1967/26

A IN THE PRIVY COUNCIL No. 17 of 1966

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N :-

WOOLWORTHS LIMITED (Defendant) ~~Appellant~~

B - and -

STIRLING HENRY LIMITED (Plaintiff) Respondent

B E T W E E N :-

STIRLING HENRY LIMITED (Plaintiff) Appellant (By Cross-Appeal)

C - and -

WOOLWORTHS LIMITED (Defendant) Respondent (By Cross-Appeal)

PLAINTIFF'S CASE ON DEFENDANT'S APPEAL

1. This is an appeal to the Board from the
D Judgment of Collins J. sitting in the Commercial Causes Jurisdiction of the Supreme Court of New South Wales without a jury, the parties having consented to trial by a Judge without a jury pursuant to Section 3(1) of the Supreme Court
E Procedure Act, 1900-1957 (N.S.W.) which provides:-

RECORD: p.393 l.12.

> "In any action by consent of both parties the whole or any one or more of the issues of fact in question may be tried, or the amount of any damages or
F compensation may be assessed by a judge without a jury".

2. Where, as in this case, a common law action is heard by a judge without a jury, the provisions of Section 5 of the Supreme Court Procedure Act

apply - Simons v.Gale (1958) 58 S.R. (N.S.W.) 273 - and that Section, so far as material provides:-

"(1) Subject to the provisions of this section the verdict or finding of any judge sitting without a jury on the trial or assessment of any issue of fact or amount of damages or compensation pursuant to this Act shall be of the like force and effect in all respects as the verdict or finding of a jury.

(2) Nothing in this section shall authorise judgment to be signed on the verdict or finding, but judgment may be directed to be entered as provided in this section, and the entry shall have the like force and effect in all respects as the signing of judgment.

(3) The Court may direct judgment to be entered for any or either party and for that purpose the Court may be held and its jurisdiction exercised by the judge, and either at or after the trial.

(5) Any judgment directed by the judge to be entered under the provisions of this section shall, unless there is an appeal as provided in this section against the judgment, have the same force and effect in all respects as a judgment of the Court".

3. It follows that in New South Wales, the finding of fact of a judge trying alone an action at law in the Supreme Court is the equivalent in all respects of the verdict of a jury. It is submitted, therefore, that in this appeal, the Board cannot review the findings of fact of the trial Judge and for these reasons:-

(a) It is well settled that no appeal

lies to the Board from the verdict of a jury. Nathoobhoy Ramdass v. Mooljee Madowdass (1840) 3 Moo. P.C. 87 (13 E.R. 40), Tronson v. Dent (1853) 8 Moo. P.C. 419 (14 E.R. 159), and Dagnino v. Bellotti (1886) 11 App.Cas. 604.

(b) In Riley v. Nelson (1965) 39 A.L.J.R. 389 a majority of the High Court of Australia consisting of Barwick C.J. and Taylor J., Menzies J. doubting, held that in appeals to the High Court from the judgment of a single judge of the Supreme Court of New South Wales sitting without a jury, and thus pursuant to the Supreme Court Procedure Act, 1900-1957, the High Court could not review the judge's findings of fact. At p. 397 Barwick C.J. said:

"In my opinion the result of the trial of issues of fact by a judge without a jury under the Supreme Court Procedure Act is that, unless judgment at law is entered upon them, the findings of fact by the judge are not reviewable. If judgment at law is directed to be entered upon them, and an appeal is brought to the Supreme Court in banc against such judgment the findings of fact are completely reviewable by that Court. If an appeal is brought to this Court from the decision of the Supreme Court in banc given in an appeal from a judgment entered upon such findings, this Court may review the initial findings or any findings substituted for them by the Supreme Court in banc. But otherwise the findings of the

> trial judge cannot themselves form the basis of an appeal to this Court, nor can they be reviewed by this Court in an appeal brought to it". A

Taylor J. concurred at p. 397.

