Privy Council Appeal No. 31 *of* 1936

B. Davis, Limited - - - - - - *Appellants*

v.

Tooth & Company, Limited - - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST OCTOBER, 1937.

Present at the Hearing:
LORD RUSSELL OF KILLOWEN.
LORD ROCHE.
SIR LYMAN POORE DUFF (Chief Justice of Canada).
[*Delivered by* LORD ROCHE.]

This is an appeal from an order of the Full Court of the Supreme Court of New South Wales dated 30th September, 1935. The judgment under review by the Full Court was a judgment of the Supreme Court (Halse Rogers J.) ordering the defendant company to pay to the plaintiff company the sum of £7,444 damages with costs. Against that judgment both parties appealed and the Full Court (Davidson, Stephen and Maxwell JJ.) unanimously dismissed the appeal of the plaintiff company which was directed to securing an increase in the amount of the damages; but by a majority (Stephen J. dissenting) allowed the cross-appeal of the defendant company and reduced the damages to the nominal sum of one shilling.

The action was begun by writ issued on 16th March, 1934, and so far as is relevant to this appeal, was brought to recover damages for breach of an agreement between the parties dated 1st February, 1929, whereunder in the events that happened there was granted to the defendant company the sole selling rights in New South Wales for a period of 10 years of certain brands of Scotch whisky known as Watson's whisky. The questions involved in the litigation and in this appeal are the meaning and effect of the contract upon its true construction, the extent if any to which the defendant company was in breach of the contract, and if it was in such breach the basis upon which damages should be assessed and the proper amount to be awarded therefor.

The circumstances under which the agreement of 1st February, 1929, was made are as follows:—

The plaintiff company was registered in London on 22nd October, 1925, to take over the business of spirit

merchants which had previously been carried on by one Mr. Boydie Davis in England and Australia, who became and at all material times was the managing director of the plaintiff company. The defendant company has a long established and large business as brewers and merchants of liquors in Sydney and throughout New South Wales and owns or controls a large number of tied houses (about 1,200) and from time to time itself occupies and manages others of its licensed houses through managers. Prior to 1929 there had been business relations between Mr. Davis and the plaintiff company on the one side and the defendant company on the other and under an agreement of 30th April, 1924, the defendant company agreed to purchase annually over a period of years specified quantities of a Scotch brand of whisky known as Macleay Duff. By a further agreement of 27th March, 1926, another Scotch whisky known as Low Roberston was similarly dealt in between the parties and in part this whisky was to be substituted for Macleay Duff whisky to be delivered under the agreement of 30th April, 1924. Both these agreements provided for the purchase by the defendant company in each year of their currency of certain specified minimum quantities of the whisky in question. These agreed quantities varied for different years but ranged from 18,000 to 25,000 gallons per annum. The Macleay Duff whisky, at any rate as regards certain deliveries, proved to be of inferior quality, and at the date of the agreement sued upon (1st February, 1929), there was a quantity of 46,000 gallons or thereabouts of this Macleay Duff whisky in the defendant company's hands and this was later increased by the arrival of another shipment to about 50,000 gallons. The plaintiff company under these circumstances in November, 1928, made proposals to the defendant company for cancelling the Macleay Duff and Low Robertson contracts and making instead a contract in respect of Watson's whiskies. Watson's whiskies had been sold in New South Wales at an earlier date but had been off the market for several years. A new company James Watson & Co., Ltd., associated with what is known as the whisky combine—Distillers, Limited—had been formed for the purpose of blending and marketing Watson's brands and at the end of 1928 the plaintiff company, which is also associated with the combine, was in a position to offer to the defendant company terms for the purchase of Watson's brands with the sole rights of sale in New South Wales. By an option dated 1st December, 1928, and an agreement dated 21st May, 1929, made pursuant to the option, the plaintiff company became the sole selling agent for the export of Watson's whiskies to certain countries out of the United Kingdom, which included New South Wales. In these circumstances Mr. Davis proceeded from England to Sydney and in January, 1929, negotiated with Mr. Cleary, the defendant company's general manager, a contract to supersede the Macleay Duff and Low Robertson contracts and to regulate the purchase and sale of Watson's whiskies.

The contract is in writing and is in the following terms:—

MEMORANDUM OF AGREEMENT made the First day of February One thousand nine hundred and twenty nine BETWEEN B. DAVIS LIMITED of Adelaide House, London Bridge in the City of London whose registered office is situate there Spirit Merchants of the one part and TOOTH & CO. LIMITED of Sydney in the State of New South Wales in the Commonwealth of Australia Brewers and Merchants of the other part WHEREAS the said B. Davis Limited has the sole export agency for the sale of James Watson & Company Limited Scottish whiskies in Australasia for the period of Fifteen years as from the First day of February One thousand nine hundred and twenty-nine AND WHEREAS the said B. Davis Limited has agreed to appoint the said Tooth & Co. Limited its sole agents for the sale of James Watson & Company Limited Scottish whiskies in the said State of New South Wales NOW IT IS HEREBY MUTUALLY AGREED as follows:—

1. Pursuant to the above Agreement the said B. Davis Limited hereby grants and the said Tooth & Co. Limited hereby agrees to take and accept the sole agency for the State of New South Wales for the sale of James Watson & Company Limited Scottish whiskies for a period of five years from the First day of February One thousand nine hundred and twenty-nine.

B. Davis Limited agrees to supply Tooth & Co. Limited, with a standard sample of each quality of such whisky and all whisky supplied by B. Davis Limited shall comply with such respective sample.

