

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

No. 25 of 1971

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW
SOUTH WALES COURT OF APPEAL

B E T W E E N

INGEBORG GERDA PETSCH Appellant

AND

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

CASE FOR THE THIRDNAMED RESPONDENT
WENTWORTH DEVELOPMENTS NO. 2 PTY.
LIMITED

20 1. This is an appeal from an order of the
Supreme Court of New South Wales, Court of
Appeal (Jacobs, Holmes & Moffitt J.J.A.) dated
30th June, 1971. The order of the Court of
Appeal dismissed (by majority) an appeal from
an order of Street, J. sitting in the
Equitable Jurisdiction of the Supreme Court
dismissing a suit brought by the Appellant as
Plaintiff against the Respondents as Defendants.

BACKGROUND FACTS AND CIRCUMSTANCES
OF THE CASE

2. The relevant background facts to this appeal
are as follows:

30 (a) The secondnamed Respondent (Ingrid Pty.
Limited) (hereinafter called "the
Company") was incorporated on the 11th
day of July, 1967 under the provisions
of the New South Wales Companies Act,

RECORD

2.

- pp. 162-170 1961 (as amended), as a company limited by shares. The subscribers to the Memorandum and Articles of Association of the secondnamed Respondent were the Appellant and the firstnamed Respondent;
- p. 170 (b) At a meeting of the subscribers of the secondnamed Respondent held on the 14th day of July, 1967, the firstnamed Respondent, the Appellant and a Mr. Gordon Wallace Kennedy was each appointed to be a director of the secondnamed Respondent; 10
- (c) At the said meeting Mr. K.A. Bennell was appointed Secretary of the Company;
- p. 172 (d) The first meeting of Directors of the Company was held on the 14th day of July, 1967. At that meeting it was resolved that the firstnamed Respondent be appointed Chairman of Directors of the Company. It was also resolved that the Appellant be appointed Managing Director of the Company; 20
- p. 175 (e) At a meeting of Directors of the Company held on the 28th day of December, 1967, Twelve thousand four hundred and ninety nine (12,499) fully paid shares of One dollar (\$1.00) each in the capital of the Company were allotted to each of the first named Respondent and the Appellant. Thereafter, each of the firstnamed Respondent and the Appellant was the holder of Twelve thousand five hundred (12,500) fully paid shares of One dollar (\$1.00) each in the capital of the Company. At all material times, these were the only issued shares in the capital of the Company; 30
- (f) At some time in 1967, the said Gordon Wallace Kennedy ceased to act and relinquished his office as a director of the Company; 40
- p. 180 (g) The Minutes of the First Annual General

Meeting of shareholders of the Company held on the 30th day of December, 1968 record the firstnamed Respondent and the Appellant 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 the firstnamed Respondent as Chairman. They do not record any business whatever referable to retirement, election, or re-election of directors;

10

(h) At the Second Annual General Meeting, held on the 1st day of 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 the firstnamed Respondent and the Appellant, and commences:

p.186

20

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

p.185

30

It is dated the 1st day of 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;

p.178

40

(i) The Minute Book of the Company discloses that since the time in 1967 when the said Gordon Wallace Kennedy relinquished his office, the firstnamed Respondent and the Appellant purported to act as the only two Directors of the Company. Each set of Minutes is signed by the firstnamed Respondent as Chairman. At the time

p.187

p.187

of the hearing before Street J., the most recent set of Minutes in point of time were those purporting to be Minutes of a meeting of 4th August, 1970. The Minutes immediately preceding those Minutes purported to be those of a meeting of Directors held on the 2nd day of April, 1970, attended by the firstnamed Respondent and the Appellant at which it was resolved that a dividend of Seven thousand dollars (\$7,000.00) be payable forthwith to shareholders registered as at the 2nd day of April, 1970;

10

(j) It was common ground on the hearing before Street J., that no notices of Directors' Meetings had ever been sent out by the Company.