4. Section 73 of the Commonwealth of Australia Constitution Act - 63 & 64 Vic. c.12 - provides that the High Court shall have jurisdiction "to hear and determine appeals from all judgments, decrees, orders and sentences ... of the Supreme Court of any State". B C

5. Appeals to the Privy Council from the Supreme Court of New South Wales are governed by the Order in Council of 2nd April, 1909 made pursuant to the Imperial Act, 9 Geo IV c. 83 sec. 15. This section provides inter alia: D

> "...That it shall and may be lawful for His Majesty...by any Order or Orders of His Majesty in Council to allow any Person or Persons feeling aggrieved by any Judgment, Decree, Order or Sentence of the said Supreme Courts respectively to appeal therefrom to His Majesty in Council....." E

6. It will be observed that the appellate jurisdiction of the High Court is conferred in terms substantially identical with those set out in Section 15 of the Imperial Act referred to above. F

7. The Plaintiff therefore submits that the reasoning and decision of the majority of the High Court of Australia in Riley v. Nelson (supra) applies to appeals to the Privy Council from a judgment of the Supreme Court entered upon the direction of a judge of that Court who has tried an action at law without a jury G H

pursuant to the Supreme Court Procedure Act, 1900-1957. Accordingly, the Plaintiff submits that the findings of fact of the trial judge cannot be reviewed by the Board in this appeal.

FIRST GROUND OF DEFENDANT'S APPEAL:

8. The first ground of appeal as set out in the Notice of Motion for Conditional Leave is:

> "That His Honour was in error in holding that the Defendant had repudiated the contract between the Plaintiff and the Defendant". RECORD: p.394.

This ground of appeal is ambiguous as it may mean:

(a) That His Honour was in error in his findings as to the terms of the contract, and their true construction; or

(b) That His Honour was in error in holding that the Defendant's conduct amounted to a repudiation of the contract as found and construed by His Honour; or

(c) That His Honour was in error as to both (a) and (b).

9. As to 8(a), it is submitted:-

(a) In the present case, it was common ground (and His Honour found) that the contract of July, 1961 was oral; and His Honour further found that its terms were correctly recorded in the letter from the Defendant to the Plaintiff of the 13th August, 1963 quoted in the Judgment at the pages referred to. This finding, which follows the allegations made in paragraph 4 of the Defendant's amended Points of Defence is not of course RECORD: p.371 l.20 et seq. p.6 et seq.

challenged by the Defendant in its grounds of appeal.

(b)These findings in any event are findings of fact amply supported by evidence and thus not open to challenge in this appeal.

(c)His Honour was both entitled and bound to construe the contract as found by him in the light of the surrounding circumstances in accordance with the principles applied in Charrington & Co. Limited v. Wooder (1914) A.C.71. The surrounding circumstances as found by His Honour are set out in the Judgment. They are not the subject of challenge by the Defendant in its grounds of appeal.

p.379 l. 26 - p. 380 l. 17
p.385 l. 12 et seq.

(d)The construction of an oral contract is a question of fact, not of law. Thus, where the action is tried by a judge sitting with a jury, it is a question for the jury, Deane v. The City Bank of Sydney 2 C.L.R. 198 at 209. Even if the contract in the present case is regarded as being partly oral and partly in writing its true construction would remain a question of fact and not of law. See Deane v. The City Bank of Sydney (supra) at p. 209.

(e)The contract as pleaded by the Defendant and as found by His Honour binds the Defendant to pay market prices for the stockings which it bought from the Plaintiff. His Honour found that the prices offered by the Defendant to the Plaintiff in August and November, 1963 were not market prices upon the true

RECORD:
p.386 l. 34 et seq.

construction of the terms of the contract.

(f)This was a finding of fact amply supported by evidence and not open to challenge in this appeal.