2. For James Watson's No. 10 Scottish whisky for bottling purposes and Watson's Special Scottish whisky for bulk purposes the price shall be Twenty-four shillings and sixpence per proof gallon less Two shillings per gallon ALLOWANCE f.o.b. Scotch Port wood extra (quarter-casks Two pounds Hogsheads Three pounds) Capsules labels corks and wrappers free for the bottling of Watson's No. 10 it being agreed that Watson's No. 10 shall be sold in bottle only and Watson's Special shall be sold in bulk PROVIDED ALWAYS that should the Combine lower the export price to Australia of their present leading proprietary brands of Scotch whisky the prices herein mentioned shall be similarly reduced.

For the cheaper bulk James Watson & Company Limited Scottish whiskies the price payable shall be (as per delivered samples):—

1. 15s. per proof gallon f.o.b. Scotch Port.
2. 16s. 6d. per proof gallon f.o.b. Scotch Port.
3. 18s. per proof gallon f.o.b. Scotch Port.
4. 20s. per proof gallon f.o.b. Scotch Port.

Wood extra (quarter-casks Two pounds Hogsheads Three pounds).

The above whiskies shall all carry a minimum five years' age certificate at the least.

2A. The price at which Tooth & Co. Ltd. shall sell Watson's No. 10 whisky bottled shall be not less than the price at which the Combine's present leading proprietary brands of Scotch bottled whisky are sold in New South Wales.

3. Payment: Tooth & Co. Limited shall pay for each shipment against shipping documents on demand.

4. Subject to B. Davis Limited notifying Tooth & Co. Limited by either cable or registered letter before the First day of June One thousand nine hundred and twenty-nine that the said B. Davis Limited are prepared to forthwith purchase Thirty thousand gallons of Macleay Duff Whisky held by the said Tooth & Co. Limited at the price of Twenty shillings per regauge proof gallon f.o.b. Sydney plus Two shillings and sixpence per gallon charges and wood extra (Two pounds for each quarter-cask and Three pounds for each Hogshead).

Payment by draft at sixty days sight IT IS HEREBY MUTUALLY AGREED that the following terms shall apply for the sole Agency of James Watson & Company Limited Scottish whiskies.

(*a*) The said B. Davis Limited hereby grants and the said Tooth & Co. Limited hereby agrees to take and accept the sole agency for the State of New South Wales for the sale of James Watson & Company Limited Scottish whiskies for a period of Ten years from the First day of June One thousand nine hundred and twenty-nine until the First day of June One thousand nine hundred and thirty-nine WITH A FURTHER OPTION of Five years until the First day of June One thousand nine hundred and forty-four.

(*b*) That the said Tooth & Co. Limited agrees with the said B. Davis Limited as follows:—

(*c*) That they will during the period of the said agency devote the principal part of their energies so far as Scotch whisky is concerned by means of themselves their travellers and others pushing the sale of Watson's No. 10 in bottle and Watson's Special Scotch whisky in bulk throughout New South Wales.

(*d*) That the said Tooth & Co. Limited will not accept the agency for nor take any interest in any other brand or brands of Scotch whisky ALWAYS PROVIDED that this shall not preclude the said Tooth & Co. Limited from selling and supplying proprietary brands of Scotch Irish or Australian whiskies throughout New South Wales in respect of orders which may be given to them for such proprietary brands or selling the present stock of whiskies held by Tooth & Co. Limited.

(e) That so long as Tooth & Co. Limited hold the agency for Watson's No. 10 and Special Scotch whisky they will purchase all their requirements of bulk Scotch whisky from B. Davies Limited at the prices and conditions provided in paragraph two hereof.

(*f*) That the said B. Davis Limited agrees to supply the said Tooth & Co. Limited with all such whiskies as above as Tooth & Co. Limited require.

(*g*) That the said B. Davis Limited agrees to supply the said Tooth & Co. Limited with James Watson & Company Limited's No. 10 Scotch Whisky for bottling purposes and with the said Watson's Special Scottish whisky and cheaper bulk Scottish whiskies for bulk purposes at the prices and upon the conditions provided in paragraph two of this Agreement.

(*h*) That the said B. Davis Limited agrees to supply the said Tooth & Co. Limited with all capsules labels corks and wrappers free for the bottling of Watson's No. 10 Scottish whisky only.

(*i*) That the said Tooth & Co. Limited shall pay for each shipment against shipping documents on demand.

(*j*) That the said Tooth & Co. Limited be allowed Two thousand pounds for advertising purposes during the first year of the agency.

Throughout this Agreement the several expressions B. Davis Limited and Tooth & Co. Limited shall mean in addition to the parties hereof their respective successors in titles and assigns.

IT IS HEREBY MUTUALLY AGREED THAT this Agreement supersedes and duly cancels contract between B. Davis Limited and Tooth & Co. Limited dated twenty seventh March One thousand nine hundred and twenty six and contract dated thirtieth April One thousand nine hundred and twenty four between Mr. B. Davis and Tooth & Co. Limited.

Subsequently as a result of cables and correspondence between the parties the quantity of 30,000 gallons of Macleay Duff whisky provided for in clause 4 of the agreement was increased to 50,000 gallons with certain variations in respect of the prices to be paid. This purchase was in due course carried out and the bulk of the Macleay Duff whisky was thus taken off the hands of the defendant company and off the New South Wales market.

