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11/1963

No. 22 of 1962.

# In the Privy Council.

## ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND.

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| UNIVERSITY OF LONDON  |
| INSTITUTE OF ADVANCED |
| LEGAL STUDIES         |
| 19 JUN 1964           |
| 25 RUSSELL SQUARE     |
| LONDON, W.C.1.        |

BETWEEN

"TRUTH" (N.Z.) LIMITED a duly incorporated company having its registered office at Wellington (Defendant) . . . . .

*Appellant*

AND

10 GLADYS VALENTINE HOWEY of Auckland, Gentlewoman (Plaintiff) . . . . .

*Respondent.*

74111

## Case for the Appellant.

1. This is an Appeal, by leave of that Court, from a Judgment of the Court of Appeal of New Zealand delivered on the 15th day of March, 1962, and the Order of the same date made in pursuance thereof, reversing a Judgment and Order of the Supreme Court of New Zealand of the 22nd day of September, 1960, which had dismissed the Respondent's (Plaintiff's) application by Originating Notice of Motion as the holder of 7% (reduced by the National Expenditure Adjustment Act, 1932, to 5.6%) Preference Shares in the capital of the Appellant for relief under Section 41 of the said Act restoring the dividend thereon to the original rate of 7% per annum.

App., p. 24  
 App., pp. 20-23  
 App., p. 24  
 App., pp. 15-19  
 App., pp. 1-2

2. Immediately prior to the coming into force of the National Expenditure Adjustment Act, 1932, on the 10th day of May, 1932, the authorised capital of the Appellant was £200,000 divided into 100,000 7% Cumulative Preference Shares and 100,000 Ordinary Shares, all of £1 each, of which 50,000 Preference Shares and 75,007 Ordinary Shares had been issued and were fully paid up.

3. Section 41 of the National Expenditure Adjustment Act, 1932, was in the following terms:—

30 "41.—(1) The rate of dividend payable by any company registered under the Companies Act, 1908, on any cumulative

preference shares heretofore issued by it is hereby reduced by twenty per centum thereof for the period of three consecutive financial years of such company, that first such year being the financial year that commences in the calendar year nineteen hundred and thirty-two :

Provided that this subsection shall not operate to reduce the rate of the dividend on any cumulative preference share below the rate of five per centum per annum of the nominal value of such share.

(2) The holders of not less in the aggregate than fifteen per centum of the cumulative preference shares heretofore issued by any company as aforesaid, or, where there are two or more classes of such shares, the holders of not less in the aggregate than fifteen per centum of the issued shares of any such class, may apply to the Supreme Court for relief from the operation of this section. 10

(3) An application under the last preceding subsection may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(4) On any such application, the Court, after hearing the applicant, the company, and any other persons who apply to the Court to be heard and who appear to the Court to be interested in the application, may make such order as in the circumstances it thinks just and equitable, taking into consideration the economic position of New Zealand as well as the conditions of the parties. 20

(5) Any order made by the Court granting relief from the operation of this section shall apply to all the shares of the class represented by the applicant."

4. As appears therefrom this Section was originally intended to operate for a period of three consecutive financial years commencing with the financial year commencing in 1932 ; but the Act was subsequently amended from time to time and finally made permanent by the Section 84 (1) (c) of the Mortgagors' and Lessee's Rehabilitation Act, 1936. Section 41, as presently amended is set out at p. 16 of the Appendix. 30

5. The effect of the said Act of 1932 was to reduce the annual dividend payable by the Appellant upon its said 7% Cumulative Preference Shares from 7% to 5.6%, 20% of 7% being 1.4%.

6. Subsequent to the 10th day of May, 1932, the nominal capital of the Appellant has undergone the following changes :—

(A) On the 9th day of December, 1953, the nominal capital of the company was increased to £210,000 by the creation of 10,000 additional ordinary shares of £1 each. 40

(B) On the 9th day of December, 1955, the nominal capital of the company was increased to £260,000 by the creation of an additional 50,000 ordinary shares of £1 each. On the same date the existing 100,000 preference shares were subdivided into two classes of which 74,000 remain on the original basis and 26,000 were converted to 5% (participating to 6%) cumulative preference shares.

10 (c) On the 17th day of June, 1960, the nominal capital of the company was increased to £300,000 by the creation of 40,000 additional ordinary shares of £1 each.