10. As to 8(b), it is submitted:

(a)His Honour said:-

> "It follows that the prices offered by Mr. Millist in August, 1963 and the varied figures offered by Woolworths in November, 1963 were not market prices, that Stirling Henry were justified in refusing to sell at these prices and that Woolworths' insistence on these prices was in breach of contract and amounted to repudiation of the contract by Woolworths". p.386 l.33

(b)It is submitted that once His Honour found that the prices offered in August and November, 1963 were not market prices upon the true construction of the terms of the contract, the Defendant's insistence upon these prices inevitably amounted to a repudiation of the contract.

11. Upon this ground of appeal, it is therefore submitted that His Honour's findings as to -

(a)the terms of the contract

(b)the true construction of those terms

(c)what was the market price within the meaning of the contract at any relevant time, and

(d)whether the Defendant by insisting upon prices which were lower than market prices repudiated the contract

are all findings of fact, amply supported by evidence, which are correct, and which in any event cannot be challenged in this appeal.

SECOND GROUND OF APPEAL

12. The second ground of appeal is :-

> "That His Honour was in error in holding that the prices of certain types of fully fashioned hosiery suggested by the Defendant's representative Mr. Cooper to the Plaintiff's representative in July, 1963 were 'market prices' within the meaning of that expression contained in the agreement made by and between the Plaintiff and the Defendant on the 10th July, 1961".

13. This ground of appeal involves a pure question of fact. The Plaintiff submits that the finding here challenged was amply supported by evidence and was correct and that in any event, it is not now open to review.

14. It is further submitted that the evidence in support of this finding appears abundantly throughout the record, both in the oral evidence and in the documents tendered. In particular, the Plaintiff submits that the prices verbally offered by Cooper in July, 1963 and referred to in the enclosures to the Plaintiff's letter to the Defendant of 1st August, 1963 were admissions by and thus evidence against the Defendant of what were the market prices for future purchases of goods.

RECORD: p.373 l. 13 et seq.
RECORD: p.495 et seq.

THIRD GROUND OF APPEAL

15. This is:-

> "That His Honour should have found that the Plaintiff had not discharged the onus of establishing what was the market price".

This ground is only a restatement of the second ground of appeal and further comment is unnecessary.

A FOURTH GROUND OF APPEAL:

16. This is:-

> "That there was no evidence of what were 'market prices' within the meaning of the contract".

B The Plaintiff submits (and the Defendant does not contend otherwise) that the meaning of "market prices" in this contract involved a question of fact. In order to determine it, the Court was entitled to consider -

C (a)the surrounding circumstances at the time the contract was made. Charrington & Co. Limited v. Wooder (supra) especially at pp. 82 and 93.

(b)the conduct of the parties thereafter.

D Watcham v. Attorney General of the East Africa Protectorate (1919) A.C. 533.

17. As to 16(a):-

(a)it is submitted that there was ample evidence of how matters stood when the

E original contract was varied in July 1961.

(b)from this evidence His Honour drew thirteen matters of significance enumerated in his judgment and each one supported by evidence. RECORD: pp.385-386

F (c)upon this evidence, His Honour accepted the submission which the Plaintiff made at the trial, and repeats, that "market prices" meant prices which were fair and reasonable between the parties, taking

G into consideration all the relevant circumstances, not the least of which was the fact that "there was no market price in the real sense between wholesaler and

retailer; Woolworths did not deal with wholesalers, but directly with manufacturers".

p.385 l 37 et seq.

It might be interpolated at this stage that His Honour concluded from the terms of the Defendant's letter of the 13th August, 1963 setting out the terms of the variation agreed in July 1961, that "market prices" did not mean the lowest price at which stockings in any quantities could be bought by the Defendant from other manufacturers from time to time. This conclusion was well open, and was indeed, it is submitted, irresistible.

p.499

p.381 l 32-
p.382 l 36

(d) upon this evidence the Plaintiff submitted at the trial, (and submits in this Appeal) that it was fundamental to the 1961 contract that there was to be a continuing business relationship between the parties. This necessarily involves the conclusion that the "market prices" had to allow the Plaintiff a reasonable margin of profit.

