[HIGH COURT OF AUSTRALIA.]

PALMOS AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

WILSON AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE. *Aug.* 1, 2;

SYDNEY, *Nov.* 29.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Companies—Articles of association—Construction—Directors empowered to sell freehold property—Provision in articles that property not to be sold without first obtaining consent of members by extraordinary resolution—Extraordinary resolution passed—General authority to sell given to directors—Sale pursuant to authority—Whether sale intra vires—Whether consent to specific sale necessary.

The articles of association of a company which had been formed to acquire and let a city building gave the directors power to sell any of the company's property but provided that the building "shall not be sold without first obtaining the consent of the members expressed by extraordinary resolution". In 1950 the shareholders, purporting to act in pursuance of this provision, passed an extraordinary resolution stating that "the directors be and are hereby authorised to sell the company's freehold property described in cl. 3 of the company's memorandum of association."

Held by *Dixon* C.J., *Webb*, *Kitto* and *Taylor* JJ., *Fullagar* J. dissenting, that the articles did not require a consent to a particular sale and that the resolution of 1950 was sufficient authority for a sale effected in 1955.

Decision of the Supreme Court of Queensland (*Stanley* J.), affirmed.

APPEAL from the Supreme Court of Queensland.

On 13th May 1955 Jerry Palmos, Elizabeth Palmos and Roy Wentworth Ralph (hereinafter called the plaintiffs) being shareholders in Heindorffs Building Company Limited (hereinafter called "the company") issued out of the Supreme Court of Queensland a writ of summons against Robert Frederick Genge Wilson, Wilfred Manning Hall, George Royden Howard Gill and Ernest Frederick

Stewart (hereinafter called "the directors"), the company and Australia and New Zealand Bank Limited by which they claimed :— 1. An injunction restraining the defendants from carrying out or completing or doing any acts or things for the purpose of carrying out or completing the sale by the defendant Heindorffs Building Company Limited or the defendant directors and the purchase by the defendant Australia and New Zealand Bank Limited of the freehold property of Heindorffs Building Company Limited situate in Queen Street Brisbane pursuant to an alleged contract for sale and purchase. 2. A declaration that the defendant directors had no power to make or enter into a contract for such sale on behalf of Heindorffs Building Company Limited or to make such sale of the said freehold property. 3. A declaration that the articles of association of Heindorffs Building Company Limited prohibited such sale and/or contract in that the consent to such contract and/or sale by the members of Heindorffs Building Company Limited expressed by extraordinary resolution was not first obtained and that the purported sale was void and of no effect. 4. Further and other relief.

Following upon the issue of the writ the matter came on for hearing before *Stanley* J. by way of motion for an interlocutory injunction which by consent of the parties was treated as the trial of the action on affidavit evidence without pleadings. His Honour refused to grant the injunction and to make the declarations sought by the indorsement on the writ of summons.

From this decision the plaintiffs appealed to the High Court.

The relevant facts and provisions of the company's memorandum and articles of association appear in the judgments of the Court hereunder.

A. L. Bennett Q.C. and *L. L. Byth*, for the appellants.

G. A. G. Lucas and *H. T. Gibbs*, for the respondent directors and the respondent company.

G. L. Hart Q.C. and *W. B. Campbell*, for the respondent Australia and New Zealand Bank Limited.

Cur. adv. vult.

Nov. 29.

The following written judgments were delivered :—

DIXON C.J. The question upon which this appeal depends is confined entirely to the interpretation of the proviso to art. 107 (13) of the articles of association of Heindorffs Building Company Limited. What exactly must be done to fulfil the condition which the proviso

