No. 10 of 1976

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FULL COURT OF HONG KONG

B E T W E E N :

TAI HING COTTON MILL LIMITED — Appellant

- and -

KAMSING KNITTING FACTORY (a firm) — Respondent

CASE FOR THE RESPONDENT

Record

1. This is an appeal from the Order of the Full Court of Hong Kong exercising appellate jurisdiction /Huggins, McMullin and Cons JJ., Cons J dissenting on the Cross Appeal/ dated the 19th September 1975, dismissing the Appellant's appeal and allowing the Respondent's Cross Appeal from the judgment of the Hon. Mr. Justice Briggs, Chief Justice, exercising Original jurisdiction, dated the 19th February 1975 and accordingly substituting for the sum of $451,773 which the Learned Trial Judge adjudged due to the Respondent a sum of $833,553.

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2. The only question of substance raised by this appeal is what is the correct amount of damages to which the Respondent is entitled by reason of the Appellant's failure to deliver the balance of 424-20 bales of 32 count yarn to the Respondent in breach of a written contract for the sale of 1,500 bales of the said yarn by the Appellant to the Respondent dated the 23rd March 1971. On the basis of the contents of the Appellant's Notice of Appeal to the Full Court and the leave given by that Court to bring this appeal the Appellant may seek to raise as subsidiary questions :

p. 239
pp. 233-238
p. 195
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(i) whether the Learned Trial Judge should have ordered additional discovery of documents by the Respondent;

(ii) whether the Full Court should have permitted the Appellant to Re-amend its Defence and argue the points raised by the Re-amendment.

3. The following basic facts were either common ground between the parties or were found as facts by the Learned Trial Judge - no appeal has been brought against any finding of fact material to this appeal : 10

p. 233

p.188 L10

p.188 L12

(a) As to the contract, that although the contract provided "Delivery: Apr. 1971-Dec. 1971" both parties ignored this provision which was never intended to be binding and that "the true agreement which can be implied from the conduct of the parties was that the defendant (Appellant) would supply 1,500 bales of yarn at a fixed price for an indefinite period - the plaintiff (Respondent) having the right to call for deliveries." 20

p. 239

p. 188 L21

p. 188 L38

p. 189 L13

p. 190 L31

p. 190 L42

(b) As to the breach of contract, that deliveries were made over a period of time as set out in a schedule produced by the Respondent, that at any rate during the latter part of 1972 and in 1973 the Appellant did not supply the Respondent with the quantities it was requesting, that in the latter part of 1972 the Appellant promised to deliver all that the Respondent wanted after Chinese New Year (in February) 1973, that the Appellant did not keep the said promise, that the last delivery was in May 1973 and that by letter of the 31st July 1973 the Appellant for the first time and unequivocally indicated an intent no longer to be bound by the contract and to deliver no more yarn, at which date the Respondent was entitled to the delivery of 424-20 bales of yarn at the price of $1,335 per bale. 30 40

pp. 185-192

4. In addition to the above matters, which were specifically recited in the Learned Trial Judge's judgment;

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(i) The Learned Trial Judge accepted the evidence of the Respondent's witness Mr. Mui Chok Chue as to the content of a conversation with Mr. Chow of the Appellant in late May 1973. In his evidence Mr. Mui had said that Mr. Chow repeated an offer of 15 bales per month and that he, Mr. Mui, had said "there was no reason for you to deliver so small a quantity of 15 bales only. You should deliver everything."

p.190 L1

p.83 L30

(ii) There was in evidence before the Learned Trial Judge a letter from the Respondent to the Appellant dated the 21st July 1973 in which the Respondent wrote, inter alia, "In order to complete the captioned contract you are earnestly requested to deliver us daily at least four bales, i.e. 1,600 lbs, starting from the 26th of this month."

p. 240

p.240 L35

Accordingly it was in evidence before the Learned Trial Judge that there had been by the 31st July 1973 a complete non-performance of the balance of the contract by the Appellant. And if the letter of the 21st July 1973 amounted to more than an attempt to mitigate loss by giving the Appellant the opportunity to supply at the contract price before the Respondent went into the market, the letter called for a delivery schedule which would have resulted in the 424-20 bales being delivered by the end of November 1973 (if a 6-day week) or the end of December 1973 (if a 5-day week).

