it be more than once? A. Probably, yes.
- Q. More than once? A. I would say yes. I am not sure. I think that it would be more than once. 10
- Q. And did you always see him at the office of Home Units Pty. Limited? A. Yes, I think so.
- Q. Did you receive any letters from any other company relating to Farrell House? A. Not after that.
- Q. Not after that? A. I did not receive any letters after that.
- Q. Did you receive any from Wynyard Developments Pty. Limited? I am sorry, did you receive any from Wentworth Developments? A. No. 20
- Q. You did not? A. No.
- Q. At no time? A. No, I did not receive any from them.
- Q. But you had many conversations with Mr. Wynyard? That is correct, is it, that you had many conversations with Mr. Wynyard? A. I would not say that I had many conversations with him. I had conversations with him.
- Q. Between March and August how often did you see Mr. Wynyard? A. Probably four or five times. 30
- Q. You saw him probably four or five times between March and August? A. Yes.
- Q. Were all of those at his office? Was it at his office on each occasion when you saw him? A. No, not all of them.
- Q. Were some of them at Farrell House? A. I think he called there once.

- Q. Called there once? A. Yes, I think so.
- Q. Do you remember when it was that he called there? A. It was probably June or July.
- Q. Were you there when he called? A. Yes, I was there.
- Q. And was Miss Petsch there when he called? A. No, she was not there.
- Q. And he discussed with you the question of selling Farrell House? A. Yes.
- 10 Q. At any time did you say to him that you were having trouble with Miss Petsch? Did you ever say that you were having trouble with Miss Petsch, or anything like that? A. I would say yes.
- Q. You would say yes? A. Yes.
- Q. Because at all times she was unwilling to sell or to concur in the selling of Farrell House? That is correct isn't it? A. Yes, that would be right.
- 20 Q. She felt it was worth a lot more than \$660,000? (objected to by Mr. Horton; rejected).
- Q. Did you tell Mr. Wynyard that Miss Petsch thought that the property was worth a lot more than \$660,000? A. Yes. (Objected to by Mr. Horton; admitted).
- Q. And Miss Petsch had in fact told you that she thought it was worth a lot more than \$660,000? She had told you that, hadn't she? A. Yes.
- 30 Q. Not once, but often. She had often told you that? A. Well, she has got an exaggerated idea, I think, of what -
- Q. She told you this more than once, didn't she? She told you that it was worth much more than that amount on more than one occasion? A. Yes.
- Q. You discussed the question of sale with Mr. Bennell, did you not? A. I think I sent him one of those letters.

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- Q. Just one of those letters? A. I sent him one or both of them.
- Q. Did you send them to him, or take them to him?
A. I took them to him. He is the secretary of the company.
- Q. You took them to him and showed them to him?
A. He is the secretary of the company.
- Q. When was that that you took the letters to him? A. It would be soon after I received it, I guess. 10
- Q. Sometime in late March or early April?
A. Early April.
- Q. You only spoke to him once about it? A. No, I used to speak to him every time I had occasion to go to his office, if he was in.
- Q. How often did you go to his office between March and August 1970? A. About once a fortnight.
- Q. You went to his office about once a fortnight?
A. Yes.
- Q. What did you go there for? A. I took any relevant documents over to him to process the books. He was the secretary. 20
- Q. How often on these occasions did you see him? Was it as much as once in two times? Did you see him every time you went there, or how often did you see him? A. I did not see him every time I went there. He was in a separate room at the office, and if the door was shut I would not see him at all even if he was there. But if the door was open I would see him. Usually I did not have a yarn to him. If the door was open I would see him. He congratulated me on the offer. 30
- Q. He congratulated you on the offer? A. Yes.
- Q. Had you discussed the offer with him? A. I discussed it with him only in a general sense. I pointed out to him that if we received that much money and we put it even into Government bonds we would get more for that money than would be taken through Farrell House - the gross amount, not the net amount. We would be getting more than the gross amount even if we put it into Government bonds. 40

Q. When did you tell him that? A. I told him that at one of our meetings. I don't know which one.

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Q. You consulted Mr. Bruce Evans about the matter also, I take it? A. Yes, that is right.

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Q. How often did you see him before the meeting in August 1970? A. I saw him four or five times before the meeting.

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10 Q. When was the most recent occasion before the meeting in August? A. It would be probably be the day before the meeting, or the night of the meeting.

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Q. And I suppose that you told him that you were having trouble getting Miss Petsch to agree? A. That is true. (Objected to by Mr. Deane).

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20 HIS HONOUR: It can be noted that Mr. Deane objects to this evidence being admitted as against the 3rd defendant. The objection appears to me to be well-founded, but as the evidence is admissible against the 1st defendant the question may be answered and the appropriate dissection made of this and other similar matters at the end of the hearing.

MR. HENDERSON: Q. You told Mr. Evans that you were having trouble with Miss Petsch in getting her concurrence to the sale? That is correct, isn't it? A. Yes, that is right.

Q. Indeed, you told him that she would not agree? A. Yes.

30 Q. You discussed with him, I suppose, how you could hold a meeting and obtain a board decision about this? (Objected to by Mr. Horton: rejected).

40 Q. Mr. Kennedy, when you went to the meeting early in August 1970 at which Mr. Bennell and Mr. Wynyard were present, you had the intention of using your casting vote as chairman of directors in order to carry a motion approving the sale of Farrell House? A. Yes. (Objected to by Mr. Deane).

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HIS HONOUR: I will have it noted that in the course of presenting her evidence, both from her own witnesses and in cross-examination, the plaintiff may tender material which is admissible only against Mr. Horton's client and not against Mr. Deane's client. In order to preclude the necessity for Mr. Deane taking exception on each occasion when severable evidence of such nature may be tendered it will be noted that all evidence which may be admissible only against Mr. Horton's client and not against Mr. Deane's client will be taken subject to objection being raised by Mr. Deane and dealt with in the course of final submissions. 10

MR. HENDERSON: Q. Mr. Kennedy, had you discussed the question of the conduct of the meeting with Mr. Bennell before the meeting took place?

A. No.

Q. You had spoken to him I think, on that same day and asked him to attend the meetings? You had asked him to attend the meeting? A. Yes. 20

Q. And he had agreed to do so? A. Yes, that is right.

Q. In the course of that conversation what did you say to him? I am sorry, in the course of that telephone conversation what did you say to him? A. I don't think we spoke by phone that day. I think I was in his office.

Q. How did he come to attend the meeting? A. How did he come to attend the meeting? 30

Q. Yes. How was it that he came to attend the meeting? A. Because he is the secretary of the company.

Q. How did he know that a meeting was going to take place? A. I told him.

Q. When did you tell him? A. That day.

Q. You told him that day? A. Yes.

Q. By telephone? A. No, I told him personally.

Q. You told him personally? A. Yes.

- Q. Did you ask him to bring the seal to Farrell House? Did you ask him to bring the seal of the company to Farrell House? A. No, I already had it.
- Q. You already had it? A. Yes.
- Q. Do you always keep it? A. Yes.
- Q. It is never out of your possession? A. Well, since that meeting Mr. Bennell took it with him.
- Q. He took it with him? A. Yes, after that meeting.
- 10 Q. Had you always had it before that? A. Yes.
- Q. You saw him at his office that day, did you? A. Yes.
- Q. What time of the day did you see him? A. It was in the afternoon, I think.
- Q. What did you say to him and what did he say to you that afternoon? A. I can't recall it.
- Q. Well, do you remember what was talked about overall? I suppose you told him that you were going to have a meeting that night? A. Yes, I told him that.
- 20 Q. And I suppose you told him that there would be somebody there from Wentworth Developments? A. No. I did not know whether he was coming or not.
- Q. You didn't know whether he was coming or not? A. No.
- Q. At that stage did you have a copy of the contract in your possession? A. Yes.
- 30 Q. Did that copy have the seal of Wentworth Developments on it? A. Just pardon me a moment. I hope you excuse my slowness. I am suffering from lack of blood in the brain, and I am very slow doing anything like this. (Produces document and peruses it). I think that is the copy I got from Mr. Evans after the meeting.

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- Q. But at the time of the meeting did you have in your possession a copy of the contract with the seal of Wentworth Developments on it?
A. It did not have the seal on it at that stage.
- Q. It did not have the seal on it at that stage?
A. I don't think so.
- Q. How many copies of the contract did you have?
A. Only the one.
- Q. At that meeting? A. Only the one.
- Q. You only had the one copy? A. Yes. 10
- Q. Did you have any other documents at the meeting? A. I don't think so.
- Q. Just one copy of the contract? A. Yes.
- Q. Did you tell Mr. Bennell that afternoon that you were expecting some opposition from Miss Petsch? A. Yes.
- Q. And did you discuss with him the question of using your casting vote as chairman to pass a motion? A. Probably.
- Q. Do you recollect whether or not you discussed that with him? A. No, I don't recollect. 20
- Q. When you spoke to Mr. Bennell that afternoon you did not tell Miss Petsch that there was going to be a meeting, did you? A. No.
- Q. And indeed, the first she knew about it was after Mr. Bennell and Mr. Wynyard were both at Farrell House? A. Yes. (Objected to by Mr. Deane; question withdrawn).
- Q. I am sorry. The meeting took place at your home unit? A. Yes. 30
- Q. And Miss Petsch didn't know about the meeting being held until Mr. Bennell and Mr. Wynyard were both at the home unit? (Objected to by Mr. Deane; admitted against Mr. Horton's client).
- Q. You don't make any suggestion that Miss Petsch knew about this meeting before you told her that night? A. That would be right.

Q. You certainly didn't tell her? A. No, I did not tell her.

Q. Why was that? Why didn't you tell her? A. I did not tell her because I thought she may not come. She may have stayed in Farrell House that night rather than attend the meeting.

HIS HONOUR: Q. You thought she might not come? A. Yes. I think it was on legal advice that I did that.

10 MR. HENDERSON: Q. What legal advice was that? (Objected to by Mr. Horton; allowed).

Q. Whose advice was that? Was that on the advice of Mr. Evans? A. It could have been Mr. Evans; it could have been Mr. Bennell.

Q. And at no time that night did Miss Petsch say "All right, I will attend this meeting." She did not say that at any time that night, did she? A. I don't think so, no.

20 Q. Of course, she was against the whole thing - against the sale? A. Yes. (Objected to by Mr. Horton; rejected).

Q. She kept saying that the place could not be sold without her consent? (Objected to by Mr. Horton; question withdrawn).

30 Q. At the meeting she kept on saying - Miss Petsch said many times that the place could not be sold without her consent. That is so, isn't it? A. I think I answered that by saying "I have to be cruel to be kind." I think I told her, "We have to be cruel to be kind."

Q. You said that to her? A. Yes.

Q. But she said numerous times that evening that the place could not be sold without her consent? A. I don't recall her saying that.

Q. Not at all? A. Not at the meeting.

Q. When you said you told her that you had to be cruel to be kind, when did you say that to her? A. Several times.

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- Q. During that evening? A. Not only that evening, but prior to that.
- Q. Did you say it to her that evening? A. Yes.
- Q. At what stage of the proceedings did you say that to her? A. I think it was after I moved that the offer be accepted.
- Q. What made you say it? A. Well, it is a statement of fact.
- Q. Had she said anything just before you said that - before you said that you had to be cruel to be kind - had she said anything just before you said that that made you use that phrase? A. No. 10
- Q. No? A. I had used it before.
- Q. What? A. I had used that phrase several times before the meeting.
- Q. But at the meeting itself all of a sudden you moved a motion, and you said "I have to be cruel to be kind." Is that right? A. No, not in that sequence. 20
- Q. Well, what was the sequence? Can you tell his Honour what the conversation was? A. Yes. I moved that the offer be accepted, and she didn't approve, so I said "We have got to be cruel to be kind." I said, "I will have to exercise my casting vote as chairman of directors."
- Q. Had you talked to Mr. Wynyard about the problem you had with Miss Petsch beforehand? A. He knew all about it.
- Q. You had told him? A. No. ~~He-knew-all-about-it~~ 30
~~from~~ - (Objected to; by direction answer struck out as indicated).
- Q. Had you told Mr. Wynyard of the difficulty you had with Miss Petsch about the purchase? Had you told him about that? A. Yes.
- Q. How often had you told him that? A. He knew about it himself, because he negotiated with Miss Petsch for months or weeks before the meeting. He negotiated with her before the meeting. 40

Q. But you yourself had told him that you were having trouble with her, or anticipated trouble with her? A. Anticipated trouble.

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Q. When did you last tell him this before the meeting in August - the meeting of the 4th August? A. ~~Well, he knew it all along~~ (objected to by Mr. Deane; by direction struck out as indicated).

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10 Q. You did tell him that? A. I think so.
(Objected to by Mr. Deane; admitted).

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Q. When did you tell him that you anticipated trouble with her? A. Well, she has been against it right from the beginning.

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Q. When did you tell him you anticipated trouble with her? When was the last time before August the 4th, or before the meeting on 4th August, that you told Mr. Wynyard that you anticipated trouble from Miss Petsch about the sale? A. I said "She is very illogical, because as a going concern it is not worth anything like the price that is offered. ~~The value of the land is much enhanced because of the redevelopment scheme with home units.~~ (Objected to; by direction portion indicated struck out).

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20
30 HIS HONOUR: Q. All you are being asked, Mr. Kennedy, is what you told Mr. Wynyard. You made some reference to Miss Petsch being illogical, and you went on in your answer to say that you said something to Mr. Wynyard about the value of the land. I did not hear the rest of your answer? A. It was general comment. It was not directed to Mr. Wynyard personally.

MR. HENDERSON: Q. When did you tell Mr. Wynyard that? When did you tell him what you have just said? A. All along I have told him.

Q. All along? A. Yes.

Q. When was the last time you told him that before the meeting of 4th August, 1970?
A. I would not know the precise time.

40 Q. Was it within a few days before the meeting?
A. I would say so.

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- Q. Did you talk to him about how you proposed to overcome Miss Petsch's opposition to the sale? A. No.
- Q. Not at all? A. No.
- Q. Did you tell him that you were chairman of directors? A. Yes.
- Q. Did you tell him you had a casting vote? A. Yes.
- Q. Did you tell him that you would not give her notice of the meeting? A. I did not say I would not give any notice of the meeting. 10
- Q. What? A. We never sent out notices of meetings.
- Q. The question I asked you was, did you tell Mr. Wynyard that you would not give her any notice of the meeting? A. No, I did not tell him that.
- Q. At no time? A. No.
- Q. At the meeting itself, how long did the meeting last? A. Over an hour.
- Q. It lasted for over an hour? A. Yes. 20
- Q. And when Mr. Bennell and Mr. Wynyard arrived you and they were together before Miss Petsch joined you? A. Would you say that again, please?
- Q. You and Mr. Bennell and Mr. Wynyard were together before Miss Petsch came? A. No. As soon as Mr. Bennell came in before we went into the room where the meeting was held I called in Miss Petsch to come and see Mr. Bennell.
- Q. Did you call to her, or did you go and speak to her face to face? A. I spoke to her face to face. 30
- Q. You left the room? A. Yes.
- Q. And went to fetch her? A. In the hallway.
- Q. She was just outside? A. Yes.

Q. By the way, when did you ask Mr. Wynyard to come to the meeting? A. Well, he had to come to the meeting to display his plans where he said they would very much like to have the Farrell House land, but it could be done - they could do it without it by skirting around the side of it.

10 Q. When was that conversation with Mr. Wynyard? When did that take place? A. When he put the plans on the table at the meeting.

Q. When did you tell him about the meeting going to take place? (objected to by Mr. Deane; rejected).

Q. Did you tell Mr. Wynyard that the meeting was to take place on the evening of 4th August? A. Well, I either told him or Mr. Evans told him.

Q. Do you remember telling him? A. No, I don't specifically remember telling him.

20 Q. Were you surprised when he arrived? A. No. I knew that he was coming.

Q. You knew he was coming? A. Yes. And also at the meeting in his preliminary address he said "We will have to have finality tonight as to whether we include it in our plan, or we don't." And he read a letter to that effect. He read out a letter offering the sum of money.

Q. You fetched Miss Petsch in to meet Mr. Bennell? A. In the hallway.

30 Q. In the hallway? A. Yes.

Q. You spoke to her, and said, "Come and meet Mr. Bennell"? A. Yes.

Q. Did you tell her that Mr. Wynyard was there? A. No, because she knew that he was there.

Q. Did you tell her that he was there? A. No. She saw him.

Q. She saw him? A. Yes.

Q. Before she came into the room? A. Yes.

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- Q. And she came into the room where they were, and what was then said and what happened?
A. Mr. Bennell said "Is this a duly constituted board meeting?" and I said, "Yes",
- Q. As soon as she came in? A. As soon as we started discussing the business of the meeting.
- Q. She came into the room and stayed? A. Yes.
- Q. And didn't go out again? A. No.
- Q. And was she crying at all? A. I didn't see anything. 10
- Q. You didn't see? A. She was ranting and raving quite a lot.
- Q. Ranting and raving quite a lot? A. Yes.
- Q. But she was not crying at any stage? A. No.
- Q. You didn't see her crying that night? A. No.
- Q. So that she came into the room, and did she greet Mr. Bennell? A. Yes.
- Q. What did she say? A. "How are you?" or he may have spoken first. I can't recall now. There was no animosity.
- Q. There was no animosity? A. No. 20
- Q. There was no animosity between her and Mr. Bennell? A. No.
- Q. I suppose the two men were standing up when she came in? A. Yes.
- Q. And what was the first thing that happened after one or other of them said to the other "How are you?" What was the next thing that happened? A. Mr. Wynyard got out his plans and laid them on the table.
- Q. Did anyone sit down? A. We were all sitting down then. 30
- Q. What? A. We were all sitting down then.
- Q. You were all sitting down at that stage?
A. Yes.

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- Q. You said that she was ranting and raving? A. Yes.
- Q. What did she rant and rave about? A. I could not recall everything but she was going on in a very illogical manner, being upset at the irrelevance of the meeting, and -
- Q. Had you at any stage told her what the business of the meeting was to be? A. It was not necessary. She knew what it was.
- 10 Q. She knew what it was? A. Yes.
- Q. When did she first know? A. As soon as she came into the room.
- Q. That was the very first time she had any idea there was going to be a meeting? A. Yes.
- Q. How did she know what was to be the business of the meeting? A. Mr. Wynyard got up and laid down the plans and read out a letter making an offer.
- 20 Q. He read out the letter making an offer? A. Yes, that is right, and he said, "It has got to be finalised one way or another tonight. We have been humbugged about this for too long."
- Q. You say that he produced a letter making an offer? A. Yes, that is right.
- Q. Have you that? Do you have that letter? A. No, I have not got it.
- Q. Where is it? Where is that letter? A. It would be with his papers.
- Q. He took it away again, did he? A. Yes.
- 30 Q. Did you have it in your hand? Did you have that letter in your hand? A. No.
- Q. Did anyone other than Mr. Wynyard have it in his hand? A. I don't think so.
- Q. And he read it out? A. Yes, he read it.

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Q. And what did he say? A. He said that if we did not come to a decision at last on this meeting, after months of negotiations - he said "We will have to include Farrell House in the scheme or out of the scheme." He said that we had to come to a decision at the meeting.

Q. And he read that document? A. Yes.

Q. And he did not leave a copy of the document with you? A. No.

Q. Or with Miss Petsch? A. No.

10

Q. Or with Mr. Bennell? A. No.

Q. Miss Petsch was obviously surprised to see Mr. Wynyard, wasn't she that night?
A. Probably.

Q. And she was surprised to see Mr. Bennell, wasn't she? A. No. I told her that Mr. Bennell was coming.

Q. When did you tell her that? A. During the meal before the meeting.

Q. During the meal? A. Yes.

20

Q. What time was that? A. Seven o'clock.

Q. What time did Mr. Bennell arrive? A. Just before eight o'clock.

Q. But you did not tell her about Mr. Wynyard coming? A. No.

Q. At that stage you knew that Mr. Wynyard was coming, didn't you? A. Yes.

Q. Then after Mr. Wynyard had read the letter, or the document, what was the next thing that happened? A. I can't recall exactly.

30

Q. How long did it take Mr. Wynyard to read the letter? A. Two or three minutes.

HIS HONOUR: Q. How long? A. Two or three minutes.

MR. HENDERSON : Q. And he had other papers with him, did he? A. He had the whole plan of the development scheme.

- Q. The whole plan of the development? A. Yes.
- Q. What did he do with the plan of development?
A. He took it away with him.
- Q. He took it away with him? A. After he read it at the table.
- Q. What did he do at the meeting? A. He laid it down at the table, and pointed out what they intended to do.
- Q. He laid it out on the table? A. Yes.
- 10 Q. Did he talk about it? A. Yes.
- Q. What did he say? A. He said "We would like to get the Farrell House land, but we can go on with the scheme without it." He said "Don't get me wrong. We would rather have it than not, but it is not essential that we have it."
- Q. That evening Miss Petsch did not have dinner with you, did she? A. Yes she did.
- Q. Your recollection of that is clear? A. Well, she didn't have it anywhere else, so that she
20 must have had it with us.
- Q. How do you know she didn't have it somewhere else? A. Because she never does.
- Q. You don't recollect very clearly what happened that night, do you? A. I remember all the essentials. I don't remember every detail.
- Q. The essential details, I suppose, are what happened at the meeting? A. Yes.
- Q. You don't recall what happened that afternoon very clearly? A. She was not there in the
30 afternoon.
- Q. You don't recollect whether or not you spoke to Mr. Bennell that day? A. Yes, I spoke to Mr. Bennell that day.
- Q. You recollect that quite clearly, do you?
A. Yes.

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- Q. You don't recollect whether you spoke to Mr. Wynyard that day? A. Not until he came to the meeting.
- Q. Not until he came to the meeting? A. Yes, that is right.
- Q. You don't recollect whether Miss Petsch was there or not for the evening meal, do you? A. Yes, she was.
- Q. Who was the first to arrive of Mr. Bennell and Mr. Wynyard? A. Mr. Wynyard was the first. 10
- Q. Mr. Wynyard was the first to arrive? A. Yes.
- Q. Mr. Kennedy, you read Miss Petsch's affidavit in this matter, did you not? A. No.
- Q. You didn't read it at all? A. No.
- Q. At no time? A. No.
- Q. Not in your solicitor's office? A. No.
- Q. Was it read to you? A. No.
- Q. Were you told what was in it? A. I don't remember.
- Q. You don't remember? A. No. 20
- Q. Well then, Mr. Wynyard talked about being able to go on with this project without your land, but said that they would rather have it than not? A. Yes, that is right.
- Q. What was said after that? A. Just general conversation about the whole development scheme.
- Q. General conversation? A. Yes.
- Q. How long did that general conversation last? A. Two or three minutes.
- Q. Two or three minutes? A. Yes. 30
- Q. Who took part in that general conversation? A. Mr. Wynyard mostly. He had all the details there.

- Q. Did anyone else say anything about it? A. No.
- Q. What was the next thing after Mr. Wynyard spoke in those general terms? A. I don't remember.
- Q. You don't remember? A. No.
- Q. What was the next thing that was said or done?
A. I said, "If we get this \$720,000 for the Farrell House land, the takings of Farrell House average between \$40,000 and \$50,000 per annum, and if we accept this offer for it, and even if we put the money into Government bonds the sum total would be far greater than the total takings - not the profit, but the total takings of Farrell House, without any work or expenses - no land tax, no water rates, no council rates."
- Q. What was the next thing that was said?
A. Miss Petsch did most of the talking.
- Q. What did she say? A. She gets the devil in her sometimes, I often said to her and she just rants and raves.
- Q. For how long did she rant and rave? A. For about half an hour.
- Q. After she finished ranting and raving what was the next thing that was said? A. I said, "I move that the offer be accepted." That was about 9 o'clock.
- Q. What was the next thing that was said then?
A. I think she said, "I am not selling Farrell House."
- Q. And the next thing? What was the next thing that was said after that? A. I said, "I have to be cruel to be kind", so I said, "I will now cast my chairman's extra vote in favour of the offer".
- Q. And what was the next thing that was said?
A. I think Mr. Bennell agreed to what I said.
- Q. What did he say? A. He said, "With that money you can get far more income than what you can by keeping Farrell House going as a going concern."

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- Q. What was the next thing that was said?
A. She would not listen to it.
- Q. What did she say? A. "We are not selling
Farrell House."
- Q. And what was the next thing that was said?
A. I said, "I have to be cruel to be kind."
- Q. You said it twice? A. I have often said it
to her.
- Q. Did you say it twice that night? A. I think
so. I probably said it three times. 10
- Q. What was next said, after you said "I will
have to be cruel to be kind"? What was said
after that? A. I think she didn't answer it.
- Q. Yes. A. She didn't give a logical reply to
it, anyway.
- Q. And what was the next thing that was said or
done? A. Subsequently Mr. Bennell said,
"Have you got the company's seal?"
- Q. He said, "Have you got the company's seal?"
A. Yes. 20
- Q. And what did you say? A. I said, "Yes", and
I went and got it.
- Q. You went and got the company's seal? A. Yes.
- Q. Where did you have to go to get it? A. Into
my bedroom.
- Q. Where did you keep it there? A. In a drawer
with the rest of the Farrell House papers.
- Q. You brought it back into the room, did you?
A. Yes, I brought it back in the room.
- Q. Just the seal? A. Yes. 30
- Q. What was the next thing that happened, or
what was the next thing that was said? A. I
put it on the document and signed it - signed
the contract.

- Q. What was the next thing that was said or done?
A. The meeting broke up after that.
- Q. The meeting broke up after that? A. Yes.
- Q. You put the seal on the contract? A. Yes.
- Q. And signatures? A. Yes.
- Q. Whose? A. Mine.
- Q. Anyone else's? A. Mr. Bennell also signed the document, too.
- 10 Q. He also signed it? A. Not across the seal, but he signed it. He attested it, that it was sealed in his presence, or something to that effect.
- Q. That was the only document that was signed, was it? A. Yes, that was the only document that was signed.
- Q. And the meeting broke up? A. Yes.
- Q. By the way, have you read Mr. Bennell's affidavit in this matter? A. I think I have.
- 20 Q. You don't recollect? A. If I did it would be in Mr. Evans' office if I saw it. I don't think I did see it.
- Q. Do you recollect reading it? A. No.
- Q. Do you know what is in it? A. No.
- Q. And you never have? A. No.
- Q. So really you have not read it - if you have read it, you have not read it with any care?
A. No.
- Q. And you have no recollection of reading it?
A. No, I have no recollection of reading it.
- 30 Q. Do you recollect that you yourself swore an affidavit in this matter? A. I don't recollect swearing an affidavit, no.

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Q. You don't think you did? A. No, unless it is on the contract.

Q. You know what an affidavit is? A. Yes.

Q. An affidavit is - A. A statement.

Q. A statement on oath in writing? A. Yes.

Q. Of events that occur? A. Yes.

Q. And you don't recollect signing such an affidavit in this matter? A. I signed one of my own.

Q. What? A. I signed my own affidavit. 10

Q. Your own affidavit? A. Yes.

Q. You signed an affidavit? A. Yes.

Q. Did you read that affidavit before you signed it? A. Yes.

Q. In that do you recollect that you said that you had read Mr. Bennell's affidavit? A. If it is in there- if I said that, when making it, that would be right.