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imposes upon the power of disposition with which the article invests the directors? The proviso refers to the freehold property from which the company takes its name. The purchase of the property was the first object set out in the company's memorandum. What the proviso says is that the property shall not be sold without first obtaining the consent of the members expressed by extraordinary resolution. Is this condition satisfied by an extraordinary resolution which states no more than that "the directors be and are hereby authorised to sell" that property? Must the precise sale be identified or the terms of a sale approved or consented to? Must the price be named or delimited? Or is it enough to give a general consent expressed as an authority to sell? In my opinion it is enough to do so. I think that the purpose of the proviso was to preserve, subject to the members' decision, the company's property in the building, because the acquisition and management formed so to speak the substratum of the company. No doubt the proviso enabled the members to retain a complete control of the disposition of the property. The consent might have been given only to a sale on particular terms or to a proposed transaction identified in all its details. But if the members were prepared to give a general consent expressed in an extraordinary resolution and otherwise to leave the sale to the directors, I do not see why they should not do so. Neither the language nor the general purpose of the proviso appears to me to require an interpretation which entrusts exclusively to the members of the company any greater responsibility in the sale of Heindorff House and I do not think that such a proviso should receive a narrow construction.

I shall not discuss the question more fully because I have had the advantage of reading the judgment prepared by *Kitto* J. and agree in his Honour's conclusion and, subject to one reservation which I shall mention, in the reasons which the judgment expresses. In any case the interpretation of such a provision must depend on the impression which it makes on the mind and not greatly on analytical reasoning. The reservation relates to the duration of the consent or authority given by the extraordinary resolution passed on 25th July 1950. I prefer the view that its operation is limited to a reasonable time, in accordance with the general rule implying an intention that an act shall be done within a reasonable time, when no time is specified by the instrument contemplating the doing of the act. Cf. *Reid* v. *Moreland Timber Co. Pty. Ltd.* (1) and the authorities there cited. I am not satisfied that the purpose of art. 107 (13) or the nature of the extraordinary resolution supplies any indications to the contrary

(1) (1946) 73 C.L.R. 1, at p. 13.

which would exclude the implication. But the directors proceeded to act on the extraordinary resolution by putting Heindorff House on the market and at no time abandoned their intention of selling it. It is true that over four and a half years elapsed before a sale was actually effected. But having regard to the circumstances, including the nature of the transaction and the purpose of art. 107 (13), and of the extraordinary resolution, I do not think that the period should be held to be more than a reasonable time.

In my opinion the appeal should be dismissed.

WEBB J. This is an appeal from a judgment of the Supreme Court of Queensland (*Stanley* J.) in an action by the appellants against the respondents, in which an application for an interlocutory injunction was treated by consent as the trial of the action, there being no pleadings and only affidavit evidence. Judgment was given for the respondents, the defendants in this action. The main question for decision on this appeal is as to the proper construction of art. 107 (13) of the articles of association of the respondent Heindorffs Building Company Limited.

The appellant, Jerry Palmos, in November 1952 began a business of cafe proprietor in leased premises in part of " Heindorff House " which is situated in Queen Street, Brisbane, and was owned by the company. The lease was due to expire on 31st December 1958. In 1954 and 1955 the appellants acquired shares in the company to an extent that enabled them to prevent the passing of an extraordinary resolution by the shareholders.

By the memorandum of association of the company it is provided, *inter alia*, that :—" 3. The objects for which the company is established are :— (a) to purchase or otherwise acquire all those pieces of land " (then follows a description of the land on which " Heindorff House " is situated). (m) to sell the undertaking and all or any of the property of the company for cash or for stock shares or securities of any other company or for other considerations."

The articles of association of the company provided, *inter alia*, that :—" 105. The business of the company shall be managed by the directors who may exercise all such powers of the company and do on behalf of the company all such acts as may be exercised and done by the company and as are not by statute or by these presents expressly required to be exercised or done by the company in general meeting but subject nevertheless to the provisions of the statutes and of these presents and to any regulations from time to time made by the company in general meeting . . . . 107. Without prejudice to the general powers conferred by art. 105 and

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of (sic) the other powers conferred by these presents it is hereby expressly declared that the board" (i.e. the board of directors) "shall have the following powers . . . (11) . . . to . . . borrow . . . by way of mortgage . . . ; provided however that the freehold property of the company described in cl. 3 of the company's memorandum shall not be mortgaged for a sum exceeding £30,000 without first obtaining the consent of its preference shareholders by extraordinary resolution. (12) With the consent of the members expressed by an extraordinary resolution and upon such terms as may then be approved to carry into effect any arrangement for the amalgamation or union of the company with any other company or for the dissolution or extinction of the company or for the winding up of its affairs or for the sale or transfer of its business and properties to any other company. (13) To sell . . . as they shall think fit and on such terms as they shall think proper all or any portion of the company's property plant or other assets; provided however that the freehold property of the company described in cl. 3 of the company's memorandum shall not be sold without first obtaining the consent of its members expressed by extraordinary resolution."

