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EGERTON-WARBURTON v. DEPUTY FEDERAL COMMISSIONER OF TAXATION.

Costs of the case stated other than the costs exclusively referable to the appeal of the appellant, Randle Egerton-Warburton, to be paid by the Commissioner to the appellants, Piers Edward Egerton-Warburton and George Gray Egerton-Warburton. Costs of the case stated exclusively referable to the appeal of Randle Egerton-Warburton to be paid by him to the Commissioner.

Solicitors for the appellants, *Villeneuve Smith & Keall.*

Solicitor for the respondent, *A. A. Wolff*, Assistant Crown Solicitor for Western Australia.

[HIGH COURT OF AUSTRALIA.]

PARA WIRRA GOLD & BISMUTH MINING SYNDICATE NO LIABILITY AND ANOTHER . . . . . Appellants;
Plaintiffs,

AND

MATHER AND OTHERS . . . . . Respondents.
Defendants,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Sept.* 27, 28.

MELBOURNE, *Oct.* 15.

Rich, Starke, Dixon and McTiernan JJ.

Company—Mining company—Contract for option—Consideration—Allotment of shares in company formed for purpose of exercising option—Reconstruction of purchasing company—Exercise of option by reconstructed company—Allotment of shares in reconstructed company—Compliance with contract—No fiduciary relationship.

A no liability mining company, incorporated with a nominal capital of £4,000 divided into 400 shares of £10 each, entered into a contract which conferred on it an option to purchase certain mineral reef claims. The consideration for the sale to result from an exercise of the option was described in the contract as "the consideration of the payment of a further sum of £500 in cash and of

the allotment and issue to the vendors of 1,000 fully paid up shares of £1 each in the capital of any company having a registered capital of not more than £50,000 divided into shares of £1 each (whether now or hereafter to be incorporated) which shall be formed for the purpose of exercising and shall exercise the said option." The company set about reconstructing. A new no liability mining company was formed, and the old and the new companies executed the reconstruction agreement by which the option was assigned to the new company. The boards of directors of the two companies were identical. On the day of the reconstruction agreement the new company notified the vendors of the assignment and of the intention to exercise the option, allotted to them 1,000 shares and tendered the scrip. The vendors refused the tender and declined to complete the sale. The new company had a nominal capital of £50,000 divided into 50,000 shares of £1. The reconstruction agreement provided for a consideration of 27,345 shares in the new company, of which 9,945 were allotted to the old company as fully paid and 17,400 as paid up to 17s. 6d. The assets of the old company for which this consideration was given consisted substantially in nothing more than the above and two other options.

Held that, though the old company was promoter of the new, the vendors' rights were purely contractual, that there was no fiduciary relationship between the old company and the vendors, that the principle requiring disclosure by promoters had no application to the option agreement, and that the agreement had upon its true construction been performed by the companies and should be specifically enforced against the vendors.

Decision of the Supreme Court of South Australia (*Angas Parsons* J.): *Para Wirra Gold and Bismuth Syndicate No Liability* v. *Mather*, (1933) S.A.S.R. 379, reversed.

APPEAL from the Supreme Court of South Australia.

In the latter part of 1932 the Para Wirra Gold & Bismuth Mining Syndicate No Liability was registered as a no liability company with a nominal capital of £4,000 divided into 400 shares of £10 each. In the earlier part of 1933 this company (hereinafter called "the old company") took up three "working options" over certain mineral reef claims in one locality in South Australia. One of these options was contained in an agreement in writing dated 4th March 1933 made between Henry James Bunyan Mather and others (hereinafter called "the vendors") and the old company.

The option conferred by this agreement was as follows:—"1. In consideration of the sum of one shilling (1s.) on or before the execution hereof paid by the purchaser to the vendors (the receipt whereof the vendors do by their execution hereof acknowledge) and for other the considerations hereinafter appearing the vendors hereby grant to

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the purchaser the sole and exclusive option to purchase free from encumbrances at any time on or before the 19th day of March 1933 the said premises and all the right title and interest of the vendors therein and thereto at or for the consideration of the payment to the vendors of the further sum of five hundred pounds (£500) in cash and of the allotment and issue to the vendors or their nominees or nominee of one thousand (1,000) fully paid up shares of one pound (£1) each in the capital of any company having a registered capital of not more than fifty thousand pounds (£50,000) divided into shares of one pound (£1) each (whether now or hereafter to be incorporated) which shall be formed for the purpose of exercising and shall exercise the said option to purchase."