It will be observed that the contract, which was, it is said, drawn up by the parties unaided by any legal draftsman, contains no provision for the purchase of fixed minimum quantities annually, but in clause 4 (*c*) and (*d*) contains provisions requiring certain conduct on the part of the defendant company. It is with those provisions and with the meaning and consequences of their somewhat inartificial language that one of the main controversies in this protracted case has been concerned.

The agreement was to come into operation on 1st June, 1929, but deliveries thereunder really began a few months later. The writ, as has previously been stated, was issued on 16th March, 1934. The period between those dates was taken as being for effectual purposes and for the purposes of the action 4½ years ending March, 1934. The course of affairs during that period in some of its details must be discussed more at length at a later stage, but in outline it was as follows:—The orders for No. 10 and Special brands of whisky given by the defendant company over the period in question and the quantities shipped pursuant to such orders were as follows:—

Date.	Ship.	No. 10.	Special.
		Proof Gallons.	Proof Gallons.
11. 7.1929	Herminius ...	4,942·2	1,676·1
15. 7.1929	Bendigo ...	64·5	—
1. 8.1929	Glaucus ...	4,996·6	—
12.11.1929	Ning Chow ...	3,658·5	—
3.12.1929	Nestor	—	1,836·7
11.12.1929	Runic	3,659·7	—
27. 9.1932	Orontes	—	902·2
7.12.1932	Port Wellington	1,842·3	556·8
8.12.1932	Orestes	1,842·7	379·3
8. 1.1934	Nestor	513·1	865·4
25. 1.1934	Ceramic	1,315·0	1,022·4
		22,834·0	7·169·0
			22,834·0
			7,169·0
		Total ...	30,003·0

It should be said that the figures in the above table are in proof gallons and also that there was apparently a difference by way of loss of as much as 5 per cent. between the shipped quantities and the quantities of the same shipments when taken out of bond in New South Wales. Further when the defendant company came to sell the whiskies the sales were under proof. The difference in strength varied at different times under varying government regulations and during part of the material time the degree of dilution was 23·5 under proof and during another part was 30·5 under proof.

It was common ground that an economic depression of great severity and of world wide character reached New South Wales in the latter half of 1929 and it was said that it lifted there at about the end of 1932. The effect of this

depression upon the whisky trade in general and upon the working of this contract in particular was a matter of debate and controversy at the trial and will have to be further considered later. But it is to be noted here that for the purpose of securing greater revenue the duty upon whisky was twice increased during the latter half of 1929. Thus on 23rd August, 1929, it was raised by 2s. per gallon from 35s. to 37s. per gallon and again on 22nd November, 1929, by 8s. per gallon from 37s. to 45s. per gallon. The natural result of such increases and of the anticipation of them was a large amount of forestalling in the shape of removals of whisky from bond and an increase in the quantities purchased by both wholesalers and retailers to avoid payment of the increased prices which as usual followed upon the increases of duty. The following figures show the quantities of whisky the produce of the United Kingdom, Irish Free State and Canada and taken out of bond in New South Wales at material dates:—

Month.	1929.	1930.	1931.	1932.	1933.	1934.
	Proof Galls.	Proof Galls.	Proof Galls.	Proof Galls.	Proof Galls.	Proof Galls.
January ...	43,642	6,069	15,609	10,398	9,815	10,947
February ...	38,245	13,989	12,017	7,116	10,646	14,107
March ...	32,259	59,417	12,403	15,990	14,676	14,125
April ...	39,533	1,444	16,966	16,080	14,703	19,026
May ...	48,218	2,603	14,132	18,347	18,890	25,946
June ...	42,955	5,363	30,286	17,039	18,244	18,417
July ...	188,875	16,506	17,974	19,662	16,360	15,232
August ...	109,381	11,327	8,859	13,296	17,326	19,902
September	4,917	10,402	12,824	15,267	14,427	19,416
October ...	10,629	18,559	15,970	14,616	17,965	17,799
November	107,100	10,693	11,649	17,817	28,332	—
December	2,808	16,971	23,308	22,033	14,497	—
	668,562	173,343	191,997	187,661	195,881	174,917

Another set of figures which can usefully here be given are the figures showing the quantities of Scotch whisky sold by the defendant company at various periods. Inasmuch as one of the issues between the parties arises from the defendant company's action in connection with brands of whisky other than Watson's—mostly if not entirely proprietary brands—the figures are given of the defendant's company's sales both of Watson's and of Macleay Duff and Low Robertson's whiskies and also of proprietary brands. They were as follows over the period from January, 1929, to September, 1933:—

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COMPARISON of Defendant's Sales in Proof Gallons of Defendant's own whiskies (Macleay Duff and Low Robertson and Watson's No. 10 and Special Whiskies) with Sales of Other Proprietary Brands for the periods shown.