Q. You don't recollect reading Mr. Bennell's affidavit? A. No. 20

Q. And you don't recollect what was in it? A. No.

MR. DEANE: Q. Mr. Kennedy, as I understand it, you have told Mr. Henderson that no formal notice of any directors' meetings was ever given by Ingrid Pty. Limited in respect of any meetings, is that so? A. Would you say that again, please?

Q. I think you told Mr. Henderson that Ingrid Pty. Limited never on any occasion gave formal notice of directors' meetings? A. That is right (Objected to by Mr. Henderson). 30

HIS HONOUR: Mr. Kennedy said, "We never sent out notices of meetings."

MR. DEANE: Q. Would it be true to say that over the years to your knowledge there have been a number of directors' meetings of Ingrid Pty. Limited? A. Yes.

Q. And there have also been a number of shareholders' meetings? That is, the annual meetings, when you and Miss Petsch were there alone? A. Yes.

10 Q. Would it be true to say that there was never any written notice of any of the previous directors' meetings that were held? A. That would be true, yes. I can't see the necessity, because we could have a meeting whenever we had anything to discuss. We often discussed things and came to decisions without holding a formal meeting.

Q. You were living with Miss Petsch throughout the whole of this period? A. Yes.

20 Q. And if there was anything that had to be dealt with at a directors' meeting you would simply raise it with her at a convenient time, or she would raise it with you at a convenient time. Is that the position? A. Yes, that is right.

Q. And you would then hold directors' meetings in relation to that matter? A. Yes.

Q. Without ever any question of notice ever being raised? A. No written notice, no.

30 Q. Did Miss Petsch ever before the meeting of 4th August at any time say to you, "We have got to have notices of directors' meetings"? A. No.

Q. And did she on the night of 4th August say, "there is something wrong with this directors' meeting. I was not given notice about it"? A. No.

40 Q. Indeed, during the whole of this meeting of the directors did Miss Petsch ever - on 4th August did Miss Petsch ever at any stage suggest that what was happening was not a valid meeting of directors? A. No.

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- Q. Did she ever at any stage say that she wanted some notice, or some time? A. No.
- Q. Did she ever at any stage say, "I object to this being dealt with now. I want a week's notice before it is dealt with"? A. No.
- Q. Or anything like that? Did she ever at any stage say anything like that? A. Nothing.
- Q. And would it be true to say, Mr. Kennedy, that the first you heard that any attack was being made on the contract with Mr. Wynyard's company was after Miss Petsch's solicitor had written some letters attacking the validity of the contract? A. I never saw any.

10

Re-examination

RE-EXAMINATION:

- MR. HORTON: Q. You are suffering from an illness at the moment? A. Yes. It is getting progressively worse.
- Q. Is that illness affecting your brain in some way? A. Definitely.
- Q. It is affecting your brain? It has affected your brain, has it? When I say that, has it caused damage to your brain? A. Not in a physical sense, except that the brain does not function. I cannot add up figures like I used to do. It takes me hours to type a letter now, which two or three years ago I could do without any difficulty. Even my spelling has deteriorated quite a lot.
- Q. Has it affected your manual processes? A. Definitely, yes.
- Q. What about your mental processes? For example, your memory. Has it affected that? A. Definitely.

20

30

Q. In what way has it affected your memory?
A. Well, I go up the street to get something - two or three things - and I forget the most important one.

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Q. Does this have a varying affect depending on the day, or is it continually always the same?

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A. It has got progressively worse in the last two years. It even affects my voice, and anything I do with my fingers is very much slowed up. Turning the pages of a newspaper, or anything like that - I don't know if I am turning two pages or three pages, and I have difficulty in separating them.

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Q. You are thinking of going abroad for treatment for this? A. Yes.

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Q. One more point. Taking you back to the meeting, you said that you signed something on the contract, I think? A. Yes.

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Q. You affixed the seal, and Mr. Bennell signed the contract? A. Yes.

Re-examination (continued)

20

Q. Do you know what happened to the contract after you and Mr. Bennell signed it? A. I think Mr. Wynyard took it away.

PLAINTIFF

Evidence for Plaintiff

Sworn, examined as under:

Ingeborg Gerda Petsch

MR. HENDERSON: Q. What is your full name?

A. Ingeborg Gerda Petsch.

Examination

Q. Where do you reside? A. Unit 81, 17 Wylde Street, Potts Point.

30

Q. You are a residential proprietor by occupation?
A. Yes.

Q. You are the plaintiff in this matter? A. Yes.

Q. And you swore an affidavit? A. Yes.

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CROSS-EXAMINATION:

- MR. HORTON: Q. Miss Petsch, you are not qualified to value land, are you? A. Well, I have been in the residential business for about 12 years buying, and I paid off and sold and rebought something better and better.
- Q. That would be your only qualification to value land? A. Well, I had shopped around. I shop around before I buy something, and that is how I got the instinct of finding out which is which. 10
- Q. Have you ever seen a valuation by a qualified valuer of Farrell House as at 4th August, 1970? A. No. I did have an offer a year before -
- Q. If you would just answer my question. A. ~~£1,400,000~~ (Objected to; by direction struck out).
- Q. I will repeat the question for you. Have you seen a valuation by a qualified valuer in respect of Farrell House as at 4th August, 1970? A. I have not, but the valuation is different from what you want to sell it. I don't want to sell Farrell House. 20
- Q. Really you don't want to sell Farrell House? A. No, and Mr. Wynyard knew it - (objected to by Mr. Deane; admitted).
- Q. You know, do you not, that a valuation has been obtained of Farrell House as at 4th August 1970? You know that, don't you? A. A valuation has been shown to me from Mr. Kennedy's party, I think, but it has got nothing to do with me because I am not interested in a valuation. 30
- Q. You know that that valuation was by a director of Richardson & Wrench? A. But I am not interested. I talked to Tom Wynyard. He knew it. I didn't want to sell it. I am not interested in selling it. I talked to Tom Wynyard and told him I am not interested unless he paid me 2-million. I asked him. He didn't want to - it was too much. So he went to Mr. Kennedy after 1½ years of bargaining with me. 40

- Q. Do you know who the valuation of Farrell House was made by? Do you know who carried out the valuation of Farrell House? A. The valuation was made from Mr. Kennedy's party. It was from someone. I don't know who.
- 10 Q. You have seen written offers made by various people to buy Farrell House over the years, haven't you? A. Mentioned offers, and somebody particularly who wanted to buy Farrell House. Yellow Cab was resold twice, because they could not sell it because I told these people it cannot be sold without my consent. That is how I bought Farrell House.
- 20 Q. Will you look at this document, please? Have you seen that document before? A. I don't know if I seen it. I asked for 2-million, and then I would sell it, but not for his price.
- Q. You asked that person for 2-million? A. I could not tell you exactly if I have seen that one, but I told Mr. Wynyard my offer, and he said, "It is ridiculous." I said, "All right", but an American firm would have bought Farrell House the year before if I would have consented to it. I told him I would not consent because I wanted to buy Mr. Kennedy out from the first four weeks after Farrell House was bought.
- 30 Q. Do you know whether an offer was ever made by James & Abrahams for Farrell House? A. There came so many people. There were so many, from the first four weeks afterwards, after I started working in Farrell House.
- Q. You don't recollect an offer being made by James & Abrahams? A. Yes, James & Abrahams and I think Hookers, and Richardson & Wrench, and Benjamins several times.
- 40 Q. How much did James & Abrahams offer? A. I did not take any interest, because at this stage all the time I said "No", because I wanted to buy Mr. Kennedy out after he starts worrying me after the first four weeks, because Bruce Evans told me before - convinced me to go into the agreement, and told me "Don't worry ..." (Objected to).

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- Q. Will you look at this document? I am showing you Exhibit B. Will you look at that document, and you will see in the middle of that "Special Condition 2." Will you look at the page headed "Special Conditions"? A. On the first page?
- Q. Will you look at the contract, and you will see a page headed, "Special Conditions". Do you see that? A. Yes. It is a lot to read. Do you want me to read it?
- Q. Do you see the page headed "Special Conditions", 10 and if you will look at Special Condition 2 there? Do you see that? A. Yes.
- Q. It reads, "Notwithstanding the purchase price ... shown." Do you see that? A. Yes.
- Q. First of all, have you taken any steps yourself to obtain a valuation from Richard Stanton & Sons or L.J. Hooker? A. No. I told him it was not for sale - I didn't want to sell it. So that there is no reason for it.
- Q. So far as you are aware no valuation of Farrell House has been obtained from Richard Stanton or Hookers? A. So far as I am aware there has not been. From Mr. Kennedy's party, yes, because I have seen that paper. A valuation has been taken which is much less than what it would have. 20
- Q. You have said over and over again that you won't sell Farrell House. That is correct, is it? A. Yes. I said to Mr. Wynyard, "If you give me the 2-million now before the new Mt. Isa issue comes out we will take it, because it is 50-50, because Fred wants to go on a trip around the world." He said, "That is ridiculous, It is too much," and he came along with an offer - 30
- Q. Who made the first suggestion to you that Mr. Frederick Kennedy might not be a director of Ingrid Pty. Limited? A. Actually a couple of years ago Fred told me "I give up the directors. I get out of it." He told me that at home once. But I could not accept it, because Mr. Kennedy has been ill - very badly ill - for the last two years. 40

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10 Q. So that you have not thought that he has
been a director for some two years, is that
right? A. Well actually even the whole three
years, because I always was worried over the
money. You see, the only thing which more or
less I was worried about was in regard to the
money - paying money to the bank, which I fixed
up in the envelope, and fixed up the expenses
and so on for the secretary - expenses and wages,
you know - and then the gross takings, and the
balance - I put the rest of the money in an
envelope, and signed cheques, because we arranged
to have two signatures on cheques, and many
times I was worried that he lost the money,
because it is very hard to collect.

Q. He has got a bad memory? A. He has lost many
times some money.

20 Q. But when did you first think that he ceased
to be a director of Ingrid Pty. Limited?
A. Well, as a director, I didn't take much
notice of it because he didn't have to direct
much. I did the whole of it myself so I didn't
take much notice of it. It (sic) never knew that he
was - Bruce Evans told me, when I was against
it, that Fred should come in - he said -
(Objected to).

30 HIS HONOUR: Miss Petsch, try as far as possible
just to answer each question that is asked.
Keep your answers directly in line with the
question that is asked. I think you will find
it much easier in the long run to deal with
the matter if you just answer each question
directly as it is asked.

MR. HORTON: Q. Starting at 4th August, 1970 -
on 4th August, 1970, did you think that Mr.
Kennedy - Mr. Frederick Kennedy - was a director
of Ingrid Pty. Limited? A. That thought never
came to my head. It never came to me, because
I didn't think anything would happen.

40 Q. You never thought about whether he was a
director or not? A. Well, I didn't have to
think about it, because Bruce Evans told me
that Farrell House cannot be sold without my
consent.

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When did you last direct your mind to the question of whether Mr. Frederick Kennedy was a director, or not, of Ingrid prior to 4th August 1970? Prior to that date when did you last direct your mind to that question? A. Well, we never asked about directors. It is only when we got our directors' fees it is mentioned. I run Farrell House and that is it, you see.

(Luncheon adjournment)

At 2 p.m.

10

HIS HONOUR: You are still on your former oath, Miss Petsch.

MR. HORTON: Q. Miss Petsch, did you believe in September, 1969 that Mr. Frederick Kennedy was a director of Ingrid Pty. Limited? A. Well, we had never argued anything. He never mentioned anything.

Q. Will you answer the question, please, Miss Petsch? Did you understand the question?
A. Yes.

20

Q. Did you believe in September 1969 that Mr. Frederick Kennedy was a director of Ingrid Pty. Limited? A. It never occurred to me to think of it. That is all I can say. It never occurred to me to think about it, because some time ago he mentioned that he would leave the -

Q. Miss Petsch, I wonder if you would have a look at Exhibit D, which is the minute book of the company. It is open at folio 14 - the director's statement, dated 19th September, 1969. Will you look at the statement at the top of that page? A. Yes.

30

Q. Will you read it? A. "We, Frederick Kennedy..."

HIS HONOUR: Read it to yourself Miss Petsch.

MR. HORTON: Q. That is your signature just below that statement? A. Yes, that is my signature. This is for the taxation, isn't it?

Q. You believed that statement to be true, did you not, when you signed it? A. I didn't see much of them. All I know is that Frederick said to me, "This is for the taxation, and the figures are all right," so I signed it.

40

- Q. So you signed it? A. Yes.
- Q. Did you believe it to be untrue? A. No.
My figures are all right - correct.
- Q. So that there is no mistake, did you believe the statement that you signed to be true or untrue when you signed it? A. Well, he told me what it is. He said, "It is for taxation - takings, and so on. Just sign it." He told me that and I signed it.
- 10 Q. Will you answer the question? Did you believe it to be untrue when you signed it? A. Not untrue. I didn't read it properly. Anyhow, when I signed it I didn't read it properly, because he told me what it is.
- Q. The first time you ever said to anyone that Mr. Frederick Kennedy is not a director of Ingrid was after 4th August, 1970? That was the first time, wasn't it? A. Yes.
- 20 Q. The only minutes of the company - of the meeting of the company and directors of which you have ever made any complaint to anyone about are those of the meeting of 4th August, 1970, aren't they? A. I don't understand what you are asking.
- Q. You know what minutes are, don't you? A. It is the meeting.
- Q. You know what the minutes of a meeting are? A. Yes, where you gather and talk about something.
- 30 Q. So that there is no mistake, this is the minute book of the company. You are aware of that, aren't you? A. Not really.
- Q. Had you made any complaint to anyone prior to 4th August, 1970, about the minutes of the company? Did you make any complaint prior to that date about the minutes? A. For what reason?
- Q. I am not asking the reason. Did you or did you not make any complaint to anyone? A. Because I didn't really know what it means -
- 40 Q. You have been living at the same flat as Mr. Kennedy all the time since this company was formed, haven't you? A. And before

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- Q. And before? A. Yes.
- Q. But continually since the formation of Ingrid you have lived in the same premises? A. Always.
- Q. And you are still living with Mr. Kennedy in that flat? A. Yes.
- Q. You are on good terms with him on the whole? A. Yes.
- Q. You occasionally no doubt have arguments? A. Very little, because I am quiet, and the man is ill. 10
- Q. But you are on good terms with Mr. Kennedy? You have not had any long periods where you have refused to speak to each other? A. Only when the terms came up about Farrell House.
- Q. Prior to that you spoke to one another every day, I suppose? A. Yes.
- Q. And you frequently discussed with him the business of Farrell House and Ingrid Pty. Limited prior to that time? A. Not really, We talked about the kitchen or anything. He was probably arguing. 20
- Q. Didn't you ever talk about outgoings, or the bills, of Ingrid Pty. Limited? A. About what?
- Q. The bills of Ingrid Pty. Limited. The accounts? A. Well, I asked him if these bills are paid or not, because many times I didn't know how I am standing.
- Q. But from time to time you discussed various aspects of the business of Ingrid with him, is that correct? A. I didn't really discuss very much because I am always being very sad about the whole affair. 30
- Q. Would it be true to say that you have never discussed the business of Ingrid with him? A. The business about Farrell House, if we discussed it, was not always in a very good way.

- Q. Let us not deal with the sale of Farrell House. We are not talking about that. Did you have any discussions with him about the business of Ingrid Pty. Limited? A. In the beginning, yes - right from the first four weeks upwards.
- 10 Q. You in fact never received formal notice of directors meetings from the time the company was formed, did you? You never received formal notice of directors meetings? A. Formal? Not really.
- Q. When business came up to be discussed you both got together and discussed it? A. Yes. He told me if there was something to sign. He just told me to "sign here" and that is all.
- 20 Q. Now, you had lots of discussions, did you not, over a long period of time with Mr. Kennedy about the sale of Farrell House to Wentworth Developments No. 2? A. No. No. We did not. Not lots of discussions at all.
- 30 Q. But you had discussions? A. Only in the very late time, when I didn't know that Mr. Kennedy already was moving something with Mr. Wynyard, because he didn't tell me, because Mr. Wynyard used to come to me to the office since the end of February, which is when Mr. Kennedy left the Winchester Hospital - the same place that Tom Wynyard bought the land. Just after Mr. Kennedy left the hospital Mr. Wynyard approached me in Farrell House in the office.
- Q. So that you have had discussions about the sale of Farrell House with Mr. Wynyard? A. I and Mr. Wynyard?
- Q. You from time to time no doubt had mentioned the sale of Farrell House, or your refusal to sell it, to Mr. Kennedy, had you? A. About this Tom Wynyard business?
- 40 Q. Yes. A. I explained everything to Mr. Wynyard what happened in the past, and the cards are put right on the table, and he knew everything in detail.

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- Q. Prior to the 4th August you had firmly made up your mind, had you not, that you would not sell Farrell House to Wentworth Developments No. 2 unless they paid you 2-million for it?
A. I don't know on the 4th - about anything particularly that happened on the 4th.
- Q. Had you made any decision about not selling Farrell House yourself prior to the 4th?
A. Prior to the 4th August? About four weeks before - Mr. Tom Wynyard used to come to my office in Farrell House many many times, sometimes twice a week, and when he came - 10
- Q. And you told him that you would not sell, is that right? A. I told him I would not sell unless he pays me 2-million before the Mt. Isa new share issue comes out.
- Q. You told Mr. Wynyard quite clearly that you would not sell Farrell House unless he paid you 2-million, is that right? A. Yes, that is right. 20
- Q. And you had made a firm decision on that, I take it? You had made up your mind on that?
A. Yes, because I know I can state that figure.
- Q. You had made up your mind? That was your attitude? A. I know that that figure is correct.
- Q. You had made up your mind that that was your attitude, that you would not sell Farrell House for less than 2-million? A. Yes, that is correct.
- Q. You had made up your mind about that well before the 4th August? A. I told him that all the time - 2-million. 30
- Q. You had made this clear to everyone concerned - to Mr. Kennedy and to Mr. Wynyard - that you would not sell for less than 2-million? A. Yes, in the time so that we could buy Mt. Isa shares before the new issue comes out.
- Q. So that Mr. Kennedy knew before 4th August that you had made the decision that you would not sell Farrell House for less than 2-million?
A. That is correct. 40

- Q. And Mr. Wynyard knew that? A. That is right.
- Q. And you had given it a lot of thought, and you had made that decision after a lot of thought, I take it? A. My word.
- Q. And you knew that Mr. Kennedy - you knew prior to 4th August that Mr. Kennedy really wanted to sell Farrell House? A. Mr. Kennedy wanted to sell Farrell House desperately after the first four weeks after I started to work Farrell House. He wanted to sell it. I wanted to buy him out.
- Q. His attitude before 4th August, so far as you know, was that he wanted to sell Farrell House? A. All the time he wanted to sell.
- Q. And your attitude prior to 4th August was that you would not sell Farrell House unless you got 2-million for it, is that right? A. Tom Wynyard wanted the place desperately, so -
- Q. His attitude - Mr. Kennedy's attitude - was that he wanted to sell and your attitude was that you would not sell unless you got 2-million? A. Yes. But I wanted to buy Mr. Kennedy out all the time from the first four weeks upwards, because I wanted peace of mind.
- Q. You knew his attitude and he knew your attitude before the 4th August? A. Yes.
- Q. At that meeting on 4th August you maintained your attitude throughout, didn't you? A. Yes.
- Q. You did not change your attitude? A. No.
- Q. And Mr. Kennedy at that meeting - his attitude was that he still wanted to sell? A. Yes.
- Q. Now on 4th August you did not say, did you, at that meeting anything to the effect that "This is not a proper directors' meeting of Ingrid"? You did not say anything to that effect? A. Well, I was so surprised when I came home at eight o'clock, a bit late as usual.

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- Q. Did you or did you not say anything to that effect? A. Nothing was arranged and told me beforehand. It was just like coming in out of the sunshine.
- Q. At that meeting did you say anything to the effect that "This is not a proper directors' meeting of Ingrid"? Did you say anything to that effect? A. I did not say those words.
- Q. Or anything to that effect? Did you say anything to that effect? A. I said "There won't be a sale at all." 10
- Q. You talked about a sale, but you didn't talk about it not being a directors' meeting, did you? A. No, I didn't say anything about a directors' meeting.
- Q. At that meeting on 4th August you did not complain that you had not received any notice of the meeting, did you? A. I was surprised, yes, because if Mr. Kennedy would have arranged something - 20
- Q. Will you listen to the question please? Did you complain? A. About the whole set-up, yes.
- Q. Did you complain at that meeting that you had not received any knowledge of the meeting? Did you complain about that? A. I complained about the whole thing.
- Q. Will you listen to the question and answer it, please, Miss Petsch. Did you complain at that meeting that you had not received any notice of the meeting? A. Well, I was upset about the whole thing. Nothing was mentioned to me before. I was upset about it, because it had not been mentioned to me. 30
- Q. You understand the question that I asked you? A. Yes.
- Q. Will you answer it? A. I complained.
- Q. At the meeting you complained? What exactly did you say about the notice? A. The word "notice" has not been mentioned.

- Q. I ask you whether you complained about the notice. Did you say anything about notice at the meeting? A. The word "notice" never came up.
- Q. You did not say anything about not having received notice at the meeting? A. No-one asked me anything.
- 10 Q. Can I take it, then, that you did not say anything about notice at that meeting on 4th August? A. No notice has been offered to me. How can I complain?
- Q. You say that you did not receive any notice of the meeting, is that correct? A. That is correct.
- Q. Did you say to anyone anything at that meeting about not receiving a notice? A. Well, the word "notice" was never mentioned.
- 20 Q. Was any other word to the same effect as "notice" mentioned? A. Yes. When I came in and Mr. Kennedy says to meet Mr. Wynyard, I said, "Not again? What for?" He said, "For a sale of Farrell House." I said, "No."
- Q. You meant by that that you did not want to sell Farrell House? A. That is right. "Farrell House cannot be sold," I said, "without my consent."
- Q. Have you read an affidavit sworn by Mr. Bennell in these proceedings? A. Yes.
- 30 Q. And I think you were in Court when Mr. Bennell was cross-examined last week, is that correct? A. Yes, that is right.
- Q. And you heard his evidence? A. Yes, I did.
- Q. I suggest to you that his evidence in that affidavit and when he was cross-examined about what happened about the meeting is true? A. His affidavit, yes. But he is doubtful in single questions about what went on.
- Q. Do you say that his affidavit is untrue? A. No I don't

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Q. You don't? It is true? A. He mentions in his affidavit that he can't remember quite in detail the movements of myself, and so on.

Q. Anything that he does say about the conversations - if he does say he remembers it, it is clear that he is saying what his recollection is - do you say any of that is untrue?

HIS HONOUR: Mr. Horton, it is not objected to, I know, but it is not open to confront a witness with the evidence of another witness, and ask if the evidence of the other witness is true or false. I know that it is now (sic) objected to, but I do not really think you ought to press it. 10

MR. HORTON: I withdraw it. I was trying to shorten the case.

Q. That meeting on 4th August lasted for what? An hour or an hour and a half, or thereabouts?
A. Yes, something like that.

Q. You don't have a very clear recollection of what was said at that meeting, do you? A. Well, I told them right from the start that Farrell House cannot be sold without my consent and I am not interested, because that is what Mr. Evans told me before when he convinced me, and I agreed, that Mr. Kennedy should come in 50-50 20

Q. Have you got a clear recollection of what was said at that meeting? A. Well, I didn't take too much notice, because for me it never occurred that Farrell House could be sold without my consent, so I didn't have to listen very much what they said or not. 30

MR. DEANE: Q. You have told his Honour that you had a number of conversations with Mr. Wynyard prior to August of this year? A. Yes.

Q. That is correct, isn't it? A. Yes, that is right.

Q. And do you remember in those conversations talking to Mr. Wynyard about Mr. Kennedy?
A. Yes, I remember everything.

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- Q. Will you just answer my question? Do you remember that you told Mr. Wynyard that Mr. Kennedy was a sick man? A. Yes, because he asked me.
- Q. And do you remember telling Mr. Wynyard that Mr. Kennedy was the other director of Ingrid Pty. Limited? A. "He is my partner", I said. I said, "It is 50-50."
- 10 Q. Do you remember telling Mr. Wynyard that you and Mr. Kennedy were two directors of Ingrid Pty. Limited? A. I said, "He is my partner." Not director. I never mentioned "director" to him. I told Mr. Wynyard - I said to Mr. Wynyard that Mr. Kennedy is my partner.
- Q. Do you remember telling Mr. Wynyard in the course of these conversations that you did not want any contact to be made with Mr. Kennedy? A. Yes, because first of all there were many reasons for that.
- 20 Q. And do you remember saying that you did not want Farrell House sold at all until after Mr. Kennedy was dead? A. Well, yes and no. I mentioned that because of some reason. I said to him - I didn't want Mr. Kennedy to come into Farrell House, and Mr. Bruce Evans said, "He wants to put in \$25,000." I said, "I don't want it. I only need \$7,000." Mr. Evans said, "There will only be trouble." I said, "But I don't want his money." Bruce Evans convinced
- 30 me that he would fix the contract so that it cannot be sold without my consent.
- Q. Do you remember telling Mr. Wynyard that you did not want Farrell House sold? A. Unless they paid 2-million. That is what I said. I could have bought Mr. Kennedy out -
- Q. Will you please listen to my question? A. Yes.
- Q. Do you remember telling Mr. Wynyard that you did not want Farrell House sold until Mr. Kennedy was dead? A. I didn't say that.
- 40 Q. Do you remember telling Mr. Wynyard -
A. Not in that fashion.
- Q. Do you remember telling Mr. Wynyard that Mr. Kennedy had left you the shares in Ingrid Pty. Limited in his will? A. Yes. That is

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what Mr. Bruce Evans told me before I agreed to sign the contract with Mr. Kennedy. But I didn't want his money.

- Q. And do you remember telling Mr. Wynyard that you didn't want Farrell House sold until Mr. Kennedy had died and you owned all the shares in the company? Do you remember telling Mr. Wynyard that? A. It is not true, the way you put it.
- Q. What did you say? A. I said, "If you give me the 2-million now I will sell Farrell House and we will put it into Mt. Isa shares." He said, "No, that is too much". He said, "Well, you can stay in there for about 1½ years and take all the profits out of it." I said, "No, if you can't give me the 2-million now I will not sell it. If you give me the 2-million now I will walk out." I didn't want to be in that, because Mr. Kennedy wanted to go on a trip around the world. I said, "Anyhow, if you don't want to give me 2-million, forget about it, because Mr. Kennedy wants to go on a trip around the world." Mr. Kennedy had wanted to go on a trip around the world from the time I met him. Mr. Rod Mackay has offered himself all the time that he would go in to Farrell House and run Farrell House for the time we went on a trip around the world. That would not stop us from selling or not selling. 10 20
- Q. Did you ever mention Mr. Kennedy's death to Mr. Wynyard? A. Not in the way that you have put it. 30
- Q. In what way did you mention it to Mr. Wynyard? A. When Bruce Evans convinces me that Fred wants to come 50-50, I said to Bruce Evans, "Look, I don't want anything of trouble," and Mr. Evans said to me, "Don't worry. Listen, it is all in the will, if something happens," and Mr. Kennedy told me that it is true - "If I die you get Farrell House anyhow. So that there is nothing hidden about it. There is no reason for selling Farrell House." 40

MR. DEANE: Q. Miss Petsch, after the 4th August do you remember ringing up the office of Home Units? After the 4th August do you remember ringing up the office of Home Units and talking to a Mr. Bogard there? A. Yes, I remember that.