5. So far as the quantum of damages is concerned the position is as follows :-

(a) The Respondent pleaded in the Statement of Claim endorsed on the writ issued the 21st November 1973, after reciting the contract and breach of contract, in paragraph 19 that on account of the Appellant's wrongful repudiation on the 31st July 1973 the Respondent suffered a loss, being the difference between a market price as at the 31st July 1973 of $3,325.00 per bale and the contract price of $1,335, i.e. $1,990 x 424-20 bales, a total loss of $844,158.00.

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(b) The Respondent proved by evidence that there had been a very sharp rise in the Market Price of yarn from the beginning of 1973, that the Respondent made a purchase of 100 bales of the said yarn at a price of $2,400 per bale on the 30th May 1973 and (with the aid of evidence of actual purchases in August 1973 of 32 count yarn from mainland China, this yarn being slightly cheaper than Hong Kong yarn) that the Market Price of the said yarn on the 31st July 1973 and in August 1973 was $3,300 (not $3,325 as pleaded) per bale.

p.34 L31
p.42 L1-7
pp.43-46

(c) The Respondent submitted to the Learned Trial Judge in reliance on the above evidence, that damages should be assessed on the difference between the said figure of $3,300 and the contract price of $1,335, i.e. $1,965 x 424-20 bales, and asked for damages for the resultant total of $833,533, relying in particular upon the judgment of McCardie J. in Hartley v. Hymans [1920] 3 K.B. 475 in which he said, on page 496 :

p.191 L30

> "The defendant here ... cancelled with peremptory abruptness. But for the fact that the defendant's repudiation was absolute as to all undelivered goods a difficulty would have arisen as to the proper period or periods for delivery which could have been fixed by the defendant in March 1919. But inasmuch as he absolutely refused on that date to take any further goods at any time, the point is covered by the decision of the Exchequer Chamber in Tyers v. Rosedale and Ferryhill Iron Co. (1875) L.R. 10 Ex. 195. Hence it is right to assess the damages as at March 1919."

(d) The Appellant pleaded in its Defence dated the 5th January 1974 and amended the 10th November 1974 in paragraph 15 merely a denial of paragraph 19 of the Statement of Claim. The Appellant in its Defence made no allegation of failure to mitigate damage, no allegation that there had been a breach of contract earlier than the 31st July 1973 and no allegation that if anything the letter of the 31st July 1973

p. 16
p. 12

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was an anticipatory breach and that some date later than the 31st July 1973 was appropriate for the assessment of damages.

(e) The Appellant during the hearing of the evidence called no evidence on the question of damages and made no suggestion during the cross-examination of the Respondent's witnesses that the Respondent's evidence as set out in (b) above was in any way inaccurate. It was put to Miss Mui Nuen-Tin and she accepted that the market price of yarn in Hong Kong began to fall in September 1973 and had fallen by the time of the trial (late January 1975) to a price of about $1,800 per bale. She said and it was not challenged that in September 1973 the price fell a little only. No alternative calculation of damages was suggested to her or any other witness on the basis that if there had been no breach of contract on the 31st July 1973 deliveries would have been later than the 31st July 1973 and the market price different. It was put to Mr. Mui Chok Chue that a letter he wrote to the local Textile Association indicated that the Respondent still desired deliveries under the contract in September 1973 and he agreed. But no alternative calculation of damages as at any date after the 31st July 1973 was put to any witness. The Appellant's cross-examination on the issue of damages was directed to seek to establish that if the Appellant had failed to deliver yarn in breach of contract, the failure had been much earlier than 1973, that the Respondent had or ought to have been buying yarn elsewhere, following the Appellant's failures, because of the duty to mitigate loss, and that accordingly the lower market price at a date or dates much earlier than the 31st July 1973 should form the basis of the assessment of damages. It was in this connection that a request was made for discovery of documents showing purchases of yarn by the Respondent from sources other than the Appellant in 1972. The matter was raised during the evidence of Miss Mui and left on the basis that some other witness - perhaps her father - might deal with the matter. This matter was not thereafter pursued by the Appellant. No suggestion was made to any witness that the letter of the 31st July

p.75 L1-20

p.75 L7

p. 106

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pp.58-62

p. 63

p.63 L21-26

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1973 was merely an anticipatory breach and that damages should be calculated at the date of subsequent acceptance of the repudiation or on such date after the 31st July 1973 as delivery could have been expected but for the breach on the 31st July 1973 and no evidence or cross-examination was directed by the Appellant to the amount of the market price of yarn as at such date or dates. 10