On 25th July 1950, the shareholders passed the following extraordinary resolution—"That, pursuant to art. 107 (13) of the articles of association of the company, the directors be and are hereby authorised to sell the company's freehold property described in cl. 3 of the company's memorandum of association."

Stanley J. held that this resolution was a valid consent to a sale made in April 1955 by the board of directors of the company to the appellant Australia and New Zealand Bank Limited following the exercise by the latter company of an option to purchase given in March 1955, and dismissed the application for a declaration that the sale was *ultra vires* and for an injunction restraining its completion.

The questions for decision are (1) whether the consent required by art. 107 (13) was a consent to the mere selling, or a consent to the actual terms of sale; and if it was the latter, then (2) whether the company could in any event in general meeting ratify the sale, thus rendering any declaration or injunction futile.

As to question (1): it is noted that in cll. (11) and (13) of art. 107 the expression "without first obtaining the consent" is used; that the consent is to be at least to the mortgaging or selling, as the case may be, but that no provision is expressly made for consent to the terms of the mortgage or sale; whereas in cl. (12) the expression is "With the consent" and the consent required is to the carrying into effect *any arrangement* for the amalgamation or other proceeding

specified and not merely to the mere amalgamation or other proceeding apart from its terms. This difference in language is, I think, significant. But apart altogether from this difference, the natural meaning of the words in cll. (11) and (13) is that the consents are to be to the mere mortgaging or selling and not necessarily to the terms of the mortgage or sale. However, the natural meaning is supported by the context of art. 107, including cl. (12), and there is nothing elsewhere in the memorandum or articles of the company, or in *The Companies Act*, nor is there any fiduciary or other relationship involved, that requires the natural meaning of the words to be departed from. But it was submitted by counsel for the appellant that if the resolution of 25th July 1950 were given this effect then it had a general effect and so served the purpose of an article, which however can be made only by special resolution. This could well be the case. It would be no answer to say that the sale was of specific property: art. 107 (13) itself dealt with the specific property. However, this article also stated the kind of consent required, and the natural meaning of the words it used as well as their meaning in the particular context was that consent to the mere act of selling, apart from the terms of sale, was required. No question was raised as to the validity of the article with that meaning. Nor could it be successfully raised.

It was further submitted by counsel for the appellants that, even if this were the correct view of art. 107 (13), still this consent was given so long before the sale in question as not to have authorised that sale. But the resolution of 25th July 1950, was duly registered in the office of the Registrar of Companies as required by *The Companies Act*, and I think it must be taken to have been operative until it was revoked. The intending purchaser could, I think, safely have relied on the resolution as a consent to the sale. It would be contrary to the purpose of registration of the resolution that a purchaser should act upon it at his peril, while it was held out by the company as operative by leaving it unrevoked. The shareholders alone are in control of the situation that arises from registration of the resolution. It might perhaps be different if the resolution had fixed a price and there was evidence of a change in the meantime warranting a much higher price.

It is unnecessary to decide whether, if the sale by the board of directors was not authorised, still it could be ratified by the company in general meeting, i.e. by a majority of those present personally or by proxy, so that the declaration and injunction sought by the appellants would be futile in any case. However, it would appear that under arts. 105 and 107 (13) the sale was required to be made by

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the board of directors subject to the consent specified and could not validly be made by the company in general meeting. The company in general meeting could not ratify what it could not itself have done.

I would dismiss the appeal.

