

[HIGH COURT OF AUSTRALIA.]

MARRIOTT . . . . . APPELLANT ;  
DEFENDANT,

AND

THE GENERAL ELECTRIC COMPANY }  
LIMITED . . . . . } RESPONDENT.  
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF  
VICTORIA.

*Contract—Sale of fifty-one per cent of issued capital in company—More formal contract to be executed—To be based upon terms of original contract—Agency—Agent of purchaser authorized to sign documents necessary to complete agreement with vendor—Agreement entered into by agent of purchaser—Equal representation given to vendor and purchaser on directorate—Repudiation of such agreement by purchaser—Authority of agent—Ratification of contract—Estoppel.*

H. C. OF A.  
1935.  
MELBOURNE,  
Feb. 26. 27,  
28 ; March 1 ;  
May 23.

The appellant agreed to sell to the respondent fifty-one per cent of the issued share capital in a company. The agreement provided that a more formal contract should be executed, but that such contract should be based upon the terms of the original agreement. A contract was subsequently drawn up carrying out the original agreement, except that it added provisions for equal representation of the vendor and of the purchaser on the directorate, a provision not contained in the original agreement, thus depriving the purchaser of the advantage which it held by acquiring the fifty-one per cent interest in the issued share capital of the company. The respondent authorized its agent to “sign and complete” on its behalf “such documents as may be necessary to complete” the agreement with the vendor. Purporting to act under this authority, the agent signed the contract giving equal representation upon the directorate. Upon discovering the terms of the latter agreement the respondent repudiated it, and commenced an action claiming relief from its terms.

Rich, Starke,  
Dixon, Evatt  
and McTiernan  
JJ.

H. C. OF A.

1935.

MARRIOTT

v.

GENERAL  
ELECTRIC  
CO. LTD.

*Held* that the authority to the agent to "sign and complete . . . such documents as may be necessary to complete" the agreement with the vendor did not authorize him to sign a contract at variance with the substantial character of the original agreement, which provided that any further contract should be based upon the terms of the original contract, and that the agreement giving equal representation upon the directorate was accordingly not binding upon the respondent; by *Rich, Dixon, Evatt and McTiernan JJ.* (*Starke J.* dissenting), that the provisions relating to the directorate should not be regarded, as they would be in the original agreement, as an interdependent part of the entire arrangement, so that their invalidity would annihilate the contract, and that the later contract expressed or re-expressed a contract binding upon the respondent in all respects except its provisions relating to the directorate.

*Held*, further, that the respondent had not done any acts which could be held to be a ratification of the later agreement, and that it was not estopped from renouncing its terms.

Decision of the Supreme Court of Victoria (Full Court) affirmed as varied.

APPEAL from the Supreme Court of Victoria.

The plaintiff, The General Electric Co. Ltd., carried on business and was managed in England and sold its products in Australia, among other places. In 1930 a company called Hecla Electrics Pty. Ltd. was incorporated in Victoria. The defendant, Clarence William Marriott, was the governing director of Hecla Electrics Pty. Ltd. and was in a position largely to control the share capital of that company and of other companies which were subsidiary to it. During 1930 he was in England where he negotiated with the directors of the plaintiff company, particularly with two of them named Gamage and Railing, an agreement for the acquisition by the plaintiff of fifty-one per cent of the shares in his companies. The plaintiff and defendant on 3rd October 1930 entered into an agreement in London whereby the plaintiff agreed to purchase from the defendant fifty-one per cent of the issued capital of Hecla Electrics Pty. Ltd. and its subsidiary companies, and to make payment therefor in the event of the purchase being completed in accordance with the terms of the agreement. It was recited in the agreement that "if necessary it is intended that a more formal contract shall be executed when the vendor returns to Australia, but such contract shall be based upon the terms of this agreement." Clause 7 of the agreement provided:—"The articles of association of" Hecla Electrics Pty. Ltd. "and of the subsidiary companies shall be revised in accordance with the reasonable requirements



of both parties hereto and particularly to the following effect : (1) The clauses and conditions in the articles giving the vendor powers as governing director or any other powers beyond those to be vested in him as managing director shall be deleted and the usual clauses as to the appointment of directors shall apply save that the vendor shall not be liable to retirement by rotation so long as he holds the office of managing director." Subsequently an agreement was drafted in Melbourne by the solicitors for the parties and approved by the defendant and by Edward Hirst as agent for the plaintiff. That agreement recited the London agreement of 3rd October 1930 and continued : "And whereas by the original agreement it was recited that a more formal agreement based upon the terms of the original agreement should if necessary be drawn up upon the vendor's return to Australia and whereas the vendor has now returned to Australia and it is deemed necessary that a more formal agreement should be drawn up." The agreement as drafted substantially coincided in form with the London agreement, but clause 7 of the former provided :—"The articles of association of " Hecla Electrics Pty. Ltd. "and of the subsidiary companies shall be revised in accordance with the reasonable requirements of both parties hereto and particularly to the following effect : —(i.) The clauses and conditions in the articles giving the vendor powers as governing director or any other powers beyond those to be vested in him as managing director shall be deleted and the usual clause as to the appointment of directors shall apply save that the vendor shall not be liable to retirement by rotation so long as he holds the office of managing director of the company. (ii.) The number of directors of the company shall be four. (iii.) The vendor and purchaser shall each be entitled to appoint two directors and at any time and from time to time to remove from office any director so appointed by them and to appoint another director in place of any director so removed or of any director appointed by them who may die or resign or otherwise vacate office. (iv.) The vendor shall be appointed chairman of directors. The chairman of directors shall not have a casting vote. (v.) The quorum for meetings of directors shall be two provided that one of such directors is a nominee of the vendor and the other is a nominee of the purchaser. Any two

H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO. LTD.



