1/80

IN THE PRIVY COUNCIL

No. 16 of 1979

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

B e t w e e n :

COACHCRAFT LTD.

Appellant
(Plaintiff)

- and -

S.V.P. FRUIT CO. LTD. and
MAXWELL GEOFFREY CHAPMAN

Respondents
(Defendants)

CASE FOR THE APPELLANT

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Respondents (Defendants)

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B e t w e e n :

COACHCRAFT LTD. — Appellant (Plaintiff)

- and -

S.V.P. FRUIT CO. LTD. and MAXWELL GEOFFREY CHAPMAN — Respondents (Defendants)

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CASE FOR THE APPELLANT

RECORD

1. This is an appeal from a judgment of the Full Court of the Supreme Court of Victoria (Starke, McInerney and Murphy JJ.) given on 22nd November 1978 dismissing an appeal from a judgment of the Supreme Court of Victoria (Menhennitt J.) given on 8th June 1978 dismissing the Appellant's claims for declarations and an injunction.

p.76

p.113

2. The dispute between the parties to the appeal relates to an extraordinary general meeting of the first Respondent ("the Company") held on 5th October 1977. At that meeting a special resolution was purportedly passed whereby the Company went into members' voluntary liquidation and the second Respondent ("the Liquidator") was appointed liquidator. In the Appellant's submission, the special resolution was not passed by the required 75% majority because the chairman wrongly disallowed certain votes cast against the resolution by David Harold Allen Craig.

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p.133,1.21

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RECORD

3. 186,511 votes were cast for the special resolution, so at least 62,171 votes had to be cast against in order to defeat it. In fact, counting votes that were disallowed by the chairman of the meeting, 137,359 were cast against. They were made up as follows :

Appellant (as registered holder of 10,000 shares)	10,000
Other shareholders whose votes were not disallowed	17,047
Mr. Craig as proxy	97,006
Mr. Brierley as proxy	9,290
Mrs. Moloney as proxy	4,016
	137,359

p.31,1.10

The 110,312 votes cast by Mr. Craig, Mr. Brierly and Mrs. Moloney were disallowed, but the arithmetic is such that the Appellant has only to show that Mr. Craig's votes should have been allowed.

4. The background to the meeting and the reason why the chairman of the meeting disallowed Mr. Craig's votes were as follows:

(a) On 14th May 1976 the Appellant issued a "first come first served" invitation for some of the shares in the Company (then called Blue Moon Fruit Co-Operative Limited), as a result of which it acquired at least 49,086 shares. p.139; pp.29,1.5; p.114,1.32

(b) On 21st April 1977 the Appellant made a formal takeover offer in accordance with Part VIB of the Companies Act 1961 (Vic.) for the rest of the shares in the Company, as a result of which it acquired at least a further 61,226 shares. p.148; pp.30,1.1; p.114,1.41

(c) In August 1977 the Appellant became registered as the holder of 10,000 shares, 8,500 being other shares acquired as a result of the invitation and the formal offer and 1,500 being shares purchased separately. It could not be registered as the holder of more than that number because Article 6 of the Company's Articles of Association provides: pp.7,1.18; p.115,1.1; p.115,1.4

RECORD

"6. The shares held or capable of being held by or by and on behalf of any one member shall not exceed in number ten thousand nor in value ten thousand pounds." (Separate set of Articles)

(d) The vendors of the other shares that had been sold to the Appellant as a result of the invitation and the formal offer were still registered as the holders of those shares and remained members of the Company.

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(e) The Appellant had taken a proxy from each of the vendors referred to in paragraph (d). The form of proxy taken from vendors pursuant to the invitation and the form of proxy taken from vendors pursuant to the formal offer differ slightly, but again the arithmetic is such that the Appellant has only to show that Mr. Craig's votes pursuant to either set of forms of proxy should have been allowed. In either case there were 62,171 or more votes cast against the special resolution.

p.142

p.169

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5. The Appellant sued for a declaration that the special resolution was void and for certain ancillary declarations and an injunction. Counsel for the Appellant conceded in the Courts below that each declaration should be expressed to be "subject to the application (if any) of section 268 of the <u>Companies Act</u> 1961". Section 268 provides :

p.4,l.3

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"268. (1) The acts of a liquidator shall be valid notwithstanding any defects that may afterwards be discovered in his appointment or qualification.

