

91470

1967/26

1.

IN THE PRIVY COUNCIL

No. 17 of 1966

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N :

WOOLWORTHS LIMITED

(Defendant)

Appellant

- and -

STIRLING HENRY LIMITED

(Plaintiff)

Respondent

AND BETWEEN :

STIRLING HENRY LIMITED

(Plaintiff)

(By cross-appeal)

Appellant

- and -

WOOLWORTHS LIMITED

(Defendant)

(By cross-appeal)

Respondent

UNIVERSITY OF LONDON
 INSTITUTE OF ADVANCED
 LEGAL STUDIES
 18 MAR 1968
 25 RUSSELL SQUARE
 LONDON, W.C.1.

10

CASE FOR THE APPELLANT IN THE APPEAL
AND THE RESPONDENT IN THE CROSS-APPEAL

	<u>CONTENTS</u>	<u>Paragraphs</u>	<u>Record</u>
20	Introduction	1 - 20	
	Circumstances out of which Appeal arises	21 - 50	
	Contentions	51 - 66	
	Submission and Reasons	67	

RecordINTRODUCTION

1. This is an appeal from a Judgment of the Supreme Court of New South Wales entered in favour of the respondent against the appellant in the sum of \$66,000 and costs in an action entered in the Commercial Causes List of that Court pursuant to the provisions of the Commercial Causes Act 1903 (as amended) and heard before Mr. Justice Collins sitting without a jury in which the respondent was plaintiff and the appellant was defendant. The Judgment so entered has, by reason of section 5 of the Supreme Court Procedure Act 1900 (as amended) the same force and effect in all respects as a Judgment of the Supreme Court of New South Wales. 10

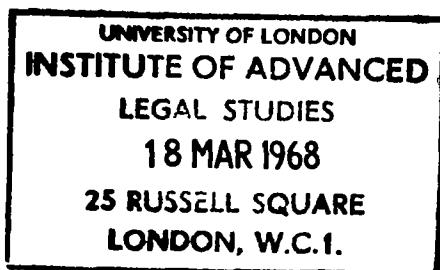
2. The said action was commenced by a writ issued out of the said Court on the 16th day of December 1963 in which the respondent claimed from the appellant damages on an unspecified cause of action in the sum of £200,000 (\$400,000). Pursuant to an order of the Court made on the 17th day of August 1964 pleadings were dispensed with and the respondent and the appellant were ordered to file Points of Claim and Points of Defence respectively. 20

3. The Points of Claim of the respondent, as originally filed and served, were as follows:-

"1. The Plaintiff is a duly incorporated company and as such is entitled to sue in its corporate name. At all material times the Plaintiff has carried on business as a textile manufacturer. 30

2. The defendant is a duly incorporated company and as such is liable to be sued in its corporate name. At all material times the Plaintiff has carried on business throughout Australia as a chain store retailer.

3. Prior to the year 1955 the plaintiff did not manufacture ladies stockings and did not have the plant and machinery to do so. 40



91473

10 4. During the year 1955 it was agreed by and between the plaintiff and the defendant that the plaintiff would purchase the necessary machinery and plant and would erect and establish a mill for the production of ladies fully fashioned nylon stockings and it was further agreed that the plaintiff would produce the stockings exclusively for the defendant and that the defendant would buy from the plaintiff at fair and reasonable prices the whole of the production of the said mill in such sizes, colours, styles and qualities as the defendant should from time to time specify and it was further agreed that the said agreement should be determinable upon reasonable notice in that behalf given by the defendant to the Plaintiff and not otherwise.

20 5. The plaintiff purchased the necessary machinery and plant and erected and established the said mill and until the defendant repudiated the said agreement as hereinafter alleged, the plaintiff produced stockings exclusively for the defendant and the defendant bought the whole of the production of the said mill in sizes, colours styles and qualities which it from time to time specified and paid fair and reasonable prices therefor.

30 6. The Plaintiff always was and remained ready willing and able to perform the said agreement on its part and to produce stockings exclusively for the defendant and to sell to the defendant the whole of the production of the said mill in such sizes, colours, styles and qualities as the defendant should from time to time specify.

40 7. All things happened, all times elapsed and all conditions were fulfilled necessary to entitle the plaintiff to performance by the defendant on its part of the said agreement.

8. Without giving to the plaintiff reasonable or any notice of its intention to

Record

do so the defendant determined the said agreement and repudiated the same and refused to be further bound thereby.

9. The plaintiff has lost the profits it otherwise could and would have earned from the production and sale to the defendant at fair and reasonable prices of the production of the said mill during the period of any reasonable notice, and the said mill, and the machinery therein have become of no use and value to the plaintiff and the plaintiff has been unable to secure other markets for the production of the said mill and has been obliged to close it down and the plaintiff claims £200,000 damages". 10

4. To these Points of Claim the appellant filed Points of Defence, which were as follows:-

"1. The Defendant admits the statements in paragraphs 1 and 2 of the Points of Claim.

2. The defendant denies the statements in paragraphs 6 and 8 of the Points of Claim. 20

3. With reference to paragraph 4 of the Points of Claim the defendant admits that during the year 1955 it was agreed by and between the plaintiff and the defendant that the plaintiff would purchase the necessary machinery and plant and would erect and establish a mill for the production of Ladies' Fully fashioned Nylon stockings and would produce the said stockings exclusively for the defendant but the defendant says that neither the terms nor the effect of the agreement made between the parties is correctly set out in paragraph 4 of the Points of Claim and that the said agreement was as set out in a letter from the defendant to the plaintiff dated the tenth day of May 1955 as follows:- 30

' This will confirm our discussion of the 6th May to the effect that you will import and set up machinery to produce ladies' F/F Nylon stockings exclusively for Woolworths Limited. 40

As discussed, it is anticipated this plant will be installed, and commence production early in 1956, and be capable of manufacturing 50,000 dozen in the first year of operation, and as indicated, we are prepared to place with you contracts for 12 months production on the following basis.

10 30 denier, 51 guage .. 18,000 dozen
 15 denier, 60 guage .. 32,000 dozen

The prices ruling for the first six months to be as follows:-

30 denier, 51 guage .. 71/- per doz.
15 denier, 60 guage .. 79/- per doz.

and thereafter, as we agreed, the price to be:-

30 denier, 51 guage .. 62/- per doz.
15 denier, 60 guage .. 71/- per doz.

20 The basis for subsequent contracts is that each six months a new contract to be placed, and at that date, all outstanding balances to be cancelled, so that you will be holding a twelve months cover for production.

Orders will be placed from time to time drawing stocks ex contract when colour and size proportions will be detailed.

30 Should you wish to submit this letter, or a copy of same to the Authorities to support your application for an import licence covering the necessary plant and machinery, it is quite in order for you to do so.

I would like to record my appreciation of the manner in which our discussions were carried out, and thank you for your co-operative spirit in the course of our negotiations'.

Record

4. In the month of July 1961 the agreement between the plaintiff and the defendant hereinbefore referred to was varied or alternatively rescinded by an agreement which provided as follows:-

(a) The defendant would henceforth purchase seventy-five per centum (75%) of its requirements in fully-fashioned women's hosiery from the plaintiff at market prices;

(b) If seventy-five per centum (75%) of the defendant's requirements in any year fell below fifty thousand (50,000) dozen the defendant would purchase from the plaintiff at least fifty thousand (50,000) dozen pairs of stockings; 10

(c) Contracts to be placed for six months' requirements and the price to be firm for six months but quantities to be reviewed each three months thereby giving to the plaintiff a six months' cover at any one time;

(d) The plaintiff to have the opportunity of quoting special prices for the initial twenty five per centum (25%) requirements of the defendant; 20

(e) The plaintiff to have the right to sell upon the open market and not to be compelled to confine its production to the defendant.

5. At all relevant times the defendant was ready willing and able to perform the agreement between the parties made in May 1955.

6. At all relevant times the defendant was ready willing and able to perform the agreement between the parties made in July 1961 and hereinbefore referred to. 30

7. The plaintiff refused and failed to supply to the defendant goods in accordance with the requirements of the agreement between the parties made in July 1961.

8. By reason of the said refusal and failure of the plaintiff the defendant became and was discharged from performance of the agreement by its part. 40

9. Alternatively the defendant says that if (which is denied) the agreement between the parties made in May 1955 was not varied or discharged by an agreement made between the parties in July 1961 the first-mentioned agreement provided that each six months a new contract for the purchase of stockings by the defendant from the plaintiff was to be agreed upon and that prior to the date when the defendant ceased to purchase the stockings from the plaintiff and at all times since and at all material times the plaintiff and the defendant were unable to and did not agree upon the terms of such contracts.