Period.	Defendant's own cased whisky—Macleay Duff and Low Robertson Watson's No. 10. Proof Gallons.		Defendant's own bulk whisky—Macleay Duff and Low Robertson Watson's Special. Proof Gallons.		Defendant's own cased and bulk whisky Macleay Duff and Low Robertson and Total Watson's. Proof Gallons.		Total Others. Proof Gallons.		Percentage Watson's to Others.
	Total.	Per month.	Total.	Per month.	Total.	Per month.	Total.	Per month.	
Plaintiff's figures in italics			*11,244*	*1,249*	*12,444*	*1,383*	*56,201*	—	*22·0*
January to September, 1929 (9 months) Defendant's figures in roman type	1,207*	134*	8,954*	995*	10,161*	1,129*	57,673	6,408	17·6
October to December, 1929 (3 months)	5,713	1,904	{ 317* / 1,318	106* / 439	317* / 7,031	106* / 2,344	12,791	4,264	58·0
3 months to March, 1930	493	164	323	107	816	272	6,809	2,270	12·0
6 months to September, 1930	1,355	226	788	131	2,143	357	21,927	3,654	9·8
6 months to March, 1931	870	145	682	114	1,552	259	19,711	3,285	7·9
6 months to September, 1931	1,086	181	942	157	2,028	338	22,534	3,756	9·0
6 months to March, 1932	849	141	737	123	1,586	264	19,736	3,289	8·0
6 months to September, 1932	998	166	959	160	1,957	326	23,966	3,994	8·2
6 months to March, 1933	1,073	179	565	94	1,638	273	18,232	3,039	9·0
6 months to September, 1933	1,288	215	740	123	2,028	338	22,737	3,790	8·9
Total	13,725		7,054		20,779		168,443		12·3

* Macleay Duff.

In the above table all the figures are agreed between the parties save where there are alternative figures in italics and roman type. There the parties differ for reasons which need not be developed and a decision on the difference is difficult even if it is possible. Their Lordships do not regard the difference as of any real importance for the purposes of their decision.

It should be remembered in connection with the above figures that MacLeay Duff and Low Robertson whiskies were normally bulk whiskies only and are comparable therefore with Watson's Special rather than with Watson's No. 10.

The largest individual constituents in the total sales of proprietary brands were Dewars and White Horse, but McCallums Perfection Whisky also sold well, and this whisky assumes some importance, as McCallums, like Watsons, were then newcomers to the market. A company called Goldsbrough Mort were agents for McCallums and were influential and active and apparently the same observations apply to a company called Dalgety & Co., who were agents for White Horse whisky.

Another matter of some importance must be mentioned. The whisky was all shipped to Sydney in bulk and in so far as it was to be sold in bottles was bottled by the defendant company at that place. By clause 4 (*h*) of the contract corks and capsules were to be supplied by the plaintiff company free. But the defendant company was desirous of using a device other than a cork for bottling Watson's No. 10, and as a result of cables passing between the parties in the latter part of 1929, it was arranged that the defendant company should procure in Australia the form of stopper it desired. There was some discussion on the argument of this appeal, as apparently there was in the Courts below, as to the effect of the cables upon the incidence of the expense of this substituted arrangement, but their Lordships have no doubt that the effect was that the expense was to be debited to the plaintiff company although in the events that happened the cost of certain defective stoppers and replacements is said not to have been so debited. The device adopted was a screw stopper fitted internally at the top of the stopper with a thin piece of cork covered with a liner of metal foil. This liner should have been of pure tin and in the contract with the manufacturers who supplied the stoppers the defendant company so specified. Unfortunately, the contract was broken and as it turned out over 90 per cent. of lead was used in the composition of the foil. In consequence a large quantity of No. 10 whisky (said to be nearly 4,000 cases each of a dozen bottles and each containing 2 gallons of whisky) was sold and distributed sealed with stoppers so lined. When the spirit came into contact with the liner, as happens when the bottle is lying down, the metal disintegrated and caused discoloration of the whisky and the deposit of flakes or sediment in the bottle. The defendant company as quickly and effectively as possible called in whisky so damaged, treated it by unbottling and filtering and issued it again re-bottled with different and proper stoppers. There can be no doubt that this occurrence was a detriment to the sale of No. 10 whisky, but the extent to which it so operated is a matter of controversy, as is the question whether and on what grounds the defendant company is legally liable for any damage flowing from the defects in the stoppers.

It will be observed from the table of figures appearing earlier in this judgment that after the considerable purchases and shipments under the contract sued upon made before the end of 1929 there were no further purchases or shipments

until September, 1932. From December, 1930, there was an interchange of cables and letters between the parties, the purport of which was that the plaintiff company urged the defendant company to give instructions for shipments and complained of the small orders given. The tenour of the replies was that stocks were sufficient and that the depression was preventing business. The defendant company also suggested some alterations in price and other terms in their favour and some concessions were made by the defendant company. In August, 1932, Mr. Davis came out to Sydney and presented complaints against the defendant company's manner of performing the contract. Provisional terms of settlement were negotiated and drawn up at this time, but they were not confirmed by the board of the plaintiff company in England. The only relevance of the provisional terms is that one of them proposed the substitution of a fixed quantity to be purchased per annum for the obligations in clause 4 (*c*) of the existing agreement. Such proposed quantity was a mean between estimates of 15,000 and 10,000 gallons, that is to say, 12,500 proof gallons per annum for a certain period of time and the learned trial Judge, as will be seen, regarded this figure as some guide to him in estimating the quantity that could have been absorbed by New South Wales at the material time. It should be mentioned that a writ was issued in England by the plaintiff company in respect of the matters now in question on 10th February, 1933, and notice thereof was served in New South Wales in May, 1933. But on the defendant company's application this service was set aside by the Court here on the ground that the defendant company had shown that the proposed English forum was not convenient for the trial of the matters in issue. The present action was then brought. It was suggested upon the argument of this appeal that certain greater activity said to have been shown by the defendant company, viz. in 1933 was due to the stimulus of the writ in the English action or to the visit of Mr. Davis to Sydney in 1932. There was in fact a renewal of newspaper advertising in the period from April, 1933, to March, 1934, and the sum of about £1,480 was then spent by the defendant company upon this form of advertising. Newspaper advertising had been virtually suspended from March, 1930, and entirely from July, 1930, until this renewal in 1933. In the earlier campaign of newspaper advertising which began in November, 1929, and ceased altogether in July, 1930, some £2,180 had been spent. This sum included the £2,000 provided by the plaintiff company in accordance with clause 4 (*j*) of the agreement. Other methods of advertising by window displays and by means of mirrors, and other articles bearing the name of Watson's were employed throughout the whole period now in question and the sums so expended amounted to about £2,150. A special traveller was employed to travel in the interests of Watson's whiskies from October, 1929, to March, 1930, when his employment for this purpose was discontinued. A very considerable amount of Watson's whiskies was used in making gifts and