(2) Any conveyance, assignment, transfer, mortgage, charge or other disposition of a company's property made by a liquidator shall, notwithstanding any defect or irregularity affecting the validity of the winding up or the appointment of the liquidator, be valid in favour of any person taking such property bona fide and for value and without notice of such defect or irregularity.

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(3) Every person making or permitting any disposition of property to any liquidator shall be protected and

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RECORD

indemnified in so doing notwithstanding any defect or irregularity affecting the validity of the winding up or the appointment of the liquidator not then known to such person.

(4) For the purposes of this section a disposition of property shall be taken as including a payment of money."

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It was thought appropriate that the Liquidator and third parties should remain at liberty to show that particular transactions ought to be regarded as valid pursuant to that section. If your Lordships should be disposed to advise Her Majesty that the declarations sought by the Appellant should be made, the Appellant humbly asks that they be expressed to be subject to the application (if any) of Section 268.

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6. The Liquidator counterclaimed for certain relief. The counterclaim was not proceeded with at the trial, but the Full Court held that there should be no order as to the costs of the counterclaim. The Appellant does not ask for any order as to the costs thereof on this appeal. The matters set out in paragraph 5 and this paragraph are in fulfilment of an undertaking given by the Appellant to the Full Court on the application for leave to appeal to Her Majesty in Council.

p.21,l.10

pp.112,l.10; p.113,l.26

p.123,l.1

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7. The action came on for hearing before Menhennitt J. on 1st, 2nd, 3rd and 6th February 1978 and judgment was given on 8th June 1978. His Honour held that the Company's Articles of Association, and in particular Article 6, contained an implication that a shareholder could not by the granting of a proxy or proxies indirectly achieve as against the Company a result he could not achieve by selling to anyone, including the Appellant, shares which would give the purchaser beneficial ownership of shares in excess of 10,000 and that, because the appointment of Mr. Craig as the vendors' proxy was inseverably associated with sales which were invalid as against the Company, the documents appointing Mr. Craig were ineffectual as against the Company to exercise the vendors' entitlement to appoint proxies. The learned trial judge held that the vendors nevertheless retained the right to vote in person or to give valid and effective proxies.

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p.39

p.68,l.26

p.73,l.45

p.73,l.42

RECORD

8. By Notice of Appeal dated 20th June 1978 the Appellant appealed to the Full Court. The appeal came on for hearing before Starke, McInerney and Murphy JJ. on 22nd, 26th and 27th September 1978 and a joint judgment was given on 22nd November 1978. Their Honours went much further than the learned trial judge. They held that, although the vendors remained on the register as members of the Company, they were not "entitled to vote" within the meaning of those words in section 141 of the Companies Act 1961, the material provisions of which are set out in paragraph 17 below. So long as the vendors remained in breach of the contract constituted by the Articles of Association, they could not obtain relief from the Court if the chairman of a meeting of members refused to accept their vote. Moreover the appointments of Mr. Craig as the vendors' proxy were an essential part of and inextricably bound up with the Appellant's scheme to obtain ownership of and control of the voting rights exercisable in respect of more than 10,000 shares and therefore it was not possible to apply the doctrine of severance to the instruments of appointment.

p.79

p.83

p.108,1.36

p.111,1.31

9. On 19th December 1978 the Full Court (Young C.J., Starke and Marks JJ.) made an order granting the Appellant conditional leave to appeal to Her Majesty in Council, and on 22nd February 1979 the Full Court (Lush, Crockett and McGarvie JJ.) made an order granting the Appellant final leave, pursuant to rule 2(a) of the Order in Council made by His Majesty King George V on 23rd January 1911. As the appeal lay as of right it was unnecessary for their Honours to consider whether it raised points of general importance; but it is submitted that it does for the reasons, and especially the first and second reasons, set out in Mr. Brierley's affidavit sworn on 7th December 1978 in support of the application for conditional leave.

p.122

p.125

p.120,1.34 (separate copy of Exhibit E)

10. The Appellant's principal submissions are -

(a) that Article 6 of the Company's Articles of Association does not, expressly or by implication, prevent a member from appointing a proxy even if he appoints an officer of another member to whom he has sold his shares in breach of that article, in the sense that the sale has resulted in more than 10,000 shares being held by and on behalf of that other member;