H. C. OF A.  
1935.  
MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO. LTD.

directors may convene meetings of the directors. (vi.) Clarence William Marriott and Alexander Stuart nominees of the vendor and Edward Eugene Hirst and Malcolm M. Brodie nominees of the purchaser are to be appointed directors. . . . Both parties agree that general meetings of the company and the subsidiary companies shall be called to alter their respective articles of association accordingly and that both parties will vote for such alterations. If there should be any dispute as to the alterations to be made in the articles of association the same shall be settled by some counsel in Australia to be nominated by the solicitors to the respective parties or failing agreement by the president for the time being of the Law Institute of Victoria." Before executing the agreement Hirst, who represented the plaintiff in Melbourne, had cabled to London as follows: "Authorize me to sign documents on behalf of G.E.C. naturally after same have been agreed by lawyers and auditors as lawyers advise my existing power of attorney insufficient," and received in reply a cablegram concluding as follows:—"Understand all necessary documents have now been agreed by B.G.E. lawyers and auditors (stop) You are therefore authorized sign and complete on behalf of G.E.C. such documents as may be necessary to complete our agreement with Hecla Ltd." This cable was produced to the defendant's solicitors and thereupon on 5th February 1931 the defendant and Edward Hirst executed the agreement. Meetings of Hecla Electrics Pty. Ltd. and its subsidiaries were subsequently called and alterations made in the articles embodying the provisions of clause 7 (ii.), (iii.), (iv.), (v.) and (vi.) of the Melbourne agreement; the shares were duly transferred and the purchase money paid over. After hearing that the Melbourne agreement gave the plaintiff and the defendant equal representation upon the directorate, the plaintiff repudiated that agreement, but no complete and unconditional renunciation of the agreement, at any rate in its entirety, was communicated to the defendant until a year had elapsed from its execution. In the meantime the directors nominated on behalf of the plaintiff continued to perform their duties.

In an action in the Supreme Court of Victoria the plaintiff claimed (1) a declaration that the Melbourne agreement was not binding



on the plaintiff; (2) the cancellation or return to the plaintiff of the same; (3) an order for *restitutio in integrum*; alternatively (4) damages for breach of contract; and (5) such other relief as might be just. By his defence the defendant alleged that Hirst was authorized to make the Melbourne agreement, and that such agreement bound the plaintiff; that the plaintiff was estopped from denying that the Melbourne agreement was based upon the terms of the London agreement, and from denying that the Melbourne agreement was necessary for effectuating and carrying out the London agreement, and that the plaintiff held out Hirst as its agent to enter into the Melbourne agreement; that the plaintiff ratified the Melbourne agreement, and that in any event *restitutio in integrum* was no longer possible. He also pleaded laches, and, as to the claim for damages, that there had been no damage.

The action was heard by *Gavan Duffy J.* and was dismissed. On appeal the Full Court of Victoria reversed that decision, and made a declaration that the agreement made in Melbourne on 5th February 1931 was void, and ordered it to be delivered up to be cancelled, but refused the plaintiff any further relief in the action.

From that decision the defendant now appealed to the High Court.

*Fullagar K.C.* and *Tait*, for the appellant. Hirst was authorized to sign the Melbourne agreement by the terms of his original authority and by cable. If there was any particular limitation of his authority, the appellant had no notice of it. Secondly, the Melbourne agreement was satisfied by the writings and conduct of the respondent. Thirdly, no substantive relief can be had by the respondent and, therefore, an empty declaration ought not to be made; shares were transferred and the agreement was performed, and that transaction cannot be set aside. On the first point, the ultimate source of Hirst's authority is the London agreement itself. Whatever further agreement is within the terms of the London agreement Hirst is authorized to agree to and execute. The cable is rather a confirmation of authority than a conferring of authority. The cable simply designates Hirst as the person who is to sign the Melbourne agreement. The Melbourne agreement is within that authority, and any express limitation imposed by the principal cannot affect the person dealing

H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO. LTD.



H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO. LTD.

with the agent unless it is known to that other person. Some degree of variation in the terms of the London agreement would be within Hirst's agreement. Clause 7 of the Melbourne agreement giving equal representation upon the directorate is not inconsistent with anything which is fundamental in clause 7 of the London agreement. On the second point, the Melbourne agreement was ratified and adopted by the English company, and even if it was not binding *ab initio*, it became binding afterwards. The only proper view of what happened is that the transfer of the shares and the alteration of the articles and the payment of the money were all done in pursuance and performance of the Melbourne agreement. When the respondent heard of the terms of the Melbourne agreement on 16th March 1931, it had to choose whether it would ratify or repudiate the agreement. It could not adopt a middle course. Moreover, it could not repudiate clause 7 of the Melbourne agreement and approve the rest of the agreement. The word "approval" to designate ratification was used in *Harrisons & Crossfield v. London and North-Western Railway* (1). The fact that the respondent may have been in a difficult position and did the best it could under the circumstances is quite irrelevant in determining its rights in law and equity now. The vital element is that the respondent accepted what had been done in performance of the Melbourne agreement. Its acts are not justifiable on any other footing, and, having accepted that, it is bound by it. On the third point, if the Melbourne agreement is void, still the respondent cannot have rescission of the executed contract to take shares, which is the substance of the relief which it claims. There cannot be rescission with a *restitutio ad integrum*. When an agreement has been executed it has passed really beyond the sphere of contract. The contract has been discharged by performance. There would no longer be an executory contract capable of ratification. The matter has passed into the sphere of performance, and the real question is what can be done about the accomplished transfer. The respondent has no substantive cause of action in the case and, therefore, it is quite wrong to make a declaration (*Dysart (Earl) v. Hammerton & Co.* (2)). Specific performance

(1) (1917) 2 K.B. 755, at p. 758.

