20/85

IN THE PRIVY COUNCIL No. 7 of 1985

O N A P P E A L

FROM THE FULL COURT OF
THE SUPREME COURT OF WESTERN AUSTRALIA

B E T W E E N :

FORSAYTH OIL AND GAS N.L. Appellant

AND

LIVIA PTY. LTD Respondent

CASE FOR THE RESPONDENT

INTRODUCTION AND ABSTRACT

1. This Appeal is from the decision of the Full Court of the Supreme Court of Western Australia delivered on
pp 70-72 19th December, 1984 which varied the Judgment of the Honourable Mr. Justice Franklyn delivered 17th
pp 40,41 September, 1984 but otherwise dismissed the present Appellant's appeal from that Judgment and confirmed the declarations set out in the Record.

2. In response to an originating summons issued by
pp 1-3 the Appellant seeking certain declarations with respect to its obligations and the Respondent's rights as a holder of options over unissued shares in the
pp 4,5 Appellant, the Respondent took out a Cross-Summons and sought and obtained declarations as to its rights in consolidated proceedings.

3. The Appellant sought declarations to the effect that the rights of optionholders had been varied by a reduction in capital effected by the Appellant's
pp 1-3 shareholders in general meeting, so that each option holder was entitled to acquire one 25 cent share in the Appellant at a price of 20 cents each for every 10 options to acquire $1.00 shares in the Appellant which they held.

4. The Respondent sought declarations that it was
pp 4,5
pp 40 entitled to the benefit of its option contract, and

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that the Appellant was bound to perform its contract with the Respondent in accordance with the express terms thereof.

5. The orders and declarations duly made by the Honourable Mr. Justice Franklyn in the Supreme Court of Western Australia, and confirmed by a majority in the Full Court (The Honourable Mr. Justice Brinsden and the Honourable Mr. Justice Kennedy with the Honourable Mr. Justice Wallace dissenting) on appeal, held that the Appellant was bound to perform its contract with the Respondent in accordance with its terms. pp 40,41 pp 70-72

SUMMARY OF RELEVANT FACTS

6. (a) The Appellant is a no liability company which was incorporated in New South Wales on 11th December, 1969 and which, prior to the 15th March, 1983, had a nominal share capital of $200,000,000 divided into 200,000,000 shares of $1.00 each, of which 112,364,727 shares had been issued and were fully paid, and 3,148,018 shares had been issued and were paid to 62¢ each. (A further 21,313,577 shares paid to 60¢ each had been forfeited by reason of non-payment of calls). p 12 p 17 lines 25-31 p 18 lines 4-23

(b) The Appellant had also granted approximately 70,000,000 options to acquire $1.00 fully paid shares in the Company which were pp 34,35

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expressed to be exercisable at any time prior to 1st June, 1984 on payment of 25¢ each. Both the shares and the options were listed on the Australian Associated Stock Exchanges.

(c) At the annual general meeting of shareholders
pp 17-19 of the Appellant held on the 15th March, 1983 a number of special resolutions were passed which, inter alia, had the effect of reducing the Appellant's aforesaid nominal capital to $20,000,000 divided into 80,000,000 shares of 25¢ each, of which 11,236,473 shares were issued and fully paid and 314,802 shares were
pp 20,21 issued and paid to 16¢ each. (A further 2,131,358 shares paid to 15¢ being forfeited through non-payment of the aforesaid call). The reduction of capital was approved by the Supreme Court of New South Wales on 16th May, 1983.

(d) The Notice of Meeting which was forwarded to shareholders advising of the aforesaid general meeting contained the following passage:-

"Shareholders will also be asked to authorise the Company to offer optionholders a new option in lieu of those presently held.
p 203 lines 48-53 Optionholders are to be offered one new

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option to acquire one fully paid 25¢ share at an exercise price of 20¢ per option for every ten options to acquire $1.00 fully paid shares currently held."