(f) The Appellant submitted to the Learned Trial Judge that he should not apply the measure used in Hartley v. Hymans (supra) i.e. market price at date of absolute repudiation less contract price. Whilst no submission was made that there had been a repudiation earlier than the 31st July 1973 which had or ought to have been accepted it was argued that since there had been failures to make requested deliveries in the latter part of 1972 and early 1973 the Respondent should have mitigated its losses at that time. The whole case was put on the basis of failure to mitigate loss and the Appellant was asking for an assessment based on market prices prior to the 31st July 1973. No suggestion was ever made that the letter of the 31st July 1973 was merely an anticipatory breach and that damages should be calculated at the date of subsequent acceptance of the repudiation or on such date after the 31st July 1973 on which but for the repudiation delivery would have been made.

p.192 L7

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If that suggestion had been made it could have been dealt with by further evidence. Or the Respondent could have advanced arguments on the basis of the matters set out in paragraph 4 above. It could have been argued that there had been a complete non-performance by the 31st July 1973 so that it was not a case of anticipatory breach at all and as the Learned Trial Judge held "at the date of the cancellation ... the plaintiff (Respondent) was entitled to the delivery of 424-20 bales of yarn at the price of $1,335 per bale." Or it could have been argued that in accordance with the deliveries contemplated by the letter of the 21st July 1973, i.e. 26th July until

p.190 L42

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	Record
the end of November or December 1973 and in the absence of evidence as to any different market price and in the light of Miss Mui's evidence referred to in paragraph 5 at (e) above the Court should in any event have taken the market price in August 1973, i.e. $3,300 per bale as the appropriate figure when assessing damages.	p.240 p.75 L1-20

6. The Learned Trial Judge in his Judgment found in favour of the Respondent on all controversial issues of fact. On the question of damages he accepted the Appellant's argument that the Respondent should have mitigated its damages by buying yarn elsewhere prior to the 31st July 1973. He assessed damages by reference to the only prior purchase from a third party of which evidence had been given, namely the purchase of the 30th May 1973 of 100 bales at a price of $2,400 per bale, see paragraph 5 at (b) above. On this basis damages were awarded of $1,065 x 424-20 bales a total of $451,773. He did not expressly deal with the matters referred to in paragraph 4 above nor consider the measure of damages as at any date after the 31st July 1973 because no such point was raised by the Appellant which rested its case solely on alleged failure to mitigate loss. He did, however, find as a fact that at the date of the cancellation of the contract by the Appellant on the 31st July 1973, the Respondent was entitled to the delivery of 424-20 bales of yarn at the price of $1,335 per bale.

(Record: pp.185-192; p.192 L9-22; p.42 L1-7; p.190 L42-44)

7. On the 24th March 1975 the Appellant gave Notice of Appeal to the Full Court by which : (Record: pp.195-196)

(i) <u>Under Head (1)</u> the Appellant raised the issue of whether the Respondent had mitigated its damage and thus avoided any damage and in this connection criticised the Learned Judge for holding that the failure of the Appellant to deliver the quantities required by the Respondent had first commenced in the latter part of 1972 (although in fact the Learned Judge did not so hold in terms). (Record: p.188 L23)

(ii) <u>Under Head (2)</u> the Appellant suggested that the Learned Judge wrongly excluded documents relevant to the issues, being documents showing what purchases of yarn

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the Respondent made from other suppliers in anticipation of or by reason of the Appellant's short-deliveries.

(iii) Under Head (3) the Appellant contended that the production of such documents would show that the Respondent had suffered no damage or less damage than the sum awarded.