FULLAGAR J. This case depends entirely on the meaning to be given to cl. 107 (13) of the articles of association of Heindorffs Building Co. Ltd., a company incorporated under the law of Queensland. Clause 107 (11) and cl. 107 (12) are not directly relevant, but, since they may serve to throw light on cl. 107 (13), it is desirable to set them out also. Article 107 provides:— "Without prejudice to the general powers conferred by Article 105 and of the other powers conferred by these presents it is hereby expressly declared that the board shall have the following powers that is to say:— . . . . (11) From time to time to raise or borrow in the name or otherwise on behalf of the company such sums of money as they may from time to time think expedient either by way of mortgage of the whole or any part of the property of the company including uncalled capital or by bonds or debentures notes or in such other manner as they deem best; provided however that the freehold property of the company described in Clause 3 of the company's memorandum shall not be mortgaged for a sum exceeding £30,000 without first obtaining the consent of its preference shareholders by extraordinary resolution. (12) With the consent of the members expressed by an extraordinary resolution and upon such terms as may then be approved to carry into effect any arrangements for the amalgamation or union of the company with any other company or for the dissolution or extinction of the company or for the winding-up of its affairs or for the sale or transfer of its business and properties to any other company. (13) To sell lease mortgage subject to the proviso in Clause 11 of this article or otherwise dispose of and deal with as they shall think fit and on such terms as they shall think proper all or any portion of the company's property plant or other assets; provided however that the freehold property of the company described in Clause 3 of the company's memorandum shall not be sold without first obtaining the consent of its members expressed by extraordinary resolution."

The property described in cl. 3 of the company's memorandum of association is a freehold property in the city of Brisbane, and it was one of the objects of the company to acquire this property. The company was incorporated in 1927. On 25th July 1950 the following extraordinary resolution was duly carried by the members of the company:— " That pursuant to art. 107 (13) of the articles of association of the company the directors be and are hereby authorised

to sell the company's freehold property described in cl. 3 of the company's memorandum of association." This resolution was duly registered with the Registrar of Companies, as required by *The Companies Acts* (Q.). At the time when it was passed no particular transaction was in contemplation or was submitted to the meeting. It is not possible, therefore, to place any limited construction on the resolution, and it must be taken to be what it purports to be, viz. a general authority to the directors to sell the property if and when a satisfactory sale could be effected.

After the passing of the resolution of July 1950 the directors made efforts to sell the property, but these were not successful. Early in 1955, however, an agent who was in fact acting for the Australia and New Zealand Bank Ltd. asked for an option for one month to purchase the property for £130,000. The directors met on 2nd March 1955 to consider the matter, and the minutes of their meeting contain the following:—"Letter received from Ray White Pty. Ltd., intimating that they had a client who desired to purchase Heindorff House for £130,000—, and requesting an option of purchase for a nominal figure for one month. On the motion of Mr. Wilson seconded by Mr. Stewart, it was resolved that the option be given as requested, and that if the company was required to sign a document under the seal of the company, that any two directors and the secretary be authorised to do so." On the following day an option was signed by the secretary on behalf of the company, and on 19th April 1955 a formal contract of sale by the company to the bank for £130,000 was executed.

The appellants were not members of the company in July 1950. In 1954 and 1955 they acquired, and they now hold, a number of shares in the company which is just sufficient, on the taking of a poll, to prevent the passing of an extraordinary resolution. On 13th May 1955 they commenced an action in the Supreme Court of Queensland against the company and its directors and the bank, claiming an injunction to restrain the carrying out of the sale to the bank. A motion for an interlocutory injunction, which was treated by agreement of the parties as the trial of the action, came on for hearing before *Stanley* J. His Honour, although he expressed some doubt on the matter, refused the injunction. It is against that refusal that the present appeal is brought to this Court.

The case, as I have said, turns entirely on the construction of cl. 107 (13) of the company's articles. On the one construction that clause means that a general authority to sell the property at any time in the future may be given by extraordinary resolution to the directors. If this is the correct construction, the directors had

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authority to sell to the bank and to cause the common seal of the company to be affixed to the contract of 19th April 1955. This was the view accepted by *Stanley* J. On the other construction, the directors have no authority to effect any sale of the property except a particular sale to which a specific consent of the members is given by means of an extraordinary resolution. If this is the correct construction, the directors had no authority to sell to the bank or to cause the common seal of the company to be affixed to the contract, and the appellant plaintiffs are entitled to an injunction.