10. With reference to paragraph 5 of the Points of Claim the defendant denies that it repudiated the said agreement and says that the prices paid by it to the plaintiff from time to time were arrived at in accordance with the agreements between the parties.

11. The defendant does not know and cannot admit the statements set out in paragraph 9 of the Points of Claim".

5. In its Reply the respondent joined issue with the appellant on its Points of Defence except in so far as the same contained admissions.

6. Prior to the commencement of the action the solicitors for the respondent wrote a letter dated the 9th day of December 1963 to the Managing Director of the appellant alleging the existence of an agreement made in 1955 between the appellant and the respondent under which the appellant would purchase from the respondent all the latter's production of fully-fashioned nylon stockings at a price equivalent to a fair market price and capable of providing to the respondent a reasonable margin of profit and a fair return upon its substantial capital investment. The letter further alleged that during 1961 the respondent consented to substantial reductions in its selling prices in order to assist the appellant to meet the difficult trading conditions which it was then said to be encountering. The

p.529 l.19
p.530 l. 5

p.530 l.19

Record

letter further alleged a breach of the agreement of 1955 by the appellant.

7. Such letter was answered by the solicitors for the appellant on the 12th day of December 1963 in which any breach or repudiation by the appellant was denied and it was asserted that the correspondence between the parties indicated a willingness on the part of the appellant to commit itself to purchasing on the most generous terms because of a long association between the appellant and the respondent

10

pp.552-3

8. By letter dated the 2nd day of September 1964 the solicitors for the appellant sought from the solicitors for the respondent particulars of the Points of Claim in their original form and such letter, omitting formal parts, is in the following terms:

" Will you please let us have the following particulars of the matters alleged in the plaintiff's points of claim:

20

As to paragraph 4:

(i) Was the agreement referred to oral or in writing or partly oral and partly in writing?

(ii) If in writing or partly in writing please identify the document and indicate where it may be inspected.

(iii) If oral or partly oral when, where and by whom on the part of the plaintiff and the defendant respectively was it made.

30

As to paragraph 5:

(i) On what date or dates is it alleged that the plaintiff purchased the necessary machinery and plant.

(ii) From what person or persons did the Plaintiff purchase the necessary machinery and plant.

(iii) Please specify the cost of the

necessary machinery and plant.

Record

(iv) On what date did the plaintiff complete the erection and establishment of the said mill?

As to paragraph 8:

(i) Was the 'determination' of the said agreement express or implied?

10

(ii) If implied please specify the facts and circumstances said to give rise to the implication.

(iii) If express was it oral or in writing or partly oral and partly in writing?

(iv) If in writing or partly in writing please identify the document and indicate where it may be inspected.

(v) If oral or partly oral when, where and by whom on the part of the defendant and to whom on the part of the plaintiff was it made?

20

(vi) It is assumed that the 'repudiation' referred to arises out of the 'determination' of the agreement, but if any additional facts and matters are relied upon to support the allegation that the defendant repudiated the agreement will you please furnish particulars of the same.

As to paragraph 9:

30

(i) Please furnish full particulars of the profits which it is alleged the plaintiff could have earned from the production and sale to the defendant at fair and reasonable prices during the period of any reasonable notice and indicate how the amount claimed for loss of profits is arrived at.

(ii) What sum, if any, is claimed in respect of the allegation that the mill and the machinery have become of no use and value to the plaintiff and the plaintiff has

Record

been obliged to close down the mill - if any sum is claimed in this respect please identify with precision how the same is arrived at.

We note that we have 14 days after the receipt of the above particulars for the purpose of filing our points of defence".

p.554-6

9. Such particulars were furnished by letter dated the 29th December 1964 which letter, omitting formal parts, was in the following terms:

10

" We furnish herewith the following further and better particulars of the plaintiff's claim as requested:

As to paragraph 4

(i) In writing.

(ii) Letter Woolworths Limited to Stirling Henry Limited dated 10/5/55, Agreement Woolworths Limited and Stirling Henry Limited dated 30/11/55.

20

As to paragraph 5

(i), (ii), (iii) A schedule covering these matters is attached.

(iv) This is a matter of evidence

As to paragraph 8

(i) Express.

(ii) Not applicable

(iii) Oral and in writing

(iv) By letters from Woolworths Limited to Stirling Henry Limited dated 12/11/63, 14/11/63 and 27/11/63.

30

(v) At the meetings at the defendant's office, 80 Market Street, Sydney on 14/11/63 between Messrs. Kelly, Millist,

Wainberg and Stopford, and at the subsequent meeting at the same place on 2/12/63 between Messrs. Kelly, Millist and Stopford.

Record

(vi) Your assumption is correct.

As to paragraph 9

(i) The average annual gross profits earned by the plaintiff from the operation of its hosiery mill manufacturing stockings for the defendant were as follows:-

- 10 (a) Over the last 7 years before the mill was closed down - average £83,099.
- (b) Over the last 5 years - average £88,033
- (c) Over the last 3 years - average £84,080.

The average annual net profit from the operations of the mill were as follows:-

- (a) Over the last 7 years - £40,792
- (b) Over the last 5 years - £43,103
- (c) Over the last 3 years - £39,711.

- 20 (ii) The written down value of the plant and machinery installed in the hosiery mill, as recorded in the Company's books of account as at 30/6/64 was £39,464.

No depreciation has been provided for in respect of the hosiery mill building which is now surplus to the company's requirements. The building cost the plaintiff £22,520.6.6".

10. By letter dated the 11th day of February 1965 the solicitors for the respondent sought from the solicitors for the appellant particulars of the Points of Defence, such letter being in the following terms: p. 559
- 30

" We would be glad if you would furnish us with the following particulars in relation to paragraph 4 of the Points of Defence:

Record

1. Was the agreement of July 1961 referred to wholly oral, wholly in writing or partly oral and partly in writing.

2. If wholly or partly in writing identify the documents relied upon and state when and where they may be inspected.

3. If wholly or partly oral state:

- (a) when,
- (b) where, and
- (c) between whom

the oral agreement, or the oral terms thereof were made, and state the substance of the said terms".

10

p.560-1

11. By letter dated the 9th March 1965 the solicitors for the appellant wrote to the solicitors for the respondent a letter which omitting formal parts was in the following terms:

" We refer to your letter of the 11th February 1965 and answer your requisitions as follows:

1. The agreement of July, 1961 referred to was partly oral and partly in writing.

20

2. The documents relied upon are:-

Letter from Woolworths Limited to Stirling Henry Limited 10th July 1961.

Letter from Stirling Henry Limited to Woolworths Limited 27th July, 1961.

Letter from Woolworths Limited to Stirling Henry 1st August, 1961.

Letter from Stirling Henry Limited to Woolworths 9th August, 1961.

30

These documents may be inspected at our office by appointment.

3. The oral part of the agreement arose from a meeting held on the 10th July, 1961 at 80 Market Street, Sydney, when there were present Mr. T. Kelly and Mr. R.H. Fleming of Woolworths Limited and Mr. A. Wainberg and Mr. A.J. Stopford of Stirling Henry Limited.

The Agreement reached was substantially as follows:-

(i) Woolworths Limited were to draw 75% of their requirements of Fully Fashioned Women's Hosiery from Stirling Henry Limited at Market price.

(ii) If 75% of Woolworths Limited's requirements fell below 50,000 dozen, the percentage of purchases was to rise to ensure that Stirling Henry Limited received an order for not less than 50,000 dozen.

10 (iii) In the event of Woolworths Limited's total requirements falling below 50,000 dozen, this total would be the quantity then purchased from Stirling Henry Limited.

(iv) A contract was to be placed for six months' requirements; prices to be firm for six months but quantities to be reviewed each three months, giving a six months' cover at any one time.

20 (v) Woolworths Limited were to give Stirling Henry Limited the opportunity of quoting special prices for the 25% requirements referred to earlier.

(vi) Stirling Henry Limited were to have the right to sell on the open market and not confine their production to Woolworths Limited".

12. By letter dated the 30th April 1965 the solicitors for the respondent sought further particulars from the solicitors for the appellant and such letter was in the following terms:

p. 575

30 " We have been advised that the plaintiff for the purpose of preparing for trial is entitled to further and better particulars of the allegations in paragraph 7 of the defendant's Points of Defence.

Accordingly we would be glad if you could supply us with the following particulars:-

(a) Was the said refusal express or implied.