RECORD

(b) that the contract constituted by the Company's Articles of Association was not made on a footing relating to voting power for the purposes of "the general rule that a party to a contract made on the footing of the continuance of a state of things may not by any act within its power or control do anything to destroy or relevantly to diminish that situation" referred to by Barwick C.J. in Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth of Australia (1977) 52 A.L.J.R. 254, at p. 257;

p.66,1.26; p.110,1.34

(c) alternatively to (b), that that general rule is not a positive rule of the law of contract but merely an application of the usual principles relating to implied terms and that no such implied term should be discerned in Article 6 or any other provision of the Company's Articles of Association;

(d) that if Article 6 would, expressly or by implication or as a result of a positive rule of the law of contract, have prevented the vendors from appointing Mr. Craig as their proxy, it was overridden by section 141 of the Companies Act 1961;

(e) that the invalidity as against the Company of the sales by the vendors of their shares to the Appellant did not invalidate their appointments of Mr. Craig as their proxy or entitle the chairman of the meeting to disallow the votes cast by Mr. Craig on their behalf.

11. Article 6 speaks only of the number of shares "held or capable of being held by or by and on behalf of any one member". It goes no further than to impose a limit on the number of shares of which a member may be the legal or beneficial owner. It is conceded that, because the sales by the vendors of their shares to the Appellant transferred the beneficial ownership to the Appellant, the vendors committed a breach of Article 6; but the most that that breach entitled the Company to do was to treat the transfer of beneficial ownership, as against the Company, as a nullity. The vendors remained members with all the rights attaching to membership. Indeed it is arguable that, as between the Company and the vendors, they must still be regarded not only as members but as the beneficial owners of the shares. That argument is not pressed because, although it could be supported on the basis that the Company cannot approbate and reprobate, the better view may be that the transfer of beneficial ownership can be asserted by the Company but not against it. Even if that is correct, beneficial ownership is irrelevant to membership and it is their membership that gave the vendors the rights

RECORD

to vote and to appoint Mr. Craig as their proxy.

12. Although ownership of a share is a congeries of rights, including the right to vote, the prohibition in Article 6 cannot be applied distributively so as not only to forbid a transfer of legal or beneficial ownership but also to prohibit a transfer of control of a particular right. Moreover :

10 (a) Even if Article 6 could be applied distributively so as to prohibit a transfer of the right to vote there was no such transfer in the present case, but only the appointment of Mr. Craig as the vendors' proxy. The fact that he could vote according to the Appellant's wishes did not involve a transfer of the right to vote but was merely a consequence 20 of the transfer, as between the vendors and the Appellant, of the beneficial ownership of the shares. It was control of the right to vote, and not the right to vote itself, that was transferred.

(b) If Article 6 did authorize the Company through the chairman of the meeting to disallow Mr. Craig's votes because his appointment as the vendors' proxy 30 transferred control of one of the rights constituting ownership of a share to the Appellant, the same argument would apply to dividends and a return of capital. The Company could refuse to pay dividends or return capital on liquidation to the vendors on the grounds that they would be obliged to account to the Appellant. The Respondents have understandably 40 not pressed their argument that far. That conclusion was also disclaimed by the learned trial judge and would apparently have troubled the members of the Full Court.

p.64,1.32

p.103,1.31

13. Turning to "the general rule that a party to a contract made on the footing of the continuance of a state of things may not by any act within its power or control do anything to destroy or relevantly to diminish that situation", it is 50 submitted that the only "state of things" that can be derived from Article 6 is that no member shall be the legal or beneficial owner of more than 10,000 shares. It is submitted that it is not possible to extract a further

p.66,1.26;
p.110,1.34

"state of things" from Article 6 or any other provision of the Company's Articles of Association. In particular, it is not possible to predicate of the Articles that the contract that they constitute was made on the footing that a member would not appoint another member, or an officer of a company that was another member, as his proxy if that would result in the other member
10 controlling more than 10,000 votes or indeed on any footing relating to voting power.

