~~P.C.~~
~~GE 1 G 6~~

Judgment
57, 1964

IN THE PRIVY COUNCIL No. 39 of 1964

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

J.M. CONSTRUCTION COMPANY LIMITED, and
JONES TIMBER COMPANY LIMITED Appellants

AND

HUTT TIMBER AND HARDWARE COMPANY LIMITED Respondent

CASE FOR THE APPELLANTS

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1. This is an appeal from part of a judgment of the Court of Appeal of New Zealand dated the 12th December, 1963, whereby it reversed in part a judgment of the Supreme Court of New Zealand given on the 28th September, 1962 and Supplementary Judgment given on the 30th November, 1962. 154 / 134

2. In the proceedings in both Courts below the present two Appellants were joined with another party, R.O.Slacke Ltd., but the latter Company did not join in the application for final leave to appeal. 1 8

3. The case has been conducted on the basis that the claims of all three parties were identical (except as to quantum) and all the evidence (except for individual details) is therefore relevant in each case. The three parties each had separate money claims and the present appeal is from that part of the Court of Appeal's judgment which disallows the J.M.Construction Company Limited's claim of £3,203 and the Jones Timber Company Limited's claim of £9867. 147 8-14

4. The Appellants were duly incorporated as private companies in 1949. As summarised in the opening words of the judgment of Leicester J. the business of the first Appellant was that of builder and the business of the second Appellant was that of builders' merchant. The business of the Respondent was that of builders' supplier. 105 3-5 / 105 5-6

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5. The Respondent was incorporated as a private company in 1943 with a capital of £29,000. The origin of the Respondent Company was as follows: The Hutt Valley is a large industrial and residential area immediately north of Wellington, the Capital City. When the second World War commenced there were a large number of builders operating in this valley. Building operations were requisitioned for the war effort. To keep their identity, and at the same time use their combined efforts for defence work, builders in the Hutt Valley formed a company known as the Hutt Valley Master Builders Construction Co. Ltd., which operated on a co-operative basis and nominally undertook the war contracts. The various builders passed over their employees to that Company and any profit of that Company was distributed to the builders proportionately to the man-hours contributed, so that the profits went back to the builder shareholders.

105 6-7
52 10-20
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6. In 1943 war work was tapering off, and the present Respondent company was formed by the same persons as had been members of the previous company as a successor to such previous company. The objective was to enable the builders to profit in their own businesses by a continued application of the co-operative principle. The profits were to be rebated each year to shareholder customers proportionate to their purchases. For convenience the Respondent Company is sometimes hereinafter referred to as "the Hutt Company".

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7. It was common ground in the action that:

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(a) The Hutt Company distributed or rebated all income or surplus to shareholder customers each year.

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(b) Such distribution was proportionate to the purchases of shareholder customers from the Company.

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(c) Owing to the fact that the Hutt Company distributed or claimed to have distributed all surpluses to its members on this mutual basis, it paid no income tax thereon.

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73 23-25
95 11-13

(d) The shareholder customers were rendered liable to income tax in respect thereof and did in fact pay income tax thereon.

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8. Co-operative associations are common in New Zealand. The income tax legislation contains special provisions applying to certain types of co-operative associations, which are basic to the economy of the country, such as dairy companies and milk marketing companies: but the general provision relating to co-

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operative associations is as follows:

"Land and Income Tax Act 1954, Section 145: 95 11-13

Profits of mutual associations in respect of transactions with members - (1) Where an association enters into transactions with its members, or with its members and others, any profit or surplus arising from those transactions which would be included in the profits or gains of the association if the transactions were not of a mutual character shall be deemed to be profits or gains arising from those transactions and to be assessable income of the association, except that, in calculating the assessable income of the association, the Commissioner shall allow as expenses any sums which 109 16-23 168 2-3

(a) Represent a discount, rebate, dividend, or bonus granted or paid by the association to members or other persons in respect of amounts paid or payable by or to them on account of their transactions with the association being transactions which are taken into account in calculating the assessable income; and

(b) Are calculated by reference to the said amounts or to the magnitude of the said transactions and not by reference to any share or interest in the capital of the association.

(2) Nothing in this section shall affect the extent of the exemption from income tax of any co-operative company to which the provisions of paragraph (f) of subsection one of section eighty-six of this Act are applicable.

(3) Where any discount, rebate, dividend, or bonus is granted or paid to any person by an association, it shall form part of the assessable income of that person if the transaction from which it arises is of such a nature that any payment in respect thereof by that person to the association would be allowed as a deduction in computing the assessable income of that person.

(4) For the purposes of this section, a discount, rebate, dividend, or bonus shall be deemed to have been granted to or paid to a person when it has been credited in account or otherwise dealt with in his interest or on his behalf.

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(5) In this section the term "association" includes any body or association of persons, whether incorporated or not".

