R.C.
G.1.9.(
UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
23 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1.

Judgment (57) 1964

In the Privy Council

78724

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. — Respondents

RECORD OF PROCEEDINGS

Linklaters & Paines,
Barrington House,
59–67 Gresham Street,
London E.C.2.

Agents for:
Robinson & Cunningham,
Solicitors,
Perry Street,
Masterton,
New Zealand.

Solicitors for Appellants.

MacFarlanes,
Dowgate Hill House,
London E.C.4.

Agents for:
Hogg, Gillespie, Carter & Oakley,
Solicitors,
T. & G. Building,
Grey Street,
Wellington,
New Zealand.

Solicitors for Respondent.

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, Incorporated Companies having their respective Registered Offices at Lower Hutt — Appellants

AND

HUTT TIMBER AND HARDWARE COMPANY LIMITED, an Incorporated Company having its Registered Office at Hollands Crescent, Lower Hutt, — Respondent

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

PART I

No.	Description of Document	Date	Page
	IN THE SUPREME COURT OF NEW ZEALAND		
1	Statement of Claim	25th January 1962	1
2	Statement of Defence	21st February 1962	4
3	Answer of B.C. Odlin to Interrogatories for examination of R.O. Slacke Ltd.	17th May 1962	10
4	Answer of G.I. Hooper to Interrogatories for examination of J.M. Construction Co. Ltd.	17th May 1962	14

Part I (continued)

No.	Description of Document	Date	Page
5	Answer of G.I. Hooper to Interrogatories for examination of Jones Timber Co. Ltd.	17th May 1962	18
6	Answer of L.R. Bowen to Interrogatories for examination of Hutt Timber and Hardware Co. Ltd.	18th June 1962	22
7	Amendment of Statement of Claim	9th July 1962	28
	Plaintiff's Evidence:		
8	K.L. Westmoreland – Examination		30
	– Cross-Examination		35
	– Re-Examination		36
9	G.I. Hooper – Examination		37
	– Cross-Examination		42
	– Re-Examination		49
10	R.O.G. Slacke – Examination		52
	– Cross-Examination		55
	– Re-Examination		58
11	B.C. Odlin – Examination		60
	– Cross-Examination		62
	– Re-Examination		64
12	W.E. Jones – Examination		67
	– Cross-Examination		69
	– Re-Examination		71
	Defendant's Evidence:		
13	L.R. Bowen – Examination		73
	– Cross-Examination		81
	– Re-Examination		95
	– Cross-Examination		99
14	M.W. Downes – Examination		103
	– Cross-Examination		103
15	Reasons for Judgment of Leicester J.	28th September 1962	105
16	Supplementary Reasons for Judgment of Leicester J.	30th November 1962	129
17	Formal Judgment of Supreme Court	30th November 1962	134

Part I (continued)

No.	Description of Document	Date	Page
	IN THE COURT OF APPEAL OF NEW ZEALAND		
18	Notice of Motion on Appeal	26th February 1963	135
19	Reasons for Judgment of North P.	12th December 1963	136
20	Reasons for Judgment of Turner J.	12th December 1963	147
21	Reasons for Judgment of McCarthy J.	12th December 1963	153
22	Formal Judgment of Court of Appeal	12th December 1963	154
23	Order granting Final Leave to Appeal to The Privy Council	4th May 1964	155

Part II

Exhibit Mark	Description of Document	Date	Page
Plaintiff's Exhibits			
A	File of Correspondence between Parties and their respective Solicitors.	24th September 1957 to 4th July 1962	156
B	Extracts from Hutt Timber & Hardware Co. Ltd. Ledger Accounts.	1949 – 1960	213
D	Hutt Timber & Hardware Co. Ltd. Annual Accounts.	30th November 1961	234
E	Extract from Hutt Timber & Hardware Co. Ltd.'s Directors' Minute Book.	22nd February 1950	212
G	Shareholding History of Jones Timber Co. Ltd. and J.M. Construction Co. Ltd.	1946 – 51	205
H	Letters between Hutt Timber & Hardware Co. Ltd. and Shareholders.	1954 – 1955	218
Defendant's Exhibits			
1	Agreement dated 28th November 1947.	28th November 1947	206

Part II (continued)

Exhibit Mark	Description of Document	Date	Page
3	Forms of Rebate Chits	1950 – 60	216
6	Summary of Share Transfer Forms.	1949	210
7	Letter, Hutt Timber & Hardware Co. Ltd. to W.E. Jones Ltd.	10th November 1949	211
8	Memorandum and Articles of Association of Hutt Timber & Hardware Co. Ltd.	6th November 1943	189
9	Letters, Bank of New Zealand to Hutt Timber & Hardware Co. Ltd.	1954 – 56	225
12 to 15	Resolutions extracted from Hutt Timber & Hardware Co. Ltd. Minute Books.	1945 – 61	198
14	Extracts from Directors' Minute Book.	July and September 1958	229
16	Attendances at Hutt Timber & Hardware Co. Ltd. Annual Meetings.	1950 – 61	215
18	Agreement dated 14th July 1959.	14th July 1959	230
19	Hutt Timber & Hardware Co. Ltd. Schedule of Shareholders' Rebates.	1955 – 60	228

Certificate of Registrar of Court of Appeal of New Zealand 238

In the Privy Council

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

J.M. CONSTRUCTION COMPANY LIMITED,and JONES TIMBER COMPANY LIMITED, Incorporated Companies having their respective Registered Offices at Lower Hutt. — Appellants

AND

HUTT TIMBER AND HARDWARE COMPANY LIMITED , an Incorporated Company having its registered office at Hollands Crescent, Lower Hutt, — Respondent

RECORD OF PROCEEDINGS

No. 1.
STATEMENT OF CLAIM

In the Supreme Court of New Zealand

No. 1.

Statement of Claim, 25th January 1962

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY — No. A. 14/62.

BETWEEN

J.M. CONSTRUCTION CO. LTD., JONES TIMBER CO. LTD. and R.O. SLACKE LTD. Incorporated Companies having their respective
10 registered offices at Lower Hutt, — Plaintiffs

AND

HUTT TIMBER & HARDWARE CO. LTD., an Incorporated Company having its registered office at Hollands Crescent, Lower Hutt, — Defendant

In the Supreme Court of New Zealand

No. 1.

Statement of Claim, 25th January 1962 (continued)

The Plaintiffs by their Solicitor sue the Defendant and say:–

1. THE Plaintiff companies are duly incorporated private companies, the first named and the third named each carrying on the business of builder's merchant. The registered offices of J.M. Construction Company Limited and Jones Timber Company Limited are at Victoria Street, Lower Hutt and the registered office of R.O. Slacke Limited is at 1 Mitchell Street, Lower Hutt.

2. THE Defendant company is a duly incorporated public company having its registered office at Hollands Crescent, Lower Hutt, and carrying on, inter alia, the business of builders' supplier. 10

3. THE Plaintiff companies are and have at all material times been, shareholders in the Defendant Company and they purchased builders' supplies at all material times from the defendant Company.

4. SUCH purchases were on the terms that the Defendant Company would annually rebate and pay shareholders pro rata according to the value of their respective purchases an amount equal to its excess of income over expenditure for the respective years in which such purchases were made.

5. FOR the years which ended on the 30th days of November 1958, 1959 and 1960 the following rebates were due from the Defendant Company to the Plaintiffs: 20

Year ended.	J.M. Construction Co. Ltd.	Jones Timber Co. Ltd.	R.O. Slacke Ltd.
30.11.58	£ 389	£1,120	£ 665
30.11.59	1,334	805	1,719
30.11.60	1,448	6,425	2,106
	£3,171	£8,350	£4,490

6. THE Defendant company failed to pay to the Plaintiff companies the rebates referred to in paragraph 5 hereof. In purported satisfaction of the said rebates the Defendant company purported to allot to the Plaintiff companies shares in the Defendant company of a nominal value corresponding to the amounts due in respect of the said rebates. Particulars of such purported allotments, as far as the Plaintiff companies have been able to ascertain, are as follows: 30

Date of return to Registrar of Companies.	J.M. Construction Co. Ltd.	Jones Timber Co. Ltd.	R.O. Slacke Ltd.
21.8.1959	389	1,120	665
18.7.1961	1,334	805	1,719
19.9.1961	1,448	6,425	2,106

7. THE purported allotments of shares referred to in Paragraph 6 hereof were made by the Defendant company without authority and wrongfully and contrary to the express instructions of each of the Plaintiff companies, and no notices of allotment were given to the Plaintiff companies.

WHEREFORE the Plaintiff companies severally pray as follows:

(a) Declarations that the shares referred to in Paragraph 6 hereof were allotted to the respective Plaintiff companies without authority and wrongfully.

10 (b) Orders that the register of members of the Defendant company be rectified by removing therefrom the names of the respective Plaintiff companies in respect of the said shares.

(c) The Plaintiff J.M. Construction Company Limited prays judgment for the sum of £3,171, the Plaintiff Jones Timber Company Limited prays judgment for the sum of £8,350, the Plaintiff R.O. Slacke Limited prays judgment for the sum of £4,490, being the debts due for the abovementioned rebates.

(d) Such further or other relief as may be just.

(e) The costs of and incidental to this action.

20 This Statement of Claim is filed and served by Thomas Allan Cunningham of Masterton, Solicitor for the Plaintiffs, whose address for service is at the offices of Messrs. Martin, Murphy & Jeffries, Paragon Chambers, Kelburn Cable Car Avenue, Wellington.

In the
Supreme
Court of
New Zealand

No. 2.

Statement of
Defence
21st February
1962

NO.2
STATEMENT OF DEFENCE.

The Defendant by its Solicitor Neill Thomas Gillespie, says:

1. IT admits the allegations contained in paragraph 1 of the Statement of Claim.

2. IT admits the allegation contained in paragraph 2 of the Statement of Claim.

3. IT admits that the Plaintiff companies are shareholders in the Defendant Company and have been shareholders since the registration of share transfers to them respectively in 1949. It further admits that each of the three Plaintiff Companies has while it has been a shareholder in the Defendant Company purchased builder's supplies from the Defendant. 10

4. IT admits that purchases of builder's supplies by the Plaintiff Companies from the Defendant were made on terms that the Defendant would annually make rebates to shareholders who were purchasers from it of builder's supplies during the year and says such rebates were to be made under and in accordance with the provisions set forth in the Agreement or Deed dated 28th November 1947 (which Agreement or Deed is hereinafter referred to as "the rebate agreement") and in all other respects denies the allegations set forth in paragraph 4 of the Statement of Claim. 20

5. IT admits that rebates for certain amounts were declared in favour of the Plaintiff Companies for the years ending on the 30th days of November 1958, 1959 and 1960, and says such rebates were to be dealt with in accordance with the provisions set forth in the rebate agreement, and says that the amounts so declared are as follows:

Date of Return to Registrar of Companies	J.M. Construction Co. Ltd.	Jones Timber Co.	R.O. Slacke Ltd.
21 . 8 . 1959	389	1,120	665
18 . 7 . 1961	805	917	1,719
19 . 9 . 1961	1,448	6,425	2,106

30

but save as aforesaid denies each and every of the allegations in paragraph 5 of the Statement of Claim.

6. IT admits that it did not pay the rebates referred to in paragraph 5 of the Statement of Claim in cash and it admits that it allotted to the Plaintiff Companies shares in the Defendant Company of a nominal value corresponding to the amounts due in respect of the said rebates but it says that the said shares were allotted credited as fully paid, and that

allotments of shares so made and allotments of shares to the Plaintiff Companies at all times have been valid and effectual and amounted to performance by the Defendant of all its legal obligations to the Plaintiff Companies and save as aforesaid denies each and every of the allegations set forth in paragraph 6 of the Statement of Claim. The numbers of shares allotted are as set out in paragraph 5 hereof.

7. IT denies each and all the several allegations contained in paragraph 7 of the Statement of Claim

AND AS A FURTHER AND ADDITIONAL DEFENCE the Defendant says:

10 8. IT repeats the admissions assertions and denials contained in paragraphs 1 to 7 of this Statement of Defence.

9. BY the rebate agreement the Defendant Company and its shareholders as at that date (whose names are set forth in the Schedule to the rebate agreement) agreed (inter alia) that at the end of each financial year the Company should pay and satisfy rebates by the allotment of shares in the capital of the defendant company credited as fully paid in sums equal to the amounts of rebates declared and that each of the shareholders to whom rebates were declared would accept such shares so allotted to him or it.

20 10. THE rebate agreement is valid and in force and binding upon all the parties thereto.

AND AS A FURTHER OR ALTERNATIVE DEFENCE the Defendant says:

11. IT repeats the admissions, assertions and denials contained in paragraphs 1 to 7 and 8 to 10 both inclusive of this Statement of Defence.

12. EACH of the Plaintiff Companies upon becoming a shareholder of the Defendant Company agreed with the Defendant Company to be bound by the rebate agreement and each of the Plaintiff Companies is bound to receive the respective allotments of shares which have been or shall be made to it from time to time (and in particular those referred to in paragraph 6 of the Statement of Claim) and to so receive the same in satis-
30 faction pro tanto of rebates declared in its favour.

AND AS A FURTHER OR ALTERNATIVE DEFENCE the Defendant says:

13. IT repeats the admissions assertions and denials contained in paragraphs 1 to 7, 8 to 10 and 11 and 12 inclusive of this Statement of Defence.

14. THE rebate agreement is and was at all material times part of the regulations governing the relations between the Defendant and its Shareholders and was and is binding on the Plaintiff Companies as share-

holders and the rebates hereinbefore referred to were satisfied and the shares allotted to the Plaintiff Companies as hereinbefore set forth were properly allotted to them in exercise of the rights of the Defendant thereunder.

AND AS A FURTHER OR ALTERNATIVE DEFENCE the Defendant says:

15. IT repeats the admissions, assertions and denials contained in paragraphs 1 to 7, 8 to 10, 11 and 12 and 13 and 14 of this Statement of Defence.

16. THE rebate agreement is and was binding at all material times upon the Plaintiff Companies by reason of their having acquired their shares and having been accepted by the defendant as shareholders subject to their becoming parties to and being bound by the rebate agreement and their rebates were satisfied and the shares properly issued in exercise of the rights of the Defendant Company thereunder. 10

17. THE rebate agreement could be performed and the said rebates paid only with the concurrence of all shareholders purchasing goods from the Defendant and could be altered or revoked only with the consent of the shareholders generally.

AND AS A FURTHER OR ALTERNATIVE DEFENCE the Defendant says:

18. IT repeats the admissions, assertions and denials contained in paragraphs 1 to 7, 8 to 10, 11 and 12, 13 and 14 and 15 to 17 of this Statement of Defence. 20

19. THE said rebates were payable to the Plaintiff Companies as purchasers of goods from the Defendant and the goods were sold by the Defendant to them and rebates became available only on the condition of capitalisation of those portions of the rebates which were in fact capitalised; and the rebates were satisfied and the shares so allotted to the Plaintiff Companies were properly allotted in pursuance of the terms of the contract between the Defendant and the respective Plaintiff Companies in relation to the sale and purchase of such goods. 30

20. THE Plaintiff Companies having become bound by the rebate agreement or otherwise becoming bound to accept shares in satisfaction of rebates could not by notice purporting to be no longer bound so to do effectively cease to be so bound while still purchasing goods and claiming to be entitled to rebates from the Defendant.

AND AS A FURTHER OR ALTERNATIVE DEFENCE the Defendant says:

21. IT repeats the admissions, assertions and denials contained in paragraphs 1 to 7, 8 to 10, 11 and 12, 13 and 14, 15 to 17 and 18 to 20 of

this Statement of Defence.

22. IF the Plaintiffs or any of them were at any time entitled to the payment of rebates in cash they have by their conduct waived those rights.

AND AS A FURTHER OR ALTERNATIVE DEFENCE the Defendant says:

23. IT repeats the admissions, assertions and denials contained in paragraphs 1 to 7, 8 to 10, 11 and 12, 13 and 14, 15 to 17, 18 to 20 and 21 and 22 of this Statement of Defence.

24. THE Plaintiffs are estopped by their conduct and representations from denying that they were or are bound by the rebate agreement for so
10 long as they are entitled to rebates, and from denying that they were and are bound to act and to be treated in accordance with the provisions of the rebate agreement in that:

(a) The Plaintiff Companies took transfers to themselves of their original purchases of shares with notice that such transfers were registered and they were accepted as shareholders and as customers only subject to their becoming parties to or being bound by the Rebate Agreement and they induced the Defendant to act accordingly.

(b) They have at all relevant times had notice that the said Agreement was and is the basis of the sale and purchase of builder's materials and
20 of the distribution of rebates to shareholder customers and they have acted and induced the Defendant to act accordingly.

(c) They were given notice from time to time of the Company's distribution of rebates in accordance with the rebate agreement and acquiesced therein and thereby induced the Defendant to make such distribution in lieu of the distribution of moneys to shareholders in any other way.

(d) They have acted in accordance with the rebate agreement along with all other shareholders for many years prior to 1958 and since that year and they have taken benefits and have been allotted and have received and accepted shares in satisfaction of the rebates accordingly and induced
30 the Defendant to act accordingly at all relevant times.

(e) They have endeavoured to sell shares so allotted to them thereby warranting their title to do so and in the case of the second named Plaintiff Company it has sold certain of the shares so allotted to it and thereby accepted and warranted its title to do so.

AND AS A FURTHER OR ALTERNATIVE DEFENCE the Defendant says:

25. IT repeats the admissions, assertions and denials contained in paragraphs 1 to 7, 8 to 10, 11 and 12, 13 and 14, 15 to 17, 18 to 20, 21 and

22 and 23 and 24 of this Statement of Defence.

26. THE Plaintiff Companies are estopped by their conduct and/or their representations made to the Defendant from making certain of the allegations contained in paragraphs 6 and 7 of the Statement of Claim or from advancing evidence in support of those assertions.

27. THE conduct of the Plaintiff Companies relied on (inter alia) by the Defendant Company as constituting an estoppel is

IN RESPECT OF THE FIRST AND SECOND NAMED PLAINTIFF COMPANIES:

(a) Their notice of a letter from the Defendant Company by way of reply to a letter addressed to W.E. Jones Ltd. dated the 10th day of November 1949 the contents of which were communicated to and were well known by the said first and second named Plaintiff Companies. 10

(b) The receipt by them without objection of rebates and allotments of shares for the financial years ended the 30th days of November 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956 and 1957.

(c) The acceptance of transfers of shares in the capital of the Defendant Company owned by W.E. Jones Ltd. and from time to time in offering to sell shares to other shareholders.

(d) By concurring at all material times, as shareholder and as customer, in a system of governing the defendant company's affairs, and of selling and purchasing its goods, which involved the declaring of rebates and the satisfying of same by the allotment of fully paid shares. 20

AND IN RESPECT OF THE THIRD NAMED PLAINTIFF COMPANY:

(a) The receipt by it without objection of allotments of shares for the financial years ended the 30th days of November 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960 and 1961.

(b) In offering to sell shares owned by it being shares so allotted to it from time to time.

(c) By concurring at all material times, as shareholder and as customer, in a system of governing the defendant company's affairs, and of selling and purchasing its goods, which involved the declaring of rebates and the satisfying of same by the allotment of fully paid shares. 30

This Statement of Defence is filed by Neill Thomas Gillespie of Lower

Hutt, the solicitor for the Defendant, whose address for service is at the offices of Messrs. Hogg, Gillespie, Carter & Oakley, Solicitors, T. & G. Building, Grey Street, Wellington.

In the Supreme Court of New Zealand

No. 3.

Answer of B.C.Odlin to Interrogatories for Examination of R.O. Slacke Ltd.

17th May 1962.

NO. 3.

ANSWER OF BRIAN CHARLES ODLIN TO INTERROGATORIES FOR EXAMINATION OF R.O. SLACKE LIMITED.

In answer to the said interrogatories, I, BRIAN CHARLES ODLIN of Silverstream, Public Accountant Secretary of R.O. Slacke Limited, make oath and say as follows:-

Interrogatory No. 1:
When was the said plaintiff company incorporated?

Answer: 1st day of April, 1949

Interrogatory No. 2: 10
Who were its original shareholders?

Answer: Randall Owen George Slacke and Mary Jean Slacke.

Interrogatory No. 3:
Who were its original directors?

Answer: Randall Owen George Slacke, Sole Director.

Interrogatory No. 4:
When did the said plaintiff company first acquire shares in the defendant company?

Answer: 1949

Interrogatory No. 5: 20
How many shares did it then acquire, and from whom?

Answer: 1,785 £1 shares from Randall Owen George Slacke.

Interrogatory No. 7:
Were the first directors of the said plaintiff company or any of them aware when it acquired such shares of the existence of an agreement bearing date the 28th day of November 1947, made between the defendant company and sundry shareholders of the company?

Answer: Randall Owen George Slacke was aware.

Interrogatory No. 9:
Did the said plaintiff company after first acquiring shares in the 30

defendant company purchase any goods from the defendant company upon terms of becoming entitled to rebates from the defendant company?

Answer: Yes.

Interrogatory No. 13:

Has the said plaintiff company in any year or years since its incorporation received copies of the annual accounts of the defendant company? If yes, during what years?

Answer: The plaintiff company received some copies of defendant's annual accounts but is unable to say whether or not such copies were received for every year.

Interrogatory No. 14:

Has the said plaintiff company in any year or years since its incorporation had notices of annual general meetings of the defendant company? If yes, during what year or years?

Answer: The plaintiff company received some notices of annual general meetings but is unable to say whether or not such notices were received for every year.

Interrogatory No. 16:

During what year or years (if any) has the said plaintiff company since its incorporation purchased goods from the defendant company upon the basis that rebates would or might become payable to the said plaintiff company in respect of such purchases from the defendant company?

Answer: In every year since the plaintiff company's incorporation.

Interrogatory No. 17:

During which of the year or years referred to in the last question did rebates become so payable.

Answer: In every year since the plaintiff company's incorporation with the exception of the year ending 30th day of November 1956.

Interrogatory No. 19:

What in full were the terms and conditions in regard to rebates on which goods were sold by the defendant company to the said plaintiff company and purchased by the said plaintiff company from the defendant company, in the first year after the said plaintiff company's incorporation?

Answer: Such terms and conditions were that the defendant company would annually rebate to the plaintiff company a proportion of the defendant company's excess of income over expenditure, corresponding to the proportion which the plaintiff company's purchases bore to the purchases of

all shareholder customers during the year for which the rebate was made.

Interrogatory No. 20:
Did such terms differ in later years?

Answer: No.

Interrogatory No. 23:
Did the said plaintiff company in any year or years acquiesce in the allotting to the said plaintiff company of shares in the capital of the defendant company credited as fully paid in or towards satisfaction of rebates? If yes, in which year or years (if any)?

Answer: The plaintiff has never acquiesced in the allotting to the plaintiff of shares in or towards the satisfaction of rebates. Rebates were always payable in cash being discounts or reductions on monies which the plaintiff company has paid to the defendant company in the course of trading. In the following years the plaintiff company allowed the expenditure of such cash on the payment up of shares on which there was a cash liability to the extent shown:-

1949	£400
1950	£445
1952	£333
1953	£260
1954	£ 23
1955	£705
1956	£232
1958	£529

Interrogatory No. 24:
Has the said plaintiff company at any time or times repudiated the allotment of any such shares? If yes, state which and when.

