41A/76

HIGH COURT OF AUSTRALIA

GUSS v VEENHUIZEN (No 1)

Barwick CJ, Stephen and Mason JJ

26, 27 February, 14 May 1976

[1976] HCA 25; (1976) 136 CLR 34; 50 ALJR 638; 9 ALR 461; 2 ACLR 337; [1976] ACLC 28,582

COMPANIES – ANNUAL GENERAL MEETING – REQUIREMENT FOR MEETING TO BE HELD AT LEAST ONCE IN EACH CALENDAR YEAR – MEETING CONVENED AS ANNUAL GENERAL MEETING IN ONE CALENDAR YEAR AND ADJOURNED TO FOLLOWING CALENDAR YEAR – REQUIREMENT FOR ACCOUNTS TO BE MADE OUT AND LAID BEFORE COMPANY IN ANNUAL GENERAL MEETING – ADJOURNMENT OF MEETING BEFORE ACCOUNTS LAID BEFORE IT – ACCOUNTS LAID BEFORE ADJOURNED MEETING – WHETHER LAID BEFORE ANNUAL GENERAL MEETING: *COMPANIES ACT* 1961 (VICT.), SS5(1), 136, 162(3), 163, 375(2).

Judgment in this matter was delivered by His Honour Mr Justice Dunn on 8.12.1975. The defendant Guss then applied for special leave to appeal to the High Court and after hearing the appeal the Full High Court granted special leave to appeal, allowed the appeal and set aside the Order of the Supreme Court of His Honour Mr Justice Dunn.

HELD: Special leave granted. Appeal allowed. Orders of Dunn J (MC5/1976) set aside. Orders nisi discharged.
Barwick CJ:
1. The propriety of the magistrate's action in dismissing the complaints must turn on whether an annual general meeting of a company must complete within the calendar year the business the Act requires it to do (see s136(1) of the Act). It is quite evident from a perusal of the provisions in div. 3 of Pt V of the Act that it was the legislative intention that companies should within the calendar year take all the steps which are required to be taken at an annual general meeting. To allow those things which ought to be done at an annual general meeting to be done at any indefinite time after the conclusion of the calendar year quite obviously would open the door to considerable abuse and would, indeed, defeat what has been indicated was the legislative intention.

2. The word "held" in this connexion means called and concluded within the calendar year. It is to a meeting which will have concluded its business before 31st December of the year that the balance-sheet must be produced with auditors' certificates and directors' indorsements. The question is not really whether a company has power to adjourn its annual general meeting but whether, if it does not conclude its meeting within the confines of the calendar year, it performs the obligation placed upon it by s136 of the Act.

3. It would follow that the magistrate was right in accepting the submission made to him on behalf of the applicant. There was no annual general meeting at which the applicant produced a balance-sheet which was itself required by the statute to be produced.

Stephen and Mason JJ:
1. What is meant by the word "held" in s136 of the *Companies Act* 1961? That is the critical question. Does it mean "convened" or does it mean "completed", at least so far as the consideration of the company's accounts is concerned?

2. The protection of shareholders which is the evident object of s136 is more effectively served if "held" is given a broad rather than a narrow meaning. No doubt the section would serve some purpose if it were to be construed as imposing an obligation merely to convene an annual general meeting within the time prescribed, thereby allowing an adjournment to a date beyond that time if the shareholders present so decided, but it gives added protection to the shareholders if it is read as requiring that the company in general meeting should proceed to the consideration within the time prescribed of so much of its business as is required by law to be transacted at such a meeting. The narrower construction would allow an indefinite adjournment of the meeting, without the transaction of any business at the initial meeting.

3. Section 136 emerges as a provision which further secures the protection of shareholders by insisting that the annual general meeting will take place within the time specified, at least so far as it relates to the business which is required by law to be transacted at such a meeting.

4. In the result, the notion that s136 merely requires that the annual general meeting will be convened within the prescribed time and that the meeting may then be adjourned to a date beyond the end of the calendar year referred to by the sub-section is rejected. It is sufficient to say that as all that took place within the calendar year 1972 was an adjournment of the meeting to a date in the succeeding year it was impossible to conclude that the meeting was held in 1972.

5. The meeting held on 8th August 1973 was therefore not an annual general meeting and, as s162(3) in conjunction with s163(1) created but one offence, that of failing to cause to be made out and to be laid before an annual general meeting a balance-sheet of the required character, the charge under s163(1) must be dismissed. The charge under s375(2) must also be dismissed as the balance-sheet was not one "required by or for the purposes of this Act" within the meaning of that sub-section.