The agreement contained a further provision which gave the purchaser the right to extend the period of the option up to and inclusive of 19th June 1933 on payment of £500. This provision was in these terms :—" 3. The purchaser shall have the right at any time on or before the said the 19th day of March 1933 to extend the period of the said option to purchase up to and inclusive of the 19th day of June 1933. If the purchaser desires to so extend the said period he shall on or before the said 19th day of March 1933 give notice in writing of such his intention to the vendors and shall at the same time pay to the vendors or their solicitor the sum of five hundred pounds (£500) and thereupon the period for the exercise of the said option to purchase shall be extended accordingly and this agreement shall be read and construed subject to the provisions of this clause as if the words and figures ' June 1933 ' were substituted for the words and figures ' March 1933 ' wherever the same occur other than in this clause. If the purchaser shall subsequently exercise the said option to purchase the said sum of £500 shall be taken into account as and deemed to be a payment on account of the said purchase consideration but otherwise shall be deemed to be the consideration for the extension of the said option to purchase as aforesaid. Provided that if the purchaser shall form and register the company referred to in clause 1 of this agreement before the expiration of the extended period of the said option the scrip for the said 1,000 shares in the said company shall be delivered to the vendors or their solicitor forthwith upon the completion of

the formation and registration of the said company without waiting for the expiry of the said extended period of option."

On 18th March 1933 the old company exercised its right to extend the option and paid to the vendors the sum of £500. There was evidence that the option was taken up for the purpose of floating it off to the public and that an unsuccessful attempt was made to do so. On 1st June 1933 the old company called an extraordinary general meeting for the purpose of passing special resolutions for reconstruction. The meeting was held and the resolutions duly passed. On 16th June 1933 the reconstructed company, Para Wirra Gold Mines No Liability (hereinafter called "the new company"), was registered with a nominal capital of £50,000 divided into 50,000 shares of £1 each. The boards of directors of the old and the new companies were identical. On 19th June 1933 a reconstruction agreement was entered into between the old company and its liquidator and the new company. By this agreement the concessions, options, goods, chattels, moneys, undertakings and goodwill of the old company were transferred and assigned (or agreed to be transferred and assigned) to the new company, and the new company undertook to satisfy and discharge all the obligations of the old company and to keep it indemnified. The assets so transferred and assigned included substantially nothing beyond the three working options. The new company issued to members of the old company, as part of the consideration for the transfer, 27,345 shares in the new company, of which 9,945 were allotted as fully paid, and 17,400 as paid up to 17s. 6d. On 19th June 1933 the old and new companies notified the vendors that the new company was formed (*inter alia*) to exercise, and did thereby exercise, the option to purchase the mineral reef claims referred to in the agreement of 4th March 1933, and tendered share certificates for 1,000 shares in the new company. The tender was refused and the vendors declined to complete the sale. After other correspondence between the solicitors for the respective parties, on 3rd July 1933 the vendors' solicitor wrote to the companies' solicitors: "It was never in the contemplation of the parties to the option agreement that my clients would be offered shares in a reconstructed company which is virtually the same as the syndicate (i.e., the old company) itself and which even if the

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reconstruction is successful will have little, if any, capital to carry on development work." On 5th July 1933 the following reply was written:—"As the syndicate held rights over about 80 acres adjoining and in addition to your clients' 10 acres, it must have been in its contemplation that it would receive some consideration in the new company in respect thereof, and the constitution of the new company is entirely different from that of the old company."