9. The present Appellants were not original members of the Hutt Company, but they derived shares from an original member, W.E.Jones Ltd., when they took over respectively certain parts of the business of W.E.Jones Ltd. Both Appellants acquired their shares in the year 1949, and since that date have received, or been credited with, rebates on their purchases from the Hutt Company and paid income tax in respect thereof, in each year down to the issue of the Writ. 37 10-19 213-214

10. The present dispute first came to a definite controversy in 1957, although prior to that there had been dissatisfaction on the part of the Appellants and an undetermined number of other shareholders. The cause of the dissatisfaction was that, instead of paying the shareholder customers their rebates in money, the Hutt Company was issuing them with shares in itself to the nominal amount of the rebates. When confronted with this the Hutt Company gave its explanation in the correspondence referred to in the next succeeding paragraphs hereof. 71 9-11

11. On 24th September, 1957, the Solicitors for the Appellants wrote to the Firm of Solicitors who normally acted for the Hutt Company stating that they had been consulted with regard to assessments of income tax on rebates received from the Hutt Company. They pointed out that, although the Hutt Company was purporting to distribute all profits to shareholder customers on a co-operative basis, such profits were not being paid out in money, but were being applied to more shares, and that it seemed that the Hutt Company was either operating illegally or else there was some other factor of which the writers did not know. Their clients were being assessed for tax as though the shares issued were equivalent to cash in the nominal amount thereof. 156 157

12. The Hutt Company's Solicitors replied on the 4th October, 1957 that the Hutt Company was relying on an agreement dated the 28th November, 1947 (hereinafter referred to as "the 1947 Agreement"). 159 160 206-209

13. On being asked for a full copy of the Agreement the Hutt Company's Solicitors supplied a copy on 9th October, 1957 and stated: "As far as we know, and we have made enquiries on the point, there are no modifications or additions and this document is still relied on by the company". 162

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14. On 10th December, 1957, the Appellants' Solicitors wrote to the Hutt Timber Company pointing out that "a company cannot issue shares in payment of its debts without the most express and explicit authority and acceptance thereof by the creditor, and there has been no such authority given by either the Jones Timber Co. Ltd., or the J.M.Construction Co. Ltd." They asked that the purported issue of the shares with which they were dealing - i.e. those in the assessments which had been received from the Income Tax Department - should be reversed. Failing this they stated that they would have to contest the assessments direct with the Income Tax Department on the basis that the purported issue of shares which had taken place was illegal. 163 164

15. On the 26th February, 1958, the Hutt Company's Solicitors replied to the foregoing letter agreeing that a company cannot issue shares in payment of debts without authority, but claiming that the 1947 Agreement gave such authority and that in any case the Appellants were estopped from reopening the matter. They claimed that the procedure conformed to the provisions of Section 145 of the Land and Income Tax Act relating to co-operative concerns. 167 168

16. On 12th March, 1958, the Appellants' Solicitors replied that in view of the stand taken by the Hutt Timber Company, and as the Appellants' right of objection to the Income tax assessments was on the point of expiry, they were about to take the matter up by direct objection to the Income Tax Department. An acknowledgment of this letter was received from the Hutt Company. 169

17. It is here particularly to be noted that the argument in the foregoing correspondence was centred on shares which had been issued in the past, and assessments then in hand for the rebates on which they were based. The Hutt Company Solicitors argued that Appellants were estopped from reopening the past transactions. This might or might not have some force with regard to such past transactions but (in Appellants' submission and as later held by the Court) could not apply to future ones. 169 24-28 167 17-20

18. In order that there should be no misunderstanding with regard to such future transactions, the Appellants on 2nd July, 1958, gave notice to the effect that they would not accept any further shares in satisfaction of rebates. They sent copies of this letter to the Respondent itself, to the Respondent's Solicitors and to the Registrar of Companies. Receipt of this letter and the effect thereof is noted in the Hutt Company's Minute Book. It made no reply. The only acknowledgment came from the Deputy Registrar of Companies. The silence on the part of the Hutt Company and its advisers continued 171 229 5-8 175

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till November, 1961, when the Appellants gave notice preliminary to the present action because they had learned that the warning that they would not accept shares had been disregarded and that further shares had been issued without notice to them. 177 178

19. After the Appellants' notification to the Hutt Timber Company on 2nd July, 1958, that no further rebates were to be applied to shares, trading relations between the Appellants and the Hutt Timber Company continued as before as far as rebates were concerned. The amounts rebated are set out in the Respondent's own Exhibit - No.19 - and they correspond with the amounts claimed by the Appellants to be owing to them by the Hutt Company - £3203 to the first Appellant and £9867 to the second Appellant. 77 47; 78 1-3; 71 29-31; 96 2-8; 228; 40 41-43; 59 12-16

20. In Appellants' submission the 1947 Agreement may be summarised as follows: The recitals confirm that the Hutt Company was trading on a co-operative basis. The rest of the Agreement amounts to a temporary arrangement whereby the shareholder customers who signed it agreed for a limited term to apply some of the income rebated to them to taking up more shares in the Hutt Company. 206 14-17