40 (b) If implied state the facts and

Record

circumstances relied upon as giving rise to the implication.

- (c) If express was the said refusal
 - (i) wholly oral,
 - (ii) wholly in writing,
 - (iii) partly oral and partly in writing.

(d) If wholly or partly in writing identify the documents relied upon.

(e) If wholly or partly oral state when, where and between whom the oral refusal was communicated.

10

(f) What was the substance of any oral refusal by or on behalf of the plaintiff.

(g) Give particulars of any failure by the plaintiff not covered by the answers to the above".

p.581-2

13. The solicitors for the appellant replied to the said letter on the 3rd day of June 1965 and such letter was in the following terms:

20

" We refer to your several letters dated 30th April in connection with this matter and, so far as discovery is concerned we are instructed that the only references in the Minutes of Directors Meetings of the Defendant during 1955/1956 and in 1961 which relate to the matters referred to by you occur in meetings held on the 15th November, 1955 and the 22nd November, 1955, and copies of such Minutes are enclosed herewith.

30

So far as the other matters of which you seek discovery are concerned we are arranging for these records to be made available and will let you know as soon as you may inspect the same.

So far as your request for particulars of the allegations in paragraph 7 of the Points of Defence is concerned we reply as follows:-

40

(a) Both

Record

(b) The failure of the plaintiff during the year 1963 and, in particular, during and after August, 1963, to supply to the defendant 75% of its requirements in fully-fashioned women's hosiery or 50,000 dozen pairs of stockings per year whichever was the greater at market prices;

(c) Partly oral and partly in writing.

10 (d) The writing is contained in all correspondence and telegrams between the parties and their solicitors as discovered by the parties from and after the 13th August, 1963.

20 (e) The defendant relies upon the discussions referred to in the correspondence and telegrams to which reference is made in (d) above and, in particular discussions which occurred at meetings between Messrs. Millist, Cooper, Wainberg and Stockford on 12th August, 1963, 22nd August, 1963 and 27th August, 1963, and on 11th and 14th November, 1963. The defendant also relies upon discussions at a meeting between Mr. Wainberg and Mr. Stockford and Mr. Kelly and Mr. Millist on the 28th August, 1963.

(f) You are not entitled to this.

(g) See (b) above".

30 14. By letter dated the 16th June 1965 the solicitors for the appellant wrote to the solicitors for the respondent informing them that on the hearing of the action leave would be sought to add additional paragraphs to the Points of Defence, namely:

pp.584-5

"3A. The agreement between the plaintiff and the defendant as set forth in paragraph 3 of the Points of Defence was and is void for uncertainty and created no enforceable rights and/or obligations;

40 3B. Alternatively to paragraph 3A the said

Record

agreement referred to in paragraph 3 of the Points of Defence created no enforceable rights and/or obligations after the first period of twelve months therein referred to and in so far as it purported to create any rights and/or obligations thereafter was void for uncertainty".

pp.592-4

15. By letter dated the 1st day of December 1965 the solicitors for the respondent informed the solicitors for the appellant that on the hearing of the action the plaintiff would seek leave to amend its Points of Defence (sic) by the addition of certain new counts and the alteration of certain existing counts. A list of the proposed amendments was supplied and was in the following form:

10

"4A. In the alternative to the allegations contained in paragraph 4 hereof the Plaintiff says that in or about the month of May 1955 a contract was made between the Plaintiff and the Defendant the terms of which were contained in a letter from the Defendant to the Plaintiff dated 10th May 1955. The Plaintiff craves leave to refer to the said letter when produced as if the same were fully set forth herein.

20

4B. The contract referred to in paragraph 4A hereof was varied later in 1955 when at the Defendant's request the Plaintiff increased the manufacturing capacity of its new mill and purchased additional machinery therefor. The terms of the said variation are contained in a written contract bearing date the 30th November 1955. The plaintiff craves leave to refer to such contract when produced as if the same were fully set forth herein.

30

5. Add at the end of the existing paragraph 5

'or in the alternative the Defendant paid for such goods the prices fixed by the contract evidenced by the letter of 10th May 1955 as varied from time to time'.

40

5A. In the alternative to the allegations contained in paragraph 4, 4A and 4B hereof the Plaintiff says that in or about the months of July and August 1961 the existing contract between the parties was varied by a contract or in the alternative was replaced by a contract the material terms of which (inter alia) were as follows:

10 (a) The Defendant would henceforth purchase seventy five per centum (75%) of its requirements of fully-fashioned women's hosiery from the Plaintiff at market prices.

(b) If seventy five per centum (75%) of the Defendant's requirements in any year fell below fifty thousand (50,000) dozen the Defendant would purchase from the Plaintiff at least fifty thousand (50,000) dozen pairs of stockings.

20 (c) With regard to the remaining twenty five per centum (25%) of the Defendant's requirements the Plaintiff would have the right of first refusal to supply to the Defendant fully fashioned hosiery at any prices less than market prices at which other manufacturers might offer such goods to the Defendant.

30 The terms of such contract are contained in letters passing between the parties dated 10th July 1961, 27th July 1961, 1st August 1961, and 9th August 1961. The Plaintiff craves leave to refer to such letters when produced as if the same were fully set forth herein.

6. At all material times the Plaintiff was ready, willing and able to perform on its part the contract between the parties.

40 7. All things happened all times elapsed and all conditions were fulfilled necessary to entitle the Plaintiff to performance by the Defendant on its part of the contract between the parties.

8. In and about October, November and

Record

December 1963 the Defendant repudiated its contract with the Plaintiff and refused to be further bound thereby.

9. The Plaintiff has lost the profits it otherwise could and would have earned pursuant to the contract between the parties from the sale to the Defendant of the production of the said mill and the said mill and the machinery therein have become of no use or value to the plaintiff".

10

16. On the 2nd day of December 1965 the solicitors for the appellant wrote to the solicitors for the respondent informing them that it was proposed to seek leave to amend the Points of Defence by deleting, in paragraph 4, the sub-paragraph numbered (b) and inserting in lieu thereof the following sub-paragraph:

"(b) If 75% of the defendant's requirements in any year fell below fifty thousand dozen the percentage of the defendant's purchases would rise to ensure that the plaintiff received orders for not less than fifty thousand dozen and in the event of the defendant's total requirements falling below fifty thousand dozen the defendant would purchase from the plaintiff its said total requirements".

20

pp.3-9

17. The action first came on for hearing before the Honourable Mr. Justice Manning on the 6th day of December 1965 when the amendments previously referred to were allowed and amended Issues for Trial were filed. Such amended Issues for Trial were in the following form:

30

"Writ issued 16th December, 1963

Appearance entered 17th December, 1963

Points of Claim
filed 21st August, 1964

1. The Plaintiff is a duly incorporated company and as such is entitled to sue in its corporate name. At all material times the

40

plaintiff has carried on business as a textile manufacturer.

Record

2. The defendant is a duly incorporated company and as such is liable to be sued in its corporate name. At all material times the plaintiff has carried on business throughout Australia as a chain store retailer.

10 3. Prior to the year 1955 the plaintiff did not manufacture ladies stockings and did not have the plant and machinery to do so.

20 4. During the year 1955 it was agreed by and between the plaintiff and the defendant that the plaintiff would purchase the necessary machinery and plant and would erect and establish a mill for the production of ladies fully fashioned nylon stockings and it was further agreed that the plaintiff would produce the stockings exclusively for the defendant and that the defendant would buy from the plaintiff at fair and reasonable prices the whole of the production of the said mill in such sizes, colours, styles and qualities as the defendant should from time to time specify and it was further agreed that the said agreement should be determinable upon
30 reasonable notice in that behalf given by the defendant to the plaintiff and not otherwise.

40 4A. In the alternative to the allegations contained in paragraph 4 hereof the plaintiff says that in or about the month of May 1955 a contract was made between the plaintiff and the defendant the terms of which were contained in a letter from the defendant to the plaintiff dated 10th May 1955. The plaintiff craves leave to refer to the said letter when produced as if the same were fully set forth herein

4B. The contract referred to in paragraph 4A hereof was varied later in 1955 when at the Defendant's request the plaintiff increased the manufacturing capacity of its

Record

new mill and purchased additional machinery therefor. The terms of the said variation are contained in a written contract bearing date the 30th November 1955. The plaintiff craves leave to refer to such contract when produced as if the same were fully set forth herein.