The old and new companies took proceedings in the Supreme Court of South Australia claiming against the vendors specific performance of the option agreement. No affirmative proof was led to show that the capital allotted as paid up in the new company was in excess of the value of the assets taken as the consideration for its allotment, and there was no evidence as to whether any and what additional information as to the value of the claims was obtained during the currency of the options. The action was dismissed by *Angas Parsons* J. on the ground that the old company, in promoting a new company, was under a fiduciary duty to the vendors to act in a manner equitable to them, that the vendors' interests had been entirely disregarded, and that it would be unconscionable to permit them to complete their contract on terms which the facts showed to be unjust.

From this decision the plaintiffs now appealed to the High Court.

Mayo K.C. (with him *Harford*), for the appellants. The option agreement contemplated that the old company should work the claims, and that, if it desired to continue operations, a new company should come into being and the vendors should take shares therein. It was competent for the old company or its assigns to exercise the options, and the old company must have had power to pass on the options at a profit. The vendors have been paid £500 and have been tendered shares which comply with the agreement. Had there been an independent board of directors of the new company, its only duty to the vendors would have been to see that they received their consideration. There was no fiduciary relationship, or, if there were, again the only duty was to give shares in compliance with the contract. There is no hardship which disentitles the appellants to specific performance.

Ligertwood K.C. (with him *Coventry*), for the respondents. The principle involved is that persons who promote companies owe a duty to prospective shareholders and can make no profit at their expense. Here the promoters of the new company bound the vendors to take shares therein. The old company sold to the new company at a price far higher than it paid. The whole object of the reconstruction was to change the ratio between the shareholders and the vendors.

[STARKE J. Suppose the transaction could be attacked as between the two companies, how does that help the vendors ?]

Because they are prospective shareholders in the new company, and the duty is owed to all prospective shareholders. We do not mind a fair profit but we want the interposition of an independent board to ensure that the profit is fair.

[DIXON J. Can shares in a no liability company be issued at a discount in South Australia ?]

No (*Re Fraser's South Gold Mining Co.* (1)).

[DIXON J. They can in Victoria (*New Good Hope Consolidated Gold Mines No Liability* v. *Stutterd* (2)).]

It appears from the option agreement that the understanding of the parties was that the option should be exercised by a company to be formed in the future. Therefore if a new company is floated, the promoters must have regard to the fiduciary position which they occupy towards each shareholder, including the vendors, and each must have some remedy to assert his rights. But what was done was to change the vendor's proportion from about 1/5th to about 1/26th, and this was the only object of the reconstruction.

The new company cannot exercise the option except as an assignee ; it is assignee only by the reconstruction agreement ; that agreement should be rescinded, and in equity the new company cannot benefit by it. Promoters cannot make a profit at the expense of the cestuis que trust (*Erlanger* v. *New Sombrero Phosphate Co.* (3)). If they are in a fiduciary relation to others whom they invite to come into the company, why not to the vendors whom they have bound ? At least the nature of the reconstruction agreement is a ground for refusing specific performance, because it would be unfair to require it.

(1) (1900) S.A.L.R. 56. (2) (1916) V.L.R. 580.
(3) (1878) 3 App. Cas. 1218.

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[STARKE J. referred to *Re Cape Breton Co.* (1).]

The difference between that case and this is that we are attacking the transaction at its inception (*In re Leeds and Hanley Theatres of Varieties Ltd.* (2); *Gluckstein* v. *Barnes* (3)).

[DIXON J. referred to *Jubilee Cotton Mills Ltd.* (*Official Receiver and Liquidator*) v. *Lewis* (4).]

As an alternative ground, the option agreement contemplated that the new company which was to exercise the option was to be formed from the general public, and a mere transformation of the old company to a new company did not comply with the agreement. The amount of profit would be regulated by what the public would subscribe, and we would not complain of that.

[RICH J. referred to *Wragge's Case* (5).]

Mayo K.C., in reply. Dishonest conduct has been neither pleaded nor proved. If there is anything wrong with the shares tendered to the vendors they must prove it. Bad faith is not presumed. The vendors, owing to the companies' work, have seen the value of the property and they now want to keep the £500 as well as the mine. The option agreement shows that the old company was a mining company which bound itself to test the property. Was it to spend its money in this way for no profit? As soon as it is conceded that the old company was to have a profit the whole argument based on fiduciary relationship falls to the ground. Even assuming a fiduciary relationship, there was the same relationship to all other shareholders. The vendors now ask that they receive the property as well as £500 and that the interests of the other shareholders be disregarded.