This arrangement was to last "until the capital of the company has reached Sixty thousand pounds (£60,000) or such larger amount as the Directors may consider necessary on a consideration of the Company's financial position when that figure has been reached." 207 25-29

The evidence showed that, as originally drawn, the terminal figure was £70,000 simpliciter, but that before signing this was reduced to £60,000 and the additional words were added. 89 44-46; 90 1-2

21. The total number of shares held by the signatories at the time of the Agreement was 32,900, so that the increase definitely authorised by the Agreement was £27,100. The Interrogatories and the Evidence show that the Hutt Company claimed that the words inserted after the figure £60,000 authorised it to retain rebates totalling £359,295 and beyond. 209; 22 16-21; 61 31-32

Pleadings

22. The dispute as summarised in the pleadings is as follows:

(1) The Appellants claimed that they had made purchases from the Hutt Company on the terms that such Company would annually rebate and pay shareholders pro rata according to the value of their respective purchases 2 14-18

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an amount equal to its excess of income over expenditure. They set out the amounts to which they were so entitled by way of rebate and alleged that payment thereof had not been made and asked for judgment for the amounts claimed.

(2) The Hutt Company's Statement of Defence may, in the Appellants' submission, be analysed as follows: 4-9

It admitted that the purchases of builders' supplies by the Appellants were made on terms that the Hutt Company would annually make rebates to shareholders who were purchasers from it of builders' supplies during the year. The Statement of Defence does not specifically state that the rebates were to be calculated on the basis set out in the Statement of Claim. But it is submitted that when the Statement of Defence is taken in conjunction with the Answers to the Interrogatories and the Evidence, it is clear that it was in effect admitted that the rebates were to be calculated on the basis set out in the Statement of Claim, and that this was common ground in the action. 26 15-20 73 23-25

(3) The basis on which the Hutt Company resisted payment in every defence or alternative defence set up was that its course of action was justified by the 1947 Agreement aforementioned. This is specifically stated in paragraphs 4, 5, 9, 10, 12, 14, 16, 17, 19, 20 and 24 of the Statement of Defence. 4-8

(4) In paragraphs 22, 24 and 27 of the Statement of Defence the Hutt Company raised the defences of waiver and estoppel, which examination shows are also based on the assumed existence of the 1947 Agreement. 7-8

(5) It is submitted that the sole defence set up was the 1947 Agreement. This corresponds with what the Hutt Company's Solicitors in their first letter had told the Appellant's Solicitors was what the Hutt Company relied on. That letter also stated that they (the Solicitors) had enquired into the matter and that as far as they knew there were "no modifications or additions". The Hutt Company's Secretary in evidence confirmed that there was no basis of capitalising other than the 1947 Agreement. 75 22-26 96 2-3

23. In answer to Interrogatories the Hutt Company made the following further statements and admissions:

Interrogatory No. 14: That since 1947 all revenue of the Company in each year had been rebated to 26 15-20

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customers in proportion to their respective transactions.

Interrogatory No. 8: That rebates were proportionate to customers' transactions with the Company. 23 21-22

Interrogatory No.17: That with regard to the shares issued the Hutt Company did not claim that the shares or any of them were "'allotted as fully or partly paid up otherwise than in cash' within the meaning of Section 60 of the Companies Act, 1955" (N.Z.) 26 32-38

Interrogatory No. 4: That the capital of the Hutt Company reached £60,000 (the figure mentioned in the 1947 Agreement) in March, 1950. 22 23-24

Interrogatories Nos. 5 and 6: That the Directors then gave consideration to fixing a larger amount, but they fixed none. 22 25-30
23 1-4

Interrogatory No. 3: That the total increase in the Hutt Company's capital allotted in purported pursuance of the 1947 Agreement was £359,295. 22 21

24. At the hearing in the Supreme Court, (in July 1962) the evidence in the main concerned the history of the Hutt Company, its trading relations on a co-operative basis with its shareholder customers and the 1947 Agreement.

25. The evidence given on behalf of the Appellants (or elicited in cross examination) was broadly to the effect:

(1) That the Hutt Company traded on the basis of rebating its profit or surplus to shareholder customers. 53 1-6
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(2) That the 1947 Agreement had long been defunct. 39 23-33

(3) That it was on the point of becoming defunct at the time Appellants acquired their shares in 1949, so they did not sign it. 38 4-6

(4) That other new shareholders after that date had not signed it. 46 30-35
99 30-31

(5) That the receipt of shares in previous years was not because of the 1947 Agreement, but because shareholder customers were persuaded to take them up from year to year: 49 13-15

(a) In earlier years by their desire to help the co-operative Company in what they believed to be a genuine shortage of money. 84 23-25

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(b) From year to year by continued promises each year that the then current year would be the last in which they would be asked to take up shares. — 50 41-43; 54 2-6

(c) Because they were told each year that there would be trouble with the Bank if the money were paid out — 46 9-13; 82 1-2

(d) By the sometimes strong-handed methods of the Chairman of Directors in stifling opposition. — 61 8-11