(e) At the meeting it was resolved as an ordinary resolution that the holders of the options be offered one (1) new option to acquire one (1) fully paid 25¢ share exercisable on or before the 31st December, 1985 at an exercise price of 20¢ each for every TEN (10) options then held. p 18 lines 45-56

(f) Holders of the options were not consulted with respect to the reconstruction or the offer which was put to them. No meetings of optionholders were ever called or held. p 34 lines 24-28

(g) Both shareholders and optionholders were subsequently sent a notice from the Appellant headed "RECALL OF CERTIFICATES" which, inter alia, contained the following paragraph:- p 205 lines 19-21

"In addition, the holders of options to purchase one fully paid $1.00 share in the Company on or before June 1 1984 at an exercise price of 25 cents per option are hereby offered one option, for every ten options currently held, to purchase one fully

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paid 25 cent share exercisable on or before December 31 1985 at an exercise price of 20 cents per option."

p 35 lines 10-16

(h) Holders of approximately 62,000,000 of the then existing options (approximately 70,000,000) accepted the offer made to them.

pp 209-212

(i) Subsequent to the aforesaid general meeting and reduction of capital the Respondent acquired 1,272,170 of the original options, lodged with the Appellant certificates and transfers in respect of such options for registration on 13th April, 1984 and duly exercised such options on the 30th May, 1984.

p 30 lines 1-11

p 208

pp 213,214

(j) The Appellant refused to accept the entitlement of the Respondent to be registered as the holder of 1,272,170 original options or to exercise such options, and issued an originating summons (No. 2252 of 1984) seeking declarations concerning its liability to optionholders namely:

pp 1-3

"(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:-

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(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

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the Company at a price of 20 cents each for every 10 options to acquire $1.00 shares in the Company which they may hold."

(k) The Respondent subsequently issued an originating summons (No. 2253 of 1984) which
pp 4,5 sought alternative declarations, and was consolidated and heard with the Appellant's originating summons on the 6th August, 1984 by the Honourable Mr. Justice Franklyn.

(l) On 17th September, 1984 the Honourable Mr. Justice Franklyn delivered a reserved
pp 42-59 judgment and made the following declarations on the Respondent's originating summons (No. 2253 of 1984):-

"(1) Upon the registration of transfers to it of 1,272,170 options for $1.00 fully paid shares in FORSAYTH OIL & GAS NL, at
pp 40,41 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 & GAS NL at an exercise price of 25 cents.

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(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 NL at an exercise price of 25 cents, LIVIA PTY LTD was entitled to be issued with 1,272,170 $1.00 fully paid shares in the capital of the aforesaid FORSAYTH OIL & GAS NL and the said FORSAYTH OIL & GAS NL was liable 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 NL and using it's best endeavours to procure the passage of such resolutions as may be necessary to enable such shares to be issued to the said LIVIA PTY LTD."

(m) On the same date the Honourable Mr. Justice Franklyn ordered that the Appellant's originating summons (No. 2252 of 1984) be dismissed. p 41

THE ISSUES ON THIS APPEAL

7. On the Respondent's case this appeal raises two basic questions which were resolved in the Respondent's favour in the Courts below:-

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(1) Whether upon the registration of transfers to it of 1,272,170 options for $1.00 fully paid shares in the Appellant, at an exercise price of 25 cents, the Respondent 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 Appellant at an exercise price of 25 cents.

(2) Whether upon the exercise by the Respondent, as it did on 30th May, 1984, of the aforesaid options the Respondent was entitled (subject to any defences which may be available to the Appellant in respect of any claim by the Respondent for specific performance) to be issued with 1,272,170 fully paid $1.00 shares in the capital of the Appellant and the Appellant was liable to take such steps as may be neceesary to issue such shares to the Respondent.