(2) (1914) 1 Ch. 822, at p. 838; (1916) 1 A.C. 57.



ordering the appellant to have the document delivered up to be cancelled would not be granted. The Full Court should not have made a declaration in this matter, because any such declaration would do nothing to define the rights of the parties, but would leave the rights of the parties just where they were before. The Melbourne agreement was authorized by the respondent and was therefore binding upon it.

H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO. LTD.

*Latham* K.C. and *Lewis*, for the respondent. Hirst had no authority to bind the respondent by the Melbourne agreement. He was a special agent with limited powers, and not a general agent in any sense (*Halsbury, Laws of England*, 2nd ed. (1931), vol. 1, at pp. 200, 209). Hirst's authority was in fact very definitely prescribed and limited, and he was not at liberty to do anything inconsistent with the London agreement. The appellant in fact knew that Hirst's authority was a special and limited authority. There was no ratification by the respondent of the act of Hirst in signing the Melbourne agreement. The issue of ratification and the inquiry into ratification only arise if there was no authority in the agent. This act of Hirst's was wholly unauthorized and, therefore, the respondent was not bound to repudiate it. The respondent could do nothing, and the alleged agreement being beyond Hirst's authority would not bind it. In the case of an act done by an agent without authority, there must be clear adoptive acts done by the principal in order that he may be bound, and in this case there is no adoption of the Melbourne agreement. It is a question of fact, and all the facts have been found by the Court in favour of the respondent on this issue. Ratification must be by words or acts. All the words relating to the matter repudiate the alleged agreement; and as far as acts are concerned, they must be unequivocally referable to the agreement alleged to be ratified. They must be solely and unequivocally referable to that agreement, the agreement which it is alleged has been adopted, and the facts do not support that position. If the respondent repudiated only one element in the contract, namely, clause 7, and affirmed the rest of the Melbourne agreement, clause 7 is severable from the rest of the Melbourne agreement, and the adoption would refer only to the remainder of the agreement other



H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO. LTD.

than clause 7. The order made by the Full Court of Victoria was a proper order. Alternatively, the original claim for rescission was justified. It is very substantial relief to have the agreement delivered up and cancelled. There was no ratification of the Melbourne agreement.

*Fullagar K.C.*, in reply.

*Cur. adv. vult.*

May 23.

The following written judgments were delivered :—

RICH, DIXON, EVATT AND McTIERNAN JJ. The appellant must have been at least surprised to hear the proposal made by those representing the respondent company in Melbourne that the board of directors of Hecla Electrics Pty. Ltd. should be composed of two members nominated by him and two by the respondent company, and that there should be no casting vote. It would be difficult for him to avoid doubting whether the concurrence of Mr. Gamage and Mr. Railing in the proposal had been obtained. For our part we feel reasonably satisfied that when it was actually put forward, the appellant knew that its source was in Melbourne and that it was not put forward in obedience to instructions from London. When the depositions of Mr. Gamage and Mr. Railing and the correspondence are read beside the appellant's evidence, a strong impression is produced that the appellant when he left England knew they meant their voting power to be available if need arose as a means of controlling the company through the board of directors. The account given of the way in which equality of representation on the board was proposed suggests that those who were present understood that it was made on the spot without prior consultation with London. The appellant must at least have suspected that it had not received and would never obtain the approval of the men he had met there. No doubt this consideration was not the reason for seeking better evidence of Mr. Hirst's authority to execute the agreement. To request production of his power of attorney was a routine procedure, and when the transaction was seen to fall clearly outside its ambit the natural alternative was to ask for a cable authorizing execution of the instrument.



It does not appear whether Mr. Hirst's cabled request for authority as well as Mr. Gamage's answer was produced to the appellant and his legal advisers, but as its terms are by no means against the appellant's case, it may be assumed in his favour that it was. The material parts of the cables sent and received by Mr. Hirst seeking and giving authority are as follows: "Authorize me to sign documents on behalf of G.E.C. naturally after same have been agreed by lawyers and auditors as lawyers advise my existing power of attorney insufficient." And in reply:—"Understand all necessary documents have now been agreed by B.G.E. lawyers and auditors (stop) you are therefore authorized sign and complete on behalf of G.E.C. such documents as may be necessary to complete our agreement with Hecla Limited."

If the appellant were able to show that by these cables a belief was produced in his mind that the method provided by the draft agreement for constituting the directorate had been communicated to London and there approved, it would be necessary to consider whether there was anything to justify such a belief. In fact Mr. Hirst's cable reads as if he had not been informed of the contents of the documents, and for that reason said that he understood the lawyers and auditors of the British General Electric Co. had agreed to the documents.

But the appellant has not proved that he entertained such a belief. Upon the text of the cables, if he stopped to consider the extent of the authority given, he might perhaps conclude that it authorized Mr. Hirst to commit the respondent company to any documents which the lawyers and auditors reasonably thought to be necessary to carry to completion the agreement made in London.

Mr. Gamage's cable, when it is read with attention, shows, in our opinion, an intention to limit the authority to documents necessary to complete the existing agreement, and further to require that they should have received the prior approval of the lawyers and auditors. Definite proof was not given that the appellant or his legal advisers understood the cable in any other sense. We do not think that it could be read as authorizing any documents whatever which the lawyers and auditors might sanction. But perhaps it may be right to assume that the appellant might reasonably understand and did

H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO. LTD.

Rich J.  
Dixon J.  
Evatt J.  
McTiernan J.



H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO. LTD.

Rich J.  
Dixon J.  
Evatt J.  
McTiernan J.

in fact believe Mr. Gamage to mean to authorize all documents reasonably considered necessary to effectuate the agreement made in London. If so, the respondent company would be bound by his construction of an authority which, according to the hypothesis, would be ambiguous. But the agency was special and not general. To bind the respondent company the transaction must fall within the ambit of the authority even though that ambit is ascertained by reference to the construction placed upon the authority by the appellant. The authority thus construed might enable the inclusion in the document of additional terms which extended or amplified the operation of the agreement they were intended to effectuate; but it could not allow the introduction of provisions at variance with the substantial character of that agreement.