RECORD: p.520

It is clear from the Plaintiff's letter to the Defendant of 20/11/63 that the prices offered by the Defendant in November and December, 1963 would have returned to the Plaintiff a margin of nett profit of only 2% - 2½%.

Once His Honour found that "market prices" in this contract did not mean the lowest possible price at which the Defendant could buy, the Defendant's offers of November, 1963 inevitably stood condemned as repudiations of the contract. Any "market prices" such as contemplated by the 1961

contract must have been fair and reasonable between the parties. Prices which resulted in profit margins of 2% - 2½% to the Plaintiff, and in profit margins of 50% - 100% to the Defendant, were "res ipsa loquitur". Such prices could not be within any conceivable market prices contemplated by the 1961 contract.

18. As to 16(b):-

(a)At the trial it was agreed by both parties that the contract between them was constituted by the original agreement of May, 1955, as varied by the agreement of July, 1961. See His Honour's judgment and paragraph 5A of the Plaintiff's Points of Claim and paragraph 4 of the Defendant's Points of Defence.

p.375 l 43 et seq.
p.4 l 43
p.7 l 35

(b)This contract plainly required the Defendant to buy 75% of its requirements from the Plaintiff at market prices, and was continuously performed at least up to the end of July, 1963, various prices being offered by the Defendant and accepted by the Plaintiff during that period. These prices, it is submitted, were thus market prices within the meaning of the contract.

RECORD: p.495 et seq.

(c)On the 24th July, 1963 Cooper offered certain prices for the period October - December, 1963. It is submitted that this offer was evidence against the Defendant that these were market prices within the meaning of the contract, because they were prices offered by the

p.76 l 36-p.77 l 24
p.496

Defendant pursuant to an agreement to pay market prices. A

19. The Plaintiff therefore submits that His Honour's construction of the term "market prices" was a conclusion of fact, amply supported by evidence, was correct, and is, in any event, not B open to challenge in this Appeal.

FIFTH GROUND OF APPEAL

20. This is:-

> "That His Honour misdirected himself in holding 'it is easier to establish that C there was a breach by Woolworths than it is to define what precisely the contract meant when it used the phrase 'market prices'".

The Plaintiff submits that this is not a D ground of appeal. His Honour is merely saying that he found one part of his task easy and another part difficult. This is a statement of fact and not a misdirection.

SIXTH GROUND OF APPEAL E

21. This is:-

> "That His Honour was in error in holding that the case sought to be made by the Defendant:
>
> (a) was incompatible with the arrangement F entered into between the parties in July, 1961.
>
> (b) was inconsistent with the whole of its conduct up to August 1963, and
>
> (c) that no satisfactory explanation had G been given for such inconsistency".

The Plaintiff submits that these are findings of fact amply supported by evidence, that these findings are correct, and are in any event not open

to challenge in this Appeal.

22. The case which the Defendant sought to make was that "market prices" in this contract meant the lowest price at which the Defendant could buy, a contention which His Honour rejected.

23. First, His Honour found this to be incompatible with the arrangement entered into between the parties in July 1961, because of the plain meaning of the Defendant's letter of 13th August, 1963 in which the terms of that arrangement are set out. These terms distinguish between "market prices" and "special prices". "Special prices" were clearly lower than "market prices", so that "market prices" could not be the lowest prices at which the Defendant could buy.

RECORD: p.499

p.381 l 32
p.382 l 36

24. Second, it was not until August 1963 that the Defendant's construction of "market prices" (as contended for at the trial) was ever asserted. The prices agreed upon immediately after the July 1961 contract was made are the best guide to what the parties meant by "market prices" in that contract. Those prices then agreed upon must be taken to have been "market prices" within the meaning of the contract. It is clear that the prices paid to the Plaintiff immediately after July 1961 were higher than the prices at which similar merchandise was offered to the Defendant by other suppliers. There is abundant other evidence to the same effect down to August, 1963.