THE NOTICE OF APPEAL TO THE FULL COURT

8. By its Notice of Appeal to the Full Supreme Court of Western Australia the Appellant sought to set aside
pp 60-69 the judgment of the Honourable Mr. Justice Franklyn, and in lieu thereof sought declarations to the effect that the rights of the holders of the options were:-

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(a) Varied by the aforesaid reduction in capital by the Appellant so that such holders were entitled to acquire ONE (1) 25¢ share in the Company at a price of 20¢ each for each TEN (10) options which they held; p 61 lines 20-23 p 62 lines 1-9

or alternatively

(b) To receive ONE (1) ordinary share at a price of 25¢ each in respect of each option sought to be exercised, whatever the nominal or par value of the ordinary shares in the Appellant at the time of the exercise of the option; p 62 lines 10-22

or alternatively

(c) Varied by the aforesaid reduction of capital so that such holders were entitled to acquire ONE (1) 25¢ share in the Appellant at a price of 25¢ each for each TEN (10) options which they held; p 62 line 23 p 63 lines 1-9

THE OPTION CERTIFICATE

9. The declarations sought by the Appellant in its Notice of Appeal and the submissions made by the Appellant to the Full Court and summarised in paragraph 10 below, were based on two statements appearing in the Option Certificate. These were:-

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(a) On the face of the said Certificate,

"This is to certify that the abovenamed is the registered holder, subject to the
p 23 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."; and

(b) On the reverse of the Certificate (under the heading "Conditions Upon Which The Options May Be Exercised, And The Effect Of Such Exercise"),

"Shares issued on the exercise of options will be allotted after receipt of all
p 24 relevant documents and payments and will rank equally with the existing ordinary shares of the Company."

THE APPELLANT'S SUBMISSIONS TO THE FULL COURT

10. The Appellant's submissions to the Full Court were that:-

(a) As the Appellant had power under Article 34 of its Articles of Association to reduce its capital, the Respondent's right to be allotted shares on exercise of its options was subject to that power and, therefore,

Brinsden J
pp 94,95,96
pp 102,103

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upon the reduction of capital being effected, optionholders became entitled to be issued a number of shares which was identical to the number of shares the optionholder would have had after the reduction of capital if it had exercised its option before the reduction of capital (i.e. ONE (1) 25¢ ordinary share for every TEN (10) $1.00 ordinary shares that the Respondent would have been entitled to before the reduction had it then exercised its option);

Kennedy J p 118

or alternatively

(b) It was a condition of the option that upon exercise the shares issued would rank equally with the existing ordinary shares of the Appellant and in order to rank equally, the number of shares issued must necessarily take into account the reduction of capital;

Brinsden J pp 100-102

Kennedy J pp 120,121

or alternatively

(c) As the Appellant had reduced the par or nominal value of its ordinary shares from $1.00 to 25¢ pursuant to its power to reduce its capital, the optionholders became entitled to the stated number of ordinary shares having a par or nominal value of 25¢

Brinsden J pp 94,95

Kennedy J p 122

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(i.e. ONE (1) 25¢ share for each option exercised);

or alternatively

(d) As the Respondent acquired its options after the reduction of capital and with knowledge of it, it must be taken as having agreed to be allotted the reduced number of 25¢ shares set out in (a) above;

Brinsden J p 95 pp 102,103

Kennedy J p 123

or alternatively

(e) The contract between the Appellant and the Respondent was frustrated by the action of the Appellant in reducing its capital;

Brinsden J pp 96,97

Kennedy J p 122

or alternatively

(f) The contract between the Appellant and the Respondent was satisfied by the Appellant offering the Respondent the number of shares in the Appellant after the reduction of capital which was appropriate to the number of options held by the Respondent.

11. During the course of his submissions in Reply Senior Counsel for the Appellant raised a contention that a term should be implied in the option contract, which was expressed in the alternative as either:-

Kennedy J p 123

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(i) that the options should only remain open until 1st June, 1984 unless before that time the Company had altered its capital so that the ordinary shares of the Company ceased to have a nominal value of $1.00; Brinsden J pp 97,98 Kennedy J pp 123,124

or alternatively

(ii) that upon the reconstruction the options were to equal the right given to any holder of a $1.00 share in the capital before reconstruction, having regard to the price payable by the option holder.