5. The plaintiff purchased the necessary machinery and plant and erected and established the said mill and until the defendant repudiated the said agreement as hereinafter alleged, the plaintiff produced stockings exclusively for the defendant and the defendant bought the whole of the production of the said mill in sizes, colours, styles and qualities which it from time to time specified and paid fair and reasonable prices therefor, or in the alternative the defendant paid for such goods the prices fixed by the contract evidenced by the letter of 10th May 1955 as varied from time to time. 10 20

5A. In the alternative to the allegations contained in paragraph 4, 4A and 4B hereof the plaintiff says that in or about the months of July and August 1961 the existing contract between the parties was varied by a contract or in the alternative was replaced by a contract the material terms of which (inter alia) were as follows:- 30

(a) The defendant would henceforth purchase seventy five per centum (75%) of its requirements of fully-fashioned women's hosiery from the Plaintiff at market prices.

(b) If seventy five per centum (75%) of the defendant's requirements in any year fell below fifty thousand (50,000) dozen the defendant would purchase from the plaintiff at least fifty thousand (50,000) dozen pairs of stockings. 40

(c) With regard to the remaining twenty-five per centum (25%) of the Defendant's requirements the plaintiff would have the right of first refusal to supply to the Defendant

fully fashioned hosiery at any prices less than market prices at which other manufacturers might offer such goods to the defendant.

Record

10

The terms of such contract are contained in letters passing between the parties dated 10th July 1961, 27th July, 1961, 1st August 1961, and 9th August 1961. The plaintiff craves leave to refer to such letters when produced as if the same were fully set forth herein.

6. At all material times the plaintiff was ready, willing and able to perform on its part the contract between the parties.

7. All things happened all times elapsed and all conditions were fulfilled necessary to entitle the plaintiff to performance by the defendant on its part of the contract between the parties.

20

8. In or about October, November and December 1963 the Defendant repudiated its contract with the plaintiff and refused to be further bound thereby.

30

9. The plaintiff has lost the profits it otherwise could and would have earned pursuant to the contract between the parties from the sale to the defendant of the production of the said mill and the said mill and the machinery therein have become of no use or value to the plaintiff.

Points of Defence filed 5th February 1965

1. The defendant admits the statements in paragraphs 1 and 2 of the Points of Claim.

2. The defendant denies the statements in paragraphs 6 and 8 of the Points of Claim.

40

3. With reference to paragraph 4 of the Points of Claim the defendant admits that during the year 1955 it was agreed by and between the plaintiff and the defendant that the plaintiff would purchase the necessary

Record

machinery and plant and would erect and establish a mill for the production of Ladies' fully-fashioned Nylon stockings and would produce the said stockings exclusively for the defendant but the defendant says that neither the terms nor the effect of the agreement made between the parties is correctly set out in paragraph 4 of the Points of Claim and that the said agreement was as set out in a letter from the defendant to the plaintiff dated the Tenth day of May 1955 as follows:- 10

'This will confirm our discussion of the 6th May to the effect that you will import and set up machinery to produce ladies' F/F Nylon Stockings exclusively for Woolworths Limited.

"As discussed, it is anticipated this plant will be installed, and commence production early in 1956, and be capable of manufacturing 50,000 dozen in the first year of operation, and as indicated, we are prepared to place with you contracts for 12 months production on the following basis. 20

30 denier, 51 gauge ... 18,000 dozen
15 denier, 60 gauge ... 32,000 dozen.

'The prices ruling for the first six months to be as follows:-

30 denier, 51 gauge ... 71/- per doz.
15 denier, 60 gauge ... 79/- per doz. 30

and thereafter, as we agreed, the price to be:-

30 denier, 51 gauge ... 62/- per doz.
15 denier, 60 gauge ... 71/- per doz.

'The basis for subsequent contracts is that each six months a new contract to be placed, and at that date, all outstanding balances to be cancelled, so that you will be holding a twelve months cover for production.

'Orders will be placed from time to time drawing stocks ex contract when colour and size proportions will be detailed.

'Should you wish to submit this letter, or a copy of same to the Authorities to support your application for an import licence covering the necessary plant and machinery, it is quite in order for you to do so.

10 'I would like to record my appreciation of the manner in which our discussions were carried out, and thank you for your co-operative spirit in the course of our negotiations'.

3A. The agreement between the plaintiff and the defendant as set forth in paragraph 3 of the Points of Defence was and is void for uncertainty and created no enforceable rights and/or obligations.

20 3B. Alternatively to paragraph 3A the said Agreement referred to in paragraph 3 of the Points of Defence created no enforceable rights and/or obligations after the first period of twelve months therein referred to and in so far as it purported to create any rights and/or obligations thereafter was void for uncertainty.

30 4. In the month of July 1961 the agreement between the plaintiff and the defendant hereinbefore referred to was varied or alternatively rescinded by an agreement which provided as follows:-

(a) The defendant would henceforth purchase seventy five per centum (75%) of its requirements in fully-fashioned women's hosiery from the plaintiff at market prices.

40 (b) If 75% of the defendant's requirements in any year fell below 50,000 dozen the percentage of the defendant's purchases could rise to ensure that the plaintiff received orders for not less than 50,000 dozen and in the event of the defendant's

Report

total requirements falling below 50,000 dozen the defendant would purchase from the plaintiff its said total requirements.

(c) Contracts to be placed for six months' requirements and the price to be firm for six months but quantities to be reviewed each three months thereby giving to the plaintiff a six months' cover at any one time;

(d) The plaintiff to have the opportunity of quoting special prices for the residual twenty five per centum (25%) requirements of the defendant; 10

(e) The plaintiff to have the right to sell upon the open market and not to be compelled to confine its production to the defendant.

5. At all relevant times the defendant was ready willing and able to perform the agreement between the parties made in May 1955. 20

6. At all relevant times the defendant was ready willing and able to perform the agreement between the parties made in July 1961 and hereinbefore referred to.

7. The plaintiff refused and failed to supply to the defendant goods in accordance with the requirements of the agreement between the parties made in July 1961.

8. By reason of the said refusal and failure of the plaintiff the defendant became and was discharged from performance of the agreement by its part. 30

9. Alternatively the defendant says that if (which is denied) the agreement between the parties made in May 1955 was not varied or discharged by an agreement made between the parties in July 1961 the first mentioned agreement provided that each six months a new contract for the purchase of stockings by the defendant from the plaintiff was to be agreed upon and that prior to the date 40

when the defendant ceased to purchase the stockings from the plaintiff and at all times since and at all material times the plaintiff and the defendant were unable to and did not agree upon the terms of such contracts.

10 10. With reference to paragraph 5 of the Points of Claim the defendant denies that it repudiated the said agreement and says that the prices paid and subsequently offered by it to the plaintiff from time to time were in accordance with the agreements between the parties.

11. The defendant does not know and cannot admit the statements set out in paragraph 9 of the Points of Claim.

Replication filed 16th April, 1965.

20 The plaintiff joins issue with the defendant on its Points of Defence herein except in so far as the same contains admissions".

18. In view of the illness of Mr. Justice Manning the hearing of the action was recommenced before the Honourable Mr. Justice Collins on the 7th day of December 1965 and occupied six sitting days between the 7th and 14th December 1965 and on the 15th day of February 1966 His Honour delivered Judgment.

19. The conclusions to which His Honour came are as follows:-

30 (a) An agreement was reached in 1955 between the respondent and the appellant of which an accurate memorandum is contained in a letter dated the 10th May 1955 written by the appellant to the respondent.

p.367 l.25
p.368 l.30

(b) Thereafter the respondent erected a new factory on its premises at Flemington for the purpose of manufacturing women's fully-fashioned hosiery.

p.369 ll.5
-35

(c) A matter of importance in the case was the

- Record
p.369 1.36
p.370 1.15
- extraordinary decline in fashion popularity of fully-fashioned hose between 1955 and 1965
- p.371 1.20
p.372 1.27
- (d) On the 10th day of July 1961 an important meeting took place between Messrs. Kelly and Fleming on behalf of the appellant and Mr. Wainberg and Mr. Stopford on behalf of the respondent and at such meeting the parties arrived at a further agreement which varied the original contract of May 1955; an accurate memorandum of the terms of the variation is to be found in a letter dated the 13th day of August 1962. 10
- (e) Thereafter meetings between the parties took place at intervals when prices were discussed and agreed upon for the ensuing period.
- p.373 11.13
-19
- (f) At the quarterly meeting of the 24th July 1963 Mr. Cooper on behalf of the appellant offered Mr. Stopford on behalf of the respondent the following prices for stockings; Fairyweb 44/-; Mesh 63/6; Captivation 56/-. Because of the refusal by the respondent to accept these prices a further meeting was arranged for the 12th August 1963 in which Mr. Millist on behalf of the appellant offered the following prices; Fairyweb 41/-; Mesh 48/-d; Captivation 48/-. 20
- p.373 11.20
-36
- (g) Subsequently and after inspection of the books of the respondent by the auditors of the appellant the appellant offered to the respondent the following prices: Fairyweb 60 gauge 43/-; Fairyweb 51 gauge 41/11; Mesh 51/6; Captivation 51/7. 30
- p.374 11. 7
-10
- (h) By letter dated 27th November 1963 the appellant wrote to the respondent withdrawing its offer which had not then been accepted.
- p.374 11.17
-22
- (i) The case was one in which the verbal evidence was of no great importance. The witnesses were all truthful and honourable gentlemen 40

and there was really no dispute on any factual matter. The disputes were almost entirely on matters of interpretation.