The latter construction is, in my opinion, the correct construction. The vital word is the word " consent ". That word does not convey to my mind the notion of a general conferring of authority. It suggests rather the approval of a particular proposal submitted for approval—an *ad hoc* acceptance of something definite and concrete. It is very significant, I think, that the resolution of July 1950 does not use the word " consent ". I do not suggest that failure to use the precise words of the article is fatal to the validity of the resolution. But the language of the resolution seems to me to proceed naturally from an instinctive recognition that the word " consent " is quite inappropriate to what is really being done.

The point is not susceptible of lengthy discussion. It is primarily a matter of one's conception of the natural meaning of a particular word in a particular context. And the critical word here does not seem to me to comprehend the giving of a general authority to sell. I begin by thinking that an *ad hoc* approval *must* at least be *included* in what is contemplated by art. 107 (13). That is, indeed, the *primary* meaning of the word " consent ". It could not, to my mind, be contended that a resolution in terms consenting to a sale to X for £100,000 was outside the scope of that provision. Then I consider that a general authority to sell is something much wider in scope and effect than a consent to, or approval of, a particular sale. I feel an insuperable difficulty in saying that a thing so different in nature, and so much wider in scope is comprehended by a word the primary meaning of which is plain. The point may be put in another way by saying that " general authority " is the wider term, and " *ad hoc* approval " is the narrower term. " General authority " may include " *ad hoc* approval ", but " ad hoc approval " cannot include " general authority ".

There is another consideration which carries weight to my mind. A general authority to sell has the instant effect of making art. 107 (13) a dead letter. To all intents and purposes it is deleted from the articles by an extraordinary resolution. An *ad hoc* consent, on the other hand, is a *factum* upon which art. 107 (13) operates, but it

leaves art. 107 (13) with the same force as before, and, if the particular transaction approved falls through, any new proposal for sale will be subject to art. 107 (13). It seems to me much more likely that the extraordinary resolution was intended to have the more limited effect.

I do not think that any strong support for either view is to be found in sub-cll. (11) or (12) of art. 107, which I have set out above. But there is one consideration which does perhaps tend to support the view expressed above. Each of these clauses refers to a consent expressed by an extraordinary resolution. I think that the word should be given the same meaning in each of the three sub-clauses. Sub-clause (12) speaks of consent to an arrangement for amalgamation " upon such terms as may then be approved ". This appears to contemplate an *ad hoc* approval, and I think, though I do not attach much importance to it, that it affords some ground for saying that the other two sub-clauses also contemplate an *ad hoc* approval.

Counsel for the respondent referred to the case of *Tyler* v. *Ferris* (1). I would regard that as a very doubtful decision. It was doubtless based on grounds of convenience. In any case, it cannot be treated as an authority governing the construction of a different document.

In my opinion, this appeal should be allowed, and an injunction granted.

KITTO J. This is an appeal from a decision of *Stanley* J., given in the Supreme Court of Queensland on the hearing of a motion for an interlocutory injunction which was treated by consent as the trial of the action.

The plaintiffs in the action, who are the present appellants, were some of the shareholders in the respondent company, Heindorffs Building Company Limited. The defendants were the directors of the company, the company itself, and Australia and New Zealand Bank Limited. The company, acting by its directors, had entered into a contract in writing to sell to the defendant bank a freehold property in Brisbane known as Heindorff House for the price of £130,000 and on certain terms and conditions. The plaintiffs sought to prevent the completion of this sale, relying upon a provision in the company's articles of association that the freehold property should not be sold without the consent of the members expressed by an extraordinary resolution, and contending that the only extraordinary resolution which purported to express such a consent was

(1) (1906) 1 K.B. 94.

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insufficient for the purpose. *Stanley* J. gave judgment for the defendants, holding that the requisite consent was effectually given by the resolution.

The company was formed in 1927, under the provisions of *The Companies Acts* 1863 *to* 1913 (Q.). In the forefront of its objects, as set forth in cl. 3 of the memorandum of association, is the acquisition of the freehold property which is in question in these proceedings. The capital of the company was stated in cl. 5 to be £100,000 divided into 100,000 shares of £1 each. Clause 6 provided, in effect, that 18,475 shares should be deemed fully paid up, and that of this number 13,475 should be allotted as full consideration to the vendors of portion of the freehold property and the remaining 5,000 should be allotted as part consideration to the vendors of the rest of that property. Article 4 provided for affixing the seal of the company to agreements for the purchase of the two portions of the property from the respective vendors.