Each of the Appellant's submissions was rejected by the majority in the Full Court.

RESPONDENT'S SUBMISSIONS

General

12. (a) The option contract as evidenced by the option certificate provided for the issue of ONE (1) $1.00 share at the price of 25¢ in respect of each option (i.e. each share was to be issued at a discount of 75¢) upon the due exercise of the option. pp 23-24 Franklyn J pp 51,52 pp 55,56

(b) At all times since the reconstruction the Appellant has had the ability to issue fully p 158 lines 5-7

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Franklyn J pp 58,59 Brinsden J p 99 Kennedy J pp 123,124

paid shares of $1.00 at the price of 25¢ each to any optionholder who exercised his option and was bound to do so.

Hilder -v- Dexter (1902) AC 474 at 482 per Lord Brampton

Ballos -v- Theophilos (1957) 98 CLR 193 at 207 per Williams J.

Laybutt -v- Amoco Australia Ltd. (1974) 132 CLR 57 at 71 per Gibbs J. (as he then was)

Secured Income Real Estate (Australia) Ltd. -v- St. Martins Investments Ltd. (1979) 144 CLR 596 at 607-608 per Mason J.

Northern Counties Securities Ltd. -v- Jackson & Steeple Ltd. (1974) 1 WLR 1133 at 1142-1145 per Walton J.

(c) The resolutions passed by the shareholders of the Appellant on 15th March, 1983 as approved by the Supreme Court of New South Wales on the 16th May, 1983 did not affect, or purport to affect, the terms of the option contract.

pp 17-19

Franklyn J p 53 Kennedy J pp 118,119

(d) The resolution which authorised the Appellant to make an offer to optionholders to exchange their existing options for new options had no effect and did not purport to have any effect upon the terms of the option contract, as it did no more than authorise the Appellant to

p 18 lines 49-56

Franklyn J p 54

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make an offer to optionholders which they were free to accept or reject. Kennedy J pp 118,119

(e) On the proper construction of the option contract, the Appellant was obliged to issue to the Respondent fully paid $1.00 shares in the Appellant at a price of 25¢ each and not shares in number or of the denomination or at the price contended for by the Appellant. pp 23,24 Franklyn J pp 54,55 Brinsden J pp 104,105 Kennedy J pp 124,125

(f) The contract specified $1.00 shares and not merely shares of the par value issued or unissued by the Appellant at the time of exercise. p 23

(g) The par value of the fully paid shares the subject of the option contract entitled the optionholder to shares which, when issued, would give him an aliquot portion of the Appellant's share capital: Archibald Howie Pty. Ltd. v. The Commissioner of Stamp Duties (NSW) (1948) 77CLR 143 at pp 152/153 per Dixon J. (as he then was). p 199 lines 1-20 p 194 lines 2-8

(h) All the various alternative declarations advanced by the Appellant involve a variation of the contract with respect to subject matter and price, whether in the actual sum Brinsden J pp 95,96 Kennedy J p 118,122

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to be paid per share, or in the relationship between that sum and the par value of the shares to be issued, and ignore altogether the 75% discount contemplated by the option contract.

(i) There is no provision in the option contract nor any power in the Memorandum and Articles of Association which would enable the Appellant unilaterally to vary the par value, the price payable per share, or the relationship between the price and the par value of the shares to be issued.

(j) The Appellant at no stage purported to pass any resolution to so vary the existing contract.

(k) Upon presentation to the Appellant by the Respondent of transfers to it of 1,272,170 options for $1.00 fully paid shares in the Appellant together with the relevant option certificates the Respondent was entitled to have such transfers registered, to be entered in the Appellant's register of optionholders under S.131 of the Companies (New South Wales) Code and to be issued with an option certificate certifying that the Respondent

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was the registered holder of 1,272,170 options for fully paid shares in the Appellant at an exercise price of 25 cents.

