Privy Council Appeal No. 17 of 1966

Woolworths Limited – – – – – – – *Appellants*

v.

Stirling Henry Limited – – – – – – – – *Respondents*

(and cross-appeal consolidated)

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH NOVEMBER 1967

Present at the Hearing:
VISCOUNT DILHORNE
LORD HODSON
LORD GUEST
LORD WILBERFORCE
SIR ALFRED NORTH

[*Delivered by* VISCOUNT DILHORNE]

The respondents, Stirling Henry Ltd., claimed damages for breach of contract from the appellants, Woolworths Ltd. The action was tried by Collins J. in the Supreme Court of New South Wales without a jury. He found in the respondents' favour and awarded them $66,000 damages. Judgment was entered for that amount and from that judgment the appellants now appeal. The respondents have entered a cross-appeal on the ground that they were entitled to more by way of damages.

Pleadings were dispensed with but the parties were ordered to file Points of Claim and Points of Defence. The respondents alleged in paragraph 4 of their Points of Claim, filed on 21st August 1964, that it had been agreed with the appellants in 1955 that the respondents would purchase the necessary machinery and plant and would erect a mill for the production of ladies' fully fashioned stockings and would produce the stockings exclusively for the appellants and that the appellants would buy the stockings from them at fair and reasonable prices. They alleged that the agreement was terminable by notice and that it had been repudiated by the appellants without notice.

The appellants admitted in their Points of Defence, filed on 5th February 1965, that it was agreed in 1955 that the respondents would purchase the necessary machinery and plant and erect a mill for the production of such stockings exclusively for them but alleged that the terms and effect of the agreement were not fully or correctly set out in the Points of Claim but were set out in a letter written on behalf of the appellants to the respondents on 10th May 1955.

That letter reads as follows:

" 10th May 1955.

Mr. A. Wainberg,
Managing Director, Stirling Henry Ltd.,
The Crescent,
Flemington, N.S.W.

Dear Mr. Wainberg,

RE: Full Fashioned Nylon Hosiery

This will confirm our discussion of the 5th 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 twelve months' production on the following basis:

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 ... ... 71s. per dozen
15 denier, 60 gauge ... ... 79s. per dozen

and thereafter, as we agreed, the prices to be

30 denier, 51 gauge ... ... 62s. per dozen
15 denier, 60 gauge ... ... 71s. per dozen

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 the 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.

Yours faithfully
R. W. WILSON,
Merchandise Manager, Woolworths Ltd."

The appellants also alleged in their Points of Defence that in July 1961 this agreement had been varied or rescinded by an agreement which provided as follows:

(*a*) The appellants would purchase 75% of their requirements in fully fashioned women's hosiery from the respondents at market prices;

(*b*) If 75% of the appellants' requirements in any year fell below 50,000 dozen, the appellants would purchase from the respondents at least 50,000 dozen pairs of stockings;

(*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 respondents a six months' cover at any one time;

(*d*) The respondents to have the opportunity of quoting special prices for the initial 25% requirements of the appellants;

(*e*) The respondents to have the right to sell upon the open market and not to be compelled to confine their production to the appellants.

They denied that they had repudiated their agreement with the respondents and alleged that the respondents had failed to supply stockings in accordance with the agreement made in July 1961.

The hearing of the action began on 7th December 1965. A few days before that, on 1st December, the respondents gave notice that at the hearing leave would be sought to amend the Points of Claim by alleging in the alternative that an agreement had been made in the terms of the letter of 10th May 1955; and, also in the alternative, that in July or August

1961 the existing agreement between them had been varied or replaced by an agreement which contained the terms set out in paragraphs (*a*) and (*b*) above and also the following:

> " With regard to the remaining 25% of the appellants' requirements, the respondents would have the right of first refusal to supply to the appellants fully fashioned hosiery at any prices less than market prices at which other manufacturers might offer such goods to the appellants."

On 2nd December the appellants gave notice that they would apply at the hearing for leave to amend their Points of Defence by the deletion of (*b*) and the insertion of the following paragraph in its place:

> " (*b*) If 75% of the appellants' requirements in any year fell below 50,000 dozen the percentage of the appellants' purchases would rise to ensure that the respondents received orders for not less than 50,000 dozen and in the event of the appellants' total requirements falling below 50,000 dozen the appellants would purchase from the respondents their total requirements."

