

05/76

SUPREME COURT OF VICTORIA'

VEENHUIZEN v GUSS

Dunn J

8 December 1975

COMPANIES – "ANNUAL GENERAL MEETING" AND ADJOURNMENT THEREOF INTERPRETED – ANNUAL MEETING ADJOURNED – COMPANY FAILED TO CAUSE BALANCE SHEET TO BE LAID OUT AT ANNUAL GENERAL MEETING – FINDING BY MAGISTRATE THAT THERE WAS NO POWER TO ADJOURN MEETING BEYOND THE END OF THE CALENDAR YEAR – CHARGES DISMISSED – WHETHER MAGISTRATE IN ERROR: COMPANIES ACT 1961, SS163, 375.

Two informations under the *Companies Act* 1961 were dismissed by the Magistrates' Court. The informations abbreviated were:-

- (i) being a director did fail to take all reasonable steps to secure compliance by directors of the company to cause to be made out and laid at the general meeting a balance sheet ... and that the said offence was committed and with intent to deceive or defraud creditors of the company, (under s163(1) & (3)), and the further information,
- (ii) wilfully make a statement which was false or misleading in a material particular in the balance sheet (under s375).

The Magistrate found that the informant had established the necessary facts to justify a conviction in each case except:

- (a) in respect of each information he held that the meeting of 8.8.1973 purporting to be an adjournment of the annual general meeting held on 8.12.1972 had no legal basis and therefore the presentation of the balance sheet at that meeting was not "required" by s102 of the *Companies Act* 1961 and
- (b) in respect of the second information, for the same reason that in his opinion the meeting of the 8. 8.1973 had no legal basis, the balance sheet was not a "document required by or for the purpose of" the Act as specified in s375(2).

The following relevant provisions of the *Companies Act* 1961 (as in force on 8.8.1973) viz., s5(1) "Annual General Meeting" definition; s136 ss (1) - (4) inclusive; s162 ss (1) - (3) inclusive; s350(2). It was common ground that no extension of time was sought or given pursuant to s136(2) for the holding of the annual general meeting of the company concerned – G.M.I. Co. Pty Ltd. The material facts may be summarised as follows:

- (a) the same balance sheet, (ie, for the financial year ending 30.6.1972) which was the subject of each charge, was alleged to have been laid before the general meeting of G.M.I. on 8.8.1973.
- (b) the Annual General Meeting was held on 8.12.1972, and since the balance sheet had not been prepared the meeting was adjourned to 28.2.1973 to allow this to be done, and further on the subsequent date for the same reason, the meeting was adjourned to a date to be fixed. (c) and at the last adjourned meeting on 8.8.1973 the balance sheet was tabled and approved by the meeting.

The Magistrate dismissed the charges. Upon Order Nisi to review—

HELD: Order absolute. Dismissals set aside. Remitted to the Magistrates' Court to be further dealt with according to law.

1. **There was nothing in the provisions of the *Companies Act* 1961 which prevented the adjournment of an annual general meeting to a date in the next calendar year, if such an adjournment was within the power to adjourn given by the company's articles.**

2. **There was no logical reason why an annual general meeting commenced within the proper calendar year could not be properly adjourned by the members of the company to a date in the next calendar year. Except as otherwise provided by statute, adjourned meetings were deemed to be a continuation of the original meeting.**

3. **Accordingly, the Magistrate was in error in holding that there was no power to adjourn the annual general meeting beyond the end of the calendar year 1972. Because an adjourned meeting is a continuation of the original meeting, the requirements in s162(1) of the *Companies Act* 1961 that the annual general meeting should be held within six months of the end of the financial year, and the balance sheet made up to the end of the financial year were complied with in this case.**

DUNN J: ... The argument for the defendant which the learned Stipendiary Magistrate accepted and was repeated before me is:

1. To justify a conviction of the defendant for the offence alleged in respect of s163(1), the informant had to establish a failure by the defendant to take all reasonable steps to comply with the provisions of s162(3).
2. Section 162(3) required the directors to cause to be made out and laid before G.M.I. at its annual general meeting for the calendar year 1972 (see s136(1)) 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 particulars given with the information show that the information was directed to the allegation that the balance sheet for the financial year ending 30th June 1972, did not give a true and fair account of the state of affairs of the company.
4. The balance sheet was not laid before an annual general meeting of G.M.I. held in the calendar year 1972.
5. By reason of Article 58 of G.M.I.'s Articles of Association there is power to adjourn an annual general meeting, but it cannot be adjourned to a date beyond the end of the particular calendar year for which it was held, because of the terms of s136 and s162(1).
6. Therefore, this balance sheet, when laid before the meeting of 8th August 1973, was not laid before an annual general meeting and was not within the terms of s162(3).
7. In the alternative, if the meeting of 8th August 1973, was a properly adjourned annual general meeting, this balance sheet still was not within the ambit of s162, because by reason of the terms of s162(1), (3) and (10), it was required to relate to a period ending on a date not earlier than six months before the date of the meeting, i.e. before 8th August 1973 and this balance sheet did not purport to fulfil that requirement.

In my opinion, there is nothing in the provisions of the *Companies Act* 1961 which prevents the adjournment of an annual general meeting to a date in the next calendar year, if such an adjournment is within the power to adjourn given by the company's articles. Neither the researches of the industrious counsel in this case, or my own, have found any authority directly bearing on the problem.

In *Smedley v Registrar of Companies* (1919) 1 KB 96 the majority of the Court held, in effect, that an annual general meeting could be held in a calendar year, even though it was beyond the period of fifteen months since the last annual general meeting.

By s15(a) of the *Companies Act* 1971 the provisions of s136(2) were enacted in their present form. It enlarged the power of the Commissioner for Corporate Affairs (then called the Registrar of Companies) to permit the annual general meeting to be held in a calendar year other than that in which it would otherwise be required by sub-section (1) of s136 to be held. This emphasises that the purpose of this section is to ensure that an annual general meeting for each financial year is held even if it is late, rather than to prevent it being held at all.

This being so, there seems no logical reason why an annual general meeting commenced within the proper calendar year could not be properly adjourned by the members of the company to a date in the next calendar year.

Moreover, except as otherwise provided by statute, adjourned meetings are deemed a continuation of the original meeting: see *Scadding v Lerant* (1851) 3 HLC 418; *McLaren v Thomson* (1917) 2 Ch 41. This principle was applied in *Neuschild v British Equatorial Oil Company* (1925) Ch 346 to hold valid the confirmatory resolutions of extraordinary resolutions which had been passed at an adjourned meeting held outside the time prescribed by s69(2) of the *Companies (Consolidated) Act* 1908, the meeting which was adjourned having been held within the period prescribed by s69(2).

I can see no valid reason why the same principle should not apply to an adjourned annual general meeting.

For those reasons, in my opinion the learned Stipendiary Magistrate was in error in holding that there was no power to adjourn the annual general meeting beyond the end of the calendar year 1972. Because an adjourned meeting is a continuation of the original meeting, the requirements in s162(1) that the annual general meeting should be held within six months of the end of the financial year, and the balance sheet made up to the end of the financial year were complied with in this case.

It is to be inferred from the learned Stipendiary Magistrate's reasons that he was satisfied, if there was power to adjourn the annual general meeting to a date or dates in 1973 that the meeting of 8th August 1973, was validly constituted. No argument to the contrary was put before the learned Stipendiary Magistrate. But before me two points were taken by Mr Merkel – the first, that no notice of the date of the adjourned annual meeting of 8th August 1973 was proved to have been given to the members; and second, that only 'business left unfinished at the meeting from which the adjournment took place' can be dealt with at the adjourned meeting and consideration of this balance sheet was not unfinished business because that only covers business in respect of which some consideration was given at the meeting before it was adjourned.