in providing entertainment and refreshment for the defendant company's customers and others. Though this procedure was no doubt part of the ordinary policy of the defendant company, intended to forward its business generally in beer and everything else, yet possibly it may also have served to make Watson's whiskies more widely known.

The action was heard by Halse Rogers J. as a commercial cause and appears to have been tried with exemplary care and patience during the 45 days occupied by the hearing. The first matter argued and disposed of as a preliminary question was the construction of the contract between the parties. The contentions of the parties upon clause 4 (*c*) of the contract may be stated broadly to be as follows: The plaintiff company's contention was that the defendant company undertook to push the sale of Watson's whiskies and to devote the principal part of its energies to this end, that is to say, the powers possessed by the defendant company were to be actively exercised to this end. The contention of the defendant company was that so long as the defendant company did more for Watson's whiskies than it did for all other brands combined the contract was performed. It was added to this contention that it might be a term proper to be implied in the contract that the defendants would carry on its business in Scotch whisky as before with such modifications as might be reasonable in the circumstances. On this point the learned Judge in the main adopted the contention of the plaintiff company. He held that the defendant company undertook "to feature" this whisky, adopting an expression used by Counsel for the plaintiff company, that is to say, to make it prominent in its whisky business and so to push it. He also held that this whisky had to be put in the forefront of the Scotch whisky business. The learned Judge refused to admit evidence of what other agents for other brands did and limited the enquiry to the opportunities and achievements of the defendant company itself. The parties were also at issue as to the meaning of the phrase in clause 4 (*d*) of the contract "nor take any interest in any other brand or brands." It was said for the defendant company that this merely prohibited anything of a nature *ejusdem generis* with an agency, that is to say, an interest of a financial nature. It was said for the plaintiff company that the words were general and forbade any interest in or concern with other brands beyond selling them if unsolicited orders for such brands were given to the defendant company. Upon this topic the learned Judge thought that the words were intended to cover any sort of pushing which might tend to prevent the defendant company from devoting the principal part of its energies to pushing Watson's whisky and reserved for later consideration all questions as to whether specific acts which might be proved constituted a breach of this term of the contract so interpreted. Other matters of construction were also debated and decided, but in the main these have now ceased to be material. The legal position as to the

stoppering of the bottles and the responsibility for the defective liners was not considered at this stage of the hearing. After this preliminary judgment the allegations of breaches of agreement were dealt with: a large body of evidence was heard and a very large number of books and documents were put in and dealt with in argument. In addition to the issues now in question, other issues, some of them of first importance, such as an allegation of improper blending of Watson's whiskies with other whiskies, were dealt with and decided. In the main, the allegation of improper blending failed and is no longer an issue in the case. On the issues arising out of the obligations imposed by clause 4 (*c*) of the contract the learned Judge in a considered judgment dealt with various branches of the defendant company's organisation such as methods of sale, advertisements, travellers, tied houses and managed houses and other matters, and the gist of his final conclusion was that there had been a failure by the defendant company to make Watson's whiskies, either No. 10 or the Special, a real feature of its business and that it did not put them in the forefront of its business and that it adopted a policy of *laissez-faire* instead of pushing the whiskies. As regards the stoppering of the bottles it was contended for the plaintiff company that the defendant company by undertaking to bottle No. 10 whisky warranted the materials used for the bottling. The defendant company contended that it was at most liable for negligence and that no negligence was proved. The learned Judge thought it unnecessary for him to decide the legal question inasmuch as on the facts he found that negligence was proved because no test was made of the liners supplied and because the damaged whisky was not analysed. Certain conduct alleged to constitute breaches of the term as to taking an interest was held not to constitute such breaches. Certain minor breaches of other terms of the contract were held to be established.

There was then a further hearing on the question of the amount of the damages and further oral and documentary evidence was adduced. In the result the learned Judge held that the deficiency of effort below the required standard and the negligence in regard to the liners had resulted in a loss of sales and therefore of purchases. He thought that the estimates of the plaintiff company's witnesses as to the extent of the loss were very extravagant and that there was great uncertainty as to the true figure but that his best guide was the figure taken by the parties in their abortive negotiations for a compromise. He therefore took as the quantity that could have been sold and would have been purchased an average of 12,500 gallons per annum during the $4\frac{1}{2}$ years. He subtracted the amount actually bought and awarded 5s. per gallon, which it is agreed was the correct figure, in respect of the difference. He treated the bad stoppering as responsible for the loss during one year when taken in conjunction with a contemporaneous failure adequately to push Watson's Special, and he treated deficiency of effort in respect of both brands of Watson's

whisky as responsible for the loss during the remaining 3½ years. The resulting figures for damages was £7,444 in sterling or £9,305 in Australian currency. He gave the plaintiff company the general costs of the action and under powers given to him by an earlier consent order made an order as to the taxation of the costs of issues upon which one or other party had succeeded.