At the hearing these amendments were allowed with the result that the respondents" claim was put in three ways: first, alleging breach of an agreement made in 1955 whereby the appellants had agreed to buy the stockings produced by them at fair and reasonable prices; secondly, breach of the agreement set out in the letter of 10th May 1955 and thirdly and alternatively breach of the agreement between them as varied or replaced by an agreement in July or August 1961 whereby the appellants agreed to buy 75% of their requirements at market prices.

In the course of the hearing before Collins J. it was agreed, as he said in the course of his judgment, that the contract between the parties should be treated as " being the original contract of May 1955 as varied by the agreement of July 1961 ".

Production of fully fashioned stockings by the respondents began in 1956 but full production was not achieved until the following year. Unfortunately at this time the demand for fully fashioned stockings in Australia began to decline. In 1955 92% of the stockings manufactured in Australia were fully fashioned, the remaining 8% being circular hosiery. In 1956 the percentage for fully fashioned stockings rose to 95 but in the year ending June 1957 it fell back to 92%. By the year ending June 1961 it had fallen to 56%. The following year it fell to 35% with 65% circular hosiery. In the year ending June 1965 only 7% of the stockings manufactured in Australia were fully fashioned. This reduction in the quantity manufactured reflected the change in demand.

From time to time the prices to be paid by the appellants for the stockings which the respondents were to make were agreed. Mr. Stopford, the respondents' merchandise manager gave evidence that at a meeting on 15th March 1961 a Mr. Miller on behalf of the appellants said that in future purchases were to be made at regular market value and these values were to be assessed at the prices Woolworths were able to purchase regular merchandise and not based on clearance or job prices.

He said that he and Mr. Wainberg representing the respondents had a further meeting on 24th March 1961 with a Mr. Miller and Mr. Cooper from the appellants. Mr. Stopford made a record of what took place at that meeting and he gave evidence that he had recorded that the prices were subject to market prices ruling for regular supplies.

At a further meeting with representatives of the appellants on 7th June he said it was stated that prices could be arranged regularly " according to market prices ruling for regular supplies and not subject to job or special purchases ".

Mr. Stopford gave evidence about a further meeting on 14th June 1961. He said that then Mr. Kelly, Woolworths Managing Director, had stated that prices would be reviewed every six months to arrange a correct

market price and that if they did not take the respondents' full production, the respondents would have the opportunity of having consideration of the excess stock being bought at special prices.

Thereafter from time to time prices were agreed. In October 1961 the price for the 15 denier stockings, which were given the brand name of "Fairyweb", was fixed at 50s. a dozen and that for the 30 denier stockings, called "Captivation", at 56s. 6d. a dozen. In May 1962 48s. 9d. a dozen was fixed as the price of "Fairyweb", 56s. a dozen for "Captivation" and 66s. 6d. per dozen for mesh stockings the respondents were then making.

On 24th July 1963 Mr. Cooper for Woolworths offered to pay 44s. a dozen for "Fairyweb", 56s. a dozen for "Captivation" and 63s. 6d. a dozen for the mesh stockings.

These reduced prices were not accepted by the respondents. A further meeting between the representatives of the two companies took place on 12th August. Mr. Millist for the appellants then offered even lower prices, namely for "Fairyweb" 41s. a dozen, for "Captivation" 48s. a dozen and for mesh stockings 48s. a dozen.

The next day, 13th August 1963, Mr. Millist of Woolworths wrote to Mr. Wainberg as follows:

"Dear Mr. Wainberg,

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 Stirling Henry Limited.

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 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; prices to be firm for six months but quantities to be reviewed each three months, giving them a six months' cover at any one time.
5. We would give this Company the opportunity of quoting special prices for the 25% requirement referred to earlier.
6. Stirling Henry would have the right to sell on the open market and not confine their production to us.

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—

Construction	*Current Market Price*
15 denier, 60 gauge	41s.
30 denier, 51 gauge	48s.
15 denier, 51 gauge, mesh	48s.

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.

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

Yours faithfully,

WOOLWORTHS LIMITED

R. G. Millist

Merchandise Manager, Soft Goods."