(6) That the demands of the Bank were in time found to be a disingenuous excuse. Instead of being paid off, the overdraft rose during the relevant period to over half a million pounds, and so did the value of the Hutt Company's assets purchased out of it. Its balance sheet at 30th November, 1961, showed nett funds of £605,379. The Hutt Company, while focussing the attention of shareholder customers on the Bank overdraft as excuse for non-payment, had been deliberately pursuing a policy of increasing that overdraft, and accumulating huge assets. — 46 9-13; 88 21-25; 88 35-39

(7) That the Hutt Company charged its members full retail price for goods and that unless the reduction by rebate returns was received, they were receiving nothing for their membership in the Hutt Company and were both buying and selling at retail prices. — 45 2-4

(8) That the policy of issuing shares without limit and at the same time distributing (in effect) nothing but tax liabilities had made the Hutt Company's shares unsaleable and practically valueless, and in fact a liability from the tax view-point, and the whole result had become a travesty of co-operative principles. — 51 15-16

(9) That some shareholders were getting substantial collateral benefits from the Company's outlays, such as those on land subdivision. — 87 23-24; 96 8-12

(10) That there was no agreement that rebates should be paid in other than cash. — 49 13-15

26. The evidence of the Hutt Company was (in Appellants' submission) broadly directed to supporting its reliance on the 1947 Agreement. Only one material witness, the Secretary, Mr. Bowen, gave evidence. That of the Auditor, Downes, was on formal matters. The Secretary (who had also answered Interrogatories on behalf of the Hutt Company) stated or admitted: — 73-102

(1) That the Hutt Timber Company paid no tax on surplus revenue. It was distributed in one form or another to shareholders and was taxable to them. — 73 23-25

		Record page	Record lines
(2)	That the 1947 Agreement was what the Defendant relied on. No other basis had been discussed with shareholders.	75 96	22-26 2-3
(3)	That the rebate was "cash in the first instance, but.....cash to be disposed of in a particular way under the Agreement".	97 86	9-20 16-18
(4)	That, "when they (the customers) earn a rebate it is their property but they went a step further and they authorised the Company to apply their funds in a certain way".	95 102	6-8 1-4
(5)	That he did not maintain that the Company's conduct was within the spirit of the 1947 Agreement, but within the letter.	80	43-47
(6)	That the 1947 Agreement was never discussed at any meeting after 1947 or 1948.	78 83	10-13 33-35
(7)	That the customers had the rebates lying to their credit in the Hutt Company's books for many months from the time the Hutt Company completed its financial year in November each year until the next year's annual meeting when the capital was increased, and that if the capital was not increased the credits would remain.	93 93	30-31 43-46
(8)	That the real reason for non-payment of rebates was Bank pressure.	83	27-38
(9)	That had it not been for the expansion cash would have been available for rebates.	74	34-38
(10)	That the Bank occasionally allowed exceptions to its requirements that rebates be not paid out.	84	9-12
(11)	That the Chairman of the Hutt Company continually held out hopes of cash "very soon".	88	29-33
(12)	That at the time of his giving evidence "the company has more or less revolted and a promise has been made to the shareholders that from 1962 onwards, the Company will pay its own income tax and they will be free of that burden".	98	40-43
(13)	That his answer to Interrogatory No. 17 to the effect that the Hutt Company did not claim that the shares were issued otherwise than for cash within the meaning of Section 60 of "The Companies Act, 1955", was made on legal advice.	94	18-19

27. Section 60 of "The Companies Act, 1955" (N.Z.) is the same in all material respects as Section 52 of "The Companies Act, 1948" of England, and the English cases apply.

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28. Also produced in evidence were extracts from the Hutt Company's Ledger Accounts showing that in each year the Appellants had been credited at November 30th with their full proportion of the Hutt Company's surplus by way of rebate in the amounts claimed by the Appellants respectively in their statement of claim - Exhibit "B". 213-214

29. A further Exhibit compiled by the Hutt Company gave a complete Schedule of shareholders' rebates for the years from 1955 to 1960 inclusive. This Exhibit again showed the rebates to the Appellants in the respective years as being the amounts claimed in the Statement of Claim. It also showed that the Hutt Company's whole income or surplus was passed on to the shareholders by way of rebate each year - Exhibit 19. Also produced were the then last Annual Accounts of the Hutt Company for the year ended 30th November, 1961. These included its Profit and Loss Account which contained the following item immediately before the Auditor's Report: 228

	1961	1960	
"Nett Profit for year rebated to shareholders	£85727	£101404"	236

The Annual Accounts thus showed the income of the Hutt Company itself as being nil - Exhibit "D".

30. It is submitted that at this stage it was established as common ground that the Hutt Company was a co-operative association, and that it distributed, or contracted to distribute, all surpluses to shareholder customers by way of rebates on purchases.