Record
p.377 11. 6
-16

(j) The agreement of May 1955 was unenforceable at the termination of the expiration of the period of twelve months referred to in the letter of 10th May 1955.

p.379 11.13
-17

10 (k) The only question which needed to be determined on the issue of liability in the case was: what were the market prices for fully-fashioned women's hosiery from July to November 1963? The answer to this question determines whether the appellant repudiated the contract by insisting on the figures offered by Mr. Millist in August, as varied after the auditors' inspection.

p.380 11.35
-43

20 (l) In this case "it is easier to establish that there was a breach by Woolworths than it is to define what precisely the contract meant when it used the phrase 'market price'".

p.381 11.28
-32

(m) The "special prices" referred to in paragraph 5 of the letter of the 13th August 1963 are prices lower than the market prices referred to in paragraph 1 of the said letter from which it follows that market prices are not the lowest possible prices.

p.499 11.36
-38
p.382 11. 1
-20

(n) In arriving at the market price of fully-fashioned hosiery there are some thirteen important considerations to take into account.

p.385 1.12
p.386 1.11

30 (o) In July 1963 the correct market price for the stockings were the prices offered by Mr. Cooper, namely;

Fairyweb 44/-; Captivation 56/6; Mesh 63/-

From this it follows that the prices offered by Mr. Millist in August 1963 and the varied prices offered by the appellant in November 1963 were not market prices, that the respondent was justified in refusing to sell at these prices and that the insistence by the appellant on such prices was in breach of contract and amounted to repudiation of the contract by the appellant.

p.386 11.26
-40

Record

20. The appellant proposes briefly to review the circumstances out of which the action arose as revealed by the evidence and then to present the contentions by reason of which it is respectfully urged that His Honour's Judgment was wrong. The review is contained in paragraphs 21 to 50 hereof and the contentions in paragraphs 51 to 64 hereof.

CIRCUMSTANCES OUT OF WHICH THE APPEAL
ARISES

10

21. Prior to the year 1955 the respondent carried on business as a manufacturer of textiles but had never manufactured women's hosiery. At all material times the appellant carried on business as a retailer, having a large number of stores throughout Austria.

Exhibit
"A" p.401

22. By letter dated the 10th day of May 1955 written by the appellant to the respondent the former confirmed the terms of an oral agreement made between the parties to the effect that the respondent would import and set up machinery to produce ladies' fully-fashioned nylon stockings exclusively for the appellant. The terms of such agreement are set out in paragraph 3 of the amended Points of Defence hereinbefore set out.

20

Exhibit
"A"
pp.405-7

23. Certain financial assistance was given by the appellant to the respondent to enable the latter to erect new buildings and install new machinery and an agreement between the parties evidencing such arrangements formed part of Exhibit "A".

30

24. From time to time thereafter the parties met and agreed upon the price to be paid by the appellant to the respondent for the stockings manufactured by the latter.

25. Between the period from July 1954 until June 1965 according to the Commonwealth Bureau of Census & Statistics the Australian production of fully-fashioned and circular nylon hosiery, in dozen pairs, varies as follows:-

40

<u>Year</u>	<u>July to</u>	<u>Fully</u>					<u>Record</u>
<u>June</u>	<u>Fashioned</u>	<u>%</u>	<u>Circular</u>	<u>%</u>	<u>Total</u>	<u>%</u>	<u>Exhibit 2</u>
1954-55	2,050,272	92	186,134	8	2,236,406	100	p.632
1955-56	2,065,176	95	114,366	5	2,179,542	100	
1956-57	2,270,974	92	195,835	8	2,466,809	100	
1957-58	1,809,027	85	326,879	15	2,135,906	100	
1958-59	1,847,496	77	558,741	23	2,406,237	100	
1959-60	1,655,085	66	844,203	34	2,499,288	100	
10 1960-61	1,429,435	56	1,123,774	44	2,553,209	100	
1961-62	964,549	35	1,825,197	65	2,798,746	100	
1962-63	852,344	25	2,549,425	75	3,401,769	100	
1963-64	493,389	13	3,273,186	87	3,766,575	100	
1964-65	275,079	7 (r)	3,934,973	93	4,210,052	100	

r = revised.

26. Over the same period the sales by the appellant of circular hosiery continued to rise and those of fully-fashioned hosiery diminished.

p.256 1.3

20 27. By the years 1960 and 1961 the demand for fully-fashioned hosiery was falling and at the same time prices were falling and in July 1961 an agreement was made between the appellant and the respondent which agreement is evidenced in a letter dated the 13th August 1963 written by the appellant to the respondent and is also set out in paragraph 4 of the amended Points of Defence which is reproduced in paragraph 17 hereof.

30 28. At the trial of the action Senior Counsel for the respondent in his opening address relied substantially upon the agreement of May 1955 and no evidence in chief to establish the agreement of 1961 was given by Adrian Johnson Stopford, the Merchandising Manager of the respondent, who was the only witness called by the respondent other than witnesses called solely in relation to damages.

pp 58-60,
63-66

40 29. Under cross-examination the said Adrian Johnson Stopford agreed that Mr. Wainberg, the Managing Director of the respondent, had maintained right up until the respondent ceased to manufacture stockings for the appellant that

pp.110-112
pp.117-121

Record

the agreement in force between the parties was that made in 1955.

30. From time to time after the making of the agreement of July 1961 the parties met together for the purpose of fixing prices for the ensuing period of three months.

31. On the 10th day of July 1961 the appellant wrote the respondent a letter in which it said, inter alia:

Exhibit "A"
p.436 11.20
-24

"In view of the impact that seamless hosiery is having on the fully fashioned market we feel that in all fairness we must today give you the right to sell fully fashioned hosiery elsewhere". 10

32. By letter dated the 27th day of July 1961 the respondent wrote to the appellant and said, inter alia:

"In reference to the last paragraph of your letter - since we have received it we have approached several likely hosiery buyers and have found that at present it is almost impossible to secure business, in fact we were asked how we could expect business now when trade is difficult, when we had not been prepared to solicit orders when conditions were favourable. As you will understand our agreement with your goodself which prevented us from offering any part of our hosiery production to anyone else has for many years precluded any contact on our part with the general market for these goods. It seems to us that we must continue to rely on you for absorption of our production and rely on our agreement that you will not purchase elsewhere any fully fashioned hosiery that we are able to produce until all our production has been absorbed by you. After all, you have been purchasing very large quantities of fully fashioned hosiery besides our own production and also your organisation is constantly growing so under these circumstances we feel that we can look forward to doing business together as in the past". 20 30 40

Exhibit "A"
p.445 1.40
p446 1.20

33. By letter dated the 1st day of August 1961 the appellant wrote to the respondent as follows:

Record
Exhibit "A"
p.447

" It was indeed a great surprise to us to receive your letter which, in effect, if accepted by us would re-open the whole question of the supply of fully fashioned hose.

10 This matter was discussed at length by Mr. A. Wainberg, your Managing Director and yourself with our Managing Director, Mr. Kelly, and Merchandise Manager, Mr. Fleming. This talk lasted for some time and all aspects of the matter were thoroughly discussed.

20 In brief, it was resolved that we would purchase 75% of our requirements from you at market prices, total purchases to be not less than 50,000 dozen per annum unless the situation arose whereby our total requirement was less than this figure. We would give you the opportunity of quoting on the 25% balance of our requirements.

You must, therefore, be clear that we cannot accept the proposals as outlined in your letter under discussion, particularly those referred to in the last paragraph of your letter on the second page".