Answer: The plaintiff company repudiated the allotment of shares by the following letters:-

Letter dated the 10th December, 1958, from the Plaintiffs' Solicitors to the defendant company.

Letter dated 19th April, 1962, from the Plaintiff's Solicitors to defendant company's Solicitors.

Letter dated 19th April, 1962, from the plaintiff's Solicitors to the Registrar of Companies.

SWORN at Lower Hutt by the said)
BRIAN CHARLES ODLIN this) 'B.C. ODLIN'
17th day of May 1962, before me:-)

'K.G. GIBSON'

A Solicitor of the Supreme Court of New Zealand.

In the Supreme Court of New Zealand

No. 4.

Answer of G.I. Hooper to Interrogatories for Examination of J.M. Construction Co.Ltd.

17th May 1962

NO. 4.

ANSWER OF GEORGE IAN HOOPER TO INTERROGATORIES FOR EXAMINATION OF J.M. CONSTRUCTION COMPANY LIMITED

In answer to the said interrogatories, I, GEORGE IAN HOOPER of Lower Hutt, Company Director, Secretary of J.M. Construction Company Limited, make oath and say as follows:–

Interrogatory No. 1:
When was the said plaintiff company incorporated?

Answer: 27th April, 1949.

Interrogatory No. 2: 10
Who were its original shareholders?

Answer: Wilfred Ernest Jones
Sidney Charles Morris

Interrogatory No. 3:
Who were its original directors?

Answer: Wilfred Ernest Jones
Sidney Charles Morris.

Interrogatory No. 4:
When did the said plaintiff company first acquire shares in the defendant company? 20

Answer: June, 1949.

Interrogatory No. 5:
How many shares did it then acquire, and from whom?

Answer: 1000 £1 shares acquired from Wilfred E. Jones Limited.

Interrogatory No. 7:
Were the first directors of the said plaintiff company or any of them aware when it acquired such shares of the existence of an agreement bearing date the 28th day of November 1947 made between the defendant company and sundry shareholders of the company?

Answer: One of the first directors of the plaintiff company, namely Wilfred E. Jones, was also a director of Wilfred E. Jones Limited and in 30

such capacity had cognisance of the fact that the defendant company and sundry shareholders thereof had signed an agreement in or about November, 1947. The other director of the plaintiff company had no knowledge thereof.

Interrogatory No. 9:

Did the said plaintiff company after first acquiring shares in the defendant company purchase any goods from the defendant company upon terms of becoming entitled to rebates from the defendant company?

Answer: Yes

Interrogatory No. 13:

10 Has the said plaintiff company in any year or years since its incorporation received copies of the annual accounts of the defendant company? If yes, during what years?

Answer: The plaintiff company received some copies of the defendant's annual accounts, but is unable to say whether or not such copies were received for every year.

Interrogatory No. 14:

Has the said plaintiff company in any year or years since its incorporation had notices of annual general meetings of the defendant company? If yes, during what year or years?

20 **Answer:** The plaintiff company received some notices of annual general meetings, but is unable to say whether or not such notices were received for every year.

Interrogatory No. 16:

During what year or years (if any) has the said plaintiff company since its incorporation purchased goods from the defendant company upon the basis that rebates would or might become payable to the said plaintiff company in respect of such purchases from the defendant company?

Answer: In all years since plaintiff's incorporation.

Interrogatory No. 17:

30 During which of the year or years referred to in the last question did rebates become so payable?

Answer: In all years since plaintiff's incorporation with the exception of the year ending 30th November, 1956.

Interrogatory No. 19:

What in full were the terms and conditions in regard to rebates on which goods were sold by the defendant company to the said plaintiff company and purchased by the said plaintiff company from the defendant

In the Supreme Court of New Zealand

No. 4.

Answer of G.I. Hooper to Interrogatories for Examination of J.M. Construction Co. Ltd.

17th May 1962 (continued)

company, in the first year after the said plaintiff company's incorporation?

Answer: Such terms and conditions were that the defendant company would annually rebate to the plaintiff company a proportion of the defendant company's excess of income over expenditure corresponding to the proportion which the plaintiff company's purchases bore to the purchases of all shareholder customers during the year for which the rebate was made.

Interrogatory No. 20:

Did such terms differ in later years?

Answer: No.

Interrogatory No. 23: 10

Did the said plaintiff company in any year or years acquiesce in the allotting to the said plaintiff company of shares in the capital of the defendant company credited as fully paid in or towards satisfaction of rebates? If yes, in which year or years (if any)?

Answer: The plaintiff has never acquiesced in the allotting to the plaintiff of shares in or towards the satisfaction of rebates. Rebates were always payable in cash, being discounts or reductions on monies which the plaintiff company had paid to the defendant company in the course of trading. In the following years the plaintiff allowed the expenditure of such cash on the payment up of shares on which there was a 20 cash liability to the extent shown:

1950	£ 97
1951	£ 150
1952	£ 255
1953	£ 150
1954	£1135
1955	£ 850
1956	£ 271

Interrogatory No. 24:

Has the said plaintiff company at any time or times repudiated the 30 allotment of any such shares? If yes, state which and when.

Answer: The plaintiff company repudiated the allotment of shares by the following letters:

Letter dated 2nd July, 1958 from plaintiff company's Solicitors to defendant company.

Letter of same date from plaintiff company's Solicitors to Registrar of Companies.

In the Supreme Court of New Zealand

No. 4.

Answer of G.I. Hooper to Interrogatories for Examination of J.M. Construction Co. Ltd.

17th May 1962 (continued)

Letter of same date from plaintiff company's Solicitors to defendant company's Solicitors.

Letter dated 29th January 1960 from plaintiff company's Solicitors to defendant company.

Letter dated 2nd November 1961 from plaintiff company's Solicitors to defendant company.

Letter dated 19th April, 1962 from plaintiff company's Solicitors to defendant company's Solicitors.

10 Letter of same date from plaintiff company's Solicitors to Registrar of Companies.

SWORN at Lower Hutt by the said)
GEORGE IAN HOOPER this 17th) 'GEO HOOPER'
day of May 1962, before me:-)

'K.G. GIBSON'

A Solicitor of the Supreme Court of New Zealand.

In the Supreme Court of New Zealand

No. 5.

Answer of G.I. Hooper to Interrogatories for Examination of Jones Timber Co.Ltd.

17th May 1962

NO. 5.

ANSWER OF GEORGE IAN HOOPER TO INTERROGATORIES FOR EXAMINATION OF JONES TIMBER COMPANY LIMITED

In answer to the said interrogatories, I, GEORGE IAN HOOPER of Lower Hutt, Company Director, Secretary of Jones Timber Company Limited, make oath and say as follows:–

Interrogatory No. 1:
When was the said plaintiff company incorporated?

Answer: 25th August, 1943.

Interrogatory No. 2: 10
Who were its original shareholders?

Answer: Wilfred Ernest Jones
Ethel Jones

Interrogatory No. 3:
Who were its original directors?

Answer: Wilfred Ernest Jones
Ethel Jones

Interrogatory No. 4:
When did the said plaintiff company first acquire shares in the defendant company? 20

Answer: July, 1949

Interrogatory No. 5:
How many shares did it then acquire, and from whom?

Answer: 1500 £1 shares acquired from Wilfred E. Jones Limited.

Interrogatory No. 7:
Were the first directors of the said plaintiff company or any of them aware when it acquired such shares of the existence of an agreement bearing date the 28th day of November 1947 made between the defendant company and sundry shareholders of the company?

Answer: One of the first directors of the plaintiff company, namely 30

Wilfred E. Jones, was also a director of Wilfred E. Jones Limited and in such latter capacity had cognisance of the fact that the defendant company and sundry shareholders thereof had signed an agreement in or about November, 1947. The other director of the plaintiff company had no knowledge thereof.

Interrogatory No. 9:

Did the said plaintiff company after first acquiring shares in the defendant company purchase any goods from the defendant company upon terms of becoming entitled to rebates from the defendant company?

10 **Answer:** Yes.

Interrogatory No. 13:

Has the said plaintiff company in any year or years since its incorporation received copies of the annual accounts of the defendant company? If yes, during what years?

Answer: The plaintiff company received some copies of the defendant's annual accounts, but is unable to say whether or not such copies were received for every year.

Interrogatory No. 14:

Has the said plaintiff company in any year or years since its incorporation had notices of annual general meetings of the defendant company?
20 If yes, during what year or years?

Answer: The plaintiff company received some notices of annual general meetings, but is unable to say whether or not such notices were received for every year.

Interrogatory No. 16:

During what year or years (if any) has the said plaintiff company since its incorporation purchased goods from the defendant company upon the basis that rebates would or might become payable to the said plaintiff company in respect of such purchases from the defendant company?

30 **Answer:** In all years since plaintiff's incorporation.

Interrogatory No. 17:

During which of the year or years referred to in the last question did rebates become so payable?

Answer: In all years since plaintiff's incorporation with the exception of the year ending 30th November, 1956.

Interrogatory No. 19:

What in full were the terms and conditions in regard to rebates on

In the Supreme Court of New Zealand

No. 5.

Answer of G.I. Hooper to Interrogatories for Examination of Jones Timber Co. Ltd.

17th May 1962 (continued)

which goods were sold by the defendant company to the said plaintiff company and purchased by the said plaintiff-company from the defendant company, in the first year after the said plaintiff company's incorporation?

Answer: Such terms and conditions were that the defendant company would annually rebate to the plaintiff company a proportion of the defendant company's excess of income over expenditure corresponding to the proportion which the plaintiff company's purchases bore to the purchases of all shareholder customers during the year for which the rebate was made.

Interrogatory No. 20:

Did such terms differ in later years? 10

Answer: No.

Interrogatory No. 23:

Did the said plaintiff company in any year or years acquiesce in the allotting to the said plaintiff company of shares in the capital of the defendant company credited as fully paid in or towards satisfaction of rebates? If yes, in which year or years (if any)?

Answer: The plaintiff has never acquiesced in the allotting to the plaintiff of shares in or towards the satisfaction of rebates. Rebates were always payable in cash, being discounts or reductions on monies which the plaintiff company had paid to the defendant company in the course of 20 trading. In the following years the plaintiff allowed the expenditure of such cash on the payment up of shares on which there was a cash liability to the extent shown:

1950	£ 716
1951	£ 305
1952	£ 505
1953	£ 245
1954	£2485
1955	£2082
1956	£ 794

30

Interrogatory No. 24:

Has the said plaintiff company at any time or times repudiated the allotment of any such shares? If yes, state which and when.

Answer: The plaintiff company repudiated the allotment of shares by the following letters:

Letter dated 2nd July, 1958 from plaintiff company's Solicitors to defendant company.

Letter of same date from plaintiff company's Solicitors to

In the Supreme Court of New Zealand

No. 5.

Answer of G.I. Hooper to Interrogatories for Examination of Jones Timber Co. Ltd.

17th May 1962 (continued)

Registrar of Companies.

Letter of same date from plaintiff company's Solicitors to defendant Company's Solicitors.

Letter dated 29th January 1960 from plaintiff company's Solicitors to defendant company.

Letter dated 2nd November 1961 from plaintiff company's Solicitors to defendant company.

Letter dated 19th April, 1962 from plaintiff company's Solicitors to defendant company's Solicitors.

10 Letter of same date from plaintiff company's Solicitors to Registrar of Companies.

SWORN at Lower Hutt by the said)
GEORGE IAN HOOPER this 17th)   **'GEO HOOPER'**
day of May 1962, before me:–)

'K.G. GIBSON'

A Solicitor of the Supreme Court of New Zealand.

In the Supreme Court of New Zealand

No. 6.

Answer of L.R. Bowen to Interrogatories for examination of Hutt Timber & Hardware Co. Ltd.

18th June, 1962.

NO 6.

ANSWER OF LLEWELLYN RUTHERFORD BOWEN TO INTERROGATORIES FOR EXAMINATION OF HUTT TIMBER AND HARDWARE COMPANY LIMITED

In answer to the said interrogatories, I, LLEWELLYN RUTHERFORD BOWEN of Upper Hutt, Secretary to the defendant company, make oath and say as follows:

Interrogatory No. 1:
What was the paid up capital of the defendant company at the time of the Agreement dated 28th November 1947?

Answer: £32,400.

Interrogatory No. 2:
What was, or is claimed by the defendant company to have been, its paid up capital at the commencement of the present action?

Answer: £500,920.

Interrogatory No. 3:
How much of the increase or purported increase in the defendant company's paid up capital effected between the dates mentioned in questions 1 and 2 was allotted in pursuance or purported pursuance of the of the Agreement dated 28th November 1947?

Answer: £359,295.

Interrogatory No. 4:
When did the paid up capital of the defendant company reach £60,000?

Answer: March 1950.

Interrogatory No. 5:
When the figure of £60,000 was reached, did the Directors give consideration to the defendant company's financial position with a view to deciding whether or not it was necessary to fix a larger amount, pursuant to clause 7 of the said Agreement?

Answer: Yes.

In the Supreme Court of New Zealand

No. 6.

Answer of L.R. Bowen to Interrogatories for examination of Hutt Timber & Hardware Co. Ltd.

18th June, 1962.
(continued)

Interrogatory No. 6:

If the answer to question 5 is Yes, did the Directors then fix any and if so what larger amount?

Answer: They fixed none.

Interrogatory No. 7:

If the answers to questions 5 and 6 are Yes, give the date and the reference to the record in the Directors' Minute Book or elsewhere of the resolution of the Directors fixing such larger amount.

Answer: There is no record in the Directors' Minute Book or elsewhere
10 of the Directors fixing a larger amount; but at folio 150 of the Directors Minute Book it is recorded that the Chairman stated that the Bank of New Zealand would require the capital of the Company to be increased to at least £300,000.

Interrogatory No. 8:

After the 28th November, 1947, when allotting or purporting to allot new shares and applying to the payment thereof part or all of the rebates due to shareholders, on what principles or basis did the Directors of the defendant company decide how many shares each shareholder was to receive and how much of the rebates was to be left standing to the credit
20 of each shareholder?

Answer: (a) Rebates were proportionate to a customer's transactions with the defendant company; and such rebates were declared on the basis of their being credited to payment of share capital.

(b) No principle or basis was adopted as to "how much of the rebate was to be left standing to the credit of each shareholder."

Interrogatory No. 9:

Were the principles or basis set out in the answer to the last question
30 applied equally as regards all shareholders entitled to rebates?

Answer: Yes.

Interrogatory No. 10:

After the 28th November, 1947 were all shareholders always treated by the defendant company on an equal footing as regards the payment out of cash?

Answer: Yes.

Interrogatory No. 11:

Did the defendant company pay out the following sums in cash to the

shareholders named on or about the dates stated?

To James Murray Limited £1,000 in 1953
To Grimes & Browning Limited £1,164 in November, 1955
To G.W. Bennett Limited £204.6.10 in November, 1955

Answer: Payment of the sums stated were made to the firms stated in the question.

Interrogatory No. 11 (a):

Give particulars of the extent to which the payments mentioned in the last question or any of them were in respect of rebates, and the extent to which they, or any of them, were in respect of other, and if so what, matters. 10

Answer:
(i) The payment to James Murray Limited was in respect of rebates.
(ii) The payment to G.W. Bennett Limited was in respect of rebates.
(iii) Of the sum paid to Grimes & Browning Limited, £914:13:10 was in respect of rebates; and the balance in respect of a share of profit due to Grimes & Browning Limited in respect of a land transaction.

Interrogatory No. 12: 20

If any of the payments mentioned in the last question were wholly or partly in respect of rebates, give in relation to each such payment, the following particulars:

(a) The year for which the rebate was due.
(b) The total purchases from the defendant company for that year of all shareholder customers.
(c) The total purchases from the defendant company for that year of the company to which the payment was made.
(d) The surplus revenue of the defendant company allocated to rebates for that year after making provision for a dividend (if any). 30
(e) The total rebate due for that year to the Company to which the payment was made.
(f) The total capital of the defendant company when the amount to be paid out to the respective builders from the rebatable funds for that year was fixed.
(g) The total shareholding at the same time of the company to which the payment was made.
(h) The extent to which the total rebate stated in answer to (e) was applied in the payment up of shares allotted to that company and the date of the allotment. 40
(i) Particulars of any further payments out in cash to that company in respect of that total rebate.

In the Supreme Court of New Zealand

No.6.

Answer of L.R. Bowen to Interrogatories for examination of Hutt Timber & Hardware Co. Ltd.

18th June, 1962. (continued)

Answer: 12 (a) James Murray Limited – 1951/1952
G.W. Bennett Limited – 1954
Grimes & Browning Limited 1952

(b) Information not now available.

(c) Information not now available.

(d) Year ending November 1951 – £24,617 : 13 : 5
Year ending November 1952 – £16,677 : 11 : 2
Year ending November 1954 – £42,292 : 7 : 2

(e) (i) To James Murray Limited – £1060 . 0 . 9 for 1951
– £478 . 6 . 3 for 1952
(ii) To G.W. Bennett Limited – £204 . 6 . 0
(iii) To Grimes & Browning Limited – £1824 . 13 . 10

(f) 1951 – £ 70,000
1952 – £132,500
1954 – £175,500

10

20

(g) James Murray Limited – 1951 – 3278
do – 1952 – 3905
G.W. Bennett Limited – 4322
Grimes & Browning Limited – 15,305

(h) James Murray Limited – £530 – May 1952
do – Nil – 1952
G.W. Bennett Limited Nil
Grimes & Browning Limited £910 – May 1953
do – £2280 – Sept.1954

30

(i) None.

Interrogatory No. 13:

Did the defendant company pay out any sums in cash to other shareholders in respect of rebates due for the years set out in the answer to question 12 (a), and, if so, were such payments made to all shareholders entitled to rebates for those years and, in the case of each of the plaintiff companies, when were such payments made and what were their respective amounts?

Answer: (1) The defendant did pay out sums in cash to other shareholders in respect of rebates due for the years set out in the answer to question 12 (a).

40

(ii) Such payments were not made to all shareholders

In the Supreme Court of New Zealand

No. 6.

Answer of L.R. Bowen to Interrogatories for examination of Hutt Timber & Hardware Co. Ltd.

18th June, 1962. (continued)

entitled to rebates for those years.

(iii) The plaintiff companies received in January 1953 payments of £257 . 15 . 9, £509 . 9 . 11 and £342.14.6 respectively from 1951 rebates. The plaintiff companies J.M. Construction Company Limited and Jones Timber Company Limited have since 1955 without the consent of the defendant purported to set off the whole of their credit in the books of the defendant company against their debit for timber purchases.

The plaintiff R.O. Slacke Limited without claiming such a set off has over the same period left his customer's account with the defendant company continuously in debit in sums in excess of his credit. 10

Interrogatory No. 14:

Since the 28th November, 1947, has all surplus revenue of the defendant company in each year after making provision for any dividend been rebated to builders in proportion to their respective transactions with the Company?

Answer: No. It has been so rebated to customers in proportion to their respective transactions with the defendant company. 20

Interrogatory No. 15:

Since the 28th November, 1947, has the defendant company allotted any shares to employees of the defendant company not being themselves builders?

Answer: Yes.

Interrogatory No. 16:

If the answer to the last question is Yes, has the defendant company applied in or towards payment of those shares any of the surplus revenue mentioned in question 14? If so give dates and full particulars.

Answer: No. 30

Interrogatory No. 17:

As to the allotments of shares comprised in increases of capital of the defendant company since 28th November, 1947, were any of these shares, or does the defendant company claim that 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, or the corresponding provision in any earlier Act?

Answer: No.

Interrogatory No. 18:

If the answer to the last question is yes, give particulars of the allotments concerned and state whether the requirements of the said section 60 or corresponding provision were complied with in the case of each such allotment.

Answer: No answer required.

Interrogatory No. 19:

Was an agreement similar to the Agreement dated 28th November, 1947, ever entered into with Auckland shareholders of the defendant
10 Company?

Answer: Yes.

Interrogatory No. 20:

If the answer to the last question is No, was it at one stage contemplated by the defendant company that such an agreement with Auckland shareholders might be entered into, and if so, why was the proposal not proceeded with?

Answer: No answer required.

SWORN at Wellington by the said)
LLEWELLYN RUTHERFORD)
20 BOWEN this 18th day of June, 1962) 'L.R. BOWEN'
before me:)

J.M. MOULDER

A Solicitor of the Supreme Court of New Zealand.

In the Supreme Court of New Zealand

No. 7.

Amendment of Statement of Claim

9th July, 1962

NO. 7.

ADMENDMENT OF STATEMENT OF CLAIM

NOTE:

At the hearing in the Supreme Court before Leicester J. the Plaintiffs were permitted to amend their Statement of Claim. The amendment relates to quantum only and is set out in the Judgment of Leicester J. It relates to paragraphs 5, 6 and 7 of the Statement of Claim. These paragraphs as amended read as follows:

"5 FOR the years which ended on the 30th days of November 1957, 1958, 1959 and 1960, the following rebates, inter alia, were due from the Defendant Company to the first two plaintiffs and for the years which ended on the 30th days of November 1958, 1959 and 1960 the following rebates, inter alia, were due from the defendant company to the third plaintiff:- 10

Year Ended	J.M. Construction Co. Ltd.	Jones Timber Co. Ltd.	R.O. Slacke Ltd.
30 . 11 . 57	£ 561	£1,405	
30 . 11 . 58	£ 389	£1,120	£ 665
30 . 11 . 59	£ 805	£ 917	£1,719
30 . 11 . 60	£1,448	£6,425	£2,106
	£3,203	£9,867	£4,490

20

"6 THE Defendant Company failed to pay to the Plaintiff companies the rebates referred to in paragraph 5 hereof. In purported satisfaction of the said rebates the Defendant Company purported to allot to the plaintiff companies shares in the Defendant Company of a nominal value corresponding to the amounts due in respect of the said rebates. Particulars of such purported allotments, as far as the Plaintiff companies have been able to ascertain, are as follows:–

30

Date of Return to Registrar of Companies	J.M. Construction Co. Ltd.	Jones Timber Co. Ltd.	R.O. Slacke Ltd.
4 . 12 . 1958	561	1,405	–
21 . 8 . 1959	389	1,120	665
18 . 7 . 1961	805	917	1,719
10 . 9 . 1961	1,448	6,425	2,106

"7. THE purported allotments of shares referred to in Paragraph 6 hereof were made by the Defendant company without authority and wrongfully and contrary to the express instructions of each of the Plaintiff companies, and no notices of allotment were given to the Plaintiff companies.

"WHEREFORE the Plaintiff companies severally pray as follows:

(a) Declarations that the shares referred to in Paragraph 6 hereof were allotted to the respective Plaintiff companies without authority and wrongfully.

10 (b) Orders that the register of members of the Defendant company be rectified by removing therefrom the names of the respective Plaintiff companies in respect of the said shares.

(c) The Plaintiff J.M. Construction Company Limited prays judgment for the sum of £3,203, the Plaintiff Jones Timber Company Limited prays judgment for the sum of £9,867, the Plaintiff R.O. Slacke Limited prays judgment for the sum of £4,490, being the debts due for the above-mentioned rebates."