RECORD:
p.59 l. 5
p.66 l. 22
p.67 l. 30
p.68 l. 20

SEVENTH GROUND OF APPEAL

25. This is:-

"That the damages awarded were excessive".

The Plaintiff submits that:

(a)The Defendant cannot show on the evidence that the award of damages for loss of net profits was inordinately high.

(b)The Defendant cannot point to any error of principle in His Honour's judgment which was calculated to or which did increase the award of damages for loss of net profits.

Accordingly, the Defendant cannot challenge in this appeal the amount of damages awarded. Nance v. British Columbia Electric Railway Co.Ltd. (1951) A.C. 601 at p.613.

EIGHTH GROUND OF APPEAL

26. This is:-

> "That the Plaintiff did not establish that it had suffered any damage".

It is submitted that since there was obviously some evidence of damage, His Honour's findings cannot be reviewed in this Appeal.

27. The Plaintiff therefor submits that the Defendant's appeal should be dismissed for the following (amongst other)

REASONS

1. The grounds of appeal raise issues of fact.
2. Riley v. Nelson 39 A.L.J.R. 389, was correctly decided, and applies also to appeals to the Privy Council from the judgment of a single Judge of the Supreme Court of New South Wales sitting without a jury under the Supreme Court Procedure Act.
3. His Honour's findings of fact cannot be reviewed if they are supported by

A evidence.

4. The disputed findings are all supported by evidence.

5. In any event His Honour's findings of fact were correct.

B 6. None of the disputed findings of fact are vitiated by errors of law.

7. The award of damages for loss of net profit is not inordinately high, and cannot be shown to have been <u>increased</u>

C by any error of principle.

K.R. HANDLEY

PLAINTIFF'S CASE ON PLAINTIFF'S APPEAL

28. Prior to 1955, the Plaintiff had carried on business as a textile manufacturer but had never manufactured women's hosiery. Thereafter, pursuant to the original contract with the Defendant, the Plaintiff commenced to manufacture stockings, while maintaining its manufacture of other textile goods. Its hosiery mill was, therefore, at all material times, one division of its total manufacturing complex.

29. His Honour found that the contract between the parties was one terminable upon reasonable notice, and that the proper period of notice to be given by the Defendant to the Plaintiff would have been two years from 1st January, 1964.

RECORD: p.388 ll. 12 - 25

30. His Honour further found that at or at any time after the Defendant's repudiation of the contract, there was no prospect of the Plaintiff establishing an alternative market for the hosiery previously manufactured for and supplied to the Defendant, so that the Plaintiff had no option but to close down its hosiery mill, as it did at the end of 1963. The other divisions of the Plaintiff's manufacturing business remained in production.

p.388 ll. 30 - 40

31. The Plaintiff at the trial claimed to recover -

(a) its estimated loss of net profits during the period of reasonable notice.

(b) the amount necessary to meet the standing charges which it would have incurred, and did in fact incur, during the same period.

(c) an allowance for depreciation, to enable

the Plaintiff to recoup over the same period the outstanding balance of its capital expenditure upon the mill machinery.

32. His Honour, however, restricted the award of damages to the Plaintiff's loss of net profit. The evidence on damages was called by the Plaintiff only: and His Honour observed: "Again on this issue the facts were scarcely in dispute; the dispute was on matters of emphasis and interpretation". This evidence, so far as is relevant to the present question, consisted of the evidence of Lyel John Murrell, a Chartered Accountant and a partner in the firm of Priestley & Morris, the Plaintiff's Auditors. His evidence was reduced to documentary form and appears in the Record.

RECORD: p.388 ll. 26 - 29

p.181 et seq

Exhibits C. D,E,F,G, H.pp.603 - 608.