The articles of association contain in art. 105 a general provision as to the powers of the directors. This article provides that the business of the company shall be managed by the directors, who may exercise all such powers of the company and do on behalf of the company all such acts as may be exercised and done by the company and as are not by statute or by the articles expressly required to be exercised or done by the company in general meeting, but subject nevertheless to the provisions of the statutes " and of these presents " and to any regulations from time to time made by the company in general meeting; but no regulation made by the company in general meeting is to invalidate any prior act of the board which would have been valid if such regulation had not been made.

Article 107 provides that, without prejudice to the general powers conferred by art. 105, the board is to have a number of particular powers described in eighteen paragraphs of which three must be quoted in full. " (11) From time to time to raise or borrow in the name or otherwise on behalf of the company such sums of money as they may from time to time think expedient either by way of mortgage of the whole or any part of the property of the company including uncalled capital or by bonds or debenture notes or in such other manner as they deem best; provided however that the freehold property of the company described in Clause 3 of the company's memorandum shall not be mortgaged for a sum exceeding £30,000 without first obtaining the consent of its preference shareholders by extraordinary resolution. (12) With the consent of the members expressed by an extraordinary resolution and upon such

terms as may then be approved to carry into effect any arrangements for the amalgamation or union of the company with any other company or for the dissolution or extinction of the company or for the winding-up of its affairs or for the sale or transfer of its business and properties to any other company. (13) To sell lease mortgage subject to the proviso in Clause 11 of this article or otherwise dispose of and deal with as they shall think fit and on such terms as they shall think proper all or any portion of the company's property plant or other assets ; provided however that the freehold property of the company described in Clause 3 of the company's memorandum shall not be sold without first obtaining the consent of its members expressed by extraordinary resolution."

The express words of art. 105 make it clear that that article, insofar as it would empower the directors to sell Heindorff House, is subject to the proviso to par. (13) of art. 107. This was contested by counsel for the plaintiffs, who relied upon the opening words of art. 107, " Without prejudice to the general powers conferred by Article 105." These words, however, quite clearly mean no more than that art. 107 is to operate only in amplification of the powers conferred by art. 105, so that the generality of art. 105 is not to be restricted by any implication from the terms in which specific powers are granted in art. 107. The proviso in art. 107 (13) indeed does not in any way of its own force derogate from the powers conferred by art. 105, but the latter contains its own qualifying provision, incorporating (*inter alia*) the proviso by reference.

It should also be mentioned that the expression " extraordinary resolution " in the proviso has, by virtue of the definition in art. 2, the meaning assigned to it by *The Companies Act* 1863 (Q.). Sections 51 and 119 of that Act, now replaced by s. 127 of *The Companies Act of* 1931 (Q.), provided in combination that such a resolution was one passed by not less than three-fourths of such members as, being entitled according to the regulations of the company to vote, might be present in person or by proxy (in cases where by the regulations of the company proxies were allowed) at any general meeting of which notice specifying the intention to propose the resolution had been duly given.

The events which have given rise to the litigation were briefly these. On 25th July 1950 an extraordinary resolution was duly passed at a general meeting of the company, reading: " That, pursuant to art. 107 (13) of the articles of association of the company, the directors be and are hereby authorised to sell the company's freehold property described in cl. 3 of the company's memorandum

