20/85

IN THE PRIVY COUNCIL)
ON APPEAL FROM THE)
FULL COURT OF THE)
SUPREME COURT OF)
WESTERN AUSTRALIA)
APPEAL NO. 443 OF)
1984)

No. 7 of 1985

APPEAL TO HER MAJESTY
IN COUNCIL

B E T W E E N :

FORSAYTH OIL & GAS N.L.

Appellant
(Plaintiff)

-and-

LIVIA PTY. LTD.

Respondent
(Defendant)

CASE FOR THE APPELLANT

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CASE FOR THE APPELLANT

THE APPEAL

RECORD PAGE

1. This is an appeal from a decision of the Full Court of the Supreme Court of Western Australia (Brinsden J. and Kennedy J., Wallace J. dissenting) given on 19th December 1984, whereby the Full Court dismissed the Appellant's appeal from the decision of Franklyn J. given on 17th September, 1984 dismissing the Appellant's claim for declarations and granting certain declarations in favour of the Respondent.

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2. The dispute between the parties to the appeal arises out of the acquisition and purported exercise by the Respondent of options to acquire shares in the Appellant after the Appellant's capital had been reduced fortyfold.

THE FACTS

3. The Appellant, Forsayth Oil & Gas N.L. is a no liability company incorporated in the State of New South Wales under the Companies Act 1961 of that State on 11 December 1969.

4. The shares of the Appellant are, and have for many years been, listed on the Australian Associated Stock Exchanges.

5. The original nominal capital of the Appellant was $5,000,000 divided into 25,000,000 shares of 20¢ each.

6. Prior to 1980 the members of the Appellant exercised their power under Article 30 of the Articles of Association of the Appellant to increase the nominal share capital and consolidate the shares of the Appellant into a nominal capital of $50,000,000 divided into 50,000,000 shares of $1.00 each.

7. On 28 August 1980 the members of the Appellant in general meeting again exercised the power under Article 30 to increase the nominal capital of the Company from $50,000,000 divided into 50,000,000 shares of $1.00 each to $200,000,000 divided into 200,000,000 shares of $1.00 each.

Page 141

8. From time to time the Appellant issued shares to meet its capital requirements, some fully paid and others at a discount.

9. The Appellant also issued options to acquire fully paid $1.00 shares in its capital at an exercise price of 25¢ each exerciseable on or before 1 June 1984 ("June 1984 options").

Page 8.10

10. It is stated on the face of the certificates for the June 1984 options that the option holder is:

> "... the registered holder, subject to the Memorandum and Articles of Association of the Company, of the undernoted options over fully paid shares of $1.00 each subject to the conditions overleaf."

Page 23

11. The conditions on the reverse of the option certificate state, inter alia , that:

> "Shares issued on the exercise of options will be allotted ..... and will rank equally with the existing ordinary shares of the Company."

Page 24

12. Prior to 15 March, 1983 the issued capital of the Appellant comprised 112,389,727 fully paid shares of $1.00 each, 3,148,018 contributing shares of $1.00 each paid to 62¢ and 21,313,577 contributing shares of $1.00 each paid to 60¢ and forfeited through non-payment of calls.

Page 203.20 left column

13. Prior to 15 March, 1983 the Appellant also had on issue approximately 70,000,00 June 1984 options.

Page 35.10

14. The nominal value of the issued capital of the Appellant in March 1983 did not reflect the value of the assets of the company, which had been depleted by exploration expenditure.

Page 203.10 left column

15. By March 1983 the price of the Appellant's fully paid $1.00 shares on the member exchanges of the Australian Associated Stock Exchanges had fallen to 2¢ each. The June 1984 options were listed on these stock exchanges but were not being traded as they had no market value.

Pages 7.10, 8.15

16. A general meeting of the Appellant was convened on 15 March, 1983 to consider resolutions for the reduction of the issued capital of the Appellant from $127,129,644.36 (comprising 112,389,727 fully paid shares of $1.00 each, 3,148,018 contributing shares paid to 62 cents each and 21,313,577 contributing shares paid to 60 cents each and forfeited for non-payment of calls) to $3,179,815.13 (comprising 11,238,973 fully paid shares of 25 cents each, 314,802

contributing shares of 25 cents paid to 16 cents each and 2,131,358 contributing shares of 25 cents paid to 15 cents each and forfeited for non-payment of calls), a forty-fold reduction in issued capital effected by turning every ten $1.00 shares into one 25 cent share.