BARWICK CJ: The Supreme Court of Victoria held in this matter that the meeting which commenced in December and which had been validly adjourned so that the presentation to that adjourned meeting in August 1973 of a balance-sheet and profit and loss account of the company was a balance-sheet and income of the company required by the *Companies Act*, 1961 as amended (Vic.) (the Act) to be presented to that adjourned meeting. Though the question in the case is a narrow and technical one, it involves consideration of a matter of considerable importance. The appellant was charged upon two informations, one alleging breach of s163(1), and the other alleging a breach of s375(2) of the Act, the offence in each case being alleged to have been committed in August 1973. These sections are in the following terms:

> "163. (1) Subject to the succeeding provisions of this section, if a director of a company fails to take all reasonable steps to comply with or to secure compliance with any of the preceding provisions of this Division other than section 161A, or has by his own wilful act been the cause of any default under any of those provisions, he shall be guilty of an offence against this Act.
> Penalty: $1,000 or imprisonment for six months."

> "375. (2) A person who, in a return report or certificate or in accounts or in any other document required by or for the purposes of this Act, wilfully makes or authorizes the making of a statement which is false or misleading in a material particular knowing it to be false or misleading or wilfully omits or authorizes the omission of any matter or thing without which the document is misleading in a material respect shall be guilty of an offence against this Act.
> Penalty: On conviction on presentment, $5,000 or imprisonment for two years, or both; on summary conviction, $1,000 or imprisonment for six months, or both."

2. The relevant provision with which it was alleged that the appellant had not taken all reasonable steps to secure compliance was that of s162(3). Section 162(1) and (3) are in the following terms:

> "162. (1) The directors of a company shall cause to be made out and laid before the company at each annual general meeting a profit and loss account for the period since the date to which the last preceding profit and loss account so laid was made up (or, in the case of the first profit and loss account, since the date of the incorporation of the company) made up for a period ending on a date not earlier than six months before the date of the meeting, giving a true and fair view of the profit or loss of the company for that period."

> "162. (3) The directors of a company shall cause to be made out and laid before the company at each annual general meeting a balance-sheet as at the end of the financial year, giving a true and fair view of the state of affairs of the company as at the end of the financial year."

3. The magistrate dismissed both charges, accepting a submission that the meeting in August 1973 was not an annual general meeting and that s162 of the Act did not require the presentation to that meeting of the balance-sheet and profit and loss account. Although he found that a note on the balance-sheet touching the market value of an item of real property was false and misleading, the offence under s375 was not made out because the balance-sheet presented to the meeting in August 1973 was not required by or for the purposes of the Act.

4. The Supreme Court reversed the magistrate's dismissal of the complaints and ordered them to be remitted to the magistrate to be dealt with according to law.

5. The propriety of the magistrate's action in dismissing the complaints must turn on whether an annual general meeting of a company must complete within the calendar year the business the Act requires it to do (see s136(1) of the Act). It is quite evident, to my mind, from a perusal of the provisions in div. 3 of Pt V of the Act that it was the legislative intention that companies should within the calendar year take all the steps which are required to be taken at an annual general meeting. To allow those things which ought to be done at an annual general meeting to be done at any indefinite time after the conclusion of the calendar year quite obviously would open the door to considerable abuse and would, indeed, in my opinion, defeat what I have indicated was the legislative intention. The draftsman has secured the effectuation of that intention by providing that the annual general meeting shall be held before the expiry of the calendar year (s136(1)). The Supreme Court has decided that a meeting called for a date within the calendar year at which nothing of substance was done except a motion to adjourn the meeting to some date outside the calendar year was held within the calendar year within the meaning of the section. I am unable to agree. In my opinion, the word "held" in this connexion means called and concluded within the calendar year. It is to a meeting which will have concluded its business before 31st December of the year that the balance-sheet must be produced with auditors' certificates and directors' indorsements. The question is not really whether a company has power to adjourn its annual general meeting but whether, if it does not conclude its meeting within the confines of the calendar year, it performs the obligation placed upon it by s136 of the Act.