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 8 K.L.Westmoreland.

Examination

NOTES OF EVIDENCE TAKEN BEFORE THE HON. MR. JUSTICE LEICESTER

9th July, 1962.

KEITH LIONEL WESTMORELAND

I am Deputy Registrar of Companies at Wellington and I produce the defendant company's files of documents registered in my office, and also a file of correspondence relating to the defendant company. Three files altogether. EXHIBITS. G.H.I. Turning to the file of correspondence, that includes a letter received from Jones Timber Company and J.M. Construction Co. Ltd. dated 2 July 1958 – a letter from Robinson and Cunningham, and a letter this year dated 12 April 1962 from Martin, Murphy & Jeffries. There are a number of other letters on my file relating to the defendant company and no-one on behalf of the plaintiff companies has perused those letters.

Are there letters relating to allotments of shares or alterations of allotments? I am not familiar with the contents. I have not had personal knowledge of the defendant company's dealings. There has been correspondence this year concerning an alteration to some allotments. The only letter that has been received from 19 April is from Martin, Murphy & Jeffries. At some stage I or my office instructed the defendant company that some alteration should be made in a return of the allotments. Turning to the company's return of allotments for file in July 1961 – 18 July 1961 – there has been an alteration made in that return to the shares allotted to J.M. Construction Co. Ltd., Jones Timber Co. Ltd., and Treseder Ltd. An alteration from 1334 to 805 shares in J.M. Construction Co. Ltd. 805 to 917 and 917 to 1334 – the alteration is simply altering the order, some transposition. That allotment – the notice of allotment was filed on 18 July 1961. The allotment was made on 28 June 1961. That alteration involving transposition was made – there is nothing on my file to indicate that. The alteration is made in ink and signed by the secretary. Starting from File 1, going through the annual reports of the Directors of the company and allotments. The defendant company was incorporated in 1943 with paid up capital of £29,200. It was reregistered as a public company in 1949, 3 March 1949. Until it was reregistered as a public company there were no annual balance sheets and profit and loss accounts filed in my office, so the first return was for 9 November 1948. The annual return made up to 9 March 1949 includes the Balance Sheet as at 30 November 1948. Turning to the Director's report in that Balance Sheet – that states that the Profit and Loss Account for the year after making provision

for depreciation and taxation, had a balance of £11,365 odd, and that with an amount carried forward from the previous year produced a total of £12,000 odd. And a sum of £10,150 has been rebated.

"Your Directors recommend 3% dividend amounting to £1189."

Turning to the annual return made up to 23 March 1950, that shows for the year ending 30 November 1949 the total amount was £20,441 with a balance of £703 carried forward making a total of £21,144. £19,000 payable by way of rebate. The balance available for appropriation is £2,144. The meeting referred to an Annual General Meeting of Shareholders to be held on 18 March 1950 and the directors recommendation was 2½%, £182. 10. 0. The return of allotments made on 23 February 1949 shows there was a return on that date filed on 7 September 1950 showing 7,660 shares had been allotted, and stated this was capitalisation of rebate. There is a return of allotments made on 7 July 1950, showing a total sum of £14,225 allotted in shares again as capitalisation of rebates. The list of allottees in that case shows amongst the allottees Jones, Wilfred Ernest, 352 shares; Jones Timber Co. Ltd., 716 shares, J.M. Construction Co. Ltd. 97 shares, and Randolph Owen Slacke 445 shares. There is no allotment to R.O. Slacke Ltd. Return of allotments made on 3 April 1951, shows amount of shares 8475, allotment paid for by way of capitalising out of profit payable by way of rebate on sale. Looking at the allotments for that year, they include the following, L.R. Bowen, Company Secretary, 150; and J.M. Construction Co. Ltd. 130, Jones Timber Co. 305, and no allotments to R.O. Slacke or R.O. Slacke Ltd. Turning to annual return made up to 17 April 1951, and to the Directors Report therein, in the Profit and Loss Account after providing for depreciation and taxation there is a balance of £24,449 and that this amount the directors have recommended to be paid by way of rebate. It says that of this sum £8,475 will be capitalised bringing the capital up to £70,000 and the balance £15,974 will be payable in cash. It goes on to say the directors have recommended that no dividend be payable this year. The next document on my file – a letter dated 21 December 1951 to Hogg Gillespie & Co., from the Deputy Registrar. The letter of 21 December 1951 gives consent under Finance Emergency Regulations to an increase in capital from £70,000 to £110,000 by creating 40,000 new shares the purpose being to cover the initial deposit of £40,000 on the purchase of a block of pinus forest in the Rotorua district. That is filed with the notice of increase of capital and says that the consent is also granted to issue of the additional shares at par for cash, such shares to be subscribed for privately and to be offered in the first place to existing shareholders. There is a return of allotments made on 23 Januray 1952, covering an allotment of 50,000 on terms of cash 5/- per share and amongst the allottees, these names appear, J.M. Construction Co. Ltd. 890, Jones Timber Company 875, R.O. Slacke Ltd. 1592. The next document is a return of allotments made on 27 May 1952, covering an allotment of 12,500 shares, and described as capitalisation of part of annual cost. Annual Return to 10 June 1952 – that contains a report of

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 8 K.L. Westmoreland

Examination (continued)

directors for 8th Annual General Meeting for 1952, showing Profit and Loss Account with £24,617, – the Directors have decided to rebate the whole of this sum and will capitalise £12,500, leaving £12,117 payable in cash. Turning to list of shareholders with that return – that shows amongst the list 2137 to J.M. Construction Co. Ltd., Jones Timber Co. 3396, Slacke 3822, and L.R. Bowen 1500. I can find no entry for R.O. Slacke Ltd. The return of allotments made on 20 October 1953. Allotment of 8,000 shares described as capitalisation of portion of company profit by issue of fully paid up shares. Shows amongst allottees L.R. Bowen 155, J.M. Construction Co. Ltd. 150, Jones Timber Co. 245, and R.O. Slacke Ltd. 260. The annual return made up to 23 June 1954 – report of directors for 10th Annual General Meeting says the Profit & Loss Account shows a credit balance of £43,474 and your directors have decided to rebate the whole of this sum and capitalise £23,000 leaving £20,274 payable in cash. That is a report in which there is a reference to progress made in building of mill in Tokoroa and the timber trade has been the highest on record for the current year. Annual return for year ending 31 October 1955 – it has been amended. The Report of Directors for 11th Annual General Meeting to be held in October 1955, Profit & Loss Account has credit balance of £42,297 after loss on Tokoroa of £11,202, and goes on to say your directors have decided to rebate the whole of this sum and capitalise £32,000 leaving £19,297 payable in cash. There is also a statement that the trade for the year has been particularly high bringing production of company's mill at Tokoroa up considerably, also exports to Australia. Returns of allotments on 29 July 1954 registered on 17 September 1954 – allotment of 35,000 shares said to be capitalisation of proportion of company's profit, and the list of allottees, L.R. Bowen, 415, J.M. Construction Co. Ltd. 1135, Jones Timber Co. 3485, R.O. Slacke Ltd. 1570. There is a further return of allotments made on 28 September 1955, covering 54325 shares, described as payable in cash of £1 each on four quarterly calls of 5/- each, and the return of allotments shows that neither J.M. Construction Co. Ltd., Jones Timber Co. Ltd. or R.O. Slacke Ltd. took any of those shares. The next return of allotments is a return made on 28 September 1955. It covers 53,000 allotted for consideration and 5,735 allotted for cash; 53,000 capitalised out of profit by way of rebate on sales, and 5735 quoted in cash. In the return of allottees the following names, L.R. Bowen 330, J.M. Construction Co. 850. Jones Timber Co. 2080 and R.O. Slacke Ltd. 705. Annual return made up to 5 November 1956 – before that the list of shareholders to 31 October 1955 – in the list of shareholders attached to that there appear the names of a number of shareholders residing in or about Auckland – about 19 of them. Looking back at the annual return for the previous year there are no Auckland shareholders for the 1952 year. The list of shareholders for the intervening year is missing at the moment. The Auckland shareholders appear in 1955, and the 1956 Annual Return —

ADJOURNMENT UNTIL 10 a.m. 10.7.62.

10 JULY 1962

The year 1956 in my Register - annual return for that year made up to 5 November 1956. It refers to the accounts for year ended 30 November 1955. The directors – of the Profit and Loss Account £12,454 net trading profit, trading due to decline in houses had not been up to previous years; Tokoroa sawmill had again shown a loss; due to heavy royalties there had been a steady decline in indigenous mill profits. Re rebates – the directors recommended that the whole of the net profit be rebated and issued as fully paid up shares. Net profit £12,454. List of shareholders in that annual return – J.M. Construction Co. Ltd. 4,998; total holding as at date of annual return, excluding any shares that may later be allotted following the Directors recommendation to the Annual General Meeting as set out in the Directors report. Jones Timber Co. 5,655 shares; R.O. Slacke Ltd. 5,379; for R.O. Slacke personally, none. L.R. Bowen, 2,000. Turning to the next return of allotments, made on 23 October 1956 filed on 14 November 1956 – covers an allotment of 16,885 shares described as capitalisation of undistributed profit. The allottees include J.M. Contruction Co. Ltd. 271 – the system of these returns of allotments consists of a list of allottees on a left hand page and a list of shares allotted on the right hand page, and to try to find out how many shares have been allotted to each allottee one has to endeavour to line up the two pages. My lining up of that is 271. Jones Timber Co. Ltd. 794, and R.O. Slacke Ltd. 232. Turning to Annual Return made up to 30 May 1957 – contains report of Directors for presentation to Annual General Meeting to be held on 30 May 1957 and refers to company's accounts for year ending 30 November 1956. The directors' report states that the accounts show a loss of £11,555. The report further states that trading at Lower Hutt and Tokoroa has been good and substantial profits on both but that the indigenous mills were a source of considerable loss. There is a reference to the Auckland yard –"The Auckland yard had its first full year of trading but due to shortage of housing, for the shareholders the turnover was considerably below expectations. It is anticipated that the position will be much better in the coming year". The next document is annual return to 31 July 1958 – filed 14 August 1958. There is a letter indicating there had been difficulty in getting that annual return. I wrote to the Secretary of the Company on 7 August "It is noted that your company's annual return is overdue, –". On 10 August – at this stage – I can only hazard a guess that I was prompted to write this letter. The obligation to file an annual return is to file one at certain intervals, within 14 days of the annual meeting. That is a statutory obligation. In this return filed on 14 August 1958 the directors report says as to rebates – "The accounts show a profit of £26,787 – after deducting previous year's loss and the Directors have resolved that that amount would be rebated to shareholders in relation to their purchases from the company and of that amount they have further resolved to issue £26,785 as fully paid up shares. That refers to the balance in the Profit and Loss Account for year ended 30 November 1957. That report of the Directors was for presentation to the

In the Supreme Court of New Zealand

Plaintiffs' Evidence
No. 8
K.L. Westmoreland

Examination (continued)

14th Annual General Meeting to be held on 19 June 1958. The date at which the report of the directors was completed – the auditors certificate is June 11, 1958. The report must have been completed before 19 June 1958 – it appears that it must have. Allotments made later in that year and registered on 4 December 1958. A return of allotments registered on December 4th 1958 – for the allotments which were made on 4 November 1958. It covers 26,760 shares. That figure of 26,760 is an amendment from 25,650 the amendment being signed by M.R. Bowen. The consideration is described as other than cash and particulars of the consideration given are capitalised profit as per agreement between company and shareholders. Of my own knowledge – any previous reference in any of the files to any agreement between company and shareholders – I would not know of any such agreement. Turning to allottees – shares shown for J.M. Construction Co. Ltd. 561; that is an original figure. Jones Timber Co. 1405; A figure of 161 – it is not very easy from perusing the return of allotments to be sure what has been allotted to whom – it is not easy for me at this moment, but it could be done. J.M. Construction Co. Ltd., 561, Jones Timber Co. Ltd., 1405; R.O. Slacke Ltd. 529. The return of allotments is signed by Mr Bowen as agent for shareholders. Comparing that letter beside it with the one for the return of allotments filed before then – 23 October 1956, registered on 14 November 1956 – that letter was signed by L.R. Bowen, Secretary – there is no reference in that to his being agent for shareholders. We covered the return of allotments on 14 November 1958. The next return of allotments on the file is a return made on 31 July 1959 and registered on 21 August 1959. The capital that covers is a total of 24,430 an allotment of 24,430 shares, divided up 23,520 issued in terms of rebate statement with shareholders – these are £1 shares – 910 issued as bonus shares to staff as per contract. Looking at the list of allottees, J.M. Construction Co. Ltd. 389; Jones Timber Company 1120; R.O. Slacke Ltd. 665. There are a number of allottees with Auckland addresses, about 15. That return is signed by L.R. Bowen, Agent of above subscribers. Turning to annual return made up to 30 September 1959, – that contains the report of the directors for presentation to the Annual General Meeting to be held on 30 September 1959. As to the Profit and Loss Account it says "The Profit and Loss Account shows a balance of £23,548. This sum will again be rebated in full to the shareholders and the amount of £23,520 will be issued as fully paid up shares." The Annual General Meeting is said to be taking place as 15th Annual General Meeting on 30 September 1959. The Annual return made up to 12 September 1960, and contains report of Directors for presentation to 16th Annual General Meeting to be held on 26 April 1960. Report says "The Profit and Loss Account after making provision for depreciation shows a balance of £49,882. This profit will be again rebated in full to the shareholders and £49,850 will be issued as fully paid up shares." The next return of allotments on file is a return made up to 28 June 1961. That is a return of allotments made on that date. The return is registered on 18 July 1961. The shares cover 43,430 allotted for consideration other than cash. consideration described as issued in settlement of rebate due

to shareholders from the company. The allottees are J.M. Construction Co. Ltd. (this return has been amended) 1,334 is original figure and amended 805; Jones Timber Company 805 original, 917 amended. R.O. Slacke Ltd. – no allotment, it is shown to Randolph Owen Slacke personally, 1719 shares. This latter figure has not been altered. The return is signed L.R. Bowen, Secretary. There is an annual return made up to 14 August 1961, registered 11 September 1961 and Directors Report says "Net Profit £101,403. It is again proposed to rebate the whole of the profits this year to shareholders in the form of shares." That was a report for presentation to Annual General Meeting to be held on (date not given). Return of Allotments made 12 September 1961 registered on 19 September 1961. 105,725 shares. Described as payment of rebate due to shareholders. The allottees are J.M. Construction Co. Ltd. 1448; Jones Timber Company 6425; R.O. Slacke Ltd. 2106; R.O. Slacke personally none. That is the last return of allotments on the file. The returns of allotments over the years in the case of shares for which rebate credits are to be used has normally been described as consideration for allotment as 'other than cash'. On the standard printed form of return of allotments there is a reproduction of the section of the Companies Act which described what is to be done when shares are allotted other than for cash. – s.60 – and that is the form which has been used by the defendant company in all these returns. S.60 required particulars of the contract or agreement constituting the title of the allottee. If issuing shares in the normal way for cash you don't have to file any agreement, but if you are purporting to issue them otherwise than for cash you do. Any such agreement or particulars thereof has not been filed in my office in the case of the Hutt Timber and Hardware Co. Ltd. to the best of my knowledge. There were two returns of allotments made on 28 September 1955 the first being registered on 18 November 1955 and the second return being registered on 5 December 1955. In the case of the first of those two the plaintiff companies were not allottees; in the case of the second of those two the plaintiff companies were allottees.

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 8 K.L. Westmoreland

Examination (continued)

CROSS–EXAMINED.

Cross - Examination

On the figures, would you check again the figure for the return of allotment on 53,000 where you gave us R.O. Slacke Ltd. 1305 – you first gave another figure, 705? The correct figure is 705. The requirement of agreements where shares allotted other than by cash is regarded as having a twofold application, first of all to cover requirements of revenue statute on agreement, and the second would be to prevent sale of fictitious assets – your department is enabled to scrutinise the assets? Yes. Your department made no queries on the returns as filed by the company? No. Your department presumably knew the general basis on which these shares were being made? Yes, and the Stamp Duties Department makes a practice of looking over our records in their own interests. So that they might themselves have (looked at the Defendant Company's returns)? Yes. Your

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 8 K.L. Westmoreland

Cross Examination

(continued)

early evidence of the amendment of the return where three companies were shown with incorrect figure, 1961 return of allotments, dated 18 July 1961. Wasn't that an error in transposition of names which was first raised by Mr Bowen himself? There is certainly an error in transposition and it has been signed by Mr Bowen. It is a matter your department itself would not pick up? No. Is there a directors' report for each year from 1949 say to the date on your file? I have not checked that myself. As far as you know there is one? I should think so, yes. The return of allotments 23 January 1952 showing an issue of 50,000 shares, that was a new issue, was it – no reference to capitalisation of profits? No, on the face of it it is very definitely a new issue. On the issue of 53,000 shares on 28 September 1955 does that make any reference to its being capitalisation only of the preceding years profits or is there any reference made to profits in other years? Talking of the 53,000 capitalised out of profit payable by way of rebate on sales. It doesn't make reference to other years? No. The 1955 return of allotments? There is reference to Auckland shareholders? Yes, there is reference to Auckland shareholders in the return you were discussing previously – 1955. The Auckland shareholders were shown together with the Hutt Valley shareholders in the same return of allotment? Yes. Could you point out the directors report for presentation at the 15th meeting. (Witness does so.)

Re-Examination

RE - EXAMINED

You said to Mr Relling that a certain allotment was a new issue, thereby implying that others were not new issues – that is not strictly correct, is it – aren't all these allotments we have gone through new issues? Yes, I was thinking in terms of capital. In the case of allotments which are in some way associated with rebates, the moneys used to pay up the shares have been the plaintiff companies' credits for rebates, and in what you call the new issues money has been brought in? Yes.

COURT: I think you said so far as your recollection extends there is no reference to any agreement under which these particular allotments were made? Yes. If these allotments were made in strict pursuance of the terms of a particular agreement, is there any necessity to have stated that at any time? The agreement has not been filed in the office. But you have no recollection of its being so filed? No.

Not all agreements between a company and its shareholders have to be filed? No, I was thinking of agreements coming within terms of s.60, certainly not all agreements between shareholders and companies. You have not seen what is termed the 1947 agreement? No. And can't say whether or not it is within that requirement? No.

NO. 9.

In the Supreme Cout of New Zealand

Plaintiffs' Evidence No.9 G.I. Hooper

Examination

GEORGE IAN HOOPER

I live at 5 Beecham Grove, Lower Hutt, and am a Company Manager. I am a director and secretary of both J.M. Construction Co. Ltd. and Jones Timber Co. Ltd. I am also manager of Jones Timber Co. Ltd. I have managed the business of that company since 1960. Prior to that Mr Wilfred Jones was living in Wairarapa and I carried out the duties of manager under his supervision. In 1947 I started working for Wilfred E. Jones Ltd. and Jones Timber Co. Ltd. Some time in July 1947. My capacity was accountant. J.M. Construction Co. Ltd. was not in existence at that time. It was formed about 1949 and when it was formed I became its accountant too. Wilfred E. Jones Ltd. was both builder and merchant company and in 1949 Jones and myself and solicitors had some discussion about merchant company and separate building company and as a result Jones Timber Co. came into being at that date. The shares which Wilfred E. Jones Ltd. held in Hutt Timber and Hardware Co. Ltd. were transferred to Jones Timber Co. and J.M. Construction Co. Ltd. The consideration for the transfer was cash. The shareholders in W.E. Jones Ltd. were Mr (Jones and his wife).

I produce a summary showing the position over the years as to shareholders in J.M. Construction Co. Ltd. and Jones Timber Co. Ltd.

EXHIBIT G. The initial shareholders in J.M. Construction Co. Ltd. were Mr Wilfred Jones and Mr Charles Morris, and subsequent changes in shareholding of that company are shown in the list produced. For Jones Timber Co. the shareholders at the time of the purchase of shares were .... In the case of one or other of the companies another person named Jones came in at a later date, a son, G.W. Jones. I myself have also come in as a shareholder. When I started with W.E. Jones and Jones Timber Co. Ltd. I knew that Hutt Timber and Hardware Co. Ltd. traded as a co-operative company. I was able to observe that from the transactions. By co-operative I mean they paid rebates back to their shareholders. The 1947 agreement I first heard of at the time of preparation of transfers in 1949. I met Mr Jones prior to my employment with this company. The question of the 1947 agreement was discussed when we prepared transfers for 1949. The transfers were prepared by me and I think they were delivered, by Mr Jones. A letter was received by W.E. Jones from Hutt Timber and Hardware Co. Ltd. referring to Rebate Agreement in 1949.

10 MINUTE ADJOURNMENT.

You knew that a letter had been sent to W.E. Jones Ltd. in 1949 referring to the agreement? That is correct. As a result of that I took

In the Supreme Court of New Zealand
Plaintiffs' Evidence
No. 9
G.I. Hooper

Examination (continued)

instructions as to what the attitude of the companies concerned was. Mr. W. Jones received the letter and discussed it – I received instructions and contacted the secretary for Hutt Timber and Hardware Co. Ltd. by telephone. I told Mr Bowen that as the capital which I believed to be £60,000 had nearly been reached my company did not consider it was necessary to sign the agreement. Apart from the fact that the £60,000 was reached, I gathered that Mr Jones had a 'no-sign' complex in relation to the defendant. There was another instance of this when at a later date my companies were asked to sign a guarantee by the bank and our company would not sign that. The bank guarantee was for an overdraft. 10
The shareholders were asked to sign the guarantee and my companies refused. Mr Bowen's attitude in this telephone conversation – he referred the matter to his directors. As far as I can remember there was no long discussion on it because I was not in full possession of the details. I am sure there was a reference to the £60,000 being nearly reached. I was present when the defendant company's documents were inspected after this action was started and I then saw a minute of the defendant company's directors relating to approval of transfers. That minute was shown to me and shows they were approved without any mention being made of the approval of the 1947 agreement. 20

EXHIBIT E. This is the minute I examined when the documents were inspected. In 1950 I do not recollect receiving some formal notification that the transfers had been approved but I gathered from subsequent transactions with the defendant company that they had been. In the early years we received some payments in cash for rebates. We received payments in 1953 in cash. Then the Hutt Timber and Hardware Co. Ltd. ceased paying cash to our companies – we received no further cash after that date. With regard to rebates, they were capitalised in the form of paid up share capital after 1953. Some portion of them were credited and left standing to our companies' credit and some used as shares. We very 30
infrequently received notification from the defendant company of those credits, and as a result our records are a little hazy for those years. We adopted the practice of setting off our credits against the price of goods we had been debited for by the defendant company. In 1955 we commenced doing that, J.M. Construction Co. Ltd. and Jones Timber Co. Ltd. That has continued until the present day. Our companies general attitude to Hutt Timber and Hardware Co. Ltd. – from 1953 onwards it appeared that the company was becoming more deeply indebted to the bank as a result of a course of policy being adopted by its directors. The result to shareholders was that no cash was being received on investments. We 40
had discussions with the Managing Director and as a result we, the two companies concerned, offered to the directors of Hutt Timber and Hardware Co. Ltd. a parcel of 2,000 shares for disposal in accordance with their articles. The articles required shares to be offered to directors for sale before being offered for sale outside. They circulated their shareholders and eventually disposed of 2,350 £1 shares, at par. That would be in 1953 or early 1954. There was some delay – it appeared that shares were

difficult to dispose of and in fact one shareholder, A.W. Tressider & Co. Ltd. did not take up the shares that had been allocated to them. The directors of the Hutt Timber and Hardware Co. Ltd. found the purchasers and divided the shares among them. They prepared the share transfers and forwarded them to us for signature. In 1955 we attempted to dispose of further shares. We offered shares to the Hutt Timber and Hardware Co. Ltd. again and they were unable to dispose of the shares offered. I produce the correspondence relating to this matter.