Cur. adv. vult.

Oct. 15.

The following written judgments were delivered:—

RICH, DIXON AND MCTIERNAN JJ. Towards the end of 1932 a no liability mining company was registered with a capital of 400 shares of £10. In the earlier part of the following year it proceeded

(1) (1885) 29 Ch. D. 795; (*sub nom.* *Cavendish Bentinck* v. *Fenn* (1887) 12 App. Cas. 652).
(2) (1902) 2 Ch. 809.
(3) (1900) A.C. 240.
(4) (1924) A.C. 958.
(5) (1868) L.R. 5 Eq. 284.

to take up three "working options" over claims situated in one locality. One of these options was granted by the respondents, who are defendants in an action for specific performance brought to enforce the contract of sale arising from the exercise of the option. The original term was short, about fifteen days, but the agreement giving the option provided for an extension of a month. The consideration for the original term was a shilling only. The consideration for the sale to result from the exercise of the option was described as follows: "The consideration of the payment of a further sum of £500 in cash and of the allotment and issue to the vendors or their nominees or nominee of 1,000 fully paid up shares of £1 each in the capital of any company having a registered capital of not more than £50,000 divided into shares of £1 each (whether now or hereafter to be incorporated) which shall be formed for the purpose of exercising and shall exercise the said option." The provision for extending the option made it a condition that the sum of £500 should be paid as consideration for the extension, but allowed it to be taken into account as a payment of purchase money upon the subsequent exercise of the option.

The company elected to take an extension of the option and paid the £500. During its currency the company worked or exploited the claim at a cost of about £700. At the same time it exploited one of the neighbouring claims over which it had taken an option. Before the option expired, some attempt appears to have been made to arrange for raising capital from the public but without success. Then the company set about reconstructing. A little less than three weeks before the expiry of the option, it gave notice of the necessary extraordinary meeting and special resolutions, which were duly passed. Three days before the expiry of the option it registered a new no liability mining company with a capital of £50,000 divided into 50,000 shares of £1. On the last day of the option it executed the reconstruction agreement with the new company, which took an assignment of the option and notified the respondents, the vendors, of the assignment of the option and of the intention to exercise it and allotted to them 1,000 shares and tendered the scrip. The vendors, who in the meantime had, at their own request, been shown the reconstruction agreement, refused the tender and declined

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to complete the sale. The agreement of reconstruction provided for a consideration of 27,345 shares in the new company, of which 9,945 were allotted to the old company as fully paid up and 17,400 as paid up to 17s. 6d. The assets of the old company, for which this consideration was given, consisted substantially in nothing more than the options. In stating his clients' objection to complete the transaction, the respondents' solicitor wrote: "It was never in the contemplation of the parties to the option agreement that my clients would be offered shares in a reconstructed company which is virtually the same as the syndicate (i.e., the old company) itself and which even if the reconstruction is successful will have little, if any, capital to carry on development work." To this the solicitors for the company replied: "As the syndicate held rights over about 80 acres adjoining and in addition to your clients' 10 acres, it must have been in its contemplation that it would receive some consideration in the new company in respect thereof, and the constitution of the new company is entirely different from that of the old company."

These rival statements exhibit clearly the difficulty which is created by the terms of the option agreement expressing the consideration. The limitation of £50,000 placed upon the capital of the company contemplated by that agreement as the body to exercise the option ensures that the respondents' shares shall amount to no less than a fiftieth interest. It leaves it possible to issue £49,000 capital payable in cash and thus to raise money for actual mining operations. But no positive provision is made requiring that all or a specified part of this capital shall be issued only for a consideration in money representing new capital, and it is difficult to suppose that the old company was to receive nothing for the expenditure in exploiting the respondents' claims, and, either was not to transfer to the new company the neighbouring claims, or was not to receive any consideration therefor. While the probability is high that the parties intended that a large part of the company's shares should be issued for new capital, an equal probability exists that both intended that some of the shares should be allotted to the old company or its shareholders. The parties have omitted to deal with the question how much of the contemplated new company's capital is to be available for these conflicting purposes, and we can