From this judgment, as has already been stated, both parties appealed and, as has also been stated, the Full Court was unanimous in dismissing the appeal of the plaintiff company for an increase in the damages. With regard to the cross-appeal of the defendant company Davidson J. gave a reasoned judgment in favour of allowing this appeal with costs save as to certain very minor breaches of contract in respect of which he held that the damages were nominal only. Maxwell J. concurred in the order proposed by Davidson J. Stephen J. dissented and was for upholding the judgment for the amount awarded by the trial Judge. It should be stated that further documents were put in at the hearing of the appeal, but though these may have further elucidated the issues they did not, as it appears to their Lordships, materially alter the position in any respect. The minor breaches may be dismissed from consideration because it was not contended for the plaintiff company that, if the majority judgment stood and these were the only breaches, the damages were worth discussion or consideration. On the matter of stoppering it was held that there was no negligence and on this issue Stephen J. agreed with the other members of the Full Court. The difference of judicial view arose upon the main issue, the breach of clause 4 (*c*) of the contract which the trial Judge had held to be established. Davidson J. appears to have adopted to the full the construction of the clause contended for by the defendant company and thought that if the defendant company conducted its business as it had done before or conducted it in the manner it thought best in the *bona fide* exercise of its discretion, giving to the plaintiff company more of its energies than it gave to others, then there was no breach of contract. As regards the detailed matters of complaint, other than the minor matters already referred to, Davidson J. found that neither in respect of its travellers nor its tied houses nor its managed houses nor otherwise had the defendant company been in default. The order as to costs of trial was somewhat varied and the defendant company was to receive the costs of both appeals to the Full Court. Stephen J. agreed with the trial Judge upon the construction of the contract and in his findings of a breach of contract. He thought that there had been a default in the obligation to push Watson's whiskies during a substantial part of the contract period and he thought that the figure of 12,500 gallons per annum was too low an estimate of the proper quantity to be bought and sold over the average of the years in question. Accordingly he thought, in spite of his view upon the stoppering issue, that the award of the trial Judge as to damages did not call for any variation.

This appeal was very fully and very ably argued by Counsel on both sides and their Lordships are much indebted to them for the assistance thus afforded in the consideration of the very voluminous documentary and oral evidence bearing upon the facts of the case as well in the consideration of the matters of construction which lie at the root of the matter. Their Lordships find it unnecessary in these circumstances to discuss at any great length the various topics which have been so fully debated at the Bar and will content themselves with stating as compendiously as may be the conclusions at which they have arrived.

As to the construction of the contract: Their Lordships are of opinion that the contention of the plaintiff company is correct upon the main point, that is to say, the extent of the obligation imposed upon the defendant company by clause 4 of the contract. In their view, the obligation was to push, that is to say, vigorously to promote sales of Watson's whiskies, or in other words, to do the best that the defendant company could do to sell as much as could be sold. The only limit to the obligation was quantitative and not qualitative. Instead of an obligation to use all its energies in pushing the sale of Watson's whiskies the defendant company was to devote the principal part of its energies to that end, reserving out of them enough to do that which it was allowed to do under sub-clause (*d*) of clause 4. The various sub-clauses of clause 4 are closely related and must be read together. So read it becomes, in the opinion of their Lordships, plain that the defendant company was obliged to use its organisation with its staff, its tied and its managed houses, for the purpose of actively encouraging and so far as possible effecting sales of Watson's whiskies in bottle and in bulk. This obligation, however, was not to prevent it from selling existing stocks of whisky or from selling proprietary brands of whisky in bottles to satisfy orders given for such brands. It followed that purchases of such brands of whisky might be made by the defendant company to satisfy the demand represented by such orders. All bulk whisky (other than existing stocks) had to be purchased from the plaintiff company. Further as to the proprietary brands the defendant company might not accept any agency for or take any interest in any other brand or brands. The words "any interest" are very wide and their precise meaning has been much debated. Their Lordships are not disposed to limit their scope; but it is unnecessary and undesirable to attempt to enumerate all the cases they would cover seeing that, for reasons which will appear later, their Lordships are of opinion that on the facts of this case there was no breach of this particular provision of the contract. The contentions raised before this Board by the defendant company in opposition to the plaintiff company's contention were: (1) That there was no provision in the contract for the actual exertion of effort but merely a provision as to the proportion of any efforts in fact exerted which the defendant company was bound to devote to Watson's whiskies. It was said that the contract

was silent as to the totality of the effort to be put out; and that if the proportions were right that was enough. It follows from what has already been said that their Lordships cannot accept this contention. It seems, amongst other things, to give entirely insufficient weight to the word "push"—a word not of art but of well known significance. It would also logically justify complete inaction so long as other whiskies were not preferred. (2) As an alternative to this main contention it was submitted by Mr. Monahan in a forcible argument, as it was submitted in the Courts below, that in sub-clause (*c*) there was to be implied a term that the defendant company should carry on its business in Scotch whisky as before with such modifications as might be reasonable in the circumstances. Their Lordships are unable to hold that any such implication is consistent with the express terms of the contract or is necessary or proper in itself. Previous business between the parties had been done on the basis of fixed or minimum quantities to be purchased annually and when for such an obligation there was substituted clause 4 (*c*) a new situation arose. With fixed or minimum purchases the defendant company could do what it liked with its purchases. To do what it liked in the new situation might be to ignore the plaintiff company and Watson's whiskies altogether. In this connection the purchase by the plaintiff company of the Macleay Duff stocks cannot be disregarded. It was no doubt in the interest of both parties that those stocks should be off the New South Wales market; but they were taken off the market at the expense of the plaintiff company. A bargain for real and active effort to sell Watson's whiskies was the least that might be expected or implied in return and that is what in their Lordships' view was expressly provided for. It is of course true that the efforts required would have to be conditioned by the potentialities of the defendant company's business and by the circumstances which might arise to affect it. The obligation was to do what the defendant company itself could reasonably do in such circumstances. For this reason their Lordships are not prepared to assent to a contention urged on behalf of the plaintiff company that the trial Judge was wrong in rejecting the evidence of agents for other whiskies. The learned Judge was in their view justified in rejecting evidence of that character which was tendered to him.