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 9 G.I. Hooper

Examination (continued)

EXHIBIT H. There are four letters relating to disposal of shares by
10 our companies in 1955 consisting of two letters dated 15 August 1955 from our companies to Hutt Timber and Hardware Co. Ltd., a reply by the Hutt Timber and Hardware Co. Ltd. dated 8 September 1955 and an earlier letter from Hutt Timber and Hardware Co. Ltd. to our companies on 25 July. (Letters read and confirmed).

After that the directors of Hutt Timber and Hardware Co. Ltd. were not able to dispose of the shares. We eventually disposed of them to C.H. Hewinson. He took them at par. They had special value to him in that he was mainly engaged in architect's work and ownership of the shares would enable him to purchase rimu from the Hutt Timber and Hard-
20 ware Co. Ltd. and other native timbers which were in short supply. Later those shares were disposed of and offered by the directors of Hutt Timber and Hardware Co. Ltd. to shareholders. We did not take up any of them. At this stage no-one was suggesting that J.M. Construction Co. Ltd. or Jones Timber Co. Ltd. were bound by the 1947 agreement. When we made the sale to Hewinson it was not suggested to us that he had to agree to sign the 1947 agreement. It didn't operate at that stage. Its terms had ceased to operate – the term of capitalisation at £60,000. – in 1950 this ceased to operate. Using rebates for shares was said to be because of the bank aspect of the situation. From approximately 1956/7 the Hutt
30 Timber and Hardware Co. Ltd. has been in what I would term a state of receivership, although not at law. It was never suggested that using rebate for shares was required by the 1947 agreement rather than by the bank. – not to my knowledge. At a later stage there had been references as to whether cash would be available to shareholders. On at least two occasions the directors of Hutt Timber and Hardware Co. Ltd. had stated the company would be in a position in the following year to make cash payments. In 1955 I received a circular from the Hutt Timber and Hardware Co. Ltd. relating to a new issue of £75,000.

EXHIBIT I – copy of circular.
40 That circular reads as follows. (read by counsel) With regard to that 75,000 issue, our companies did not, I think, take up any of those shares. There was an issue of 40,000 or 50,000 in 1952 which was referred to by the Registrar of Companies (quotes from foot of page 2 of Notes of Evidence). On that occasion we took up some of the new issue which had nothing to do with rebates, and that was in or about 1952. At that stage the shares were saleable. When this other issue was made in 1955 and

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 9 G.I. Hooper Examination (continued)

we received a circular relating to it we took up some of the 1955 issue, the amount that was standing at our credit. No share certificates were issued by the defendant company or any records. The reason for taking them up would be to turn the cash rebates into shares which could then be sold and in that way get some money out of the investment. We were aware at that stage that it was almost impossible to get the rebates paid in cash. The return of allotments if it does not show that our company took up any of the allotment, would be correct. Coming to 1957, our company at that stage took some steps with regard to its future relationship with Hutt Timber and Hardware Co. Ltd. The director of the two companies was in England then and I was becoming increasingly perturbed at the situation of our investments in Hutt Timber and Hardware Co. Ltd. I instructed our solicitors to take the necessary steps to protect our rights. The reason for my being perturbed were firstly that it did not appear from the way in which the company was being operated that there was any prospect of cash dividends or rebates being received for a long number of years. To my mind this was a designed plan of action by the directors of Hutt Timber and Hardware Co. Ltd. The other reason was that with the continual capitalisation of nearly all of the profits, the shares were rapidly decreasing in value. It is commonly known as watering the shares. My directors could foresee that the Hutt Timber and Hardware Co. Ltd. would so increase its capital that in future years it would not be able to pay a reasonable dividend. The income tax position – the companies which I represent were in a high tax bracket and the shares rebate by the Hutt Timber and Hardware Co. Ltd. were increasingly making our tax position difficult. We, in the case of Jones Timber Co., were faced with the prospect of paying 10/- in the £. on each share issued to us by Hutt Timber and Hardware Co. Ltd. That was the rate of taxation we would have to pay and the shares were treated for taxation purposes as income at that value per share. We made representations to our solicitors to approach the Inland Revenue Department and Mr Cunningham after considerable negotiation succeeded in having the Hutt Timber and Hardware Co. Ltd. shares valued as low as 1/- in certain years. As well as conducting negotiations with Inland Revenue Department Mr Cunningham conducted negotiations with Hutt Timber and Hardware Co. Ltd. It was decided we would accept no further shares from Hutt Timber and Hardware Co. Ltd. and Mr Cunningham was instructed to advise them accordingly. A letter has been put in that was written by Mr Cunningham in accordance with our instructions. I understand he received an acknowledgment but no reply as to the course of action. None of it was conveyed to me anyway. After Mr Cunningham's letter we continued trading with the Hutt Timber and Hardware Co. Ltd. They raised no demur about accepting our orders – they were only too grateful to accept them. At this stage there was a shortage of timber, but it was becoming increasingly plentiful.

COURT: What was the advantage of continuing with the Company? Their class of timber was taken into account. We were not able to yield from our own mills all our requirements.

They made no suggestion that we were no longer entitled to rebates. That was never discussed. We assumed – I never gave the matter any real thought but I knew we were not getting any new shares, but we would perhaps be entitled to rebates. (latter part of answer objected to) From about 1958 onwards there were statements made by the chairman and directors of Hutt Timber and Hardware Co. Ltd. regarding the future. There was a meeting of shareholders held in the form of a Christmas party in December 1958. There was a meeting in December 1958 which I attended at which the chairman of directors of Hutt Timber and Hardware
10 Co. Ltd., Mr Browning, stated that the prospects of being able to pay a proportion of the rebate in cash in the coming years was good. That was a meeting at which reference was made to shareholders having negotiations with Income Tax Department. Mr Browning read an opinion he had received from a Mr Richardson, a taxation consultant, concerning the valuation of the Hutt Timber and Hardware Co. Ltd.'s shares. This opinion was at variance with the position that we had discovered in our dealings with the Inland Revenue Department. Mr Browning felt it was wrong that any shareholder should make representations to the Inland Revenue Department to have the Hutt Timber and Hardware Company's shares valued at a
20 figure less than their nominal value of £1. He further went on to state that in the event of the Hutt Timber and Hardware Co. Ltd.'s shares being valued at 1/- by the Department the shareholders could at some stage be liable for taxation on the remaining 19/-. This was pointed out to him as being incorrect, as any increase in value on shares taken at 1/- would be a capital increase. In connection with his view that it was wrong for shareholders to get the shares valued at 1/-, he said the future prospects of the company were good, the company had lots of reserves, and that in a short time they would be in a position to pay cash to their shareholders. That meeting could have been in December 1959. It was in the nature of a
30 Xmas party. After the decision and instructions to take no further shares it was subsequently discovered by our auditor that further shares had been put in the companies' names. No allotments or share certificates had been received. Two letters have been produced by Mr Cunningham repudiating the shares, and these letters were written by direction of our company. The directors were most disturbed that the instructions of 1958 had not been adhered to. We also learnt from the auditor of the two allotments made in 1961, and it became evident that only litigation would settle the position as far as we were concerned.

COURT: Were these shares since 1958 purported to be the full
40 amount of the rebateable fund or only portion? The full amount except for odd shillings and pence.

Did you have any knowledge of any agreement with Auckland shareholders? Not until I visited the Hutt Timber and Hardware Co. Ltd.'s premises with Mr Cooke on discovery of documents. I heard discussion between Mr Cooke and Mr Bowen regarding that agreement.

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 9 G.I. Hooper

Cross - Examination

CROSS – EXAMINED

You have been either secretary or manager of J.M. Construction Co. Ltd. and Jones Timber Co. Ltd. since 1949? I have been secretary of both since 1949, but not manager of J.M. Construction Co. Ltd. How long have you been a director? A director of J.M. Construction Co. Ltd. since 1954 and Jones Timber Co. Ltd. since early 1960. Did you become secretary of W.E. Jones Ltd.? Yes, about 1949. Did you remain as secretary until they ceased trading as W.E. Jones Ltd.? It is still operating in a different sphere. Was it not put into liquidation? No. Have you continued as secretary? Yes. Jones Timber Co. Ltd. and J.M. Construction Co. Ltd. bought 2,500 shares altogether from W.E. Jones Ltd.? Yes. Is it correct that at the time of purchases of shares by Jones Timber Co. Ltd. and J.M. Construction Co. Ltd. they took over separate parts of W.E. Jones Ltd.'s existing business? Yes. Jones Timber Co. Ltd. would take over the merchant side and J.M. Construction Co. Ltd. the housebuilding side? Yes. And the two respective blocks of shareholding would represent the purchase of those parts of the business? Yes. And the parts of business taken over were going concerns? Yes. So that you would take over all the benefits that were at that stage accruing to W.E. Jones Ltd. in respect of shares? No not necessarily so – some of the contracts with W.E. Jones Ltd. were continued by them. But you took over all the benefits that accrued to W.E. Jones Ltd. in proportion to the shares? Yes, at valuation. And apart from the odd washing-up work you would have taken over the obligations of W.E. Jones Ltd. in respect of those two portions? Yes. Mr Jones himself was a signatory to the 1947 agreement? Yes, I understand that is correct. I only saw that when we went to the Hutt Timber and Hardware Company's office on discovery. W.E. Jones Ltd. is typed and Wilfred E. Jones Common Seal is there and Wilfred Jones has signed it – would you have a look at this original? That is correct.

EXHIBIT 1. AGREEMENT. The reason Jones Timber Co. Ltd. and J.M. Construction Co. Ltd. required shares in Hutt Timber and Hardware Co. Ltd. at the time was to enable them to participate in the benefits Hutt Timber and Hardware Co. Ltd. were offering? That is correct; it gave them the timber. And you knew at that stage that Hutt Timber and Hardware Co. Ltd. was offering rebates to its shareholders? Yes, I understand that to be correct. That was one of the terms of the 1947 Agreement? I myself never read it – I have heard of it. You had some knowledge of it because you discussed the details with Mr Jones? I discussed the question of shares to be capitalised. From 1949 onwards you knew that there was an agreement as to capitalisation of rebates? Yes, up to 60,000. You knew there was agreement as to capitalisation? Yes. Did Jones Timber Co. Ltd. and J.M. Construction Co. Ltd. purchase the shares for cash? Yes. Was cash paid? Yes. At par? Yes. Were those shares shown in the books of J.M. Construction Co. Ltd. and Jones Timber

Co. Ltd. as assets? Yes. At par? Yes. Have they continued to be shown in the books of the two companies? The original shares. You didn't discover those books of the company – was there any reason? No none that I know of. In the years when rebates were capitalised and shares were allotted to your companies up to 1958, were the shares shown in the books of the two plaintiff companies? Yes. Were they shown as assets of the companies? They were shown as investments.

COURT: The shares that represented the allocation of rebatable funds? Yes.

10 They were shown in the assets portion of your balance sheet? Yes. What date is the last issue of rebate shares shown in the books of the company? I would say for the year 1958 although without reference to the books I wouldn't like to say because the rebates made by the Hutt Timber and Hardware Co. Ltd. do not follow any pattern and occur months after. Can you make available this afternoon the books of your company from 1958 up to date? Yes, I see no reason why not. I simply want to know the way in which you have treated those allotted shares? Yes, they can be made available. In the first year after we wrote to Hutt Timber and Hardware Co. Ltd. in 1958, the amount of rebate was shown as a sundry debt
20 and was written out on the other side of the accounts as a bad debt.

COURT: In other words you didn't treat the shares allocated subsequent to 1958 in the same manner as you treated earlier shares? That is correct.

I would still repeat my request to have the books (Decided books could be made available on morning of 11 . 7 . 62)

Witness: In respect of year 1960 no account whatsoever has been taken of rebate in the books. They have been totally ignored.

LUNCHEON ADJOURNMENT.

Mr S. Morris was director of J.M. Construction Co. Ltd. from its inception? That is correct? And still is? Yes. Mr G. Jones – was he a
30 director of Jones Timber Co. Ltd.? He became a shareholder in about 1946, and had become a director at that date, and has remained ever since. He was not a director of J.M. Construction Co. Ltd.? No. You told us when you started with these companies you had knowledge that Hutt Timber and Hardware Co. Ltd. was a co-operative company and rebated their profits? That is correct. You knew it was not registered as a co-operative company. You say it has the basis of a co-operative company? Yes. Which implies that all its shareholders are treated alike? It implies

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 9 G.I. Hooper

Cross - Examination

(continued)

that; I don't know whether they are or not. In 1949 you would expect the three plaintiff companies to be treated on the same basis as other shareholders? Yes. You told us you knew about the rebating of profits and the capitalisation of certain of the rebates? Yes. Did you know that terms such as those were included in the 1947 agreement? I knew nothing of the 1947 agreement apart from the fact that it provided for capitalisation. Did you expect that there was some other agreement in force other than the written 1947 agreement which provided for rebates and capitalisation? No I had no knowledge. But you knew it was the practice adopted? So. there must have been some form of agreement in existence? I have never been able to discover – I don't know whether anyone really knows. Until 1958 the plaintiff companies did not challenge the right of the defendant to capitalise rebates or part of them? Correct. And it was always accepted by your companies to that date that they had the right to do so? Correct. And capitalisation was part of the general rebating of profits scheme? It was not intended to go on – it was only up to a limited amount. It was not intended to go on – indefinitely. You have told us it was due to reach £60,000 almost at the time the plaintiff companies became shareholders? Yes. That would be 1949? 1950, I think the transfers were registered then. So that for the next eight years the capital would have exceeded £60,000? Yes. You would know that because of your attendance at general meetings – or your directors would know? Yes. You yourself would have seen some of the annual reports? Yes. And in those years they would have shown capital in excess of £60,000? Yes. And during those eight years rebates were still capitalised partly or wholly? Correct. You don't deny the right during those years of the defendant so to capitalise? No, we accept the right year by year. So that in those latter years there was no change in your view of the right of the defendant to capitalise these? As far as we were concerned he didn't have any right unless we said so. You did accept capitalisation? Yes, up till 1958. Without any protest? Without protest. You knew that all other shareholders were adopting the same basis? Yes. In 1949 you would agree that whatever the basis of trading on the basis of rebates, all shareholders of the company were to be treated alike? No I don't know that because they weren't all treated alike. Some seemed to get larger cash rebates and others such as ours got larger shares and small cash rebates. Are you aware that certain of the companies to which you are referring traded in shares for cash and cash for shares? No I am not aware of that. If that did in fact go on that would account for discrepancies in allotment of shares? In some cases, yes. Do you know of any case where the rebate formula was not precisely followed by the defendant in the first instance? I have heard rumours but have been able to confirm them because the calculation was destroyed. The granting of rebates by this company was a beneficial term to you and other shareholders? I wouldn't say that – it may have been in earlier years but not in latter years. Would you agree that up to 1958 it was beneficial? Up to 1956 or 1957. There was no other company with which you could have traded and got any rebates? I couldn't answer that – we made no further investigation.

You know of no companies? No, I don't. And in all your purchases you paid current prices? We paid the retail price. The same price that would be charged by other purchasing companies? Yes. And in addition you got a rebate for whatever it was worth? Yes. On that point of retail prices, didn't Jones Timber Co. Ltd. purchase its timber from the company at wholesale rates? The surplus timber was purchased at wholesale rates – we got no more advantage than we would have got by purchasing from other companies. The only thing you have any detailed knowledge of is the £60,000 limit in the 1947 agreement? Yes. Did you have no knowledge of any of the other terms? No. Who told you that rebates would be capitalised? Sometimes I asked Mr Bowen; in some years the Hutt Timber and Hardware Co. Ltd. sent out a memo. In other years I ascertained myself. Originally you asked Mr Jones? No. It didn't interest us because a figure was quoted to us – the information had to come from Mr Bowen. You say you didn't even know the basis on which it was done? That is right. You made no enquiry? No. You know now that your interpretation of the limit of £60,000 is not quite in accordance with the document itself? I have seen the document and it says £60,000 or such amount as the directors think fit. You didn't know that? No. And is that why you took no further steps after the figure got to £60,000? We didn't consider ourselves bound by the agreement and similarly if Wilfred Jones Ltd. continued to hold shares they would not have been bound. So that you say that Jones Timber Co. Ltd. and J.M. Construction Co. Ltd. would only be bound in the same way by any agreement as W.E. Jones? If they were bound at all. You know that the directors each year recommended increased capital over £60,000? No – I may have seen the accounts – sometimes I did and sometimes I didn't. So in the year you saw the accounts you would know that? Yes. Up till 1953 you received some cash and some shares? Yes. – Paid in 1953 in respect of 1951 rebates. And from 1953 onwards you received all rebates? No, I don't think so – I think the amount standing to the company's credit in Hutt Timber and Hardware Co. Ltd.'s book was part – – – 1955 was the first year where all shares were issued? I think that is the date.

COURT: From 1955 onwards all the rebates seem to take the form of shares. Yes, except for odd shillings and pence. That seems to be so in all companies.

Did you make no enquiries at all as to the formula for capitalisation of shares? No, the defendant company's accounts were audited, and I left it to them.

COURT: Was it never a percentage rebate? I yet can't really grasp what it is all about, and in this respect if you have 5000 shares and I have 5000, you might get £1000 credit and I could get £2000 credit – the formula

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 9 G.I. Hooper

Cross-Examination (continued)

as to how these were worked out was destroyed. The initial method of arriving at the rebate? On purchase – the percentage of purchases to the whole of the company's sales.

But you knew there was a method of equalisation in course up to 1953 but you don't know the basis? That is right. Do you agree that the defendant company needed extra capital for its expansion? If the expansion had been carried out in a reckless way it has of recent years, yes. Up till 1958 it needed extra capital for expansion? Yes. And that is the reason for capitalising the rebates? That was because the company was heavily in debt to the bank and the only way the bank could reduce the overdraft was to take the shareholders' funds. Its indebtedness to the bank has been by reason of its expansion? Yes, its unlimited expansion has been the policy of one particular man in the company. But that has been the basis of its expansion? Yes. And as a result of its expansion your company and other shareholders gained increasing numbers of rebate shares? Yes, and of decreasing value. Would you look at these share transfers – I think they are the transfers from Jones Timber Co. Ltd. to which you referred earlier. Yes, that would be correct. These are the original letters in 1954/55 relative to the proposed sales? When you say relative to the proposed sales that is not quite correct because the shares could not be disposed of. Yes, I said proposed sales – would that be fair? Yes. Would you have a look at the letter of November 21 1954 – an offer of 1500 shares to which reference has apparently not been made – and similarly with letter of 30 May 1955 to which reference had not yet been made? Yes, they relate to a transfer to Hewinson. And you sold direct to him? No, we found the buyer; the transfer I think was prepared by Mr Bowen, and I think he collected £1500. Your company considered it had a good title to those shares it was proposing to sell? Yes. There was no suggestion made that the shares you were proposing to sell were not (properly) allotted to your company? No, no such suggestion. You said there was no mention of the 1947 agreement made when the sale to Hewinson was put through? Not to our company – I haven't seen the share transfer. You don't know whether discussions were carried out? No, although I think Hewinson would have told us – I am quite sure he would have. Would it be correct to say that your reason for dissatisfaction with the rebate shares was because of taxation? Only in part – one of the main reasons was dissatisfaction with the policy adopted by the company. You did nothing to try and change that policy? That was beyond us. What basis during what years had you in fact paid taxation on these shares at 1/-? I couldn't tell you offhand – – – I would say in 1954, 1955, and perhaps 1957, but it could be a year either way. Did you have other years at 2/- or 4/-? No. When do you say you were first taxed on the basis of £1.? When the shares were first issued. And then there was a change to 1/-? Because the shares were not valued at £1. Did you receive a circular concerning shares to be allotted to Mr Browning, the general manager? Yes. That circular made some reference to the value of shares at 1/-? They said they would be given to him at 1/- a share, but our company

would not contribute to that and were not in favour. That circular was 1955? About that time. Did you use that circular to cut down the valuation of your shares for taxation purposes? I had nothing to do with the approach to Inland Revenue – that was handled by Mr Cunningham. Did you give him that circular? Yes I think he had that circular. After you gave your notice in 1958 your company would not have suffered any financial disability in trading with other merchants? No, I think that is a fair statement. But you continued trading with Hutt Timber and Hardware Co. Ltd. after that notice? Yes, because we already had an investment. And you continued up to date? J.M. Construction Co. Ltd. yes, and Jones Timber Co. Ltd. until about 1960. There were no discussions as to a changed basis of trading? No. Would you have been satisfied if you had got no rebates at all? That is difficult; we still hold shares in the company. Would you have traded with them if you got no rebates? I couldn't answer that – it is not for me to decide. It would be you and other directors? Yes. Would it be correct that a representative of Jones Timber Co. Ltd. attended general meetings from 1951 to 1955 inclusive? I should say that is probably correct. I didn't attend them. Were you aware that Mr Morris attended the general meetings from 1951 to 1961 inclusive on behalf of J.M. Construction Co. Ltd.? He may have done – he has never discussed it with me. Your companies received notices of meetings each year? Yes, I think that is fairly correct, although since 1958 I know we don't receive a lot of correspondence such as invitations to social functions. Were you at the 1959 Xmas party? Yes, but I haven't been to any subsequent ones. Did you receive copies of accounts? Yes. Did you receive each year the notice of the capitalisation resolution? That was attached to the accounts I understand. After the general meeting when you received a rebate chit showing what had happened to your shares in cash? I can remember receiving only about 1953 or 1953 – we do not receive any chits or notices of rebate. We havn't since 1954 to my knowledge and certainly not since 1958. Would you have a look at these – they are not made out in your company's name, but it is a cyclostyled form. I note they have no dates. Can you recall receiving any chits like that? Approximately 1, definitely not since 1958 and probably two years before that. Did you telephone Mr Bowen to find out what your rebate position was? In some years, but in other years by the auditor. That was a standing practice that either you or the auditor rang up? Yes, but in 1958 or 1959 accounts we brought the rebate in as a debt and I think that was the last time I enquired. In 1960 the auditor drew our attention to it. Evidence will be given you telephoned Mr Bowen in 1959 and 1960 and enquired about the rebate. That wouldn't necessarily be me. You deny you telephoned Mr Bowen and asked what your company's rebate was? I do. Your auditor may have done? Yes, he may have done and I would say he has. Did you telephone Mr Bowen in 1961 telling him that your companies did not want any more shares? I can't recall that. Apart from 1958 – we didn't ring the defendant company unnecessarily. You say you don't recall? No I don't. Do you recall any discussion with Mr Bowen about taking no more shares because of the taxation? No. Mr Odlin, our auditor, may have

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 9 G.I. Hooper

Cross - Examination *(continued)*

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 9 G.I. Hooper

Cross - Examination (continued)

been in contact with him. This meeting you referred to in December 1959 – both you and Mr Odlin were there? Yes, and Mr Morris. Isn't the tenor of the first part of the meeting that all shareholders should be able to benefit from low taxation if one shareholder can get away with it? No I wouldn't say that but I could explain my impression of the meeting. At that meeting did you take the floor and discuss taxation of these rebate shares? No, only after Mr Browning had read an opinion, which was not factually correct. But you took the floor and addressed the meeting? Yes. Would it be correct that at that meeting you indicated that the companies you represented had already had the advantage of 1/- a share valuation? Yes. And did you indicate at that meeting the system your companies used in getting that figure? I wouldn't say that – the system was having that valuation placed on them by the Inland Revenue – whether that was a system or not I couldn't say. Would it be correct that you told the meeting that you bought in the full credit of the rebate and then showed 19/- as a bad debt? No that wouldn't be correct at all. You deny saying that? Yes. You would agree you told the meeting you were getting your companies shares through at a shilling? Had had them put through at a shilling. It was a matter between the directors (of our own companies) not for the shareholders (of the defendant company).