14. If, contrary to the submission in paragraph 13, the contract constituted by the Articles was made on the footing of the continuance of a state of things relating to voting power, the general rule that a party to a contract made on such a footing may not by any act within his power or control do anything to destroy or relevantly to diminish that situation is
20 not a positive rule of the law of contract but just an implied term. If it were a positive rule of the law of contract, it would apply irrespective of the intention of the parties determined by the true construction of their agreement. It is respectfully submitted that that would be inconsistent with the fundamental principles of contract law and that the general rule is no more than an implied term that is usually to be found where a contract is made
30 on the footing of the continuance of a state of things. That analysis was preferred by at least three (Gibbs, Mason and Murphy JJ.) of the five members of the High Court who decided Ansett Transport Industries (Operations) Pty. Ltd. v. The Commonwealth of Australia (1977) 52 A.L.J.R. 254. The usual principles relating to implied terms, as enunciated in Liverpool City Council v. Irwin (1977) A.C. 239, at pp. 253 -254 per Lord Wilberforce
40 (esp. at pp. 253G - 254F), at pp. 257 - 259 per Lord Cross of Chelsea (esp. at p. 258B), at pp. 261 - 263 per Lord Salmon (esp. at p. 262A -C) and at pp. 265 - 266 per Lord Edmund-Davies (esp. at p. 266C), and other cases apply.

15. In the Ansett Transport Industries case the majority of the High Court refused to apply the general rule or to discern an implied term. In the present case, it is submitted that it is even more difficult to discern an
50 implied term that would enable the chairman of a meeting to disallow the relevant votes. That is illustrated by paragraph 12(b) above and by consideration of the practical difficulties of administering a company if such an implication were made. Moreover, however

wide the implied term Article 6 would not apply to a purchaser who took care not to become registered in respect of any shares and therefore not to become a "member". Accordingly the implied term would not in any event give "business efficacy" to the contract constituted by the Articles. The Appellant respectfully accepts everything that was said by the High Court in the Ansett Transport Industries case, except the learned Chief Justice's tentative preference at p. 257 and Aickin J.'s possible preference at p. 273 for the positive rule of law analysis, but submits that the general rule referred to is not applicable here. Indeed the Appellant goes further and submits that accepting, as the Courts below accepted, that the majority agreed with the basic principle enunciated by Barwick C.J. and Aickin J., the majority's refusal to apply that principle in such a manner as to discern an implied term positively supports the Appellant's case. The Appellant especially refers to what was said by Mason J. in the first paragraph on p. 262.

p.68,l.14;
p.111,l.14

16. There is an analogy with share splitting. It is a commonplace of company law that, where the articles prescribe the maximum number of votes that may be cast by a member at a meeting, a member may transfer parcels of shares to nominees to increase his effective voting power. That would appear to be even more obviously a case for the application of the general rule referred to above or the discovery of an implied term; but it has always been held that share splitting of that kind is effective, even though it is obviously a way of circumventing the articles and destroys or relevantly diminishes the situation that the articles were designed to preserve as regards voting power at meetings.

17. The Appellant also relies on section 141 of the Companies Act 1961, the material provisions of which read :

"141. (1) Subject to subsection (2) of this section, a member of a company entitled to attend and vote at a meeting of the company, or at a meeting of any class of members of the company, shall be entitled to appoint -

(a) in the case of a company not having a share capital - another member or, where the articles so provide, another person (whether a member or not); or

RECORD

(b) in any other case - not more than two other persons (whether members or not),

as his proxy or proxies to attend and vote instead of the member at the meeting and a proxy appointed to attend and vote instead of a member shall also have the same right as the member to speak at the meeting, but unless the articles otherwise provide a proxy shall not be entitled to vote except on a poll.

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...

"(2) A member of a proprietary company shall not be entitled to appoint another person as his proxy under subsection (1) except -

(a) in accordance with the articles of the company; or

(b) with the leave of the Court.

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..."

18. The Appellant submits that section 141 confers a statutory right on a member entitled to attend and vote at a meeting to appoint a proxy, that in the case of a public company as opposed to a proprietary company that right cannot be excluded by the Articles and that the vendors were members "entitled to attend and vote" within the meaning of the section. The Respondents do not contest that a statutory right to appoint a proxy is conferred. The second part of the submission, that in the case of a public company that right cannot be excluded by the Articles, is supported by the fact that section 141(2)(a) applies only to proprietary companies. To say that a breach of Article 6 invalidates an appointment pursuant to section 141 (as the learned trial judge did) is just another way of making the section subject to the Articles even though the Company is a public company.