This letter is the first document which passed between the parties stating fully the terms of the agreement made in 1961. In reply Mr. Wainberg wrote a long letter on 19th August. He did not contend that the record of the 1961 agreement was inaccurate in any respect. He did not deny that in 1961 it had been agreed that Woolworths would take 75% of their requirements at market prices but he said in this letter:

> " There is, of course, no ' Market ' in the technical sense in this business, since all sales and purchases are made by direct negotiation between buyer and seller and the final price is affected by a whole variety of factors special to the manufacturer and his purchaser. Market price as used in your letter can only mean the reasonable price which will allow a fair profit margin to both parties."

He refused the prices offered and did not agree to supply an audited statement.

Later it was agreed that Woolworths' auditors should inspect the respondents' books and after they had made their report, Woolworths made a further offer on 12th November 1963. The prices they then offered to pay were market prices plus 7½% which they said they were prepared to pay because of their long association. This offer was also refused.

The respondents claimed that the prices offered by the appellants in August and November did not comply with the agreement with them and that by their failure to offer proper prices, the appellants had repudiated their agreement.

Two questions thus arise for determination; first, what was the proper interpretation to be given to the expression " market prices "; and secondly, was it established that these prices offered by the appellants were not " market prices ".

Collins J. in his judgment said that it was " easier to establish that there was a breach by Woolworths than it was ' to define what precisely the contract meant when it used the phrase " market prices " ' ".

In the course of his judgment he said:

> " It is a difficult task to set out every factor that had to be taken into consideration from time to time in arriving at the Market price of stockings. It is simple to say that all the circumstances had to be taken into account and that no one circumstance was of itself decisive. Nevertheless, in an attempt to state the more important circumstances, I refer to the following matters:
>
> (1) Stirling Henry had spent, at Woolworths' request, £200,000 in the erection of a building and the importation of machinery;
>
> (2) Woolworths had a safe supply of women's hosiery for the greater part of their requirements;
>
> (3) Woolworths were greatly strengthened in bargaining with other manufacturers for stockings in excess of those supplied by Stirling Henry;
>
> (4) As a consequence of (2) and (3) above, it was in Woolworths' interests to keep Stirling Henry as a manufacturer in being. It was not in their interests that Stirling Henry's business should be run at a loss or at so small a profit that it would not be worthwhile continuing;

(5) Very large quantities of goods were involved;

(6) Stirling Henry were in fact a tied supplier whose only customer in practice was Woolworths. The concessions made in 1961, giving the right to Stirling Henry to seek other buyers, was in reality, worthless;

(7) All stockings manufactured by Stirling Henry were branded with names owned by Woolworths;

(8) The prices were estimates as to what market prices would be in some months time;

(9) There was no market in the real sense as between wholesaler and retailer; Woolworths did not deal with wholesalers, but directly with manufacturers;

(10) The machines were incapable of being converted for the manufacture of seamless stockings;

(11) Stirling Henry had no worries concerning expenses for advertising or for sales staff and very few delivery worries;

(12) Woolworths' margin of profit:

(13) In the later years the change of fashion with the consequent dramatic decline in popularity of fully fashioned hosiery."

While all these factors might well be relevant in determining the prices to be paid if the agreement was silent on that, the agreement between the parties stipulated that market prices should be paid. In their Lordships' opinion most, if not all, of these factors are irrelevant to the determination of the meaning to be given to the words "market price" or to the question whether the appellants had offered to pay market prices.

Mr. Stopford's evidence that on 15th March 1961 Mr. Miller on behalf of the appellants had said that future purchases were to be made at regular market value and that these values were to be assessed at the prices Woolworths were able to purchase regular merchandise, shows that he, the respondents' merchandise manager, was then in no doubt as to the meaning to be given to "market price".

On 1st August 1961 Mr. Miller for the appellants wrote to the respondents and referred to a meeting which had taken place between Mr. Wainberg and Mr. Stopford and Woolworths' Managing Director, Mr. Kelly, and their merchandise manager. He said that at that meeting

> "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."

Mr. Stopford replied on 9th August. He did not dispute that it had been agreed that Woolworths should pay market prices for 75% of their requirements. What he said was this:

> "With regard to the third paragraph in your letter of August 1st," (the paragraph quoted above) "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."

Mr. Stopford thus recognised the existence of a market price for such hosiery.