The next question to be determined is: What if any breaches of the contract were committed by the defendant company? Their Lordships have followed and considered the elaborate and helpful analysis of the evidence by Counsel and have considered it in all its details; but their conclusion can be stated broadly. It is that the defendant company was fundamentally in breach of its contract in that during a considerable part of the material period it performed the contract as it contended in the litigation it was entitled to perform it, that is to say, with activity or comparative passivity as it suited the defendant company for its own business purposes it should be performed. Their

Lordships are much impressed with the variableness of the efforts made by the defendant company as between one time and another and as between some parts of its organisation and other parts. At first there were active efforts to sell Watson's No. 10 and not inconsiderable efforts to sell the Special. But these were not steadily maintained though there were partial revivals of interest from time to time. It should not be taken that no efforts to sell the whiskies were afterwards made. The facts contradict any such idea. But such efforts were partial and spasmodic. Some travellers were active in the matter. Others were not. Some managed houses sold large quantities of Watson's whisky and thus showed that it could be done. In others there was a conspicuous failure in this respect and the failure was in their Lordships' view mainly due to the absence of effort to sell. The higher management of the defendant company failed for reasons which have already been indicated, to appreciate that they were bound under the contract to see that all travellers and all licensees were active in the matter. In one important district of New South Wales, the Newcastle district, it is clear that the district manager, a Mr. Hall, who gave evidence, neither realised that sales of Watson's whiskies were to be pushed nor in fact pushed them. He was plainly mistaken in thinking he had not been told that the whiskies were available and should be sold, but it is equally plain that he forgot or ignored the matter and that at any rate for a considerable period he was not corrected from the head office and did not alter his methods of business in this regard.

The question of the tied houses must be specially considered. The effect of the ordinary form of covenant employed to tie licensees to the defendant company was (*a*) to give the defendant company exclusive advertising rights in the tied licensed houses including the right to remove any advertisements therein and (*b*) to oblige the licensee to deal solely with the defendant company for spirits amongst other liquors. It is certain that in respect of both (*a*) and (*b*) the full legal rights of the defendant company were not exercised; but it is said that all that could reasonably be done was done and that licensees ought not to be coerced and could not successfully be coerced into buying particular liquors. Their Lordships agree with the last proposition; but they think that considerably more could have been done by the defendant company without any injudicious or improper oppression. With regard to tied houses there is not as ample material as exists in the case of managed houses for a comparison of business done in one tied house with that done in another. But some comparison is possible on the oral evidence and on the documents and it is again noticeable that there is an inequality and irregularity of results in connection with sales of Watson's whiskies. This irregularity and inequality, in their Lordships' view, making all allowance for differing circumstances is only explicable by difference in the amount of effort expended in impressing on the licensees the desirability of selling these whiskies.

The very limited extent to which Watson's Special was introduced into managed houses or into tied houses as what is called a house whisky is a fact of significance and their Lordships are impelled to the conclusion that it was attributable to default on the part of the defendant company. But in their Lordships' view an even more important matter is the undoubted fact that advertisements of other brands of Scotch whiskies were allowed, and allowed on a large and attractive scale, to remain in tied and indeed in managed houses. Licensees could properly be permitted to stock and exhibit such whiskies and announce through their lists they had them to sell; but for the defendant company to allow the continued exhibition of advertisements amounting to propaganda for the merits and claims of other and competing proprietary brands was of necessity detrimental to the sale of Watson's whiskies, and it was not only within the defendant company's power to prevent such exhibition but it was their duty to do so in the interests of Watson's whiskies. For these reasons and in these respects their Lordships find that a breach of the contract to push the sale of those whiskies is established.

With regard to the allegations that the defendant company broke the term of the contract prohibiting the taking of any interest in any other brands their Lordships agree with the Courts below. The most important allegations were that orders for other brands of proprietary whisky were solicited by the defendant company's travellers. It was also said that when the increases of duty were anticipated the defendant company laid in by way of speculation stocks of proprietary brands. As to the first matter: for travellers to ask licensees what may be their requirements for various brands is not in any real sense solicitation of or pressing for orders. Advance purchases made in anticipation of an expected and accruing demand is not in any real sense a speculative purchase. Both Courts below have found there was no solicitation for orders and that the purchase of stocks were made in the ordinary course of business. So far as matters of law are involved in these conclusions their Lordships agree with the conclusions of the Courts below: in so far as they are findings of fact they are concurrent findings, which their Lordships have no reason to suppose require correction and with which they will not interfere.

