Privy Council Appeal No. 25 of 1971

Ingeborg Gerda Petsch – – – – – – – *Appellant*

v.

Frederick Hugh Kennedy and Others – – – – *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH MARCH 1972

Present at the Hearing:
LORD WILBERFORCE
VISCOUNT DILHORNE
LORD PEARSON
LORD CROSS OF CHELSEA
LORD SALMON

[*Delivered by* LORD WILBERFORCE]

The judgment from which this appeal is brought is a judgment of the Supreme Court of New South Wales, Court of Appeal, which by a majority dismissed an appeal from Street J. in the Equitable Jurisdiction of the Supreme Court.

The proceedings were started by Originating Summons, and evidence in the first instance was given by affidavit. At the hearing, the deponents were orally cross-examined. Although there are some differences in the accounts which the witnesses gave of the relevant events, the learned trial judge found that no question of credibility arose. The main outline of facts was undisputed, and it is only in a small, though critical, area that the Judge was required to pronounce between rival contentions.

The action concerned a property in Sydney which belonged to, and was the only substantial asset of Ingrid Pty. Limited, the Second respondent. This Company was incorporated in New South Wales on 11th July 1967, and at all times its only shareholders were the appellant, Miss Ingeborg Petsch, and the first respondent, Mr. Frederick Hugh Kennedy (referred to in this judgment as "Mr. Kennedy"). They each owned 12,500 shares of $1 each. For a short time Mr. G. W. Kennedy was a director but he never acquired any shares and had ceased to act before the relevant events. Miss Petsch and Mr. Kennedy were the effective and since 1968 the only directors.

The Company was formed in order to acquire a building at Darlinghurst called Farrell House. A price of $135,080 was paid for it in 1967, most of which was raised on mortgage. The remainder appears

to have been provided by Miss Petsch and/or Mr. Kennedy, their exact contribution not being material. Farrell House was run as a Boarding House, and as such was managed mainly, if not wholly, by Miss Petsch: she was Managing Director of the Company. Mr. Kennedy claimed to concern himself with the Company's finances. The Company had no other business apart from owning and managing Farrell House.

In 1970 the third respondent Wentworth Developments No. 2 Pty. Limited became interested in buying Farrell House in connection with a larger scheme of development. Their representative, Mr. Wynyard, made an offer to Miss Petsch, but she said that she would not sell for less than a figure greatly in excess of what Mr. Wynyard was prepared to pay. Indeed she expressed reluctance to sell at all. It then seems that Mr. Wynyard approached Mr. Kennedy and reached provisional agreement with him as to a price of $720,000. Mr. Kennedy took the view that an offer of this sum should be accepted, but realised that there would be difficulty in persuading Miss Petsch to agree. The dispute in the action essentially relates to the circumstances in which and the method by which Mr. Kennedy sought to achieve this objective, or failing it, to procure a resolution to sell the property which would be binding on the Company. His case is that a valid resolution of the Directors of the Company was passed on 4th August 1970, by means of his casting vote as chairman, for the sale to the third respondent for $720,000, and it is this claim which has to be examined. Before their Lordships neither Mr. Kennedy nor the Company appeared, but the third respondent asserted the validity of the resolution and of a contract between itself and the Company executed on behalf of the Company in pursuance of the resolution.

The appellant's contentions, as summarised in her affidavit, were that she was not given any notice of any meeting on 4th August 1970, that she did not participate in any meeting, that no motion to accept the third respondent's offer was put, that she was not asked to vote for or against any such resolution, and that she did not hear anybody else vote for or against any resolution. It was between these rival versions of what happened on the evening of 4th August 1970 that the trial judge had to decide.