Q. And do you remember saying to Mr. Bogard that his company would not be able to get Farrell House? A. That is correct -

10 Q. And do you remember - A. Without my consent.

Q. Do you remember saying to Mr. Bogard that you were not prepared to sell Farrell House while Mr. Kennedy was alive? A. Oh, that is a lie. That is untrue.

Q. Did you mention Mr. Kennedy's death to Mr. Bogard? A. That is untrue. I did not mention that.

20 Q. Did you mention when you would be prepared to sell Farrell House to Mr. Bogard? A. I did not mention it though I said I wanted to buy Mr. Kennedy out from the first four weeks when he was excited to take the £10,000 profit and then a later time, about a year later, I offered \$90,000 to Mr. Kennedy and even his brother, Gordon Kennedy, was in the evening, home in our place, and I offered 90,000 because there came the hire purchase system out and my shares, Mount Isa shares would not have covered that but rather than bleed myself to death....

30 Q. Did you tell Mr. Wynyard that it would be unfair for Mr. Kennedy to have the same share in the proceeds of sale as yourself (Objected to).

40 Q. Did you at any time discuss with Mr. Wynyard what share Mr. Kennedy should have in the proceeds of sale? A. Well the thing was put very frank in details as Mr. Wynyard was very friendly and put a lot of sale pressure on, the things were put so in details that I even said, "Look, I would not harm anybody" and I wanted to have paid \$90,000 when the offer was made a second time to a doctor - Mr. Benjamin - he had a purchaser after four weeks and the definite purchaser after about a year to a doctor, and I

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offered 90,000 then. I do not want to let Mr. Kennedy, I did not even want him into the business because I did not want him to have any worries about the place because he is a sick man.

- Q. Well, did you discuss with Mr. Wynyard the question of how much Mr. Kennedy should get from the sale of Farrell House? A. He was starting to discuss that.
- Q. You never discussed - A. When he started discussing it, it means he is to discuss it with somebody and that was me. 10
- Q. Of course, all you said, in opposition to the proposed sale of Farrell House at this gathering on the 4th August was, "Bruce Evans told me that Farrell House could not be sold without my consent;" that is so, isn't it? A. And the price as well, I said, "Not for that figure."
- Q. And the objection that you were taking was not to the matter being discussed; that is so, isn't it? A. What matter discussed? 20
- Q. You believed that Mr. Kennedy was a director of Ingrid Pty. Limited, didn't you? A. I never gave him any thought of it because I run the whole show.
- Q. You believed that Mr. Kennedy was a director of Ingrid Pty. Limited, did you not? A. If he was, I had the last word because Bruce Evans told me so. 30
- Q. Yes, but you believed that Mr. Kennedy was a director of Ingrid Pty. Limited, didn't you? A. I did not think of anything. I did not believe it or unbelieve it.
- Q. You believed that you were a director of Ingrid Pty. Limited? A. Oh well, I am running the show. Somebody had to be directing something in the place.
- Q. You knew there were two directors, did you not, yourself and Mr. Kennedy? A. That is when it was bought, yes. There were three directors 40

actually.

Q. And the other Mr. Kennedy had never played any part in anything, that is so? A. Yes. There is supposed to be three in case something happens to Mr. Kennedy and his son.

10 Q. Your belief was that you and Mr. Kennedy were directors of Ingrid Pty. Limited? A. I do not know what to say to that, because for what reasons should I ask you about it if he was or was not because it could never have happened without my consent. Why should I have to ask you or them about it.

Q. You understand now, do you not, that the articles of association, that is the documents that provide how Ingrid Pty. Limited is run, provide that the chairman of directors has a casting vote? A. That has not been told to me when I have been convinced to sign the contract the second time.

20 Q. You understand that now though, don't you? A. After it has been signed the sale and I still did not know Farrell House has been sold I think somebody told me, if he is chairman he has first vote and then I nearly got a heart attack; I was shocked about it and I rang up Mr. Bruce Evans on Sunday evening because I could not get him during the week on his office 'phone.

30 Q. This was after the meeting that you first found out? A. After the meeting, I rang up Mr. Evans, I could not get him so I rang him up on the evening on the Sunday evening at home.

Q. And it was after the meeting you first found out that the chairman of directors had a casting vote; that is what you said, isn't it? A. Yes, I found that out, yes.

Q. And when you found that out I think you said you were shocked about it? A. Yes.

40 Q. Because, of course, you knew then that Mr. Kennedy had cast his casting vote at the meeting? A. Yes, but Mr. Bruce Evans -

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- Q. The answer to my question is yes, isn't it?
A. (No audible answer.)
- Q. Of course, that being so, you knew that there had been a resolution at the meeting for Farrell House to be sold; that is so, isn't it? A. Well, the thing of a casting vote is a contradiction to the contract when I have been convinced to sign it and to go with Mr. Kennedy in.
- Q. You knew there had been a resolution at the meeting, that Farrell House was to be sold; that is so, isn't it? A. How you mean a resolution? It could not be sold without my vote. 10
- Q. Would it be true to say that what you are complaining about is that the articles of association of Ingrid Pty. Limited provided that Mr. Kennedy should have a casting vote if he were chairman of directors and that you did not know about it; is that true? A. The complaints on the 4th August was first thing about a price of Farrell House, which I did not agree right from the start with Mr. Wynyard so he could not do any good with me so he had to go to Mr. Kennedy. 20
- Q. But you have told his Honour that when you were told that the chairman of directors had a casting vote, you were greatly shocked; that is so, isn't it? A. Yes, because Bruce Evans did not tell me that when I signed the contract. 30
- Q. And the reason you were shocked was that you knew that Mr. Kennedy had used that casting vote at the meeting on the 4th August; that is what you said, isn't it? A. Well, it would be so, like that.
- Q. And he had used that casting vote, as you knew, on a resolution that Farrell House was to be sold? A. Yes, but not for that price. I disagreed with the price too. 40
- Q. And what you objected to at the meeting was the price at which Farrell House was being sold? A. Yes, and without my consent it never can be

sold.

Q. And the basis on which you say can never be sold without your consent is, as I understand it, that you say that Mr. Bruce Evans told you that that was so? A. That is correct.

10 Q. I will again put to you that what you are complaining about and all you have to complain about is that the articles of association of Ingrid Pty. Limited contained a provision - without your knowledge - that the chairman of directors had a casting vote? (Objected to - not pressed.)

MR. HENDERSON: I do not want to re-examine Miss Petsch, your Honour.

(Witness retired.)

MR. DEANE: I do not propose to call evidence.

20 HIS HONOUR: Mr. Henderson, I should like to have this noted by reason of the fact that there are no pleadings in this suit. Do you allege any personal equity against Mr. Kennedy relating to his use of the casting vote?

MR. HENDERSON: No your Honour I was not alleging anything about the use of the casting vote.

HIS HONOUR: The answer to that is "No"?

MR. HENDERSON: As I said, your Honour, we are relying on three points. There is a dispute between the parties as to the actual value.

30 HIS HONOUR: I would like you to state specifically the three points so they can be noted in the transcript.

MR. HENDERSON: The first one is, your Honour, that Mr. Kennedy has not since the end of 1968 been a director and therefore was not entitled to take part in directors' meetings.

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Secondly, your Honour, if I do not succeed on that point, then that the meeting as such was invalid on the basis that there was no notice in circumstances where notice was called for. They are the two points against Mr. Kennedy, your Honour.

Then the third matter that I see to be in issue, an issue of law based on inferences, I will ask your Honour to draw the inference that Mr. Deane's client -

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HIS HONOUR: That is what is described as the charge against the third defendant, noted on p.1 of the transcript of 6th November.

MR. HENDERSON: Yes your Honour.

HIS HONOUR: Mr. Henderson, I do not want any doubt about the issues because there is a large sum involved here. It is an important suit. It has been taken as a matter of urgency without pleading and I want to be quite clear what the issues are and to have them recorded for any later significance that may attach to them.

20

MR. HENDERSON: I am now looking at the transcript of the 6th November and what I say, as far as the third named defendant is concerned, it was on notice that the meeting was a defective meeting and that no motion authorising the entry of the company into the contract or for the fixing of a seal was passed, either the contract or the transfer.

HIS HONOUR: So that it may be clear, you do not allege any personal equity against Mr. Kennedy?

30

MR. HENDERSON: In respect of the use of the casting vote

HIS HONOUR: Or at all? I do not want to cross-examine you, but I want to make sure that I have your case recorded in the transcript.

MR. HENDERSON: Only to this extent, your Honour, that we allege against him that he is not entitled to hold himself as a director - is not and has not been entitled to hold himself as a director - since the end of 1968.

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HIS HONOUR: But there is no allegation of personal equity arising out of any earlier understanding, arrangement, discussion or otherwise between Mr. Kennedy and Miss Petsch.

MR. HENDERSON: No your Honour.

HIS HONOUR: Mr. Horton, you accept the issues - I don't say concede them - but accept the issues as Mr. Henderson has put them.

MR. HORTON: That is so, yes, your Honour.

10 HIS HONOUR: And your defence is a denial of them?

MR. HORTON: Yes.

HIS HONOUR: Mr. Deane, you similarly - may I take it - accept that as crystallising the issues.

MR. DEANE: Yes your Honour.

HIS HONOUR: And, so far as your client is concerned, you deny them, do you?

20 MR. DEANE: We would deny them your Honour and of course we would raise particular defences which we would say are available to us as an outsider.

HIS HONOUR: Yes, namely?

MR. DEANE: Well, as much as the - namely -

HIS HONOUR: S. 119?

MR. DEANE: Yes your Honour.

HIS HONOUR: Yes.

MR. DEANE: The rule which is, we would say, Mahoney's case or Turquand's case; estoppel.

30 HIS HONOUR: An estoppel.

MR. DEANE: Estoppel, your Honour, by representation as against the plaintiff

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HIS HONOUR: Yes.

MR. DEANE: S 51A of the Conveyancing Act.
They are all the additional defences, your
Honour.

HIS HONOUR: That concludes the whole of the
evidence and then the issues are as stated in
broad and as have been recorded and the matter
is then ready to go argument and decision?

MR. HENDERSON: Yes your Honour.

(Counsel addressed)

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(Further hearing adjourned to Monday,
16th November, 1970.)

NO. 8

JUDGMENT OF HIS HONOUR
MR. JUSTICE STREET

In the Supreme
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16th November 1970

No.8

IN THE SUPREME COURT OF NEW SOUTH WALES
IN EQUITY

No.1433 of
1970

Judgment of
His Honour
Mr. Justice
Street

CORAM: STREET, J.

Monday, 16th November, 1970

16th November
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PETSCH v. KENNEDY & ORS.

JUDGMENT

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HIS HONOUR: Ingrid Pty. Limited, the second defendant, was incorporated on 11th July, 1967. There are two shareholders, namely, the plaintiff, who presently holds 12,500 shares, and the first defendant, who presently holds 12,500 shares. The first substantial business undertaken by the company was that authenticated at a directors' meeting held on 25th July, 1967, attended by the plaintiff and the first defendant. It was resolved at this meeting that the company purchase, for the sum of \$135,080, a building known as "Farrell House".

30

The plaintiff and the first defendant remain the sole shareholders in Ingrid Pty. Limited, and the present litigation has its origin in a strong disagreement between them upon whether "Farrell House" should be retained or sold. The particular transaction in immediate dispute is a contract under which Ingrid Pty. Limited purports to agree to sell "Farrell House" to the third defendant for the sum of \$720,000; this document bears date 4th August, 1970.

40

The dispute concerning the future of "Farrell House" is undoubtedly of great importance to Miss Petsch and Mr. Kennedy. The sum of money involved is substantial. Both parties, Miss Petsch in particular, have worked in connection with the running of the residential business conducted in "Farrell House", and the decision whether or not to sell that property is of personal significance to both parties. The ground upon which one side or the other will win or lose that dispute in the present litigation does not involve any evaluation of the sufficiency of the price of

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£720,000. Nor does it involve any investigation of the background leading up to the meeting of 4th August, 1970, or of the personal relationship between Miss Petsch and Mr. Kennedy. Success or failure in the litigation which is at present before the Court will turn solely upon whether or not on 4th August, 1970, there was a properly convened directors' meeting at which was passed a valid resolution that the company enter into this agreement for the sale of the property. The suit involves no more than the ascertainment of the significance in point of law of the events of this particular evening.

10

Evidence has been given by three witnesses, on affidavit and in cross-examination, concerning what took place on the night of 4th August, 1970. Before summarising that evidence I should state briefly the view that I have formed upon the credit attaching to these three witnesses. Substantially speaking there is little real divergence between their accounts of what took place. Both Miss Petsch and Mr. Kennedy have given evidence, as also has a Mr. Bennell, a chartered accountant and the secretary of the company, who was present at the events of the night of 4th August, 1970. Mr. Kennedy is suffering from an illness which has to some extent impaired his memory and his mental agility. It is not, however, suggested that his reason has been affected by this illness. His account of events of the night of 4th August is not perhaps as clear-cut as the account given by either Mr. Bennell or Miss Petsch; to the extent that there are realms of uncertainty or even inconsistency in his account of those events compared with the other accounts I have no hesitation in ascribing these uncertainties or inconsistencies to his defective memory rather than as being due to any conscious attempt on his part to misrepresent what took place. I accept him as an honest witness and, subject to the qualification inherent in his memory difficulties, as a reliable witness.

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Of Miss Petsch the same observation of honesty and reliability can be made. I assent to what Mr. Henderson has put to me from the bar table that she has done her best faithfully to recount what took place on that night, and I regard her as a witness of credit. At the same time, however, in fairness

to her, I should add that I have the distinct impression that in her enthusiasm to develop her particular viewpoint of the matters upon which she was questioned she may have tended at times to have assented to propositions or to make statements in somewhat wider terms than she really intended. I do not think it fair to hold against her, for instance, that she assented to the events of the night of 4th August being technically a meeting merely because she agreed to a number of questions in which it was put to her that certain matters had or had not been dealt with at a meeting on that night. With this qualification in her favour, I regard her as an honest and reliable witness.

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The third witness, Mr. Bennell, is remote in a personal sense from the strong disagreement between Miss Petsch and Mr. Kennedy. His connection with their affairs and with the affairs of Ingrid Pty. Limited appears to be purely in his professional capacity. He gave his evidence clearly and convincingly, and I formed a most favourable view of both his credit and his reliability as a witness. On any point upon which his evidence may depart from the evidence of the other two witnesses I would prefer the evidence of Mr. Bennell.

Although I have made these preliminary observations, I do not see the present litigation ultimately succeeding or failing on credit. Insofar, however as there are minor conflicts in the three versions I think it as well that the actual version of the facts which I accept should be clearly stated.

It would appear that some months prior to August 1970 a Mr. Wynyard, who is presumably an officer of the third defendant, conceived that it would be desirable in the interests of the third defendant to negotiate for the purchase of "Farrell House". He approached Miss Petsch. Apparently it was made clear to him by her that she was not prepared to negotiate for the sale of "Farrell House" at a figure in the vicinity of the figure that Mr. Wynyard was prepared to offer. She also made clear to Mr. Wynyard that "Farrell House" could not, in her view, be sold without her consent.

Mr. Wynyard pursued his negotiations with Mr. Kennedy, and was apparently able to achieve a situation in which Mr. Kennedy took the view that

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"Farrell House" should be sold for the price and on the terms that the third defendant, through Mr. Wynyard, was prepared to offer. Mr. Kennedy accordingly took steps on 4th August to arrange for Mr. Bennell, the Secretary of Ingrid Pty. Limited, to come at about 8 p.m. to the home unit in which Miss Petsch and Mr. Kennedy were living together. Mr. Wynyard was also to be present on that occasion. No fore-warning was given to Miss Petsch that either Mr. Bennell or Mr. Wynyard was coming to the home on that night, or that it was proposed to discuss or transact any company business. Mr. Kennedy stated in his evidence that he deliberately did not tell her because he thought she might not come. He thought:

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"She may have stayed in 'Farrell House' that night rather than attend the meeting."

According to Miss Petsch, she arrived home at the unit at about eight o'clock on 4th August, and when she went into the lounge room she saw Mr. Kennedy and Mr. Wynyard sitting at a table with some documents on it. Mr. Kennedy said to her that Mr. Bennell would be coming soon. She asked for what purpose, and Mr. Kennedy replied:

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"To arrange for the sale of 'Farrell House'".

Miss Petsch's affidavit continues:

"I said, 'Fred, Farrell House is not going to be sold without my consent'. I had not been informed that there was going to be any company business discussed or transacted on that evening, and no one suggested that I had been so informed. I was feeling very upset, and went into another room and lay down. A short time later the door bell rang and the first-named defendant called out: 'Ingrid, come and see Mr. Bennell'. I then went into the lounge room and greeted Mr. Bennell but then left the room immediately."

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I take up the narrative from Mr. Bennell's affidavit. Upon his arrival Mr. Kennedy introduced him to Mr. Wynyard and then went out to get Miss Petsch. Mr. Bennell continues:

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"Almost as soon as she saw me Miss Petsch

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"A long discussion then followed lasting almost one and half hours. Most of the discussion took place between Mr. Wynyard and Miss Petsch. I do not recall the conversation fully. Mr. Wynyard explained the offer at great length. I recall him producing some plans and saying 'there is an alternative scheme if we cannot acquire "Farrell House"—we can by-pass "Farrell House"'. Miss Petsch took part in the discussions relating to the offer but frequently in answer to points made by Mr. Wynyard Miss Petsch talked at length about her early personal relationship with Mr. Kennedy. After the discussion had progressed some distance Miss Petsch left her chair at the table and sat in an arm chair a few feet away from the table but continued to take part in the discussion from the armchair. At a later stage in the evening she returned to the chair at the table and sat by Mr. Kennedy but I do not recall at what stage precisely this move back to the table occurred.

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Shortly before 9.30 p.m. Mr. Kennedy said, 'I move that the offer made by Wentworth Developments No.2 Pty. Limited be accepted'. at the time that was said Miss Petsch was either sitting next to Mr. Kennedy at the table or was in an armchair a few feet away. Miss Petsch then said, 'If this means you're selling "Farrell House" I am against it.' Mr. Kennedy then said, 'Well, as I am the chairman of the company and I have a casting vote I'll exercise my casting vote as chairman and vote in favour of the motion'. He then said, 'I declare the motion carried'. During these proceedings Miss Petsch was either sitting right beside Mr. Kennedy or not more than a few feet away from him. She then said 'I am opposed to selling "Farrell House"'. Mr. Kennedy then said, 'Alright, I'll affix the seal to the document'. He affixed the seal to the contract, a form of transfer and a form of authority to act and signed them. Whilst he was doing this Miss Petsch said, 'I don't know what you are signing and it won't have any effect'.

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After Mr. Kennedy had signed the documents he

turned to me and said, 'Will you sign as secretary?'. I then signed the three documents. After I had finished signing Mr. Kennedy said, 'Well, that's it'. Miss Petsch then got up and left the room and Mr. Wynyard and I left the unit together and Mr. Kennedy came down in the lift with us."

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10 The motion which Mr. Kennedy proposed, and which he purported to pass by the exercise of his casting vote, was that the offer made by Wentworth Developments No.2 Pty. Limited be accepted. Consequent upon the passing of this motion, as is stated in the passage that I have read from Mr. Bennell's affidavit, the contract was sealed with the company's seal.

20 The relief sought by the plaintiff in the present suit is an injunction restraining Mr. Kennedy from holding himself out as a director of Ingrid Pty. Limited, a declaration that he is not a director, a declaration that Ingrid Pty. Limited is not bound by the contract which was sealed on the night of 4th August, and an injunction restraining Mr. Kennedy from affixing the common seal of Ingrid Pty. Limited to any transfer of "Farrell House".

30 The suit as it is presented on Miss Petsch's behalf has been confined to three challenges formulated by counsel as follows: first, that Mr. Kennedy has not since the end of 1968 been a director of Ingrid Pty. Limited, and therefore was not entitled to take part at a purported directors' meeting on 4th August, 1970; secondly, that the meeting of 4th August, 1970, was invalid on the basis that there was no notice in circumstances where notice was called for; and thirdly, that as far as the third defendant is concerned, it was on notice both that the meeting of 4th August was a defective meeting and that no valid resolution authorising the entry of the company into the contract or for the affixing of the seal was passed.

40 The third challenge, directed against the third defendant, will only arise if one or both of the earlier challenges to the motion and resolution of 4th August, 1970 succeed. If both the earlier challenges to that motion and resolution fail, no other attack is made upon the rights of the third defendant under the contract.

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Under the first challenge, namely, the claim that Mr. Kennedy has not been a director of Ingrid Pty. Limited since the end of 1968, the argument is that Article 64 operated to bring about Mr. Kennedy's retirement from office at the meeting of shareholders held on 30th December, 1968. The Company is in its entirety a Table A Company. Article 64 is in the following terms:

"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

At the first meeting of directors held on 14th July, 1967, it was resolved that Mr. Kennedy be appointed chairman, and that Miss Petsch be appointed managing director. Mr. Henderson contends that, his client having been appointed managing director, the terms of Article 91 preserve her office as a director; there is not, however, any similar preservation in the case of a chairman of directors. 20

The minutes of the first annual general meeting of shareholders held on 30th December, 1968, record Mr. Kennedy and Miss Petsch as being present. The notice convening the meeting was taken as read. The directors' report and balance sheet was received and adopted. Auditors for the next ensuing year were appointed at a fee to be fixed by the directors. The minutes are signed by Mr. Kennedy as chairman. They do not record any business whatsoever referable to retirement, election, or re-election of directors. 30

At the second annual general meeting, held on 1st December, 1969, the minutes are in, substantially speaking, similar form. The directors' report and balance sheet, which was received and adopted, is incorporated in the minute book. The report is a formal statement signed by Mr. Kennedy and Miss Petsch, and commences: 40

"We, Frederick Hugh Kennedy and Ingeborg Gerda Petsch being two of the Directors of Ingrid Pty. Limited do hereby state".

It is dated 1st December, 1969. A similar formal statement was also included in the directors' report of 9th September, 1968, that was tabled at the first annual general meeting and adopted.

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10 Since a date at some time in 1967, when a third original director apparently relinquished his office, it appears throughout the minute book that Mr. Kennedy and Miss Petsch have purported to act as the only two directors of the Company. Each set of minutes is signed by Mr. Kennedy, as chairman. The most recent in point of time purport to be minutes of the alleged meeting of 4th August, 1970. The minutes immediately preceding these minutes purport to be those of a meeting of directors held on Thursday, 2nd April, 1970, attended by Mr. Kennedy and Miss Petsch, at which it was resolved that a dividend of \$7000 be payable forthwith to shareholders registered as at 2nd April, 1970.

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20 Article 66 of Table A is in the following terms:

30 "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."

The critical words of Article 66 for present purposes are "... .. the retiring director shall if offering himself for re-election be deemed to have been re-elected." There is no specific evidence regarding the course of events at either of the annual general meetings. According to the minutes, no business whatever was transacted affecting the occupancy by the directors of their offices as such.

40 In each case where this article is relevant it will be a question of fact whether, in the circumstances, the Court should find that a retiring director has offered himself for re-election. It may be, as Mr. Deane has suggested, that the mere sending out of a notice indicating retirement and availability for re-election would amount to an offer for

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re-election. It may be that considerably less by way of specific objective evidence would be required. It may be that, simply from a series of statements at a meeting unrelated expressly to election or office as a director, the Court would be justified in inferring that there had been an offer of himself for re-election by a retiring director. I do not agree with Mr. Henderson's contention that an offer cannot be implied. Conduct or statements could readily imply such an offer without an express statement having to be proved.

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In the present case, leaving aside generalities, I must decide whether or not it is correct to infer as a conclusion of fact that Mr. Kennedy, at one or both of the annual general meetings to which I have referred, offered himself for re-election within the meaning of that phrase in Article 66.

Article 66 of Table A follows the form of the English Table A Article 92. There has been some development of the form of this article from the form in which it stood when Spencer v. Kennedy (1926 1 Ch.125) was decided. The corresponding article which was considered then did not make any reference to an offer for re-election or willingness to be re-elected. A later form of article, which was considered by the Court of Appeal in Grundt v. Great Boulder Proprietary Mines Limited (1948 1 Ch. 145), provided for automatic re-election in circumstance in which the retiring director "... .. shall, if willing, continue in office". The present form of Article 66 carries the matter perhaps one stage further in requiring as an ingredient "offering himself for re-election". But although the article has developed in point of terminology in this way, its basic purpose is to cover the casus omissus, that is to say, to provide against a company through sheer inadvertence finding itself without directors currently in office. So far from leaning against applying Article 66 in what might be regarded as an elastic manner, I am of the view that the Court should tend to construe the article with due regard to the situation that it is aimed to cure, namely, the case of an inadvertent omission. The Court should not be astute to analyse too closely the course of events at a meeting for the purpose of testing on a technical basis whether or not there was an offer for

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re-election. The inquiry is one which should be undertaken on the basis of determining whether, in the light of all of the surrounding circumstances, including subsequent conduct on the part of persons whose conduct could have significance, it is proper to infer that there was an express or implied offer of himself for re-election.

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10 There is no evidence whatever of statements or (apart from the minutes) of the events at either of these annual general meetings. It is, however, clear that both meetings were conducted and concluded on the basis that the directors were continuing in office. This follows from the resolution that the auditors are to be appointed at a fee to be fixed by the directors. There was no suggestion that any other person could or would be a director, insofar as no other person held shares in the company. Throughout the whole of the affairs of the company in the 12 months following the first annual general meeting, and in the period following the second annual general meeting up until the point of time of the meeting of 4th August, 1970, Mr. Kennedy and Miss Petsch continued, with the full assent of each other, to occupy, and exercise, the roles of directors of this company. I have already referred to the reports that they signed as directors. Such executive decisions of directors as were made and recorded in the minute book were made at meetings that they both purported to attend. Miss Petsch did not challenge Mr. Kennedy's capacity as a director at any point of time until after the disputed meeting.