COURT: Were the 1/- shares, shares which had been allocated to you subsequent to 1958 or prior? Prior, 1954, 1955, and 1957. The main point is that the opinion given by Mr Browning was not in accordance with the facts as I knew them.

But didn't he read out Mr Richardson's letter? Plus his own comments. Mr Richardson is a taxation consultant? That is right. – I might add Mr Browning could be tangled up with death duties – many people would not know any difference. Many of those people would have secretaries of their own? Not present at that meeting. You told us you had no knowledge of any written agreement. You knew one was being entered into with Auckland shareholders? I can't really truthfully say that – I may have known but didn't pay much attention and the time it was brought up in discovery was the first time I remember hearing of it. You mean you had no knowledge of the form of document? That is right. You say your companies have always been entitled to rebates? Yes, we have never been advised otherwise. You said in your answers to interrogatories that they had always been payable in cash - Interrogatory No. 11. (Question objected to and withdrawn) Do you contend that your companies are entitled to rebates always payable in cash? Yes. Is there any agreement that you know of which says that? No, but it could only be payable in one of two things, cash or goods. You know of no agreement? No. Do you rely then on some understanding which has arisen during the course of trading? No, after or when a profit is made it must be cashed. It can't be converted into anything else, shares, or suchlike, until the machinery is

put into being. You don't go on to say that there is an agreement that you must be paid in cash? No, but they must exist and they are in our name. But there is no agreement that the company must pay you cash? It they are going to pay their debts they must do. Is there a written agreement? No. Is there an oral one? There must be an understanding. You say it must have arisen through circumstances? (Objection)

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 9 G.I. Hooper

Cross - Examination (continued)

My sole question is directed to any agreement to pay rebates which have accrued in cash – you agree there is no written agreement and no oral agreement? Yes, that would be correct. And you say any agreement 10 would be because of circumstances? There would be no other way unless the company refused to pay taxation and distributed its profits in the normal way.

COURT: Is there any agreement that the rebates should be paid in other than cash? No, apart from 1947 agreement. From 1953 to 1958 you accepted by allocation of shares? By mutual consent.

You don't seek to put your two companies on any different basis from the basis on which other shareholders are? I don't think that our companies are prepared to accept some of the policies of Mr Browning which can only lead to the final disintegration of the Hutt Timber and Hardware Co. Ltd. 20 I don't know the basis of other companies. I think it is clear, but on your purchases from the defendant company there was no question of discounts being made available to be credited to each company in the books? By discounts do you mean trade or cash discounts. Cash discounts. There is a normal 2½% which is allowed. The rebatable funds were only arrived at as a result of overall trading? That is right. They had no relation to individual discounts which companies had? That is right. Your counsel made some reference to applying at a later stage for amended statement of claim to cover 1958. Your letter was dated July 1958 – your solicitor's notice? Yes, I think so. Up to that date of that notice you 30 had traded on exactly the same basis with the company as you had done for many years past? Yes. So that if you are claiming for cash declared in respect of the previous year's trading the company would have had no notice of your change of attitude until after a years trading had been completed? That would be correct.

RE EXAMINED

Re-Examination

Mr Relling put to you questions about what happened in 1949 when W.E. Jones shares were sold to the other two companies. Do you recollect his asking whether that meant the two portions of the Jones business were being transferred to separate companies? Yes. And do you recollect 40 telling me in evidence in chief that you had some discussion with Mr Jones

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 9 G.I. Hooper

Re-Examination (continued)

as a result of which you rang Mr Bowen. Were Jones Construction Co. and Jones Timber Co. Ltd. taking over the obligations of W.E. Jones – you indicated in general terms that was correct. My learned friend didn't specifically ask you about the 1947 agreement in that connection – was it the intention of J.M. Construction Co. Ltd and Jones Timber Co. Ltd. to bind itself to the 1947 agreement when they took the transfer of the shares? Not really, but at the same time there was no intention of evading any obligations. (Agreement outdated or nearly so - didn't warrant the time to sign it.) Would it sum it up to say that – (Objected to) If obligations fell on J.M. Construction Co. Ltd. and Jones Timber Co. Ltd. by law they had to meet those obligations? I don't know whether it would. – There was no endorsement on the transfer – the companies took it without any previous obligation. About contacts with Mr Bowen after 1958, I think you told my learned friend the auditor was in touch with Mr Bowen at some stage? Yes. Then a letter was written by Mr Cunningham on 29 January 1960 repudiating shares? Yes. Do you recollect how it came about that Mr Cunningham was instructed to write that letter? I think Mr Odlin discovered on verification that further shares had been issued and about that time the Land and Income Tax wrote and pointed out our accounts were not correct. Was it as a result of that you instructed Mr Cunningham to write that letter? Yes.

COURT: Would you have a look at EXHIBIT B – you will see in the years 1950 and 1951 that there are certain rebates in each of those years in respect of the three companies? Yes. Those rebates appear in those two years to have been split up somewhat differently between the three companies, one company receiving certain proportions in cash and others in shares and so on – do you know any way in which that allocation can be reconciled? None whatsoever – Mr Browning could perhaps supply that. Are you able to say whether that method of allocation in those years is or is not in conformity with the 1947 agreement? No I can't say because I am not familiar with the terms of the agreement. Any claim to a rebate the three companies had would depend, would it not, upon the ratio which the purchases of the shareholders bore to the general profits made? Yes, that is correct. Am I to understand that you personally left it to the defendant to work out what the rebates would be without precise knowledge of the amount each shareholder was to get? That is correct, because the accounts were audited by public accountants. On subsequent discovery we found this particular rebate level had never been altered. For the years 1953 to 1958, the practice became to allocate shares to the three companies and not to allocate anything in cash? Yes, although there was a promise, as I understand it, at each annual meeting that cash would be paid the next year, and I think we were led on by those promises not to take action sooner. Was it not until 1955 or 1956 that you became aware the shares were worth considerably less than their face value? Yes. At the meeting held in 1959 when the Managing Director purported to give information to shareholders based on Mr Richardson's opinion, was

anything said to the shareholders about the request of your company not to receive further shares? No it wasn't raised by me because I didn't consider it an appropriate time, and it wasn't raised by Mr Browning. From 1958 onwards is it your view that the shares allocated to your company were definitely a liability from a tax angle? Yes, definitely. And from an asset angle what do you say as to your becoming the owner of more shares? My personal view is that they are not worth more than 1/- at the moment. From the time of your notice in 1958 has any reason been advanced by the Managing Director or any other member of the defendant company as to why your request for no further shares has been ignored? No, I don't know of any reason advanced. In regard to the Auckland agreement, did you at any time peruse that? No. Did you know of it? I had heard of it, although I didn't even know the agreement had been concluded. I think there was some secrecy because local shareholders had been making a fuss and talking about action. From 1956 onward, had the system of rebates become of any real value to your company? None whatsoever. It is clear rhat you accepted for better or worse the shares allocated between 1952 and 1958? Yes, we accepted them until 1958. On what then do you base your claim that you should be paid the rebates from 1958 onwards in cash? We are shareholders of the company in respect of those shares to 1958 and as such are entitled to a share in the profits. But a share in the profits might not correspond to the amount you would receive under the rebate system? Our purchases in relation to the total sales of the company were – – – the shares rightfully belong to us. Is the company in a position to pay at the moment? I shouldn't think so, judging from the last balance sheet. If you received these rebates from 1958 onwards to a figure equivalent to the shares, they really become a debt due by the company? Yes.

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 9 G.I. Hooper

Re-Examination (continued)

TEN MINUTE ADJOURNMENT.

EXHIBIT 2 – SHARES: EXHIBIT 3 – LETTERS:

In the Supreme Court of New Zealand

NO. 10

Plaintiffs' Evidence
No. 10
R.O.G. Slacke
Examination

RANDALL OWEN GEORGE SLACKE

I live at 1 Mitchell Street, Lower Hutt. I am a shareholder and company director of R.O. Slacke Ltd., one of the plaintiff companies in this action. I am trading as building construction company in Lower Hutt and surrounding districts. Before the war I traded on my own account and commenced round about 1929; through the depression years, I left the business and came back about 1936. At the early start of the war I was trading on my own account and there was a combination of the separate builders in Lower Hutt to do defence work. That combination actually formed itself into a company. The name of the company was The Hutt Valley Master Builders' Construction Co. Ltd., and as its shareholders were a number of builders in the Valley – I don't remember exactly how many. It undertook defence work and did not buy or trade at the start. Later that company did not do any buying. There was a system in that company whereby we contributed men to the company. When the company was formed in the war years, each passed over the men employed by us. Our men worked for that company and any profit of that company was proportioned to the builders pro rata per man hours contributed. The profits were given back to the shareholders. The man who actually conceived that idea – Mr Browning had a portion in it, and Mr Wilf. Jones had a share. The managing director of that company was Mr Browning – who is now managing director of Hutt Timber and Hardware Co. Ltd. I was at a meeting of that construction company in about 1942 or 1943. At that meeting it was decided to make some alterations to that construction company. Mr Browning the managing director, referred to "the Hutt Timber and Hardware Co." and a member then queried what the meaning of the name was, and he said he would refer to that later in the evening. That would be about 1942 or 1943. He made a brief reference later before the finish of the meeting that they were going to change the name of the construction company which was to become a timber and housing company. It was then proposed that the new company – the trading would be on the same basis as previously but the man hours would be added to the money invested in the company. That company was formed and I would think it was about 1944 or 1945. The Hutt Valley Master Builders Construction Company merged into the new company. The shares I had in the Construction Company were automatically taken over by the new company. I was a signatory to the Articles of the new company. At the very inception of the company it was thought the new company would trade with builders only – only the shareholders. The state of the timber market at that time was that it was exceptionally hard to get timber. Mr W. Jones was endeavouring to get preferential discount from merchants for builders. Anyone could get timber from merchants at the same rate as builders.

The profits were to be paid out to the shareholders in cash pro rata of their purchases. I cannot remember any reference at that time to payments according to capital contributed. The profits were to be paid out to the builders in cash. They were paid, with the previous construction company, in cash. That is the way the Hutt Timber and Hardware Co. Ltd. traded between 1943 and 1947 as far as I can remember. I have heard mention of this 1947 agreement, but I haven't seen it that I can recall. I believe I did sign that agreement – if I remember rightly we all lined up and signed it one after the other. There was no opportunity of studying it.
10 Looking at the bottom of the agreement, that is my signature. At that stage I was then trading on my own. In 1949 R.O. Slacke Ltd. was incorporated and that took over the business I previously carried on. The defendant company would have been advised of the incorporation of R.O. Slacke Ltd. After incorporation some shares were transferred from the defendant company to my new company, I think. I don't know if they were submitted to the defendant company. R.O. Slacke Ltd. were never asked to enter the 1947 agreement. I attended a meeting of the shareholders of the defendant company some time early in 1950. There was a discussion at that meeting about further expansion of the affairs of Hutt Timber and
20 Hardware Co. Ltd. That is when they decided to go into the pine forests at Tokoroa – I would say it would be first mentioned probably in 1950/51. The meeting I would think, would have been in 1951. A proposal was not made at that meeting as to future payment of the rebates. Mention was made by the managing director that they wouldn't be allowed to pay out rebates in cash for the next three or four years, and then the shareholders would be in the box seat – everything would be all right. Mr Browning said it was on account of the overdraft the bank would not allow the rebates to be paid out. Mr Browning proposed that instead of paying the rebates out they would be capitalised into further shares. Mr Browning
30 mentioned, I am definite on this, either three or four years for this arrangement. I cannot remember any mention at this meeting of the 1947 agreement. In the 1950s. my company was doing mostly house construction work, and it was quite a prosperous business, making reasonably fair returns. During this period I was trading with the defendant company, but not entirely. I knew I was receiving shares for those three or four years. After that we were to get cash. The last cash I can remember getting is in 1953. The receipt of these shares was affecting my tax position – I was getting more and more worried about the amount of tax I had to pay on the profit, and there was very little profit left after the
40 tax was paid. The shares I received from Hutt Timber and Hardware Co. Ltd. meant I had to pay extra tax. I discussed this with my accountant and that led up to having a discussion with my then solicitors and a letter dated 10 December 1958 was sent by my then solicitors. A reply was received dated 19 February, an acknowledgment. Prior to sending that letter I was not satisfied with the policy of Hutt Timber and Hardware Co. Ltd. I had been dissatisfied from about 1957 onwards. They seemed to want to expand all the capital and create bigger overdrafts. I did not discuss this with Mr Browning or Mr Bowen of the company before the

In the Supreme Court of New Zealand

Plaintiffs' Evidence
No. 10
R.O.G. Slacke

Examination (continued)

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 10 R.O.G. Slacke

Examination (continued)

letter was sent. I attended most of the general meetings in that period. Mr Browning continually promised that that financial year and balance sheet under discussion would be the final one for capitalisation of the rebates. The reason advanced by the Managing Director for this continued capitalisation of the rebate was that he always blamed the bank for not allowing them to pay out cash. I cannot recall any reference having been made at these meetings to the 1947 agreement. After the letter dated 10 December 1958 was sent, earlier in the next year I had occasion to discuss the matter with Mr Bowen the Secretary of the company when I had occasion to call at the office. Mr Bowen followed me out to the door and told me he had received this letter but I had signed an agreement with the company, and that would have no effect. In the finish I said it was a matter I was not familiar with and it would be over to my accountant. When I was told about the agreement on that occasion – the last time I can recall hearing the agreement mentioned in this connection, I cannot remember. After the letter dated December 1958 my company continued to trade with Hutt Timber and Hardware Co. Ltd., and we were not receiving cash rebates. Eventually I thought that one day the rebates would be paid out in cash. After the letter of 10 December 1958 no approach was made until after the writ of this action regarding my company's trading with the defendant company. I never received any indication that the defendant company refused to trade with me before this action was commenced. Some time during this period my company adopted a practice in the payment of its accounts with the defendant company to offset portion of our account against the rebates which we considered due to us. That commenced probably in 1960. No complaint was received by me from the defendant company about this practice until after the writ.

COURT: Did you receive any account in which any credit was given by the company for moneys due under the rebateable funds? Not over latter years. They accepted your offset without comment? They made no comment. But did you keep getting accounts for your indebtedness, or were the accounts in some way the subject of credit? No, they kept the monthly account without any reference to offset.

When I first heard after the letter of December 1958 – I never received advice about any shares. Prior to 1958, in the early 1950s. and late 40s. we used at times to get a slip of paper saying the rebate was so much. I don't think there was any other information on it. I would say that continued until 1951 or 1952. In the period 1952 to 1958 when I received shares in payment of rebates I received no share certificates. I received no other advice personally that shares had been allotted. I now know that shares were allotted to me in 1959 but I received no advice of that. Further shares were allotted to me in July and September 1961 but I received no

advice whatsoever of that. I first personally became aware that shares were being issued to me after 1958 late in 1961, I think.

Examination (continued)

CROSS - EXAMINED

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 10 R.O.G. Slacke

Cross - Examination

When did non shareholders commence purchasing from the company? I wouldn't know. It has been going on for a good number of years? I wouldn't be in a position to answer. The 1947 agreement which you say you signed in your personal capacity, was read out at the time it was signed by the builders? I can't remember its being read out, but there was a discussion on it at the meeting. Do I understand there were a whole group of builders present when it was discussed and then you were asked to sign it? Yes. The smaller shareholders were handled by the general manager at the general meeting. This is the share transfer from yourself to R.O. Slacke Ltd. on 1785 shares in Hutt Timber and Hardware Co. Ltd. dated 17 November 1949? Yes. When that transfer was put through you had a discussion with Mr Bowen about the effect of the company on the shareholders? He would be notified through my solicitor that we were becoming a limited company but I had no discussion with him myself at all. Did you know in 1949 when you incorporated the company, that the 1947 agreement was designed to bind all shareholders? I took it that it would cover all. You may not have known all the terms in detail of that agreement but did you know the clauses regarding capitalisation of rebates – turning them into shares? I wouldn't know. You did know your company got some shares and some cash in respect of the rebates? Yes.

COURT: In 1959 and 1960 the company capitalised all the shares didn't they? Yes.

Did you have a secretary of your company in 1949 to 1955?. A public accountant and secretary, Mr Russell. Did he remain secretary? His firm was taken over in later years by Mr Odlin and he took over. I think he represented your company at some meetings? No. You refer to the discussion at the 1950 or 1951 meeting when Tokoroa was discussed, there was a discussion then I think about capitalising the shares? They wanted to increase the capital. That discussion related to the capitalisation of your rebates? Yes. You understood what was being done? In a broad sense. That procedure had been adopted in 1949 and 1950 also? I couldn't answer that. At all meetings until 1958 there was discussion about the position of the bank and the pressure it was putting on the defendant company. I would think from 1952 onwards. That matter was explained to the shareholders? Yes. And that was the reason given for requiring capitalisation of portion and later all of the rebates? Yes, the company wished

In the Supreme Court of New Zealand

Plaintiffs' Evidence

No. 10

R.O.G. Slacke

Cross - Examination (continued)

to capitalise portion of the rebates. And that procedure was to continue until the overdraft was paid off or reduced? For three or four years. Was not that the period in which it was hoped to reduce or eliminate the overdraft? To satisfy the bank. It was made clear you couldn't get cash until the bank was satisfied? Yes, but we were told it would be satisfied in that period. You said that you couldn't recall mention of the 1947 agreement at the meeting in 1950 or 1951 – the basis of that agreement was discussed though wasn't it? I can't remember. Up until 1958 do you accept that the company had the right to capitalise rebates or portions of them? No. From 1952 I would say for three or four years, but after that I don't agree they had the right. That takes us up to 1955 or 1956 – what steps did you take to protest between 1956 and 1958? Actually we were always assured we were going to get the rebates. You had notices of the meetings in which it was proposed to capitalise rebates, 1956 to 1958? I had notices, yes. You attended meetings of the company 1952 to 1955 inclusive? Yes. And in 1958? I wouldn't be sure about 1958. You made, assuming you attended at the 1958 meeting, you made no protest about the system then? Very few people made any protest whatsoever. My question to you was that you didn't make any protest? I didn't make any protest there. You continued to buy goods from the defendant? Yes. At the 1958 general meeting it was clear that all rebates were to be allotted in the form of shares? I can't remember attending that meeting. I may have been there.

COURT: What was the date of the meeting in 1958?

Counsel: 19 June, 1958.

At that period I was in failing health and I may not have attended. You say you received some chits showing the amount you received in rebates? In the early years. Do you deny you received any at all in the latter years from 1955 onwards? I never received any. Do you deny that your company received them? Practically all the mail comes directly to me – and if it had been there I would have seen it. Do I take it some could have gone to Mr Odlin direct? I doubt very much – he may have specially requested it. Your company's address is at your place? Yes. During these years 1955 onwards was Mr Odlin actually appointed secretary of the company? Yes. You heard some evidence that certain allotments showed your name personally and others showed the name of your company – were you aware there was some looseness in description? Had you received any notices showing your name or your company's name. I can't recall – it would all have gone to R.O. Slacke Ltd. The defendant always regarded you as being a company? Yes. This question of payment of

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 10 R.O.G. Slacke

Cross - Examination (continued)

accounts and setting off rebates, – the figure which you sought to set off was accrued cash from rebates? That was handled by the secretary who was also my accountant. But you knew that cash had been credited to you in the books of the company which was frozen? I didn't really know, but I concluded that. And it was that which you set off against your purchases? Yes. You were told earlier by Mr Bowen not to do it? I was not. During the period up to 1958 did your company ever after the allocation of shares, swap shares for cash with other shareholders? You mean did I buy shares? Yes. I bought some off Stummell and Roamann, I would say about 1950. They were rebate shares? They were the same shares as I held. You said you had no advice that shares were allotted – since when? Since about 1955 – when I say I had no advice, my accountant in making the balance sheet would have found out. He would have made enquiries each year to see what you had been allotted? Up to 1958. Your company accounts made no reference to these rebate shares after 1958? That is right. Have you not paid tax on them? No. Did you or your accountant make any enquiries from the defendant company as to what shares had been allotted? I would say there were no enquiries. You had a number of notices of meetings and rebate notices in your company's documents? Of annual meetings. You kept no record of which ones you had received? No. Apart from your solicitor's letter of December 1958, your company took no further steps to press the position about future shares? Not until the issue of the writ. Do you agree that the allotting of shares up to 1958 by the defendant company to your company was correctly done? No. When do you say it was incorrectly done? As far as I can remember from 1955 or 1956. Prior to that time you agree the shares were properly allotted? Those from 1952 to 1955 were ones I had agreed were properly allotted. During those years you made no specific request regarding the shares? No. During those years we thought we had no option but to accept the shares. I gather that Mr Bowen made it clear to you that the defendant could not accept your notice of 10 December. That appeared to be early 1959 – this discussion we are talking about? I think so. What brought about the discussion? The notice we had served on the company – he followed me out and said what I said before. Would it be fair to say that from the defendant company's point of view it would have to go on the same basis it had been going on for years past? He didn't definitely say it would have to go on. The notice that my solicitor had sent would be put aside – I took it there would be no further action. Did he not make it clear that the defendant company had to go on in the way it had been going on in the past? No, the discussion was very short.

ADJOURNMENT UNTIL 10 a.m. 11.7.62.

11.7.62.