(l) The Respondent duly exercised the said options on 30th May, 1984.

(m) Upon the exercise by the Respondent of such options the Respondent was entitled (subject to any defences which may be available to the Appellant in respect of any claim by the Respondent for specific performance) to be issued with 1,272,170 fully paid shares in the capital of the Appellant and the Appellant was liable to take such steps as may be necessary to issue such shares to the Respondent.

The Option Certificate

13. (a) The words referred to in paragraph 9(a) above certify that the person named therein is the "registered holder" of the stated options, "subject to the Memorandum and Articles of Association of the Company". The options are expressed to be "each subject to the conditions overleaf". p 23

(b) There is an important distinction between:-

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(i) the terms of the option contract (i.e. as to price, subject matter, manner of exercise etc.); and

(ii) the financial structure of the Appellant and the powers with respect to those matters in its Memorandum and Articles of Association.

(c) By providing that the optionholder is the registered holder "subject to the Memorandum and Articles of Association of the Company" of the subject options, the option contract did no more than provide that the Appellant reserved to itself the right to exercise all or any of the powers conferred on it under the Memorandum and Articles of Association.

p.23

(d) Those words did no more than make clear that the Appellant could do what it could have done in the absence of those words, namely carry on business as it saw fit and exercise its powers under the Memorandum and Articles of Association, including the power either to increase or to reduce its capital: Hirsch and Co. v. Burns (1897) 77 LT 377 at 378 per Lord Halsbury LC; at 328 per Lord Watson, at 381-382 per Lord Herschell; at 383 per Lord Davey;

Brinsden J p 94

Kennedy J pp 119,120

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(e) The Memorandum and Articles of Association of a company constitute a contract between the company and its members and between the members inter se. However the Memorandum and Articles of Association do not have the same effect in relation to a contract between the company and an outsider, such as the holder of an option over unissued shares in the company.

(f) There is no power in the Memorandum and Articles of Association which authorises the Appellant to unilaterally vary the terms of an option contract with an outsider, such as the Respondent. Further it is not a consequence of the exercise by the Appellant of a power conferred on it under the Memorandum and Articles of Association that the contract will be varied. Kennedy J p 120

14. (a) The condition that the shares issued upon exercise of the option would rank equally with the existing ordinary shares appears on the reverse of the Certificate under the heading "Conditions Upon Which The Options May Be Exercised And The Effect Of Such Exercise", and does not relate to, purport to affect the subject matter of the option Brinsden J pp 100-102 Kennedy J pp 120-122

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contract, or imply that the subject matter of the contract itself may change or be changed.

(b) The effect of the condition is that the existing ordinary shares are to carry no preferential or special rights or privileges under the Memorandum and Articles of

p 158 lines 24-30

Association as against the ordinary shares to be issued to those exercising their options,

p 159 lines 1,2

and that such ordinary shares to be issued to optionholders would not be issued with any special rights or privileges.

(c) This condition is for the benefit and protection of optionholders, who otherwise

pp 158,159

may risk having shares issued to them "upon such terms and conditions and with such rights or privileges attached thereto as the Directors shall determine, and in particular such shares may be issued ... with a preferential or qualified right to dividends and in the distribution of assets of the Company." (see Article 31).

(d) The condition ensures that the Memorandum and Articles of Association of the Company will bear on and be applied equally with respect to existing ordinary shares and ordinary

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shares to be issued pursuant to the exercise of options.