discover no materials warranting an implication of any term with which the course actually taken by the company is inconsistent. The fact that the new company is a reconstruction of the old does not prevent it being another and distinct company. It is said that the capital allotted as paid up (£25,170) is grossly in excess of the value of the assets taken as the consideration for its allotment. But this allegation rests only upon the suspicion which naturally arises from the steps in the transaction. No affirmative proof was led in support of it and indeed no case appears to have been made attacking the bona fides of the value assigned to the assets, including the options. Whether any and what additional information as to the value of the claims was obtained during the currency of the options does not appear. All that we know is that the parties regarded one of them as worth the trouble and cost of litigation.

By the judgment under appeal, *Angas Parsons* J. dismissed the plaintiff's claim for specific performance upon the ground that, as promoter of the new company, the old company owed a fiduciary duty to the new company and its future shareholders including the respondents, which it had broken by causing the allotment to itself of the 27,345 shares. No doubt the old company was promoter of the new. "In equity the promoters of a company stand in a fiduciary relation to . . . those persons whom they induce to become shareholders in it, and cannot in equity bind the company by any contract with themselves without fully and fairly disclosing to the company all material facts which the company ought to know" (per *Lindley* M.R. in *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (1)). It is, of course, well settled that disclosure to a board of directors is insufficient unless it is an independent board, and, in the present case, the board of the new company was identical with that of the old. But, in our opinion, these principles have no application to the complaint of the respondents. Their complaint is not as shareholders in a company which has suffered from a breach of fiduciary duty. It is as contracting parties, vendors to the new company and persons contracting with the old company. It is true that, under the contract, they are entitled to shares in the new company. That is part of the consideration bargained for. For all that appears,

(1) (1899) 2 Ch. 392, at p. 422.

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allottees of shares in the company, as such, may be entitled to cause properly constituted proceedings to be taken seeking relief on behalf of the new company in relation to the reconstruction agreement. But the principle requiring disclosure by promoters does not appear to us to have any application to the agreement with the respondents by which, as vendors, they agreed with the old company to give the option to the new. They stipulated for a specified consideration which included shares. If, upon its proper construction, that agreement required that the shares should be in an independent company with which the old company made no contract, or no contract entitling it to a consideration such as it took, the agreement has not been performed and there is no need for the doctrine of equity. But, in our opinion, the agreement will not bear that construction. It is so expressed as to admit of the new company taking over the assets of the old for shares. The principle has no application to a contract made between parties at arm's length. Merely because the agreement provides that one of them shall promote a company, shares in which shall form part of the consideration received by the other, they cannot thus suddenly be placed in a fiduciary relation.

For these reasons we are unable to agree with the decision appealed from.

We think the appeal should be allowed. The judgment appealed from should be discharged and an order for specific performance made.

STARKE J. The appellant, the Para Wirra Gold & Bismuth Syndicate No Liability—hereinafter called the old company—was incorporated in the State of South Australia with a nominal capital of £4,000, divided into four hundred shares of £10 each. One hundred and seventeen of these shares were issued, or agreed to be issued, as fully paid up, one hundred and seventy-five were contributory shares, and one hundred and eight were held in reserve. By an agreement in writing dated 4th March 1933, the respondents—in the agreement with their and each of their executors and administrators called the vendors—agreed to grant to the old company—in the agreement with its successors and assigns called the purchaser—an option to purchase certain mineral reef claims in the State of