On 9th March 1962 Woolworths wrote a letter which contained the following:

> "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.
>
> 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."

There does not appear to have been any dissent from the statements in these paragraphs.

It is not without some significance that the respondents before the hearing gave notice that they would seek to allege that for the remaining 25% of the appellants' requirements "they would have the right of first refusal to supply" . . . "at any price less than market prices at which other manufacturers might offer such goods to the appellants".

In their Lordships' opinion when the parties agreed that the appellants should buy 75% of their requirements at market prices, both parties knew that that meant the prices at which other manufacturers might offer stockings of a similar kind to the appellants, the prices of job lots and special prices being excluded.

The appellants throughout the period to November 1963 bought 15 and 30 denier fully fashioned stockings and 15 denier mesh stockings from other manufacturers as well as from the respondents. They produced a list showing the prices at which they bought these stockings from the respondents and from the other manufacturers. That list shows that the prices they paid to the respondents were throughout this period above those they paid to other manufacturers except in April 1962 when the price paid to a manufacturer for 15 denier fully fashioned stockings was higher than that paid to the respondents.

Collins J. held that the prices offered by Mr. Cooper in July 1963 represented market prices at that time. The Schedule shows that they were higher than the prices then paid to the other manufacturers who supplied Woolworths.

Despite the hint contained in their letter of 9th March 1962 that the respondents in the near future would have to accept "the fair market price", it does not appear that any attempt was made by Woolworths to adhere to that until 12th August 1963. As their letter of 13th August shows, the prices they then offered were their assessment of the current market price.

Collins J., having concluded that the prices offered by Mr. Cooper in July 1963 represented market prices, held that the prices offered in August and those offered in November, as the current market price plus $7\frac{1}{2}\%$ were not market prices.

In their Lordships' view there was no evidence before Collins J. on which he could hold that the prices offered in July represented the fair market price if to the words "market price" is given the meaning stated above. Nor in their Lordships' opinion was there any evidence before Collins J. on which he could hold that the prices offered in August and November were below the market price. It was for the respondents to

prove that the agreement had been broken by the appellants. No evidence was produced by them to show that the prices offered in August and November were below the prices at which Woolworths were able to obtain supplies of similar stockings from other manufacturers, ignoring job lots and stockings supplied at special prices.

Collins J. held that the appellants had broken the agreement by failing to offer the respondents market prices. In their Lordships' opinion there was no evidence that they had failed to do so and so no proof of breach of the agreement.

The respondents contended that the findings of fact of Collins J. could not be reviewed in this appeal and that the Board could only entertain questions of law and of error. In support of this contention they relied on the provisions of the Supreme Court Procedure Act 1900–57 of New South Wales.

S. 3 (1) of that Act reads as follows:

> " 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 compensation may be assessed by a judge without a jury."

It was pursuant to this provision that this action was tried by Collins J. without a jury.

S. 5 (1) is in the following terms:

> " 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."

Prior to 1924, as Isaacs J. pointed out in *Hazeldell Ltd. v. The Commonwealth* (1924) 34 C.L.R. 442, the Supreme Court could where the action had been tried by a judge without a jury pursuant to s. 3 (1), set aside the findings of the judge as wrong in law or direct one of their number to sit alone and commence the whole proceedings *de novo* and decide upon the facts again but, he said, " the one course that a reasonable man would think obvious, where the materials are present, the law prevents them from taking, namely to say what appears to them to be the proper conclusion upon the facts ".

No doubt it was as a result of these observations that the Act was amended in 1924. The words " Subject to the provisions of this section " were inserted in subsection (1) and, *inter alia*, the following subsections were added:

> " (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.
>
> (6) Any party may appeal to the Court against any judgment so directed by the judge to be entered.
>
> (7) The appeal shall be by way of rehearing, and on appeal the Court shall—
>
> (*a*) have all the powers and duties of the judge as to amendment or otherwise, including the power to make findings of fact and to assess damages or compensation.
>
> (*b*) . . .

(9) The Court may on the appeal give any judgment and make any order which ought to have been given or made in the first instance . . ."