7. Subsequent to the 10th day of May, 1932, the issued following issues of capital have been made by the Appellant :—

(A) On 30th September, 1951, 18,256 ordinary shares were issued to ordinary shareholders at par. App., p. 8, ll. 21-34

(B) On the 14th day of October, 1953, an additional 10,000 ordinary shares were issued to existing ordinary shareholders at par.

20 (c) On the 9th day of December, 1955, an additional 23,477 ordinary shares were issued to existing ordinary shareholders at a premium of 5/- per share.

(D) On the last mentioned date 11,756 5% (participating to 6%) cumulative preference shares were issued at par.

(E) On the 17th day of June, 1960, 63,370 B ordinary shares were issued as a bonus issue in the ratio of 1 B ordinary share for every two ordinary shares held by ordinary shareholders on the 17th day of June, 1960.

8. The present capital of the Appellant is accordingly as follows :—

|    |                                  |  |  | <i>Authorised</i> | <i>Issued</i> |
|----|----------------------------------|--|--|-------------------|---------------|
|    |                                  |  |  | £                 | £             |
| 30 | Ordinary Shares .. ..            |  |  | 200,000           | 190,110       |
|    | Cumulative Pref. Shares .. ..    |  |  | 74,000            | 50,000        |
|    | Participating Pref. Shares .. .. |  |  | 26,000            | 11,756        |
|    |                                  |  |  | £300,000          | £251,866      |
|    |                                  |  |  | £300,000          | £251,866      |

9. None of the persons who were the holders of the said Cumulative Preference Shares on the 10th day of May, 1932, still hold such shares ; only one holder of a parcel of 500 thereof has obtained title to the shares otherwise than by purchase. App., p. 18, ll. 12-13

10. The Respondent, representing the holders of not less than 15% of the issued Cumulative Preference Shares, commenced the present App., pp. 1-2  
40 proceedings by Originating Notice of Motion on the 30th day of March,

1960, under the provisions of Section 41 of the said Act, of 1932, claiming an Order by way of relief against the operation of the said section that as from the 31st day of March, 1960, the rate of dividend thereon should be restored to 7% per annum.

App., p. 2

App., pp. 3-7  
App., pp. 4-15

11. The said Application was supported by an Affidavit of one Howard Neville Robieson, sworn on the 30th day of March, 1960, and by an Affidavit of one Ernest Dawson Wilkinson sworn on the 24th day of August, 1960. An Affidavit of Muriel Joyce Sutherland the Secretary of the Applicant was sworn on the 1st day of September, 1960, in answer. The Affidavit of the said Robieson gave no information as to the number of Cumulative Preference Shares held by or the "condition" (within the meaning of the said s. 41 (4)) of the Respondent, or as to the identity of any of the other holders of the said Cumulative Preference Shares on whose behalf she had been "appointed in writing" in accordance with the provisions of the said s. 41 (3). The extent of the Respondent's holding (300) appeared from the affidavit of the said Sutherland; by consent certain documents (namely, a Circular letter of the 12th day of July, 1960, from the Respondent's Solicitors to all the Preference Shareholders, a Form of Authority to the Respondent to represent such holders, and a Letter of the 8th September, 1960, from the Respondent's Solicitors to the Appellant's Solicitors) were put in by consent at the hearing. 10

App., pp. 25-29

App., pp. 28-29

From these documents it appeared that at the date when the Respondent commenced her said application she was authorised to represent four Insurance Companies holding 9,600 of the said shares, and that she had since obtained authorities from other shareholders, holding all told (including the said 300, and 9,600) 38,662 Shares. No information as to the "condition" of any of the said holders within the meaning of the said s. 41 (4) is contained in any of the said admitted documents.

App., p. 4, ll. 31-32

12. The Affidavit of the said Wilkinson shows (as is not disputed) that the present economic conditions of New Zealand are very prosperous as compared with those of the years 1932 to 1934 inclusive. 30

App., pp. 7-14

13. The Affidavit of the said Sutherland and the Exhibits thereto disclose that the Appellant is at present in a strong financial position and would have no difficulty in paying the extra 1.4% per annum upon the said Cumulative Preference Shares.