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p.73,11.26,45

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19. It may be that the Articles could regulate the statutory right, for example by providing that an instrument appointing a proxy must be in the English language or lodged at the registered office not less than 48 hours before the meeting, but the Articles could not expressly or by implication or in conjunction with a positive rule of law of the kind referred to above -

RECORD

(a) exclude a class of persons, such as other members already owning 10,000 shares or the officers of companies already owning 10,000 shares, from the range of persons that a member might appoint as his proxy; or

(b) deprive a member altogether, whilst he was in breach of the Articles, of his right to vote by proxy.

10 A subsidiary argument in support of sub-paragraph (a) is that, if the Articles could define a prohibited class of appointee in terms of members already owning 10,000 shares or their officers, it is difficult to see why the Articles could not exclude other classes of possible appointees. The policy of the section on the other hand is to give a member of a public company with a share capital an unrestricted right to appoint a proxy whether
20 or not the proxy is a member of the company.

20. The Appellant's submissions based on section 141 would fail if the vendors' breach of Article 6 caused them to lose their entitlement to vote even in person, for then they would not be members "entitled to attend and vote" within the meaning of that section. The Appellant's reasons for submitting that the vendors' breach of Article 6 did not expressly, and could not by implication or the general
30 rule relating to the continuance of a state of things, strip them of their right to vote even in person are set out in paragraphs 11 to 16 above.

21. The Respondents also contended, and the contention found favour in the Courts below, that the appointment of Mr. Craig as the vendors' proxy was, as it were, contaminated by its association with the sales in breach of Article 6. It is submitted that the appointments
40 would fail only if, on the true construction of the documents signed by the vendors, it could be said that the vendors did not intend the appointments to stand if the sales should be for any reason invalid. As Taylor J. said in relation to severability in Brooks v. Burns Philp Limited (1969) 121 C.L.R. 432, at p.442, "fundamentally the question is one of intention to be gathered from the instrument itself: Fitzgerald v. Masters (1956) 95 C.L.R. 420
50 and Whitlock v. Brew (1968) 118 C.L.R. 445." In the present case the vendors had sold their shares to the Appellant and have in fact been paid for them. Their intention was to confer on the Appellant whatever rights the documents that the Appellant asked them to sign might confer. To say that the vendors are to be taken as having intended that the appointments should not stand if the sales were invalid would be to impute a

p.73,l.45;
p.111,l.31

p.149,l.42;
p.151,l.31;
p.153,l.30;
p.115,l.13

RECORD

dishonest intention to them as they certainly did not intend to refund the purchase price if the sales were invalid. It is not suggested that the Respondents' contention goes that far but only that it would have to do so in order to succeed.

22. There are some subsidiary points arising from the judgments of the Courts below that should also be mentioned :

10 (a) It is respectfully accepted that Re Stranton Iron and Steel Co. (1873) L.R. 16 Eq. 558 and Pender v. Lushington (1877) 6 Ch. D. 70 are not themselves directly applicable, but it is submitted that that in no way detracts from the argument in paragraph 16 above. If the general rule referred to by Barwick C.J. in the Ansett Transport Industries case could be applied as the Courts below applied it, it would apply a fortiori to sharesplitting with the result that a settled understanding of company law would be wrong. p.64,l.8; p.102,l.29

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(b) The Full Court's conclusions "that the appellant could not require the company to allow the appellant, in respect of [the shares that could not be registered in its name], to attend or vote by its proper officer or by proxy at meetings of the company, and that it could not require the company to pay to it dividends in respect of those shares" is just a consequence of non-registration. The same is true of any purchaser who has not been registered. The words "For the company to have done so" at the beginning of the next sentence must therefore mean only "For the company to have registered transfers of shares whereby the appellant would have become registered as the holder of shares in excess of 10,000". p.103,l.17 p.103,l.25

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40 (c) In the Appellant's submission the words "Subject to these Articles" at the beginning of Article 70 refer only to Articles like Articles 73 and 77 and the right to vote conferred by Article 70, or conferred subject thereto by section 140(1)(c) of the Companies Act 1961, is not conferred subject to Article 6 except so far as Article 6 prevents registration. p.104,l.40

50 (d) Again the Full Court's conclusion that a shareholder "is not entitled to attend and vote at a meeting of the company in respect of any shares held by him or by him and on his behalf in excess of ten thousand" is just a consequence of non-registration. Moreover, it is, with great respect, the vendors' rights to attend and vote and appoint a proxy that are in issue, not the p.105,l.9

RECORD

Appellant's rights to do so. It clearly had none in respect of shares that had not been registered in its name.