The Appellant also gave notice of its intention to seek leave from the Full Court to Re-amend its Defence to add a paragraph 16A alleging that any breaches of contract by the Appellants took place during 1971, 1972 and early in 1973 and that damages should be assessed as at the dates of such short-deliveries. 10

p.199

8. On the hearing of the appeal the Full Court in the exercise of their discretion rejected the application to Re-amend the Defence and the appeal was dismissed unanimously either on its merits as being misconceived in law or because the Full Court did not consider that it was proper to argue the points sought to be raised by the Notice of Appeal in the absence of a suitable pleading. 20

p.202 L38-46
p.205 L46-
p.206 L14
p.208 L22-
p.209 L31
p.225 L16

9. With regard to the Appellant's appeal from the dismissal of his appeal to the Full Court and the refusal of the Full Court to allow the proposed re-amendment of the Defence the Respondent's main submissions are that : 30

(1) The decision whether to allow the proposed re-amendment was one for the discretion of the Full Court and it would be wrong to interfere with their exercise of this discretion.

(2) The Re-amendment would have raised matters which had not been fully canvassed in evidence and it was right to reject the application for leave to re-amend. 40

(3) In any event, if the merits of the points raised by the proposed re-amendment and/or the Notice of Appeal are material,

(a) a Buyer owes no duty to mitigate losses in the absence of a repudiation by the Seller accepted by the Buyer

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and therefore no question of mitigation could arise until at the earliest the 31st July 1973;

(b) the Learned Trial Judge did not exclude the documents referred to in Head (2) of the Notice of Appeal or hold as that Head of the Notice infers - the matter was raised and then not pursued by the Appellant, see paragraph 5 at (e) above; p. 63

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(c) even if the Learned Trial Judge had so held he would have been justified, in the exercise of his discretion, because of the lateness of the application;

(d) in any event the documents of which discovery was sought were, even if available, irrelevant because they related to purchases of yarn by the Respondent from other suppliers prior to any time when the Respondent owed a duty to mitigate losses being caused by the Appellant.

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10. By a Respondent's Notice dated the 8th April 1975 the Respondent cross-appealed to the Full Court against the finding of the Learned Trial Judge as to damages and in summary the points raised were : pp.197-198

(i) that in view of the Learned Trial Judge's findings of fact there was no repudiation by the Appellant until the 31st July 1973 and there could be no duty to mitigate prior to that date; and that therefore damages should not have been assessed by reference to a market price on the 30th May 1973;

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(ii) that damages should have been assessed by reference to the market price on the 31st July 1973 this being the date of the Appellant's repudiation and the date at which the Learned Judge held the Respondent was entitled to the delivery of 424-20 bales of yarn at the price of $1,335 per bale; p.190 L42-44

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(iii) that if contrary to the said contentions it was right to take into

account the purchase of 100 bales on the 30th May 1973, the assessment of damages in relation to the 324-20 bales which made up the undelivered balance should nevertheless have been by reference to the market price on the 31st July 1973.

11. On the hearing of the cross-appeal there was forthe first time during the conduct of the case :- 10

(a) a reference to section 53(3) of the Hong Kong Sale of Goods Ordinance of 1896, which provides in relation to damages for non-delivery -

"Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the 20 time or times when they ought to have been delivered, or, if no time was fixed for delivery, then at the time of the neglect or refusal to deliver."

(The words underlined for the purpose of this Case do not appear in the analogous section 51(3) of the Sale of Goods Act 1893).

(b) an argument advanced, either by the Full 30 Court of its own motion or by Counsel for the Appellant, that the letter of the 31st July 1973 was merely an anticipatory breach, not a "refusal" within the meaning of the latter part of the said sub-section; that accordingly damages should be assessed by reference to the market price on the later date or dates on which delivery would have taken place in the ordinary course of 40 events but for the repudiation, and that since the Respondent put forward no date for the assessment of damages other than the 31st July 1973, if that date was wrong the cross-appeal should be dismissed.

12. By a majority (Cons J. dissenting) the

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Full Court allowed the cross-appeal. In summary, it was held :

By Huggins and McMullin J.J.