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of association." This resolution was duly registered with the Registrar of Companies on 1st August 1950 in accordance with s. 128 of *The Companies Act of* 1931 (Q.), and it has never been rescinded. At the time it was passed, none of the plaintiffs held any shares in the company. In November 1952 one of the plaintiffs became a tenant of a portion of Heindorff House, and he is now in possession thereof under a lease which will expire at the end of 1958. In 1954 and 1955 the plaintiffs acquired their present shareholdings in the company, and, as they now hold amongst them more than one-fourth of the issued shares of the company and at a general meeting each share carries one vote (art. 65), they are in a position to defeat any motion that may be proposed for an extraordinary resolution giving a fresh consent to the sale of Heindorff House. The personnel of the board has changed since the resolution of 1950 was passed, but the board as constituted from time to time during the intervening five years has made endeavours to sell Heindorff House, relying upon the resolution as sufficient to satisfy the condition to which their power to sell that property is subject by virtue of the proviso to art. 107 (13). On 3rd March 1955, a letter having been received from a firm of estate agents intimating that they had a client who desired to purchase Heindorff House for £130,000, the company pursuant to a resolution of the directors gave one Black, who in fact was acting as agent for the bank, an option for a period of thirty days to purchase Heindorff House for £130,000. The option was exercised on 25th March 1955, and on 19th April 1955 a formal contract between the company and the bank was entered into for the sale and purchase of the property. It is this contract which the plaintiffs attack as being beyond the powers of the directors for want of the requisite consent.

If all that is required by the proviso is a consent to sale generally, the requirement is satisfied by the resolution of 1950. If, however, it is a consent to a specific contract of sale negotiated by the directors, or to a sale not yet negotiated but to be made at a minimum price, on particular terms, or in given circumstances, then the resolution of 1950 cannot be held sufficient to satisfy the proviso in relation to the sale which is now in question, and the directors have exceeded their powers in purporting to commit the company to that sale. It should be added that, as *Stanley* J. has held, if the resolution of 1950 does not provide a consent which will support the sale, the bank cannot hold the company to performance of the contract by asserting a right to infer the due performance of conditions upon the principle of *Royal British Bank* v. *Turquand* (1); for if any sufficient consent

(1) (1856) 6 E. & B. 327 [119 E.R. 886].

had been given the extraordinary resolution expressing it was required by law to be made public by registration with the Registrar of Companies: *Irvine* v. *Union Bank of Australia* (1).

The language of the proviso to art. 107 (13) is by no means unambiguous, but its intent becomes, I think, apparent when the memorandum and articles of association are read as a whole. The primary purpose for which the company was formed was evidently the purpose of deriving profit from the letting of Heindorff House. So much is to be gathered from the company's name, the prominence given in cll. 3 and 6 of the memorandum and in art. 4 to the acquisition of the property, and the absence of any indication of any other specific object as having been in contemplation at the establishment of the company. The company's corporate powers are, of course, not to be understood as limited by reference to this main object; but precisely for that reason it is apparent that, unless the articles placed appropriate restrictions upon such of the powers of the directors as would extend to withdrawing the company's capital entirely or substantially from its state of investment in Heindorff House, the directors would be in a position, without consulting the general body of members, to alter the character of the company by departing from the particular object which had formed its substratum. Restrictive provisions are accordingly found, as has been seen, in the paragraph giving the directors power of sale and in the paragraph conferring power to mortgage the company's property, as also in the paragraph which has to do with amalgamations and the like. In the last-mentioned paragraph the consent is expressly required not only to the principle of a proposed arrangement but also to its terms; and this is to be expected, since the carrying into effect of the arrangement will have direct consequences upon the actual shareholdings of the individual members. Noticeably, the other two paragraphs do not specify that the consent of the members must necessarily extend to the terms of the mortgage in the one case or of the sale in the other. The language of par. (13) is indeed in marked contrast to that of par. (12) in this respect; for the power to sell which its main provision confers is to sell "on such terms as they (the directors) shall think proper", and the proviso is expressed as dealing only with the question whether Heindorff House shall "be sold" or not. There is in this a sufficiently clear indication that the check intended to be placed upon the directors' power to sell Heindorff House ensures only that, before making the fundamental change in the Company's character which a sale or heavy

(1) (1877) 2 App. Cas. 366.