(e) It is true that the wording of Article 6 is based on section 356(12)(c)(i) of the Companies Act 1938 but Article 8 expressly provided that the provisions of section 356 (11) and (12) of that Act should not apply to the Company. The only way section 356 may be relevant is, it is submitted, in construing doubtful words in Article 6. In that case the proviso to section 356(12) would imply that breach of Article 6 does not result in total invalidity and that there is no room for an implication designed to preserve the Company's co-operative character de jure or de facto. p.57,l.50; p.105,l.13

(f) The Appellant accepts the Full Court's conclusion that it was "entitled to attend and vote at any meeting of the company in respect of shares in respect of which it was registered ... to the total number of ten thousand only and that it was only in respect of that total number of shares that it was entitled to appoint proxies to vote" p.105,l.35 because that follows from its inability to be registered as the holder of more than 10,000 shares but not, with respect, their Honours' reference to shares "held on its behalf" p.105,l.38 (for it could not vote or appoint proxies in respect of any shares, even below 10,000, which it did not hold in its own name) or that that conclusion follows from a combined reading of sections 140 and 141 of the Companies Act 1961 and the Articles. p.105,l.33 So far as entitlement to vote and appoint proxies is concerned, again it is the vendors' entitlement and not the Appellant's that is in issue.

(g) The next sentence in their Honours' judgment is sufficiently addressed by the Appellant's submissions earlier in this case, save to say that Mr. Craig did not purport to vote on behalf of the vendors. p.105,l.41 He did so in fact, just as any proxy appointed by a vendor at the instance of a purchaser or by a trustee at the instance of cestui que trust votes on behalf of the vendor or trustee although in the interests of the purchaser or cestui que trust.

RECORD

(h) Partly in amplification of the foregoing and partly in reference to the next paragraph of the Full Court's judgment, it may be helpful to test the Respondents' contentions by asking whether Article 6 would have prevented the vendors appointing the chairman as their proxy with instructions to vote against the resolution. p.105,l.49

10 (i) It is submitted that the principle illustrated by Measures Bros. Ltd. v. Measures (1910) 1 Ch. 336, (1910) 2 Ch. 248 (a suit for specific performance) and the passage from your Lordships' advice in Australian Hardwoods Pty. Ltd. v. Commissioner for Railways (1961) A.L.R. 757, at pp. 761 - 762; (1961) 1 W.L.R. 425, at p. 432; (1961) 1 All E.R. 737, at p. 742 (also a suit for specific performance) cited by the Full Court are just not directed to a case like the present. p.107,l.38 p.108,l.1

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(j) If they did have possible application to the Articles of a company and the required interdependence could be shown, it is submitted that they would not apply -

(i) where the status of a company is in issue, as it is in the present case; or

(ii) in so far as the Appellant relies on a statutory, as opposed to contractual, right to appoint proxies.

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(k) Not in any spirit of criticism but simply to avoid confusion, the Appellant draws attention to two typographical errors in the judgment of the Full Court. The words "by and" are omitted before "on behalf of" the first, but not the second, time Article 6 is quoted. The number of votes cast by Mrs. Moloney was 4,016, not 4,116. p.84,l.29; p.104,l.43. p.88,l.22

40 (l) Similarly, in the judgment of the learned trial judge the case referred to in Halsbury's Laws of England (4th ed.) vol. 7 at p. 221 is In re Newcastle-Upon-Tyne Marine Insurance Co., Ex p. Brown (1854) 19 Beav. 97; 52 E.R. 285. p.61,l.34

23. Finally, the Appellant submits that it was not a member of the Company before August 1977 and that therefore at least in respect of the shares acquired as a result of the "first come first served" invitation issued on 14th May 1976, there was no breach of Article 6 by the Appellant or the vendors because that article speaks only of shares held by or by and on behalf of any one "member". p.7,l.18 p.115,l.1 p.6,l.15; p.114,l.38; p.165,l.27.