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I am of the view, on a consideration of the whole of the surrounding circumstances, that the proper inference to be drawn in the present case is that Mr. Kennedy offered himself for re-election at each of the two annual general meetings of shareholders. It follows that he has continued in office as a director of this company, and still continues as such. Having been appointed chairman of directors at the first directors' meeting, he has, once again without challenge by Miss Petsch, continued to occupy the chair at other meetings. As chairman of each particular meeting he has a casting vote (see Article 80). There is no challenge to the factual proposition that Mr. Kennedy occupied the chair at the meeting on 4th August. It was he that led the discussion, and purported to exercise such control over

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proceedings as one might reasonably expect of a chairman. He was accordingly, as such chairman, entitled to have a second, or casting, vote on business transacted thereat.

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I turn to the second challenge, namely that the meeting was invalid on the basis that there was no notice in circumstances where notice was called for. Apart from the statements made when the parties seated themselves around the table, Miss Petsch was given no notice that this was to be a directors' meeting. 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 co-incident physical presence of all directors does not constitute a formal directors' meeting. Where two persons are the sole directors of a company, a discussion between them on company affairs will not amount to an effective directors' meeting unless both are aware, before purporting to proceed to business, that the occasion is to be a directors' meeting. Notice of a meeting about to be held instanter (such as was given to Miss Petsch on the night of 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. In determining what is reasonable in point of length, form and content of the notice regard will be had, inter alia, to the context of the company's structure, practice and affairs.

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In the case of this company, it is common ground that no notices of directors' meetings have ever been sent out. Nor is there any evidence of any established course of practice in the summoning and holding of directors' meetings.

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It was clear to all concerned that this meeting of 4th August was a formal occasion. This was not a mere chance or conversational discussion attended by informality, and absence of recognition that it was a formal occasion. On the contrary, it

was a discussion at which were present the Secretary of the company as well as the two shareholders and directors. When one takes into account also the nature of the matter under discussion, and the terms in which it was discussed, the proceedings could fairly be regarded as formal and effective in character.

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10 The discussion proceeded upon the basis which must have been apparent to all concerned that it was a directors' meeting, and that it was a meeting at which it was intended, so far as Wentworth Developments No.2 Pty.Limited was concerned, to achieve finality, yes or no, in relation to the sale of "Farrell House". Miss Petsch, although at the outset distressed when she found Mr. Wynyard and Mr. Bennell in her home, participated, albeit in an opposing capacity, in the discussion regarding the sale of "Farrell House". She stated that she was only willing to sell it for a price of \$2-million, with a time condition appended to such sale. She did not at any point of time object to the proceedings being conducted on the basis that company affairs were under discussion and consideration. Her protestations, vehement though I have no doubt they were, were apparently confined to opposition to any decision on the part of the company to sell "Farrell House", coupled with an assertion that no sale could take place without her consent. Although opposing strongly the proposal which was being advocated by Mr.Kennedy and Mr. Wynyard, the plaintiff clearly acquiesced in that proposal being discussed. She did not at any stage assert that what was taking place could not be regarded as a directors' meeting. Neither did she object to the proceedings upon any suggestion that, by reason of her not having been notified, she was prejudiced, or placed at any disadvantage. She participated as an active party in the discussion.

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40 I am not persuaded that there was any defect in the validity of the meeting flowing from the absence of some prior written notice. Such notice would have been unprecedented, and the absence of such notice does not at this stage, that is to say after the event, furnish the ground for any objection so far as Miss Petsch is concerned. The situation would have been different had Miss Petsch objected or complained at the absence of notice or fore-warning. Such objection or complaint might well have availed her even if, in unwilling submission to what might

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have appeared the exigencies of the situation, she had thereafter participated in the proceedings. A Court would not be slow to recognise such participation, after complaint or protest, as being in effect without prejudice, and to decline to recognise such participation as acquiescence. But nothing of that sort occurred in the present case. Miss Petsch made no objection or complaint regarding the absence of notice or fore-warning. She did not assert that she was in any way procedurally disadvantaged. Her participation in the discussion was not in the character of being under protest or without protest or without prejudice, and I draw the inference that by her participation she acquiesced in the meeting proceeding without any other notice. One might well deprecate, as I am prone to do, Miss Petsch having been placed in a situation in which she had little real alternative, short of incivility to Mr. Wynyard and Mr. Bennell, but to be present at the directors' meeting without any prior warning to her. But this falls short of entitling her to assert at this subsequent point of time that the meeting was invalid by reason of the absence of notice.

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The second challenge propounded on behalf of the plaintiff is not made out.

There being no other challenge to the validity of what took place on the night of 4th August as a directors' meeting, it follows that the declarations and injunctions sought on behalf of Miss Petsch will not be granted. In such circumstances, on occasion arises to consider the third issue, namely, that relating to the challenge made against the validity of the contract itself. Unless the plaintiff had been able to establish an internal invalidity in the purported events on the night of 4th August, 1970, it would not be necessary for consideration to be given to such defences, by way of estoppel and otherwise, as might have been available to the third defendant. The initial basis for a challenge to the contract has not been made out.

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Before pronouncing the decretal order I should record that so far as concerns the costs of this litigation it was agreed between both the plaintiff and the first defendant that the costs of all parties might properly be ordered to be paid by the

second defendant. I shall accordingly give effect to that agreement. The second defendant is a party to, and has appeared in a submitting role in, the suit. I do not think it necessary to provide a formal opportunity for the second defendant to be heard on the order for costs for the reason that the plaintiff and the first defendant are themselves the sole directors and shareholders.

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10 I make a decretal order in the following terms:

I dissolve the existing injunction. The suit is dismissed. The plaintiff to pay the costs of the first and third defendants. The second defendant to pay the plaintiff's costs, such costs to include the costs ordered to be paid by the plaintiff to the first and third defendants.

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(continued)

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NO. 9

No.9

NOTICE OF APPEAL

Notice of Appeal

14th December, 1970

14th December 1970

20 IN THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL

No.723 of 1970

B E T W E E N : INGEBORG GERDA PETSCH Plaintiff

- and -

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

NOTICE OF APPEAL

Name of appellant: INGEBORG GERDA PETSCH

30 Name of respondent: FREDERICK HUGH KENNEDY,
INGRID PTY. LIMITED,
WENTWORTH DEVELOPMENTS NO.2
PTY. LIMITED

Court from which the appeal is brought:

In the Supreme
Court of New
South Wales
Court of
Appeal

No.9

Notice of
Appeal

14th December
1970

(continued)

Supreme Court of New South Wales in Equity

Name of the Judge of the Court from which the
appeal is brought:

The Honourable Mr. Justice Lawrence
Whistler Street.

Day or days of hearing at first instance:

6th, 13th and 16th November, 1970.

Whether appeal is against the whole or part only of
the order decree judgment or verdict:

Whole, except the Order for costs.

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Order decree judgment or verdict sought to be set
aside:

Suit dismissed; costs of the first and third named
defendants to be paid by the Plaintiff. The second
named defendant to pay the costs of the Plaintiff,
including those paid to the first and third named
defendants.

Order sought in lieu thereof:

Orders 1 to 5 inclusive as asked in the Originating
Summons herein.

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Grounds of appeal:

1. That His Honour erred in fact and in law in
holding that what took place on the night of the
Fourth day of August, 1970 amounted to a
meeting of directors of Ingrid Pty. Limited.

2. That His Honour erred in fact and in law in
holding that the first named defendant was at
any relevant time a Director of Ingrid Pty.
Limited.

3. That His Honour erred in fact and in law in
holding that the alleged Contract for Sale
between the second and third named defendants
was duly executed by or on behalf of Ingrid
Pty. Limited.

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4. That His Honour ought to have held that the

deliberate failure on the part of the first named defendant to give the Plaintiff notice of the alleged meeting of the 4th August, 1970 vitiated all the proceedings thereat.

In the Supreme Court of New South Wales Court of Appeal

5. That His Honour ought to have held that the third named defendant had notice that the alleged meeting of the 4th August, 1970 was not a duly constituted meeting of Ingrid Pty. Limited.

No.9

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10 6. That His Honour's decision was against the evidence and the weight of the evidence.

14th December 1970 (continued)

14th December, 1970 (Signed) A.M. GLEESON Counsel for the appellant

NOTE: As at the date of filing of this Notice the appellant has not been able to obtain a copy of His Honour's reasons for Judgment. The appellant reserves the right to add further grounds of appeal when such reasons for Judgment become available.

NO. 10

No.10

20 JUDGMENT OF HIS HONOUR MR. JUSTICE JACOBS

Judgment of His Honour Mr. Justice Jacobs

30 JACOBS J.A.: The appellant plaintiff and the first named respondent were at all relevant times the sole shareholders in the second named respondent, Ingrid Pty. Limited. The third respondent is a development company which desired to purchase certain real property owned by Ingrid Pty. Limited, namely, "Farrell House" which is a boarding house situated in Farrell Avenue, Darlinghurst. On 4th August, 1970, the common seal of Ingrid Pty. Limited was purported to be affixed to a contract for the sale of "Farrell House" to the third named respondent for a sum of \$720,000. At the time of affixing the seal to the said contract Mr. Kennedy signed as director and Mr. Bennell, who was the secretary of the company, signed in that capacity.

30th June 1971

40 On 20th October, 1970, the present proceedings were commenced by the appellant Miss Petsch by originating summons claiming a declaration that Ingrid Pty. Limited was not bound by the alleged

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contract bearing date 4th August, 1970, for the sale of "Farrell House" from it to the third named respondent. An injunction was sought restraining Mr. Kennedy from affixing the common seal of Ingrid Pty. Limited to any memorandum of transfer of the land the subject of the alleged contract of sale without the approval of the plaintiff, Miss Petsch.

It was part of the case of the plaintiff that Mr. Kennedy was not a director of Ingrid Pty. Limited either at the time of the signing of the contract of sale or at the time of the institution of the suit. Therefore in the originating summons a declaration was sought that Mr. Kennedy was not a director of Ingrid Pty. Limited and an injunction restraining him from holding himself out as a director.

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Two main questions arose for determination in the suit, each bearing upon the issue whether a valid contract of sale had been entered into by Ingrid Pty. Limited on 4th August, 1970. First, there was the question whether Mr. Kennedy at the relevant time was a director. If he was not then there was no meeting of the Board of Directors on 4th August, 1970, he was not Chairman of Directors so that he could exercise a casting vote under the Company's Articles, and he could not sign as a director when the common seal was affixed to the contract of sale. Secondly, even if Mr. Kennedy was director and Chairman of Directors, there is the question whether there was in fact a Directors' meeting held on 4th August, 1970.

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In relation to the first of these questions there is no dispute on the facts. In relation to the second of them there was a dispute on the facts and it is necessary to set out the findings of fact made by Street, J. in the course of reaching his conclusion. His conclusion was that Mr. Kennedy was a director with Miss Petsch as the other director, that Mr. Kennedy was Chairman of Directors with a casting vote, that there was a meeting of the Board of Directors of Ingrid Pty. Limited on 4th August, 1970, and that the common seal of Ingrid Pty. Limited was duly affixed to the contract of sale of "Farrell House" to Wentworth Developments No.2 Pty. Limited pursuant

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to a resolution passed at that meeting of Directors. The conclusion of Street, J. therefore was that the suit failed and he dismissed it. The order for costs was a special order made by consent of all parties.

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The plaintiff appeals claiming that His Honour erred in fact and in law in holding that there had been a meeting of directors of Ingrid Pty. Limited on 4th August, 1970, and in holding that the contract of sale had been duly executed.

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(continued)

I turn now to the facts as they were found by Street, J. Ingrid Pty. Limited was incorporated on 11th July, 1967, with Mr. Kennedy and Miss Petsch as the only shareholders each holding 12,500 shares. At the first Meeting of Directors held on 14th July, 1967, it was resolved that Mr. Kennedy be appointed Chairman of Directors. At the same meeting it was resolved that Miss Petsch be appointed Managing Director of the company. At a Directors' Meeting held on 25th July, 1967, attended by Miss Petsch and Mr. Kennedy it was resolved that the company purchase "Farrell House". This purchase was subsequently completed.

At the first Annual General Meeting held on 30th December, there were present Mr. Kennedy as Chairman and Miss Petsch. It was resolved that the Directors' Report and Balance Sheet be received and adopted and it was also resolved that Messrs. Chown, Bennell & Co. be reappointed auditors of the company for the ensuing year at a fee to be fixed by the Directors.

A further meeting of Directors was held on 10th February, 1969, at which it was resolved that a dividend be paid. This meeting was attended by Mr. Kennedy and Miss Petsch. Another meeting attended by them both was held on 21st April, 1969, when it was resolved that a further dividend be paid.

There was thus no appointment of Directors made at the Annual General Meeting held on 30th December, 1968. The Articles of the Company are Table A Articles and of these Article 64 provides:-

"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

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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."

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(continued)

At the second Annual General Meeting held on 1st December, 1969, the minutes were in much the same form as at the previous Annual General Meeting. The Directors' Report was received and adopted and this was incorporated in the minute book. The report was a formal statement signed by Mr. Kennedy and Miss Petsch and describes them both as Directors. It is dated 1st December, 1969.

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There was a third original director whose relinquishment of office is now of no significance, but apart from this Mr. Kennedy and Miss Petsch were at all times the only two directors of the company and they purported to act as such. Each set of minutes is signed by Mr. Kennedy as Chairman. In the minutes of a meeting of directors held on 2nd April, 1970, the attendance of Mr. Kennedy and Miss Petsch is noted and it was resolved that a dividend of \$7,000 be payable forthwith to shareholders registered as at 2nd April, 1970.

20

In the light of Article 64 it appears that at the first Annual General Meeting held on 30th December, 1968, both Mr. Kennedy and Miss Petsch retired from office. However, no director was appointed in their places. It has been suggested that Miss Petsch did not retire because of the effect of Article 91. However, that Article provides only that a Managing Director shall not be subject to retirement by rotation. It does not deal with retirement at the first Annual General Meeting. Therefore, since Miss Petsch retired as a Director at the Annual General Meeting, by virtue of s.91 her appointment as Managing Director was automatically determined, unless article 66 is applicable to her.

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Article 66 of Table 'A' provides as follows:-

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"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."

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10 It is not of great significance in the present case whether or not Miss Petsch remained as Managing Director. The significant matter is whether she and Mr. Kennedy remained directors. If they did, there is no dispute that Mr. Kennedy remained Chairman of Directors. If Mr. Kennedy did remain a Director, he remained so by virtue of the operation of Article 66. The question is whether there was any evidence to support the finding of the learned Judge that Mr. Kennedy offered himself for re-election. The answer to this question depends upon the meaning of these words in the context and the application of these words to the facts. The evidence is sparse. There is clear evidence that at and after each of the annual general meetings both Miss Petsch and Mr. Kennedy continued to act as directors and that after each Annual General Meeting they performed acts which could only be performed by the directors. Before considering this aspect further I shall proceed to the further narration of the facts as found by Street, J.

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30 Some months prior to August, 1970, a representative of Wentworth Developments approached Miss Petsch on behalf of that company in order to negotiate for the purchase of "Farrell House". Miss Petsch made it clear to him that she was not prepared to negotiate for the sale of "Farrell House" at a figure anywhere near that which this representative, Mr. Wynyard, was prepared to offer. She also made it clear to him that "Farrell House" could not in her view be sold without her consent.

40 Mr. Wynyard took up the negotiations with Mr. Kennedy and a situation was reached where Mr. Kennedy took the view that "Farrell House" should be sold for the price which Wentworth Developments was prepared to offer.

Mr. Kennedy was of the view that Miss Petsch would not attend a meeting of Directors in order to deal with the sale of "Farrell House" if she knew in

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advance that that was the subject matter of the meeting. He accordingly arranged with Mr. Bennell, the secretary of Ingrid Pty. Limited to come at about 8.00 p.m. on 4th August, 1970 to the home unit in which Miss Petsch and Mr. Kennedy were living together. Mr. Wynyard was also to be present. No forewarning was given to Miss Petsch that either Mr. Bennell or Mr. Wynyard was coming to the home on that night or that it was proposed to discuss or transact any company business. Mr. Kennedy deliberately did not tell Miss Petsch.

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Miss Petsch arrived home at the unit at about 8 o'clock on the evening in question. She went into the lounge room and saw Mr. Kennedy and Mr. Wynyard sitting at a table with some documents on it. Mr. Kennedy said to her that Mr. Bennell would be coming soon. She asked for what purpose and Mr. Kennedy replied that it was to arrange for the sale of "Farrell House". Street, J. accepted the evidence of Miss Petsch on the following events and recounts it in the form in which they appear in her affidavit.

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"I said, 'Fred, Farrell House is not going to be sold without my consent'. I had not been informed that there was going to be any company business discussed or transacted on that evening, and no one suggested that I had been so informed. I was feeling very upset, and went into another room and lay down. A short time later the door bell rang and the first named defendant called out: 'Ingrid, come and see Mr. Bennell'. I then went into the lounge room and greeted Mr. Bennell but then left the room immediately."

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The account accepted by the trial Judge then proceeds in the language of Mr. Bennell:-

"Almost as soon as she saw me Miss Petsch started crying and left the room. Mr. Kennedy waited for a few moments then left the room and returned very shortly afterwards with Miss Petsch. Up to that time no business had been discussed between any of us. Mr. Kennedy, Miss Petsch, Mr. Wynyard and myself then sat on chairs at the dining room table.

40

As soon as we were seated Mr. Kennedy said

10 'This is a directors' meeting to consider the sale of "Farrell House". He then said 'I have received an offer for "Farrell House" from Wentworth Developments No.2 Pty. Limited' and he was at this time holding some documents in his hand. He then said 'This is the offer and here is the contract'. He then summarised the offer referring to the document in his hand and then turned to Mr. Wynyard and said 'Will you explain the offer in detail?'. Miss Petsch then said 'I do not want to sell "Farrell House"'. "

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Mr. Bennell may have asked whether it was a duly constituted Board Meeting and received an affirmative answer from Mr. Kennedy but Street, J. did not find this of critical significance and I respectfully agree with him. Street, J. summarises the evidence to that point as follows:-

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20 "All four persons present apparently sat down at table. Mr. Kennedy announced that it was a directors' meeting and identified the business for consideration. Two of those present were the sole shareholders, and the sole directors of Ingrid Pty. Limited. The third was the secretary of the company, and the fourth was the representative of a company which was seeking to purchase the main asset of Ingrid Pty. Limited. It was clearly enough a gathering of some importance, and whether a formal question was asked regarding
30 its due constitution as a directors' meeting does not appear to be decisive."

The further facts are taken by Street, J. from Mr. Bennell's affidavit:-

40 "A long discussion then followed lasting almost one and a half hours. Most of the discussions took place between Mr. Wynyard and Miss Petsch. I do not recall the conversation fully. Mr. Wynyard explained the offer at great length. I recall him producing some plans and saying, 'there is an alternative scheme if we cannot acquire "Farrell House" - we can by-pass "Farrell House"'. Miss Petsch took part in the discussions relating to the offer but frequently in answer to points made by Mr. Wynyard Miss Petsch talked at length about her early relationship with Mr. Kennedy. After the discussion had

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progressed some distance Miss Petsch left her chair at the table and sat in an armchair a few feet away from the table but continued to take part in the discussion from the armchair. At a later stage in the evening she returned to the chair at the table and sat by Mr. Kennedy but I do not recall at what stage precisely this move back to the table occurred.

Shortly before 9.30 p.m. Mr. Kennedy said, 'I 10
move that the offer made by Wentworth
Developments No.2 Pty. Limited be accepted.'
At the time that was said Miss Petsch was
either sitting next to Mr. Kennedy at the
table or was in an armchair a few feet away.
Miss Petsch then said, 'If this means you're
selling "Farrell House" I am against it.'
Mr. Kennedy then said, 'Well, as I am the
chairman of the company and I have a casting
vote I'll exercise my casting vote as chairman 20
and vote in favour of the motion.' He then
said, 'I declare the motion carried'. During
these proceedings Miss Petsch was either
sitting right beside Mr. Kennedy or not more
than a few feet away from him. She then said,
'I am opposed to selling "Farrell House"'.
Mr. Kennedy then said, 'alright, I'll affix
the seal to the document'. He affixed the seal
to the contract, a form of transfer and a 30
form of authority to act and signed them.
Whilst he was doing this Miss Petsch said, 'I
don't know what you are signing and it won't
have any effect'.

After Mr. Kennedy had signed the documents he
turned to me and said, 'Will you sign as
secretary?' I then signed the three documents.
After I had finished signing Mr. Kennedy said,
'Well, that's it'. Miss Petsch then got up
and left the room and Mr. Wynyard and I left 40
the unit together and Mr. Kennedy came down in
the lift with us."

Street, J. came to the conclusion that what had
occurred was a Directors' Meeting and that it had
proceeded without objection to the lack of reasonable
notice of it. He concluded that Miss Petsch did
not object or complain about the absence of notice
or forewarning. I do not think that I can add ...

thing to the examination made of this point by Street, J.:-

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10 "Apart from the statements made when the parties seated themselves around the table, Miss Petsch was given no notice that this was to be a directors' meeting. 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. Where two persons are the sole directors of a company, a discussion between them on company affairs will not amount to an effective directors' meeting unless both are aware, before purporting to proceed to business, that the occasion is to be a directors' meeting. Notice of a meeting about to be held instanter (such as was given to Miss Petsch on the night of 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

20 reasonable, subject always to any specific provision in the articles. In determining what is reasonable in point of length, form and content of the notice regard will be had, inter alia, to the context of the company's structure, practice and affairs.

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40 In the case of this company it is common ground that no notices of directors' meetings have ever been sent out. Nor is there any evidence of any established course of practice in the summoning and holding of directors' meetings.

It was clear to all concerned that this meeting of 4th August was a formal occasion. This was not a mere chance or conversational discussion attended by informality, and absence of recognition that it was a formal occasion. On the contrary, it was a discussion at which were present the Secretary of the company as

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well as the two shareholders and directors. When one takes into account also the nature of the matter under discussion, and the terms in which it was discussed, the proceedings could fairly be regarded as formal and effective in character.

The discussion proceeded upon the basis which must have been apparent to all concerned that it was a directors' meeting, and that it was a meeting at which it was intended, so far as Wentworth Developments No.2 Pty. Limited was concerned, to achieve finality, yes or no, in relation to the sale of "Farrell House". Miss Petsch, although at the outset distressed when she found Mr. Wynyard and Mr. Bennell in her home, participated, albeit in an opposing capacity, in the discussion regarding the sale of "Farrell House". She stated that she was only willing to sell it for a price of \$2 million, with a time condition appended to such sale. She did not at any point of time object to the proceedings being conducted on the basis that company affairs were under discussion and consideration. Her protestations, vehement though I have no doubt they were, were apparently confined to opposition to any decision on the part of the company to sell "Farrell House", coupled with an assertion that no sale could take place without her consent. Although opposing strongly the proposal which was being advocated by Mr. Kennedy and Mr. Wynyard, the plaintiff clearly acquiesced in that proposal being discussed. She did not at any stage assert that what was taking place could not be regarded as a directors' meeting. Neither did she object to the proceedings upon any suggestion that, by reason of her not having been notified, she was prejudiced, or placed at any disadvantage. She participated as an active party in the discussion.

I am not persuaded that there was any defect in the validity of the meeting flowing from the absence of some prior written notice. Such notice would have been unprecedented, and the absence of such notice does not at this stage, that is to say after the event, furnish the ground for any objection so far as

Miss Petsch is concerned. The situation would have been different had Miss Petsch objected or complained of the absence of notice or fore-warning. Such objection or complaint might well have availed her even if, in unwilling submission to what might have appeared the exigencies of the situation, she had thereafter participated in the proceedings. A Court would not be slow to recognise such participation, after complaint or protest, as being in effect without prejudice. But nothing of that sort occurred in the present case. Miss Petsch made no objection or complaint regarding the absence of notice or fore-warning. She did not assert that she was in any way procedurally disadvantaged. Her participation in the discussion was not in the character of being under protest or without prejudice, and I draw the inference that by her participation she acquiesced in the meeting proceeding without any other notice. One might well deprecate, as I am prone to do, Miss Petsch having been placed in a situation in which she had little real alternative, short of incivility to Mr. Wynyard and Mr. Bennell, but to be present at the directors' meeting without any prior warning to her. But this falls short of entitling her to assert at this subsequent point of time that the meeting was invalid by reason of the absence of notice".

30 I too am prone to deprecate the course of events but I do not think that this feeling can lead the Court to a different conclusion from that at which Street, J. arrived. There is no suggestion and no claim that Miss Petsch was over-borne. She believed that her consent was necessary before any effective sale could be made of "Farrell House". If Mr. Kennedy was a director then, it being admitted that he was in that case Chairman of Directors, she was wrong in that view. If she had realised that she was wrong in that view then the only way she could have prevented the resolution from being passed was by refusing to attend a meeting of directors. It may well be that that is what Mr. Kennedy feared and that is why no notice was given. It was largely a battle of tactics, each relying on his or her own legal advice. The truth is however that Miss Petsch, although she was unwilling to join in the sale of "Farrell House" at the price offered by

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Wentworth Developments, she claiming that it was worth considerably more, did take part in a long business discussion. That discussion may at times have been emotional and it may at times have shown a confusion between personal and business affairs, but it was a business discussion concerned with the proposed sale of an asset which belonged to the company. Miss Petsch was confident that no resolution could be passed without her consent and it may be that for this reason she was prepared to engage in the long discussion about the affairs of the company. However, on the findings of the trial Judge she had been told that it was a meeting of directors, the Secretary of the company whom she only knew in a business capacity was present, and although the outcome of the meeting was not to her satisfaction I do not think that afterwards she can, in the absence of any evidence of having been over-borne, complain that it was not a meeting of directors because she had not received formal notice. I agree with the conclusion of Street, J. upon this question.

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I also agree with his conclusion that Article 66 operated so that Mr. Kennedy was deemed to have been re-elected at each of the Annual General Meetings in 1968 and 1969. The answer to the question whether he should be deemed to have been re-elected depends upon whether the condition was fulfilled that he offer himself for re-election. As I have said, there is no evidence that in any notice prior to the meeting or at the Annual General Meeting Mr. Kennedy expressly offered himself for re-election. If an express offer is necessary then Mr. Kennedy fails to show that he was a Director. However, I am of the opinion that no express offer is necessary. The intention of Article 66 is primarily to ensure that there is no inadvertent gap in the directorate of a company. It is not intended that an unwilling director should have the office foisted upon him simply because the company does not appoint a director in his place when he retires under the company articles. For that reason the condition is inserted that the director in question offer himself for re-election. By these words I take no more to be meant than 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 director. If he does not attend the meeting and has done

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nothing previously to disclose a willingness to continue as director then he cannot be deemed to be re-elected under Article 66. However, if he attends the meeting and, as Mr. Kennedy did, takes the chair and remains in the chair throughout the meeting and concludes the meeting with himself apparently still chairman, if a resolution be passed which envisages that there will be directors to carry it into effect, such as the resolution for the fixing of the auditors' fees by the directors, then I think that there is considerable evidence from conduct to show that Mr. Kennedy was offering himself for re-election. I agree with Street, J. that it is a question of fact whether in the circumstances a retiring director has offered himself for re-election. I also agree that an offer can be implied. I agree that both general meetings were conducted and concluded on the basis that the directors were continuing in office. There was no suggestion that any other person could or would be a director and, very significantly Miss Petsch did not challenge Mr. Kennedy's capacity as a director at any point of time until after the disputed meeting.