Page 204.30
left column

17. The resolutions for the reduction of capital were expressed to be subject to the approval of the Supreme Court of New South Wales under Section 123 of the Companies (New South Wales) Code. The resolutions were duly passed by the necessary majorities at the general meeting on 15 March, 1983.

Pages 17, 18
19

18. Resolution 9 on the Notice convening the general meeting dealt with optionholders in the following terms:-

> "Subject to the passing of resolutions (4), (5), (6) and (8) set out above that the holders of options granted by the Company to purchase fully paid $1.00 shares in the Company on or before 1st June 1984 at an exercise price of 25 cents be offered one option to acquire one fully paid 25 cent share exerciseable on or before 31st December 1985 at an exercise price of 20 cents per option for every 10 options currently held and where as a result of the foregoing any optionholder becomes entitled to a fraction of an option to acquire a fully paid 25 cent share such optionholder receive one option exerciseable on or before 31st December 1985 at an exercise price of 20 cents to purchase a fully paid share in respect of that fraction".

Page 204.20
right column

19. This resolution was also duly passed as an ordinary resolution.

Page 18.40

20. On 16 May 1983 the Supreme Court of New South Wales confirmed the reduction of capital in accordance with the terms of the resolutions passed at the general meeting.

Page 21

21. No meetings of optionholders or creditors were held with respect to the reduction of capital and the order of the Supreme Court of New South Wales expressly provided that Section 123(3) of the Companies (New South Wales) Code, governing the convening of meetings of creditors, should not apply to the reduction of capital before the Court.

Page 34.20,
Page 21.05

22. A Notice of Recall of Share Certificates, also setting out the invitation to optionholders, was sent to all shareholders and optionholders between 16 May 1983 and 10 June 1983.

Page 205,
Page 35.01

23. The invitation to optionholders was accepted, over the course of time, by the holders of some 62,000,000 of the approximately 70,000,000 issued June 1984 options.

Page 35.10

24. No steps were taken by the Appellant to have the June 1984 options removed from the lists of the Australian Associated Stock Exchanges. However, they ceased to be traded.

Page 35.25

25. After the reduction of capital, and with knowledge of that reduction, the Respondent, Livia Pty. Ltd., proceeded to acquire 1,272,170 June 1984 options from holders who had not taken up the Appellant's offer of new options.

Page 9.20,
Page 20.10

26. Under cover of a letter dated 13 April, 1984 the Respondent delivered to the Appellant certificates and transfers for 1,272,170 June 1984 options and requested the registration of the transfers of those options into its name.

Page 207

27. By further letters of 3rd and 7th May 1984 the Respondent confirmed that it had not accepted "the offer" made to the holders of June 1984 options, that it required the registration of the transfers of the options delivered to the Appellant and threatened legal action.

Page 26,
Page 28

28. The Appellant replied by letter dated 9 May 1984 informing the Respondent that it was attending to having the Respondent registered as the transferee of the options setting out the terms of the reduction of capital effected in 1983 and advising that the Appellant would be seeking declarations from the Supreme Court of Western Australia as to its obligations.

Page 208

29. An option certificate in the name of the Respondent for 127,217 options to acquire fully paid 25¢ shares in the Appellant at an exercise price of 20¢ each exerciseable on or before 31 December 1985 was forwarded by the Appellant to the Respondent on 29 March 1984.

Pages 215-6,
Page 209

30. The Respondent replied by letter dated 30 May 1984 asserting the exercise of its 1,270,170 June 1984 options by formal notice of exercise and application for shares under seal accompanied by bank cheques totalling $318,042.50. The penultimate paragraph of this letter invited the satisfaction of the Respondent's entitlement to $1,272,170 worth of the nominal share capital of the Appellant by the issue of either 1,272,170 fully paid shares of $1.00 each or 5,088,680 fully paid

ordinary shares of 25¢ each. The option certificate for 127,217 shares was also returned with the letter.