It was not disputed that no notice of any directors' meeting was given to Miss Petsch. On the contrary, Mr. Kennedy admitted that he had deliberately refrained from giving the appellant any notice because he was afraid that by doing so he might arouse her opposition. His plan —and it was a deliberate plan—was to organise a meeting, obtain the appellant's participation in it, hopefully to persuade the appellant to agree to the sale or, in any event, to procure the passing of a resolution to accept his offer by the use, if necessary, of his casting vote. He therefore arranged for the Company Secretary, Mr. Bennell, and Mr. Wynyard, representing the third respondent, to be present at the home unit occupied by Miss Petsch and Mr. Kennedy at 8.00 p.m. on 4th August 1970. He knew that Miss Petsch would return there about that time. Mr. Wynyard had with him some documents including a contract, a form of transfer and an authority to act. The Company's seal was available. Miss Petsch arrived home about 8.00 p.m. and on entering the loungeroom saw Mr. Kennedy and Mr. Wynyard sitting at a table with documents on it. She went to her own room and soon after Mr. Bennell arrived. Miss Petsch greeted him, left the room again in distress but was asked to return by Mr. Kennedy and did so. Mr. Kennedy then said some words—what these were will be discussed later in this judgment—and mentioned the fact of an offer for Farrell House by the third respondents—he had the documents in his hands. He invited Mr. Wynyard to explain in detail.

A long discussion followed lasting for one and a half hours mainly between the appellant and Mr. Wynyard during which Mr. Wynyard made it clear that his company required a decision that day, failing which it would have to proceed with its redevelopment scheme without Farrell House. On her side the appellant stressed her opposition to the sale, affirmed that Farrell House could not be sold without her consent and complained generally about what was happening. Finally, at about 9.30 p.m., Mr. Kennedy, according to his evidence, said that he moved that the offer made by Wentworth Developments No. 2 Pty. Limited be accepted. The appellant stated her dissent, as she said to the sale, as Mr. Kennedy said, to the motion, upon which Mr. Kennedy said that as he was chairman of the Company and had a casting vote he would exercise it in favour of the motion. He declared the motion carried and affixed the Company's seal to the contract, form of transfer and authority to act. Miss Petsch said that she did not know what he was signing and it would have no effect. The documents were then signed by the Company Secretary. Minutes were later prepared purporting to record a meeting of directors held at the time and place mentioned and the carrying of a motion as stated by the casting vote of Mr. Kennedy as Chairman. The appellant then commenced the present proceedings for (*inter alia*) a declaration that she was not bound by the contract and a declaration that Mr. Kennedy was not a director of the Company.

It is necessary, first, to understand clearly the basis on which the appellant put forward her claim. It was, as stated, made by originating summons without pleadings, supported by affidavit. At the trial before Street J., after the deponents to the affidavits had been cross-examined, the learned judge asked Counsel for the appellant whether he alleged any personal equity against Mr. Kennedy relating to the use of the casting vote. Counsel replied "No." His Honour then asked for the points on which the appellant was relying to be stated specifically, so that they could be noted. Counsel thereupon stated three points.

1. That Mr. Kennedy had not been a director since the end of 1968.

2. That the meeting (sc. of 4th August 1970) was invalid for lack of notice.

3. That the third respondent had notice of the defects in the calling of the meeting.

From this it is clear that the appellant has not sought to allege any unfair dealing, undue influence, or oppression, against Mr. Kennedy, or any such lack of equity as might be taken into account in proceeding between persons whose relationship, though formally that of co-shareholders in a limited company, partook much more of the nature of a partnership. Nothing of this kind was set up. Indeed it is only right to say that there was no suggestion that Mr. Kennedy was seeking to gain any financial advantage over the appellant, or that he did so, or that the price for the property was inadequate. His case was that he considered the price offered to be very advantageous and that if he overbore Miss Petsch he was being cruel to be kind. The contract for sale in fact contained a clause providing for an increase in the price if it fell below the average of valuations which might be obtained from three independent and reputable firms of valuers. The appellant's claim was simply and essentially that she objected to the sale—an objection which she was perfectly entitled to entertain on any, or no ground—that her consent to it had never been given and that the procedure, through the mechanism of a Directors' meeting of the Company, which had been devised to overcome her objection was, on strict legal grounds, invalid.