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In these circumstances I do not think that much assistance is gained from an analysis of cases which have arisen on Articles not dissimilar from Article 66. See Spencer v. Kennedy, (1926) 1 Ch.125; Grundt v. Great Boulder Proprietary Mines Limited, (1948) 1 Ch.145. See also Holt v. Catterall, (1931) 47 T.L.R. 332. These cases deal with typical questions which may arise in deciding whether the final proviso to the Article does or does not apply to the circumstances of the case. It is a difficult question whether a meeting has expressly resolved not to fill the vacated office. However, it seems to me that these cases make it clear that the purpose of such Articles as Article 66 is to ensure that there is not an inadvertent vacancy in the directorate and I do not think that any difference in language between the various Articles leads to a different purpose being disclosed.

Mr. Henderson submitted that the Article could never apply where there was oversight both by the director and the shareholders because in that event there would be no positive act by the director which could be described as an offering of himself for re-election. He sought support in this regard from an unreported decision of Meares, J. given on 22nd April, 1971 at nisi prius on an application for a verdict by

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direction, Adelstein v. Talcott Factors Limited,
where Meares, J. said:-

"In my opinion, if a director liable to retire
... and wishing to be re-elected does
absolutely nothing, then the article does not
operate."

If by this is meant that the wish is not accompanied
by any overt statement or action, then I would
respectfully agree. There must be a communication
of an offer. However, the communication may in my
opinion be either express or implied by conduct. 10
I do not read these words of Meares, J. to be to
the contrary of that view although I have not found
it necessary to consider how the principle was
applied by Meares, J. in the particular case there-
after. In the present case I am of the opinion that
Mr. Kennedy did offer himself for re-election by his
conduct in continuing throughout the meeting as
chairman and by immediately thereafter continuing 20
with Miss Petsch in the conduct of the affairs of
the company in circumstances from which I find the
inference irresistible that he had offered himself
for re-election. The Article in my opinion was
designed for just such a case as the present and its
whole purpose would be defeated if in circumstances
such as present circumstances an operation were
denied to it.

In view of these conclusions I am of the
opinion that the appeal fails and should be 30
dismissed. It is therefore not necessary for me to
deal with the further arguments which were submitted
on behalf of the respondent to the appeal, namely,
that the requirement of Article 64 that all Directors
retire at the first Annual General Meeting was
waived by all the shareholders, and secondly, that
Wentworth Developments No.2 Pty. Limited has the
benefit of the rule in Mahoney v. The Liquidator of
East Holyford Mining Company (1875) 7 E & I 869.
It is also particularly to be noted that, providing 40
a finding is made that Mr. Kennedy was deemed to be
re-elected as director, there is no submission that
he was not chairman of directors with a casting vote
at any meeting of directors. This point was not taken
in the notice of appeal and was not argued. Indeed
it was expressly disclaimed.

I would propose that the appeal be dismissed
with costs.

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HOLMES J.A.L I have read the reasons for judgment
of Jacobs, J.A. in draft form and I agree with those
reasons and with the orders he proposes. For myself
I would like to add by way of emphasis that this
case primarily concerns the true construction of
certain Table A Articles. They must bear the same
10 meaning whatever the capacity of the Directors.
Secondly the case concerned whether or not a valid
directors' meeting was held when the Seal was
affixed to the contract of sale of Farrell House
from Ingrid Pty. Ltd. to Wentworth Developments
No.2 Pty. Ltd. on the 4th of August, 1970.

As the learned presiding Judge has said this
depends upon the construction of the articles as
applied to the facts to ascertain whether Miss Petsch
and Mr. Kennedy were directors. If so it is not
20 denied that Mr. Kennedy was Chairman and had a
casting vote. It is clear that Street, J. and
Jacobs, J.A. have decided this question in the only
way possible. The important matter for what follows
is that Miss Petsh was a director.

No head of equity has been relied upon whereby
Miss Petsch is to be taken as a director of the vendor
company suffering a disability. Despite some display
of womanly emotion directed not at the view that there
30 was no proper directors' meeting, but that it was her
right to prevent the sale without her consent (in
which she was wrong) and that the price was not high
enough (in which for all we shall ever know, she may
have been right), she attended the meeting submitting
her business views as well as matters personal to the
relationship with Mr. Kennedy with whom she had shared
a home unit for years. Quite strong minded women with
all their business faculties about them live in that
way. Anyhow no case was ever made that Miss Petsch
did not understand the business and was overborne.
40 No such case was open on the pleadings and no such
case was argued. I doubt very much if such a case
was open.

Indeed if Miss Petsch had failed to attend the
meeting the ultimate result would no doubt have been
obtained by a sale by a liquidator of the company.

I am of opinion that the appeal should be
dismissed with costs.

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MR. JUSTICE MOFFITT

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MOFFITT, J.A.: This appeal has troubled me. With very great respect to the learned Judge who tried this case, I find myself in disagreement with his decision on the facts of the case and, with deference to my brother judges who think otherwise, I have formed so clear a view that he was in error that I think I should express my dissent. It is proper in these circumstances that I should deal with the factual considerations, which arise, at some length. My dissent is directed to the question of whether the purported passing of the resolution to accept the offer of the respondent company to buy Farrell House was at a meeting of directors of the second respondent Company. As in my view Street J. was in error in finding that it was, it is unnecessary for me to consider the other questions raised in this appeal.

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As Jacobs J.A. has set out many of the facts and circumstances to which I wish to refer, I will not repeat them, but, in view of the approach I have taken, I will add references to other parts of the evidence material to my conclusion. The circumstances of the case were such that the question arises as to the ease or otherwise with which a Court should draw an inference against an unwilling director that a meeting has taken place, where it appears his co-director, deliberately without notice in order to gain an advantage by surprise, in a manner departing from frank and reasonable dealing between directors, has sought to foist or "spring" a "meeting" on the other at a place where the other happens to be and where there may be other reasons, than an agreement to attend the meeting, for his not withdrawing from that place and for his then engaging in some discussion. In the present case this discreditable manoeuvre was for no minor purpose, but in order to procure the disposal of the company's entire business undertaking, for which it had been originally formed, which the appellant as Manager had been running for some years as a guest-house and which the transaction shows was worth at least to the respondent purchasing company not less than \$720,000, when it was known the appellant was opposed to the sale and considered that any sale ought to be at a much higher price and when the fact

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was that the appellant had half the shareholding and had contributed half the moneys which led to the purchase of the asset in question.

Street J. said:

"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 co-incident physical presence of all directors does not constitute a formal directors' meeting. Where two persons are the sole directors of a company, a discussion between them on company affairs will not amount to an effective directors' meeting unless both are aware, before purporting to proceed to business, that the occasion is to be a directors' meeting."

and

"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."

No dissent from these propositions were expressed before us and it can be accepted that they raise the questions, in relation to which the facts must be considered (and see Barron v. Potter 1914 1 Ch.895; Gower Modern Company Law 3rd ed.138). In most cases where a meeting is suggested instanter out of convenience because the parties happen to be present and the directors stay and amicably proceed to business, no difficulty arises. A more difficult and different question arises when, as here, one starts with an attempt to foist a meeting on a director at a place and for motives already referred to and where what then occurs is or may be equivocal and where there is some kind of protest, ambiguous though it be. If, as here, there is no express agreement to waive notice and no express agreement to have a directors' meeting instanter and if, as here, those who seek to treat it as a directors' meeting do not seek to obtain either of such assents, but seek to rely on implications,

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then the inquiry, as to whether there is agreement, waiver or assent, is one directed to the subjective state of mind of the director who is said to have agreed or assented or to have waived notice. This of course must depend on what he did in the circumstances, but in the end the question is directed to his assent or agreement. If what he does or if his failure to withdraw are reasonably explicable by other reasons than his requisite assent, then those who seek to rely on his assent must fail.

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The propositions of Street J., which I have quoted, need some further definition and relation to the critical parts of the events of the evening of 4th August 1970. During the period that the two directors, the company secretary and Mr. Wynyard the representative of an outsider were present together until the resolution was purported to be passed, there were three periods. Although in the end, all have to be looked at as a whole, I think it material to appreciate these different periods and their significance. The first was for about two minutes when statements were made by the respondent director Mr. Kennedy which included, according to His Honour's findings, a statement that it was a meeting of directors. The second was for about an hour and a half, during which time virtually only Mr. Wynyard and the appellant participated in the discussion and in which Mr. Kennedy took no part and during which time, so far as the evidence reveals, there was no discussion or conversation between the directors. It was by virtue of the appellant's participation during this period, but in the light of what had occurred in the first two minutes, that the learned trial judge was able to find by implication the necessary assent and agreement of the appellant. The third period was for the short time that it took for Mr. Kennedy, the respondent director to propose a resolution, for the appellant to make a short objection, to which I will later refer, and for such respondent director then to exercise a casting vote and declare the resolution carried. The question of ultimate importance is whether the resolution, moved at about 9.30 p.m. in the third period, was duly passed. To have been so passed there must have been at that time current a directors meeting with a quorum of two directors, present in that capacity at such a meeting. The

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case of the respondents is that a directors' meeting commenced upon or soon after the announcement of the respondent director in the first period and continued up to and including the time when the resolution was declared as having been passed.

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10 Whatever might have been the position, if after the initial formal announcement was made, the directors, contrary to what did occur, had then themselves continued in a formal way to deal with company business, the events which in fact followed in the second period, not being such a formal
20 continuance, have to be looked at to see if there was a directors' meeting assented to at all and if there was, whether it continued by assent until Mr. Kennedy suddenly spoke up an hour and a half later and proposed the sale. The unilateral intention of Mr. Kennedy at any stage was not sufficient. If the truth of the matter is that an initial unilateral attempt at the beginning to make the meeting of the group into a directors' meeting was side tracked into a continuation of an earlier course of bargaining, which the appellant earlier had with the outsider who was present in the group, then a later unilateral attempt, at an instant, to make it a directors' meeting could not achieve this object. It would be otherwise, if the intervening bargaining or discussion was that of a director doing so in the course of the directors' meeting for the purpose of
30 aiding himself or herself or the co-director to come to a decision on the business of the directors' meeting. If of course the events were equivocal and either view was open, then as indicated an implied agreement or assent could not be found.

40 Let me first examine the setting which existed before the first stage, to which I have earlier referred, was reached. Mr. Kennedy admitted that he deliberately gave no notice of the meeting to the appellant, that is either written or oral notice of either the fact of the meeting or any proposed subject matter thereof, that is either of discussing the offer or of the proposal to move a resolution to accept an offer for a particular sum of money or to execute a contract, a transfer or written instructions to a solicitor, all of which documents were prepared in readiness. The failure to do so cannot be equated to any method of conducting the company's affairs in the past, as was sought to be done in argument, any more than the past conduct of non contentious business by

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the directors in an informal way later accepted can be brought reasonably in aid of drawing inferences of waiver and agreement in the circumstances that existed on 4th August and in the face of the omissions and informality in what occurred on that night. I make these observations because of the fundamental importance of the business proposed, because of known lack of agreement by the appellant, because a stranger to the board and the company's secretary were able to be given notice of the meeting and proposed business which the co-director was not, because legal advice has been obtained by Mr. Kennedy in relation to the meeting and because the company secretary, a man skilled in the conduct of company meetings, was present and because the appellant was deliberately kept in the entire dark in order to gain an advantage by surprise and in order to put her in an awkward position by making it difficult for her to retreat from the place where the meeting was and where she lived. 10

As Street J. found, Mr. Kennedy deliberately did not tell the appellant of the meeting because she might not come. He said in evidence, quoted by His Honour, that she might have stayed in "Farrell House", the subject property, that night, rather than attend the meeting. The location planned and notified to the other two was the mutual home of the two directors where they had lived together for fourteen years. Thus the time and location was planned, so she would be bound to come and then be, for reasons unconnected with any desire to be at a directors' meeting. At the outset, the case therefore starts with a strong presumption against any intention on the part of the appellant that evening to attend or participate in a directors' meeting. These initial circumstances of course, would not prevent later events showing that the fears of Mr. Kennedy were ill founded or that her intentions changed. However, they are most material circumstances to be considered when such later events are looked at and the respondents seek from them an implication of willingness and assent to the contrary. No assertion was made and no evidence was led on behalf of the respondents to the effect that the appellant at any time expressly agreed to waive lack of notice or to treat the occasion as a directors' meeting. One might be forgiven for thinking that none of the three men present would have risked a request for such a direct assent. 30 40

This is borne out by the way the motion was dealt with. It was formally put, the casting vote was formally cast and the motion was formally declared carried, but in the midst of this formality there was lacking any formality in allowing the appellant to exercise her right and duty as a director. These formalities were suddenly raised after the long discussion in which Mr. Kennedy had been silent. According to the oral evidence of Mr. Bennell, when the motion was moved, the appellant said "You can't sell it without my consent" and repeated this when Mr. Kennedy exercised his casting vote. These observations are consistent with a refusal to regard the step being taken as having any validity. They are consistent with a challenge to the validity of the motion for a reason undisclosed which could be objection to the whole proceeding that night or to this particular matter without prior notice and without her consent or which could be she was indicating a refusal of any co-operation in proceedings because they were irrelevant in that the Company could not sell without her consent. Neither in terms nor effect are they a vote of a director upon a motion. They are rather an objection to its validity. Thus it is equivocal as to whether it means that there is no directors' meeting or the board or the company for any one of a number of reasons good or bad, true or fancied have no power to sell without the appellant's authority. Whatever it was, it was not a vote on the motion. Despite this, the formality of putting the motion or asking the appellant to vote on the motion was omitted. Immediately all the documents were sealed. The company secretary had brought the seal along for the purpose. These were acts beyond the mere acceptance of the offer. They involved, as their terms show, affixing the seal to each document with the alleged authority of the board of directors. One was a contract, one a transfer and one an authority to a particular solicitor amongst other things to write a consideration into the transfer after its execution, which authority involved employment of the solicitor by the company. Why was no motion put or resolution passed on these matters? The motion so formally put and passed related only to acceptance of the offer and could not on any view provide authority beyond making a contract with the third respondent. This could not have escaped the notice of Mr. Bennell. Mr. Wynyard and Mr. Bennell, especially the latter, no doubt did not lack experience in such matters but

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neither made any comment or suggestion. Mr. Bennell said the next thing after the motion was declared passed was that all three documents were signed and sealed including by him as secretary and without any authority being sought from the "meeting." He sought to justify putting his signature under the words, which inter alia appeared on the transfer and authority, "The common seal of Ingrid Pty Limited was hereunto affixed by authority of the Directors and in the presence of ... K.A. Bennell Secretary", on the basis that he considered the transaction was in the best interests of "Mr. Kennedy and the Company and Miss Petsch" and otherwise would have refused to sign. He gave this explanation while conceding he knew Miss Petsch was opposed to the sale and that he had seen no valuation. Mr. Kennedy's initial concessions and this course of events make it difficult to come to any conclusion other than that there was a deliberate avoidance of any question or procedure calling for a response from the appellant, which might lead to the appellant making some direct statement challenging the meeting or lack of notice or in some way withdrawing from the group. It is reasonable to infer that the transaction was rushed through in the presence of the appellant, but without consulting her on any vote, so that, by the absence of objection, it could be said there was implied acceptance. In this setting the evidence upon which the respondents rely should be carefully scrutinised and evaluated for in my view unequivocal evidence in relation to the relevant part of the evening's events would be necessary before the requisite implications can or ought to be properly made. It is on this basis that I think the evidence and the findings of Street J. should be considered.

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What happened after the appellant came home, at various points, is suggestive of unwillingness of the appellant to participate in the events of the evening and that Mr. Kennedy was exploiting their personal relationship to procure the planned meeting and that she in fact was placed, as intended, in a dual and embarrassing situation, to which she reacted in a somewhat ambiguous way. Apparently, on arriving home, realising Mr. Wynyard was present she went to the bedroom. Both her evidence and that of Mr. Kennedy shows that she was prevailed on to come into the room by the request

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"Come and meet Mr. Bennell." When she came in and saw the two men she started crying and left the room. After presumably she composed herself Mr. Kennedy prevailed on her to return. Apparently the room was a combined lounge and dining room, for Mr. Kennedy said they were the same room. Apparently there was a dining table and not far away there were lounge chairs. The appellant, Mr. Kennedy, Mr. Wynyard and Mr. Bennell then sat on chairs at the dining room table. It was only after they were so seated that, according to the affidavit of Mr. Bennell, an indication was given that this was a directors' meeting. That it was announced it was a "directors'" meeting, was accepted by Street J. This appears from the affidavit of Mr. Bennell confirmed by the affidavit of Mr. Kennedy. Both gave oral evidence to non leading questions as to precisely what occurred at the outset, but this evidence was not that it was announced it was a "directors'" meeting. I will return to this matter in the end, but, in view of this finding of Street J., I will examine the rest of the evidence on the assumption this announcement was made.

The appellant coming into the room and sitting there with the others, could provide no assent to attend a directors' meeting. Her mere continued presence was equivocal, as Street J. appears to have, with respect, rightly accepted, because he referred to her "having been placed in a situation in which she had little real alternative, short of incivility to Mr. Wynyard and Mr. Bennell, but to be present at the directors' meeting without prior warning" and because he appears to have based his ultimate conclusion on the fact "she participated as an active party in the discussion" following what occurred at the outset. The appellant coming into the room and sitting at the table may be accounted for otherwise. It is reasonable to assume that before any announcement, that she would have realised seeing Mr. Wynyard present, that some attempts were going to be made to give him an opportunity to renew efforts on his part to persuade her to give her approval in whatever capacity was relevant to his proposals to buy Farrell House. He had earlier tried many times, unsuccessfully, apparently with unwanted persistence, to persuade her in this regard. On first appearance it no doubt would have seemed that with Mr. Kennedy's assistance and approval Mr. Wynyard was being brought along to renew his activities, perhaps with some

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assistance from Mr. Kennedy and the company secretary. After the announcement concerning the meeting, Mr. Kennedy referred shortly to the offer and did so in relation to the form of contract he held in his hand. To use Mr. Bennell's words "he then passed the proceedings over to Mr. Wynyard who was asked to explain in full detail" or "He mentioned some of the terms and then he asked Mr. Wynyard to explain in full detail to Miss Petsch." At this point, and at this point alone, she participated in the "discussion", that is apart from assertions on numerous occasions that the property could not be sold without her consent. It is this conduct that has to be considered, in the light of the earlier comments I have made, to determine its significance and whether it is equivocal or whether it gives rise to the implications found by His Honour.

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When people clothe their business or property relationships in some legal form, such as in that of a private company, then their affairs must be dealt with on the basis of the form, which they have adopted, and their actions even although informal will without much difficulty be construed as applying to the necessary legal forms or the company structures which they have adopted. However, it is one thing to so interpret a course of conduct of an admittedly acquiescent nature later challenged and quite another to adopt such a course in an unusual case such as the present. I think that great care should be taken before the same approach is applied, where one party, particularly on a matter of a major or unusual significance, seeks by means of concealment, lack of frankness or trickery, against an unwilling party, to procure a situation to which the other party did not directly assent, where the other is deliberately put in an equivocal position and it is later sought to say that that party by inference assented. This is the more so when the party, who has set up the design, appears to have deliberately refrained from ever raising any situation where the other is asked directly to assent, and then seeks merely to rely on implication. In this class of situation I do not think the case can or ought to be decided by inquiring, as the respondents sought to do, whether the party put in difficulty has raised the precise objection that she would if he had a lawyer at his elbow particularly if she raises some kind of objections

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even if of an equivocal kind. As the question of whether an assent of the kind referred was given is a subjective matter, it is necessary to look closely at the other relationships of the parties and other considerations that were possibly in the mind of the party, said by implication by his actions to assent.

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10 As the appellant had a number of different relationships to the various people who were present in the room, it is misleading to resort to tests appropriate to determine equivalent questions from directors in a purely business relationship in a two director company running smoothly by informal proceedings. The appellant bore a personal relationship with Mr. Kennedy, and a personal relationship, as hostess in her home, to people brought there by the man with whom she lived. It is clear both in a very great degree intruded into the events of that night. For example, the
20 evidence of Mr. Bennell, at many points, shows that her personal association with Mr. Kennedy and their earlier business dealings, looked at in a personal and non directorial way, intruded into the discussions with Mr. Wynyard. It is also pretty clear that, on Mr. Kennedy's side, personal relations with the appellant played a part in his conduct that evening, and particularly into what occurred in the hour or hour and a half when the appellant had her discussions with Mr. Wynyard. He had had legal
30 advice as to how to go about procuring the meeting and how it should be conducted and he came along to the meeting not needing to be persuaded to give his assent to the acceptance of the offer which was all cut and dried down to the last detail. He came along knowing he had the power to and intending to determine the matter himself by exercising his casting vote. Nevertheless he sat there, without intervening, for an hour and a half, while Mr. Wynyard used all his powers of persuasion to endeavour
40 to persuade the appellant to come to an agreement over the sale. As he put it she "ranted and raved." His conduct in relation to this hour and a half, rather than being that of a director allowing his co-director to examine a scheme and discussing the pros and cons of it from one director to the other so they could come to a board decision, was that of a man who was concerned with the attitudes of the woman with whom he lived and with whom he expected to live after the affairs of that evening. Further, the
50 appellant was the person who had personally put money

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into the venture and claimed, justly or otherwise, that she had been instrumental in acquiring the property originally, so as to give her some kind of legal and moral right on the question of its disposal. It is not a question of saying that the property could only be sold by action of the directors and therefore when she talked of sale she only did so as a director. The question at issue is not one of estoppel or some kind of holding out but is a subjective question of whether by necessary and proper implication it can be concluded she agreed by her actions to be a party to a directors' meeting and to waive notice of it.

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As already indicated the failure to leave the room on the first announcement could not show the necessary assents by the appellant. In the circumstances, and having been kept entirely in the dark as to what was happening, her staying in the initial stages, even to listen to what was going on rather than leaving the room at the very first instant, again would not be sufficient to find agreement to the meeting and to waive the giving of notice. As soon as the question of sale arose, she said there could be no sale without her consent. This was quite consistent with an assertion that a company meeting was to no point. Nobody contradicted what she said, but instead by implication, at least to her, accepted it, because the stranger to the company who sought the sale and she proceeded without any communication between the directors to debate the question of whether she could be persuaded to consent. Why should she not regard the attempt to make it a meeting between two directors as abortive in the face of her assertion and in lieu a renewal of the bargaining between the stranger and her, who had the say.

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Mr. Bennell in his affidavit detailed what followed the lapse of about two minutes after all were seated: namely:

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"A long discussion then followed lasting almost one and half hours. Most of the discussion took place between Mr. Wynyard and Miss Petsch. I do not recall the conversation fully. Mr. Wynyard explained the offer at great length. I recall him producing some plans and saying 'there is an alternative scheme if we cannot acquire "Farrell House" -

10 we can by-pass "Farrell House". Miss Petsch took part in the discussion relating to the offer but frequently in answer to points made by Mr. Wynyard Miss Petsch talked at length about her early personal relationship with Mr. Kennedy. After the discussion had progressed some distance Miss Petsch left her chair at the table and sat in an arm chair a few feet away from the table but continued to take part in the discussion from the arm chair. At a later stage in the evening she returned to the chair at the table and sat by Mr. Kennedy but I do not recall at what stage precisely this move back to the table occurred."

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Mr. Bennell in his oral evidence said the appellant interrupted Mr. Wynyard on numerous occasions, he then gave this evidence:

20 "Q. What did she say? A. She was very emphatic she did not want to sell the property. She also went into great details of her relationship with Mr. Kennedy.

Q. Was this while Mr. Wynyard was explaining?

A. Yes.

Q. What else did she say? A. She said she thought they may receive a better offer and she referred to an offer which she said she received at one stage."

And a little later:

30 "Q. As far as her interruptions were concerned, she constantly asserted, did she not, that the property could not be sold without her consent?

A. Yes, she said that.

Q. Did she explain why it would not be sold without her consent? A. Yes. She said that she had been led to believe that it could not be sold without her consent.

= Q. Did she say by whom? A. She mentioned Mr. Evans' name, yes.

40 Q. You said Mr. Wynyard's explanation of the offer lasted some time and was interrupted by Miss Petsch. A. Yes.

Q. Interrupted by anybody else? A. No.

Q. Did you ask any questions? A. I might have asked one or two, but not very many."

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"Q. Did anybody else say anything while Mr. Wynyard was explaining the offer? A. No.

Q. When Mr. Wynyard finished explaining his offer what was the next thing that anybody said? A. The discussion had taken approximately an hour and a half and at the end of an hour and a half Mr. Wynyard had exhausted all his persuasive powers and Mr. Kennedy then put the motion to accept the offer."

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He also gave the evidence

"Q. Yes? A. The main grounds given by Miss Petsch during that evening against the sale was personal grounds - personal relationship with Mr. Kennedy.

Q. That it could not be sold without her consent? A. No. Just their personal relationship.

Q. What did she say? A. She just went back to the earlier relationship between her and Mr. Kennedy.

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Q. Yes? A. And looked upon the property as her own - that hers was the dominant interest in the property and that she did not want to sell it - she would not sell it, no matter what price was offered to her."

Street J. based his finding that the appellant had agreed to waive notice of a directors' meeting and to treat the meeting, as a directors' meeting upon her participation in the discussion. He said:

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"It was clear to all concerned that this meeting of 4th August was a formal occasion. This was not a mere chance or conversational discussion attended by informality and absence of recognition that it was a formal occasion. **On the contrary, it was a discussion** at which were present the Secretary of the company as well as the two shareholders and directors. When one takes into account also the nature of the matter under discussion, and the terms in which it was discussed, the proceedings could fairly be regarded as formal and effective in character.

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The discussion proceeded upon the basis which

must have been apparent to all concerned that it was a directors' meeting, and that it was a meeting at which it was a meeting at which it was intended, so far as Wentworth Developments No.2 Pty. Limited was concerned, to achieve finality, yes or no, in relation to the sale of "Farrell House". Miss Petsch, although at the outset distressed when she found Mr. Wynyard and Mr. Bennell in her home, participated, albeit in an opposing capacity, in the discussion regarding the sale of "Farrell House".

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He also said:

"She did not at any point of time object to the proceedings being conducted on the basis that company affairs were under discussion."

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and

"She did not at any stage assert that what was taking place could not be regarded as a directors' meeting."

20 and

"She participated as an active party in the discussion."

and

"Her participation in the discussion was not in the character of being under protest or without prejudice and I draw the inference that by her participation she acquiesced in the meeting proceeding without any other notice."