Pages 209-12

31. The application for shares and cheques were returned to the Respondent by the solicitors for the Appellant on 30 May 1984. The option certificate for 127,217 options to subscribe for fully paid 25¢ shares was enclosed with the application and cheques.

Pages 213-4

THE PROCEEDINGS

32. The Appellant commenced proceedings in the Supreme Court of Western Australia for a declaration as to the respective rights and liabilities of itself by Originating Summons No. 2252 of 1984 (originally Company No. 56 of 1984) and the Respondent brought a cross application by Originating Summons dated 3 August 1984 being No. 2253 of 1984 (originally Company No. 114 of 1984).

Pages 1-5

33. On its application the Appellant sought the following declarations:-

"1. A declaration that the liability of the Company to the holders of options granted by the company for the acquisition of $1.00 shares in the company is:-

(a) to grant to such holders, upon application by them, options to acquire 25¢ shares in the Company, on the basis that there be one option to acquire one 25¢ share in the Company at a price of 20¢ in exchange for every 10 options to acquire $1.00 shares in the Company thereupon surrendered to the Company, or

(b) to issue to such holders, upon their purporting to exercise an option to acquire $1.00 shares in the Company, 25¢ shares in the Company on the basis that

one 25¢ share in the Company be issued at a price of 20¢ in respect of every 10 options to acquire $1.00 shares in the Company sought to be exercised.

2. A declaration that the rights conferred upon the holders of options to acquire $1.00 shares in the Company have been varied by the reduction of capital of the Company effected pursuant to the special resolution of the Company on the 15th March, 1983 so that such holders are entitled to acquire one 25¢ share in the Company at the price of 20¢ each for every 10 options to acquire $1.00 shares in the Company which they may hold."

Pages 1-2

34. At first instance the Appellant's application was dismissed.

Page 41

35. The following additional declarations were sought by the Appellant on its appeal to the Full Court:

"Alternatively, that it be declared that the liability of the Appellant to the holders of options granted by the Appellant for the acquisition of ordinary shares in the Appellant was to issue to such holders upon their purporting to exercise an option to acquire ordinary shares in the Appellant, one ordinary share in the Appellant at a price of 25 cents each in respect of each option to acquire an ordinary share in the Appellant sought to be exercised, whatever the nominal or par value of the ordinary shares in the Appellant may be at the time of the exercise of the option.

Alternatively that the rights conferred upon the holders of options to acquire $1.00 shares in the Appellant were varied by the reduction of capital of the Appellant effected pursuant to the special resolution of the Appellant on the 15th March 1983

so that such holders were entitled to acquire one 25 cent share in the Appellant at a price of 25 cents each for every 10 options to acquire $1.00 shares in the Appellant which such option holders held.

C. Alternatively, that such holders were entitled to acquire one ordinary share in Appellant at a price of 25¢ each for each such option held."

Pages 62-3

36. The Respondent's cross application resulted in declarations being granted in its favour in the following terms (as varied by the Full Court):-

"1. Upon the registration of transfers to it of 1,272,170 options for $1.00 fully paid shares in Forsayth Oil & Gas N.L. at an exercise price of 25 cents, Livia Pty. Ltd. was entitled to be issued with an option certificate in its name certifying that it was the registered holder of 1,272,170 options for $1.00 fully paid shares in the said Forsayth Oil and Gas N.L. at an exercise price of 25 cents.

2. Upon the exercise by Livia Pty. Ltd. as it did on 30th May 1984 of the aforesaid 1,272,170 options for $1.00 fully paid shares in Forsayth Oil & Gas N.L. at an exercise price of 25 cents, Livia Pty. Ltd. was entitled subject to any defences which may be available to Forsayth Oil & Gas N.L. in respect of any claim by Livia Pty. Ltd. for specific performance to be issued with 1,272,170 $1.00 fully paid shares in the capital of the aforesaid Forsayth Oil & Gas N.L. and the said Forsayth Oil & Gas N.L. was liable, subject to any defences which may be available to Forsayth Oil & Gas N.L. in respect to any claim by Livia Pty. Ltd. for specific

performance, to take such steps as may be necessary to issue such shares to the said Livia Pty. Ltd. including the calling of any necessary general meetings of the said Forsayth Oil & Gas N.L. and using its best endeavours to procure the passage of such resolution as may be necessary to enable such shares to be issued to the said Livia Pty. Ltd."