14. The action was heard on the 12th day of September, 1960, before the Supreme Court of New Zealand (McCarthy, J.) It was argued for the Respondent solely on the proposition that :—

App., p. 18, l. 42-  
p. 19, l. 2

"bearing in mind the present economic position of New Zealand and the current financial position of the [Appellant], it is just and equitable that an order should be made compelling the [Appellant] to resume in full the obligations which it covenanted to meet when the preference shares were subscribed." 40

15. It was submitted on behalf of the Appellant :—

(A) That the said Act of 1932 provided only for an application by the holders of not less in the aggregate than 15% of the said issued Cumulative Preference Shares for relief from the operation of the Act, and that the Respondent and those whom she represented were precluded from applying for relief since they had never suffered from its operation, having acquired their shares by purchase after the Act had come into force.

10 (B) That the fact the Respondent and those whom she represented had all (with the exception of one holder of 500 shares) acquired their shares after the Act had come into operation was the only matter affecting them or any of them which was known to the Court.

(C) That even if it was held that the Respondent and those whom she represented were entitled to apply for relief under the Act of 1932, there was no evidence on their behalf, or on behalf of any of them, that there was anything in their "condition" (within the meaning of s. 41 (4)) which the Court might take into account as required by s. 41 (4).

20 (D) That the Legislature, by leaving the Section in operation, intended that the reduction imposed should be maintained except in special circumstances, and that no special circumstances affecting the Respondent and those whom she represented had been shown.

16. Mr. Justice McCarthy in his Judgment delivered on the 22nd day of September, 1960, accepted the submissions of the Appellant. After a recital of the facts of the case as disclosed to him, and noting the submissions on behalf of the Appellant, more particularly those under (A) and (B) above, he said :—

30 " The power to grant relief, though in terms discretionary in that the Court may make such order as in the circumstances it thinks just and equitable, is restricted in the matters which it may take into consideration to (1) the economic position of New Zealand and (2) the conditions of the parties. I have before me affidavit evidence directed to the substantial economic improvement in this country between 1932 and the present time and the overall satisfactory position which rules today. No attempt, however, has been made to establish hardship or other special circumstances on the part of the shareholders concerned in the application nor have I any information pointing to special matters affecting the acquisition of

40 the shares by any particular party, assuming for the moment that those matters are material. . . . As I have said, I have no doubt that the company is able to meet its original obligation, and if the shareholders now applying had suffered as a result of the reductions effected by the Legislation, then their position would be very strong. . . . It would not, I think, be equitable and just, merely because the company is reaping a benefit to which it might not in these days

App., p. 18, l. 32-  
p. 19, l. 10

have strong moral claims, to grant some increase to persons who, as far as the evidence before me goes, have not suffered from the impact of the Act."

17. Mr. Justice McCarthy accordingly dismissed the Respondents' Motion. From this Judgment and the Order made thereon the Respondent appealed to the Court of Appeal of New Zealand. Both Respondent and Appellant repeated the arguments which they had submitted in the Supreme Court.

18. On the 15th day of March, 1962, the Court of Appeal (Gresson, P., North and Cleary, JJ.), reversed the decision of Mr. Justice McCarthy and granted the Respondent the relief she sought by the said Originating Notice of Motion; but to operate from the 1st day of April, 1961. 10

19. The Judgment of the Court of Appeal was delivered by the Hon. Mr. Justice Gresson, President. After reviewing the facts of the case and noting that the fact that the present holders of the said cumulative preference shares were none of them shareholders in 1932 when the Act of 1932 came into force was a "relevant consideration"; that the economic position of New Zealand has substantially improved since 1932; he continued as follows:—

App., p. 21, l. 11

App., p. 21, l. 40

App., p. 23, l. 24

"The economic position of New Zealand has undoubtedly greatly changed from the position as it was in 1932; there has been a substantial improvement, and it would appear 'just and equitable' from this point of view that the restrictions imposed in 1932 should now be lifted. As regards the conditions of the parties, it is to be observed that these are very general words. The same words are used in s. 38, which enables a mortgagee or a landlord to apply to the Court for relief. That section goes further than s. 41 in that it specifies particular grounds upon which the applicant may apply for relief, one or more of which must be established by the applicant before the Court is required to consider whether it is just and equitable to make an Order, 'taking into consideration . . . the conditions of the parties.' . . . No doubt as between a mortgagor and a mortgagee, or as between a landlord and a tenant, it may well be that their respective financial positions should be regarded as highly relevant for consideration, but it seems difficult to attach the same importance to this factor as between a company and its shareholders. The latter might be a very numerous class, some in straitened circumstances, some quite affluent, and it would be difficult to attribute to the Legislature an intention that the individual financial position of each of the shareholders comprised in the class affected by the application could or should be considered. It is expressly provided in s. 41 (5) that an Order granting relief shall apply to all shares of the class represented by the applicant, so that there is no power to differentiate between individual shareholders, although the applicant need represent only fifteen per cent. of the shares of the class. This being so, we think that as between a company and its shareholders, and especially in the present case 20 30 40