6. The provisions of s162 as to the profit and loss account aid this construction. The statutory prescription is that that account must be made in respect of the period which ends not more than six months before the date of the meeting which, in my opinion, is synonymous with the expression "the date at which the meeting is held". Of course, if a meeting is called for a date and adjourned to a further date within the calendar year it may properly be said that the date on which the meeting was held is the date on which the adjourned meeting concludes its business, or if the business is partly carried out on one date and concluded at a later date within the calendar year, it may be said that the meeting was held on both dates. In that event, the date for the purpose of s162 would, in my opinion, be the first date on which the meeting transacted any relevant business. The same cannot be said when the meeting is adjourned to a date outside the calendar year. The statute distinguishes between the date on which the meeting is to be held and the date on which it is held. In s142 the distinction is made between a meeting which is called, held and conducted.

7. It would follow that the magistrate was right in accepting the submission made to him on behalf of the applicant. There was no annual general meeting at which the applicant produced a balance-sheet which was itself required by the statute to be produced. For this reason, I would grant special leave and allow the appeal, discharging the orders of the Supreme Court and reinstating the dismissal of the complaints by the magistrate.

STEPHEN AND MASON JJ: On 8th August 1973 a balance-sheet was laid before an annual general meeting of General Mutual Insurance Ltd. ("G.M.I."), a company of which the applicant was a director. The balance-sheet was made up to 30th June 1972. It had not been prepared when the annual general meeting for 1972 was initially convened on 8th December of that year. The applicant reported to the meeting on that date that it had not been possible to prepare the accounts and balance-sheet in time for presentation to the meeting. The meeting proceeded with all business other than the consideration of the accounts and the appointment of the auditors. It was then unanimously resolved in accordance with art. 58 to adjourn the meeting until 28th February 1973 on which date the accounts, including the balance-sheet, would be considered. However, at the adjourned meeting on 28th February 1973 the secretary reported to those members present that the accounts had still not been prepared, whereupon it was resolved unanimously to adjourn the meeting to a date to be fixed by the directors.

2. The date so fixed was 8th August 1973. On this date the balance-sheet was laid before the meeting. The balance-sheet then presented is said to have contained some misleading statements. In particular it showed the value of a Crown leasehold held by G.M.I. and situated at 162-166 Sturt Street, South Melbourne at $202,800. In a note to the balance-sheet an explanation of this valuation was given. The respondent alleged that the figure of $202,800 was very much an overvaluation of the property and that the applicant knew or ought to have known this fact. The respondent also alleged that the note explaining the valuation was misleading and that it was authorized by the applicant. It was on this footing that the respondent instituted proceedings

against the applicant in the Melbourne Magistrates' Court under (a) s163(1), as it relates to s162(3) and (b) s375(2) of the *Companies Act* 1961 (Vict.).

3. The magistrate held that the balance-sheet did not give a true and fair view of the state of affairs of G.M.I. as at 30th June 1972, as s162 (3) requires, by reason of the incorrect valuation of the leasehold. He also held that the note to the balance-sheet made it "misleading in a material particular" and that the applicant by signing the accounts wilfully and knowingly authorized the making of a "statement ... misleading in a material particular" within the meaning of s375(2). However, the magistrate, being of opinion that under the *Companies Act* it was not permissible to adjourn the annual general meeting beyond the end of the calendar year, at least in the absence of permission by the Commissioner under s136(2)(b), held that there was no legal foundation for the meeting on 8th August 1973. It followed that the balance-sheet was not one which was laid before an annual general meeting within the meaning of s162(3); nor did it form part of "accounts" "required by or for the purposes of this Act" within the meaning of s375(2). The charges were therefore dismissed.

4. On the return of two orders nisi to review in the Supreme Court of Victoria, Dunn J took a different view. His Honour held that the Act did not preclude the adjournment of an annual general meeting to a date in the next calendar year, that the adjourned meeting on 8th August 1973 was validly constituted and that the orders dismissing the charges should be set aside.

5. In form the application before this Court is for special leave to appeal. As no appeal lies from his Honour's decision to the Full Court of the Supreme Court and as the question which arises is one of substantial importance, special leave should in our opinion be granted. It sufficiently appears from what we have to say in connexion with the outcome of the appeal that the correct interpretation of s136 of the Act is a matter of widespread importance in the administration of companies.

6. Section 136 requires the annual general meeting of every company to "be held at least once in every calendar year and not more than fifteen months after the holding of the last preceding annual general meeting". Section 162(3) requires the directors of the company to "cause to be made out and laid before the company at each annual general meeting a balance-sheet as at the end of the financial year, giving a true and fair view of the state of affairs of the company" as at the end of that year. The term "financial year" is defined by s5(1) to mean the period in respect of which any profit and loss account laid before the company in general meeting is made up. One then looks to s162(1) and finds that the profit and loss account is required to be made up for a period ending on a date not earlier than six months before the date of the annual general meeting. The requirement of s162(3), then, is that the directors shall cause to be laid before the annual general meeting a balance-sheet as at a date not more than six months before the holding of the meeting.