33. No point now arises upon the award of damages for loss of net profit which His Honour actually made. His Honour adopted as the basis of his award the net profit of £33,000 earned by the hosiery mill in 1963 and the Plaintiff concedes that it was open to him to do so.

p.390 ll. 24 - 27, 39
p.391 l. 2
p.392 ll. 7 - 20

34. But His Honour declined to award damages in addition to net profits, and did so because he was of the view that further damages were not legally recoverable. His Honour said:-

p.388 l. 26 - p.392 l. 26

> "If damages are awarded on the basis of loss of profit that would have been earned by the machinery in two years then this, in my view, is the correct measure of damage".

p.389 l. 44 et seq.

35. The Plaintiff would not complain of this statement of principle if it were understood as referring to gross profits, but it is clear that

His Honour was referred to net profits.

Damages for Loss of Standing Charges

Ex. C p.603

36. Specifically, His Honour declined to add to the figure for loss of net profits the amount of standing charges. The figures in Exhibit C are for a period of 3 years, it having been the Plaintiff's contention that 3 years represented the period of reasonable notice. His Honour allowed two years. With the exception of the figure for depreciation, which requires further consideration, the amount for standing charges during the period of notice which His Honour allowed, may be obtained by adding the annual totals incurred in the calendar years 1964 and 1965 as shown in Exhibit C.

RECORD: p.389 l.44 et seq.

37. His Honour in the passages quoted above held that anaward of damages equivalent to the loss of net profits from the hosiery mill for the period of reasonable notice sufficiently compensated the Plaintiff for its losses flowing from the proved breach of contract by the Defendant. But damages assessed on the basis of the loss of net profits only, fell far short of the true loss suffered by the Plaintiff.

38. If the Defendant had performed its contract with the Plaintiff the mill, as His Honour found, would have continued to earn net profits during the calendar years 1964 and 1965. But those net profits would have been arrived at only after recouping to the Plaintiff -

(a)Part of its initial capital investment in the machinery, i.e. the net profit would have been after depreciation.

(b)Part of its fixed general overheads

considered not subject to variation by, or applying to, hosiery production and sales.

(c)Part of its overheads varied by or applying to hosiery production.

The fact that His Honour found that the Plaintiff would have continued to earn net profits necessarily assumes the maintenance of gross profits.

39. In order to arrive at the net profit from the hosiery mill there was deducted from gross sales:

(a)the direct and indirect costs of manufacture and distribution.

(b)an amount to cover depreciation of the mill machinery.

(c)an amount to cover the contribution which the profits of the hosiery mill was accustomed to make to the general overhead of the business.

40. When the hosiery mill closed down, the direct and indirect costs of manufacture and distribution would no longer have been incurred, so that the Plaintiff would not have been entitled to recover any sum in respect of them: and no such claim was made.

41. But certain items of general overhead of the business would continue to be incurred as an outgoing, notwithstanding the closure of the hosiery mill. However, the closure of the mill would have deprived the Plaintiff of the contribution (from the mill's gross profits) which the mill normally made to these items: with the consequence that that contribution would have to be found aliunde. What His Honour

did, in effect, was to find and award net profits without awarding the additional sums without which any net profit would have been impossible.

42. It was these continuing items of overhead, together with depreciation, which the Plaintiff defined as standing charges, and which it is submitted it was entitled to recover in addition to its net profit.

43. The letter from Walmsley Cowley & Co., (the Defendant's Auditors) to the Defendant of 6/11/63 and theaccompanying schedules shows that in the financial year ended 30/6/63 the Plaintiff's hosiery mill properly contributed £10,544 to the general overheads of the Plaintiff. Walmsley Cowley & Co. accepted this figure as appropriate for inclusion in the cost of production of stockings.

RECORD: p.507 et seq.

44. The report also makes it clear that these general overheads were in the nature of fixed charges because they were "considered not subject to variation by, or applying to Hosiery production and sales". It is clear that these charges would continue after the closing of the mill, and the dismissal of the staff directly employed there. With the closing of the hosiery mill the proportion of these charges previously absorbed by the mill would have to be absorbed elsewhere, thus reducing the profit earned by the Plaintiff in other departments. The calculation of the standing charges in question amounted to £10,107 for 1964 and £9,038 for 1965. The figures set out in Exhibit C were not challenged.