3. It is submitted that the above facts may, for relevant purposes, be summarized as follows:

20

(a) At all times since 1967 the firstnamed Respondent and the Appellant were the only shareholders in the capital of the Company and together acted as the sole Directors of the Company;

(b) At all such times, the firstnamed Respondent, with the concurrence of the Appellant, acted as the Chairman of Directors of the Company;

(c) All meetings of Directors of the Company were held without any formal notice of meeting ever being given

30

CIRCUMSTANCES OF THE CASE

pp.189-
192

4. On the 4th day of August, 1970, the Common Seal of the Company was impressed upon a form of contract for the sale by the Company to the third-named Respondent of certain land situate in Farrell Avenue, Darlinghurst, New South Wales on which was erected a Boarding House known as "Farrell House". The said land and the improvements thereon are hereinafter referred to

40

as "Farrell House" which was the phrase used to describe them in evidence before the trial Judge. The affixing of the Company's said Seal to the said form of contract was attested by the firstnamed Respondent (as a Director) and the said Mr. K.A. Bennell (as Secretary). The said Seal was affixed to the said form of contract in the presence of each of the Appellant and the firstnamed Respondent at what both the trial Judge (Street J.) and the majority of the Court of Appeal held was a Meeting of the Directors of the Company (hereinafter called "the said meeting"). At the time of its purported execution, the said form of contract had already been executed by the thirdnamed Respondent. After its purported execution by the Company, the form of contract was handed to a representative of the thirdnamed Respondent (Mr. Wynyard) who was present at the said meeting.

5. The findings of Street J. as to the relevant facts relating to the said meeting are set out in His Honour's Reasons for Judgment. It is submitted that the essential facts, as found by His Honour, were as follows:

pp.104-118

- (a) On the evening of the 4th day of August, 1970 each of the Appellant, the firstnamed Respondent, the said Mr. Bennell and the said Mr. Wynyard were present at a Home Unit in which the firstnamed Respondent and the Appellant were living together;
- (b) Each of the said four (4) persons seated themselves round a table. As soon as they were seated the firstnamed Respondent 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". At that time he was holding some documents (including the form of contract) in his hand. He then summarized the offer referring

to the document in his hand and then turned to the said Mr. Wynyard and said: "Will you explain the offer in detail?" The Appellant then said: "I do not want to sell "Farrell House"". After a long discussion which lasted almost one and one-half (1½) hours (and in which the Appellant, being either seated at the table or in an arm chair a few feet away from the table, participated), the firstnamed Respondent said: "I move that the offer made by Wentworth Developments No. 2 Pty. Limited be accepted". The Appellant then said: "If this means you are selling "Farrell House" I am against it". The firstnamed Respondent then said: "Well, as I am the Chairman of the Company and I have a casting vote I will exercise my casting vote as Chairman and vote in favour of the motion". The firstnamed Respondent then said: "I declare the motion carried". The firstnamed Respondent then affixed the seal of the second-named Respondent to the said form of contract. The affixing of the Seal was attested by the firstnamed Respondent and the said Mr. Bennell. While the firstnamed Respondent was affixing the Seal to the said form of contract and signing the same the Appellant said: "I don't know what you are signing and it won't have any effect";

- (c) The discussion at the said meeting proceeded upon the basis which must have been apparent to all concerned that it was a Directors' Meeting of the Company and that it was a meeting at which it was intended, so far as the thirdnamed Respondent was concerned, to achieve finality, yes or no, in relation to the sale of "Farrell House";
- (d) The Appellant participated, albeit in an opposing capacity in the discussion at the said meeting regarding the sale of

"Farrell House";

- (e) The Appellant had not been given prior notice of the said meeting. She did not however at any point of time object to the proceedings being conducted on the basis that Company affairs were under discussion and consideration. Although opposing strongly the proposal which was being advocated by Mr. Kennedy and Mr. Wynyard, the Appellant 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.

IN THE SUPREME COURT OF NEW SOUTH WALES
(STREET J.)

6. On the 20th day of October, 1970, the present proceedings were commenced by the Appellant by Originating Summons claiming a declaration that the Company was not bound by the alleged contract bearing date the 4th day of August, 1970 for the sale of "Farrell House". An injunction was sought restraining the firstnamed Respondent from affixing the Common Seal of the Company to any Memorandum of Transfer of the land the subject of the alleged contract of sale without the approval of the Appellant. By consent of the parties the matter was disposed of by the trial Judge (Street J.) without formal pleadings being filed on behalf of any party.

p.1

7. The only grounds upon which the Appellant attacked the validity of the alleged contract were formulated by Senior Counsel for the Appellant as follows:

- (a) "That Mr. Kennedy has not since the end

of 1968 been a director" of the Company "and therefore was not entitled to take part in director's meetings" (hereinafter referred to as "the First Point");

(b) "That the meeting as such was invalid on the basis that there was no notice in circumstances where notice was called for" (hereinafter referred to as "the Second Point");

10

(c) As against the thirdnamed Respondent, "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 the fixing of a seal was passed" (hereinafter referred to as "the Third Point");

8. Both on the hearing of the suit before Street J. and on the hearing of the Appeal before the Court of Appeal, Senior Counsel for the Appellant expressly disclaimed reliance on any other ground as a basis for attacking the validity of the said contract and both the suit and the appeal were conducted by Counsel for the thirdnamed Respondent on this basis.