where the class is numerous, we may view the matter quite broadly and have regard to the holders of the preference shares as a group of investors in the company. Approaching the matter in this way, it should be noted that from 1937 to 1954 no dividends were paid on ordinary shares. Since 1955, however, they have received increasing amounts by way of dividends, and in 1960 a dividend of 12% was paid. Later in 1960 there was a bonus issue of ordinary shares in the ratio of 1 share for every 2 ordinary shares held. The £50,000 of capital held by the cumulative preference shareholders has throughout represented a substantial portion of the total capital employed in the business of the company. The net profits of the company have been steadily increasing, and for each of the three years ending 31st March, 1960, were in excess of £30,000 after provision for tax. So far as the company is concerned it is, therefore, well able to pay a restored rate of £7 per centum, which we were told would only involve an extra payment of about £700 per annum."

20. And he further dealt with the argument that the Respondent and those whom she represented could not apply for relief when they themselves had not suffered from the operation of the Act, as follows:—

" It would be an anomalous result if an Order could be made for the benefit of all preference shareholders if fifteen per cent. of the shares issued before 1932 were still fortuitously held in the same ownership, but otherwise no Order could be made. The same argument would preclude an application for relief by a mortgagee or a landlord if there had been a transfer of the mortgage or a change of ownership of the land leased, for it could equally be said that an applicant in such circumstances was not 'aggrieved by the operation of this Part of this Act' within the words of s. 38. We do not think that this is the meaning or effect of the legislation. The Act has a continuing operation, and the holders of the shares for the time being can properly be said to be applying for relief from this continuing operation of the statute. No doubt the fact that the shares were acquired after the Act came into force can be taken into account as affecting 'the conditions of the parties,' but, with respect, we think that in the Court below too much weight or importance was attached to this matter, and instead of being a feature which could be taken into consideration it was elevated into the determining factor. We do not think it should have been given this importance, particularly with a class of 50,000 shares where changes in ownership might commonly be expected. It may be that the current dividend rate of £5.12.0d. operating at the time of purchase of each parcel may have depressed the value of the shares but in the absence of any evidence as to the price paid by the purchasers and fuller particulars as to the dates of purchase, this is all rather speculative. In the case of shares purchased between 1935 and 1936, the purchasers may well have been influenced by the knowledge that the statute was only a temporary one, due shortly to expire. Those who purchased their shares after 1936 may have had some regard to the right conferred

App., p. 22, l. 40-  
p. 23, l. 24

by the statute to apply for relief from the operation of the Act. But whichever way the matter is looked at, we do not think that the fact that the present preference shareholders acquired their shares after 1932 constitutes in the present case any sufficient reason for refusing the relief sought."

App., p. 23, ll. 25-31

21. It was accordingly the view of the Court of Appeal, particularly having regard to the strong financial position of the Appellant, that it was "just and equitable" that an Order granting the relief sought should be made, and accordingly they Ordered that as from the 1st day of April, 1961, the rate of dividend payable upon the said Cumulative Preference Shares should be 7% per annum in lieu of 5.6% per annum, the rate to which it was reduced by Section 41 of the said Act of 1932. 10

App., p. 24

22. Against the Judgment and Order of the Court of Appeal this Appeal is now preferred final leave so to do having been granted by the Court of Appeal on the 5th day of June, 1962.

23. It is submitted that the decision of the Court of Appeal was erroneous, in that no case had been established by the Respondent, either on her own behalf, or on behalf of those whom she represents, for relief under Section 41 of the said Act, of 1932 :—

(A) For the reasons set out in paragraph 15 hereof which were 20 accepted by the Supreme Court ;

(B) Because the question whether it is "just and equitable" to grant relief from the operation of the Act of 1932 on the ground of the substantial economic improvement of New Zealand alone is a matter for decision by the Legislature in New Zealand ; as the section has still been left in operation, such substantial improvement can only be one of the factors to be taken into consideration.