These two arguments are based on the terms of Article 58 of the G.M.I. Articles of Association. Article 58 is in these terms:

'The Chairman may with the consent of any meeting at which a which a quorum is present (and shall if so directed by the meeting) adjourn the meeting from time to time and from place to place but so that

(a) No business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

(b) When a meeting is adjourned for ten days or more at any time notice of the adjourned meeting shall be given as in the case of an original meeting.

(c) Save as aforesaid it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.'

There was in evidence the annual return submitted after the adjourned meeting of 8th August 1973, containing the information required by s158 of the *Companies Act*. It showed that the adjourned annual general meeting was held on 8th August 1973, and it included a copy of the Directors' report to the annual general meeting. The defendant acknowledged in evidence that he was a very experienced solicitor in company matters and aware of the requirements of notice or meetings.

He gave evidence of the circumstances in which the Directors first held a meeting on 8th August 1973, to approve of the profit and loss account and balance sheet then obtained the auditors' report and signature thereto and submitted them to the adjourned annual general meeting at which they were approved. The minutes of that meeting set out who was present in person and by proxy.

In my opinion the only reasonable inference from all those circumstances is that the necessary formalities for the holding of the meeting had been complied with. Without disrespect to Mr Merkel's argument I think the consideration of the balance sheet was clearly business left unfinished from the earlier meetings. At the annual general meeting of 8th December 1972, there was general consideration of the problems affecting the preparation of the annual report and balance sheet and the canvassing of the possibility of a change in balance date, which had resulted in the balance sheet not then being ready and consideration of the accounts was adjourned to 28th February 1973. On that date it was reported to the meeting that the accounts were still under discussion with the auditors and it was resolved unanimously that the meeting be further adjourned.

That further adjourned meeting took place on 8th August 1973, when the balance sheet was presented. Whether or not 'business is left unfinished' is a question of fact, the question of fact being 'under all the circumstances was the business connected with the balance sheet disposed of at the meeting on 8 December 1972' – to adapt the test applied in *Montgomerie's Brewery Co Ltd v Spencer* (1899) ALR 112 at p113; 20 ALT 260 at p262. In the present case the inevitable answer is that it was not.

The result is that grounds 3, 4 and 5 of the order nisi in respect of the information alleging an offence against s163 have been established. For the reasons that have already been given the ground on which the information alleging an offence contrary to s375 of the *Companies Act* was dismissed cannot, in my opinion, be upheld. The meeting of 8th August 1973 was a validly adjourned annual general meeting and because it was a continuation of the meeting of 8th December 1972, the balance sheet met with the other necessary requirements.

Further, I think Mr Meagher's argument is right that for an offence to be committed against s375(2) of the *Companies Act* 1961 in respect of a balance sheet, it is not necessary for that balance sheet to be actually laid before an annual general meeting.

Section 162(3) requires a balance sheet to be made out for the purpose of being laid before the company at each annual general meeting. It is a document required for the purposes of the Act whether or not it is ever laid before an annual general meeting – e.g. if the provisions of s372(2) were infringed in a balance sheet ready for circulation to the members of a company for the annual general meeting the offence would be committed before the meeting was in fact held, so that it does not matter if it was never held.

Section 162(3) required a balance Sheet for G.M.I. and in the circumstances one for the financial year ending 30th June 1972. The balance sheet the subject of this information was produced and used for the purpose of discharging that obligation. In my opinion it is a document covered by the terms of s375(2), even if the meeting of 8th August 1973, was, contrary to my opinion, of no legal effect.

For these reasons, grounds 1, 2, and 5 of the order nisi in respect of the second information have been established. Both orders nisi will be made absolute, with costs to be fixed, not exceeding \$200 in each case. The order dismissing each information will be set aside and each information remitted to the Magistrates' Court at Melbourne to be further dealt with according to law.

APPEARANCES: For the applicant/informant: Mr DR Meagher, counsel. John Downey, Crown Solicitor. For the respondent/defendant: Mr R Merkel, counsel. Mr Joseph Guss, solicitor.