30 It is clear from the judgment, particularly from the passages I have quoted, that the ultimate conclusion of Street J. depended upon a view that it must have been intended by and been apparent to the appellant that her participation in the discussion for an hour and a half was in the capacity of a director at a directors' meeting. It is clear from the judgment that it was her participation in this discussion and not her failure to remove herself from the room at the first instant or her sitting at the table rather than away from it at least on some occasions, that led to the conclusion that by
40 intention and agreement she participated in a

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continuing directors' meeting. His Honour made observations as to what was "apparent to all", but the critical question was, what was apparent to and intended by the appellant. The view of the others or their belief as to the nature of the proceedings during the hour and a half would be conditioned by the prior notice of meeting and such knowledge as the particular individual in fact had of the intention to bring about a surprise situation to be utilized by means of a casting vote at a directors' meeting and that the common seal, the documents to constitute the contract, transfer and instruction to a solicitor prepared in advance were there and would be executed that night. With respect to refer to what is "apparent to all" is to place emphasis away from the real question. The real question is, whether it must have been apparent to the appellant that the discussion involving her and Mr. Wynyard, which took something in the order of 90 minutes as against about three minutes for the rest of the proceedings until the resolution was passed, proceeded on the basis that it was part of a directors' meeting and that she was thereby, as a director, participating in and accepting it as such a meeting, although without prior notice to her. In the light of the general considerations to which I have earlier referred as I have said, a critical examination is required of the evidence as to the nature of the discussion.

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Some evidence concerning the discussion and the general nature of it has already been referred to. It is the respondents who rely upon the appellant's activity in this regard to establish her assent referred to and yet their evidence is gravely deficient in revealing what really did happen in this hour and a half. Mr. Bennell says he cannot recall much of what was said and refers to it in a rather general way. Mr. Kennedy makes only some general references to the discussions but these are material. Mr. Wynyard despite the implication sought to be made and the inability of the others to recollect, was absent from the witness box, a matter of some materiality. However, sufficient appears of it, in my view, to show that it would be most unlikely that the appellant would regard it as part of a directors' meeting. It was the kind of discussion, which would, of course, have occurred at a directors' meeting,

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because I suppose there are many irrelevancies which intrude into such meetings, but on examination, particularly in the light of the earlier considerations referred to, I think its nature is such that it certainly did not demonstrate what must have been the situation so as to provide the basis to infer that by this conduct the appellant was participating in a directors' meeting and agreeing to waive notice of such an important meeting.

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10 The gathering was not of two persons who were
directors or two persons who were directors and a
secretary. It was a gathering which included a
stranger. This in itself does not establish that
there was not a directors' meeting or that
negotiation or discussion with him was not part of a
directors' meeting, but the presence of a stranger,
who actively and at length participated, may raise
doubts whether there was a continuing directors'
20 meeting and, if implications are at issue, his
presence provides a further reason for a precise
examination of what occurred in order to see if what
occurred could relate or be thought to relate to
something other than a meeting of directors.

30 Further this long discussion did not involve any
discussion between the directors. It was entirely or
almost entirely between one director and the
stranger. The subject matter of the sale was not
debated at all that night between the directors. Mr.
Kennedy had made his decision in every detail and had
nothing to discuss with his co-director or the
stranger.

40 Further it was likely, as indicated, that Mr.
Kennedy, who was living with and wished to continue
to live with the appellant, had personal and not
company reasons for having Mr. Wynyard present and in
trying to persuade the appellant to consent. It was
clear he was not concerned with her views as a
director, because he came along fully prepared with
everything pre-arranged to have the contract
executed, irrespective of her views as a director or
otherwise. The inference is he allowed the appellant
to deal with matters on a personal plane for this long
period, hoping to cut down future friction, not in
company affairs, but in personal affairs.

Further the evidence, such as it is, strongly
indicates that the appellant was dealing with this

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matter on a personal plane and not at all as a director or a director at a directors' meeting. The discussion between the appellant and Mr. Wynyard was of a similar kind to those which had occurred many times before when he approached her to sell. These prior attempts to buy the property, as did some of his discussions with Mr. Kennedy, took various forms. At one stage the proposal to Mr. Kennedy had been to buy his shares and the cross-examination on behalf of the developer company shows that the shareholdings were discussed between Mr. Wynyard and the appellant on a number of occasions. Some of these discussions were on a basis of her personal interest or as shareholder and were discussed in relation to her personal relationship with Mr. Kennedy. The long discussion that night was directed to the appellant personally in an attempt to persuade her to consent. Mr. Bennell summed it up as follows:-

"the discussion had taken approximately an hour and a half and at the end of an hour and a half Mr. Wynyard had exhausted all his persuasive powers and Mr. Kennedy then put the motion to accept the offer."

He also said:

"She was very emphatic, she did not want to sell the property. She also went into great details of her personal relationship with Mr. Kennedy."

It appears that that night, she regarded herself and, according to her evidence, she still regards herself as having some right arising from her claim that she was in effect the initiator of the original purchase and could have acquired the property for herself but for the fact she was persuaded and let Mr. Kennedy come into the transaction. Such an approach played some part in her earlier discussions with Mr. Wynyard. The evidence of Mr. Kennedy confirms that of Mr. Bennell that the appellant that night dealt with the sale question by raising personal matters. As he put it, "she was ranting and raving a lot" and, when asked what she was ranting and raving about, he said "I could not recall everything but she was going on in a very illogical manner, being upset at the irrelevance of the meeting." It is difficult to see how a director who protests that the property

could not be sold without her consent, which would mean that the asserted directors' meeting was a futility and who, then, in the course of a discussion with a stranger present, demonstrates to a co-director, who is an adverse party in the litigation, an attitude that the meeting is "irrelevant", can by the same conduct lead to the necessary implication that she was adopting and participating, in the meeting as a directors' meeting.

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Further, what passed between the appellant and Mr. Wynyard shows he was using the development company's plans, which were apparently laid out on the table when she was sitting there, and that he was apparently using these plans to demonstrate how the property could be used in the company's plans and how the plans could be varied to go round such property if it was not acquired. He asserted by reading from a letter, which he retained, that a decision had to be made. This of course is consistent with the directors at a directors' meeting being called upon, even if in conflict, to come to a decision by a vote. However, particularly if taken with the assertion of the alternative it is the age old weapon of the bargainer, seeking to neutralise the weakness of his bargaining position due to his apparent keenness and so get consent of one unwilling to give his assent to the terms of the bargain he seeks. Whether the price should be \$720,000 or some higher price depended on what this developer would ultimately pay, having regard to the financial considerations and realities of these alternatives asserted by the developer. Special clause 2 based on general questions of value, is a recognition of the buyer's difficulty and an attempt to attract a sale at the general market price, when a perceptive vendor might realise he would pay a special price. What the developer would pay it alone knew but it had increased its offer by \$60,000 not long before the meeting. Earlier Mr. Wynyard by direct approaches to the appellant had sought to persuade her. On this evening he was being provided with a further opportunity but this time he armed himself with the plan and the letter referred to. According to Mr. Kennedy, Mr. Wynyard said:

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"We would rather have it than not, but it is not essential that we have it."

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(continued)

The evidence concerning these discussions thus is equivocal. It is strongly open to the inference that she brushed aside any suggestions that it was a directors' meeting in that it was futile because her consent was required and it was "irrelevant" and that she treated, as perhaps Mr. Kennedy expected she would, this as a further attempt of the buying agent to persuade her, but on this occasion as a captive audience.

Further it is wrong to say the appellant raised no protest to the meeting. She did not in legal language, but she did indirectly. She left the room at the beginning. Then, when she came back, she stayed perhaps out of courtesy at the beginning. She quickly protested that the property could not be sold without her consent. She repeated this many times. She had the long discussion with Mr. Wynyard and saw what he said in relation to his plans which were apparently laid out on the table. But, according to Mr. Bennell, she left the table and sat on a lounge chair which Mr. Kennedy said was some four to six feet away from the table. Mr. Bennell, whom His Honour regarded as the reliable witness, did not know and was not prepared to swear she had returned to the table when the motion was moved and passed. This of course was some kind of lounge dining room. True the lounge chair was nearby but when necessary inferences are sought to be made this tends to suggest lack of assent rather than assent. Where was she to go other than the bedroom of her home? This was the predicament which the co-director sought to exploit and use to demonstrate consent of a director, believed unwilling.

What did she mean when she said the property could not be sold without her consent? According to Mr. Bennell, she did not say, other than she had been so advised by a solicitor when she claimed she purchased the property. She also seemed indirectly to be asserting this was so for some personal reason relating to allowing Mr. Kennedy into the transaction. It must have seemed to her that what she was saying was accepted for she then dealt with the matter from personal and historical viewpoints. None of three men present have suggested she ever purported in the long discussion to express herself in terms as a director or to claim that, as there were two directors, a resolution could not be passed

without her vote. If this was her belief and the basis of her assertion that it could not be sold without her consent, it is surprising in her voluble discussion that she never said anything about it at all. It was submitted to us that she was content to let the meeting of directors proceed, well knowing and accepting it was such a meeting and that she was content to let any resolution be proposed to sell the property, believing that one director could not outvote the other, being ignorant that a chairman had a casting vote. Reliance in this regard was placed on some of her answers in cross-examination concerning her knowledge concerning the casting vote. It is clear that she was not aware that a chairman had a casting vote. She said that somebody told her after that evening that "if he is chairman he has first vote" and she added "then I nearly got a heart attack; I was shocked about it and I rang up Mr. Bruce Evans on Sunday evening because I could not get him during the week on his office phone." Of course, being present, she knew that that night Mr. Kennedy had purported to give a casting vote. The knowledge she received, under circumstances which were not explored, of course, provided to one without legal advice some insight into the manoeuvre that had been adopted. She knew a resolution was purported to be passed and a casting vote given in her presence. Can it be assumed that she might not have believed, without advice, that this could be done so long as she was there whether assenting or participating or not. She would not know what implications are made about whether there is a directors' meeting when in fact both are present. The answers she gave do not in my view, provide evidence of any substance to support the view that the appellant participated in and accepted the meeting as a directors' meeting in the belief she could not be outvoted or that this is what her many protestations referred to. At least it cannot change the import of what occurred.

Two particular matters require consideration.

It was argued on behalf of the respondent Mr. Kennedy, that there would have been no point in giving the appellant notice of the meeting or proposals or giving her an opportunity to take legal advice, because if she had notice or if she had had advice, then, if she had attended the meeting the result would still have been the same and if, she did not

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—————
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Judgment of
His Honour
Mr. Justice
Moffitt

30th June 1971
(continued)

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Court of New
South Wales
Court of
Appeal

No.12

Judgment of
His Honour
Mr. Justice
Moffitt

30th June 1971
(continued)

attend a meeting then the company would have been put into liquidation, as being unable to carry on, and the property would still have been sold. Implicit in this and other arguments was the suggestion that the appellant in some way was unreasonable and unworthy of consideration, in not being prepared to attend a board meeting and so was in breach of her duty as a director.

As to the last matter, this suggestion inverts responsibility for what happened. It was Mr. Kennedy (perhaps he with others), who laid the plan to conceal matters from and disadvantage his co-director by surprise. Her supposed attitude is but the admission, he made in face of criticism, for his deliberately not giving any notice of the meeting. She was not given an opportunity to attend a meeting with due notice. It is not known what she would have done, if he had acted properly and she had been given an opportunity to decide, perhaps with advice, what was proper to do. She may have taken legal advice and it is difficult to prejudge whether she would have attended the meeting or whether some negotiations might have occurred at the level of legal advisers to the directors or to these two persons in their capacity as shareholders. Having found there was a directors' meeting, His Honour took the view that Mr. Kennedy was chairman of the meeting. This however was on the basis that if there was a meeting, Mr. Kennedy had in fact acted as chairman and, being allowed to do so by the appellant, he had the casting vote. Reliance on his original appointment at the first meeting, then his continuing to occupy the chair at other meetings without challenge, was only relied upon in support of the ultimate de facto acceptance of him at the meeting in question. His Honour said:

"There is no challenge to the factual proposition that Mr. Kennedy occupied the chair at the meeting on the 4th August. It was he that led the discussion and purported to exercise such control over proceedings as might reasonably expect of a chairman. He was accordingly as such chairman entitled to have a second or casting vote on business transacted thereat."

Once the conclusion is reached that there was a

meeting of directors, then His Honour's conclusion is correct and counsel for the appellant does not argue otherwise. It does not follow however that the respondent's submission under consideration is correct. If, on legal advice, the appellant attended a meeting, but objected to Mr. Kennedy being chairman, it by no means follows that either could have been chairman in preference to the other. The only appointment of him as chairman of directors was at the original meeting, before the first annual general meeting. This appointment did not specify the duration of his office as it might have done under Article 85. However under Article 64 he retired as a director at the first Annual General Meeting. There was no subsequent formal appointment of Chairman. It is not necessary in this appeal to decide the matter, but, it is by no means clear that against opposition Mr. Kennedy could have taken the chair and then by the casting vote imposed his will on his co-director and equal shareholder. When the appellant did see a solicitor after the meeting, as appears from the evidence of Mr. Kennedy, this solicitor did raise the question whether Mr. Kennedy was chairman of directors.

Further, it is by no means clear and perhaps unlikely that, having regard to their personal relationship, either party would have taken the step of putting the company into liquidation. We are not concerned with what might have happened if there had been due notice of the meeting. It is in point, I think, however to refer to these arguments, which I regard as irrelevant in this case, because they seek to put the case in a false perspective and divert it from the bare factual issue, which as Street J. indicated, must determine the case.

The other matter is that Street J. indicated that he accepted the appellant as an honest and reliable witness, Mr. Kennedy as an honest witness but unreliable in some respects and Mr. Bennell as clear, convincing and reliable and that on any point upon which his evidence departs from that of the other two he preferred that of Mr. Bennell. He then said "I do not see the present litigation ultimately succeeding or failing on credit", which seems to suggest that, on the factual approach he adopted, it would have been virtually the same on any of the versions of the evidence. However, His Honour did base his conclusion on a particular view of the evidence which substantially

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(continued)

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His Honour
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(continued)

was the acceptance of the evidence of Mr. Bennell where there was any conflict. In so doing however he seems largely to have relied on what was stated in the affidavit of Mr. Bennell even where there are material differences and some differences of emphasis, when he came to give evidence in the more reliable form of answers in the witness box to non leading questions. This seems to suggest that His Honour may not have approached the factual side of the case in the manner, which, is at the outset of this judgment, I have suggested is necessary and in particular the suggested requirement, in the circumstance, of a close examination of the detail of the evidence in order to see whether in the end the evidence relied on by the respondent for the implications is equivocal. While counsel for the appellant did not seek directly to challenge His Honour's primary findings of fact, so far as they appear, he submitted that various versions given orally should be preferred and that they should be regarded as placing a different complexion on some matters of importance.

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The oral evidence does aid in discerning the precise nature of what occurred in the middle period when the discussion occurred between the appellant and Mr. Wynyard. Further, there are two significant variations between the affidavit evidence of Mr. Bennell and his oral testimony, one in the first period and the other in the last. The oral evidence relating to the latter has already been referred to. In respect of it, it can be observed that the affidavit as quoted by His Honour refers to the reply of the appellant when the motion was proposed that "I am opposed to selling Farrell House" yet his oral evidence when asked in a non leading question to state the "actual words" used was "You can't sell it without my consent."

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The other significant variation from the affidavit evidence relates to the important initial announcement when all four were first seated at the table. The affidavit of Mr. Bennell is that Mr. Kennedy then said, "This is a directors' meeting to consider the sale of Farrell House". As already indicated this passage was quoted by His Honour and later the effect of it which included the word "director" was included in his summary of the facts. In this affidavit Mr. Kennedy said that the account given by Mr. Bennell was correct save that

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it was his "recollection" that as soon as they sat down Mr. Bennell said "Is this a duly convened directors' meeting?" and that he replied "yes." The supposed speaker, Mr. Bennell in his evidence said he had no recollection of saying this. When Mr. Bennell came to give oral evidence he did not give evidence at all that it was said it was a "directors" meeting but gave this evidence:

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- 10 Q. What was the first thing that was said by anybody after she came back? A. We all took our places at the table and Mr. Kennedy said that it was a meeting to discuss the offer that had been received for the sale of Farrell House.
- 20 Q. You did not say to him 'Is this a duly constituted meeting?' A. I may have said so, but -- well, I am sorry I cannot recollect whether I said that or not. I understood it to be a directors' meeting and we took our seats."

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(continued)

30 His revealing answer that he understood it was a directors' meeting could well account for the differences in his oral and affidavit evidence. He had fore knowledge, which the appellant did not have. It will be recalled that, on his evidence within a matter of two minutes, Mr. Kennedy asked Mr. Wynyard to explain in full detail to the appellant. Mr. Kennedy, in his oral evidence, gave the evidence already referred to concerning Mr. Bennell's asserted inquiry as to whether it was a duly constituted board. He said this occurred "as soon as we started discussing the business of the evening." He was however asked in cross-examination about what happened immediately after the introductions when the appellant came into the room and he gave this evidence:

- 40 Q. And what was the first thing that happened after one or other of them said to the other 'How are you?'. What was the next thing that happened? A. Mr. Wynyard got out his plans and laid them on the table."

The evidence which the appellant gave in her affidavit was "I went into the room and sat in a chair at a corner of the table. There were papers on

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(continued)

the table and Mr. Wynyard said to me 'Now Ingrid I want to show you our plans'" and that she had then said she had already said Farrell House would not be sold without her consent. She was neither orally led through this evidence or cross-examined upon it. Mr. Wynyard of course gave no evidence in the case. In my view this is most unsatisfactory and unconvincing evidence upon which to base a finding that it was stated that the meeting was a directors' meeting or that, in the general circumstances of this gathering, attention was so drawn to any such claim or claim persevered in, as to bring the matter home to the attention of the appellant sufficient to support the inferences sought to be made in this case. However, it seems doubtful whether this weakness in the evidence was brought home to His Honour's attention and may have been overlooked by the appellant's counsel, as one question put by him suggests. It was for this reason and because in any event of reluctance to base an appeal decision upon an interference with a finding of a primary fact by the trial judge, that I analysed the evidence in the case on the basis of the finding of fact made by His Honour in this regard. However, having come to the conclusion that His Honour was in error even accepting this finding of primary fact namely that the assertion was made, I think that I should add that I find some additional support for my conclusion from the preference which I think should be given to this oral as against the affidavit evidence of Mr. Bennell. This does not depend upon the demeanour or credibility of a witness but first on a view of the approach to the inferences to be drawn in the circumstances of a case such as this and then upon the weight of affidavit evidence of a witness against his oral evidence not in conformity on a critical matter.

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For the foregoing reasons, in my view there was not a valid meeting of directors, when the resolution to accept the offer of Wentworth Development No.2 Pty. Limited was purported to be passed and that the decision of Street J. that there was, was in error. It follows that in my view there was an unauthorised and invalid

execution of each of the three documents signed and sealed that evening.

10 The purchasing company, the third respondent is in no better position than the first respondent Mr. Kennedy. Although so far as the evidence goes perhaps its representative, Mr. Wynyard lacked knowledge of some circumstances leading up to and concerning Mr. Kennedy's precise plans, he was present throughout the supposed meeting and on the evidence had knowledge of some other matters as well. It is not necessary however to go into these matters because on this aspect of the appeal, counsel for such third respondent concedes that that respondent is in no better position than the respondent Mr. Kennedy.

20 In my view the appeal should be allowed with costs against the first and third respondents, the orders made at first instance should be set aside and the declaration, injunctions and order asked for in prayers 3, 4 and 5 of the originating summons should be made.

In the Supreme Court of New South Wales Court of Appeal

No.12

Judgment of His Honour Mr. Justice Moffitt

30th June 1971
(continued)

NO. 13

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

The Eleventh day of October 1971

30 UPON MOTION made this day pursuant to the Notice of Motion filed herein on the twenty-eighth day of September 1971, WHEREUPON AND UPON READING the said Notice of Motion, the Affidavit of HUGH HOURIGAN sworn the eighth day of October 1971, and the Prothonotary's Certificate of Compliance, AND UPON HEARING what is alleged by Mr. A.M. Gleeson of Counsel for the Appellant and by Mr. O'Reilly Solicitor

No.13

Order granting final leave to appeal to Her Majesty in Council

11th October 1971

In the Supreme
Court of New
South Wales
Court of
Appeal

No.13

Order granting
final leave to
appeal to
Her Majesty
in Council

11th October
1971

for the Respondent Frederick Hugh Kennedy
and by Mr. Davenport Solicitor for the
Respondent Wentworth Developments No.2 Pty.
Limited and there being no appearance on behalf
of the Appellant Ingrid Pty. Limited IT IS
ORDERED that final leave to appeal to Her Majesty
in Council from the judgment of this Court
given and made herein on the thirtieth day of
June, 1971, be and the same is hereby granted
to the Appellant AND IT IS FURTHER ORDERED
that upon payment by the Appellant of the
costs of preparation of the Transcript Record
and despatch thereof to England the sum of
Fifty dollars (\$50.00) deposited in Court by
the Appellant as security for and towards the
costs thereof be paid out of Court to the
Appellant.

10

By the Court.

For the Prothonotary,

Chief Clerk.

20

EXHIBIT A
MEMORANDUM AND ARTICLES OF ASSOCIATION OF
INGRID PTY. LIMITED

Plaintiff's
Exhibits

Exhibit A

NEW SOUTH WALES
COMPANIES ACT 1961 - 1966
A COMPANY LIMITED BY SHARES

Memorandum
and Articles
of Associa-
tion of
Ingrid Pty.
Limited

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MEMORANDUM
and
ARTICLES OF ASSOCIATION
of
INGRID PTY. LTD.

Harrie R. Mitchell & Evans
Solicitors
350 George Street
Sydney
25-3495

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Printed by:
Kralco Printing Co. Pty. Limited
Box 3186, G.P.O.,
Sydney.
68-3157

NEW SOUTH WALES

No. of Company
98657

Stamp Duty
\$3.00

Companies Act, 1961
(Section 16 (3))

CERTIFICATE OF INCORPORATION OF
PROPRIETARY COMPANY

30

THIS IS TO CERTIFY that

INGRID PTY. LTD.

is, on and from the eleventh day of July, 1967,
incorporated under the Companies Act, 1961, that
the company is a company limited by shares and that
the company is a proprietary company.

GIVEN under my hand and seal, at Sydney, this
eleventh day of July, 1967.

F.J.O. Ryan
Registrar of Companies.

Plaintiff's
Exhibits

Exhibit A

Memorandum
and Articles
of Association
of
Ingrid Pty.
Limited

New South Wales
Companies Act, 1961 - 1966
A Company Limited by Shares

MEMORANDUM OF ASSOCIATION
of
INGRID PTY. LTD.

1. The name of the Company is "INGRID PTY.LTD."
2. The powers set forth in the Third Schedule of the Companies Act, 1961 are excluded.
3. The objects for which the Company is formed are all or any of the following:-
 - (a) To carry on the business of a private hotel and to conduct manage and control boarding houses guest houses residential flats accommodation houses bureaux hotels motels refreshment rooms restaurants tea coffee and milk bars and provide goods and services of every nature incidental or conducive to the conduct management and control thereof.
 - (b) To carry on the business of hotel tavern beerhouse keepers and licensees caterers victuallers wine beer and spirit merchants brewers maltsters distillers importers and manufacturers of aerated mineral and artificial waters and other drinks.
 - (c) To carry on any other business or occupation whether of the nature of manufacturing, trading, financing, performing services, or otherwise which may seem to the Directors to be capable of being conveniently carried on in connection with any of the businesses or activities which the Company is for the time being carrying on or engaged in or to be ancillary or subsidiary thereto or to be calculated directly or indirectly to enhance the value of or render profitable any of the Company's property or rights.
 - (d) To carry on the business of importers, exporters manufacturers, producers, vendors, suppliers and distributors of and dealers in all kinds of goods wares and merchandise

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of all kinds of chattels chemicals
commodities and things.

Plaintiff's
Exhibits

- (e) To seek avenues for the investment and employment of the capital and funds of the Company in industrial and commercial and other undertakings and businesses and enterprises in Australia and elsewhere and to invest the capital of the Company in such undertakings and enterprises and to sell realise charge and vary the said investments or any of them and to re-invest from time to time in like manner.

Exhibit A

Memorandum
and Articles
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of
Ingrid Pty.
Limited

(continued)

- (f) To acquire by purchase hire lease or otherwise for cash or shares or debentures or any other consideration and deal with:

(1) The whole or any part of the business property and liabilities of any person or body of persons whether corporate or unincorporated.

(2) Lands buildings easements and other rights or interests in or over real or leasehold estates.

(3) Plant machinery goods and other personal estate and effects.

(4) Patent patent rights or inventions copyrights designs trade marks secret processes technical information licences franchises and other rights privileges and concessions.

- (g) To perform or do all or any of the following operations acts or things:

(1) To sell let dispose of or grant rights over or otherwise deal with all or any property of the Company for cash or upon terms or for shares debentures or otherwise and upon any terms and conditions thought desirable.

(2) To erect buildings factories plant and machinery and other works for the purposes of the Company.

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Plaintiff's
Exhibits

Exhibit A

Memorandum
and Articles
of Association
of
Ingrid Pty.
Limited
(continued)

- (3) To subdivide land make and maintain bridges culverts drains and other works and make open and dedicate roads.
- (4) To make experiments and conduct research in connection with any business of the Company or any business in which the Company is in any way interested and to protect any inventions by letters patent or otherwise.
- (5) To grant licenses to use patents copyrights designs or secret processes of the Company. 10
- (6) To manufacture import or export plant machinery tools appliances accessories goods and things for use or sale or for any other purpose of the Company.
- (7) To provide and carry on any service including transport and the supply of water steam gas and electricity, and to do anything necessary or convenient in relation to any such service. 20
- (8) To draw accept and negoaitate bills of exchange promissory notes and other negotiable instruments.
- (9) To underwrite the shares stock or securities of any other company and so far as the law will permit to pay underwriting commissions and brokerage on any shares stock or securities issued by this Company. 30
- (10) To borrow money or to receive money on deposit either without security or secured by debentures debenture stock (perpetual or terminable) mortgages or other security charged on the undertaking or all or any of the assets of the Company including uncalled capital.
- (11) To lend money with or without security and to invest money of the Company in such manner (other than in the shares of this Company) as the Directors think fit. 40

- (12) To guarantee the contracts or liabilities of any person or body of persons whether corporate or unincorporated with or without giving or taking security for any such guarantee and to give any indemnity or undertaking. Plaintiff's Exhibits
————
Exhibit A
————
- (13) To enter into arrangements for joint working in business for sharing profits or for amalgamation with any person or body of persons whether corporate or unincorporated. Memorandum and Articles of Association of Ingrid Pty. Limited

(continued)
- (14) To act as agent or trustee for any person or body of persons whether corporate or unincorporated.
- (15) To promote companies for any purpose whatsoever.
- (16) To grant easements licences and other rights and privileges with or without consideration.
- (17) To sell the undertaking and all or any of the assets rights goodwill and property of the Company for cash or for stock shares or securities of any other company or for any other consideration.
- (18) To obtain support or oppose any Act or Acts of Parliament or other statutory enactment rule order instrument licence privilege exemption or authority as may seem to the Directors to be expedient in the interests of the Company.
- (19) To enter into any arrangements or contracts with any governmental municipal or other authority or with any person or body of persons whether corporate or unincorporated for any of the purposes of the Company and to appoint such person or body of persons the agents for the sale of its products or for any other purpose.
- (20) To appoint attorneys for and on behalf of the Company and to execute the necessary powers to the said attorneys

Plaintiff's
Exhubits

Exhibit A

Memorandum
and Articles
of Associa-
tion of
Ingrid Pty.
Limited
(continued)

to act for and in the name and on behalf of the Company and to revoke all or any of such powers and appointments as shall be deemed expedient or advisable.