The basic principles applying to such co-operative organisations are explained by Scott L.J. in Ostime v. Pontypridd and Rhonda Joint Water Board, 1943/46, 28 Tax Cases 261

> "The ground of immunity there (i.e. the "exemption of co-operative societies from income "tax) was that no profits and gains resulted, "because the cash payments by members to the society "for goods received were not final; they were sub-"ject to reduction by bonus returns so that the to-"tal of the resulting net payments left the society "with no surplus over its expenses, and therefore "no income." At pp. 273/274.

This basic truth was confirmed by Lord Macmillan in dealing with another such association in Ayrshire Mutual Insurance Association Ltd. v. Commissioners of Inland Revenue 1944-46 27 Tax Cases 331

"The ground of these decisions was that such a

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"surplus was not profit within the meaning of the "Income Tax Acts, but merely represented the extent "to which the contributions of those participating in "the scheme had proved in experience to have been "more than was necessary to meet their liabilities. "The balance or surplus was the contributors' own "money and returnable to them. Nothing had been earn-"ed and nobody had made a profit." At p. 347.

He concludes his speech by emphasising again that "the law has consistently and emphatically declared (such surplus) not to be a profit." At p. 347.

31. It is submitted that the first principles explained in the foregoing speeches and applied in the Ayrshire case provide the touchstone to decide the correctness of the decisions of the Learned Judges who had to deal with the present matter, both in the Supreme Court and the Court of Appeal.

JUDGMENT OF LEICESTER J.

32. The judgment of Leicester J. gave the following statements and findings (not verbatim except where quoted):

(a) The Hutt Company had operated from its inception on a co-operative basis. — 107 35-37

(b) "It is not contended that the 1947 Agreement as such is binding on the plaintiffs (present Appellants) and the defendant (the Hutt Company) bases its submissions upon an agreement in identical terms evidenced by a course of conduct." — 123 29-31

(c) Finding that Agreement had expired:

"I have already held that the defendant was "mistaken in 1958 when it regarded as still "existing between the parties the 1947 Agreement "or the collateral one that included its terms". — 125 15-17

(d) He found that the trading relations and the liability of the Hutt Company to pay rebates to the Appellants continued after the 1958 notices; that the 1958 notices were "not so much repudiations of the 1947 or collateral agreement as they were refusals on the part of the plaintiffs to tolerate any longer the erroneous application of their funds based upon the assumed existence of such agreement". — 125 34-37; 125 41-44

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(e) The Hutt Company had kept alive the trading relations whereby it contracted to rebate to the Appellants their pro rata shares of the income. 125 18-21

33. Leicester J. then dealt with the defences of waiver and estoppel and held that these were groundless. 127 7-11

34. He rejected the alternative argument that the 1947 Agreement was to continue in force until revoked by agreement between the defendant and its shareholders generally. 127 12-19

Payment in Cash

35. On the question of payment in cash, Leicester J. said:

> "The defendant claims that the plaintiffs must "establish a term that the rebates were to be paid "wholly in cash or, in other words, the existence "of an agreement whereby they are entitled to all "cash.....The monetary claim in this action is not "based upon any contractual obligation by the "defendant to pay rebates wholly in cash but upon "the fact that, as part of its trading relations "with the plaintiffs, and after receipt of their "1958 notices, it elected to declare rebates based "upon the plaintiffs' purchases and then, despite "such notices, to apply the property of the "plaintiffs in payment of fully paid rebate shares "which the plaintiffs did not want." 127 25-40

The above statement was commented on in the Court of Appeal. It may not be as succinct as other parts of the Learned Judge's judgment, but it is submitted that what he said must be taken in its context - and the context is that he had already found a liability based on contract - i.e. trading relations - to the effect that the Hutt Company had contracted to pay Appellants an aliquot part of its surpluses. He had demolished the only defence put up - that the Appellants had agreed to spend that income on more shares. His statement referred to above was thus merely an addendum or post-script to a decision already made.

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36. In this addendum he dealt with the submission that the Appellants had not proved affirmatively that the payment was to be in cash. His reply indicates his view that no such express affirmative proof was necessary -

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the income was really already "the property of the Plaintiffs", and could not be applied to anything except payment to them without their consent. It is obvious that this is what he referred to because he had already said exactly this in other words, and referred to "the erroneous application of "their funds" based on the assumed existence of such agreements". He referred to the same point again in his supplementary judgment. 127 39 / 125 43-44 / 133 14-18

37. It is submitted that the judgment of Leicester J. was thus clearly in accord with the first principles explained in the English cases mentioned in paragraph 30 of this case.