The agreement itself contains provisions for a further agreement, and the authority given by the cable necessarily includes any conditions which would fall within the contemplation of those provisions. The chief of these recites an intention that a more formal contract should be executed when the vendor, the appellant, returns to Australia, but adds that such contract shall be based upon the terms of this agreement.

The last clause of the agreement made in London provides that all further agreements necessary to carry out and effectuate the agreement should be prepared by the appellant's solicitors in Melbourne, and should be approved by the solicitors to the respondent company, and in case of disagreement should be settled by counsel chosen in the manner it prescribes. The clause, which is basal in the litigation, provides that the articles of association of the Hecla Electric companies shall be revised in accordance with the reasonable requirements of both parties and particularly to the following effect:—(i.) the clauses and conditions in the articles giving the vendor powers as governing director or any other powers beyond those to be vested in him as managing director shall be deleted, and the usual clauses as to the appointment of directors shall apply save that the vendor shall not be liable to retirement by rotation so long as he holds the office of managing director. After specifying other matters for revision in the articles, all directed to the protection of the appellant from the use of the voting power of a majority of



shares, the clause ends by expressing an agreement between the parties that general meetings of the companies shall be called for the purpose of altering their articles accordingly, and that both parties will vote for such alterations. If there should be a dispute as to the alterations to be made, the articles are to be settled by counsel chosen in the manner prescribed.

When these provisions are read with the leading provision of the agreement, namely, that for the purchase of fifty-one per cent of the issued capital of the companies, we think it clearly appears that an alteration of the articles was intended by which a board of directors should be established chosen by voting by shares and liable to retirement by rotation. Some latitude is perhaps involved in the words "usual clauses as to the appointment of directors," particularly as to number, first directors, order of rotation, and period of office. But having regard to the reference to retirement by rotation, to common knowledge of the contents of articles of association, and to the evident reason for stipulating for fifty-one per cent of the issued capital, an elective board is clearly indicated by the clause. It appears to us that the plan is subverted by the introduction into the scheme of an even number of directors half nominated by the purchaser and half by the vendor with no casting vote in anyone, "which," as Mr. Hirst naively said in reporting the transaction to London, "makes things equal. In other words everything has to be unanimous."

We are unable to think that such a scheme could be reasonably regarded as conducive to the effectuation of the original agreement. No doubt it appears a strong thing to say that it could not be reasonably considered necessary or proper for the carrying out of the agreement made in London when it was proposed by the respondent's solicitors with that agreement before them. But such a conclusion really means that the solicitors were actuated rather by their own opinion as to what would be a provision suitable for the government of the relations of the parties as they saw them, than by a perfect grasp of the true intention of the agreement which had already been made, an agreement inconsistent with that opinion.

Upon the question whether the provisions of the agreement executed by Mr. Hirst relating to the constitution, nomination

H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO. LTD.

Rich J.  
Dixon J.  
Evatt J.  
McTiernan J.



H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO., LTD.

Rich J.  
Dixon J.  
Evatt J.  
McTiernan J.

and voting of the directorate (clause 7 (ii.), (iii.), (iv.), (v.) and (vi.)) fall outside any antecedent authority real or apparent possessed by Mr. Hirst to contract on behalf of the respondent company, our conclusion is that they were beyond his authority.

It is necessary to consider what effect the inclusion of these provisions produced upon the immediate situation of the parties. With the exception of certain specific alterations, the agreement made in Melbourne was transcribed from that made in London. New and different rights were given only by these specific alterations and possibly by a letter containing four assurances on the part of the appellant, which at the time of the execution of the agreement he wrote at Mr. Hirst's request. The agreement made in London was complete, obligatory, and sufficient for all practical purposes. The agreement made in Melbourne illustrates this fact by the fidelity with which it reproduces the exact terms of the London agreement. Except for the specific variations, it made no alteration in the rights of the parties, although theoretically it might amount to a discharge of the contract from which they arose by substituted agreement. It re-embodied them. It is unnecessary to describe in detail the variations introduced in addition to that relating to the directorate, which is the source of this litigation. They were few and relatively unimportant. A slight alteration in the clause relating to the share capital was occasioned by the better ascertainment of the precise manner in which the shares were held by or for the appellant.

The inevitable intrusion of income and other taxes not assessed necessitated another slight adjustment. A little amplification in respect of delivery and prices took place in the provisions relating to the supply of goods. A substantial alteration was made in one provision. That provision restricted the respondent's freedom in the sale of goods. The parties appear to have been at cross purposes upon the exact restriction intended, and apparently the alteration was erroneously regarded in Melbourne as a mere correction. The alteration, however, cannot operate otherwise than in favour of the appellant, at any rate so long as the embargo upon importation is continued.

It is not clear that the appellant's letter containing his assurances has in law an obligatory effect. Only two of the assurances in any



event could add to pre-existing obligations, and these are the natural outcome of the trade provisions of the agreement to which they make no very important addition. They give nothing to the respondent company which control of the directorate would not be ample to ensure.

In our opinion these specific additions or variations are of relatively slight importance, and except that where they give an advantage to the respondent company the advantage might have been obtainable through control of the board, they have no relevance to or connection with the provisions relating to the constitution of the directorate. They could not be compensatory for that provision, and in fact it is known that they were not, because it was spontaneously and gratuitously proposed by the respondent's solicitors.