Ex. C p.603

45. The Plaintiff submits that its loss attributable to the Defendant's breach of contract included the loss of the contributions

pp.213-214

previously made by the hosiery mill out of its gross receipts to the general overheads of the Plaintiff, and that His Honour erred in principle in failing to include this loss in the award of damages.

Allowance for Depreciation

46. Depreciation is strictly not a standing charge but conventionally is regarded as an item of expenditure designed to recoup the cost of a capital asset. In Australian Blue Metal Ltd. v. Hughes (1963) A.C. 74 at pp. 98-99, Lord Devlin referred to the existence of heavy initial capital expenditure which could only be recouped in time as a very relevant factor in determining both the necessity for and the length of reasonable notice to determine a contract. In his judgment Collins J. referred to this passage and applied it in fixing the period of two years as the period of reasonable notice. Yet when His Honour came to assess damages, he declined to apply the principal enunciated by Lord Devlin, and refused to include in the Plaintiff's damages any amount in respect of the Plaintiff's unrecouped capital expenditure which it could have recouped during that period of two years.

RECORD: p.389 l 12

47. As to the amount of depreciation which the Plaintiff is entitled to claim, Collins J. found -

(a) that the hosiery mill machinery had originally cost £177,500. p.369

(b) that as at 30th June 1963 the written down value of the machinery in the Plaintiff's books was £47,340. p.389 l 15

The unchallenged evidence showed that its written down value in the Plaintiff's

amounts claimed for standing charges and depreciation.

51. In support of these propositions the Plaintiff relies primarily upon the basic principle which governs the assessment of damages for breach of contract. This principle was referred to by Lord Wright in Monarch Steamship Co.Ltd. v. Karlshamns Oljefabriker (A/B) (1949) A.C. 196 at 220 in the following passage:-

> "...the broad general rule of the law of damages that a party injured by the other party's breach of contract is entitled to such money compensation as will put him in the position in which he would have been but for the breach".

52. In Cullinane v. British "Rema" Manufacturing Co.Ltd. (1954) 1 Q.B. 292 Evershed, M.R. said at p.301:-

> "There is therefore no doubt at all that the Plaintiff is entitled to...claim as damages the business loss which must reasonably be supposed to have been, in the contemplation of the parties at the time when they made their contract, the probable result of the breach".

53. Specifically, upon the question of standing charges the Plaintiff relies upon what was said by Atkin L.J. in City Tailors Ltd. v. Evans (1921) 91 L.J.K.B. 379 at p. 387 where His Lordship, illustrating the argument of the insured under a Lloyd's "Loss of Profits" policy said:-

> "We are incurring certain standing charges and expect to earn an unknown net profit in respect of our business at the specified premises. If the premises are injured by fire or our stock or plant is injured by fire we shall for a time cease to produce and shall have no receipts to recoup us our standing charges or to give

us our net profit. We shall, therefore, lose both of these....."

54. It is clear that the Plaintiff cannot claim as damages the loss of sales due to the Defendant's breach without deducting the direct and indirect costs of manufacturing and selling the goods which it has not incurred. But it has still incurred the various standing charges: or expressed in another way the general fixed overheads which continued despite the closure of the hosiery mill.

55. In Cullinane's case (supra) the Court of Appeal was concerned only with the profits that could have been made by one machine, and the facts did not raise in a crucial form the problem of general overheads and standing charges which arise in the present case. In Cullinane's case the Plaintiff claimed for loss of profit computed by deducting from gross receipts depreciation, running costs, office expenses and interest on capital (ibid at p. 294). The report does not disclose the nature of the item "office expenses", but on the probabilities these were in the nature of avoidable rather than fixed or standing expenses. Nevertheless, it is submitted that the reasoning of the Court of Appeal in that case, so far as it touches on the content of the profits to be awarded to the Plaintiff as damages supports the submissions of the present Plaintiff in this appeal.