These amendments reduced considerably the effect of subsection (1). Provided that there was an appeal from the judgment directed to be entered, the case could be reviewed by the Supreme Court by way of rehearing. In *Riley & Ors v. Nelson* (1965–66) 39 A.L.J.R. 389 it was held that where there had been an appeal to the Supreme Court under s. 5, on an appeal from the Supreme Court to the High Court of Australia, the High Court had the same powers as the Supreme Court, but unless there was such an appeal to the Supreme Court the findings of the trial judge could not be disturbed.

The respondents contended that as there had been no appeal in the manner provided for in s. 5, the findings of the trial judge could not be altered and consequently this appeal must be dismissed.

Their Lordships are unable to accept this contention. Appeals to the Privy Council are governed by an Order in Council made in 1909 (1909 No. 1521). That provides *inter alia* that an appeal lies as of right from any judgment of the Supreme Court of New South Wales where the matter in dispute in the appeal amounts to or is of the value of £500 sterling or upwards.

This is an appeal from a judgment entered pursuant to s. 5. The entry is to have the like force and effect as the signing of judgment (s. 5 (2)). Their Lordships' power to hear the appeal cannot in their view be restricted by the provisions of an Act passed by the State Legislature dealing with procedure in the Supreme Court of New South Wales.

While it is generally desirable that procedures such as those contained in the Supreme Court Procedure Act should be followed before there is an appeal to the Privy Council, it is not the case that appeals from judgments based on findings of a judge sitting without a jury will not be entertained unless that is done. In *Wagon Mound* No. 2 [1966] 3 W.L.R. 498 and *Australia and New Zealand Bank Ltd. v. Ateliers de Constructions Electrique de Charleroi* [1967] A.C. 86 issues of fact were decided by the Board on appeal from a judge sitting alone. In their Lordships' opinion it cannot be regarded as a condition precedent to the exercise of the unfettered right of appeal given by the Order in Council that the procedure provided in the Supreme Court Procedure Act should first have been followed.

For the reasons stated their Lordships are of the opinion that this appeal should be allowed with costs and it follows that the cross-appeal must be dismissed with costs and they will humbly so advise Her Majesty.

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In the Privy Council

WOOLWORTHS LIMITED

v.

STIRLING HENRY LIMITED

(and cross-appeal consolidated)

DELIVERED BY
VISCOUNT DILHORNE

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1967

Privy Council Appeal No. 7 *of* 1962

Osele and others for themselves and on behalf of the people of Onicha-Ibabu – – – – – – – – *Appellants*

v.

Olisedozie Nwokeleke and others for themselves and on behalf of the people of Iselegu – – – – – – – *Respondents*

FROM

THE FEDERAL SUPREME COURT OF NIGERIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH JANUARY 1964

Present at the Hearing:
VISCOUNT RADCLIFFE.
LORD MORTON OF HENRYTON.
LORD GUEST.
[*Delivered by* VISCOUNT RADCLIFFE]

This is an appeal from a judgment of the Federal Supreme Court of Nigeria dated the 24th February 1958, which allowed in part the respondents' appeal from a judgment of Onyeama, Ag.J. dated the 30th April 1956 and given in the High Court of Justice, Western Region, Warri Judicial Division.

The action in which these judgments were given was one instituted by the respondents, on behalf of the people of Iselegu, in which they claimed against the appellants as representing the people of Onicha-Ibabu certain relief consisting of a declaration of title to some land called Mbuboagbala, damages for trespass on the land, forfeiture of possession as against three of the appellants, and an injunction against entering the said land without the permission of the Iselegu people. It will be convenient to refer to this action as " the present action " and to the Mbuboagbala land as " the disputed land."

The trial Judge, after hearing the evidence as to title called on behalf of the respondents, dismissed their action with costs. He was not satisfied that they had proved their case. The grounds of his judgment are expressed in the following extract from its concluding passage:—" Before the plaintiffs can get a declaration of title in their favour they must prove acts of ownership numerous and positive enough and of sufficient duration to warrant the inference that they are exclusive owners . . . From the evidence before me all I can say is that both parties are in occupation of some portions of the area in dispute and farm the area . . . The plaintiffs having failed to discharge to my satisfaction the onus placed on them, I dismiss the claim, with costs assessed at 20 guineas."