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RECORD

24. The Appellant respectfully submits that the judgment pronounced by the Full Court on 22nd November 1978 was wrong and ought to be reversed, that this appeal ought to be allowed with costs (including costs in the Courts below) and that the declarations and injunction sought in the Appellant's amended Statement of Claim should, subject to the qualification mentioned in the last sentence of paragraph 5 above, be made and granted, for the following (amongst other)

p.4,1.3

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REASONS

(1) BECAUSE the Full Court erred in holding that the Company's Articles of Association and in particular Article 6 or breach thereof by the Appellant or the vendors prohibited or precluded -

(a) the vendors of shares acquired by the Appellant as a result of the invitation from voting personally, alternatively from appointing Mr. Craig as their proxy in the form in which they did so;

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(b) the vendors of shares acquired by the Appellant as a result of the formal offer from voting personally, alternatively from appointing Mr. Craig as their proxy in the form in which they did so.

(2) BECAUSE the Full Court erred in holding that -

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(a) the appointments referred to in paragraph (1)(a) ("the first set of appointments");

(b) the appointments referred to in paragraph (1)(b) ("the second set of appointments"),

were not valid and effectual appointments of Mr. Craig as the proxy of the members of the Company who executed them, entitling him to vote on their behalf at the extraordinary general meeting held on 5th October 1977 and, to the extent that the Full Court did hold as hereinafter mentioned, in holding that those appointments were -

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(c) not authorized by and in accordance with the Company's Articles of Association; or

(d) not authorized by and in accordance with Section 141 of the Companies Act 1961 and the Company's Articles of Association to the extent (if any) that those Articles validly regulated the right conferred on members of the Company by that section.

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(3) BECAUSE the Full Court should have held that neither Article 6 nor any other provision of the Company's Articles of Association nor breach thereof by the Appellant or the vendors prohibited or precluded -

(a) the vendors of shares acquired by the Appellant as a result of the invitation from voting personally or from appointing Mr. Craig as their proxy in the form in which they did so;

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(b) the vendors of shares acquired by the Appellant as a result of the formal offer from voting personally or from appointing Mr. Craig as their proxy in the form in which they did so.

(4) BECAUSE the Full Court should have held that -

(a) the first set of appointments;

(b) the second set of appointments,

were valid and effectual appointments of Mr. Craig as the proxy of the members of the Company who executed them, entitling him to vote on their behalf at the extraordinary general meeting and that they were -

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(c) authorized by and in accordance with the Company's Articles of Association;

(d) further or alternatively, authorized by and in accordance with Section 141 of the Companies Act 1961 and the Company's Articles of Association to the extent (if any) that those Articles validly regulated the right conferred on members of the Company by that section.

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(5) BECAUSE the Full Court erred in holding that the chairman of the meeting properly rejected the votes cast by Mr. Craig pursuant to -

(a) the first set of appointments;

(b) the second set of appointments,

and that the special resolution purportedly passed at the meeting was valid.

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(6) BECAUSE the Full Court should have held that the chairman of the meeting improperly rejected those votes and that the special resolution purportedly passed at the meeting was invalid.

(7) BECAUSE the Full Court erred in affirming the judgment and order of the Supreme Court pronounced and made by Menhennitt J. on 8th June 1978 to the extent it did affirm that judgment and order and in disallowing the grounds of appeal set out in the Appellant's Notice of Appeal dated 20th June 1978 to the extent it did disallow those grounds.

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(8) BECAUSE the Full Court should have allowed each of those grounds and made declarations, subject to the application (if any) of Section 268 of the Companies Act 1961, and granted an injunction in the form, or substantially in the form, prayed for in the Appellant's amended Statement of Claim and ordered that the Appellant's costs of the action, including reserved costs and the costs of the appeal to the Full Court, be taxed and paid by the Respondents.

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Frank Callaway

F.H. CALLAWAY

IN THE PRIVY COUNCIL No. of 1979

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

Between :

COACHCRAFT LTD.

Appellant
(Plaintiff)

- and -

S.V.P. FRUIT CO. LTD. and
MAXWELL GEOFFREY CHAPMAN

Respondents
(Defendants)