1947/48 you were trading under your own name? Yes. During that period you were aware the 1947 agreement governed the question of rebates to shareholders? No, I wouldn't understand it. But you knew the agree-

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 10 R.O.G. Slacke

Cross - Examination (continued)

ment concerned the question of rebates to shareholders? Yes, but I didn't know its full significance. You didn't know its exact terms – is that it? Yes. You simply incorporated your existing business in 1949? Yes. Did your company when incorporated continue trading with Hutt Timber and Hardware Co. Ltd. as you yourself had done? Yes. Your company didn't come in as a shareholder of the defendant company on any different basis from what you had been on before? No. Your company received rebate shares in 1949? It may have, but I couldn't say. You told us that from 1955 to 1958 you don't agree that shares were properly allotted to you? That is right. During that period you took no steps to refuse? No, because we were already under promise that it was just for that year – next year everything was going to be all right. That statement by Mr Browning was made about 1952? It was made at every general meeting I attended. After your solicitors sent a letter of 10 December you didn't make any specific arrangement that you would get rebates at all? No. Are these two letters, the first one 9 December 1954, written by your company to Hutt Timber and Hardware Co. Ltd., the second 22 June 1955 written by your solicitors to Hutt Timber and Hardware Co. Ltd. concerning sale of certain shares which your company held in the defendant company? That is correct. EXHIBIT 5 – Letters.

Re-Examination

RE – EXAMINED

The letter of 19 December 1958 in reply to your letter from your then solicitors – do you recall that being received? It went direct to my solicitors. You knew the contents of it? I knew the contents. Was any reference made to solicitors in the letter? I just can't recall the wording of the letter, it was just an acknowledgment of our letter. When you spoke to Mr Bowen in early 1959 did you think that Mr Bowen's statements to you were on behalf of his company? I didn't think they were binding at all.

COURT: Mr Relling put to you that following your solicitors letter of 10 December 1958 terminating any arrangement to take shares you didn't make any arrangements about subsequent rebates, but your letter says: "On behalf of the above company we hereby give you notice that our client company is not prepared to accept any further shares in payment of rebates" – did you mean you were still prepared to accept the rebates but not the shares in lieu of rebates? Yes. Actually your trading with the company for year ending November 1959 and 1960 appear to be almost three to four times as large as many of the earlier years? They could be so, with expansion. I notice that the suggested rebate for 1959 is £1,719 and for November 1960 £2,106, and the largest rebate figure of any of the earlier years is £820 in 1950 so that apparently your trading became even more extensive with the company after the letter than before? Yes, that

would be so. Would you have continued that extensive trading if you had known that shares were being allotted instead of rebates? I understood my letter cancelled any further shares. Your letter was acknowledged on 19 December, acknowledging your letter and handing it to the defendant's solicitors for attention. I notice that in the allotments made in July 1959 and registered 21 August 1959 some 665 shares were allotted to your company? We wouldn't know about that – we ignored the shares after the letter. Between 19 December 1958 when the letter was acknowledged and 31 July 1959 when a fresh allotment of shares to your company was registered was anything said by either the managing director or secretary that your letter was as it were ignored? No, we were never notified of any share position. What did you understand the position to be in regard to rebates subsequent to your letter of 10 December 1958? I would get them by cash. Was that understanding based on anything said by the Managing Director? He always said at the general meeting that in the next year we would get the rebates in cash. If the cash came it was what might be described as money from home? But you haven't had cash rebates since 1951 – I think you got two cash rebates in that year? I wouldn't be sure of the figures.

NO. 11

In the Supreme Court of New Zealand

Plaintiffs' Evidence
No. 11
B.C. Odlin

Examination

BRIAN CHARLES ODLIN

I am a public accountant residing at Silverstream. I have been secretary of R.O. Slacke Ltd. since 1954; was officially appointed secretary after the 1955 Companies Act. I have more recently become a Director of R.O. Slacke Ltd. I am also auditor for other two plaintiff companies, since 1954. After I had been handling books of R.O. Slacke Ltd. for a time I felt that the company was being issued with shares in lieu of rebates and it was becoming onerous to pay tax on them and we couldn't raise any money from the bank on them because the bank considered they were of no value for overdraft. I discussed the position with Mr Slacke and as a result in 1958 he decided to write to the company and repudiate any further shares. This was done by his solicitor. As regards Jones Timber Co. Ltd. and J.M. Construction Co. Ltd. I first heard of the 1947 agreement in about 1958. I learnt of it then because my clients at that time had consulted Mr Cunningham in regard to the shares and he got in touch with Hutt Timber and Hardware Co. Ltd. and Mr Gillespie, their solicitor, informed him they were being issued under some form of agreement. When I and Mr Slacke decided to instruct R.O. Slacke Ltd.'s solicitors I knew R.O. Slacke Ltd. had not signed the agreement, but Mr Slacke I understood had signed it. Whether the Hutt Timber and Hardware Co. Ltd. was claiming to be issuing shares to R.O. Slacke Ltd. under any particular agreement – I think the answer to that would be no. That would explain why Mr McAlister's letter refers to "any arrangement there may have been". It was first claimed to me by someone on behalf of Hutt Timber and Hardware Co. Ltd. that R.O. Slacke Ltd. was bound by the 1947 agreement in 1961. In a conversation with Mr Gillespie he made that claim and that claim had not previously been made, to my knowledge. I was aware the Hutt Timber and Hardware Co. Ltd. had replied to R.O. Slacke's letter that the matter was being passed on to their solicitors for attention. I recollect attending one meeting of the Hutt Timber and Hardware Co. Ltd.'s shareholders in December 1959. I went there with Mr Hooper as the notice of the meeting said that it was a meeting in connection with rebates and tax on rebates. He thought I might be interested to attend. Also at the foot of the notice was that there was a Xmas party afterwards. I act as auditor for quite a number of other shareholders in these companies. At that meeting the Managing Director was present – Mr Browning took the chair and he referred to these rebates which had been issued and said that some shareholders had gone 'behind the company's back' to get these rebates valued at lower than £1, and he was most disturbed about the possible effect. He said it was the valuation of the shares. I don't think I could say the way he expressed it was very clear, but he did read an opinion from Mr Richardson which was at variance with what we had already found out through Cunningham. Mr Browning's

10

20

30

40

general attitude with regard to the future of Hutt Timber and Hardware Co. Ltd. was that the company was doing exceedingly well, that shareholders could expect dividends very shortly. In fact, there were many hidden reserves, which only he and the other directors knew about. He said the shareholders had only to go outside to look at their Daimlers and Bentleys to see the benefits they had received. He said he did not want the alteration on the shares to draw the Tax Department's attention to his company. One or two shareholders stood up and said they had heard that before and they hadn't received cash. He told one shareholder to sit down and he then declared the meeting closed and the Xmas party followed. Interrogatory No. 13 – the answer to that, the third part which relates to R.O. Slacke Ltd. (Question and third part of answer read by counsel)

10

That answer is correct – that portion. Since December 1958 the reason for that has been that my client company expected it would not receive further rebates in cash. At a later date Mr Bowen rang me about September 1961 when he said, referring to R.O. Slacke & Co. Ltd.'s account with Hutt Timber and Hardware Co. Ltd. that he had heard that it was being offset by credits in the rebate account and he said the company had no authority to do that. I understood him to mean that there was no agreement that this should be done, and I pointed out that our rebate credits were well in excess of the amount of our debit account. He didn't say anything further at that time. Mr McAlister's letter of December 1958 was not referred to. From the implication of Bowen's talk he obviously knew we repudiating further shares. I did not convey to him anything about my own view as to further shares. The matter was one which had been put in the hands of the plaintiff's solicitors. He didn't at the time inform me, either that shares had been issued. He said he would take it up with his company's solicitors and as a result of that Mr Gillespie sent for me about the first week in October. He in the interview said we had no right of set-off, that we were bound by an agreement to take the shares and I said that my clients solicitors' had written refusing to accept any further shares. He said we couldn't abrogate and that it was a deed binding for all time. I couldn't argue with him because I had never seen it. He already knew we had instructed our solicitors (R.O. Slacke & Co. Ltd.) and he suggested that perhaps I would be content if the company paid us out in full rather than pursue the action. At that stage he was aware that an action was in the offing. I had consulted Jeffries at that stage. I took it to mean that we would be paid out in part for all the shares – cash for the rebates that had accrued, less debits. This was put as Gillespie speaking for the company – it was not an offer, it was a suggestion. I said the matter was in the hands of our solicitors and I had no authority. The reason why he said R.O. Slacke Ltd. was adopting the offsetting procedure – he said that in his opinion R.O. Slacke Ltd. couldn't pay its debts and therefore was offsetting the account. I told him that was not correct and he said he would sue for the money and I said we were quite prepared to pay it into Court. After that we heard nothing further from Hutt Timber and Hardware Co. Ltd. until after the issue of the writ. After that we received two

20

30

40

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 11 B.C. Odlin

Cross - Examination

letters which have been produced in Court. I knew nothing about an agreement with Auckland shareholders. The first I heard of it was when we went to the company's offices on discovery.

CROSS - EXAMINED

You know Gillespie (is overseas)? Yes. This conversation you say you had with him in October 1961 – are you saying that that conversation is a pronouncement on behalf of the company as to the effect of these trading agreements? I think I would be entitled to assume he was acting on behalf of the company. You were not misled by anything he said? I don't think so. Were these discussions not on a 'without prejudice' basis? Not to my recollection. You do understand what I mean by that? I do, but from my recollection it was not so. At any rate no definite offer was made by Gillespie? Yes, I would not be in a position to accept an offer anyway. During what years, if any, were R.O. Slacke Ltd. Hutt Timber and Hardware Co. Ltd's shares valued at 1/-? Up to September 1961 they were either not written in the books at all; prior to 1958 they had been at par, and after that were not shown at all. As far as tax was concerned R.O. Slacke Ltd. were never made any part of the arrangement of valuing the shares at 1/-. It was only after Barr Burgess & Co. collected on behalf of Mr Tressider and other shareholders other than our companies made an approach to the Tax Department and then all the shareholders were advised that rebates had been fixed for certain years. We didn't take any action on that until about September 1961 when this action was pending. You then had your assessments re-opened? Correct. For all years up to and including 1958? We had to go ahead because otherwise we would have been barred from opening the earlier years when Mr Slacke had made good profits. The Inland Revenue Department would not allow us to claim for only those years, up to 1961. In fact your assessments have reflected the change from par to 1/- during those years you stated? In the years – we were anxious to get the earlier years so we could still object to the way they treated us in current years. But the position is right up to date now? Yes. Have Jones Timber Co. Ltd. and J.M. Construction Co. Ltd. received similar treatment? I am not really in a position to answer that, because I am their auditor. You have the companies' books here of J.M. Construction Co. Ltd. and Jones Timber Co. Ltd. – could you check it? – whether Jones Timber Co. Ltd. and J.M. Construction Co. Ltd. received re-assessments up to 1961 showing the rebate shares at 1/-? It is not easy to answer that, the reason being that these two companies were treated differently from R.O. Slacke Ltd. – R.O. Slacke & Co. Ltd. never valued their rebate shares at 1/-. Therefore I don't feel I can make any comparisons. In the first case of R.O. Slacke Ltd. we ignored the shares completely over the years and then we were re-assessed at 1/-. R.O. Slacke Ltd. had never shown the rebate shares in their accounts? Not since 1958. But prior to that they had? Yes.

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 11 B.C. Odlin

Cross - Examination (continued)

And they had been assessed at par? Yes. But the whole of the years up to 1961 were re-opened and they were assessed at 1/- for all years? Yes, in 1961 there seemed to be a bit of confusion and I have handed it to our solicitors for action. They put to 1960 shares which were not issued until July 1961. Irrespective of the confusion, at least until 1960 the rebate shares of R.O. Slacke Ltd. had been re-assessed by the Inland Revenue Department at 1/- a share? Yes. And the distinction you draw with the Jones Timber Co. Ltd. and J.M. Construction Co. Ltd. is that they had at an earlier stage arranged for re-assessment or assessment at 1/- and had paid on 1/- over a period? That is correct. The Jones Timber Co. Ltd. and J.M. Construction Co. Ltd. had continued to have their shares at 1/- until 1961? The J.M. Construction Co. Ltd. balances at 31 March and Jones Timber Co. Ltd. on 31 August. After writing our clients' solicitors – to the Hutt Timber and Hardware Co. Ltd. in July 1958 – we prepared the next set of accounts for Jones Timber Co. Ltd. for year ended 31 August 1958. In those accounts we showed rebates as a credit and on the debit side they were written off as a bad debt for the full amount. Because of the taxation year for 31 August being dated back to previous 31 March, on the Jones Timber Co. Ltd.'s account in March 1960 – – – we didn't take in any shares in those years – we took the rebate and there was no alteration in the share account. You say you took the rebate in and wrote it off? Yes, the entry in the books is to debit shares and credit rebate, so we established a debt for the rebate. Did you get the figures for these last three years of the rebates from Hutt Timber and Hardware Co. Ltd.? Either myself or one of our staff. You got the figures for each year from Hutt Timber and Hardware Co. Ltd. of the rebate? Yes. And you showed those in your books as an asset and then proceeded to write it off – for the last three years? In this particular year, 31 August 1959 we wrote the whole thing off as a bad debt. You showed the whole rebate as an asset and wrote the whole rebate off as a bad debt? It was set up as an asset which remains in the books. On 17 March 1960 this letter was received from the Inland Revenue Department which said "It is noted ..." Then we got an assessment on that basis. And that position continued in the following years? Having been instructed by the Inland Revenue Department that we must put 1/- in, in the ensuing year . . . In 1961 we reverted to the old system and left it out. You instructed McAlister Mazengarb to write a letter in December 1958? Yes. Did you not attend at the solicitors' office? I can't remember. Were you aware at the time that letter was written there was an existing arrangement between Hutt Timber and Hardware Co. Ltd. and shareholders regarding payment of rebates by issue of shares? I was aware that that was in existence. And that such arrangement had been in force between the company and its shareholders up till 1958? I was not aware of that. How far back were you aware of it? I was not aware of the details of that agreement. But you were aware there was an arrangement for an agreement which had been made? I recall that it was to be limited to £60,000. When did it expire? I knew it had expired by 1958. What arrangement then superseded that? Discussing the matter with Mr Slacke he said he had agreed to take further

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 11 B.C. Odlin

Cross - Examination (continued)

shares. Were you aware that this agreement to take shares was a general one with all shareholders and not an individual matter with Mr Slacke? I had no knowledge of the other shareholders. Did you make any inquiries from anyone other than Mr Slacke as to what the arrangements for this rebating procedure was? No, the matter was in the hands of their legal advisers. This meeting in December 1959 which you attended, did you address the meeting at all? No. Who would you be representing? No-one really asked me that question. You were then Secretary of R.O. Slacke Ltd. at that time? Yes. You know now that this reference to £60,000 was capable of extension to a larger figure? I only know what I have heard said in the Court. About that meeting, Mr Browning was concerned that all the company's shareholders be treated alike as far as their tax was concerned? Yes, he didn't like some people making other arrangements. This phone conversation with Mr Bowen in 1961 – September 1961 – did Mr Bowen say anything to you then about the longstanding arrangement of rebate shares – whereby the rebates had been turned into shares? What he said was just that we couldn't do what we were doing. Did he make it clear at the discussion that no one shareholder could change the policy? He did say that because of the position with the bank he couldn't allow shareholders to do that. Did H.O. Slacke Ltd. purchase goods after September 1961? Yes. From the defendant? Yes. You knew that an Auckland agreement had been proposed for a good number of years? No.

Re - Examination

RE - EXAMINED

As regards the preparation of the accounts for these various companies, what is the governing consideration as to how you presented the accounts? I was instructed some years ago by Mr Jones that the accounts should always be correct as to the tax part – he didn't want any questions arising from that. And in what you have shown in the accounts have you therefore complied with the requirements of the Tax Department so far as you are aware? The 1/- complied with what the Tax Department had already assessed. I knew at the time the company was taking steps to repudiate the shares. So far as the accounts were concerned when you complied with the Tax Department's requirements did you in any way tell the Hutt Timber and Hardware Co. Ltd. what the Tax Department required you to put in your accounts? We had no obligation to discuss our accounts or the way they were treated. Did you first show the rebate in full and write it off as a bad debt and subsequently at the request of the Tax Department bring it in as 1/-? Yes. In the case of Jones Timber Co. Ltd. and J.M. Construction Co. Ltd.? Yes, although we had not received a letter from the Tax Department. Did they send a similar requisition to R.O. Slacke Ltd.? No. And in their case you simply ignored the shares and rebates? Yes. But then did not the Tax Department re-open the matter in 1961 and did

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 11 B.C. Odlin

Re - Examination (continued)

you inform the Tax Department as to what your attitude was as to the right of Hutt Timber and Hardware Co. Ltd. to issue these shares? I wrote a letter to the Tax Department saying an action was pending about the shares. The tax position is now hanging fire pending this action? Yes, the position with regard to rebates into shares is still outstanding.

COURT: You told us that at the annual meeting of 1959 the Managing Director informed the shareholders that the company was doing exceedingly well - are you able to express any opinion as to whether that was correct? I haven't compared it with the following years results, but I didn't take that very seriously. Was it at that meeting that the Managing Director encouraged the shareholders to think that their rebates for the following year would be paid in cash? He implied that things were now coming right, and the cash would be coming for rebates – it was a message of hope. Are you in a position to express any opinion as to whether there was any justification for that statement at that time? No sir. – Subsequently it was proved he was wrong. In the year ending 30 November 1959 the rebate figure for R.O. Slacke Ltd. was £1719; would that from an accountancy point of view be a figure declared as at 30 November 1959? Yes – in regard to those rebates, you asked Mr Slacke why the rebates were higher . . . Do the rebates for 1959/60 year indicate a great increase in trading? As far as our client companies are concerned, they are all higher. It doesn't indicate a greater trading, but that past years losses have been made good and Hutt Timber and Hardware Co. Ltd. trading is more profitable. Rebate figures are definitely higher? Not as a result of increased trading by the plaintiff companies, but profits by the defendant company – in those years they opened their doors to other than shareholders for trading. In other words the ratio was higher in those years? Yes. Your companies shares – R.O. Slacke Ltd. shares for the year I mention was £1719 by way of rebate. As at 30 November 1959 did R.O. Slacke Ltd. owe the defendant company that amount or a higher amount? There is also a rebate credit in the books. At the moment is the amount owed by the defendant company as at 30 November 1959 in excess of the rebateable figure for that year? I should not think so. Apart from any obligations under this 1947 agreement to take shares, and from an accountancy point of view would it be accountancy practice to use the £1719 to set off wholly or in part the amount owed by R.O. Slacke Ltd. to the defendant? That is so. At 30 November 1959 do you know whether or not the defendant company was aware that shares had been valued at 1/- each by the Taxation Department? They were well aware of that – the December 1959 meeting – they had known it by then. With that knowledge, the utilisation of the refund of £1719 rebate in the form of shares, would be to give R.O. Slacke Ltd. only 1/20th of the amount of that rebate? That is correct. And similarly in the next year £2106, the shares were only worth 1/- they would in effect only receive 1/20th? Yes. Turning to the agreement, Clause 1 (read) do you know whether any dividend was ever declared in

In the
Supreme
Court of
New Zealand

Plaintiffs'
Evidence
No. 11
B.C. Odlin

Re-
Examination
(continued)

terms of the agreement? I think the last dividends were in about 1951. I don't know on what terms they were declared. Are you able to express any view as to whether it would or would not have been possible for the defendant company to have declared a dividend? It would be perfectly possible, only the way they treated their profits has been to rebate all their profits and therefore there is no profit left. It would have been possible to provide a dividend in terms of Clause 1 but they have rebated all their profits? Yes, in the earlier years they must have paid tax on some of their profits. Do you know whether the company adopted that procedure of capitalising all its profits in the form of shares after consultation with the shareholders or without consultation? I don't know personally, I have gathered from my clients that it was in the nature of a statement that that was going to be the position in the future. It was never a matter of discussion with you so long as you have been attached to R.O. Slacke Ltd.? No. It refers in paragraph 3 to such percentage as shall not be required for capitalisation . . . paid in cash – do you know whether or not it was necessary to capitalise the whole of the profits? No, I was not aware of that. Who would decide that – would it be a matter of policy for the directors? That would be the case. It would be in the Directors' hands. From an accounting point of view would it be the position that if the directors decided to capitalise the whole of the profits there would never be payable any cash rebates? That is true – they would be ignoring the agreement. Whether that is so or not, if in fact the policy had been for the last nine or ten years to capitalise the whole of the profits in shares they have precluded any possibility of paying out in cash? Yes. Is there no reference at the 1959 meeting by the Managing Director as to whether that policy would be pursued or not in future? He implied they had come to the end of it. Each year that R.O. Slacke Ltd. becomes a larger shareholder, you are faced then from the accountancy point of view with some struggle with the Department as to the value of these shares? Yes. I notice in the rebate accounts that from 1953 and onwards there has been a balance of some £700 to £900 in credit for your company – has that been utilised at all by way of off-set against moneys owing? That is part of the amount we are offsetting. Has the offsetting of that particular amount been challenged? That is all part of the rebate account. But it is a part that is not comprised of shares? Since 1958 it still lies as a rebate, but there was £700 odd prior to our notice lying uncapitalised. Has your right to have that particular amount offset been disputed? It is still lying there, but the answer is no. It is a proper amount to be so utilised? I consider so. But your contention is that in view of your notice you should be able to offset in cash the amount which has become translated in shares? Yes. Do you know what approximately that amount stands at at the moment – the amount of debt of your company? About £2,400.