App., p. 19, ll 11-18

Moreover, as noticed by Mr. Justice McCarthy at the conclusion of his Judgment, new issues of shares in New Zealand are under Government Control, working through a Capital Issues Committee, 30 which advises the Minister of Finance, who fixes maximum rates of dividend from time to time under the provisions of the Finance (Emergency Regulations) of 1940. At the date when the Originating Notice of Motion herein was issued, the maximum permitted rate of dividend for cumulative preference shares had been so fixed at 5 $\frac{3}{4}$ % per annum.

App., p. 9, ll. 33-37

As appears from the Affidavit of the said Sutherland, when the Appellant in 1955 was desirous of issuing further 5.6% Cumulative Preference Shares, the consent of the Capital Issues Committee was not forthcoming. 40

(c) In paying no attention to the entire absence of evidence as to the "condition" of the Respondent and those whom she represents as required by Section 41 (4), and in virtually finding that this word is meaningless as between a Company and its shareholders, the Court has ignored the fact that the whole of Section 41



relates and relates only to the reduction of dividends on cumulative preference shares, and that Section 41 (4) is not a general provision relating to more than one subject matter, but specifically applies to the present case.

10 (D) So far as the analogy drawn by the Court with a Mortgagee or Landlord is concerned, it is submitted that no Mortgagee or Landlord who acquires a Mortgage or Land yielding a return which was reduced in consequence of the provisions of the said Act of 1932, can be said to be "aggrieved by the operation of this Part of this Act" within the words of Section 38 thereof since his acquisition thereof would be a purely voluntary act on his own part.

(E) In the event, the Court of Appeal paid regard only to two of the matters mentioned in Section 41 (4). They criticised the Judgment of the Supreme Court for having elevated one aspect of the matter into the determining factor, but they themselves have similarly, and with less justification, elevated the Appellant's ability to pay into the determining factor.

24. The Appellant will therefore humbly submit that the Judgment and Order of the Court of Appeal in the matter was wrong and ought to  
20 be set aside and that the Judgment and Order of the Supreme Court was correct and ought to be restored for the following among other

### REASONS

- (1) BECAUSE the Applicant and those whom she represents having acquired their shares after the coming into force of the Act of 1932 are not qualified to make an application under Section 41 thereof, since they have never suffered from its operation.
- 30 (2) BECAUSE in the absence of any relevant information concerning either the acquisition by the Respondent and those whom she represents of their shares or of their present condition, there was no material before the Court of Appeal upon which the Court could come to the conclusion that it was just and equitable that the relief sought by the Respondent should be granted.
- (3) BECAUSE the fact that Section 41 has not been repealed shows that the reduction thereby imposed is intended by the Legislature of New Zealand to remain in force except in special circumstances, and no such special circumstances have been shown by the Respondent.
- 40 (4) BECAUSE the fact that the economy of New Zealand is more prosperous now than it was in 1932 is not a sufficient ground upon which it becomes just and equitable to grant relief under Section 41.

- (5) BECAUSE the fact that the Appellant is in a position to pay the full unreduced rate of interest upon the said Cumulative Preference Shares is not either by itself or in conjunction with the economic situation of New Zealand a sufficient ground upon which it becomes just and equitable to grant relief under Section 41.
- (6) BECAUSE relief can only be granted by the Court under Section 41 after a consideration of the condition both of the Appellant and of the Respondent and those whom she represents. 10
- (7) BECAUSE the Judgment and Order of the Court of Appeal is wrong and ought to be set aside.
- (8) BECAUSE the Judgment and Order of the Supreme Court was right for the reasons stated by Mr. Justice McCarthy in his Judgment and ought to be restored.

RAYMOND WALTON.

**In the Privy Council.**

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**ON APPEAL**  
*from the Court of Appeal of New Zealand.*

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BETWEEN  
**“TRUTH” (N.Z.) LIMITED**  
a duly incorporated company  
having its registered office at  
Wellington (Defendant) . . . *Appellant*  
AND  
**GLADYS VALENTINE HOWEY**  
of Auckland, Gentlewoman  
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**Case for the Appellant.**

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WRAY SMITH & CO.,  
1 King's Bench Walk,  
Temple,  
London, E.C.4.