This judgment was reversed on the appeal to the Federal Supreme Court to the extent that the respondents were granted a declaration of title to the disputed land, the action was remitted to the Court below for further investigation of their claim to forfeiture, and the appeal was dismissed so far as concerned the claims for trespass and injunction. The ground upon which the Federal Supreme Court reversed the trial Judge on the question of title was that they thought that he had wrongly rejected or refused to be bound by certain findings of fact or conclusions of law which had been arrived at by the Courts in the course of earlier litigation between the same parties. This earlier litigation consisted of two consolidated actions instituted in 1953, in which the appellants had been asking for a declaration of title against

the respondents and the respondents had been claiming damages for trespass against some of the appellants. These consolidated actions will be referred to as " the 1953 action ".

The appellants have now appealed to this Board on the question of the admissibility and force of the findings made in the 1953 action. The Federal Supreme Court, they say, were wrong in law in allowing these findings to be imported into the present action, whether as constituting estoppel per rem judicatam or in any other form. The respondents were not represented to argue their case before the Board. The point itself is a short one, not admitting of any lengthy exposition, and their Lordships, although they have given their critical scrutiny to the views of the Supreme Court, would differ from their conclusion with regret, since they are well aware how difficult it is in many cases to ensure that the application of the rules of estoppel, while admitting a fair ascertainment of the real facts, does not leave determined suitors altogether too free to fight again and again over issues that, in substance, have been decided before.

It is necessary now to turn to the 1953 action and explain what it was about. It was stated by Abbott F. J. in giving the judgment of the Federal Court that it was common ground that " the land and parties concerned in the earlier law suits are the same as those concerned in this appeal ". Their Lordships then proceed to consider the matter on the same basis and they would not feel entitled to adopt another one, even if they saw any good reason for doing so.

The 1953 action accordingly was an action in which the Ibabu people were suing the Iselegu people for a declaration of title to the disputed land and the Iselegu people on the other hand were claiming damages against some Ibabu people for trespass on at any rate part of that land. To take first the hearing of the action in the Supreme Court of the Warri Judicial Division, the presiding Judge was Mbanefo, J. On the 10th December 1953 he delivered his judgment in the consolidated suits, in which, after a detailed review of the evidence called before him, as to tradition, boundaries and user, he ended by saying " I am satisfied that the land in dispute was farmed extensively by Iselegu people and that if any Ibabu farmed it before this dispute began, he did so with the permission of Iselegu. I find that the plaintiffs' claim in W/16/53 [the Ibabu action] fails and is dismissed with costs and I find for the plaintiffs (Iselegu) in W/18/53 and award £5 damages against each defendant. The plaintiffs in W/18/53 will have an injunction against the defendants ".

The Ibabu therefore lost and failed to get a declaration of their title. The Iselegu got damages for trespass. There are however two points that have been stressed on behalf of the appellants as limiting the import of this judgment for the purposes of estoppel. The Iselegu had not counter-claimed, as they might have done, for a declaration of their title, and, as the learned trial Judge observed in the present action, in refusing a declaration to the Ibabu Mbanefo, J. had not by inference conferred a title on the Iselegu. Secondly, he had stated explicitly in his judgment that on the evidence before him he could not find that the Iselegu had title. There was a third possible claimant, a tribe known as Umuokpala. " Whether the land ", he said, " where Iselegu live belongs to Umuokpala or Iselegu or to both of them I am not prepared to say. The fact is that Iselegu has been on the present site of their town for a long time and I am unable to accept Peter Nwaka's evidence of the boundary between Ibabu and Umuokpala ".

The Ibabu parties appealed to the West African Court of Appeal, and judgment in the consolidated suits was delivered on the 15th November 1954. Their appeal against the dismissal of their action for declaration of title was dismissed. The Court, whose judgment was delivered by De Comarmond, Ag. C. J., held that there was no ground for interfering with the decision of the trial Judge to the effect that the Ibabu had not made out their title. On the other hand, they allowed the appeal against the judgment in trespass against the Ibabu farmers. In the Court's view the Judge's findings regarding the position of the Ibabu farmers on the land in dispute was not consonant with a decision that they were trespassers. He had, apparently, accepted

evidence that they were there as tenants of the Iselegu people, farming what parts they occupied with Iselegu permission, and on that basis they could not be treated by the Iselegu as unlawfully on the land and liable to pay damages for trespass.