7. What is meant by the word "held" in s136? That is the critical question. Does it mean "convened" or does it mean "completed", at least so far as the consideration of the company's accounts is concerned?

8. The principal argument for saying that the only obligation which the section imposes is to convene an annual general meeting within the time prescribed is that in the ordinary course of events it is the company which convenes and makes arrangements for the holding of a meeting; it is the shareholders, not the company, who decide the fate of the business of the meeting and who therefore determine whether the business of the meeting will be completed on a particular day. It might have been expected, therefore, that the statute would impose upon the company a duty to convene an annual general meeting and to make arrangements for it to take place within the specified time but that it would stop short of throwing a duty on the company to ensure that the meeting was completed within that time, for in a sense it would be inappropriate to require the company to do that which lies within the exclusive power of its shareholders and, what is more, to make non-compliance with the duty an offence on the part of the company and its officers who are in default (see s136(4)).

9. This, however, is not a decisive consideration, for the imposition on the company of the duty, whatever its true scope may be, punishable in the event of breach, has as its object the protection of shareholders, in particular minority shareholders. And if on its true construction the section does

extend to the completion of the business of the meeting it constitutes a means of making it more likely that the annual general meeting will take place and that it will proceed to a consideration of the accounts of the company.

10. The respondent also points to the existence of the ordinary power to adjourn a meeting, in this case conferred by art. 58, and to the absence of any express provision in the Act prohibiting the adjournment of an annual general meeting beyond the period mentioned in s136(1). So much may be conceded, but the question for decision is whether that section impliedly abrogates or cuts down the power to adjourn. A complete abrogation of the power to adjourn beyond the calendar year would deny to shareholders the advantage of instituting inquiries in relation to the accounts before deciding to approve or disapprove them if the initial meeting were convened at the end of the calendar year. However, if "held" means something more than "convened" there is nothing in s136 which would preclude an adjournment to a date in the succeeding year with the permission of the Commissioner pursuant to s136(2)(b). And it is possible that even without such permission s136 does nothing to prevent the adjournment of an annual general meeting so far as it relates to business not required by law to be transacted at such a meeting.

11. On the other hand the applicant's case is supported by a number of persuasive considerations which suggest that "held" has a wider meaning that "convened". First, "held" when used in association with "meeting" usually means "carried on" or "completed" rather than "called" or "convened". It expresses the notion that what is "held" has taken place, not merely that arrangements have been made for its taking place. That the word is used in s136 in this or in a similar sense is indicated by the presence of the words "convene" or "call" elsewhere in div. 3 of Pt V of the Act in association with "meeting" when the convening or calling of a meeting alone is in contemplation (see ss137(1), (3), (4) and (5), 138(1), (2) and (3), 142(1) and (2) and 148(3)). Some reservation should be expressed about s135 where the word "held" may and probably does have a different and more limited meaning. Because the business transacted at the statutory meeting is of a different character and because an express power of adjournment is conferred (s135(8)) and a special resolution for winding up may be passed at the adjourned meeting after a committee of inquiry has earlier been appointed (s135(9)), it is probable that the statutory meeting may be completed beyond the time prescribed by s135(1).

12. This apart, the distinction made by the Act between the convening and the holding of a meeting is further emphasized by the use in s142 of the expression "called held and conducted" and by the provision in s148 (3) that in certain circumstances where minutes have been entered or signed "(a) the meeting shall be deemed to have been duly held and convened". The reference in s142 to the conduct of the meeting does not detract from this distinction. There it was important by the use of the word "conducted" to give expression to the necessity for compliance with any prescription by the court as to the mode or manner in which the meeting should be conducted.

13. Next, as we have already indicated, the protection of shareholders which is the evident object of s136 is more effectively served if "held" is given a broad rather than a narrow meaning. No doubt the section would serve some purpose if it were to be construed as imposing an obligation merely to convene an annual general meeting within the time prescribed, thereby allowing an adjournment to a date beyond that time if the shareholders present so decided, but it gives added protection to the shareholders if it is read as requiring that the company in general meeting should proceed to the consideration within the time prescribed of so much of its business as is required by law to be transacted at such a meeting. The narrower construction would allow an indefinite adjournment of the meeting, without the transaction of any business at the initial meeting.