(i) that in the natural and ordinary meaning of the words of the latter part of the said sub-section a refusal to deliver included a refusal which was an anticipatory breach; — p.200 L14-19, p.202 L4-32, p. 214, p. 221

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(ii) that insofar as Millett v. Van Heek & Co. [1921] 2 K.B. decided to the contrary on the analogous sub-section of the English Statute it was wrong and/or ought not to be followed; — pp.204-5, pp.214-221

(iii) that the contract in this case was one where the Buyer could call for delivery on demand as and when yarn was required and that therefore no time was fixed for delivery and damages should be assessed in accordance with the latter part of the said sub-section; — p.202 L33-p.203 L6, p.207 L21-28, p. 221

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(iv) that the correct date at which to take the market price for the purpose of assessing damages was the date on which there was a positive and final refusal by the Seller to deliver any more goods, namely on the 31st July 1973. — p.203 L3-6, p.222 L6-9

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In support of their holding (iv) they relied, inter alia, on

Hartley v. Hymans [1920] 3 K.B. 475, per McCardie J. at p.496

Tyers & Ors. v. The Rosedale & Ferryhill Iron Co. Limited (1875) L.R. 10 Ex. 195, see especially Martin B. in L.R. 8 Ex. 305 at 319

Tredegar Iron & Coal Co. Limited v. Hawthorn Bros. & Co. 18 T.L.R. 716, per Collins M.R. at p. 716 and Matthew L.J. at p. 717

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Sudan Import & Export Co. (Khartoum) Limited v. Societe Generale de Compensation (1957) 2 Ll. R. 528 per Ashworth J. at p.238.

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By Huggins J. alone

(v) that even if Millett v. Van Heek & Co. (supra) was correct as to the interpretation of Section 51(3) of the Sale of Goods Act 1893, it did not apply to Section 53(3) of the Hong Kong Ordinance, because the additional words "neglect or" before "refusal" were intended by the legislature to contrast a failure to deliver ("neglect") with an indication of intent not to deliver ("refusal") so that in Hong Kong a "refusal" did include a refusal which was an anticipatory breach. 10

p.201 L24-36
p.204 L33-40

By Cons J. (dissenting)

(vi) that as the time for delivery of the balance sued for had not yet arrived when the Appellant repudiated the contract the breach could only be anticipatory and that, following and applying Millett v. Van Heek & Co. (supra) the latter part of Section 53(3) did not apply to the case and damages should not be assessed as at the 31st July 1973. 20

13. All three Learned Judges of the Full Court held that if the view of Cons J. was correct, then since the Respondent had advanced no alternative calculation or date other than the 31st July 1973 the cross-appeal would have to fail. They came to this conclusion despite the fact that it was common ground before the Full Court that the Learned Trial Judge's assessment of damages was incorrect and too low. For example, the Hon. Mr. Justice Huggins said 30

p.206 L16-20
p.224 L15-18
p.227 L33-
p.228 L11

p.203 L6-11

> "... it is common ground that in the present case the method of assessment adopted in the Court below was wrong and it is clear on figures which have been mentioned to us that it produced a figure far less than the amount of any estimate of the loss sustained which might be made in the alternative ways suggested." 40

14. As to the Appellant's appeal against the allowing by the Full Court of the Respondent's cross-appeal the Respondent's main submissions are that :

(1) The decision of the majority of the Full Court was correct for the reasons given by Huggins and McMullin J.J., namely that a "refusal" does include an anticipatory breach and the correct measure of damages was that specified in the latter part of Section 53(3) of the Hong Kong Sale of Goods Ordinance. The decision in Millett v. Van Heek & Co. (supra) on the analogous Section 51(3) of the Sale of Goods Act 1893 was wrong and/or ought not to be followed, or should be distinguished by reason of the different wording of the Hong Kong section on the grounds given by Huggins J.

(2) Moreover the Full Court should not in fact have permitted argument on behalf of the Appellant based on Section 53(3) of the Sale of Goods Ordinance or argument that the 31st July 1973 was the wrong date for the assessment of damages. They should have refused to permit such argument because the point was not pleaded or raised at the trial and if so pleaded or raised could have been dealt with by further evidence and properly investigated.