38. With regard to the words "it elected to declare rebates", these words have been commented on as possibly meaning that the declaration created the debt. It is again submitted that they must be taken in their context. What the Learned Judge was obviously referring to is the fact that, although, as he had already pointed out, after being told that the Appellants would apply no further funds to shares, the Hutt Company could have refused to do any further business with them on the basis of profit sharing, it did not so refuse. It elected to continue on the same basis as before, and in declaring the rebates it put the stamp of unarguable confirmation on that election. It could not both approbate and reprobate. The term "election" is the precise term applicable to this type of estoppel. The declaration also crystallized the quantum of the rebate. 125 27-29 / 125 32-34

COURT OF APPEAL

39. The matter came on before the Court of Appeal on 11th November, 1963. The main judgment was delivered by North P., concurred in by McCarthy J. Turner J. delivered a separate judgment. 136

40. A feature of the judgments, particularly that of North P., is that he rejected the Hutt Timber Company's argument on point after point and decided that the shares were wrongfully allotted, and only at the end decided that the present Appellants were still not entitled to cash. It is submitted that, if he was wrong in this one final point, the judgment would be in favour of the present Appellants, so that the matter comes down to a very narrow issue indeed, that of "cash".

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JUDGMENT OF NORTH P.

41. North P. agreed at the outset that the genesis of the dispute could be traced to the lax way in which the Hutt Company's affairs had been conducted, and he went on to narrate the history. 136 22-23

42. At one point his narration is indefinite and as this has a significance in a later part of his judgment it should be mentioned here. In dealing with the 1947 Agreement he says:

"Messrs Robinson and Cunningham, on being "acquainted with the terms of this Agreement, quest- "ioned the right of the company to act in the way it "was doing, but the company was adamant and maintain- "ed it was entitled to continue the course it was 138 16-22 "following even although the authority conferred on "the directors was being used to capitalise profits "to the total of several hundred thousand pounds".

43. (a) It may be that the learned Judge's narrative is correct and that the company's state of mind (as shown by later events) was that it "was adamant and maintained" it was entitled to continue the course it was following. But the point he has not adverted to is the undisputed evidence that this attitude was not communicated to the Appellants (see paras. 17 and 18 of this case). The Hutt Company Secretary said he left it to Solicitors to reply to the notice of 2nd July, 1958 and the Solicitors did 81 18-22 not reply. The correspondence in Exhibit "A" shows that all the argument in the letters of 1957 and early in 1958 was about shares which had already been issued for rebates and to which the Appellants had been assessed for income tax, which assessments had to be objected to within a 169 24-28 limited time, or they became final. As events turned out, the Appellants did not join battle with the Hutt Company on this issue, no doubt because they had been faced with 167 17-20 the plea of estoppel.

(b) But they did take the precaution of giving notice on 2nd July, 1958 that they would accept no shares 171 for the future. This notice was received by the Hutt Company without objection. It appears in the Hutt Company's Minute Book which shows that its purport was 229 clearly understood. It was not actually replied to in 81 9-12 the case of the present Appellants, although a similar letter on behalf of another previous party, Slacke Ltd., 175 received a bare acknowledgement. No communication was

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received by Appellants from the Respondent from that date, 2nd July, 1958, until 8th November, 1961 when Respondent's Solicitors stated that they would accept service of proceedings. The learned trial judge had this prominently in front of him because it was (at the least) a glaring and unexplained omission. The record apparently did not make the same impact in the Court of Appeal, and the learned President's comment is indefinite and indicates a possible misapprehension. 125 34-37

10 44. North P. upheld Leicester J. as to the 1947 Agreement, stating that it was no longer in force at the relevant times.

"In my opinion, however, Leicester J. was "perfectly right when he held that whether the matter "be looked at by having regard to the 1947 written "agreement itself or to an oral agreement in similar "terms it was plain that this agreement was no "longer in force, when in July and December, 1958 "the respondents served notice on the company that 20 "they would no longer accept shares in satisfaction "of rebates due to them". 142 35-40

45. He then went on to say that so far from being entitled by agreement the directors were relying on their powers of persuasion on each occasion.

"It seems to me to be clear from a reading "of the evidence, that the company was no longer "acting on that agreement, but on the contrary, the "directors were relying on their powers of persuasion "as each annual meeting took place.....as each 30 "annual meeting took place the shareholders were "persuaded that the policy of capitalising the "profits earned by the company and the issue to them "of new shares in lieu of any other form of "distribution must continue until such time as the "company's bank overdraft was substantially reduced". 142 43-46 143 18-22

46. Finally he said the Hutt Company was acting unlawfully.

"Therefore, it is plain, in the view I take "of the case, that the company, in pursuing its 40 "policy of granting rebates and then satisfying the "amounts by the issue of new shares was acting with- "out legal authority after the notices were served "on the company". 143 8-12

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47. North P. then went on to deal with a second submission of the present Respondent, namely that there was no proof that it had agreed affirmatively to pay the rebates in cash. At this final point of his judgment he decided this one point against the Appellants and reversed the awards of the Supreme Court.

> "I fail to see any evidence from which an "agreement on the part of the company to pay rebates "in cash can be spelt. The attitude adopted by the "company was that it was entitled by virtue of "the 1947 agreement to require the three 145 10-17
> "respondents to accept shares. That assumption "was wrong, but far from agreeing to pay rebates to "the respondents in cash, throughout they denied any "such right. I can see no grounds whatever to "justify a finding that the company ever agreed to "pay to the respondents their share of the surplus "profits in cash".