(21) To distribute in specie assets of the Company properly distributable amongst its members.

(h) To do all or any of the things hereinbefore authorised in any part of the world either alone or in conjunction with or as factors trustees or agents for others or by or through factors trustees or agents.

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(i) To do all such other things as are incidental or conducive to the attainment of the above objects or any of them.

IT IS HEREBY DECLARED that in the interpretation of this clause the meaning of any of the Company's objects shall not be restricted by reference to any other object or by the juxtaposition of two or more objects and that in the event of any ambiguity this clause shall be construed in such a way as to widen and not restrict the powers of the Company.

20

4. The liability of the members is limited.

5. The capital of the Company is Sixty thousand dollars (\$60,000. 00) divided into Sixty thousand (60,000) shares of One dollar (\$1.00) each with power to attach to the said shares or any of them or to any new shares created by an increased or alteration of the said capital such preferential deferred or special rights privileges conditions or restrictions as may be determined upon by or in accordance with the Articles of Association of the Company.

30

6. The full names addresses and occupations of the subscribers hereto and the number of shares they respectively agree to take are:-

	<u>Names, Addresses and Occupations</u>	<u>No. of Shares</u>	<u>Plaintiff's Exhibits</u>
	INGEBORG GERDA PETSCH, Unit 81, 17 Wylde Street, POTTS POINT. Residential Proprietor	One	<u>Exhibit A</u> Memorandum and Articles of Association of Ingrid Pty. Limited
10	FREDERICK HUGH KENNEDY, Unit 81, 17 Wylde Street, POTTS POINT. Taxi-Cab Proprietor.	One	(continued)

7. WE, the several persons whose names are subscribed hereto are desirous of being formed into a Company in pursuance of this Memorandum of Association and respectively agree to take the number of shares in the capital of the Company set out opposite our respective names.

	<u>Signatures of Subscribers</u>	<u>No. of Shares taken by each Subscriber</u>	<u>Signatures and Addresses of Witnesses</u>
20	INGEBORG GERDA PETSCH, Unit 81, 17 Wylde St., POTTS POINT. Residential Proprietor.	One	BRUCE EVANS, 350 George St., SYDNEY.
30	FREDERICK HUGH KENNEDY, Unit 81, 17 Wylde St., POTTS POINT. Taxi-cab Proprietor.	One	BRUCE EVANS

DATED this 6th day of July, 1967.

Plaintiff's
Exhibits

New South Wales
Companies Act, 1961 - 1966
A Company Limited by Shares

Exhibit A

ARTICLES OF ASSOCIATION
of
INGRID PTY. LTD.

Memorandum
and Articles
of Association
of Ingrid Pty.
Limited
(continued)

1. The Company is registered as a proprietary company and accordingly:-
 - (a) The right to transfer shares is restricted in that the Directors may in their absolute discretion and without assigning any reason therefor refuse to register any transfer of a share or shares. 10
 - (b) The number of the members of the Company is limited to fifty but where two or more persons hold one or more shares in the Company jointly they shall for the purposes of this clause be treated as a single member.
 - (c) Any invitation to the public to subscribe for any shares or debentures of the Company or to deposit money with the Company for fixed periods or payable at call whether bearing or not bearing interest is prohibited. 20
2. Subject as aforesaid the regulations in Table "A" to the Fourth Schedule to the Companies Act, 1961 - 1966 shall apply to the Company.
3. WE, the several persons whose names are subscribed being the subscribers to the Memorandum of Association hereby agree the foregoing Articles of Association. 30

Signature of
Subscribers

Signatures and
Addresses of
Witnesses

INGEBORG GERDA PETSCH
Unit 81,
17 Wylde St.,
POTTS POINT.
Residential
Proprietor

BRUCE EVANS,
350 George St.,
SYDNEY.

FREDERICK HUGH
KENNEDY,
Unit 81,
17 Wylde St.,
POTTS POINT.
Taxi-cab
Proprietor.

BRUCE EVANS

Plaintiff's
Exhibits

Exhibit A

Memorandum
and Articles
of Associa-
tion of
Ingrid Pty.
Limited

(continued)

DATED this 6th day of July, 1967.

EXHIBIT D.

Exhibit D

10

MINUTE BOOK OF INGRID PTY.LIMITED

Minute Book
of Ingrid
Pty.Limited

This is the Minute Book marked "KAB1" produced
and shown to Keith Albert Bennell at the time of
swearing his Affidavit in the matter of Ingeborg
Gerda Petsch and Frederick Hugh Kennedy and
others on the 30th day of October, 1970.

(Sgd.) F. Whiteman J.P.

20

MINUTES OF MEETING OF SUBSCRIBERS
OF INGRID PTY. LTD. HELD AT THE
OFFICES OF CHOWN, BENNELL & CO.,
34 HUNTER STREET, SYDNEY ON
FRIDAY 14th JULY, 1967 AT 9.00 A.M.

Minutes of
Meeting of
Subscribers
held 14th
July 1967

PRESENT: Mr. F.H.Kennedy and Miss I.G.Petsch.

Messrs. G.W. Kennedy, B.Evans and K.A.
Bennell were present by invitation.

CHAIRMAN: It was resolved that Mr.F.H.Kennedy be
appointed Chairman.

30

INCORPORATION: Mr.B.Evans reported that the Company
had been incorporated under the
Companies Act 1961 of New South Wales
on the 11th July 1967 and tabled the
Certificate of Incorporation No. 98657.

REGISTERED
OFFICE: It was resolved that the registered office
of the Company be situated at 8th

Plaintiff's Exhibits

Floor, 34 Hunter Street, Sydney New South Wales.

Exhibit D

DIRECTORS:

It was resolved that the first Directors be -

Minute Book of Ingrid Pty. Limited

9

Mr. FREDERICK HUGH KENNEDY
Miss INGEBORG GERDA PETSCH and
Mr. GORDON WALLACE KENNEDY

Minutes of Meeting of Subscribers held 14th July 1967
(continued)

SECRETARY:

It was resolved that Mr. K.A. Bennell be appointed/ (Secretary and F.H.K.) Public Officer of the Company for income tax purposes and that the Deputy Commissioner of Taxation be duly notified.

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COMMON SEAL:

INGRID PTY. LTD.
COMMON SEAL

It was resolved that the Common Seal, an imprint of which appears in the margin hereof, be adopted as the Seal of the Company.

AUDITORS:

It was resolved that Messrs. Chown, Bennell & Co., Chartered Accountants, be appointed auditors of the Company at a remuneration to be appointed by the directors.

20

SUBSCRIBERS
SHARES:

It was resolved that the subscribers to the company's Memorandum and Articles of Association be registered as shareholders in the Register of Members as follows -

FREDERICK HUGH KENNEDY 1 Share
INGEBORG GERDA PETCH 1 Share

FINANCIAL AND
STATISTICAL
BOOKS:

It was resolved that the Secretary be given authority to purchase the books necessary to be kept by statute and also such books of account necessary to record the financial transactions of the Company.

30

CONFIRMED

(Sgd.) F. H. Kennedy
.....
CHAIRMAN

MINUTES OF MEETING OF DIRECTORS OF INGRID PTY. LTD. HELD AT THE REGISTERED OFFICE OF THE COMPANY 34 HUNTER STREET SYDNEY ON FRIDAY 14TH JULY, 1967 at 10.00 a.m.

Plaintiff's Exhibits

Exhibit D

PRESENT: Mr. F.H.Kennedy, Miss I.G.Petsch and Mr.G.W.Kennedy. Messrs. B.Evans and K.A.Bennell were present by invitation.

Minute Book of Ingrid Pty.Limited (continued)

10 CHAIRMAN OF DIRECTORS: It was resolved that Mr. Frederick Hugh Kennedy be appointed Chairman of Directors.

Minutes of Meeting of Directors held 14th July 1967

MANAGING DIRECTOR: It was resolved that Miss Ingeborg Gerda Petsch be appointed Managing Director of the company.

20 BANK ACCOUNT: It was resolved that an account be opened in the name of the company with the Australia and New Zealand Bank Limited at its William Street, Kings Cross Branch and that cheques and other negotiable instruments drawn on such account be signed by two Directors one of whom must be Ingeborg Gerda Petsch. The Bank is hereby authorised to honour cheques and other negotiable instruments drawn and engrossed this way on behalf of the company.

CONFIRMED.

(Sgd.) F.H. Kennedy

CHAIRMAN

30 MINUTES OF MEETING OF DIRECTORS OF INGRID PTY. LTD. HELD AT THE OFFICES OF HARRIE R.MITCHELL & EVANS, 350 GEORGE STREET, SYDNEY ON TUESDAY THE 25TH JULY 1967 at 11 p.m.

Minutes of Meeting of Directors held 25th July 1967

PRESENT: Mr. F.H. Kennedy
Miss I.G. Petsch

Mr. Bruce Evans, Solicitor was present by invitation.

Plaintiff's Exhibits

NOVATION AGREEMENT:

Exhibit D

It was resolved that the Company execute Novation Agreement dated the 24th July 1967 whereby it agrees with Fairfield Land Development Pty. Limited the Vendor under Contract of Sale dated the 30th May 1967 for the sale to Miss I.G.Petsch of premises known as 7/13 Farrell Avenue, Kings Cross in the sum of \$135,080.00 to perform and be bound by the said Contract in the place of Miss Petsch and that accordingly authority be given for the placing of the Company's Seal on the said Novation Agreement.

10

Minute Book of Ingrid Pty.Limited

Minutes of Meeting of Directors held 25th July 1967

(continued)

Confirmed (Sgd.) F.H.Kennedy
Chairman

Minutes of Meeting held 8th September 1967

MINUTES OF MEETING OF INGRID PTY.LTD.HELD AT THE OFFICES OF HARRIE R. MITCHELL & EVANS 350 GEORGE STREET, SYDNEY, ON FRIDAY THE 8th DAY OF SEPTEMBER, 1967.

PRESENT:

Mr. F.H.Kennedy
Miss I.G. Petsch
Mr.Bruce Evans, Solicitor was present by invitation.

20

EXECUTION OF MORTGAGES:

It was resolved, for the purpose of completing the purchase of the Farrell Avenue premises that the Company's Seal be affixed to the following Mortgages in the presence of and signed by Mr.Kennedy and Miss Petsch as Directors:-

- (a) First Mortgage in the sum of \$60,000.00 to Honeywell.
- (b) Second Mortgage in the sum of \$30,000.00 to A.G.C.(General Finance) Limited
- and
- (c) Equitable Charge to A.G.C. (General Finance) Limited over plant as collateral to the second Mortgage.

30

Confirmed (Sgd.) F.H. Kennedy
Chairman

40

Unit 81
17 Wylde Street
POTTS POINT

27 Dec 1967

Plaintiff's
Exhibits

Exhibit D

The Directors,
Ingrid Pty Limited,
34 Hunter Street,
SYDNEY, 2000

Minute Book
of Ingrid
Pty.Limited
(continued)

Dear Sirs,

10 I, Frederick Hugh Kennedy, hereby apply for the
issue to me of 12,499 shares of \$1.00 each in your
Company.

Application by
Frederick
Hugh Kennedy
for allotment
of shares

I further request that payment for the 12,499
shares and the one signatory share already allocated
to me be charged against my Loan Account.

27th December
1967

Yours faithfully,
(Sgd.) F.H.Kennedy
.....
Frederick Hugh Kennedy

20 Unit 81
17 Wylde Street
POTTS POINT

28 Dec 1967

Application
by Ingeborg
Gerda Petsch
for allotment
of shares

The Directors,
Ingrid Pty Limited,
34 Hunter Street,
SYDNEY, 2000

28th December
1967

Dear Sirs,

30 I, Ingeborg Gerda Petsch, hereby apply for the
issue to me of 12,499 shares of \$1.00 each in your
Company.

I further request that payment for the 12,499
shares and the one signatory share already allotted
to me be charged against my Loan Account.

Yours faithfully,
(Sgd.) I. Petsch
.....
Ingeborg Gerda Petsch

Plaintiff's Exhibits

MINUTES OF MEETING OF DIRECTORS OF
INGRID PTY. LIMITED
HELD ON 28TH DECEMBER 1967

Exhibit D
Minute Book of Ingrid Pty. Limited (continued)
Minutes of Meeting of Directors held 28th December 1967

PRESENT: Mr. F.H. Kennedy and Miss I.G. Petsch.

APPLICATION OF SHARES Applications for shares from Mr. F.H. Kennedy and Miss I.G. Petsch were tabled.

ALLOTMENT AND ISSUE OF SHARES It was resolved that shares be allotted to the respective applicants as under:

Mr. Frederick Hugh Kennedy
12,499 shares of \$1 each

Miss Ingeborg Gerda Petsch
12,499 shares of \$1 each

(Sgd.) F.H. Kennedy
.....
Chairman

10

Minutes of Meeting of Directors held 28th June 1968

INGRID PTY. LIMITED
MINUTES OF MEETING OF DIRECTORS HELD ON 28TH
JUNE, 1968 AT 7 FARRELL AVENUE, KINGS CROSS.

PRESENT: Mr. F.H. Kennedy and Miss I.G. Petsch

DIRECTORS FEES: It was resolved that Directors fees amounting to \$500.00 be paid for the period to 30th June, 1968 and that the \$500.00 be allocated as to \$250.00 to Mr. F.H. Kennedy and \$250.00 to Miss I.G. Petsch.

INTEREST: Resolved that interest on loan monies for the six months to 30th June, 1968 be at the rate of 4½% which with the interest of 7½% paid to 31st December, 1967 makes a total of 12% for the period 15th July, 1967 to 30th June, 1968.

20

30

(Sgd.) F.H. Kennedy
.....
Chairman

INGRID PTY. LIMITEDPROFIT AND LOSS ACCOUNT FOR PERIOD 11TH JULY, 1967 (DATE OF INCORPORATION) TO 30TH JUNE, 1968Plaintiff's
ExhibitsExhibit DMinute Book
of Ingrid
Pty.Limited
(continued)Profit and
Loss Account
for period
11th July
1967 to
30th June
1968

	ADVERTISING	527.24		TAKINGS - SERVICED ROOMS	
	ACCOUNTANCY & SECRETARIAL FEES	500.00		(PERIOD 14TH SEPT.1967 to 30TH	
	BANK CHARGES	35.70		JUNE, 1968)	30,294.64
	CLEANING	189.47			
	DIRECTORS FEES	500.00			
	ELECTRICITY	1,112.00			
	GAS	623.16			
10	GENERAL EXPENSES	158.66			
	INTEREST - MORTGAGES	6,582.65			
	- LOANS	3,000.00			
	INSURANCES	590.65			
	LAND TAX	675.30			
	LEGAL EXPENSES	606.67			
	LAUNDRY	539.76			
	REPAIRS AND MAINTENANCE	2,674.12			
	RATES	2,317.01			
	REPLACEMENTS	312.63			
20	SALARY	1,500.00			
	STATIONERY AND STAMPS	156.99			
	SUBSCRIPTIONS	21.00			
	TRADE REFUSE	115.18			
	TELEPHONE	117.61			
	T.V. RENTAL	106.80			
	TRAVELLING AND ENTERTAINING EXPENSES	232.87			
	WAGES (INCLUDING GARDENING AND CASUAL HELP)	2,696.49	25,891.96		
	NET PROFIT ON TRADING FOR THE PERIOD		4,402.68		
30	- CARRIED DOWN		<u>4,402.68</u>		
			<u>30,294.64</u>		<u>30,294.64</u>
	FORMATION EXPENSES WRITTEN OFF	319.22		NET PROFIT ON TRADING FOR THE PERIOD	
	PROVISION FOR TAXATION	1,325.00		- BROUGHT DOWN	4,402.68
			<u>34,402.68</u>		<u>4,402.68</u>
				BALANCE AS PER BALANCE SHEET	2,758.46

INGRID PTY. LIMITED
BALANCE SHEET AS AT 30TH JUNE 1968

Plaintiff's
Exhibits

Exhibit D

	<u>AUTHORISED CAPITAL</u>		<u>FIXED ASSETS</u>	
	60,000 SHARES OF \$1.00 EACH	<u>\$60,000.00</u>	FREEHOLD PROPERTY - AT COST	137,751.10
	<u>ISSUED CAPITAL</u>		FURNITURE &c. - AT COST	723.00
	25,000 SHARES OF \$1.00 EACH FULLY PAID	25,000.00	PLANT - AT COST	308.95
	<u>PROFIT AND LOSS ACCOUNT</u>	<u>2,758.46</u>	FURNISHINGS - AT COST	200.00
10		27,758.46	<u>CURRENT ASSETS</u>	
	<u>CURRENT LIABILITIES</u>		A.N.Z. SAVINGS BANK LTD., KINGS CROSS	109.90
	F.HONEYWOOD - FIRST MORTGAGE DUE 1972	60,000.00	CASH IN HAND	20.24
	A.G.C.(GENERAL FINANCE) PTY. LTD.		PREPAYMENTS	875.00
	SECOND MORTGAGE DUE 1972	20,528.21		
	LOAN - F.H. KENNEDY	12,500.00		
	- I.G.PETSCH	12,500.00		
	SUNDRY CREDITORS	3,381.50		
20	AUSTRALIA & NEW ZEALAND BANK LIMITED	1,995.02		
	PROVISION FOR INCOME TAX	<u>1,325.00</u>		
		<u>112,229.73</u>		
		<u>\$139,988.19</u>		<u>\$139,988.19</u>

Minute Book
of Ingrid
Pty.Limited
(continued)

Balance
Sheet as at
30th June
1968

INGRID PTY.LIMITED
DIRECTORS' STATEMENT

Plaintiff's Exhibits

Exhibit D

Minute Book of Ingrid Pty.Limited
(continued)

Directors' Statement

September 1968

10 We, Frederick Hugh Kennedy and Ingeborg Gerda Petsch being two of the Directors of Ingrid Pty.Limited do hereby state that in our opinion the accompanying Profit and Loss Account is drawn up so as to give a true and fair view of the transactions of the Company for the period covered by the Account, and that in our opinion the accompanying Balance Sheet is drawn up so as to exhibit a true and fair view of the state of affairs of the Company as at the end of such period.

On behalf of the Directors

(Sgd.) F.H. Kennedy

(Sgd.) I.G. PETSCH

Sydney, September, 1968

SECRETARY'S DECLARATION

Secretary's Declaration

20 I, Keith Albert Bennell of 34 Hunter Street, Sydney in the state of New South Wales, Secretary of Ingrid Pty. Limited do solemnly and sincerely declare:-

9th September 1968

That the accompanying Balance Sheet and Profit and Loss Account are to the best of my knowledge and belief correct.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Oaths Act 1900-1953.

Declared at Sydney this)
9th day of September 1968 } (Sgd.) K.A.Bennell
before me

30 (Sgd.) J.C. Prowse J.P.
A Justice of the Peace

Plaintiff's Exhibits

REPORT OF THE AUDITORS TO THE MEMBERS

Exhibit D

We report that we have examined the accompanying Balance Sheet and Profit and Loss Account of Ingrid Pty. Limited for the period ended 30th June, 1968. In our opinion:-

Minute Book of Ingrid Pty. Limited (continued)

Report of Auditors to Members

9th September 1968

- (a) the Balance Sheet and Profit and Loss Account are properly drawn up in accordance with the provisions of the Companies Act 1961-1967 so as to give a true and fair view of the state of the Company's affairs, and
- (b) the accounting and other records (including registers) examined by us are properly kept in accordance with the provisions of the Companies Act 1961-1967.

10

(Sgd.) Chown Bennell & Co.
.....

Chartered Accountants

Registered under the Public Accountants Registration Act 1945, as amended.

Sydney, 9th September, 1968

20

Directors' Report to Shareholders

INGRID PTY. LIMITED

DIRECTORS' REPORT TO SHAREHOLDERS

17th December 1968

34 Hunter Street,
SYDNEY.

We have pleasure in submitting the Balance Sheet and Accounts for the year ended 30th June, 1968.

The Net Profit on Trading for the year amounted to	4,402	
<u>Less: Provision for Taxation</u>	<u>1,325</u>	
	3,077	
<u>Less: Formation Expenses written off</u>	<u>319</u>	30
leaving a balance carried forward of	<u><u>£2,758</u></u>	

The Directors propose that the payment of a Dividend

should not be made immediately but recommend that consideration be given to paying a Dividend in April 1969.

Plaintiff's Exhibits

The Directors are of the opinion that no circumstances have arisen which render adherence to the existing method of valuation of assets or liabilities of the company misleading or inappropriate.

Exhibit D

Minute Book of Ingrid Pty.Limited

10 No contingent liabilities have been undertaken by the company since the commencement of trading. No contingent liability has become enforceable or is likely to become enforceable within the succeeding period of twelve months which will materially affect the company in its ability to meet its obligations as and when they fall due.

Directors' Report to Shareholders 17th December 1968

The Directors are of the opinion that the results of the company's operations during the year have not been affected by any items of an abnormal nature, and that the state of the company's affairs is satisfactory.

(continued)

(Sgd.) F.H.Kennedy
F. H. Kennedy
Chairman

20

Sydney, 17th December, 1968.

INGRID PTY. LIMITED

MINUTES OF THE FIRST ANNUAL GENERAL MEETING OF SHAREHOLDERS HELD AT FARRELL AVENUE, KINGS CROSS ON 30TH DECEMBER, 1968

Minutes of First Annual General Meeting of Shareholders held 30th December 1968

PRESENT: Mr.F.H.Kennedy (Chairman) and Miss I.G.Petsch.

NOTICE CONVENING

30 MEETING: This notice was taken as read.

DIRECTORS' REPORT AND BALANCE SHEET: It was resolved that the Directors' Report and Balance Sheet as at 30th June, 1968 be received and adopted.

APPOINTMENT OF AUDITORS: It was resolved that Messrs.Chown, Bennell & Co., Chartered Accountants, be re-appointed Auditors of the Company for the ensuing year at a fee to be fixed by the Directors.

40

(Sgd.) F. H. Kennedy
.....
Chairman

Plaintiff's Exhibits

Exhibit D

Minute Book of Ingrid Pty.Limited (continued)

Minutes of Meeting of Directors held 10th February 1969

MINUTES OF MEETING OF DIRECTORS OF INGRID PTY. LIMITED HELD AT 7 FARRELL AVENUE, KINGS CROSS ON MONDAY 10TH FEBRUARY 1969 AT 10.00 A.M.

PRESENT: Mr. F.H. Kennedy and Miss I.G.Petsch

DIVIDEND: It was resolved that a Dividend of £1,250.00 be payable forthwith to shareholders registered at the 10th February, 1969.

(Sgd.) F. H. Kennedy
.....
Chairman

Minutes of Meeting of Directors held 21st April 1969

MINUTES OF MEETING OF DIRECTORS OF INGRID PTY. LIMITED HELD AT 7 FARRELL AVENUE, KINGS CROSS ON MONDAY, 21ST APRIL 1969 AT 10.00 A.M.

PRESENT: Mr. F.H. Kennedy and Miss I.G.Petsch

DIVIDEND: It was resolved that a further Dividend of £650.00 be payable forthwith to shareholders registered at 21st April, 1969.

(Sgd.) F.H. Kennedy
.....
Chairman

INGRID PTY. LIMITED
PROFIT AND LOSS ACCOUNT FOR YEAR ENDED 30TH JUNE, 1969

Plaintiff's
Exhibits

Exhibit D

Minute Book
of Ingrid
Pty.Limited
(continued)

Profit and
Loss Account
for year
ended 30th
June 1969

	<u>1968</u>			<u>1968</u>			
	527	ADVERTISING	697.70	30,295	TAKINGS - SERVICED ROOMS	846,434.41	
	500	ACCOUNTANCY & SECRETARIAL FEES	500.00				
	36	BANK CHARGES	90.35				
	189	CLEANING	320.64				
	500	DIRECTORS' FEES	840.00				
10	-	DEPRECIATION	112.00				
	1,112	ELECTRICITY	1,931.43				
	623	GAS	1,347.92				
	159	GENERAL EXPENSES	256.95				
	6,583	INTEREST - MORTGAGES	7,998.71				
	3,000	- LOANS	3,000.00				
	591	INSURANCES	730.51				
	675	LAND TAX	1,794.48				
	607	LEGAL EXPENSES	33.00				
	540	LAUNDRY	866.21				
20	2,674	REPAIRS AND MAINTENANCE	4,476.31				
	2,317	RATES	4,609.14				
	313	REPLACEMENTS	463.37				
	1,500	SALARY	3,120.00				
	157	STATIONERY AND STAMPS	107.31				
	21	SUBSCRIPTIONS	--				
	115	TRADE REFUSE	65.00				
	117	TELEPHONE	158.53				
	107	T.V. RENTAL	113.40				
30	233	TRAVELLING AND ENTERTAINING EXPENSES	514.46				
	2,696	WAGES (INCLUDING, GARDENING AND CASUAL HELP)	2,958.38	37,105.80			
	4,403	NET PROFIT ON TRADING FOR THE PERIOD - CARRIED DOWN	9,328.61				
	<u>830,295</u>		<u>846,434.41</u>	<u>830,295</u>		<u>846,434.41</u>	
	319	FORMATION EXPENSES WRITTEN OFF	--	4,402	NET PROFIT ON TRADING FOR THE PERIOD	9,328.61	
	1,325	PROVISION FOR TAXATION	2,900.00	-	BALANCE BROUGHT FORWARD FROM PREVIOUS YEAR	2,758.46	
	-	TAXATION SHORT PROVIDED 1968 YEAR	278.50				
	-	DIVIDEND - PAID 10TH FEBRUARY 1969	1,250.00				
40	-	" - PAID 21ST APRIL 1969	650.00				
	2,758	BALANCE CARRIED DOWN	5,078.50				
	<u>8 4,402</u>		<u>812,087.07</u>	<u>84,402</u>		<u>812,087.07</u>	
				<u>8 2,758</u>		<u>8 7,008.57</u>	

INGRID PTY. LIMITED
BALANCE SHEET AS AT 30TH JUNE, 1969

Plaintiff's
ExhibitsExhibit D

<u>1968</u>	<u>AUTHORISED CAPITAL</u>	<u>1968</u>	<u>FIXED ASSETS</u>	
<u>\$60,000</u>	60,000 SHARES OF \$1.00 EACH	<u>\$60,000.00</u>	137,751	FREEHOLD PROPERTY - AT COST 137,751.10
			723	FURNITURE &c. - AT COST 1,080.00
			309	PLANT - AT COST 329.95
			200	FURNISHINGS - AT COST 200.00
	<u>ISSUED CAPITAL</u>			<u>CURRENT ASSETS</u>
25,000	25,000 SHARES OF \$1 EACH FULLY PAID	25,000.00		A.N.Z.SAVINGS BANK LTD., KINGS CROSS 75.11
<u>2,758</u>	<u>PROFIT AND LOSS ACCOUNT</u>	<u>7,008.57</u>	110	CASH IN HAND 52.64
27,758		32,008.57	20	PREPAYMENTS --
	<u>CURRENT LIABILITIES</u>		875	
60,000	F.HONEYWOOD - FIRST MORTGAGE DUE 1972	60,000.00		
	A.G.C.(GENERAL FINANCE) PTY. LTD. - SECOND			
20,528	MORTGAGE DUE 1972	15,419.08		
12,500	LOAN - F.H.KENNEDY	12,500.00		
12,500	- I.G.PETSCH	12,500.00		
3,382	SUNDRY CREDITORS	1,850.11		
1,995	AUSTRALIA & NEW ZEALAND BANK LIMITED	2,199.04		
1,325	PROVISION FOR INCOME TAX	2,900.00		
-	PROVISION FOR DEPRECI- ATION	112.00		
<u>\$139,988</u>		<u>\$139,488.80</u>	<u>\$139,988</u>	<u>\$139,488.80</u>

Minute Book
of Ingrid
Pty.Limited
(continued)Balance
Sheet as at
30th June
1969

INGRID PTY. LIMITED
DIRECTORS' STATEMENT

Plaintiff's
Exhibits

Exhibit D

Minute Book
of Ingrid
Pty. Limited

(continued)

Directors'
Statement

21st Septem-
ber 1969

10 We, Frederick Hugh Kennedy and Ingeborge Gerda Petsch
being two of the Directors of Ingrid Pty. Limited
do hereby state that in our opinion the accompanying
Profit and Loss Account is drawn up so as to give
a true and fair view of the transactions of the
Company for the period covered by the Account, and
that in our opinion the accompanying Balance Sheet is
drawn up so as to exhibit a true and fair view of the
state of affairs of the Company as at the end of such
period.