South Australia. The option was in these terms: "In consideration of the sum of one shilling (1s.) on or before the execution hereof paid by the purchaser to the vendors (the receipt whereof the vendors do by their execution hereof acknowledge) and for other the considerations hereinafter appearing the vendors hereby grant to the purchaser the sole and exclusive option to purchase free from encumbrances at any time on or before the 19th day of March 1933 the said premises and all the right title and interest of the vendors therein and thereto at or for the consideration of the payment to the vendors of the further sum of five hundred pounds (£500) in cash and of the allotment and issue to the vendors or their nominees or nominee of one thousand (1,000) fully paid up shares of one pound (£1) each in the capital of any company having a registered capital of not more than fifty thousand pounds (£50,000) divided into shares of one pound (£1) each (whether now or hereafter to be incorporated) which shall be formed for the purpose of exercising and shall exercise the said option to purchase." It was a further term of the option agreement that the purchaser should have the right to extend the period of the option to purchase, up to and inclusive of 19th June 1933, upon payment of £500. The right to extend was in these terms: "The purchaser shall have the right at any time on or before the said the 19th day of March 1933 to extend the period of the said option to purchase up to and inclusive of the 19th day of June 1933. If the purchaser desires to so extend the said period he shall on or before the said the 19th day of March 1933 give notice in writing of such his intention to the vendors and shall at the same time pay to the vendors or their solicitor the sum of five hundred pounds (£500) and thereupon the period for the exercise of the said option to purchase shall be extended accordingly and this agreement shall be read and construed subject to the provisions of this clause as if the words and figures 'June 1933' were substituted for the words and figures 'March 1933' wherever the same occur other than in this clause. If the purchaser shall subsequently exercise the said option to purchase the said sum of £500 shall be taken into account as and deemed to be a payment on account of the said purchase consideration but otherwise shall be deemed to be the consideration for the extension of the said option to purchase as aforesaid. Provided that if the

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purchaser shall form and register the company referred to in clause 1 of this agreement before the expiration of the extended period of the said option the scrip for the said 1,000 shares in the said company shall be delivered to the vendors or their solicitor forthwith upon the completion of the formation and registration of the said company without waiting for the expiry of the said extended period of option."

On 18th March 1933 the purchaser—the old company—exercised this right to extend the option, and paid to the vendors the sum of £500 accordingly. A director of the old company deposed that the option was taken up for the purpose of floating it off to the public, and that an attempt was made to do so, but failed. It was then resolved to wind up the old company and to reconstruct. Accordingly, the old company was wound up voluntarily, and a new company was formed to take over its assets and to acquire and exercise the option to purchase under the agreement of the 4th March already mentioned. It was incorporated on 16th June 1933, and was named the Para Wirra Gold Mines No Liability. Its capital was £50,000, divided into 50,000 shares of £1 each. By an agreement dated 19th June 1933 between the old company and its liquidator and the new company, the concessions, options, goods, chattels, moneys, undertakings and goodwill of the old company were transferred and assigned to the new company, or agreed so to be transferred and assigned, and the new company undertook to satisfy and discharge all the obligations of the old company and keep it indemnified. The assets so transferred and assigned included the mineral reef claims already mentioned, and also other assets. The new company issued to members of the old company as part of the consideration for the transfer 9,945 shares fully paid up, and 27,345 were, upon payment of 6d. per share, issued as paid up to 17s. 6d. It also allotted, in three parcels, 1,000 shares fully paid up, to the vendors of the option already mentioned. On 19th June 1933, the old and new companies gave notice to the vendors or their solicitor that the new company was formed, *inter alia*, to exercise and did thereby exercise the option to purchase the mineral reef claims mentioned in the agreement of 4th March 1933, and tendered share certificates for 1,000 shares in the new company, fully paid up. But the tender

was rejected, and the vendors intimated that they considered themselves no longer bound by the option agreement. Action was then brought in the Supreme Court of South Australia by the old and new companies against the vendors for specific performance of the option agreement, but it was dismissed by *Angas Parsons* J. The learned Judge was of opinion that the old company was under a fiduciary duty to the vendors, in promoting a new company, to act in a manner fair and just, and therefore equitable, to the vendors, and he held that their interests were entirely disregarded and that it would be unconscionable to compel them to complete on terms which the facts showed to be unjust. An appeal from that decision is brought to this Court, and now falls for determination.