In these circumstances we are of opinion that the provisions relating to the directorate should not be regarded, as they would in an original agreement, as an interdependent part of the entire arrangement, so that their invalidity would annihilate the contract. The severability of provisions contained in an instrument which is a mere re-embodiment of existing rights and duties must be determined by a very different application of principle from that which is made in the case of an initial or original agreement. In the present case all the provisions relating to the directorate which are contained in the agreement made in London are repeated in the agreement made in Melbourne. The offending provisions are added to or interpolated among them. It is not as if they supplied the place of some necessary provision the adoption of which the earlier agreement had postponed. When they are excluded from the operation of the agreement made in Melbourne, that agreement embodies, subject to the other alterations, all the terms and conditions of the earlier agreement, and gives them full force and effect.

In our opinion the true legal effect of the transaction in Melbourne was to produce this result.

The Melbourne agreement expressed or re-expressed a contract binding upon the respondent company in all respects except its provisions relating to the directorate (7 (ii.), (iii.), (iv.), (v.) and (vi.)). Before the officers of the respondent company in London

H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO. LTD.

Rich J.  
Dixon J.  
Evatt J.  
McTiernan J.



H. C. OF A.  
1935.

MARRIOTT  
*v.*  
GENERAL  
ELECTRIC  
CO. LTD.

Rich J.  
Dixon J.  
Evatt J.  
McTiernan J.

were made acquainted with what had been done, an agreement to employ the appellant for ten years as managing director of the Hecla Electric companies had been made, the shares had been transferred and the articles of association had been altered, and the new directors had been nominated by the respective sides and appointed. The shares were not transferred to the respondent company but to its Australian subsidiary, the British General Electric Co. Ltd. The agreement made in London was expressed in terms which assumed that the alterations in the articles would, or at any rate might be made after the transfer of the shares, for it provided that both parties would vote for such alterations. Apparently Mr. Hirst in Melbourne thought expedition essential, and he caused all these steps to be taken, including the choice of the nominee directors, during the period occupied in the transmission of the documents to London.

When they arrived the constitution of the board of directors excited Mr. Gamage's extreme disapproval. He consulted the respondent company's solicitors, and three or four days at most after the receipt of the document by the respondent company cabled his protests to Mr. Hirst, directing him to delay the completion of the new articles which he mistakenly supposed had not yet been finally adopted. This cable was followed by a long letter which some ten days later he wrote to Mr. Hirst containing a very clear and full examination of the position as it ought to have been and as it was. In the course of the letter, this passage occurs:—  
“We have consulted our solicitors as regards our legal position. We might conceivably repudiate the agreement you have signed, on the ground that you hold no authority whatsoever from us to sign an agreement which differed materially from the original agreement. Such a procedure would involve much embarrassment and unpleasantness and even if it succeeded it would do more harm than good. At the same time, the position obviously cannot be left where it is, as it is abundantly clear from your own letters subsequent to the signing of the agreement, that we shall have to take a firm hand with Mr. Marriott if the arrangement is going to work successfully. For instance, you tell me that you have not yet been allowed to go through the works. Incidentally, Mr. Marriott cannot prevent



you from going through works, as apart from our rights as 51 per cent shareholders he is definitely under agreement to communicate to us his manufacturing experience. This, however, is typical of his attitude, and it is quite clear that we cannot allow such an attitude to continue. However, as I have said in my cable, we have not yet got the new articles of association, and as other points may arise on those, we prefer to leave our final decision until we get them."

Before sending the cable to Mr. Hirst, but probably after receiving the documents from Melbourne and whilst they were under consideration, Mr. Gamage wrote to the appellant a personal letter answering a letter from him. It contained expressions of goodwill and included the statement that he was glad to hear that everything had been satisfactorily settled between them, and all that remained was a whole-hearted co-operation in pursuit of Australian business. Long before the arrival of this letter, however, the solicitors of the respondent company in Melbourne informed the appellant's solicitors of the objections raised in London, and requested a cancellation of the new articles and the substitution of provisions for an elective directorate. In the meantime the new board of directors had entered upon their duties, and the business of the Hecla Electric companies was conducted in conformity with the agreement. The Australian subsidiary company of the respondent company obtained of course the consequential advantages. The respondent company's money had been paid over in full, and nothing further remained to be done under the agreement in order to bring about the combination of interests which it was designed to effect. About a month or six weeks after the request had been made in Melbourne, Mr. Railing wrote a personal letter to the appellant pressing him to consent to an alteration of the articles.

Efforts to induce him to adopt this course were continued both directly and through solicitors and even counsel, and they were accompanied by hints that litigation would be resorted to, but no express and unconditional renunciation of the agreement made in Melbourne, at any rate in its entirety, was communicated to the appellant until a year had elapsed from its execution. In the meantime the directors nominated as on behalf of the respondent company, one of whom was Mr. Hirst himself, continued to perform

H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO. LTD.

Rich J.  
Dixon J.  
Evatt J.  
McTiernan J.



H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
Co. LTD.

Rich J.  
Dixon J.  
Evatt J.  
McTiernan J.

their duties. From time to time they ascertained the wishes of its London officers. In particular the consent of the respondent company was obtained by them to distributing profits or dividends contrary, as it was thought, to the true commercial interests of the concern in order to escape a liability to income tax which retention of the profit might or would involve.

Upon these facts the appellant contends that the respondent company has ratified the agreement made in Melbourne, or is otherwise precluded from renouncing any of its provisions. The ratification is placed upon two grounds. An actual intention of adopting the terms agreed upon in Melbourne is imputed to the respondent company, an intention presumably formed by Mr. Gamage. Notwithstanding Mr. Gamage's letter to Mr. Hirst, already quoted, and his still earlier letter to the appellant, we think he formed no such intention, nor did anybody else acting on behalf of the respondent company. We think he was determined to take every available means of extricating his company from the provisions to which he objected, but he was unable to see how the transfer of shares, the payment of the money, and the association of the two enterprises, could be undone. These were steps which he did not desire to retrace and saw no way of retracing. So far as the board of directors was concerned, the two nominees were installed to exercise independent functions in which their sole duty was to Hecla Electrics Pty. Ltd. Without an alteration of the articles nothing could be done, and without the consent of the appellant whether obtained voluntarily or by compulsion the articles could not be altered. Mr. Gamage could do nothing to obtain the board he considered he was entitled to except by persuading or coercing the appellant.