On behalf of the Directors
(Sgd.) F.H. Kennedy.....
(Sgd.) I. PETSCH.....

Sydney, 21st September, 1969.

SECRETARY'S DECLARATION

Secretary's
Declaration

19th Septem-
ber 1969

20 I, Keith Albert Bennell of 34 Hunter Street, Sydney
in the State of New South Wales, Secretary of Ingrid
Pty. Limited do solemnly and sincerely declare:-

That the accompanying Balance Sheet and Profit
and Loss Account are to the best of my knowledge
and belief correct.

And I make this solemn declaration conscientiously
believing the same to be true, and by virtue of the
provisions of the Oaths Act 1900-1953.

Declared at Sydney this)
19th day of September 1969)
before me) (Sgd.) K.A. Bennell
(Sgd.) J.C.Prowse J.P.)
A Justice of the Peace)

30

Plaintiff's Exhibits

Exhibit D

Minute Book of Ingrid Pty.Limited (continued)

Report of Auditors to Members

19th September 1969

REPORT OF THE AUDITORS TO THE MEMBERS

We report that we have examined the accompanying Balance Sheet and Profit and Loss Account of Ingrid Pty. Limited for the period ended 30th June, 1969.

In our opinion:-

- (a) the Balance Sheet and Profit and Loss Account are properly drawn up in accordance with the provisions of the Companies Act 1961-1967 so as to give a true and fair view of the state of the Company's affairs, and,
- (b) the accounting and other records (including registers) examined by us are properly kept in accordance with the provisions of the Companies Act 1961-1967.

10

(Sgd.) Chown, Bennell & Co.
.....

Chartered Accountants
Registered under the Public Accountants
Registration Act 1945, as amended.

Sydney, 19th September, 1969.

Directors' Report to Shareholders

1st December 1969

INGRID PTY. LIMITED

DIRECTORS' REPORT TO SHAREHOLDERS

20

34 Hunter Street,
Sydney

We have pleasure in submitting the Balance Sheet, and Accounts for the year ended 30th June, 1969.

The Net Profit on Trading for the year amounted to

9,329

Less: Provision for Taxation 2,900

Tax short provided

1968

278

Dividends paid

1,900

5,078

30

4,251

Add: Balance 30th June, 1968

2,758

Leaving a balance carried forward of

£7,009

The Directors propose that the payment of a Dividend

should not be made immediately, but recommend that consideration be given to paying a Dividend in April, 1970.

Plaintiff's Exhibits

The Directors are of the opinion that no circumstances have arisen which render adherence to the existing method of valuation of assets or liabilities of the company misleading or inappropriate.

Exhibit D

Minute Book of Ingrid Pty.Limited

No contingent liabilities have been undertaken by the company since the commencement of trading.

Directors' Report to Shareholders

10 No contingent liability has become enforceable or is likely to become enforceable within the succeeding period of twelve months which will materially affect the company in its ability to meet its obligations as and when they fall due.

1st December 1969

(continued)

The Directors are of the opinion that the results of the company's operations during the year have not been affected by any items of an abnormal nature, and that the state of the company's affairs is satisfactory.

(Sgd.) F.H. Kennedy

20 F.H.Kennedy
Chairman.

Sydney, 1st December, 1969.

INGRID PTY.LIMITED

SECOND

MINUTES OF THE FIRST ANNUAL GENERAL MEETING OF SHAREHOLDERS HELD AT 7 FARRELL AVENUE, KINGS CROSS ON 1ST DECEMBER, 1969

Minutes of Second Annual General Meeting of Shareholders held 1st December 1969

PRESENT: Mr. F.H.Kennedy (Chairman) and Miss I.G.Petsch.

30 NOTICE CONVENING

MEETING: This notice was taken as read.

DIRECTORS' REPORT AND BALANCE SHEET It was resolved that the Directors' Report and Balance Sheet as at 30th June, 1969 was received and adopted.

APPOINTMENT OF AUDITORS: It was resolved that Messrs.Chown, Bennell & Co., Chartered Accountants, be re-appointed Auditors of the Company for the ensuing year at a fee to be fixed by the Directors.

(Sgd.) F.H.Kennedy...
CHAIRMAN

40

Plaintiff's Exhibits

Exhibit D

Minute Book of Ingrid Pty.Limited (continued)

Minutes of Meeting of Directors held 2nd April 1970

MINUTES OF MEETING OF DIRECTORS OF INGRID PTY. LIMITED HELD AT 17 WYLDE STREET, POTTS POINT, ON THURSDAY, 2ND APRIL 1970

PRESENT: Mr.F.H.Kennedy and Miss I.G.Petsch

DIVIDEND: It was resolved that a Dividend of \$7,000.00 be payable forthwith to shareholders registered at 2nd April, 1970.

(Sgd.) F.H. Kennedy
.....
Chairman

10

Minutes of Meeting of Directors held 4th August 1970

INGRID PTY. LIMITED
MINUTES OF MEETING OF DIRECTORS HELD AT 17 WYLDE STREET, POTTS POINT, ON TUESDAY 4TH AUGUST 1970 AT 8 P.M.

PRESENT: Mr. F.H. Kennedy (Chairman)
Miss I.G.Petsch (Director)
Mr. K.A.Bennell (Secretary)
Mr. T.A.Wynyard representing
Wentworth Developments No. 2 Pty.
Limited - by invitation.

20

FARRELL HOUSE: The Chairman tabled an offer from Wentworth Developments No. 2 Pty. Limited to purchase the Company's property known as "Farrell House" in Farrell Avenue, Darlinghurst for the amount of \$720,000.00; together with the form of Contract which set out the terms and conditions of the proposed purchase including the Special Conditions relating to the escalation of the purchase price and a Licence to Miss I.G. Petsch to occupy the property until it is required for demolition. This offer was discussed at length by the Directors and Mr. T.A. Wynyard gave detailed explanations to the meeting of his Company's offer.

30

It was moved by Mr.F.H.Kennedy that the offer made by Wentworth Developments No. 2 Pty. Limited be accepted

Plaintiff's Exhibits

Miss I.G.Petsch opposed the motion.

Exhibit D

Mr. F.H. Kennedy then exercised his second or casting vote as Chairman, in favour of the motion, and declared the motion carried. Miss I.G.Petsch again declared her opposition to the motion.

Minute Book of Ingrid Pty.Limited

10

COMMON SEAL:

The Chairman affixed the Common Seal of Ingrid Pty. Limited to the Contract for the Sale of "Farrell House" to Wentworth Developments No. 2 Pty. Limited and after signing the Contract requested the Secretary also to sign.

Minutes of Meeting of Directors held 4th August 1970 (continued)

The Chairman affixed the Common Seal to the Memorandum of Transfer and after signing requested the Secretary also to sign.

20

The meeting closed at 9.30 p.m.

Confirmed.

(Sgd.) F. H. Kennedy
.....

Chairman

EXHIBIT E

CONTRACT DATED 4th AUGUST, 1970

Plaintiff's Exhibits

Exhibit E

Contract

4th August 1970

No. 16.

INTERIM Stamp Duty

Approved by the Law Society of N.S.W. and the Real Estate Institute of N.S.W.

New South Wales 1965 Edition Stamp Duty Copyright \$10765.00 paid

Contract For Sale of Land

by

* Private Treaty

~~Public Auction~~

Delete words not applicable.

Vendor's Agent:

TRANSFER STAMPED

Description of Property.

ALL THAT piece or parcel of land situate in the City of Sydney Parish of Alexandria and County of Cumberland being the whole of the land contained in Certificate of Title Volume 7249 Folio 81 and being part of Lot J in Deposited Plan 9403 and land adjoining containing an area of one rood 30 1/2 perches having a frontage to Farrell Avenue of approximately 150'4" and a depth of 136' together with the improvements erected thereon and known as "Farrell House", 7-13 Farrell Avenue, Darlinghurst.

~~AUCTION CONDITIONS—Upon a sale by Auction. (a) The highest bidder shall be the Purchaser. In case of any dispute the property shall be put up again at any former bidding and no bidding shall be retracted. (b) The sale is subject to a reserve price and the right to bid is reserved on behalf of the Vendor. (c) Upon the fall of the hammer, the Purchaser shall sign the following agreement, the conditions of which, with these conditions, are the conditions of the sale by auction.~~

AGREEMENT made the Fourth day of August 19 70 BETWEEN

Vendor's full name, address and occupation.

INGRID PTY. LIMITED

(herein called Vendor) of the one part AND

Purchaser's full name, address and occupation.

WENTWORTH DEVELOPMENTS NO. 2 PTY. LIMITED

Delete words not applicable.

(herein called Purchaser) of the other part WHEREBY the Vendor agrees to sell and the Purchaser agrees to purchase, if more than one as *JOINT TENANTS / TENANTS IN COMMON IN THE FOLLOWING SHARES

with joint and several liability under this Agreement, the property above described (herein referred to as "the property") for the sum of SEVEN HUNDRED & TWENTY 720,000

(Sgd.) ~~SIX HUNDRED & SIXTY~~ THOUSAND DOLLARS (\$660,000)

upon and subject to the following terms and conditions:— (subject to Special Condition 2 hereof)

~~1.—The Purchaser shall upon the signing of this Agreement pay as a deposit to the Vendor's Agent herein named as stake holder the sum of~~

which shall be accounted for to the Vendor upon receipt of an order from the Purchaser or his Solicitor authorising such payment. The deposit may be paid by cheque but if any such cheque is not duly honoured on presentation the Purchaser shall immediately and without notice be in default under this Agreement

The ~~purchase price~~ purchase price shall be paid in the manner set forth in the First Schedule hereto. Any moneys payable to the Vendor hereunder by the Purchaser ~~shall be paid to the Vendor's Solicitor or as he may direct in writing.~~

Delete words not applicable.

2.—The title to the property is under the *REAL PROPERTY ACT

~~OLD SYSTEM CROWN LANDS ACT OR OTHER ACT RELATING TO CROWN LAND UNDER WHICH THE PROPERTY OR PART OF IT IS HELD, viz.:~~

3.—AS TO LAND UNDER THE REAL PROPERTY ACT, the Vendor shall furnish particulars of title sufficient to enable the Purchaser to prepare the transfer and the Purchaser shall not be entitled to an abstract of any document affecting the title. Any instrument in respect of which a caveat is entered on the register, shall if in the possession of the Vendor or of any mortgagee of the property, be produced to the Purchaser or his Solicitor free of charge.

~~— AS TO LAND UNDER OLD SYSTEM TITLE, the Vendor shall furnish a proper abstract of his title but shall not be called upon to abstract the Crown Grant (unless there is no later good root of title with which to commence title for the period prescribed by statute or otherwise stipulated in this Agreement) or to abstract, produce, covenant to produce or procure~~

~~16.—Should it be established prior to completion that at the date of this Agreement the property was affected by any town and country planning Scheme or interim development prepared or prescribed under the provisions of the State Planning Authority Act or Part XIII A of the Local Government Act 1919 or amended otherwise than as stated in the Fourth Schedule hereto or was affected by any Residential District Proclamation under Section 309 of the Local Government Act 1919, or by any existing proposals for re-alignment widening or siting of a road by any competent authority otherwise than as disclosed in the said Fourth Schedule, either party shall be entitled to rescind this Agreement by notice in writing to the other:—~~

Plaintiff's
Exhibits

Exhibit E

Contract

4th August
1970
(continued)

17.—If, before transfer of title, the Purchaser is given the benefit of possession of the property then, until transfer of title

- (i) he shall not let or part with possession of the property or make any structural alteration or addition to the same
- (ii) he shall
 - (a) keep the property in good repair, having regard to its condition at the date of possession and permit the Vendor or his agent at all reasonable times to enter and view the state of repair
 - (b) keep all buildings insured against fire as the Vendor may reasonably require and deliver the policy and renewal receipts to the Vendor
 - (c) punctually pay all rates and taxes on the property and any necessary apportionment shall be made at the date provided in clause 9 or the date of possession whichever is the earlier
 - (d) comply with the provisions of all statutes and regulations applicable to the property

If the Purchaser shall make default in any of these obligations the Vendor may without notice make good the default and without prejudice to his other rights may recover from the Purchaser as a debt the cost of so doing with interest thereon at 8% per annum until repayment and such amount and interest shall until repayment be a charge on the property.

18.—Where the balance of the purchase price is payable by instalments before transfer of title

- (a) If default by the Purchaser in payment of any instalment of the purchase price or interest hereunder shall continue for four weeks the balance of the purchase price then owing with accrued interest shall immediately without notice to the Purchaser become due and payable.
- (b) The Purchaser is not required to tender the assurance as stipulated in Clause 7 hereof but shall tender it within 14 days after making the final payment hereunder.

19.—If this Agreement is rescinded under any of the provisions of clauses 5 (d), 14 or 16 hereof such rescission shall be deemed to be a rescission ab initio, and

- (a) the deposit and all other money paid by the Purchaser hereunder shall be refunded to him;
- (b) neither party shall be liable to pay the other any sum for damages, costs or expenses;
- (c) if the Purchaser is or has been in occupation or in receipt of the rents or profits of the property he shall account for or pay to the Vendor the net rents or profits received or a fair occupation rent for the property until the date of rescission but the Vendor shall give the Purchaser credit for any interest paid by the Purchaser and any resulting balance payable by the Purchaser may be deducted by the Vendor from the deposit and other moneys before returning the same to the Purchaser.

20.—Where herein used, words importing the singular number or plural number shall include the plural number and singular number respectively, and words importing the masculine gender shall include the feminine or neuter gender.

21.—(a) Service of any notice or document under or relating to this Agreement

- (i) may be effected as provided in Section 170 of the Conveyancing Act 1919
- (ii) shall be sufficient service on a party if effected on his solicitor in any manner provided in that Section
- (b) A notice given or document signed and served on behalf of any party hereto by his solicitor shall be deemed to have been given or served by that party personally.

22.—Schedule III of the Conveyancing Act 1919 shall not apply to this Agreement.

SPECIAL CONDITIONS

See Annexure hereto.

SPECIAL CONDITIONSPlaintiff's
ExhibitsExhibit E

Contract

4th August
1970
(continued)

1. UNLESS the Purchaser has within 8 weeks from the date hereof posted notice in writing to the Vendor of the intention of the Purchaser not to proceed with this Contract, completion shall take place upon whichever is the earlier of the following, and in this respect time shall be of the essence of this Contract:-

- (a) The expiration of 12 weeks from the date hereof;
- (b) The expiration of four weeks from the Purchaser giving notice in writing to the Vendor that the Purchaser has obtained approval in a form satisfactory to the Purchaser from the Council of the City of Sydney to its plans for development of property in and around Farrell Avenue, Darlinghurst, Sydney;
- (c) The expiration of four weeks from the Purchaser giving Notice in writing to the Vendor that the Purchaser elects to complete this Contract notwithstanding that it has not received the approval referred to in paragraph (b) above.

In the event of the Purchaser posting Notice of its intention not to proceed with this Contract as contemplated above this Contract shall thereupon be voided ab initio and both parties released from all obligations hereunder.

2. NOTWITHSTANDING the purchase price hereinbefore shown, if before the date provided for completion the Vendor produces to the Purchaser a valuation of the property by each of Richard Stanton & Sons Pty. Limited, L.J. Hooker Limited and Richardson & Wrench Limited, and the average of the valuations made by such parties and produced to the Purchaser is in excess of the purchase price hereinbefore shown then the Purchaser will pay to the Vendor the amount of such average in lieu of the purchase price hereinbefore shown.

3. IF Miss Ingeborg Gerda Petsch gives written notice to the Purchaser prior to completion of this Contract that she desires to have occupation of the property for the purpose of continuing to carry on the business now conducted thereon and executes prior to such completion a Licence in a form acceptable to the Purchaser, the Purchaser will permit Miss Petsch to have such occupation without payment of any occupation fee for the purpose of carrying on such business until the Purchaser gives her written notice that it requires the property for demolition. During the period of such Licence Miss Petsch will not be required to pay Council and Water Rates or any Land Tax payable in respect of the property. It is agreed that such Licence shall provide that Miss Petsch shall have the right, exercisable within fourteen days from the giving of notice by the Purchaser that he requires the property for demolition to remove all furnishings fittings and building materials on the property.

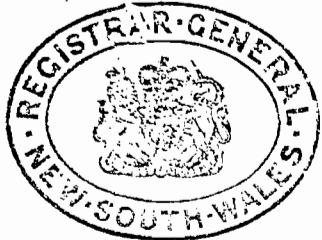
-----oOo-----

(Sgd.)

New South Wales Stamp Duty 75c paid

R.P. 13 Exhibit F

No. No 16



New South Wales New South Wales Stamp Duty Duly stamped

FEES:— £ s. d. Lodgment : : Endorsement : : : : £ : :

Transfer 4th August 1970

MEMORANDUM OF TRANSFER (REAL PROPERTY ACT, 1900)

INGRID PTY. LIMITED

(Trusts must not be disclosed in the transfer.)

Typing or handwriting in this instrument should not extend into any margin. Handwriting should be clear and legible and in permanent black non-copying ink.

a If a less estate, strike out "in fee simple" and interline the required alteration.

b State in full the name of the person who furnished the consideration monies.

c Show in BLOCK LETTERS the full name, postal address and description of the persons taking.

d If more than one person is taking state whether they hold as joint tenants or tenants in common.

e The description may refer to the defined residue of the land in a certificate or grant (eg. "and being residue after Transfer No. ") or may refer to parcels shown in Town or Parish Maps issued by the Dept. of Lands or shown in plans filed in the Office of the Registrar General (eg. "and being lot sec. D.P. "). Unless authorised by Reg. 53 of the Conveyancing Act Regulations, 1961, a plan may not be annexed to or endorsed on this transfer form.

f A very short note will suffice.

g Execution in New South Wales may be proved if this instrument is signed or acknowledged before the Registrar General, or Deputy Registrar General, or a Notary Public, a J.P., or Commissioner for Affidavits, to whom the Transferor is known, otherwise the attesting witness should appear before one of the above functionaries who having questioned the witness should sign the certificate on the back of this form.

As to instruments executed elsewhere, see Section 107 of the Real Property Act, 1900, Section 163 of the Conveyancing Act, 1919, and Section 52A of the Evidence Act, 1898.

NOT TO BE ALTERED BY ERASURE—See Foot Note

being registered as the proprietor of an estate in fee simple in the land hereinafter described, subject, however, to such encumbrances, liens and interests as are notified hereunder, in consideration of SEVEN HUNDRED AND TWENTY THOUSAND DOLLARS (\$720,000.00 (the receipt whereof is hereby acknowledged) paid to it by

Wentworth Developments No. 2 Pty. Limited do hereby transfer to

WENTWORTH DEVELOPMENTS NO. 2 PTY. LIMITED a Company duly incorporated and having its registered office at 15 Bent Street, Sydney. (herein called transferee)

ALL such its Estate and Interest in ALL THE land mentioned in the schedule following:—

Table with columns: County, Parish, Reference to Title (Whole or Part, Vol., Fol.), Description of Land (if part only). Row 1: CUMBERLAND, ALEXANDRIA, WHOLE, 7249, 81.

ENCUMBRANCES, &c., REFERRED TO

Covenant in Memorandum of Transfer No. A458614. Interest of Council of the City of Sydney in the strip of land 13 feet wide and irregular shown on the plan in the said Certificate of Title and created by re-alignment notified in the Government Gazette 17th June 1927 Folio 2861.

Signed at Sydney the 4th day of August, 19 1970 THE COMMON SEAL OF INGRID PTY. LIMITED was hereunto affixed by authority of the Directors and in the presence of: (Sgd.) F.H. Kennedy Director

(Sgd.) K.A. Bennell Secretary

Signed

THE COMMON SEAL OF WENTWORTH DEVELOPMENTS NO. 2 PTY. LIMITED was hereunto affixed by authority of the Directors and in the presence of: Secretary

Accepted, and I hereby certify this Transfer to be correct for the purposes of the Real Property Act.

Director Transferee(s)

Secretary

* If signed by virtue of any power of attorney, the original power must be registered in the Miscellaneous Register, and produced with each dealing, and the memorandum of non-revocation on back of form signed by the attorney before a witness.

† N.B.—Section 117 requires that the above Certificate be signed by each Transferee or his Solicitor or Conveyancer, and renders any person falsely or negligently certifying liable to a penalty of £50; also to damages recoverable by parties injured. Acceptance by the Solicitor or Conveyancer (who must sign his own name, and not that of his firm) is permitted only when the signature of the Transferee cannot be obtained without difficulty and when the instrument does not expose a liability on the party taking under it. When the instrument contains some special covenant by the Transferee or is subject to a mortgage, encumbrance or lease, the Transferee must accept personally.

No alterations should be made by erasure. The words rejected should be scored through with the pen, and those substituted written over them, the alteration being verified by signature or initials in the margin, or noted in the attestation.

EXHIBIT NO. 1

LETTER INGRID PTY. LIMITED TO AUSTRALIA & NEW ZEALAND
BANK LIMITED REQUESTING OPENING OF BANK ACCOUNT AND
CERTIFICATE OF RESOLUTION AND SPECIMEN SIGNATURES
ENDORSED

First
 Defendant's
 Exhibit

Exhibit No.1

Name of Account	Date	Approved by
INGRID PTY. LIMITED	received (Sgd.)	
LETTER OPENING ACCOUNT - COMPANY	20/7/67	Recorded by (Sgd.)

Letter Ingrid
 Pty. Limited
 to Australia
 & New Zealand
 Bank Limited
 requesting
 opening of
 Bank Account
 dated 14th
 July 1967 and
 Certificate
 of resolution
 and specimen
 signatures
 endorsed

10

14th July 1967

TO

AUSTRALIA AND NEW ZEALAND BANK LIMITED.

My Directors request you to open an account in the name of the undermentioned company. In pursuance of this request I hand you herewith:-

1. Certificate of Registration (for inspection and return).
2. Copy of the Memorandum and Articles of Association.

20

I append on the reverse hereof:-

- (a) Certified copy of a resolution of the Board of Directors regulating the conduct of the account.
- (b) The full names and signatures of the directors and other signing officers specified in the resolution.

The full named of the company is INGRID PTY. LIMITED.

The Registered Office of the company is situate at 8th Floor 34 HUNTER ST., SYDNEY.

30

(Sgd.) K. A. BENNELL Secretary

First
Defendant's
Exhibit

Exhibit No.1

Letter Ingrid
Pty.Limited
to Australia
& New Zealand
Bank Limited
requesting
opening of
Bank Account
dated 14th
July 1967 and
Certificate
of resolution
and specimen
signatures
endorsed
(continued)

We hereby certify that the following Resolution of the Board of Directors of the company named on the reverse hereof was passed at a meeting of the Board held on the 14th July 1967 and has been duly recorded in the minute book of the said company:-

Resolved:- That a banking account for the company be opened with Australia and New Zealand Bank Limited at its William Street Kings Cross Branch and that the said Bank be and is hereby empowered to honor cheques, bills of exchange, and promissory notes drawn accepted or made on behalf of the company, so long as its account shall be in credit, or, in the Bank's discretion, even if it shall be thereby or is already overdrawn by two of the Directors one of whom must be Ingeborg Gerda Petsch

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and to act on any instructions so given relating to the account or transactions of the company

Boxes, packets or documents lodged with the said Bank for safe custody or security may be delivered to or any other person holding an authority in that behalf signed by.....

20

(Sgd.) F. H. KENNEDY Chairman

(Sgd.) K.A.Bennell Secretary

SPECIMEN SIGNATURES

Full Names of signing officers	Office	Signature
PETSCH Ingeborg Gerda	Managing Director	(Sgd.) I.G.Petsch
KENNEDY Frederick Hugh	Chairman of Directors	(Sgd.) F.H.Kennedy
KENNEDY Gordon Wallace	Director	(Sgd.) G.W.Kennedy

30

197.

EXHIBIT NO. 1

CHEQUE

First
Defendant's
Exhibit

Exhibit No.1

Cheque

28th October
1970

BANKING GROUP

AUSTRALIA AND NEW ZEALAND BANK LIMITED
234 William Street, KINGS CROSS, N.S.W. 912-100

23 OCT 1970

PAY *Advance Electric*

OR BEARER

THE SUM OF *thirteen dollars* \$ 13-00

For and on behalf of
INGRID PTY. LIMITED

[Signature]
[Signature]

NOT NEGOTIABLE

⑆312832 ⑆042⑆1000⑆46-49-958⑆

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 -

FREDERICK HUGH KENNEDY, INGRID
PTY. LIMITED and WENTWORTH
DEVELOPMENTS NO.2 PTY. LIMITED
Respondents
(Defendants)

RECORD OF PROCEEDINGS

ROYEX COWARD CHANCE,
~~St. Swithun's House,~~
~~Walbrook~~ *ALDERMANBY SQUARE*
London, ~~EC4A 3BU~~ *EC2V 7AD*

Solicitors for the
Appellant.

LINKLATERS & PAINES,
Barrington House,
59/67 Gresham Street,
London, EC2V 7SA.

Solicitors for the
Third Respondent.