(e) Both prior to and following the reconstruction the Appellant had only issued ordinary shares, but not all of such shares were fully paid up. Prior to the reconstruction there were fully paid ordinary shares of $1.00 each, partly paid ordinary $1.00 shares paid to 62¢ each, and partly paid ordinary $1.00 shares paid to 60¢ each and forfeited through non-payment of prior calls. All ranked equally under the Memorandum and Articles of Association in that none carried any preferential or qualified rights, and the articles applied equally to all ordinary shares, although the consequences of such equal application depended on the extent to which a share was paid up. (see Article 145 (a)). This position was not altered by the reconstruction which had the effect of converting the issued shares of $1.00 each to shares of 25¢ each.

p 18 lines 7-26

(f) Accordingly any ordinary shares paid to $1.00 each issued to exercising optionholders would be subject to the same terms of the Memorandum and Articles of Association as any

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other ordinary shares although the result of the application of certain articles may produce different consequences where the shares are not fully paid up.

(g) The suggestion that the words "rank equally" should be read to mean that the actual subject matter of the contract may be transmogrified or changed, or the paid up value of the shares be reduced, or the discount from par value contemplated by the option contract be ignored altogether at the election of the Appellant, was argued for the first time before the Full Court. It is submitted that such a suggestion is without foundation.

The Notice of Appeal to the Full Court

15. (a) The declaration claimed by the Appellant in paragraph 1(1) of the Notice of Appeal to the Full Court sought to impose on optionholders
pp 61,62 a mandatory acceptance of the offer which was made to them, notwithstanding the rejection of that offer by the Respondent.

(b) The declaration claimed by the Appellant in the alternative in paragraph 1 of the Notice
p 62 of Appeal sought to change the subject matter

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of the contract from $1.00 shares to 25¢ shares, and ignored the agreed discount on purchase price altogether.

(c) The declaration claimed in paragraph 2 of the Notice of Appeal sought to treat option holders as if they had in fact exercised their options prior to the reduction of capital, notwithstanding the fact that the Respondent did not so exercise its options, and the express term of the option contract that "the options may be exercised at any time prior to the 1st June, 1984". p 63 p 24

The Appellant's Contentions

16. (a) The Appellant's submissions as summarised in paragraphs 10(a), (b) and (f) above are based on a contention that the aliquot interest in the Appellant's share capital to which the optionholder is entitled is fixed when the option is issued rather than when it is exercised. In other words the proportion of the issued capital to which the optionholder is entitled is fixed at the date the option is granted.

(b) This contention is incorrect. It ignores the fact that the option issued was in terms of a fixed number of shares rather than in terms

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of a proportion of the issued share capital. It also ignores the effect an increase in capital would have on the suggested aliquot interest or proportionate share of an optionholder. If the contention is correct the number of shares to which an optionholder is entitled would be in a continuous state of flux from the date of issue depending upon the size of the Appellant's capital from time to time. Assuming no variations to the Appellant's issued capital other than by the issue of shares to optionholders who exercised their options, each exercising optionholder would successively receive more shares than the previous exercising optionholder as the issued capital increased, and indeed the number of shares to which an individual optionholder would be entitled by progressive exercise of each of his options would vary as each was exercised.

Brinsden J pp 101,102

(c) The option certificates only indicate the date upon which the person named therein became registered as an optionholder, not when the options were issued. It would be impossible without resort to the options register of the Appellant, to determine any "aliquot interest" in the Appellant's share capital to which any such optionholder is

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entitled as proposed by the Appellant when options are issued at different times.

(d) The Appellant's proposed interpretation of the option contract arbitrarily treats options in lots of TEN (10), without attempting to deal with odd numbered parcels or holdings less than TEN (10), and notwithstanding the express term on the front of the Certificate (as quoted in paragraph 9(a) above), that "... each (option is) subject to the conditions overleaf", and the first condition on the reverse of the certificate, that, "Each option may be exercised... (etc)". p 23 p 24

(e) The Appellant's alternative submission set out in paragraph 10(c) above seeks to construe the conditions of exercise of options as amounting to a unilateral right for one party (the Appellant) to change the subject matter of the option contract and ignores the agreed discount of 75¢ per share altogether.