Pages 40-41 and 70-71

37. This appeal is brought with the leave of the Full Court of the Supreme Court of Western Australia. The Appellant respectfully asks Her Majesty in Council to reverse the judgment of the Full Court and The Honourable Mr Justice Franklyn at first instance, dismiss the Respondent's originating summons, make declarations as sought by, or as sought in the alternative by, the Appellant and order the Respondent to pay the Appellant's costs here and below.

Pages 129-30

THE ARGUMENTS ADVANCED BY THE APPELLANT

The Appellant's arguments may be summarized as follows:-

38. That:

(a) because of the express terms of the option contract that the optionholder "is the registered holder, subject to the Memorandum and Articles of Association of the Company, of the undernoted options ... subject to the conditions overleaf" and that the "shares issued on the exercise of options will be allotted ... and will rank equally with the existing ordinary shares of the company.";

(b) alternatively, because of an implied term necessary to give commercial efficacy to the option contract; and

(c) alternatively, because the option was a conditional contract for the allotment of shares subject to the satisfaction of conditions subsequent giving the

optionholder an equitable interest in unallotted shares in the Appellant, which equitable interest was subject to reduction in the same manner as issued shares;

the reduction of capital caused a pro rata reduction in the entitlement of optionholders to subscribe for shares in the Appellant proportionate to the reduction of capital so that optionholders were entitled upon the exercise of their options to the same number of shares as they would have been entitled to if they had exercised their options immediately prior to the reduction of capital of 15 March 1983.

39. Alternatively, because of the express terms of the option contract that, "shares issued on the exercise of options will be allotted ... and will rank equally with the existing ordinary shares of the company." after the reduction of capital an optionholder was entitled to receive upon the exercise of his option in accordance with its terms a number of shares equal to the number of options exercised by him but equal in all respects to the existing ordinary shares of the Appellant including, inter alia, their par or nominal value.

General Submissions

40. A share in a company is, amongst other things, an aliquot proportion of the company's share capital and an expression of the right of the holder of that share to participate proportionately in any distribution of the nett assets of the company on winding up [Archibald Howie Pty. Ltd. v. Commissioner of Stamp Duties (N.S.W.) (1948) 77 C.L.R. 143 at 152.2].

41. A share has been described as a "bundle of rights" [see Re Banque des Marchands de Moscou (Koupetchesky) [1958] Ch. 182 at p.200]. There are three major rights attaching to a share:

(1) the right to a proportion of the surplus assets of the company on winding up (the corpus);

(2) a right to receive income by way of dividends when declared out of the profits of the Company (income); and

(3) a right to participate in the management and control of the company (voting).

42. Each of these rights is subject to any particular provisions of the Company conferring or imposing on all or any particular shares some special advantage or restriction. However, in the absence of any special provision it is presumed that shares are equal in their rights as to corpus, income and voting [see: Gower's Principles of Modern Company Law 4th Edition p.403].

43. The Appellant submits that an option contract is either:-

(a) a contract for the sale of property (or for the allotment of shares) subject to the satisfaction of a condition subsequent (being the fulfilment of the conditions of exercise); or

(b) an offer to sell property (or allot shares) together with a contract not to revoke that offer during the period of the option.

[Laybutt v. Amoco Australia Pty. Ltd. (1974) 132 C.L.R. 57, per Gibbs J. at p.p. 71-74 and the cases cited therein,; Halsbury's Laws of England 4th edition Volume 9, para. 235 and Volume 42, para. 25, and in particular Helby v. Matthews [1895] A.C. 471 at 475-6 and 480].

44. On either of the views expressed in paragraph 43 a holder of an option to acquire shares is entitled, upon the proper exercise of his options, to be issued with a number of shares which will give him an aliquot proportion of the company's shares capital, being the proportion that the number of options exercised by him bears to the total number of issued shares.

45. An option to subscribe for shares is a means by which a person may, for the payment of a small sum, obtain the right (exerciseable by a certain date) to acquire shares (for a known sum) and thereby ensure that, if the value of the issuing company's shares exceeds the option exercise price , the optionholder may acquire shares at a known price.