Upon the view we have taken as to the severability of the objectionable provisions, nothing but an adoption of those provisions would amount to a ratification making them binding upon the company. There was, in our opinion, no actual intention or election to adopt them.

The second contention relied upon by the appellant in support of ratification is that whether or not there was an actual election or intention to adopt, rights had been exercised or advantages enjoyed by the respondent company to which it could have no title if it did



not acknowledge the binding force of the provisions of the agreement made in Melbourne, including the particular provisions objected to. In our opinion this contention is not well founded. In form, at any rate, the situation was that the British General Electric Co. held fifty-one per cent of the shares in the appellant's company. In virtue of those shares two directors had without the authority of the respondent company been nominated to the board. They held the office of directors, and it was their duty legally and in every other way to perform the functions of directors. The fact that they consulted the respondent company and conducted themselves so as to further its interests involved the exercise of no rights or the enjoyment of no advantages which arose out of the material provisions of the agreement. This appears clearly enough from the consideration that nothing which was done affected the position occupied by the appellant. Nothing which occurred affected the exercise by him of any of his rights or the enjoyment by him of any advantage which would not have arisen if the first agreement had been exactly pursued in reference to the alteration in the articles. In truth the whole question relates to the alteration of the articles. The departure from the earlier agreement in the later consisted in erroneously stating what alterations should be made. Once this provision was acted upon, it produced a change in the regulations controlling the administration of the company which nothing could affect or undo except another alteration in the articles. No choice existed in anybody who was brought into legal relations with the company except to acknowledge and conform to the order established by the articles as they stood. It was the appellant's obligation under the earlier agreement to vote for and bring about alterations of a different nature. The later agreement did not in fact relieve him from this obligation although it appeared to do so. The position of the respondent company was that it still insisted that he ought to perform this obligation notwithstanding that their agent had agreed to its variation, but without their authority.

By maintaining relations with the company with its altered constitution, altered on the footing of that variation, the respondent company did not, in our opinion, ratify the variation or otherwise preclude itself from insisting upon the ultimate performance by the

H. C. OF A.  
1935.

MARRIOTT

v.  
GENERAL  
ELECTRIC  
CO. LTD.

Rich J.  
Dixon J.  
Evatt J.  
McTiernan J.



H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO. LTD.

Rich J.  
Dixon J.  
Evatt J.  
McTiernan J.

appellant of his initial obligation to co-operate in amending the articles so as to give the Hecla Electrics Co. an elective board, an obligation which had been neither fulfilled nor abrogated. In our view the respondent company remains entitled to performance of clause 7 of the agreement (excluding pars. (ii.) to (vi.) thereof); that is to say, of clause 7 of the agreement made in London.

Some difficulty seems to have been felt as to the respondent company's title to relief, and in the Supreme Court it appears to have been considered that a bare declaration of right was all that it could ever obtain. A bare declaration of right probably is quite enough. But it may be open to question whether, if no further relief could be given and the respondent company could never escape from the situation which has arisen, such a declaration should be made. Indeed, in that case, the right declared would be either past or illusory. We are unable, however, to see why specific relief could not be granted to enforce the obligations incurred by the appellant under par. (i.) of clause 7 and the portion of the clause which follows par. V. in the agreement made in London.

If any objection might have been taken to specific relief on the ground that some personal relations are involved, that objection disappears once the agreement is performed in all respects other than the amendment of the articles.

It was said that this view of the matter was not open upon the statement of claim. It is true that it seeks a declaration that the entire agreement is not binding on the respondent. But the facts are sufficiently stated in that pleading, which also claims expressly such other relief as the Court thinks fit. In our opinion the order of the Full Court should be varied by confining the declaration to pars. (ii.) to (vi.) of clause 7 of the agreement and by omitting the order for delivery up. Subject to this variation the appeal should be dismissed with costs.

STARKE J. The appellant Marriott made an agreement with the respondent the General Electric Co. Ltd., in October of 1930, whereby he sold to the company, for the price of £74,000, fifty-one per cent of the issued capital of the Hecla Electrics Pty. Ltd., and such number of the issued shares of certain subsidiary companies as



would result in the purchaser acquiring a fifty-one per cent interest in the share capital of the Hecla Co. and each of the subsidiary companies. This agreement was executed in London, where the appellant was at the time, and has been referred to as the London agreement. It recited that if necessary a more formal agreement should be executed when Marriott returned to Australia, but the parties stipulated that any such contract should be based upon the terms of the London agreement. One of the terms of the London agreement provided that the articles of association of the Hecla Co. and of the subsidiary companies should "be revised in accordance with the reasonable requirements of both parties" to the agreement "and particularly to the following effect":—(i.) The clauses and conditions in the articles giving the vendor powers as governing director or any other powers beyond those to be vested in him as managing director shall be deleted and the usual clauses as to the appointment of directors shall apply save that the vendor shall not be liable to retirement by rotation so long as he holds the office of managing director. (ii.) To prevent the carrying to reserve of any profits in excess of twenty per cent of the divisible profits. (iii.) That the aggregate of fees payable to directors (other than Mr. Marriott) shall not exceed five hundred pounds per annum. (iv.) That the capital of the company or of either of the subsidiary companies can only be increased by an extraordinary resolution of the shareholders. (v.) That (unless this is already the case under Australian company law) the change of name of the company can only be made with the sanction of an extraordinary resolution of the shareholders." Should there be any dispute as to the alterations to be made in the articles of association, it was agreed that the same should be settled by some counsel in Australia nominated by the solicitors of the parties, or failing agreement, by the president for the time being of the local law society. Marriott returned to Australia, and "a more formal agreement" dated 5th February 1931 was drawn up. It has been referred to as the Melbourne agreement. It followed in the main the London agreement, but clause 7 provided:—"The articles of association of the company and of the subsidiary companies shall be revised in accordance with the reasonable requirements of both parties hereto and particularly

H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO. LTD.  
Starke J.