10 MINUTE ADJOURNMENT.

NO. 12

In the
Supreme
Court of
New Zealand

Plaintiffs'
Evidence
No. 12
W.E. Jones

Examination

WILFRED ERNEST JONES

I reside in Wairarapa and am a Company Manager. I have lived in the Wairarapa 10 or 11 years. During the war years I at that time lived in the Hutt Valley and was a shareholder and director of Wilfred E. Jones Ltd. and that company held shares in a company that was an association of builders. That association was known as the Hutt Valley Construction Co. Ltd. It was a company formed about 1942 to carry out defence work construction and the shareholders in that company comprised all the mem-
10 bers of the Hutt Valley Master Builders Association. Prior to the formation of this company my own company and one other were actively engaged in defence construction work and a period arrived just prior to the arrival of the Americans here in New Zealand when defence work had to be carried on at a faster rate. The Manpower Regulations were invoked at that stage and the majority of smaller builders were to be directed to work for the larger firms. The Hutt Valley Builders Association had prior to this welded itself together in an endeavour to procure Government housing contracts, and rather than see our organisation disbanded and to retain the identity of the builders so associated we decided to form this company.
20 Mr Browning at that particular stage was Managing Director. All our manpower resources were then directed into defence work for the next two years. The profits made out of defence construction and work carried out were distributed to the shareholders pro rata of the man hours worked in relation to the shareholding and the profits made. The capital of the company was subscribed by the builders themselves — I think I am correct in saying on a basis of manpower provided. At the conclusion of defence work that company ceased to operate and the builders once again went back to carry out work they had previously been doing. On the resumption of housing work in which they were mainly engaged it was very apparent
30 that there was considerable shortage of timber and building materials to carry on the programme. It was then that the idea was conceived of forming the Hutt Timber and Hardware Co. Ltd. Originally the Builders Association had endeavoured to procure various discounts for builders and it was felt that in forming this company it would enable the builders to provide their supplies and also get any additional discounts they could anticipate. In this direction the company carried on similarly to the previous construction company, other than the distribution of the profits were agreed to be distributed in a different manner. These profits would be rebated to the builder clients so concerned annually. After a
40 year or so the company purchased a sawmill and while it was without supplies for a few months it acquired an area of bush in an area known as Waitere and this area provided sufficient logs for an additional mill which was then built and to give the company a life of I think 10 years. Once the two sawmills were in operation the supply of timber to the

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 12 W.E. Jones

Examination (continued)

shareholding members enabled the company to proceed and make profits. I myself was a director for one year, about 1945 or 1946. At that time the company was making profits and rebating them in accordance with the procedure described. My own firm also was engaged in sawmilling, as it had been previous to 1939 and again about this stage we had a sawmill on the West Coast of the South Island. The reason for my ceasing to be a director of the company was that my interests clashed, being in opposition to the other company. Anyhow I was needled out. I recollect executing the 1947 Agreement under the Common Seal of Wilfred E. Jones Ltd. – I don't recollect but I saw my signature on it so I must have obviously signed. 10
We often used to sign agreements, and it was stated, I think by Mr Hooper that I was 'sign shy'. I may be that way now as I once signed joint and several agreements with Hutt Timber & Hardware Co. Ltd., but I ceased to be a director. The recitals of the agreement (read by counsel) correctly describes the procedure that was followed. In the provisions of the agreement is a clause which relates to £60,000. I assume that figure was in relation to the amount that was needed to carry out the programme at the time. In 1949 my company sold its shares in Hutt Timber & Hardware Co. Ltd. Somewhere about 1948 our company acquired an area of bush in the Southern part of the Wairarapa and also acquired a sawmill in Martinborough. 20 At that particular stage I decided that the building activities would have to be managed by myself as the building side of our business was properly organised and also our timber yards – I decided that I would go to the Wairarapa and look after that part of the business. In making this decision I took into consideration the question of forming the J.M. Construction Co. Ltd. to carry on the building activities and Jones Timber Co. Ltd. a change in their shareholding to enable my brother to take an active part in the business, and an old employee of ours named Morris to be the Manager of the Construction Company. The building – all the assets in relation to the building side of the business and also the shares 30
in the Hutt Timber & Hardware Co. were transferred to the other two companies. It was necessary for the J.M. Construction Co. Ltd. to have shares, more so than Jones Timber Co. Ltd. in Hutt Timber & Hardware Co. Ltd., but as I had been associated with both and Hutt Timber & Hardware Co. Ltd. up to that date, felt it would be preferable they both carried on and took the shares respectively, as it enabled them both to get supplies which were very often short. I myself went to live in the Wairarapa in 1950 or 1951. There was a transfer of the shares in 1949. The approval of the Directors of Hutt Timber & Hardware Co. Ltd. – I didn't attach a terrible lot of importance to the particular document. Being 40
the Chairman of both companies I didn't assume it carried any particular responsibility beyond the £60,000 which the company was about to have at that particular time or in the future and I had never attached any particular importance to it until it was brought to my mind by our solicitors regarding litigation. About 1947 when that agreement was being prepared, there was no suggestion at that stage that the agreement would authorise the capital of the Hutt Timber & Hardware Co. Ltd. to be increased to half a million pounds. I was not in favour of the grandiose schemes that

have developed since that time. That was when I sort of lost interst in the Hutt Timber & Hardware Co. Ltd. There is no question of sour grapes – to my mind the company went beyond what it originally intended to achieve. Having been living away from Wellington since 1951 I have been personally engaged in the management of the first two plaintiff companies, but not in the day to day details. Mr Hooper is General Manager of our company. As regards the taking up of further shares in Hutt Timber & Hardware Co. Ltd., our companies decided that we wouldn't take any more shares, about at the time when they had the 5/- share payments, perhaps 1949. Over a number of years my company went on allowing the Hutt Timber & Hardware Co. Ltd. to issue shares at the usual rebate moneys to some extent. That went on, after this particular date. We were getting shares and we were also getting money. Originally we had cash and shares, and then got to the stage where we were only getting shares and no cash, and more so with Jones Timber Co. Ltd. than J.M. Construction Co. Ltd., our tax rate was made a burden in more recent years. As a result of that situation a decision was finally taken not to have any more shares. This decision was discussed approximately in 1957, for the first time, and it would be after our balance date in 1957. Mr Hooper drew my attention to it while I was away overseas but I didn't take much notice. I became worried as to the amount of these shares we were being issued with. I have heard a letter from Robinson & Cunningham written in July 1958 – it was written in accordance with my instructions.

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 12 W.E. Jones

Examination (continued)

CROSS - EXAMINED

Cross - Examination

Your shares were not a burden while they were put through at 1/-? No, they were not a burden as 1/-. Have you ever told Mr Bowen your reason for seeking to end the arrangement is the incidence of death duties? It certainly helped to draw my attention to the fact of the position we were getting into with the shares. Would you have a look at the two share transfers; they are the two transfers to which you have referred from Wilfred E. Jones to Jones Timber Co. Ltd. and J.M. Construction Co. Ltd. You signed each transfer on behalf of both parties? That is correct.

EXHIBIT 6. Share transfers. Would you look at the copy of this letter dated 10 November 1949 addressed to W.E. Jones Ltd. You recall receiving that letter? I don't recall receiving it but I probably did.

EXHIBIT 7. Letter. You were a Director of Hutt Timber & Hardware Co. Ltd. from 1943 until the Annual General Meeting in 1946 when you were voted out? About that time. W.E. Jones Ltd. was a signatory to the 1947 agreement and you signed on behalf of that company? Yes. Did you discuss that agreement with Mr Hooper? No, I don't think so – I don't

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 12 W.E. Jones

Cross - Examination (continued)

think I had any occasion to – I don't recollect it – it was a long time ago, but I don't think I did discuss it with Mr Hooper. We were just told to sign, and we signed. Was there discussion before you signed it? I would say there would be. We always fell in line. From the incorporation of Jones Timber Co. Ltd. and J.M. Construction Co. Ltd. would you not have discussed with Mr Hooper then the 1947 agreement? I don't recollect discussing it with them – I didn't attach much significance to it because the £60,000 was nearly there. We were always signing here and signing there. You knew there was power in the 1947 agreement to extend beyond £60,000? There is but I wouldn't say I took much notice of it. It would still have to be agreed. And it was so agreed at subsequent meetings year by year? I haven't attended those meetings apart from one or two. You attended general meetings of the defendant in 1950, 1951, 1952, G. Jones 1953, and yourself 1954, and G. Jones 1955? That would probably be correct. At each of those meetings the capital was gradually increased well beyond £60,000? It probably was. Rebates were promised every year, too. In 1950 your two companies received dividends from Hutt Timber & Hardware Co. Ltd.? I couldn't answer that. Do you recall 1951 when there was a dividend, and some cash and shares by way of repayment? I recall it somewhere about that time. You were at that meeting? I couldn't say – I probably was. You were examined about two matters and you said you never attached much importance to what was discussed with your solicitors – that was with reference to the 1947 agreement? Yes. Did you ever vote against the grandiose schemes you have described? – say 1952 onwards? That is a very hard question to answer. Did you say no to any such resolutions? I said no to a terrific lot of resolutions. At any of the general meetings? I have said no at several general meetings. To any such resolution? I have said no to plenty of them – they had various ways of doing things –they had a poll vote if anything became contentious. You were aware that all shareholders were receiving shares for rebates from 1952 onwards? I wouldn't particularly say that – I hear a lot of different things from different shareholders. Are you aware that the policy expressed from 1952 onwards was that all shareholders would be getting shares? No, I understand some were getting preferential treatment. I didn't understand that was the policy from the meetings. You received no cash for rebates since 1953? That would be correct. Under what agreement or arrangement do you say your company is entitled to rebates? There was no prospectus, but just the original set-up of the company when we first subscribed to it. We have had cash rebates. These were carried out to 1952. There were two or three different methods of payment – there was another one in which you had dividends paid on your capital. The larger shareholders could arrange to have some return for their money? It was never written into any document after the 1947 agreement? I wouldn't know – the original prospectus was changed from day to day. Your companies received notices of meetings from year to year? Yes. You know that shares were allotted to your two companies up to 1958? Yes. Do you recall receiving cyclostyled forms showing the amount? About once – originally we used to get those, and then they

ceased to come. I haven't been associated with the correspondence in our office for the last ten years so I wouldn't know whether they came over that period. The difficulty with the Bank of New Zealand has been discussed at the Annual General Meetings? Yes. And that the bank were prohibiting payments in cash? Yes. So at that stage you were not particularly hopeful about the future? I wouldn't like to say that – we were always hoping there would be cash payments but they haven't eventuated. As a result from 1953 to 1958 your two companies were allotted shares? Yes. You didn't complain? We complained amongst ourselves, but just put up with it. We had been promised there would be cash rebates each year. That has been the hope of the company? Yes. Your two companies continued trading with Hutt Timber & Hardware Co. Ltd. up to – are you still trading? J.M. Construction is, Jones Timber Co. stopped about six months ago. There is a particular difference between the two companies – one is a building company and it doesn't matter where they procure their supplies from because the basis is on rebate , and the other company has to make a profit and as it appears there is no cash rebates forthcoming, and there would be a liability in any further shares, it is preferable that that company should cease purchasing. As far as J.M. Construction Co. Ltd. is concerned, can it purchase goods from other sources than Hutt Timber & Hardware Co. Ltd.? Yes, anywhere they like, and at the same prices. So that even if no rebates at all had been payable to J.M. Construction Co. Ltd. they would have been happy to continue trading with Hutt Timber & Hardware Co. Ltd.? If it was only a matter of supplies I would say yes. But they had their money invested in that company and the original intention was that they were to have rebates on their purchases. As far as you are aware neither of your two companies made any fresh arrangement about rebates after the letter from your solicitors in 1958? Did they make any fresh arrangement about rebates on purchases? I don't think so – when we knew what the rebates were we have held them off our accounts and deducted that amount from the accounts.

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 12 W.E. Jones

Cross - Examination (continued)

RE - EXAMINED

Re - Examination

Did the Hutt Timber and Hardware Co. Ltd. ever tell you after your letter in 1958 that they weren't going to give you any more rebates? No.

COURT: It was you who instructed Mr Cunningham? Probably Mr Hooper and I approached Mr Cunningham after discussions we had, and our attention had been drawn to the position by our auditor. You knew of the instructions Mr Cunningham wrote in July 1958 declining to be registered as the holders of any more rebate shares. When did you know that requirement had not been complied with? When Odlin drew my attention to it after the next balance. Had you given any consideration yourself to

In the Supreme Court of New Zealand

Plaintiffs' Evidence No. 12 W.E. Jones

Re-Examination (continued)

the suggestion that as long as your companies continued to trade with the defendant company they would be forced to accept shares as a means of rebate payment? Only in the latter stages of it. We came to the conclusion that Jones Timber Co. Ltd. couldn't trade under those conditions, because we were virtually buying timber retail and selling retail. If these rebate shares in respect of which you have been registered since 1958 are worth only 1/- do you consider yourself that is a proper or adequate method of paying your rebates – I understand the suggestion is these shares are only worth about 1/-? That is correct. You were party to the original arrangement in 1947? Yes. Was there any contemplation then that these rebates would be paid by shares which were worth considerably less than the amount of the rebates? The value of the shares has altered from time to time . . . While the company made profits while it was milling indigenous timber and while that was so we were happy about the situation. Then the company became so big it carried on with the large pine operations and huge investments and in 1957 it made a loss and no cash rebates have payable for a long time and we more or less relied on that. If we carried on indefinitely accepting these shares we would be in the same position as Hutt Timber & Hardware Co. Ltd. – we would have our bank manager here. Do you know of any instance of these shares in the defendant company passing hands at more than par value? No, we sold some to Hewinson, but in selling those I made an enemy of a friend I have had for years.

CASE FOR PLAINTIFFS.

LUNCHEON ADJOURNMENT.

NO. 13

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Examination

LLEWELLYN RUTHERFORD BOWEN

I am Secretary of the Hutt Timber & Hardware Co. Ltd. I have been Secretary since 1944. The defendant was incorporated in September 1943, and the capital then was £29,200. I produce copy of the Articles and Memorandum of the Company. The copy of the Memorandum is a cyclostyled one and not a complete subscribed copy. EXHIBIT 8. When the company was incorporated all the shareholders were in the building trade with the exception of W.E. Jones Ltd. It became a public company in March 1949.
10 The reason for that was the number of members – it had gone beyond 25; and secondly so that dividends could be paid and qualify for Stock Exchange listing. An agreement was entered into in November 1947 between the company and its shareholders. That agreement was discussed with the shareholders. There was a meeting held. The clauses were discussed with shareholders. The shareholders had opportunity to ask questions on the 1947 agreement – a meeting was called for that purpose. The agreement had as one of its provisions capitalising of rebates. No discounts or reductions in purchase prices were given to shareholders – only the normal 2½ trade discount. Our company was selling goods at PIT retail prices.
20 The company had around 1947 – 1949 not a great deal of liquid cash – it was working on an overdraft. That fact had something to do with the capitalisation provisions, which were designed to help reduce the overdraft. The Hutt Timber & Hardware Co. Ltd. paid no tax on the surplus revenue. It was distributed in one form or another to shareholders and was taxable to them. For the first year or so cash dividends were paid to shareholders. Then the directors resolved not to pay further cash dividends. From about 1949 to 1951 rebates were paid partly in cash and partly by the issue of shares – it went for a further period than that; 1954 was the last year when a cash rebate was paid. Between 1951 and
30 1954 cash was paid out to shareholders until January 1953 that was the last cash rebate. The overdraft was arranged with the Bank of New Zealand Lower Hutt. Pressure was not exerted by the bank for the first few years in connection with the overdraft. Round about 1953 and 1954 it commenced. These two letters of 23 March 1954 and 23 March 1956 depict the bank's attitude.
EXHIBIT 9 – LETTERS. The company's turnover between the years 1949 and 1955 was expanding. There was about (15-25)% more business each year being done and the annual accounts will show that. The company extablished a mill at Mananui in 1946 and later the company established
40 operations in Tokoroa, late in 1951. That was fairly extensive, at Tokoroa – and expensive. The company roaded and developed areas of development in the Hutt Valley. The State housing policy on which we had been

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Examination (continued)

relying for a number of years was fading out because of a change in Government policy and we were forced to buy our own land to keep our builders in work. 'Our builders' refers to our shareholders. That involved the necessity of additional finances and those show from the annual accounts. These developments were discussed at general meetings of the company, and there was a special meeting called to discuss the purchase of a block in Upper Hutt. That involved at its peak a bank overdraft of about a quarter of a million, about the middle of 1951. A special meeting of shareholders was held to discuss that before it was commenced. As a result of these development projects work in house building was given to our own shareholders. 10

ADJOURNMENT UNTIL 12 . 7 . 62.

You have been telling us about the development of (the Hutt Valley land). Was that of any financial advantage to the shareholders? (Yes). As at 1953, had cash rebates been declared by the company which were at that stage not paid out? Yes. What happened to those? The Bank of New Zealand issued instructions that they be frozen. And they were frozen? Yes. Shareholders were told at the general meeting of this. A circular was sent round at a later stage asking for capitalisation of these frozen shares – the bank asked the company to endeavour to get them to capitalise them. Some did and some didn't, of the shareholders. The plaintiff companies left their cash showing as a credit in the company's books. I have heard the evidence of setting off of goods given by plaintiff witnesses, that is the fund to which we have endeavoured to apply the set-off. Since 1955 all rebates have been capitalised. The company was expanding during the years 1953 to 1958, and there was the sawmill at Tokoroa, the purchase of the forest at Tokoroa, and the operation of the mill there; this involved about £ . The value of the bush was £300,000 and the mill cost approximately quarter of a million pounds. In addition to that there was the big subdivision in Upper Hutt which was known as the Cottle Block, and our shareholder builders had the advantage of developing that block. The profits from all these schemes, including the Tokoroa Mill, came back into rebateable funds. It was not just the operation of our store and timber yard at the Hutt. The capitalisation of the rebateable fund was being used to finance the expansion. Had it not been for the expansion in the years 1957 to 1960, the position of the amounts of rebates to shareholders in those years would have been that there would no doubt have been cash available for rebate or dividends. The size of the individual rebates if it had not been for this expansion would have been round about £ – would have been based on individual transactions, and in recent years a lot of the builders' work has changed. The financial position was discussed each year with the shareholders and the question of capitalising rebates was discussed at each general meeting. The possibility of the shareholders requiring or demanding

all cash for their rebates was not envisaged at any stage. We send out a circular to our shareholders which includes the notice of the Annual General Meeting and a notice of a special meeting at which the resolution as stated on the circular is put to the meeting, a copy of the Directors' Report which is attached to the balance sheet. This copy of the 1958 set of circulars is correct. EXHIBIT 10. These circulars were sent out ever since I have been Secretary. As far as the plaintiff companies were concerned we did not change our practice after 1958 – we treated them as we always had. Our practice regarding circulars such as this – our office practice – was to put them out to the mailing clerk when they are ready to be posted – he has a list of shareholders. I never gave any instructions that the plaintiff companies were not to receive any circulars which were sent out. Rebate chits have already been put in as EXHIBIT 3, and this is the form of rebate chit which is sent out by our company. Not all the years are there, but the form which was sent out each year follows generally the wording shown on these. The chit dated 30 November 1960 is the form I have been using for the last few years. Since the company issued shares for rebates these chits have always shown the amount to be issued as paid up shares. Those chits showing amounts of rebates and numbers of shares issued were sent to the plaintiff companies – they were made out and put out for forwarding. There was no change in our practice after 1958. Turning to the 1947 agreement, I was Secretary of the company when that was prepared. Not to my knowledge has any other similar agreement been entered into with shareholders, apart from the Auckland agreement. Other than the basis set out in the 1947 agreement on capitalising, no other basis than that has been discussed with shareholders. The 1947 agreement was signed by all the then shareholders. I wrote the letter to W.E. Jones Ltd. of November 1949 which has been produced. That was written by myself on receipt of the share transfers. No written reply was received. I had no verbal reply from them. If the W.E. Jones Ltd. or the two purchasing companies had advised that they would not agree to a capitalisation of rebates scheme we would have returned their share (transfers).

COURT: Would that be because their refusal would put them on a different basis? It would have meant they would not comply with the agreement. They have to agree to accept the agreement, to comply with it? Yes. At that stage you say all the shareholders were accepting the agreement? Yes, including the transferors.

If these plaintiffs had come in on the different basis from the other shareholders this rebate scheme of capitalisation would have been most inequitable, probably. After the plaintiff companies were incorporated they commenced trading with Hutt Timber & Hardware Co. Ltd. – they carried on normally. The new companies, J.M. Construction Co. Ltd. and Jones Timber Co. Ltd. and also R.O. Slacke Ltd. when it was incorporated commenced trading with Hutt Timber & Hardware Co. Ltd. There was no suggestion by any of the plaintiffs when they commenced trading that they

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Examination (continued)

were doing so only on the basis that they would get cash only for rebates. To my knowledge neither I nor any officer of the company suggested to any of the plaintiffs that cash only would be paid for rebates. Apart from the 1947 agreement I am not aware of any written document which provides for rebates in any form – none whatsoever – again leaving out the Auckland agreement. At the stage when shares and cash were being paid and allotted – issued in proportions, the formula on which it was worked out was – the first procedure was to arrive at the total purchases each shareholder had made and then those were totalled up to get the grand total, then we took the profit to be rebated and each shareholder's share of that profit was in direct ratio of his purchases to the total purchases. That gave the total rebate he was entitled to. The next step was, if there was any cash declared by the directors, they would have to work out how much cash each shareholder was entitled to. This was done by Mr Barnett preparing the formula – Barnett and Cleary, who prepared the 1947 agreement – then we took the total shareholding of each shareholder and his proportion of cash was the ratio of his shareholding. The intention was that the shareholder who had the most shares would irrespective of his rebates get cash in relation to his shareholding. The ones with the smaller shareholding would get more shares, with the object of endeavouring to equalise the shares. In regard to the 1953 year as to the three plaintiffs there were several factors coming into it – the first is the volume of rebate that each shareholder is entitled to. They didn't all (make equal transactions). You could get one man with the same capital as the other getting possibly 50% more rebate.

COURT: One man seems to have 25 shares allocated –

Witness: Slacke had 25 shares – his rebate that year was not very big. What I want to know is why a shareholder with a credit of £662 should have £25 allocated to shares and the rest by way of cash credit while another who has £1389 should have £1135 allocated to shares and only presumably £250 to credit? They bought very largely and bought over the percentage of capital. We reduce everything down to percentage, taking the percentage of the total trading – J.M. Construction Co. Ltd. may have 4/5% of that rebate, and when you came to the cash side his total shareholding may be only 1% and that is why the shares were built up to make the shareholding higher.

If someone has a large shareholding in the company at the time when the rebate is declared and someone, making a comparison has a small shareholding, the one who has the large shareholding will get much more cash in proportion to his total rebate than the shareholder with the small shareholding – that was the intention.

COURT: Does it appear that Mr Slacke had a shareholding possibly ten or twelve times as much as the other shareholders? No, J.M. Construction Co.'s business for the year was very much greater than R.O.

Slacke Ltd.'s and therefore they became entitled to a very much greater proportion of rebate – it is based purely on turnover. J.M. Construction Co. Ltd. would have done very much more business than R.O. Slacke Ltd. If Slacke gets £625 out of his £662 in cash as against £1135 to £1389 in J.M. Construction Co. Ltd. how much bigger is the shareholding of Slacke's than J.M. Construction Co. Ltd.? (Answer not recorded).

Do you know offhand the respective shareholdings in 1953? Mr Slacke's shareholding was 4,717 against 2,742 for J.M. Construction Co. Ltd. That accounts for J.M. Construction Co. Ltd. only receiving in cash credit £250 out of their £1,389 rebateable funds, and Slacke because he had double the shareholding receiving £625 out of £650. Inequality of cash share proportions in different years would be indicated – a number of shareholders were keen to acquire more shares, and they approached the directors in regard to getting more shares. And the suggestion was made that they find other shareholders who would make a deal with them. This occurred after the year's trading had been announced. Shareholders made a swapping arrangement such as I have described, and the results of such swapping would be put in the company's share records and ledgers. After they had done their exchanging the final result was registered – Just the final result. We were advised of the exchange. The company's records in the case of swapping would not show the various steps, but just the final step. To my knowledge the formula that I have described has never been varied by the company. Cash was last issued for the year ending 1951 – paid out in 1953 for 1951. The cash share formula had been applied by the company up until 1954. After that, shares only were issued. The allocation of shares was worked out from 1955 onwards when shares only were issued – it was just worked out on a first stage of total rebate. I produce a schedule for year ended 30 November 1960 which shows the individual shareholders trading account with the company, the percentage of the individual accounts to the total rebateable funds, the amount worked out of the rebate, the number of shares allotted, and the shillings and pence in cash at that date. EXHIBIT 11. Since 1955 that is the basis on which shares have always been worked out. The allocation of shares or cash is audited periodically – it is over to the auditor. I keep a record in my minute book of attendances at general meetings. I keep the directors' minute book and the shareholders' minute book, and I produce both of those documents. EXHIBIT 12 and EXHIBIT 13. The shareholders' book covers 1953 onwards. I produce shareholders' minute book covering inception of company to date EXHIBIT 14., and directors' minute book which covers right up to date. EXHIBIT 15. I have extracted from my record of meetings this list which shows the attendances of representatives of the plaintiff companies. EXHIBIT 16. I recall the receipt of letters from the plaintiff companies' solicitors in 1958. After receipt of those letters the plaintiffs continued to trade with the company. After receipt of those letters there was no suggestion by the plaintiffs that they would require cash only for rebates. Trading went on with the exception of Jones Timber Co. Ltd. until the last few months. No fresh arrangement about rebates

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Examination (continued)

was made with the plaintiff companies after receipt of those letters. My company treated them in no way differently from what it had been doing prior to receipt of letters. At no general meeting either before or after 1958 was any resolution put forward to vary the procedure that the company had been following. No such resolution was put forward. The special resolutions shown for all years in the minute book – no capitalising resolution has ever been defeated, and has never been questioned. The shareholders have an opportunity to discuss the resolution before it is put to the meeting, and they talk about it.