46. An option does not, until exercised, confer on its holder any right to vote, to interfere in the running of the affairs of the issuing company or to participate in any distribution of nett assets of the company upon winding up. [Hirsch and Co. v. Burns and Anor. (1897) 77 L.T. 377]. It does, however, confer a means of obtaining these rights by satisfaction of the conditions of exercise.

47. An option of the type issued by the Appellant does not entitle its holder to any fixed proportion of the share capital of the issuing company, that company being free from time to time to issue more shares as it sees fit, the extent of any such issues being a relevant consideration for the optionholder in deciding whether or not to exercise the option.

48. The Appellant has at all times had only one class of shares, namely ordinary shares, although the nominal value of those shares has varied from time to time.

A. Proportionate Reduction of Entitlement

(a) Express Term for Reduction of Entitlement

49. The terms and conditions of the contract for the June 1984 options were set out in the option certificate issued by the Appellant to record the grant of the options. This standard form, and the conditions therein, were approved by the Australian Associated Stock Exchanges and employed by numerous public listed companies for options issued by them.

50. The proper time for the construction of the words used in the contract for the June 1984 options is the time of the creation of those options and not any later time.

51. The June 1984 options were issued for valuable consideration and were, in any event, issued under the seal of the Appellant.

52. The application for shares contained in the certificate for the June 1984 options, which was required to be completed upon exercise of the options, expressly provided that the optionholder, upon exercise, agreed to accept the shares allotted "subject to the company's Memorandum and Articles of Association". It was also provided on the face of the certificate that the optionholder "is the registered holder, subject to the Memorandum and Articles of Association of the company, of the undernoted options over fully paid shares".

Page 23.
Page 24.5
right column

53. It is expressly provided in Article 30(d) of the Articles of Association of the Appellant that the members of the Appellant in general meeting may, by ordinary resolution, subdivide its shares into shares of smaller nominal amount.

Page 158.10

54. It is provided in Section 123 of the Companies (New South Wales) Code and Article 34 of the Articles of Association of the Appellant that the members of the Appellant may, by special resolution, reduce the share capital of the company.

Page 159.15

55. The rights of the holders of June 1984 options were thus expressly given subject to the right of the Appellant's members to exercise the right and power under Section 123 of the Companies (New South Wales) Code and Articles 30 and 34 to reduce and subdivide the capital of the Appellant.

56. The holder of each June 1984 option is deemed to have acquired his option in the knowledge of the right of the Appellant's members in general meeting to resolve to reduce and subdivide the Appellant's capital, that right being contained in a public document of which every person had, at the time of the issue of the June 1984 options, constructive notice [Ernest v. Nicholls (1857) 6 H.L.C. 401 at 419].

57. The express terms of the contract for the June 1984 options contemplated the reduction of capital effected by the Appellant on 15 March 1983 as one of the matters which the Appellant could effect in accordance with its Memorandum and Articles of Association.

58. The Appellant therefore submits that the effect of the term "subject to the Memorandum and Articles of Association of the Company" on the certificate for the June 1984 options was to reduce proportionally the entitlement of the holders of the June 1984 options to acquire shares in the Appellant so that such holders remained at all times entitled to acquire an aliquot proportion of the Appellant's share capital, which proportion was the same as the proportion of the capital of the Appellant to which they were entitled immediately prior to the reduction of capital.

59. Further, the conditions of the contract for the June 1984 options state that upon exercise the shares issued will "rank equally with the existing ordinary shares of the company".

Page 24
right column

60. The word "existing" in this context must, it is submitted, mean "existing at the time of issue of the shares" and not "existing at the time of creation of the options" as the evident commercial purpose of

this term is that the shares, when issued, should be capable of being sold in the market place on the same basis as the other issued shares of the company.

61. It follows that, to rank equally in all respects with the shares existing at the time of issue, the shares issued pursuant to the exercise of June 1984 options should have the same par or nominal value and the same voting rights as existing shares at the time of issue and the optionholders should be entitled, by the issue of shares upon the exercise of their options, to the same aliquot proportion of the issued share capital of the Appellant as they were entitled to at the time of issue of their June 1984 options, subject to the effect of further issues of shares. This would require the entitlement of optionholders to subscribe for shares to be reduced in like manner to holders of issued shares.