H. C. OF A.

1935.

MARRIOTT

v.

GENERAL  
ELECTRIC  
CO. LTD.

Starke J.

to the following effect—(i.) The clauses and conditions in the articles giving the vendor powers as governing director or any other powers beyond those to be vested in him as managing director shall be deleted and the usual clauses as to the appointment of directors shall apply save that the vendor shall not be liable to retirement by rotation so long as he holds the office of managing director of the company. (ii.) The number of directors of the company shall be four. (iii.) The vendor and purchaser shall each be entitled to appoint two directors and at any time and from time to time to remove from office any director so appointed by them and to appoint another director in the place of any director so removed or of any director appointed by them who may die or resign or otherwise vacate office. (iv.) The vendor shall be appointed chairman of directors. The chairman of directors shall not have a casting vote. (v.) The quorum for meetings of directors shall be two provided that one of such directors is a nominee of the vendor and the other is a nominee of the purchaser. Any two directors may convene meetings of the directors. (vi.) Clarence William Marriott and Alexander Stuart nominees of the vendor and Edward Eugene Hirst and Malcolm M Brodie nominees of the purchaser are to be appointed directors. (vii.) To prevent the carrying to reserve of any profits in excess of twenty per cent of the divisible profits. (viii.) That the aggregate of fees payable to directors (other than Mr. Marriott) shall not exceed five hundred pounds (£500) per annum. (ix.) That the capital of the company or of either of the subsidiary companies can only be increased by an extraordinary resolution of the shareholders. Both parties agree that general meetings of the company and the subsidiary companies shall be called to alter their respective articles of association accordingly and that both parties will vote for such alterations. If there should be any dispute as to the alterations to be made in the articles of association the same shall be settled by some counsel in Australia to be nominated by the solicitors to the respective parties or failing agreement by the president for the time being of the Law Institute of Victoria.” Edward Hirst represented the respondent, the General Electric Co., in Melbourne. Before executing the Melbourne agreement, Hirst cabled to London : “ Authorize me to sign documents on behalf of



G.E.C. naturally after same have been agreed by lawyers and auditors as lawyers advise my existing power of attorney insufficient." And he received the following reply :—" Understand all necessary documents have been agreed by B.G.E. lawyers and auditors (stop) You are therefore authorized sign and complete on behalf of G.E.C. such documents as may be necessary to complete our agreement with Hecla Ltd."

H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO. LTD.  
Starke J.

The history of clause 7 in the Melbourne agreement is stated in the course of a letter dated the 14th April 1931 from Marriott's solicitors to him :—" On going through the preliminary agreement executed in London with you with a view to determining the provisions to be inserted in the formal agreement we drew your attention among other things to clause 7 (1) dealing with the revision to be made of articles as to appointment of directors of your companies and pointed out that in our opinion you should have representation on the Boards proportionate to your shareholding which was substantially one-half. You at that time stated that, as you had not discussed this matter specifically with the General Electric Company's representatives in London, you were inclined not to raise it lest it might appear to them to suggest some lack of confidence in their fairness towards you. You stated you felt certain that even if the provision were not made the London people would act as if it were and relying upon that view you instructed us not to raise the point. We accordingly drafted the agreement without providing for representation on the Board further than as to your managing directorship. We submitted the draft to Messrs. Blake and Riggall for approval on the General Electric Company's behalf. On the 3rd February last at the meeting of parties and their advisers here (when the draft of the proposed formal agreement was discussed) amongst points raised by Messrs. Blake and Riggall was that there should be provision in the articles for representation of the parties on the Boards of directors of your companies and that the first appointed directors should be named. Our Mr. Byrne asked what proportions were suggested. Mr. Outhwaite (Messrs. Blake and Riggall) suggested that as the parties each were to hold substantially one-half of the shares a fair and reasonable provision would be for representation on that basis say two directors for each party. This



H. C. OF A.

1935.

}

MARRIOTT

v.

GENERAL  
ELECTRIC  
CO. LTD.

Starke J.

we agreed to—the names of the directors were then discussed. You and Mr. Stuart were nominated on your behalf and Messrs. Hirst and Brodie on behalf of the General Electric Company. This was approved and agreed to and the draft agreement was finally settled and agreed to.” The clause was therefore introduced into the agreement, by the representative of the General Electric Co. in Melbourne. But as soon as the London representatives of the General Electric Co. heard of the provisions of clause 7, they were “amazed at what had happened.” Their objection is forcibly put in a letter to Edward Hirst dated the 1st April 1931: “What we had arranged was a purchase of a 51 per cent controlling interest, and the clauses in the agreement”—London—“were so drawn as to reserve this control to us, whilst protecting the interest of Marriott as a minority shareholder. What you have done, however, by allowing clauses to be added which give each side a right to appoint two, and only two, directors, is to convert, for all practical purposes, this control which we had arranged, into a 50/50 partnership arrangement, in which neither side can move without the other.” Negotiations were entered into with Marriott in order to induce him to alter the provisions of clause 7, in accordance with the views of the respondent company, but they failed. And the respondent brought the present action in September 1932, claiming a declaration that the Melbourne agreement is not binding upon it, and ancillary relief. It necessarily repudiates the action of its Melbourne representative, and claims that his actions were unauthorized and contrary to the tenor of the London agreement.

