

33/79

SUPREME COURT OF VICTORIA — FULL COURT

JENSEN v VINEY

Young CJ, McInerney and Fullagar JJ

26 April 1979 — [1979] VicRp 61; [1979] VR 597; (1979) 4 ACLR 230

COMPANIES – DIRECTOR OF COMPANY CHARGED WITH OFFENCES IN RELATION TO COMPANY – FAILURE TO CAUSE PROFIT AND LOSS STATEMENT AND BALANCE SHEET TO BE LAID BEFORE THE COMPANY – NO OBLIGATION TO HOLD ANNUAL GENERAL MEETING – NO ANNUAL GENERAL MEETING HELD – WHETHER DIRECTOR OBLIGED TO CAUSE THE REQUISITE DOCUMENTS TO BE MADE OUT AND LAID BEFORE THE COMPANY – WHETHER STATUTORY CONDITIONS APPLY TO DIRECTOR – FINDING BY MAGISTRATE THAT CHARGES PROVED – DIRECTOR CONVICTED – WHETHER MAGISTRATE IN ERROR: COMPANIES ACT 1961, S162.

HELD: Appeal allowed. Convictions quashed.

1. The plain meaning of the language used in the sub-sections of the *Companies Act 1961*, is that the directors are obliged to cause the requisite documents to be made out and laid before the company only if an annual general meeting is held. But if the requisite documents have been made out in expectation that an annual general meeting will be held on a named date and no meeting is in fact held it cannot be said that the obligation has not been carried out.

2. The argument for the Commissioner really pre-supposes that there was an obligation placed upon someone under "the preceding provisions of the Division other than section 161A", to cause the company to hold an annual general meeting whereas no such obligation arose in anyone under any of these provisions.

THE COURT: This is a case stated by Judge Stabey pursuant to s85(1) of the *Magistrates' Courts Act* and referred to this Court by Kaye J pursuant to s85(2) of that Act wherein Jensen was the Appellant (defendant) and Viney Commissioner for Corporate Affairs) is the Defendant (informant). Proceedings were appeals to the County Court against sentences imposed on appellant on 3 informations brought against him by the respondent. Appellant had pleaded guilty to 3 separate alleged breaches of s163(1) of the *Companies Act 1961*. On appeal it was found the alleged breaches had not been proved and acting pursuant to s75(5) of the *Magistrates' Courts Act* the convictions were quashed. Case stated is whether His Honour was right in doing so.

Section 163(1) of the *Companies Act 1961* reads:

"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."

The relevant sections imposing the obligations are all preceding provisions of the Division. The informations were somewhat curiously expressed. Instead of alleging that between certain dates or prior to a certain date the appellant failed to take all reasonable steps to comply with or to secure compliance with the relevant obligation, they alleged that on a particular day, the significance of which will be referred to later, the appellant was guilty of an offence and then followed particulars of the offence. In the end we do not think anything turns upon the form of the informations, but this may have tended to impede the proper analysis of the matter. The informations read:

(1) That the said defendant on 1/1/1975 at Melbourne was pursuant to section 163(1) of the *Companies Act 1961* guilty of an offence in that being a director of Mother Hubbard Freezer & Food Services Pty Ltd, did fail to take all reasonable steps to cause to be made out and laid before the said company at the Annual General Meeting for the year 1974 a profit and loss account for the period since the date to which the last profit and loss account so laid was made up for a period ending on a date not earlier than six months before the date of the said annual general meeting giving a true

and fair view of the profit or loss of the said company for that period, contrary to section 162(1) of the said Act.

(2) That the said defendant on 1/1/1975 at Melbourne was pursuant to section 163(1) of the *Companies Act* 1961 guilty of an offence in that he, being a director of Mother Hubbard Freezer & Food Services Pty Ltd did fail to take all reasonable steps to cause to be made out and laid before the said company at its Annual General Meeting for the year 1974 a balance sheet as at the end of the financial year giving a true and fair view of the state of affairs of the said company as at the end of the financial year, contrary to section 162(3) of the said Act.