The object of forming a new company was, undoubtedly, to obtain more working capital than was possessed by the old company. But companies are usually incorporated, for mining purposes, on the no-liability system, and the implication is clear, I think, that the option agreement did not exclude a company formed on this system. The acceptance of a share in such a company does not involve any contract on the part of the person accepting the same to pay any calls in respect thereof, or any contributions to the debts and liabilities of the company, and such person is not liable to be sued for any such calls or contributions (*Companies Act* 1892 (S.A.) (No. 557), sec. 219). The amount that would be subscribed in such a company, unless paid up in cash on the allotment of shares, was necessarily uncertain. And indeed, the option agreement stipulated that the 1,000 shares to be allotted and issued to the vendors might be in any company having a registered capital of not more than £50,000, divided into shares of £1 each. The amount of the working capital contemplated by the parties cannot therefore be gathered, expressly or by implication, from their agreement. It was urged that the option agreement did not contemplate a reconstruction arrangement. I see no substance in this contention, for the reconstructed company is a new and independent company. The argument went further, for it suggested that the agreement could not warrant the transfer of the option to the new company and the issue by it of shares fully or partly paid up as a consideration for the transfer: that would amount to a resale of the option at an excessive value destroying

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the balance of interests contemplated by the agreement. But I can see nothing in the agreement which entitles the vendors to anything more than 1,000 shares in a company with a registered capital of not more than £50,000. And further, on general business considerations, the old company and its shareholders were entitled to expect some consideration for the option procured and transferred to the new company, and the recoupment of any expenditure incurred. The issue of fully or partly paid up shares in the new company is just the consideration that might be expected. It is not the issue of the shares that is really objected to, but the amount that is credited as paid up upon those shares. The old company promoted the new company, and therefore stood in a fiduciary relation to it, and to its shareholders and future allottees of shares (*Erlanger* v. *New Sombrero Phosphate Co.* (1); *In re Leeds and Hanley Theatres of Varieties Ltd.* (2)). It is suggested that the reconstruction arrangement, whereby the holders of 292 shares in the old company credited with the sum of £2,920 paid up thereon became entitled to 27,345 shares in the new company credited with the sum of £25,170 paid up thereon, was in breach of this fiduciary duty, and entitled the new company to rescind the arrangement. It may well be that, in proper proceedings, the new company and its shareholders could rescind the arrangement, but that depends a good deal upon the real value of the assets transferred and how far rescission is possible in the present circumstances; and both these questions are left in obscurity by the evidence. But I am unable to follow how this fiduciary relationship arose from the contract embodied in the option agreement. It gave an option to purchase and nothing more. It stipulated the consideration that should be given for the option: cash and shares in any company having a registered capital of not more than £50,000 divided into shares of £1 each. It was for the old company to find such a company, or to float it, and no stipulations were made as to how or in what proportion the capital in such a company was to be contributed. All the vendors bargained for was 1,000 shares fully paid up in a company of the character mentioned. The option agreement may have been imprudent, but it creates no fiduciary relationship between the parties to it, whatever relationship

(1) (1878) 3 App. Cas. 1218. (2) (1902) 2 Ch. 809.

may be established between the old company and the new company and its shareholders, in connection with the reconstruction arrangement. (Cf. *Re Cape Breton Co.* (1); *Burland* v. *Earle* (2).) The vendors must take their stand upon the true construction of the option agreement, and any necessary business implications arising therefrom. And in my opinion they fail to establish any defence to a claim for its enforcement.

The appeal should be allowed and a decree made for the specific performance of the option agreement.

Appeal allowed with costs. Judgment of the Supreme Court discharged. In lieu thereof order as follows:—Declare that the agreement in the pleadings mentioned arising from the exercise on 19*th June* 1933 *of the option, dated* 4*th March* 1933, *which was assigned to the plaintiff, Para Wirra Gold Mines No Liability, ought to be specifically performed and carried into execution and order and adjudge the same accordingly. Let all parties be at liberty to apply to the Supreme Court for consequent directions or otherwise as they may be advised. Order that the defendants pay the plaintiff's costs of this action up to and including this judgment. Remit the cause to the Supreme Court.*

Solicitors for the appellants, *Symon, Murray & Cudmore.*
Solicitor for the respondents, *C. J. Coventry.*

C. C. B.

(1) (1885) 29 Ch. D. 795; (1887) 12 App. Cas. 652. (2) (1902) A.C. 83.