30 34. By letter dated the 9th August 1961 the respondent wrote to the appellant which letter, inter alia, read as follows:-

"Last Paragraph:

40 This paragraph to which you principally object is merely an explanation of the position in which we are finding ourselves in relation to our total out-put because of circumstances as mentioned in Paragraph 4 in our letter of July 27th. As you know our plant was purchased at your request for manufacturing solely for you on the understanding that you would not buy elsewhere until you had absorbed the whole of our production, this agreement has always been followed and as a

Exhibit "A"
p.448-9

Record

result we have no other market, except yourself, for our goods, and naturally mentioned that we have to rely on you to absorb our production.

With regard to the third paragraph in your letter of August 1st, this is substantially as suggested by Mr. Kelly, with the exception of the reference to 25%. In connection with this 25%, you were to give us the first refusal to supply to you fully fashioned hosiery which may be offered to you by other manufacturers at prices lower, than market prices, and not merely give us the opportunity to quote for the supply of same. In other words, should you be offered fully fashioned hosiery at lower than market prices, and be interested in purchasing same, you would inform us of this position and give us the first opportunity to supply goods at this price. 10 20

Trusting this clears any misunderstanding which you might have had in connection with this matter".

35. On the 13th day of October 1961 the appellant wrote to the respondent a letter, which, omitting formal parts, read as follows:

Exhibit "A"
pp.452-3

" We wish to advise that in view of the great swing to seamfree hosiery and the decline in prices of fully fashioned lines from other manufacturers it is no longer possible for us to absorb your production at current prices, as we are being undersold in similar lines by many department stores as well as our main opposition chain Coles. 30

For the past six months we have been offered 15 denier 60 gauge plain production at 48/6 doz. and 30 denier plain in the same style and pack at 56/6 doz.

Other lines are available from various manufacturers in 15 denier 51 and in some cases 60 gauge from 44/6 to 46/6 doz. in substantial quantities and only today we were offered 30 denier 51 gauge at 46/6 doz. 40

from current production.

Record

We feel sure you are fully aware of the position and will do all you can to meet this highly competitive situation. You will have no difficulty obtaining samples in various stores in Sydney which are selling mostly in plain packs at up to 2/- lower than our branded styles, and you can appreciate that if this position continues we will lose this business".

10

36. The letters and contract documents passing between the parties in relation to the variations in prices for fully fashioned hosiery between the 13th October 1961 and the 30th day of April 1963 were tendered as part of Exhibit "A".

Exhibit "A"
pp.454-494

37. On the 9th day of March 1962 the appellant wrote to the respondent a letter which, inter alia, read as follows:

" Regarding prices, you will note that in spite of the lower market prices prevailing at present for 15 Den. 60 Gauge plain and 15 Den. 51 gauge mesh, we have agreed to Mr. Alex Wainberg's request to leave these unchanged for the duration of these contracts, in view of the fact that you have no other market for hosiery at present, and in consideration of the very difficult trading period we all experienced last year.

Exhibit "A"
p.469 l.25
p.470 l. 8

20

It is inevitable that prices will have to be discussed again in the future and we suggest you make some provision in your reserves against the day in the near future when you may have to accept the fair market price. This is in accordance with the agreement reached at the meeting of your Managing Director Mr. A. Wainberg and yourself with our Managing Director Mr. T. Kelly and the Merchandise Manager Mr. R. Fleming last July, when all aspects of your hosiery mill were discussed. This was confirmed by a letter written by our Merchandise Controller, Mr. J. Miller dated 1st August 1961".

30

40

Record

38. On the 13th day of March 1962 the respondent wrote to the appellant a letter which, inter alia, read as follows:-

Exhibit "A"
p.477 ll.22
-35

" As regards prices those charged by us have always been fair and equitable as shown in the following schedule for 15 Denier Fairyweb.

	<u>Cost</u>	<u>Selling</u>	<u>Mark-Up</u>
1956	79/-	8/11	35%
1957 (April)	76/-	8/11	40%
1957 (June)	71/-	7/11	34%
1958 (January)	67/6	7/11	40%
1958 (September)	63/6	7/11	49½%
1959 (November)	60/-	6/11	38%
1961 (June)	56/6	6/11	47%
1961 (November)	50/-	6/11	66%
1962	50/-	5/11	42%

10

39. On the 3rd day of May 1962 the appellant wrote to the respondent a letter which omitting formal parts read as follows:

20

Exhibit "A"
pp.478-479

" Hosiery Contracts - 1 July - 30 September

Further to our recent discussion we are prepared to give you contracts for the following quantities to cover your production during this period, delivery as required, at the prices shown which will permit us to achieve our average budget mark up of 48% for each perfect quality line at our current selling prices.

In the case of 15 denier Mesh and Plain Perfects allowance has been made of the anticipated quantities we will need to purchase from other suppliers at current lower market prices in arriving at these prices.

30

B 29	15	den.	F/F Mesh	1500	doz.	Cost	66/6
B 33	15	"	" Plain	13000	"	"	48/6
B 56	30	"	"	4500	"	"	56/-
HM 15	15	"	Plain Mediums	Quantities accruing			
						40/-)
HM 45	30	"	"	"	"	42/-) *
HM 217	15	"	Mesh	"	"	44/-)

40

* Unchanged.

Record

As we indicated to you our sales opposition dropped the price of 15 denier Mesh Perfects from 7/11 to 7/6 pair and 15 denier plain Perfects from 5/11 to 5/6 pair on 23rd March. If we decide to meet these prices we confirm your willingness to lower your costs immediately to permit us to maintain our mark up margin of 48%. So far they have not dropped the price of 30 denier from 6/11 pair, but the same will apply to this line if we have to drop the price".

40. Eric William Cooper, a Buying Manager, employed by the Appellant, prepared a schedule showing the purchases of fully-fashioned hosiery by the appellant from various sources including the respondent for the period from the 4th December 1962 to the 3rd December 1963, the period from the 3rd December 1963 to the 1st December 1964 and the period from the 1st December 1964 to the 5th October 1965 and the said Schedule comprises exhibit 3.

Exhibit 3
pp.633-638

41. The said Eric William Cooper prepared also a document comparing prices paid by the appellant to the respondent and prices paid by the appellant to other suppliers of fully-fashioned hosiery from June 1961 to November 1964 which was tendered and marked Exhibit 4. Such schedule indicated that during the year 1963 and early 1964 the prices paid were as follows:-

<u>Date</u>	<u>Stirling Henry</u>	<u>Beau Monde</u>	<u>Hole- proof</u>	<u>Selling Price</u>
January 1963	46/6	42/6	42/6	5/6
May, 1963	46/6	41/-	41/-	5/6
September 1963	46/6	39/-	41/-	5/6
November 1963	44/-	39/-	41/-	5/6
January 1964	44/-	39/-	41/-	5/6

Exhibit 4
p.639

42. The above figures refer to prices paid in respect of 15 denier fully fashioned plain stockings

42. The said Schedule indicates that in respect of 15 denier fully fashioned mesh stockings the position was as follows:-

<u>Record</u>	<u>Date</u>	<u>Stirling Henry</u>	<u>Beau Monde</u>	<u>Hole-proof</u>	<u>Char-maine</u>	<u>Kayser</u>	<u>Selling Price</u>	
	<u>1962</u>							
	December	66/6	55/-	57/-	-	-	7/11	
	<u>1963</u>							
	March	66/6	55/-	57/-	-	55/-	7/11	
	April	66/6	55/-	57/-	-	55/-	7/11	
	May	66/6	48/-	57/-	-	-	7/11	
	November	63/6	48/-	-	-	-	7/11	
	December	63/6	48/-	-	-	-	6/11	10
	<u>1964</u>							
Exhibit 4 p.640	January	63/-	48/-	-	-	-	6/11	

43. The said Schedule disclosed that in relation to 30 denier fully fashioned plain stockings the position was as follows:-

<u>Date</u>	<u>Stirling Henry</u>	<u>Lincoln</u>	<u>Roslyn</u>	<u>Kolo-tex</u>	<u>Hole-proof</u>	<u>Selling Price</u>	
<u>1962</u>							
September	56/-	-	-	47/-	-	6/11	
<u>1963</u>							
May	56/-	-	-	47/-	-	6/11	20
July	56/-	-	-	47/-	-	6/11	
October	56/-	-	-	47/-	-	6/11	
<u>1964</u>							
January	56/-	-	-	47/-	-	6/11	

Exhibit 4
p.641

p.282 1.18
p.283 1.15
p.284 1.25
p.289 1.31

44. The prices agreed upon from time to time between the appellant and the respondent were increases over the prices which the appellant was paying for the purchase of stockings from other manufacturers until August, 1963, having regard to the long association between the appellant and the respondent. The evidence of Mr. Cooper was that the prices which the appellant was paying to other manufacturers for fully-fashioned hosiery from 1956 onwards were prices negotiated with such other manufacturers in the ordinary course of the buying operations of the appellant. 30

45. At a quarterly meeting held on the 24th July 1963 Mr. Cooper suggested that the prices to be operative from the 1st October 1963 should be: 40

Exhibit "A"
p.502

15 denier 60 gauge 44/-
30 denier 51 gauge 56/-
15 denier 51 gauge mesh 63/6.