(3) That the said defendant on 1/1/75 at Melbourne was pursuant to section 163(1) of the *Companies Act* 1961 guilty of an offence in that being a director of Mother Hubbard Freezer & Food Services Pty Ltd he failed to take all reasonable steps to comply with or secure compliance with the provisions of sub-section (1) of section 164 of the said Act requiring the making out of a directors report and attaching it to a balance sheet made out in accordance with the provisions of sub-section (3) of section 162 of the said Act.

Mother Hubbard Freezer & Food Services Pty Ltd was incorporated on 29th May 1973. Appellant was appointed a director and secretary of the company on 21/12/1973 and held these offices at all material times. No annual general meeting of the company was held in the calendar year 1974 and the case stated says that in respect of the failure to cause such a general meeting to be held the appellant was convicted. No doubt this means that the appellant authorised or permitted the default in holding the meeting: (see ss136(1) and (4) and 380(3) of the *Companies Act*). No profit and loss account for any period was made out and laid before an annual general meeting of the company in the calendar year 1974. No report was made by the directors or any of them stating any of the matters in relation to the company referred to in s162A(1) and no such report was attached to a balance sheet of the company in the calendar year 1974. It is said that on 31/12/1974 the last completed financial year of the company was the period of twelve months ending on 30/6/1974.

Before us argument was chiefly concentrated upon the obligation imposed by section 162(1) and (3). It will be convenient enough to follow the same course although it may be observed that resolution of the problems presented may be rendered clearer by concentration upon the obligation imposed by s162A(1).

Section 162 reads:

"(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 and loss of the company for that period.

(2) 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."

For the respondent it is said these sub-sections impose obligations to cause to be made out and laid before each annual general meeting a profit and loss account and balance sheet respectively and that each is a composite obligation requiring both the making out and laying before a meeting of the relevant documents. The offence charged is the failure to take all reasonable steps to secure compliance with the obligation. It is said that that offence must necessarily be complete by the time when the last moment for holding the annual general meeting has arrived. It is therefore irrelevant whether an annual general meeting is held. Thus 31/12/1974 was the last date on which the annual general meeting could have been held and the offence was therefore complete by the first moment of 1/1/1975. This explains the date in the informations.

The plain meaning of the language used in the sub-sections is in our opinion that the directors are obliged to cause the requisite documents to be made out and laid before the company only if an annual general meeting is held. But if the requisite documents have been made out in expectation that an annual general meeting will be held on a named date and no meeting is in fact held it cannot in our opinion be said that the obligation has not been carried out. Respondent

suggested it unnecessary for an informant to prove a balance sheet had been made out in order to show that the obligation had not been carried out. We are clearly of the opinion this contention could not succeed. We are unable to see how anyone could be convicted of ... failing ... to attach a report to a balance sheet when no balance sheet ... exists.

The argument for the Commissioner really pre-supposes that there was an obligation placed upon someone under "the preceding provisions of the Division other than section 161A", to cause the company to hold an annual general meeting whereas as we have already observed no such obligation arises in anyone under any of these provisions. We think that we would ... be required to reach (the same) conclusion by the decision of the High Court in *Guss v Veenhuizen* [1976] HCA 25; (1976) 136 CLR at p34.

Problems similar to the problem presented by the case before us have arisen under the *Companies Acts* in England and Australia in a number of reported cases. It is safe to say that similar problems will continue to arise ... so long as many of the obligations imposed upon companies and their officers are expressed in the legislature to be interdependent. An account of the authorities including *Guss v Veenhuizen* is given in the judgment of Harris J in *Waldron v Liege Investments Pty Ltd* [1977] VicRp 56; (1977) VR 492. We are of the opinion that Judge Stabey rightly upheld the appeals and quashed the convictions.