The business objections to the provisions of clause 7 of the Melbourne agreement are very real, and it is surprising that so little attention was given to them in Melbourne. But the question now is whether the respondent is bound by the action of its representative. The London agreement was not subject to any condition: it was not made subject to or dependent upon “a more formal contract”; it constituted a legally binding contract. But the parties contemplated some ancillary provisions for effectuating the agreement at which they had arrived. The formal contract was to be based upon the terms of the London agreement. The cable authority to Hirst goes no further than an instruction to him to sign and complete



such documents as might be necessary to complete the London agreement. The authority is, I think, free from ambiguity, and cases such as *Ireland v. Livingstone* (1) are therefore irrelevant. But the London agreement itself provides that the articles of association of the Hecla Co. and of its subsidiaries shall be revised in accordance with the reasonable requirements of both parties to the agreement, and in particular that the usual clauses as to the appointment of directors shall apply, and that should there be any dispute as to alterations to be made in the articles the same be settled by counsel agreed upon by the parties or nominated by the local law society. In my opinion such a provision as this does not warrant any departure from the basis of the London agreement, namely, the control of the respondent over the Hecla Co. and its subsidiaries. The provisions of clause 7 of the Melbourne agreement overthrow and destroy this control over executive action, and if valid would also prevent any alteration of the articles by a majority of the shareholders in the Hecla Co. and its subsidiaries. Such provisions cannot be described as "reasonable requirements" or as "usual clauses as to the appointment of directors" within the terms of the London agreement. No authority therefore can be found in the London agreement for the provisions inserted in clause 7 of the Melbourne agreement.

But Marriott relies upon ratification of the Melbourne agreement by the respondent, and also upon estoppel. Actual intention on the part of the respondent to ratify the Melbourne agreement is clearly absent. It is said, however, that the respondent acted upon, acquiesced in, and took benefits under it. It is true that purchase moneys were paid, shares were transferred to a nominee of the respondent, articles of association were altered in accordance with the Melbourne agreement, directors were appointed by the respondent pursuant to the altered articles, and the business of the Hecla Co. and its subsidiaries has been carried on and other acts have been done in accordance with that agreement. But in the main these acts fell for performance under the London agreement, whether the Melbourne agreement was executed or not. It was contended that the London agreement was discharged by the substitution of the

H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO. LTD.

Starke J.

(1) (1872) L.R. 5 H.L. 395.



H. C. OF A.

1935.

MARRIOTT

v.

GENERAL  
ELECTRIC  
CO. LTD.

Starke J.

Melbourne agreement, and by the performance of that agreement. The Melbourne agreement, however, only reached the respondent about the middle of March 1931, and by that time the results of the acts relied upon by way of ratification and estoppel could not be altered by anything the respondent could do. On the other hand, it was contended that the respondent had denounced the Melbourne agreement, or at least clause 7 of that agreement. But there is great difficulty to my mind in the argument that only clause 7 was denounced. Such a repudiation is only possible if the stipulation denounced be entirely independent and severable from the rest of the agreement. Despite the fact that the Melbourne agreement accords with the terms of the London agreement except as to clause 7, still it purports to be and is, in my opinion, one whole agreement founded upon one consideration. The Melbourne agreement is a unity, and does not consist of independent and several parts. But I see no reason for concluding that the respondent stood on or ratified the Melbourne agreement. Acts had been done which were in accordance with the obligations of the parties under the London agreement. Acquiescence in such acts does not itself establish any adoption of the Melbourne agreement: they are, in truth, as consistent, and really more consistent, with reliance upon the London agreement. But there are some acts, it is said, which can only be referred to the Melbourne agreement, such, for instance, as the alteration of the articles pursuant to clause 7 and the appointment of directors in accordance therewith. And it is contended, furthermore, that the respondent took advantage of the Melbourne agreement. The argument has weight, but it omits, I think, to give due consideration to the nature of the transaction, which required a continuance of the arrangement in fact established by the London agreement. The Melbourne agreement did not, in clause 7, conform to that arrangement, and the change was made without any authority from the respondent. Likewise, the alterations in the articles of the Hecla Co. and of its subsidiaries, and the appointment of directors, were made without any authority from the respondent. It could do nothing to alter the position thus created, without an alteration of the articles. But it was entitled to stand upon its rights under the London agreement. It was in accordance with



the obligations of that agreement that the purchase money was paid and transfers of shares accepted. By so acting the respondent did not affirm the Melbourne agreement or preclude itself from denouncing it. The acts and letters of the respondent, which it is unnecessary to refer to in detail, make it clear, in my opinion, that from March 1931 onwards the respondent continually sought and insisted upon its position under the London agreement, and repudiated the unauthorized Melbourne agreement and declined to stand upon it. It called upon the appellant to join in altering the articles so as to accord with the London agreement, but, relying upon the Melbourne agreement, he refused to do so. There is nothing which precludes it from so repudiating the Melbourne agreement. It has in no way misled the appellant, or induced him to alter his position in any way to his detriment. It leaves him where he ought to stand, namely, on the London agreement.

A suggestion was made that the declaration made by the Supreme Court that the Melbourne agreement was not binding upon the respondent could not be supported. It was said that it did not define the rights of the parties or put them in any different position than they were before. But I cannot assent to this view: it gets rid of the Melbourne agreement, and enables an alteration of articles to be effected without the bar created by this agreement.

The judgment of the Supreme Court should, in my opinion, be affirmed and this appeal dismissed.

*Judgment of the Supreme Court varied. Subject  
to this variation, appeal dismissed with costs.*

Solicitors for the appellant, *Whiting & Byrne.*

Solicitors for the respondent, *Blake & Riggall.*

H. D. W.

H. C. OF A.  
1935.

MARRIOTT  
v.  
GENERAL  
ELECTRIC  
CO. LTD.  
Starke J.