The point raised by the plaintiffs (the Iselegu) in the present action was that the 1953 action had concluded the issue of title between themselves and the Ibabu. The trial Judge rejected this proposition, holding that the issues before him (as to the Iselegu title) were at large and there was no estoppel operating against the Ibabu. It is not clear to their Lordships from the terms of his judgment just how the Iselegu case was presented to him on this point. It could hardly have been based on the mere dismissal of the Ibabu action in the earlier proceedings, for this by itself would not have shown that the Iselegu had a good title. Neither side might have had what was needed. There was, of course, the cross-action, in which the trial Judge's decision giving damages for trespass against the Ibabu farmers was reversed on appeal. The Court of Appeal's decision on that appeal might well be said to have decided between the two parties that the Ibabu people had been allowed on the disputed land as tenants or at any rate in some permissive capacity by the Iselegu and that they were, as Counsel argued, " estopped from denying their tenancy ": but such a decision is not in itself the same thing as an objective decision that the Iselegu are the people who have title to the land.

It seems however to be clear that the Federal Court, in reversing the trial Judge in the present action, accepted the proposition that the 1953 action really involved a decision between the two parties as to the Iselegu title. Their judgment, as has been said, was delivered by Abbott F. J. The Court's view was that the effect of the decision of the West African Court of Appeal in favour of the Ibabu in the trespass action was that they were tenants of the Iselegu. Further, they held, the reversal on appeal of the trial Judge's judgment on that issue " did not wipe out the findings of fact in that suit but in fact reinforced them ". It was on this point that they effectively differed from the view of the trial Judge, who seems to have thought that the success of the Ibabu on the cross-appeal had annulled all adverse findings against them. Dealing then with the evidence in support of the Iselegu claim to have a declaration of title in the present action, the learned Federal Justice proceeded:— " I am in agreement . . . that, in the absence of the evidence provided by the 1953 litigation and had this been the first attempt of either party to obtain a declaration of title to the land the evidence produced by the Iselegus before Onyeama J. might well have failed to discharge the onus lying upon them as claimants to title. But when one takes the 1953 decisions into account the position is greatly changed. Concurrent findings by two Courts, that the Ibabus are tenants of the Iselegus is very cogent evidence indeed of the ownership of the latter. A very large part of the onus is, in my view, discharged by these decisions and such additional evidence as the Iselegus desired to adduce need be little (if anything) more than formal ".

The Federal Supreme Court accordingly allowed the Iselegus' appeal so far as concerned the declaration of title, dismissed it in respect of the claim for damages for trespass and injunction, and remitted the case to the Court below for investigation and decision of the forfeiture claim, which had not been fully considered.

It was argued that the Federal Court had illegitimately introduced the evidence in the 1953 action into the evidence in the present action. Their Lordships do not accept this. Despite a possible ambiguity in the language used, they are sure that the Court did not regard the evidence given in the 1953 action before Mbanefo, J. as being in itself capable of being imported into and used as evidence in the hearing of the present action by Onyeama, J. What the Court must have had in mind was that the judgment or judgments in the earlier action were sufficient to set up an estoppel per rem judicatam between these two parties on certain points which, taken with the other evidence, entitled the Iselegu to a declaration of title for which otherwise they would have had insufficient evidence.

Now it is true that Mbanefo, J. did not decide in terms that the Iselegu owned the disputed land. But that was because he could not determine what the position was as between them and the Umuokpala people. If an action for a declaration of title as between A and B could ever properly be regarded as an action in rem, judgment in which would establish A's title against C and others, there would be force in the appellant's contention that no estoppel as to the Iselegu's title could arise from the 1953 action. In their Lordships' opinion however it would be contrary to all precedent to treat such an action as the 1953 action as an action in rem. If so, the position of the Umuokpala is not prejudiced and the present action is simply a dispute between Iselegu and Ibabu as to which of them has title to the land against the other.

From that point of view there is much force in what the Federal Court have said. It was certainly settled in the 1953 action that the Iselegu could not treat as wrongful the presence of Ibabu farmers on their land because, as between those two parties, the Ibabu were there with the status of tenants or licensees of the Iselegu. Their Lordships agree that that finding necessarily implies that the Iselegu possessed the superior ownership, and, since it is the accepted principle that a tenant cannot deny his own landlord's title, they see nothing to object to in the Federal Court's view that the estoppel, which could be treated as a binding admission for the purposes of the present action, sufficiently supplements the other evidence to justify the Iselegu in getting their declaration of title against the Ibabu.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs (if any) of this appeal.