Their Lordships now examine the appellant's grounds of objection. They can deal briefly with the first argument that Mr. Kennedy was not, in August 1970, a Director of the Company. This was rejected by Street J. and the majority in the Supreme Court. Moffitt J. did not find it necessary to consider it.

The relevant Article is as follows:

> "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 facts are that at a meeting of the subscribing shareholders, who were Miss Petsch and Mr. F. H. Kennedy, held on 14th July 1967 it was resolved that the first directors should be Mr. F. H. Kennedy, Miss Petsch and Mr. G. W. Kennedy. Mr. G. W. Kennedy never took up his qualifying share and it is common ground that he was not a director after 1968. Neither at the annual general meeting of the Company held on 30th December 1968 nor at any subsequent general meeting was any business transacted regarding the election of directors. Miss Petsch and Mr. Kennedy acted at all times as *de facto* Directors. At the Annual General Meeting held on 1st December 1969—the last before the events in question—at which Miss Petsch and Mr. Kennedy were present, it was resolved that *the Directors'* report be received and adopted, and also that the Auditors be re-appointed at a fee to be fixed *by the Directors*. It was obviously contemplated that Miss Petsch and Mr. Kennedy not only were but would continue to be Directors for the coming year.

What was lacking was a formal offer of himself for re-election on the part of Mr. Kennedy. But in a case such as this, where only two persons had any interest in the Company, and had met together in formal general meeting, with the clear understanding that they both were and would be Directors of the Company, a formal offering by either of them of himself for re-election would be little short of a pantomime: and it would be legally unnecessary (though in hindsight it might have been desirable) for the minute to do more than record the reality of what took place rather than to translate the plain wishes of the corporators into the language of formality. Their Lordships consider it established that Mr. Kennedy was a Director in August 1970. It is not disputed that, if he was, he was also Chairman of the Company.

On this footing their Lordships proceed to consider the second and substantial point, namely whether the meeting held on 4th August 1970 was validly a directors' meeting and the resolution taken at it a valid resolution. At the trial the appellant's contentions were based principally upon the admitted fact that there was no notice given of the intended meeting. She claimed that for this reason the meeting was invalid. But this was not the real issue, or at least not the whole issue. The Articles do not require any notice; they specify merely that the directors may meet together for the despatch of business . . . and otherwise regulate their meetings as they think fit and that a director may at any time . . . summon a meeting of the directors (Art. 77). In this context prior notice has only a limited relevance. Firstly if, after notice has been given, one of the directors does not attend, the fact of notice, assuming it to be reasonable, enables the other directors, if a quorum, to proceed without him. Secondly if notice has duly been given, and the persons to whom it has been given in fact come together at the time and place indicated, or even by agreement, at another time

or place (cf. *Smith v. Paringa & Mines Ltd.* [1906] 2 Ch. 193 where the directors met in a passage) the meeting so taking place assumes automatically and definitively the character of a directors' meeting. If the persons who are the directors meet together without any such notice having been given, something more is required to give their physical co-presence the character of a meeting of Directors.

In this case two questions arose and had to be decided. The first was whether Mr. Kennedy on the evening of 4th August 1970, when both he and Miss Petsch were present in the home unit, gave to Miss Petsch any notice that a meeting of directors was to take place; the second was whether Miss Petsch assented to the holding of such a meeting. Their Lordships accept what was said by Street J. as to the latter requirement: one director cannot, at any moment of his choosing force, or foist a directors' meeting upon his co-director who merely happens to be in the same place—a proposition illustrated by the unsuccessful attempt by Mr. Potter to force a meeting upon Canon Barron on the platform of Paddington Station, London (*Barron v. Potter* [1914] 1 Ch. 895). Were, then, these critical facts established?