(3) The last submission is a fortiori justified if it be right, as the Full Court held, that if the 31st July 1973 was an incorrect date, then the cross-appeal failed despite the fact that it was the responsibility of the Appellant that the point was not raised below and despite the fact that it was common ground that the Learned Trial Judge's assessment of damages was both wrong and too low.

(4) Irrespective of the merits of the points raised on Section 53(3) and anticipatory breach, the Full Court should have had regard to the fact that the Respondent had produced prima facie evidence of damage to a given amount and that this evidence had been challenged solely on the grounds of alleged prior failure to mitigate loss. Having rightly held that the Learned Judge was wrong on the issue of failure to mitigate loss, the cross-appeal should have been allowed in full

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on the basis of the Respondent's prima facie evidence and no examination of the points raised on Section 53(3) and anticipatory breach was necessary.

(5) In any event the decision of the Full Court was justified by the finding of the Learned Trial Judge that at the date of cancellation of the contract by the Appellant (31st July 1973) the Respondent was entitled to the delivery of 424-20 bales of yarn at the price of $1,335 per bale. That finding would have entitled the Full Court to hold and they should have held that no question of anticipatory breach arose and that the case being one of total non-performance the 31st July 1973 was the correct date at which to assess damages. The said finding of the Learned Trial Judge was in its turn justified by the evidence of Mr. Mui Chok Chue that in late May 1973 he had said to the Appellant that it should deliver everything, see paragraph 4 and 5 at (f) above.

p.190 L42-44

p.83 L30

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(6) Furthermore, even if the majority of the Full Court were wrong on the issue of the meaning of the word "refusal" in Section 53(3) and damages should have been assessed as at a date later than the 31st July 1973, on the state of the evidence this should have made no difference in the sum awarded. At the very latest, the Respondent by the letter of the 21st July 1973 called for deliveries by the end of November or December 1973, see paragraph 4 above, and/or accepted the repudiation by issuing the writ in November 1973; and there was no evidence that the market price averaged from July to December 1973 any less than its August figure of $3,300 per bale, save perhaps for Miss Mui Nuen-Tin's evidence that it fell "a little only" in September, see paragraph 5 at (e) and (f) above. Thus justice would have been done by taking the 31st July 1973 figure even if the letter of that date was merely an anticipatory breach.

p.240 L35

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(7) Therefore the decision of the Full Court should stand even though the above reasons include reasons additional to the

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reasons of the majority of the Full Court for allowing the cross-appeal in full.

15. The Respondent further submits that if the decision of the Full Court was wrong and this appeal, contrary to the submissions made above, is allowed, the decision of the Learned Trial Judge should not be restored but the issue of damages should be remitted to him for further evidence and consideration. The main reasons for this submission are
10 that :

(a) any inadequacy in the evidence on damages was due to the Appellant's failure to plead, present and argue the case on the basis it now seeks to argue it;

(b) it is common ground and/or the Full Court considered that the Learned Trial Judge's assessment of damages was both wrong and too low, see paragraph 13
20 above.

16. The Respondent therefore submits that this Appeal should be dismissed with costs, or, if allowed, that the matter should be remitted to the Learned Trial Judge for further hearing on the issue of damages, for the following among other

R E A S O N S

(1) BECAUSE the measure of damages approved and awarded by the Full Court
30 was correct.

(2) BECAUSE the Full Court were right to dismiss the Appellant's appeal and to allow the Respondent's cross-appeal.

(3) BECAUSE if the Full Court were wrong in their decision justice requires that the matter be remitted to the Trial Judge for further hearing on the issue of damages.

ROBERT GATEHOUSE

40 JOHN G.C. PHILLIPS

No. 10 of 1976

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF HONG KONG

BETWEEN:

TAI HING COTTON MILL LIMITED

Appellant

\- and -

KAMSING KNITTING FACTORY (a firm)

Respondent

CASE FOR THE RESPONDENT

HUGHES WATTON & CO.,
Regent House,
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