Record

46. About August 1963 Mr. Cooper formed a certain view in regard to the future of fully-fashioned hosiery having regard to the decline in demand of the same and thereupon had a conversation with Mr. Millist his senior. Mr. Millist thereupon spoke to Mr. Theo Kelly, the Managing Director of the appellant and subsequently on or about the 24th August 1963 a meeting took place between Mr. Cooper and Mr. Millist representing the appellant and Mr. Wainberg and Mr. Stopford representing the respondent. At such meeting Mr. Millist read out the terms of the arrangement made in July 1961 and then informed the representatives of the respondent that the appellant was currently able to purchase the requirements of hosiery being produced by the respondent at prices considerably below those which it was at present paying to the respondent and that the appellant now wished to bring into effect the terms of the arrangement made in July 1961 and purchase the appellant's future requirements at the ruling market price. Mr. Millist thereupon offered to pay the following prices on behalf of the appellant to the respondent:

p.218 1.9
p.223 1.3
p.283 1.15

15 denier 60 gauge 41/-
30 denier 51 gauge 48/-
15 denier 51 gauge mesh 48/-

47. On the 13th day of August 1963 the appellant wrote to the respondent a letter which omitting formal parts read as follows:-

" With reference to our discussion, held yesterday, regarding Fully Fashioned Hosiery, this letter will set out in brief detail the propositions put to you by the writer and Mr. Cooper, for the basis for future conduct of our purchases of Fully Fashioned Hosiery from Starling Henry Limited.

Exhibit "A"
pp.499-500

40 We referred to the arrangements made at a meeting held in July, 1961, between yourself and our Managing Director, the details of which were as follows:-

1. In Fully Fashioned Women's Hosiery we

Record

would draw 75% of our requirements from Stirling Henry at market prices.

2. If 75% of our requirements fall below 50,000 dozen, the percentage of purchases to rise to ensure that they receive not less than 50,000 dozen.

3. In the event of our total requirements falling below 50,000 dozen, this would be the quantity then purchased from them.

4. A contract should be placed for six months' requirements; price to be firm for six months but quantities to be reviewed each three months, giving them a six months cover at any one time. 10

5. We would give this Company the opportunity of quoting special prices for the 25% requirements referred to earlier.

6. Stirling Henry would have the right to sell on the open market and not confine their production to us. 20

We have advised you that we wish to operate on this basis and that our assessment of the current market price of Hosiery being supplied by you was -

<u>Construction</u>	<u>Current Market Price</u>
15 Denier 60 Gauge	41/-
30 " 51 "	48/-
15 " 51 " Mesh	48/-

" In view of the fact that you intimated that in your opinion such prices were unreasonable, we put the proposition to you that if you would be prepared to supply either us, or if you prefer our Auditors with an Audited Statement showing that our transactions over the last two to three years had been uneconomical, and that future supply at the prices indicated would be unprofitable, we would undertake to review the position to ascertain what action should be taken. 30 40

Verbally you refused these offers and we would, therefore, appreciate your advising us in writing your reactions to our proposals".

Record

48. Following upon certain discussions and correspondence between the appellant and the respondent the appellant by letter of the 14th November 1963 addressed to the respondent offered to pay the following prices:

10 15 denier 60 gauge 45/2
 15 denier 51 gauge 41/-
 15 denier 51 gauge mesh 56/9
 30 denier 51 gauge 42/6.

Exhibit "A"
p.518

The terms were F.I.S. each State less $2\frac{1}{2}\%$ for thirty days.

49. By letter dated the 20th day of November 1963 the respondent wrote and said, inter alia;

20 "In our opinion an equitable business proposition would be the cost price arrived at by Woolworths auditors, plus 10% profit margin plus the increase in labour costs mentioned above which would then show the following net prices:

 15 denier 60 gauge 47/1
 15 denier 51 gauge 43/6
 15 denier 30 mesh 59/5
 30 denier 51 gauge 44/6."

Exhibit "A"
p.522

30 50. By letter dated the 27th day of November 1963 the appellant wrote to the respondent and said, inter alia, that the prices which it had offered were based on $7\frac{1}{2}\%$ in excess of the prices at which the appellant could have purchased like merchandise from other well-established suppliers. The letter stated that in the circumstances the appellant's offer to the respondent was withdrawn as the appellant was required to arrange immediate placement of its orders for fully-fashioned hosiery elsewhere.

CONTENTIONS

40 51. The appellant respectfully agrees with the

Record

learned Trial Judge and submits that the only relevant contract between the parties for the purpose of this case is that arrived at in July 1961 and referred to in paragraph 19 (d) hereof. The appellant further agrees and submits that the principal question for consideration on the issue of liability is the meaning of the words "at market prices" as contained in such agreement.

52. In the course of his closing address, which was recorded in shorthand, Senior Counsel for the Respondent submitted that the "market price" within the meaning of the contract between the parties made in July 1961 was the fair market price at which the parties coming together, willing but not anxious on either side, fixed in relation to the market. Later in his address he defined "market price" as being "fair value in the relevant market". 10

53. No evidence was lead in chief from Adrian Johnson Stopford, the only witness called by the respondent on the question of liability, as to the meaning of the expression "market price" or as to what were the "market prices" alleged by the respondent to exist from time to time. In cross-examination, however, the said Adrian Johnson Stopford was asked the following questions and gave the following answers: 20

p.112 1.5
-1.20

"Q. You are a business man, of course, what did you understand the words 'market price' to mean? 30

A. The market price would be the price that would allow us to make a reasonable rate of profit.

Q. Do you suggest that that is the usual meaning of 'market price' or don't you? A. 'Market price' is one of those difficult things to define.

Q. Do you agree with me that that is the usual meaning of 'market price'? 40
A. I would say that 'market price' would normally be the price that would allow a person to make a reasonable profit, yes.

Q. You put that seriously, do you? A. I do put that seriously".

Record

54. In its letter of the 19th August 1963 the respondent said, inter alia:

"Market prices used in your letter can only mean the reasonable price which will allow a fair profit margin to both parties".

p.501 11.30
-33

10 55. It is submitted that in the light of the surrounding circumstances existing at the date of the contract made in July 1961 the words "market prices" referred to a price determined by the law of supply and demand and the expression has nothing to do with the profit or percentage of profit to be made by either or both parties.

20 56. It is further submitted that in determining the market price the considerations numbered 1 to 12 inclusive contained in the Judgment of His Honour and hereinbefore referred to were irrelevant considerations.

p.385 1.10
p.386 1. 8

30 57. Although His Honour said that it was easier to establish that there was a breach by the appellant than it was to define what precisely the contract meant when it used the phrase "market prices" he determined that the market prices in July 1963 were those then offered by Mr. Cooper. No grounds were advanced for this finding and the appellant submits that it is a finding made in the absence of evidence and one which cannot be supported.

58. His Honour deduced from paragraph 5 of the letter of the 13th August 1963, which set out the agreement made in July, 1961, that market prices were not the lowest possible prices, and then said:

p.382
11.12-20

40 "Once the proposition is rejected that the lowest possible prices that could be obtained for stockings from any manufacturer for any quantities were market prices within the meaning of the agreements then this list shows a consistent course of conduct on Woolworths part in paying more to Stirling Henry than these prices"

p.383
11.11-18

Record

Exhibit 4
pp.639-641

The list referred to was the list prepared by Mr. Cooper showing prices paid to other manufacturers of stockings, which list was marked exhibit 4. It is submitted that His Honour was not entitled to infer from paragraph 5 of the said letter that market prices were not the lowest possible prices from manufacturers other than the respondent. It is further submitted that His Honour was not entitled to find or infer that the prices set out in the list exhibit 4 were the lowest possible prices and it is submitted that such prices were simply the prices which were being paid by the appellant. 10

59. It is submitted that the prices in the list forming exhibit 4 are indicative of the market prices for the goods manufactured by the respondent. If this submission be unacceptable then it is submitted that there is simply no evidence from which any market price at any relevant time could be determined. 20

p.383
11.18-20

60. His Honour apparently relied upon the fact that the list (Exhibit 4) showed a consistent course of conduct on the part of the appellant in paying more to the respondent than to other suppliers, and that accordingly the "market price" could not be determined by what had been paid to such other suppliers. The evidence established that notwithstanding the prices fixed in the agreement of 1955 between the parties the appellant had consistently over a number of years paid to the respondent prices exceeding those which under the said agreement it was legally obliged to pay. In its letter of the 9th March 1962 to the respondent the appellant said: 30

p.468 11.25
-35

"regarding prices, you will note that in spite of the lower market prices prevailing at present for 15 Den. 60 gauge plain and 15 Den. 51 gauge mesh, we have agreed to Mr. Alex Wainberg's request to leave these unchanged for the duration of these contracts, in view of the fact that you have no other market for hosiery at present, and in consideration of the very difficult trading period we all experienced last year". 40

On the 13th August 1963, however, the appellant, in view of the decline in demand for fully-fashioned hosiery, advised the respondent that it wished in future to operate on the basis of the agreement of July 1961 and offered to pay prices which were in accordance with the prices then being paid by the appellant to other suppliers as appears from Exhibit 4.