20

(a) The First Point:

9. It was submitted on behalf of the Appellant that, pursuant to the provisions of Article 64 of Table A appearing in the Fourth Schedule to the New South Wales Companies Act, 1961, as amended (being, with certain immaterial exceptions, the Company's Articles of Association) Mr. Kennedy had retired as a director at the first Annual General Meeting of the Company held on the 30th day of December, 1968 and had never been re-elected. The said Article 64 provided, at all material times, as follows:

30

p.180

"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

40

three, then the number nearest one-third, shall retire from office. A retiring director shall be eligible for re-election."

10. His Honour the trial Judge (Street J.) found, on the evidence, that at the said first Annual General Meeting of the Company and at subsequent Annual General Meetings of the Company the firstnamed Respondent offered himself for re-election as a director. On the basis of this finding of fact, His Honour held that the provisions of Article 66 of the said Table A were applicable. That Article, at all material times, provided as follows:

pp.111-115

"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."

(b) The Second Point:

11. His Honour the trial Judge found, as matters of fact, that:

pp.115-117

- (a) No formal notice had ever been given of any meeting of directors of the Company;
- (b) The discussion at the said meeting proceeded upon the basis which must have been apparent to all concerned that it was a meeting of the directors of the Company;
- (c) The Appellant participated in the meeting and participated in the discussion on the question whether "Farrell House" should be sold to the thirdnamed Respondent;

10

20

30

40

- (d) The Appellant, while opposing the sale of "Farrell House" to the thirdnamed Respondent, did not raise any objection to the validity of the meeting as a meeting of directors. In particular, she did not at any time object to the proceedings "upon any suggestion that, by reason of her not having been notified, she was prejudiced, or placed at any disadvantage". The Appellant "made no objection or complaint regarding the absence of notice or forewarning". 10

In these circumstances and in the light of his specific findings of fact, His Honour held that the Appellant was not subsequently entitled to object to the validity of the meeting on the basis of there being no prior notice of it.

(c) The Third Point:

- p.117 12. In the light of His Honour's findings on the First, and Second Points, it was unnecessary for His Honour to consider the Third Point. 20

(d) Further Submissions on behalf of the Thirdnamed Respondent:

13. The thirdnamed Respondent further submitted that even if the firstnamed Respondent had not continued in office as a director after the said first Annual General Meeting by reason of the said Article 66, he was nonetheless a director of the Company by reason of the fact that he continued to act as a director (and as Chairman of Directors) with the acquiescence and unanimous consent of all the shareholders of the Company (Parker & Cooper Limited v. Reading (1926) 1 Ch. 975); Ho Tung v. Man on Insurance Co. Limited (1902 A.C. 232); War Assets Pty. Limited v. Federal Commissioner of Taxation (91 C.L.R. 53 at 88). 30

14. The thirdnamed Respondent further submitted that, even if the firstnamed Respondent had ceased to be a director of the Company after the 40

10 said first Annual General Meeting none of the Appellant, the firstnamed Respondent or the secondnamed Respondent was entitled to assert, as against the thirdnamed Respondent, that the firstnamed Respondent was not, at the relevant time, the Chairman of Directors of the Company. In this regard, the thirdnamed Respondent relied upon the principles laid down by the House of Lords in Mahony v. East Holyford Mining Company (1875 L.R. VII H.L. 869).

15. The thirdnamed Respondent also relied upon the provisions of Section 119 of the New South Wales Companies Act 1961 (as amended) and Section 51A of the New South Wales Conveyancing Act 1919 (as amended). Section 119 is as follows:

20 "119. The acts of a director ... shall be valid notwithstanding any defect that may afterwards be discovered in his appointment ..."