In considering the whole of this question of whether there was a breach of agreement in the circumstances their Lordships are not disposed to overlook or minimise the result and influence of the depression which set in at the end of 1929. On the contrary they regard it as of great importance and think that it very much reduced the chances of the success of Watson's whiskies and that whatever efforts had been made, sales of this, a newly introduced whisky, would have been much affected. But they are satisfied that

with due effort as required by the contract substantially more would have been sold than was sold. This matter will be referred to again when the question of the quantum of damage is considered.

The question of the defective stoppering of bottles by reason of the defective liners is also of first importance because it is plain to their Lordships that this incident also had a substantial and serious effect on the campaign for selling Watson's whiskies, all the more as its results coincided in time with the onset of the depression. It is therefore of great importance to see whether the defendant company is responsible in law and on the facts for the results of this bad stoppering. As to the law; it was contended for the plaintiff company that the defendant company impliedly warranted that the bottling would be good and the stoppers free from such a defect as was found in them; in other words that there was an absolute obligation upon the defendant company in the matter. Their Lordships cannot accept this contention; but in their view there was at least an obligation upon the defendant company to use reasonable care in the matter of the bottling and with regard to the materials employed in the operation. Such an obligation arose out of the relationship of the parties who were both of them concerned with the reputation and success of these brands of whisky; and out of the fact that the defendant company undertook to procure the stoppers in Australia at the expense of the plaintiff company; and above all out of the fact that the defendant company had undertaken to sell as much of the brands as it could, and to bottle negligently would be a method ill adapted to forward this undertaking. On the facts the questions in issue are more difficult of solution; but on the whole their Lordships have arrived at a clear opinion that the trial Judge was right upon this point and the Full Court was wrong in its contrary conclusion. The defendant company knew that lead must not be used for the liners. It would be contrary to the Pure Food Act in force in New South Wales and to the regulations made thereunder. The stopper was a new device so far as its manufacture in New South Wales was concerned. It was therefore in their Lordships' opinion required by common prudence that with a device new in the above mentioned sense; with an untried, though generally reputable, supplier, who might have to depend upon unknown sub-contractors for his materials such as foil, some test of the result of his work should have been made. Apart from any question of analysis, which if necessary could have been made and ought to have been made, the simple test of filling some bottles and laying them down or otherwise bringing the whisky into contact with the stoppers and liners would have put to the proof the efficacy of the stoppers for their purpose and would have made manifest the defect arising from the use of an improper material. No test whatever was made and in their Lordships' opinion this failure to test was negligence and constituted a breach of duty and of an

implied contract to use reasonable care for which the defendant company is answerable in damages. As has already been stated the defective liners did in their Lordships' opinion cause a setback to the No. 10 whisky and brought about a diminution in sales.

It remains to consider the quantum of damages. The plaintiff company has contended before this Board, as before the trial Judge and in its own appeal to the Full Court, for a sum largely in excess of that awarded by the trial Judge. Such a contention cannot in their Lordships' opinion be supported. Amongst other reasons this contention gives far too little weight to the effects of the depression of trade prevailing and also too little weight to the fact that Watson's whiskies were unfamiliar. McCallum's Perfection Whisky, also said to be a new whisky had it is true considerable success; but this whisky seems on the evidence to have had powers of attraction that may have been partially due to its name. Taking all the circumstances into account, including the set-back through the defective liners for which the defendant company is responsible, the learned Judge seems to have arrived at a figure representing with substantial accuracy the probabilities of the case. It was said for the defendant company that everything was uncertain and that in such uncertainty no substantial damages were proved. It was also said that the learned Judge improperly gave too much weight to the proposed but abortive compromise agreement. Strictly and logically the learned Judge's method may be open to the last mentioned criticism, but it was certainly permissible to treat what the parties were saying and estimating as of some significance. Their Lordships have considered the estimation of the learned Judge in the light of all the other relevant considerations, which have been called to their attention. Amongst other considerations the sales of Macleay Duff and Robertson Low whiskies, mostly in the days before the depression of 1929, are certainly of weight, though adjustments and allowances fall to be made in view of the changed circumstances of the period now in question. But at the end of such consideration their Lordships are led to the conclusion that the learned Judge assessed the probabilities, which is the most that can be done in such a case as this, with as close an approximation to accuracy of result as was reasonably possible. Certainly their Lordships are not disposed to substitute any figure of their own and think it neither necessary nor useful to take a course, that was at one time suggested, namely, to send the case back for further consideration on the figures. The mark was fairly hit by the trial Judge and no revision of his figures is required. There were some points in which his calculations might possibly be corrected in minor details but the parties agreed they were not worth consideration.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed; that the order of the Full Court should be set aside save in so far as it

dismissed with costs the appeal of the plaintiff company from the judgment of the trial Judge; that the judgment of Halse Rogers J. should be restored both as to damages and costs; and that the appellants here (the plaintiff company) should have their costs of the defendant company's cross-appeal to the Full Court, which in the view expressed in this present judgment should have been dismissed with costs. As regards the costs of the appeal to His Majesty in Council, their Lordships have in mind the fact that the appellants sought by that appeal to obtain a large increase in the amount of damages awarded to them by the trial judge. In this respect their appeal has failed. Their Lordships are of opinion that in view of this fact the order should be that the respondents pay three-quarters of the appellants' costs of this appeal. There should be a set-off of costs and any costs overpaid by one party to the other should be repaid by that party.

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In the Privy Council

B. DAVIS, LIMITED

v.

TOOTH & COMPANY, LIMITED

DELIVERED BY LORD ROCHE

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