Record

- 10 61. The evidence establishes that having regard to the insistence of those representing the respondent and the nature of the relationship between the parties the buyer for the appellant Mr. Cooper, was prepared and able to make concessions to the respondent so long as he was able to achieve a certain budget percentage mark up for the whole of his department.
- p.282 11.30
-40
p.343 11.30
-40
p.351 11.28
-32
p.358 11.15
-30
- 20 62. Having regard to the fact that, according to the evidence of Mr. Stopford, Mr. Wainberg, the Managing Director of the respondent, in the course of discussions between himself and representatives of the appellant always maintained that the original agreement of 1955 was still in force and was never prepared to negotiate on the basis of any agreement made in 1961 no evidence was forthcoming as to what were considered by Mr. Wainberg to have been market prices in accordance with the 1961 agreement. The said Mr. Wainberg was not called as a witness by or on behalf of the respondent.
- p.110. 1. 1
p.111 1.20
p.117 1.18
p.121 1. 8
- 30 63. It appears from the evidence of Mr. Stopford and from the correspondence that the respondent at all material times claimed that the price it was entitled to be paid was "a fair and reasonable price". It is submitted that such a contention involves the substitution of the words "at a fair and reasonable price" for the words "at market prices".
- 40 64. The appellant submits that not only has the respondent failed to lead any evidence from which an inference as to the "market prices" within the meaning of the contract between the parties could be arrived at but also that the only evidence in the case from which such prices could be deduced is contained in Exhibit 4.
- pp.639.641

Record

65. The appellant further submits that in relation to damages His Honour should have held that one year's notice was all that was necessary to be given to terminate the agreement. The appellant refers to its submissions in relation to damages made in connection with the Cross-appeal.

66. This appeal is brought to Her Majesty in Council pursuant to an order made by the Court of Appeal of the Supreme Court of New South Wales on the 14th day of June 1966 granting to the appellant final leave to appeal. The appeal is brought under Rule 2(a) of the Privy Council Appeal Rules of 1909. 10

SUBMISSION

67. The appellant accordingly submits that the appeal should be allowed and that a verdict and judgment should be entered for the appellant.

THE REASONS:

- (1) That His Honour was in error in holding that the Appellant had repudiated the contract between the Respondent and the Appellant; 20
- (2) That His Honour was in error in holding that the prices for certain types of fully-fashioned hosiery suggested by the Appellant's representative Mr Cooper to the Respondent's representatives in July, 1963, were "market prices" within the meaning of that expression contained in the agreement made by and between the Respondent and the Appellant on the 10th day of July, 1961; 30
- (3) That His Honour should have found that the respondent had not discharged the onus of establishing what was the market price;
- (4) That there was no evidence of what were "market prices" within the meaning of the Contract;
- (5) That this Honour misdirected himself in holding "it is easier to establish that there 40

was a breach by Woolworths than it is to define what precisely the contract meant when it used the phrase 'market prices'";

- (6) That His Honour was in error in holding that the case sought to be made by the Appellant -
- (a) was incompatible with the arrangement entered into between the parties in July, 1961; and
- 10 (b) was inconsistent with the whole of its conduct up to August, 1963; and
- (c) that no satisfactory explanation had been given for such inconsistency;
- (7) That the damages awarded were excessive;
- (8) That the Respondent did not establish that it had suffered any damage.

CROSS-APPEAL

CASE FOR THE RESPONDENT IN THE CROSS-APPEAL

- 20 1. The amount of damages awarded by the Trial Judge to the appellant in the cross-appeal was \$66,000 (£33,000) which was arrived at by taking the profits which, in the view of His Honour, the appellant would have earned during the calendar year 1964 and the calendar year 1965.
- 30 2. His Honour held that the period of notice which should have been given to the appellant by the respondent to terminate the contract between them was two years and His Honour further held that the loss of profits during the first year in such two-year period, which would have corresponded with the calendar year 1964, was \$44,000 (£22,000) and in the second of such years (the calendar year 1965) \$22,000 (£11,000). His Honour rejected any other basis for an award of damages.
3. It was claimed on behalf of the appellant that reasonable notice in the circumstances would

Record

have been three years.

Exhibit 2
p.632

4. The respondent submits that, applying the principles enunciated in Australian Blue Metal Limited v. Hughes & Ors. (1963) A.C. 74, at pages 98-99, and having regard to the very sharp decline in the market for fully-fashioned hosiery as is demonstrated by Exhibit 2 the proper period of reasonable notice which should have been given to the appellant would not exceed twelve months and under no circumstances could exceed the period of two years found by the learned Trial Judge.

10

p.182 1.12
p.598
Exhibit B

5. The appellant claimed that it was entitled in the light of the evidence given by Lyel John Murrell its accountant, to be paid a sum representing loss of net profits at the rate of \$64,000 (£32,000) per annum during the period of reasonable notice such sum representing the profit which it alleges it would have made during each of the years in the period of three years following upon the date of termination of the contract.

20

p.199 11.10
-30

6. Under cross-examination the said Lyel John Murrell said he had made no provision in calculating net profit for the decline in the demand and prices for fully-fashioned hosiery during the year 1964 and succeeding years.

7. The respondent submits that His Honour was correct in rejecting the claim for \$64,000 (£32,000) per year having regard to the fact that the evidence clearly indicated that in 1964 and in 1965 the decline in the demand for fully-fashioned hosiery was likely to continue and that the price would be likely to fall below the prices which the appellant should, on His Honour's finding as to liability, have been able to obtain during the year 1963.

30

8. It is submitted that His Honour was entitled to infer, having regard to the fall in demand for fully-fashioned hosiery and the fall in prices, that the profit to the appellant during the year 1964 would have declined by one-third and that during 1965 it would have declined to \$22,000 (£11,000).

40

9. It is submitted that His Honour was correct in refusing to award the plaintiff damages on the basis of its loss of gross profit during the period of reasonable notice.

Record

10. The appellant further sought to have included in its award of damages certain standing charges amounting to ~~£~~145,704 (£72,852) such charges being set out in Exhibit C. It is submitted that His Honour was correct in rejecting a claim for such standing charges and in holding that the only measure of damages was the loss of profits which would have been earned by the appellant during the period of reasonable notice.

Exhibit C
p.603

SUBMISSION

The respondent accordingly submits that the cross-appeal should be dismissed.

THE REASONS:

- 20 (1) That His Honour applied correct principles in the assessment of damages.
- (2) That the only damage suffered by the appellant as the result of any breach of contract by the respondent was its loss of net profit during the period of reasonable notice to which it would have been entitled.

ANDREW BATTLESON
Counsel for Woolworths Limited.

IN THE PRIVY COUNCIL No. 17 of 1966

O N A P P E A L
FROM THE SUPREME COURT OF NEW SOUTH
WALES

B E T W E E N :

WOOLWORTHS LIMITED (Defendants)
Appellant

- and -

STIRLING HENRY LIMITED (Plaintiff)
Respondent

AND BETWEEN:

STIRLING HENRY LIMITED (Plaintiff)
Appellant

(By ~~cross~~^{cross}-appeal)

- and -

WOOLWORTHS LIMITED (Defendants)
Respondent

(By cross-appeal)

CASE FOR THE APPELLANT IN THE APPEAL
AND THE RESPONDENT IN THE CROSS-
APPEAL

OSWALD HICKSON COLLIER & CO.,
Cromwell House,
6-9 Surrey Street,
London, W.C.2.

Solicitors for Woolworths Limited.