48. It is respectfully submitted that the above passage contains its own rebuttal. As explained in paragraphs 43 (a), 17 and 18, the statement that "throughout they denied any such right", could only have referred to a mental denial which became evident in retrospect because no such denial was communicated to the Appellants. Furthermore there was obviously no denial of the right to rebates, because the Hutt Company declared them each year. The only thing left to deny could relate to the application of the rebates and would be a denial (if the word can apply to an uncommunicated view) that the 1947 Agreement was defunct - a view which the Learned President had already decided was wrong.

49. But the basic error of the Learned President in accepting the submission that it must be shown affirmatively that the rebates were payable in cash, is, it is respectfully submitted, that it violates the first principles explained in the English cases in paragraph 30. Once it is recognised that the income is really that of the co-operators and that the Hutt Company was merely an assembly point or trustee therefor, it becomes obvious that the question of whether the rebates were payable "in cash" is redundant or meaningless. North P. himself refers to "their share of the surplus profits". The income was, as Leicester J. had held, already their property, and the only way the Hutt Company could escape the debt (or the duty of paying it to them) was by showing, as it had attempted to do, that such income had 145 17
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been applied to shares with the owners' authority - a submission already rejected. The only other escape (which could be an escape in theory only) would be a contention at that stage and in an Appellate Court that the Hutt Company was not operating as a co-operative association at all and had not undertaken to distribute its surpluses by way of rebates. This would involve a reversal of the whole basis of the proceedings from beginning to end, including the following:

(1) The initial correspondence in 1957/8 had tacitly admitted that the Company had undertaken to distribute all income to shareholder customers. 167 9-20

(2) The pleadings were drawn up on the same basis - see para 22 of this case.

(3) When asked to clarify its defence in Interrogatory No. 17, the Hutt Company gave an answer (on legal advice) which in law amounts to an admission that there was on its part a "bona fide liability to pay money at once" to customers who had been issued with shares. It could not resile from this statement. 26 32-38

(4) The Hutt Company's sole material witness repeatedly stated that the rebates were payable in cash and that the company relied on the 1947 Agreement and nothing else to justify its action in applying them to shares - see para. 26 of this case.

(5) The Company's own Exhibits, Ledgers and Annual Accounts show that it did so claim to have distributed all its income - see paras. 28 and 29 hereof.

(6) Its accepted claims for immunity from income tax were based on its distribution of all surpluses to shareholder customers - see paras. 7 and 26 hereof.

(7) The income tax burden assumed by the Hutt Company's shareholder customers was based on that Company's claimed distribution of all surpluses to them - see para. 26 hereof.

50. It is also submitted that the decision of North P. on this point is inconsistent with his previous finding that the directors were relying on their powers of persuasion each year to induce the Hutt Company's shareholder customers to accept shares in satisfaction of the rebates. If the rebates were not the property of the

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customers, why was it necessary to persuade them to apply such rebates to the taking up of shares? The finding that a shareholder customer had to be persuaded indicates that he had an option whether or not to agree - see para. 45 hereof.

51. In addition to the objection based on basic principles set out above, and to the Hutt Company's own evidence and admissions, it is submitted that the Learned President was wrong in law in accepting Counsel's contention that Appellants must be able to point to an express contract to pay "in cash", for the following reasons:

(1) All debts are payable in cash (at least prima facie).

(2) Even internal distributions of a Company's own property such as dividends to shareholders, are payable in cash unless there is a special authorisation to the contrary; and a majority cannot by resolution legislate a minority out of their rights. This applies to "a fortiori" to payments made under contracts with customers.

(3) The submission that there was no express contract to pay rebates in cash is equivocal and has been accepted by the Court of Appeal without scrutiny for an accurate meaning. Indeed no accurate meaning appears applicable. The alternative to payment of rebates in cash would apparently be a suggestion that they could be paid in shares, and indeed both of the learned Judges in the Court of Appeal appear to regard this as a possibility, North P. at p. 145 - line 38 and Turner J. at p. 148 line 44. It is submitted that this suggested alternative is in law impossible. The English cases mentioned in para. 30 (ante) explain that a rebate is a return of an overpayment. The dictionary meaning of the word "rebate" shows precisely the same thing - a return or reduction of a payment. So rebates must be in money in the first instance. The only way in which shares can come into the picture is if the Company can show that the recipients themselves applied, or authorised others to apply, the money to shares. (This was the task undertaken in the Hutt Company's defence - see para. 22 hereof and in which it failed - see para. 46) The Court of Appeal judgments accept an erroneous admixture of these two essentially distinct matters into one.

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Leicester J. had clearly appreciated this essential distinction between the acquisition of a rebate and the utilisation of it. It is submitted that the Court of Appeal's failure to do so was a basic error and led to errors

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throughout the Court of Appeal judgments. It was led to accept a defence which was a complete change of ground from that set up in the pleadings, the answers to Interrogatories and the evidence in the Supreme Court. It led also to an inversion (in part) of the correct onus of proof. Leave is requested to examine these judgments in detail at the hearing.