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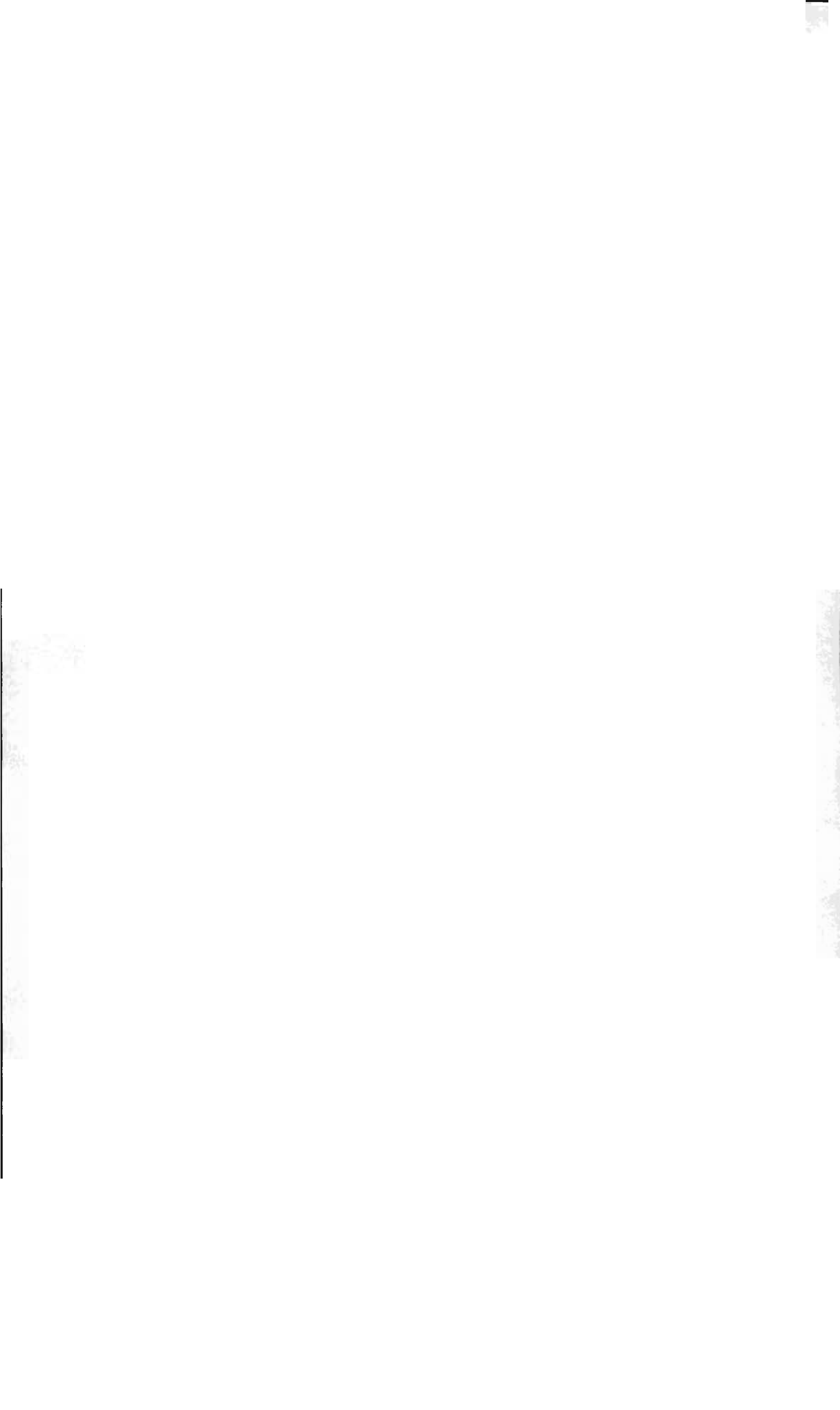

In the Privy Council

OSELE AND OTHERS FOR THEMSELVES AND ON BEHALF OF THE PEOPLE OF ONICHA-IBABU

v.

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