(f) The Appellant's submission in paragraph 10(d) above attempts to impose a different contract on the Respondent notwithstanding the fact that:-

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pp 23,24

(i) the Respondent has never agreed to the same;

p 58 lines 5-7

(ii) there was no obligation on the Appellant to have $1.00 shares available for issue at any time other than to satisfy the claims of optionholders at the date of exercise of their options;

(iii) any actual knowledge of the Respondents as to the Appellant's capital structure when such options were acquired is irrelevant;

(g) The Appellant's submission in paragraph 10(e) above apparently seeks to plead that the option contracts were frustrated by the reduction of capital notwithstanding that:-

(i) the contract did not provide, either expressly or by implication, that the shares of $1.00 each to be issued in the event of exercise of options should exist at any time prior to the time at which the Appellant was to issue the same to the Respondent;

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(ii) the Appellant has and always has had power to create and issue shares of $1.00 each;

(iii) the state of the Appellant's authorised and issued capital, and its sub-division or any knowledge of the same by the Respondent at the time it acquired the options or, indeed, at any other time (all of which is deemed known in any event), can have no effect upon the terms of the option agreement; and

(iv) in any event any such frustration was self-induced and cannot be relied upon by the Appellant to escape liability: cf Maritime National Fish Ltd. -v- Ocean Trawlers Ltd. (1935) AC 524.

Brinsden J pp 96,97
Kennedy J p 122

The Implied Term

17. The submission of the implied term by the Appellant in reply at the Full Court Appeal as set out in Paragraph 11 above:-

(a) Is not necessary to give business efficacy to the option contract, which is itself clearly expressed and fully effective;

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(b) Specifically contradicts the express terms of the option contract;

(c) Cannot be said to be so obvious that it "goes without saying" (a conclusion which his emphasised by the fact that the Appellant was forced to formulate it in the alternative);

(d) Is not capable of clear expression;

(e) Is unreasonable and inequitable.

BP Refinery (Western Port) Pty. Ltd. -v- Hastings Shire Council 52 ALJR 20 at p.26-27

Brinsden J pp 97,98

Kennedy J pp 123,124

Secured Income Real Estate (Australia) Ltd. -v- St. Martins Investments Pty. Ltd. (1979) 144 CLR 596

Codelfa Construction Pty. Ltd. -v- State Rail of New South Wales (1982) 150 CLR 29; (1982) 56 ALJR 459.

Existing Legislation

18. Under legislation existing at the time of the reconstruction there were three (3) ways in which the terms of the option contract between the Appellant and optionholders could have been varied, namely:-

(a) By agreement between the parties;

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(b) By an arrangement between the Appellant and the optionholders effected pursuant to Section 315 of the Companies (New South Wales) Code, or the Companies (Western Australia) Code. (The optionholders were contingent creditors with "claims" within that provision:
In re: Leichardt Exploration Limited
unreported S.Ct SA; Master Lunn QC 22nd May, 1984:

c.f In re: Compania De Electricidad De La Provincia De Buenos Aires Ltd. (1980) 1Ch 146 at 182-183 A,C,F-F, 1841 per Slade J.)

(c) By order of the Court made pursuant to Section 123 (5) of the Companies (New South Wales) Code or the Companies (Western Australia) Code (on the basis that the optionholders were contingent creditors of the Appellant with "claims" within the meaning of those provisions).

The Appellant clearly chose to proceed on the basis of agreement with the optionholders who accepted the offer. The position of those who did not accept the offer was not resolved. The option contracts of those who did not accept remained on foot and enforceable in accordance with their terms.

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Conclusion

19. The Respondent therefore humbly submits that this Appeal should be dismissed with costs.

DAVID K. MALCOLM

GRAHAM D. RILEY

No.7 of 1985

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FULL COURT OF
THE SUPREME COURT OF
WESTERN AUSTRALIA

B E T W E E N :

FORSAYTH OIL AND GAS N.L.
Appellant

and

LIVIA PTY LTD.
Respondent

CASE FOR THE RESPONDENT

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