62. It may be a necessary corollary to the foregoing that the liabilities of the optionholders on the exercise of their options should also be reduced so that the subscription price for each 25¢ share subscribed for is 6.25¢ or 1/40th of the total subscription price for 10 $1.00 shares in accordance with the June 1984 options, (being $2.50).

63. As it was, the invitation to June 1984 optionholders at the time of the reduction of capital called upon them to pay 20¢ in order to exercise the new options to be issued in place of the June 1984 options. 20¢ represented the anticipated market value of the new 25¢ ordinary shares on the basis of the market value of the Appellant's $1.00 ordinary shares prior to the reduction. In any event, the listing requirements of the Australian Associated Stock Exchanges require the minimum exercise price for listed options to be 20¢.

64. It is for this reason that the declarations sought are in terms that the exercise price payable by the Respondent is 20¢. The Appellant accepts that as a matter of proper construction of the option contract the exercise price may be 6.25¢ on the argument expressed above. In this way, the

discount offered to June 1984 optionholders is proportionately preserved.

(b) Implied Term for Reduction of Entitlement

65. Alternatively, the Appellant submits that it was the nature of the June 1984 options, in like manner to all listed options in public companies (each of which entitles the holder to subscribe for one share by a certain date at a certain price), that they were granted and acquired for the purpose of making speculative gains through movements in their market price, reflecting movements in the market price of the shares in the Appellant which the holders of those options were entitled to acquire at favourable prices.

66. There is therefore no inconsistency with the existing terms of the contract for the June 1984 options that the entitlement of an optionholder should be reduced pro rata to any reduction of the share capital of the Appellant.

67. In all the circumstances it is both commercially convenient and reasonable that the contract for the June 1984 options should be subject to an implied term that the entitlement of the holder be reduced pro rata to any reduction of the share capital of the Appellant, and such a term would be consistent with the purpose for the grant and acquisition of the June 1984 options stated above.

68. Conversely, no reasonable commercial man could contemplate that a reduction in the Appellant's share capital would have the fortuitous effect of increasing the right of an optionholder to subscribe for shares in the Appellant having an aliquot proportionate entitlement in the share capital of the Appellant forty times higher than at the time of the grant of the options (disregarding subsequent issues of shares)[Codelfa Construction Pty. Ltd. v. State Rail Authority of New South Wales - (1982) 56 ALJR 459].

69. If such a term is not implied, the rights of optionholders upon the reduction of capital being effected, would have increased fortyfold. That is to say, upon exercising

their options they would receive an aliquot proportion of the Appellant's share capital forty times greater than they would have been entitled to beforehand. In the case of the number of options acquired by the Respondent a right to acquire 0.99% of the capital and 1.1% of the voting rights would be converted to a right to 28% of the capital and 10% of the votes (these calculations being made immediately before and immediately after the reduction).

70. The Appellant submits that a term should be implied in the contract for the June 1984 options that upon a reduction of capital the entitlement of the holder of the options to acquire shares in the capital of the Appellant will be reduced in proportion to the reduction of the issued share capital of the Appellant so as to ensure that the optionholder is entitled, upon the exercise of his options after the reduction of capital, to the same aliquot proportion of the share capital of the Appellant as he would have been entitled to prior to the reduction of capital (subject to further issues of shares). The possible applicability of the corollary stated in paragraph 21 is acknowledged.

71. Alternatively the Appellant submits that a term should be implied in the option contract that the entitlement of the option holder remained open for acceptance until 1st June 1984 or until such earlier time as the Appellant, in accordance with its Memorandum and Articles of Association, altered its capital so that the ordinary shares of the Appellant ceased to have a nominal value of $1.00 each.

(c) Condition of Contract

72. Alternatively, the June 1984 options constitute a contract for the allotment of shares subject to the satisfaction of the conditions subsequent to completion in accordance with the terms of the option contract.

73. That being so, if the contract is of a kind capable of being the subject of an order for specific performance, then the optionholder has an equitable interest in a number of unallotted shares in the capital of

the Appellant equal to the number of options held by him from the moment of the grant of the option [Laybutt v. Amoco Australia Pty. Ltd. (1974) 132 CLR 57 per Gibbs J. at p.p. 75-76 and the authorities there cited].