14. The provisions of s162, the Ninth Schedule and s162A concerning accounts, auditors' reports and directors' reports evidence the importance that is attached by the Act to the provision to shareholders of detailed up-to-date financial information respecting the affairs of a company. The command that the directors shall cause "to be laid before the company in general meeting" the profit and loss account and balance-sheet ensures that these documents will be presented to shareholders for their consideration as part of the business of each annual general meeting. Viewed against this background s136 then emerges as a provision which further secures the protection of shareholders by insisting that the annual general meeting will take place within the time specified, at least so far as it relates to the business which is required by law to be transacted at such a meeting.

15. This view is reinforced by other provisions in the Act. Section 158(2) requires the annual return to be made out in accordance with a form set out in Pt II of the Eighth Schedule and stipulates that it shall be made up to the date of the annual general meeting or to a date not later than the fourteenth day after the annual general meeting. Even assuming that "the date of the annual general meeting" is the date on which the meeting was fixed or called the problems are not avoided. Part II of the Eighth Schedule contains, *inter alia*, this paragraph:

> "Copy of last Accounts of the Company.
> The return must include a copy of all accounts and group accounts (if any) laid before the company at the annual general meeting together with a copy of every document required by law to be attached or annexed thereto ..."

The documents referred to include the balance-sheet. Plainly enough the annual return cannot be furnished until the balance-sheet has actually been laid before the annual general meeting. Consequently, to give s136 a narrow construction would enable the requirement in s158 for the lodging of an annual return to be thwarted.

16. The respondent relied on the judgment of Lord Coleridge J (with whom Darling J agreed) in *Smedley v Registrar of Companies* (1919) 1 KB 97, at p101. His Lordship, referring to s64 of the *Companies (Consolidation) Act* 1908 (UK), a predecessor of s136, said:

> "It is clear that the appellant had not summoned a meeting within the calendar year 1917. But it appears to me that he was entitled to say that he had the whole of the calendar year up to December 31 in which to comply with that requirement, and that until the whole year had expired he could not be summoned for non-compliance."

By implication this passage seems to suggest that all that the section required was that the meeting should be convened within time. However, it does not appear that the question now under consideration was argued before the court. For this reason and for the additional reason that the cognate provisions of the Act of 1961 differ greatly from the provisions of the English Act of 1908 we do not regard the remarks in *Smedley's Case* (1919) 1 KB 97 as persuasive.

17. Reference was also made to the proposition that an adjourned meeting is a continuation of the original meeting (see *Scadding v Lorant* [1851] EngR 699; (1851) 3 HLC 418 (10 ER 164); *Neuschild v British Equitorial Oil Co Ltd* (1925) 1 Ch 346). Even if a resolution passed at an adjourned meeting takes effect on the date of the initial meeting it does not follow that s136 is satisfied by the mere calling of a meeting within the time specified.

18. In the result, therefore, we reject the notion that s136 merely requires that the annual general meeting will be convened within the prescribed time and that the meeting may then be adjourned to a date beyond the end of the calendar year referred to by the sub-section. It may well be that sub-s (1) is not satisfied unless the meeting is completed within the calendar year and that it cannot be adjourned beyond that time in the absence of the Commissioner's permission under sub-s (2) (b). However, in this case it is unnecessary to express a concluded opinion on this question; it is sufficient to say that as all that took place within the calendar year 1972 was an adjournment of the meeting to a date in the succeeding year it is impossible to conclude that the meeting was held in 1972. It may be that something short of completion of the meeting in the calendar year will suffice as a performance of the statutory obligation, as, for example, if all matters required by the *Companies Act* and the articles to be dealt with at the meeting are attended to within the prescribed time, it may then be permissible to adjourn other business to a date in the succeeding year.

19. The meeting held on 8th August 1973 was therefore not an annual general meeting and, as in our view s162(3) in conjunction with s163(1) creates but one offence, that of failing to cause to be made out and to be laid before an annual general meeting a balance-sheet of the required character, the charge under s163(1) must be dismissed. The charge under s375(2) must also be dismissed as the balance-sheet was not one "required by or for the purposes of this Act" within the meaning of that sub-section.

20. In conclusion we should observe that the difficulties encountered by the respondent would have been diminished, if not eliminated, had the applicant been charged with an offence against

s136(4) or s164(1) and (3).

21. We would, accordingly, grant special leave and allow the appeal.

ORDER

Special leave to appeal granted. Appeal allowed with costs. Orders of the Supreme Court of Victoria set aside and in lieu thereof orders nisi to be discharged with costs.