Section 51A (so far as material) is as follows:

"51A. (1) In favour of a purchaser in good faith -

30 (a) a deed shall be deemed to have been duly executed by a corporation aggregate if its seal is affixed thereto in the presence of and attested by its clerk, secretary, or other permanent officer or his deputy, and a member of the board of directors, council, or other governing body of the corporation; and

40 (b) where a seal purporting to be the seal of a corporation has been affixed to a deed attested by persons purporting to be persons holding such offices as aforesaid, the deed shall be deemed to have been executed in accordance with the requirements

of this section, and to have taken effect accordingly.

....."

16. In the light of His Honour's findings on the First and Second Points it was unnecessary for His Honour to consider these submissions made on behalf of the thirdnamed Respondent.

IN THE SUPREME COURT OF NEW SOUTH WALES
(COURT OF APPEAL)

pp.120-134

17. Pursuant to the provisions of Section 82, of the Equity Act 1901 (as amended), the hearing before the Court of Appeal was a re-hearing of the suit. No fresh evidence was however tendered before the Court of Appeal. The submissions made on behalf of the Appellant before the Court of Appeal were limited to the points relied upon before Street J. The majority of the Court of Appeal (Jacobs and Holmes J.J.A.), rejected the submissions made on behalf of the Appellant in respect of the First Point and the Second Point for reasons similar to those which found favour with Street J. Consequently, it was unnecessary for their Honours to deal with the Third Point or the thirdnamed Respondent's further submissions.

10

20

pp.135-160

18. Moffitt J.A. in a dissenting judgment stated that he found himself in disagreement with the trial Judge's "decision on the facts of the case" and came to the conclusion that the failure to give prior notice of the meeting of the Appellant invalidated the meeting and the proceedings thereat.

30

SUBMISSIONS

19. The thirdnamed Respondent submits that the order of Street J. dismissing the suit and the order of the Court of Appeal (by majority) dismissing the appeal were correct for the following (amongst other) reasons:

R E A S O N S

1. As to the First Point

40

That the firstnamed Respondent was at all material times a Director and Chairman of directors of the Company since:-

- (i) Article 64, providing for retirement of directors by rotation, did not operate in respect of the firstnamed Respondent by reason of the acquiescence and unanimous consent of all the shareholders of the Company;
- 10 (ii) (Alternatively) Article 66 applied in respect of the firstnamed Respondent, he having offered himself for re-election at each annual general meeting and the provisions of that Article were otherwise satisfied;
- (iii) (Alternatively) the defect (if any) in the appointment of the firstnamed Respondent was validated by the provisions of Section 119 of the Companies Act, 1961 (N.S.W.) (as amended).

2. As to the Second Point

That the meeting of the 4th day of August, 1970, was a validly held meeting of directors since:-

- (i) No notice thereof was called for;
- (ii) (Alternatively) the Appellant, by her conduct, waived her entitlement (if any) to notice thereof;
- 30 (iii) (Alternatively) the Appellant received notice thereof which, in the circumstances, was adequate.

3. As to the Third Point

- (i) That, even if the firstnamed Respondent had ceased to be a director of the Company after the first Annual General Meeting, none of the Appellant, the firstnamed Respondent or the Company should be

allowed to assert, as against the thirdnamed Respondent, that the firstnamed Respondent was not, at any material time, the Chairman of Directors of the Company; those parties were precluded from so asserting because the thirdnamed Respondent, as a stranger or outsider to the Company, was entitled to assume, in the absence of notice to the contrary, that there were no internal irregularities within the Company which might affect the validity of the said contract;

- (ii) (Alternatively) that the thirdnamed Respondent was a purchaser for value within the meaning of Section 51A of the Conveyancing Act, 1919 (as amended) (N.S.W.) and thus entitled to the benefit of the protection conferred by that provision.

(W.P. DEANE Q.C.)

(B.A. BEAUMONT)

No. 25 of 1971.

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW
SOUTH WALES COURT OF APPEAL

B E T W E E N

INGEBORG GERDA PETSCH

Appellant

AND

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

Respondents

CASE FOR THE THIRDNAMED RESPONDENT
WENTWORTH DEVELOPMENTS NO. 2 PTY.
LIMITED

LINKATERS & PAINES
Barrington House
59-67 Gresham Street
London, E.C.2V 7JA Agents for

FREEHILL, HOLLINGDALE & PAGE,
Solicitors,
60 Martin Place,
SYDNEY. N.S.W. 2000.