74. As no optionholder is registered nor, pending the satisfaction of the conditions subsequent, entitled to be registered as a member with respect to those shares the Appellant was not required to recognise any rights of an optionholder with respect to the shares the subject of his option (see Article 10).

75. The shares to be issued upon the exercise of the June 1984 options were, however, for the reasons set out above subject to the Memorandum and Articles of Association of the Appellant.

76. Those shares were, accordingly, liable to be affected by any reduction in the capital of the Appellant, including a reduction in nominal capital, effected by the registered shareholders in general meeting.

77. The rights of the holders of June 1984 options to subscribe for shares in the Appellant were accordingly reduced in the same manner as the shares of the shareholdings of existing ordinary shareholders were reduced by the reconstruction of the Appellant's capital on 15 March 1983.

B. Shares Ranking Equally

78. It is an express term of the contract for the June 1984 options that "shares issued on the exercise of options will be allotted .... and will rank equally with the existing ordinary shares of the company".

79. Following the reconstruction of the Appellant's capital on 15 March 1983 the "existing ordinary shares of the company" have a nominal or par value of 25¢.

80. The Appellant contends that an option to acquire shares ranking equally with existing ordinary shares is properly to be construed as being an option to acquire no more than ordinary shares and that, in so

construing the option, the denomination of those ordinary shares is irrelevant.

81. The Appellant alternatively submits that, following the reconstruction of the Appellant's capital on 15 March 1983, optionholders became entitled to one fully paid 25¢ share at an exercise price of 25¢ upon the exercise of their option.

GROUNDS

82. The Appellant therefore respectfully submits that the Full Court was in error:-

A. In holding that the holders of options to acquire fully paid shares of $1.00 each in the capital of the Appellant at an exercise price of 25¢ each exercisable on or before 1st June 1984 and ranking equally with the existing ordinary shares of the Appellant were entitled, after the reduction of the Appellant's capital on 15th March 1983, to acquire shares with a nominal or par value of $1.00.

B. In holding that the Respondent as the holder of 1,272,170 options to acquire fully paid shares of $1.00 each in the capital of the Appellant at an exercise price of 25¢ each was entitled after the reduction of the Appellant's capital on 15th March 1983 to acquire 1,272,170 shares with a nominal or par value of $1.00 each.

C. In that the Full Court should have held that after the reduction of the Appellant's capital referred to above the holders of options to acquire fully paid shares of $1.00 each in the capital of the Appellant were only entitled, upon the exercise of those options, to be issued with one fully paid 25¢ share for each ten options to acquire a fully paid $1.00 share held, as a result of the reduction of the capital of the Appellant whereby shares were subdivided and capital written off so that ten fully paid shares with a nominal or par value of $1.00 each became one fully paid share with a nominal or par value of 25¢.

D. Alternatively, in that the Full Court should have held that it was an implied term of the option contract that, upon any reduction of the issued capital of the Appellant, the entitlement of an option holder to receive fully paid shares in the capital of the Appellant upon the exercise of his options would be varied in proportion to the reduction of capital so that the option holder would receive the same number of shares of like value as if he had exercised his options prior to the reduction of capital.

E. Alternatively, in not holding that the Respondent was not and never had been entitled to exercise the options which it had purported to acquire, because the reduction of capital by the Appellant, which rendered the Appellant without the approval of its members in general meeting unable to fulfil the option contract, constituted a revocation of the options then on issue rendering those options incapable of exercise and giving rise to a cause of action in damages in the option holder so that the Respondent became the assignee of a mere chose in action in damages for breach of the contract.

F. Alternatively, in that the Full Court should have held that after the reduction of the Appellant's capital referred to above the holders of options to acquire fully paid shares of $1.00 each remained the holders of options to acquire the same number of fully paid ordinary shares in the capital of the Appellant having a nominal or par value equal to that of the existing ordinary shares in the capital of the Appellant at the time of exercise of those options and otherwise ranking equally in all respects with such shares.

83. For the reasons advanced the Appellant submits that the judgment of the Full Court should be set aside and that there should be declarations as sought by the Appellant.

for R.J. Meadows