(4) It has been authoritatively held that a Company cannot pay a debt by shares. The position is different from the capitalisation of profits available for dividend under powers in Articles of Association where the Company is "dominus". This Company was trading on a basis which does not leave a surplus distributable under the Articles.

52. Finally North P. expressed the opinion that the Appellants had failed to make out the basic allegation contained in their Statement of Claim. It is clear, however, that this was merely consequent on his views on the other matters already dealt with. If these views are wrong the consequent finding is also wrong. 145 17-22

JUDGMENT OF TURNER J.

53. Towards the end of his judgment Turner J. deals with the questions of estoppel and acquiescence and makes a declaration that the present Respondent's submissions on these points is rejected. He expressly upholds the judgment of Leicester J. in this respect and it is to be noted that North P. and McCarthy J. have taken a similar view. The present Appellants therefore, respectfully adopt the views expressed by the various Judges on these points (reserving the right to deal with them further if necessary). 151 30-33 143 25-28

54. With regard to the first part of the judgment of Turner J., it is respectfully submitted that it is difficult to extract a clear view of the principles upon which it is given. Although, in the first place, he asks four questions and gives answers to them seriatim, these answers are not valid without first answering the question which all the other Judges have thought it necessary to answer first - whether the 1947 Agreement (or a collateral one in the same terms) was in force at the relevant times. If his judgment rests on an assumption that the 1947 Agreement was still in force, it is a finding against that of the majority. If the 1947 Agreement was not in force then Turner J. apparently introduces the new proposition that liability to pay the rebate is still dependent on a resolution of the Company duly passed, and on the terms of such resolution, so that "no one was entitled to receive more than what the others received". 147 148 12-13 148 43-45 149 4-6

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It is respectfully submitted that this introduction, apparently unattributable, has no place in the proceedings.

55. In any case there was no inequality in the distribution - all customers received their correct proportions of the profits. It was on the separate matter of how the individual customers were persuaded to apply or utilise their profits that the divergence arose - a matter which is extraneous to the distribution itself - See para. 51 (3).

56. In both judgments in the Court of Appeal considerable space is devoted to the form of shareholders' resolutions relating to rebates. It is submitted that resolutions passed by shareholders could not affect rights acquired "qua customer" and that Leicester J. was right in rejecting this. He said: 26 19 23 21

> "In face of the plainest of warnings, the "defendant elected to take the risk of wrongfully "applying the property of the plaintiffs on the "apparent assumption that the rights of the "minority shareholders became submerged in the "tolerance of the majority ones". 133 14-18

57. It is humbly submitted on behalf of the Appellants that the order and judgment of the Court of Appeal in-so-far as it reversed in part the order and judgment of the Supreme Court was wrong and should be set aside and that the order and judgment of the Supreme Court should be restored in its entirety awarding the first Appellant the sum of £3,203 and the Second Appellant the sum of £9,867, for the following among other

R E A S O N S

(1) BECAUSE the judgment of the Supreme Court was correct and in accord with the law and the principles properly applying in this case.

(2) BECAUSE the judgment of the Court of Appeal was erroneous in-so-far as it departed from the decision of the Supreme Court and was not in accord with the law and the principles properly applying.

(3) BECAUSE when these erroneous parts of the majority judgment of the Court of Appeal are excised there would remain in effect a judgment in favour of the present Appellants.

(4) BECAUSE the majority judgment of the Court of Appeal involved a misreading of certain parts of the Record of the proceedings in the Supreme Court.

(5) BECAUSE it was proved and admitted that the Respondent was under a liability to pay rebates to the Appellants, but under the judgment of the Court of Appeal the Appellants receive no rebates.

(6) BECAUSE when it was proved and admitted that the Appellants were entitled to rebates, and when the affirmative defence that they were properly applied to shares failed in the Court of Appeal as in the Supreme Court (together with the defences of waiver and estoppel), that should have concluded the matter, and the appeal to the Court of Appeal should then forthwith have been dismissed in its entirety.

(7) BECAUSE, instead of so dismissing the appeal the Court of Appeal set additional requirements which in effect inverted the proper onus of proof and in effect required the present Appellants to prove a negative.

(8) BECAUSE the order and judgment of the Supreme Court was right for the reasons therein and in this case set forth.

(9) BECAUSE the order and judgment of the Court of Appeal in-so-far as it reversed the order and judgment of the Supreme Court was wrong for the reasons herein set forth.

T.A. CUNNINGHAM

No. 39 of 1964

IN THE PRIVY COUNCIL

O N A P P E A L
FROM THE NEW ZEALAND COURT OF APPEAL

BETWEEN:

J.M.CONSTRUCTION COMPANY LIMITED

and

JONES TIMBER COMPANY LIMITED

Appellants

AND

HUTT TIMBER AND HARDWARE COMPANY LIMITED

Respondent

CASE FOR APPELLANTS

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