56. Cullinane's case was considered by the High Court of Australia in T.C. Industrial Plant Pty. Ltd. v. Roberts Queensland Pty. Ltd. (1963) 37 A.L.J.R. 289. The Court comprised Kitto, Windeyer and Owen J.J. and a joint judgment was delivered. The Court held that the Plaintiff in that case, who had proved a breach of warranty as to the

output of a stone crushing machine, was entitled to damages assessed on the basis of its loss of "operating profit" or "working profit". At p.294 the Court after referring to Cullinane's case said:-

> "In the latter case the word (profit) meant a profit from operating the article purchased, in other words the excess of the receipts that would have been obtained by the contemplated use of the article to perform profitable work (if it had been as warranted) over the expenditure which that use would have involved".

57. The Plaintiff submits that the general overhead and standing charges which were apportioned on an accounting basis to the Plaintiff's hosiery mill were not expenditure which was involved in the operation of the mill in the sense referred to by the High Court and should not have been deducted in the award of profits, or should have been added back to the net profits allowed as damages.

58. Specifically upon the question of depreciation it was held in Cullinane's case (supra) that depreciation and interest ought not to be deducted in arriving at a profit figure to be awarded as damages. An award of damages for loss of profits is necessarily a net figure (that is, a figure struck after some deduction); but clearly the figure of "net" profits allowed in Cullinane's case was far removed from the pure accountant's net profit which formed the basis of the award of damages in the present case. See per Evershed M.R. at pp. 302-304 (especially at the bottom of p.303), p.305, p.306 and as to interest, at p.307. See also per Jenkins L.J. at p.308 and per Morris L.J. (dissenting) at p.315 and at pp.317-318.

59. The Plaintiff therefore submits that its cross appeal should be allowed for the following, (amongst other).

REASONS

1. An award of damages can be reviewed by an appellate Court if it is vitiated by an error of principle. See Nance v. British Columbia Electric Railway Co. Ltd. (1951) A.C. 601 at 613.
2. His Honour erred in principle in awarding damages limited to the Plaintiff's proved loss of net profits for the period of reasonable notice, and in refusing to award other damages.
3. His Honour's award of damages failed to give effect to the basic principle of an award of damages for breach of contract enunciated by Lord Wright in his speech in Monarch Steamship Co.Ltd. v. Karlshamns Oliefabriker (A/B) (1949) A.C. 196 at 220.
4. His Honour's refusal to award damages for loss of the opportunity to recoup part of the Plaintiff's initial capital expenditure by depreciation allowances over the period of reasonable notice conflicted with the principle enunciated by Lord Devlin in Australian Blue Metal Ltd. v. Hughes (1963) A.C. 74 at 98-99, and is also inconsistent with Cullinane v. British "Rema" Manufacturing Co.Ltd. (1954) 1 Q.B. 292 and T.C. Industrial Plant Pty. Ltd. v. Roberts Queensland Pty. Ltd. (1963) 37 A.L.J.R. 289.
5. His Honour's refusal to award damages for

unrecouped standing charges and general overheads was inconsistent with the authorities mentioned in (4) above.

60. The Plaintiff finally submits that the additional damages to which it is entitled should either be assessed by the Board (See Bentwich "Privy Council Practice" 2nd Edition at p.274, 3rd Edition p.236); or, in the alternative, that the action should be remitted to the Supreme Court for the assessment of such additional damages. (See 3 & 4 Will, IV, C.41 Sec.8).

K.R. HANDLEY

17 OF 1966

IN THE PRIVY COUNCIL

ON APPEAL 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 B E T W E E N:

STIRLING HENRY LIMITED
(Plaintiff)Appellant

- and -

WOOLWORTHS LIMITED
(Defendant) Respondent
(By Cross-Appeal)

CASE OF STIRLING HENRY LIMITED ON APPEAL AND CROSS-APPEAL

LINKLATERS & PAINES.,
Barrington House,
59/67 Gresham Street,
London, E.C.2.