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mortgage of Heindorff House would involve, the directors must obtain the concurrence of the general meeting in that change, and not by a bare majority but by the majority which is ordinarily required for the most important decisions. The considerations which have been mentioned do not suggest, and it is difficult to imagine, any reason which might seem to require that the shareholders, if they agree that Heindorff House need no longer be retained by the company, shall go on to consider the price for which it may be sold and the terms of sale. These are matters of a kind which, in relation to all other property of the company, they have left by art. 107 to the directors as the body considered most fitted to deal with them, and the practical considerations are strong which point to the board as the appropriate authority within the company to handle negotiations with prospective purchasers. There is, in short, no reason to suppose that it is by accident that the operative words of the proviso are " the freehold property . . . shall not be sold ", and not " a sale of the freehold property . . . shall not be made ". The natural reference of the expression used is to sale considered as a method of disposal, and not to a particular sale. The conclusion must be that it is sale in general which is the subject of the proviso, and that accordingly the modifying words " without first obtaining the consent of its members " refer only to a consent to the radical alteration in the company's affairs which a sale of Heindorff House at any price and on any terms would necessarily bring about—a consent to sale in principle, and not a consent to any particular sale.

It was contended for the appellants that, even if this be so, it does not follow that a consent given in particular circumstances will continue to satisfy the proviso when circumstances alter, and that accordingly the consent which was given in 1950 cannot be acted upon as a subsisting consent in 1955. Support for this contention might be obtained either by finding a sufficient implication in art. 107 (13) itself or by construing the resolution of 1950 as referring only to a sale within a reasonable time. Neither in the article nor in the resolution, however, is there any foothold for the argument. It would be quite consistent with the view I have expressed of the purpose and effect of the proviso to art. 107 (13) to hold that a resolution of consent to the sale of Heindorff House might be limited in terms either to a specified period or to the continuance of a specified situation. But if it expresses consent to a sale without limit of time, and thus indicates rather an opinion that the time has passed for treating the ownership of Heindorff House as important to

the members than that the existing circumstances are opportune for sale at a good price and on satisfactory terms, it would be contrary to sound principles of construction to import a time limit which only speculative considerations could suggest.

A further submission made for the appellants was, in effect, that the proviso to art. 107 (13) is prima facie a withdrawal of power, and that a resolution having the effect of restoring a power prima facie withdrawn is properly described as an authority and not as a consent. (The use of the word " authorised " in the 1950 resolution was referred to as lending point to the distinction.) Hence, it was said, the use of the word " consent " in the proviso shows that what was intended was a consent to a particular sale, and not a resolution of a blanket character which would result in the directors having a general power of sale over Heindorff House and would thus, in effect, delete the proviso without observing the statutory requirement of a special resolution for altering the articles. The argument gives no weight to the considerations which have already been stated, and the distinction which it draws between consenting to the sale of a property which cannot be sold without consent and authorising the sale of a property which cannot be sold without authorisation is too fine to be accepted as a guide to the interpretation of the article : cf. *Tyler* v. *Ferris* (1). On the construction which allows of a general consent no question of altering the articles arises. The giving of the consent leaves the articles as they were ; the difference which it makes is in their application.

It need hardly be mentioned that the resolution passed in 1950 cannot be constructed as expressing a consent limited to a sale by the board as it was composed at that time. It is a consent to " the directors " selling Heindorff House, and the expression must have been intended to have the same meaning as it has in the articles, where it is defined to mean the directors for the time being of the company (art. 2). It is also clear that there is no point to be made in the plaintiffs' favour of the fact that they themselves became members of the company after the resolution had been passed. " The consent of its members " in art. 107 (13) cannot mean the consent of all its members considered as individuals, for so to construe the expression would make nonsense of the requirement of an extraordinary resolution ; the members are referred to in contradistinction to the directors, and the consent required is simply the consent of a general meeting. By acquiring their shares after the consent of 1950 had been given, the plaintiffs came in

(1) (1906) 1 K.B. 94.

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under articles which gave the directors power to sell Heindorff House, subject only to a condition which had already been fulfilled.

For these reasons I am of opinion that the decision of *Stanley* J. was correct and that the appeal should be dismissed with costs.

TAYLOR J. I agree entirely with the reasons prepared by *Kitto* J. in this matter and I do not wish to add anything.

Appeal dismissed with costs.

Solicitors for the appellants, *V. D. McCarthy & Co.*

Solicitors for the respondent directors and the respondent company, *King & Gill.*

Solicitors for the respondent Australia and New Zealand Bank Limited, *Morris, Fletcher & Cross.*

R. A. H.