Reference has already been made to the fact that, soon after Miss Petsch had joined the others present in the home unit, certain words were spoken by Mr. Kennedy. What were these words? Mr. Kennedy and Mr. Bennell both said that they were (substantially) "this is a directors' meeting to consider the sale of Farrell House". The learned judge accepted this evidence. There was a question whether Mr. Bennell then asked whether this was a duly constituted Board Meeting and whether Mr. Kennedy answered yes, but the learned judge's view was that this was perhaps not of critical significance. He accepted that Mr. Kennedy's initial announcement of a directors' meeting was made and that all four persons present, who included the only shareholders and the secretary, sat down at the table. The majority in the Court of Appeal endorsed these findings. Moffitt J. who gave a thorough and impressive review of the conduct of the proceedings leading to the conclusion that no decision binding on the appellant was reached, did not differ from Street J. on this point. Their Lordships must and do accept that an initial announcement to the effect stated, was made.

It may of course be the case that even if this statement was made, Miss Petsch did not assent to it or even hear it, and it is true that her evidence and cross-examination leaves this point open. So it is necessary to consider her conduct and to decide whether she assented to the proceedings thereafter having the character of a directors' meeting. There are a number of matters to be taken into account. In the first place it cannot be disregarded that Mr. Kennedy deliberately refrained from giving Miss Petsch notice of any meeting because, as he admitted, he knew of her rooted objection to the sale of Farrell House. Apart from the natural criticism this stratagem must evoke—and did evoke from both courts below, the fact that it had to be resorted to must add to the burden resting upon Mr. Kennedy, and consequently upon the third respondent, of establishing that the *de facto* gathering became and continued as a directors' meeting. Secondly, as the powerful analysis of Moffitt J. well shows, the proceedings took an equivocal and indeed confused course. After a very brief introduction by Mr. Kennedy there followed a long period of conversation between Miss Petsch and Mr. Wynyard. The latter was not a member of the Company but a third party, endeavouring to persuade Miss Petsch to agree to a sale to his Company, so that there was some justification for regarding the discussion as, to some extent at least, falling outside the normal scope of a directors' meeting. Undoubtedly the main theme of what Miss

Petsch was saying was objection in general terms to anything which might lead to a sale of the property. But this might, or might not have been in the context of a meeting of the Board. The third and final phase consisted, according to Mr. Kennedy's account, of the putting of the motion for sale and the carrying of that motion. Mr. Kennedy's evidence that this is what happened was confirmed unequivocally by Mr. Bennell, and was accepted by the judge.

These three phases have to be considered together and a finding made as to the character of the meeting as a whole. The learned judge at the trial came to the conclusion that the meeting had the character of a meeting of directors. The discussion, he held, proceeded on the basis which must have been apparent to all concerned that it was a directors' meeting and that it was one at which a final decision, yes or no, was to be reached in relation to the sale. Miss Petsch, he found, " participated, albeit in an opposing capacity " in the discussion. She acquiesced in the proposal being discussed. Her participation " was not in the character of being under protest or without prejudice ". He drew the inference that " by her participation she acquiesced in the meeting proceeding without any other notice ". The majority of the Court of Appeal, after a review of all the evidence, reached the same conclusion. Their Lordships after considering with care the eloquent presentation of the opposite point of view by Moffitt J., have reached the conclusion that on balance the findings of the majority and of the trial judge ought to be upheld. The result of them is that Miss Petsch did participate in the meeting, which started as a Directors' meeting: she thought that so long as she opposed the sale it could not go through: she failed to appreciate that Mr. Kennedy as Chairman had a casting vote so that in the last resort her opposition could be overcome. This was unfortunate for her—in the sense that a decision she did not like, whether it was in her financial interest or against it, was carried against her opposition, but no legal reason for attacking the decision has been established. This makes it unnecessary for their Lordships, as it was for the Courts below, to consider whether, if there was any defect in the Company's proceedings, the third respondent had notice of and was affected by it.

Their Lordships must humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

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In the Privy Council

INGEBORG GERDA PETSCH

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FREDERICK HUGH KENNEDY AND OTHERS

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