COURT: Were the terms of the 1947 agreement specifically discussed at any meeting? Not after 1947 or 1948. Before the resolution was put the directors' resolution creating the capitalisation was referred to, but there was no discussion of the terms of the agreement. 10

The terms of the agreement for capitalising have never been queried by shareholders. There has been evidence that there have been complaints about too many shares being issued, but I have recorded no complaints at the meetings. We were in the hands of the bank. It was never specified how long the issue of shares was to carry on. Until we got down to more in line with the Bank overdraft we had to carry on capitalising shares. After 1958 notices were received I had telephone discussion with members of the plaintiff companies concerning rebate shares. Approximately September 1958. Mr Hooper rang and enquired as to what his companies rebates were. I told him. He asked how much was shares. I told him. No protest was made by Mr Hooper. There was no discussion apart from the passing on of information regarding rebate and shares. I had similar conversation each year when Mr Hooper rang, and no protest was made about the allotment of shares until 1961. No protests, that means, in the telephone conversations, were made until 1961. In 1961 Mr Hooper said that they were not taking any more shares. I remember these telephone conversations, bearing in mind their letters denying more shares – repudiating further shares. Until 1961, apart from written letters or notices nothing was said by any member of the plaintiff companies indicating their continuing refusal to take shares. There was a meeting in December 1959, 11th December, of shareholders. The purpose of that meeting was to discuss the value that the Inland Revenue Department had placed upon the shares issued to the Jones Timber Co. Ltd. and J.M. Construction Co. Ltd. I made notes at the time about that meeting. Mr Hooper was there and Mr Odlin was there. This was the special meeting in 1959 called to discuss the taxation of the rebate shares, and was prior to the Xmas party. There would have been a circular sent out about the meeting. I do not know whether my company has kept a copy of that circular. Mr Hooper addressed the meeting – at least he answered questions more than addressed the meeting. This is a copy of the circular relating to that special meeting. EXHIBIT 17. As he represented the companies receiving the 1/- a share benefit in taxation we were more or less seekers after knowledge. It got down to the old gag of keeping up with the Joneses. Hooper gave details of how they were able

20

30

40

to get their shares valued at 1/-. He indicated that they brought in the amounts as credits and obtained a bad debt of 19/-. There was no suggestion by anyone at that meeting that the company had no right or power to allot shares in rebate. That is the meeting at which Mr Richardson's opinion was read out. Hooper maintained that Richardson's opinion with regard to (death duties) and the possibility of being taxed on any sum over and above 1/- that a shareholder may get on the sale of shares that he claimed 1/- on, – he stated that their advice had been that any such gain was a capital gain. As at December 1959 I would have had one of the phone conversations with Hooper about allotment of shares for the previous year's rebate. He raised no query about his two companies' shares at the December meeting. Hooper's attendance at that meeting and his indication that his companies were accepting the shares and getting a taxation value of 1/- each placed of them gave the directors and myself the impression that they had sort of foregone their resolution not to take any further shares. Admittedly he never touched on share business there but his very attendance subsequent to the repudiation of shares made us think he was back in the fold again. Mr Hooper did not suggest the procedure his companies adopted only related to past shares and was not to be continued. I got the impression it was current procedure. Mr Odlin did not speak to the meeting. I talked to him later at the party. Jones and J.M. Construction Co. Ltd. wrote in December 1958 and the next letter was not received until January 1960. Between those two dates I had no discussion with Mr Hooper or any other member of the companies which suggested or discussed the non-allotment or repudiation of allotment of shares. He rang up and asked for his companies rebates. He was given those figures. An agreement was entered into in 1959 with Auckland shareholders and a copy of that agreement was produced. This bringing in of Auckland shareholders was discussed very fully at the 1955 meeting and recorded, and was executed in 1959. The builders in Auckland operated for a number of years before the written agreement was signed by them. EXHIBIT 18. Agreement. This is a schedule showing the rebate share position of three plaintiff companies from 1957 to 1961 – it appears to be so but I can't remember preparing it.

10 MINUTE ADJOURNMENT.

This is the schedule which I prepared showing the allocation of shares – showing the total rebates and shares to the nearest £. It is from 1957 to 1961. EXHIBIT 19. I produce a copy of the Capitalisation Resolution and Increase of Share Capital Resolution for 1961. The exact resolutions are in my minute books but that shows the form of resolution. EXHIBIT 20. New share certificates were not issued after each allotment. Up to 1947 or 1948 we issued them but it meant recalling them each year or when a new issue was made. The shareholders said it could be discontinued until the final capital goal was finally reached – this has never been specifically fixed. Certificates were available where there was the death of a shareholder – they were issued on demand. I have some

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Examination (continued)

shares myself in the company. I purchased them from several shareholders. I obtained rebates. I purchased goods from the company in my name for a builder, and rebate shares were allotted to me. I was not treated differently from other shareholders as rebates were concerned, but I did exchange shares for cash, on about two occasions. Some bonus shares were issued to staff in 1958 - that was part of a scheme which had been going on over several years. Those bonus shares have nothing to do with the question in issue here. On the appointment of a certain member in an official capacity part of the terms of his employment were 2,000 shares paid over eight years, and paid by way of bonus each year. Regarding the use of 'R.O. Slacke' and 'R.O. Slacke Ltd.' – after the incorporation of R.O. Slacke Ltd. Mr Slacke as a person stopped trading with the company. My company's dealings have been with R.O. Slacke Ltd. from that date. The cash the plaintiff companies have had since 1947 on an initial capital of £1,500 – the Jones Timber Co. Ltd. received £1,739. 19. 5d over the period plus £3,800 by way of sale of rebate shares to other shareholders and to an outsider. That was on an initial capital of £1,500. As a matter of interest, the Jones Timber Co.'s total cash including the sale of rebate shares was 68.65% of their total rebate over those years – from 1947 to 1954. The J.M. Construction Co. Ltd. received in cash £1,347 on an initial capital of £1,000. Their proportion of cash to total rebate was 29.554%. R.O. Slacke Ltd. earned £2,308 in cash and their initial cash in the company was £500. That is R.O. Slacke and R.O. Slacke Ltd. When Mr Slacke started he had £500 in capital. When the company was incorporated the capital had increased by capitalisation – 50.228% was his proportion. That was one of the main reasons why a lot of the shareholders acquired further capital. The large scale developments in the Hutt Valley – land development schemes – Neither of the Jones companies participated in either of the land schemes. Profits were made from both of those schemes by the company – substantial profits. The Jones companies participated in those profits by way of rebate schemes. The two Jones Companies did not work on either of those schemes, but R.O. Slacke Ltd. did build houses under the scheme in a minor way – not a great many. When the rebate shares were allotted by the company each year, the respective shareholders were placed on the share register in respect of those allotments in each year.

COURT: In regard to 1947 to 1954 the proportion of cash to rebate in each of the three plaintiff companies was in accordance with the letter and spirit of Clause 3 of the agreement? With the exception of the shares – the three companies participated by way of cash in accordance with the letter and spirit of the agreement. Coming to 1960 the company made a profit of £101,410 in round figures, of which the cash allocation amongst all shareholders was £32. Do you maintain that was in accordance with the spirit of the original agreement? Within the letter, but perhaps not the spirit – we weren't given any option about the spirit because it was being dictated by the Bank of New Zealand. Is it still being dictated by the Bank of New Zealand? Possibly. What is the amount of overdraft? The

general overdraft of £340,000 but there are housing overdrafts near half a million. It is almost correct to say you are deeper in the hands of the bank than ever? Not entirely – there is a sort of guaranteed sale of houses – whenever a house is sold the result is paid into the Bank Discretion Account. Is there still a restriction imposed by the bank against issue of any rebates in cash? At the present time, yes. We are changing our policy from the end of 1962, we are going to pay our own company tax.

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen Examination (continued)

CROSS - EXAMINED

Cross - Examination

Turning to Directors Minute book for 11 July 1958, does that contain reference to a letter from a solicitor? Yes. (Reads entry). You prepared those minutes? Yes. And that was your understanding of what the solicitors' letter meant? Yes. Turning to 1 September 1958, is there another reference to that matter? Yes (reads) That minute describes the lawyers as instructing you to do something – is this a reference to Mr Gillespie? Yes, it would be. Was the position that Gillespie instructed you to that effect – 'mind you put those shares in the names of the plaintiff companies?' We were in order in registering them; it could possibly have been a verbal discussion. Did he also instruct you or say it was not in order to reply to Cunningham's letter of 1958? That letter was forwarded to him for reply. Did you ever tell Cunningham you had forwarded that letter to Gillespie for reply? I presumed Gillespie would do as formerly and would reply to the letter of 11 July. In December you had a letter from Macalister Mazengarb on behalf of Slacke? I must have received it because I answered it. There is no reference to any discussion by the directors on that letter? No. Was it ever discussed at a directors' meeting? Apparently not. Who decided it should not be discussed at the directors' meeting? (Inaudible) Who decided the matter should be referred to the solicitors? I did. Are we to assume you took it upon yourself to refer it to the solicitors without referring it to the directors? Yes. Did your directors ever know anything about that letter? (Inaudible) A further letter was received by you in January 1960 from Cunningham? It would have been forwarded also to Gillespie. You have heard the letter of 29 January read in the course of this case? Yes. There is no reference to it in your directors' minutes? No. You said that as a result of the meeting in December 1959 you were under the impression that the Jones Timber Co. were no longer acting on their repudiation or words to that effect – were you in any doubt of the position after receiving this letter in January? I can't remember receiving the letter. If that had been the state of your mind in December this letter in January would have made an impression on it? It could have. Is this question of whether the company can force shares on its shareholders regarded as important by you? I only carry out the policy that is set by the company. Are you able to speak on behalf of the directors of the company? No. So the views you have been expressing in the witness box are your own views? Yes. Do you consider that this is a matter of import-

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Cross-Examination (continued)

ance to the company? It is a policy that is dictated to us and we have to carry it out. If we don't do that the bank will withdraw its credit. If any shareholder is challenging that policy, is that not a matter of considerable importance to the company? Yes. And you would have realised that on receiving the solicitors' letters? Yes, but we had had the advice of our solicitor that we were empowered under our 1947 agreement to carry on. When you say 'we' had had it, was that advice you got personally or advice passed on to the directors? It was passed on to the directors. What about the letters in December and January of 1960 and 1961: was there any discussion (of these?) There was no recorded discussion. Would it be fair to say at that stage the company didn't consider the solicitors letters were important enough to warrant discussion by the directors? I wouldn't say that; if they had been in our hands to discuss, they would have been. The letters came to you in the first instance? Yes. After January 1960 you could have been in no doubt yourself that Jones Timber Co. and J.M. Construction Co. were maintaining their attitude on repudiation? That would be right. And between July 1958 and January 1960 Hooper had rung you to get details of the rebates but had not had any discussion with you about repudiation? Not till 1961. The earlier telephone conversations were simply to get details? Yes. If Jones Timber Co. and J.M. Construction Co. had been receiving these chits you spoke of it wouldn't have been necessary to ring up for details? (Not necessarily. They may have lost them. It sometimes happens.) With regard to that meeting in December 1959, that was shortly before Cunningham's letter of January 1960? Yes. At that meeting is it not correct that Browning arrived a little late? Yes. And brought an opinion from Richardson and read it, and it was later that Hooper made some short comments on the tax? Yes. But when you say he spoke would it not be fair to put it that he only spoke a few sentences? Oh yes. The question to which he was addressing himself was some question of revaluation: One question was asked by a director representing the Bank of New Zealand and following Hooper's statements of how they arrived at the rebate he said 'Would you not have to return any money as income or bad debts recovered over and above the 1/- ('he' is Mr Hooper) on any shares that they sold on which they had been taxed on that 1/-'. That was asked of Hooper by Hannah? Yes. And what was Hooper's reply? He said that their information was that anything of that nature was a capital amount. The matter of Hooper taking the floor was a matter of his answering questions by Hannah? Yes, and answering another question. At that meeting Browning was critical of certain shareholders he did not name at having got the Tax Department to fix a low value on the shares? Yes, he wasn't at all keen on his company's shares being reduced from £1 to 1/-. Did he not also refer to the future prospects being rosy? Yes. And did he not also say there were lots of hidden reserves only the directors knew about? Yes, he also said that if they took the 1/- valuation they could not expect the Bank of New Zealand to allow the company to pay a cash rebate. Was the general tenor of Browning's remarks to suggest that for the future the shares should be valued for tax purposes at £1? At that stage I think he was loath to see the value of the company's shares reduced. And was

his whole object to convince the shareholders at the meeting that the shares were worth £1 and should be so valued for taxation purposes? No I don't agree with that.

COURT: Did he suggest any intermediate value? No, he pointed out the pitfalls that would be in the path of anyone who put shares in at 1/-.

One of the pitfalls was that the transaction could be re-opened and the shares revalued in the future at more than 1/-? Yes. But it wouldn't be safe for a shareholder who had had shares valued for some time at 1/- to assume that that practice would obtain in the future? No, that is what he meant – that any future value in those shares over and above 1/- would be retaxable, and also that for death duty purposes you could not get away with 1/-, but had to take the value of the shares for the purposes of probate. At that meeting did Browning also indicate that in the near future shareholders could expect to receive shares from the company? No, I think he said that as long as they went on with the 1/- they could not expect cash. Wasn't he urging them to put shares in for taxation purposes at £1 and if they did that they could expect to get cash in the near future– was not the basis of his approach that the shares were worth £1? Yes, he made that clear. You have perhaps heard it suggested by some of the witnesses that Browning was rather high-handed in his treatment of shareholders at general meetings – would you agree with that? No, everyone could have his say. Would you say Browning on the question of capitalisation was careful to see everyone agreed each year with what he proposed? I don't know about that – when it came to increasing of capital a short resume would be given and then the directors' resolution would be read out giving the authority for capitalisation and then the motion would be read and moved and seconded. If anyone wanted to have a say on it they were at liberty. Was the matter presented to the shareholders as being one where they had no option but to capitalise? They had no option because of bank pressure. It was always put to them that it was because of the bank they had no option? Yes. Over the years the emphasis was that they must do that because that was what the bank said? Yes, in capitalisation for rebate. It was not put to the shareholders that they must do it because the 1947 aggrement so provided? No, the last year the 1947 agreement really applied was 1954 and the cash rebate was £20,000 odd. We would have paid that out in the normal course of events but the bank said 'no' and I think there is a letter we put in yesterday in which the bank's attitude was clearly stated – no cash rebates in future without the bank's authority. And so we had no option but to carry that policy out – there would be no-one more happy than Browning to pay cash rebates if it had been allowed. Browning's firm was by far the largest shareholder and got by far the largest amount of cash. He was not paying cash rebates for the sake of not paying. Is an instance of Browning's firm getting the largest amount of cash your answer to Interrogatory No. 11 which refers to a payment of £1,164 in November 1955, and in answer to Interrogatory 11(a) is said to be in respect of rebates so far as £914 was concerned, the balance in respect of a

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Cross - Examination (continued)

share of profit due to Grimes & Browning Ltd. in respect of a land transaction. That was in respect of rebates for year ending November 1952? Yes, the Interrogatory said that. In answer to 12 you say in part A of the answer it is in respect to 1952, but the last general payment to shareholders was in respect of rebates for year ending November 1951? Yes. How does it come about that this particular company gets a payment of cash for 1952 and most of the others don't? There was a special cash issue made and Browning firm subscribed either £3,000 or £5,000 to it. They were the only old shareholders in the Hutt Valley who did. It was put up to the bank that these people want £3,000 from us but they owe us £1,100, and unless we can get a set-off of the £1,100 we are not paying the £3,000. The bank thought it better to give the £3,000 for the sake of the set-off – we got about £1,900 cash in. It was actually money they were owing but it was a principle no different from the set-off with Jones Timber Co. and J.M. Construction Co. had done with the money they were owed by the company. I suggest to you there is one difference in principle – you say in answers to interrogatories that the set-offs to Jones Timber Co. was without consent of your company? We have never disputed their right – – You agree credits for rebates are moneys legally owing? Yes, once the directors declare a cash rebate that is legally owing to J.M. Construction Co. We show it in our records as a liability and if anyone puts pressure on they can force that money out. The Bank of New Zealand can stop payment on the company's cheques if they know what it is for. We never disputed a person's right to that money, it is only to assist the company in its troubles that it is left there. But what about your letter to R.O. Slacke Ltd. That was nothing to do with that at all? Mr Odlin telephoned me, saying the set-off of the judgment was against moneys owing by R.O. Slacke Ltd.

COURT: You mean the judgment in this case? Yes. – Mr Slacke had up to that time been making payments and there had been no question of a set-off.

May I recall the answer to 12(iii) – "Without claiming such a set off he has over the same period left his customer's account with the defendant company continuously in debit in sums in excess of his credits". That had been going on since 1955? – you said over the same period which appears to refer back to the previous answer? Mr Slacke's (credit) with the company had been quite extensive at times – we had never argued with Slacke over it, we gave him the treatment we thought he warranted. The general approach of your company is to give each shareholder the treatment you think he warrants in respect of shares and cash? I am not talking about that. You said that Odlin said in his conversation they were setting of the effects of the judgment – when was that? In October 1961. And subsequent to that R.O. Slacke obtained further supplies from your company? Yes. And you knew at that time R.O. Slacke Ltd. were taking rebates in cash? No. What was the judgment you spoke of? This court case. And that is a claim for the rebates in cash? Yes. Knowing R.O.

Slacke Ltd. were making that claim your company went on supplying R.O. Slacke Ltd. with goods? We did not know that Slacke had joined forces with Jones until the writ was issued. What was Odlin's reference to a judgment about? There was no reference to a judgment in the talk I had with Odlin – I wrote a letter which I showed to Hannah and he said I should get a legal opinion. I took it down to our own solicitor and as a result of the letter Gillespie had an appointment with Odlin.

COURT: But your letter was never sent? No.

It was after your discussion with Odlin that Gillespie sent for him?
10 Yes. On 1 October 1961? That would be right. And the conversation with you was earlier than that. The reason why you referred the matter to Gillespie was that you knew R.O. Slacke Ltd. were claiming rebates in cash for the period since December 1958? Yes.

COURT: Didn't he say he received some encouragement from Hannah? Yes, I got the legal opinion on it.

And R.O. Slacke Ltd. were allowed to go on trading until February or March? Yes. February 5 1962 – letter (read by counsel). In the meantime between October and then R.O. Slacke Ltd. had gone on trading? Yes.

20 LUNCHEON ADJOURNMENT.

Interrogatory No. 3 – you told us the 1947 agreement didn't really operate after 1954? Not with regard to the cash portion – the dividend portion ceased to operate in 1949 and the cash portion in 1954. Would that be why when Jones Timber Co. showed a sale to Hewinson you didn't get Hewinson to sign the agreement? No, that had nothing to do with it, it was just an oversight on my part. It wasn't a very important matter to you that you had to attend to at all costs? I wouldn't say that – Mr Hewinson knew there was an agreement but he wasn't asked to sign it. – He was my client. I had been buying for him. He knew the benefits of the rebate
30 at that time. At tnat earlier stage there was some cash being paid but not in 1955? Yes. And would that be one of the reasons why you didn't get him to sign? No, we could have sold him our own shares – we had authority to go to £75,000. We could have sold him some of the Auckland shares. That was a new issue of £75,000 which had nothing to do with rebates? Yes they had to do with rebates. Only if the existing shareholders agreed to have their rebates used – when that £75,000 of fresh capital was issued in 1955 you sent round a circular and didn't that suggest to the shareholders that they should agree to use their rebate credits to take up some of the £75,000, but Jones Timber Co. and R.O. Slacke didn't agree?
40 That is so. A portion of the £75,000 was taken up by Auckland shareholders?

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Cross - Examination (continued)

Most of it – we could have sold Hewinson 1,500 of those but he did say he had been talking to Jones about his shares and he made an arrangement with Jones and Hewinson was really intended to come in on the agreement signed by the Auckland shareholders. If you didn't let Hewinson buy from Jones Timber Co. it was possible the Jones Timber Co. would have to negotiate a sale with someone else at a much lower price? That is new to me. Shares were getting difficult to sell about that time? Yes, the main reason being the recess in the timber market. And the absence of any cash rebates? Yes. At all events in your answers to Interrogatories you deal with capital of defendant company – 1, 2, and 3, and say capital was £32,400 in 1947, and when the present action was started it was £500,920, and the difference between those amounts, of that a certain amount was allotted in pursuance of 1947 agreement – £359,295. That doesn't account for all the capital of the company – there is some still left in the account? Yes, two cash issues. They were issues unconnected with rebates? Yes. For the other issues, for which you used rebate moneys, the purchasers had to pay cash in some way or other? (Yes.) A rebate must be cash, it can't be anything else? (Yes.) With the issue of shares you used the rebate to pay up the shares, whereas I am talking about new issues which had nothing to do with that. May I suggest to you if the 1947 agreement had stopped operating with regard to dividends in 1949, and as regards cash in 1954, then possibly your answer to Interrogatory No. 3 would require some amendment, because that allotment couldn't have been made under the 1947 agreement? Yes. The large part of that figure was allotted at a time when no cash rebates or dividends were being paid? Yes. Does that £359,000 include all the allotments in respect of which the plaintiffs are bringing the present action? Yes. You heard the Deputy Registrar of Companies give evidence? Yes. And the first mention of any agreement between the company and shareholders in any of your returns of allotments was a reference made to a return in 1959? You used to make a return of each allotment, and I suggest to you that until 1959 in none of your returns of allotment did you refer to any agreement between company and shareholders. Not as read out by Mr Westmoreland. Do you doubt he read it out correctly? No. Why was it in 1959 that was the first time you refer to an agreement? No reason at all. Cunningham's letter of 1958 and Macalister's letter of 1958 had been received by that time? Yes. When Cunningham engaged in correspondence with Gillespie in 1958, Gillespie first gave him a summary and then a copy of the 1947 agreement? I understand so. Up to that time do you know of any occasion when anyone on behalf of Hutt Timber & Hardware Co. claimed to any of the plaintiff companies that those plaintiff companies were bound by the 1947 agreement? The only reference is what Mr Slacke brought out in his own evidence. You are now talking about what Mr Slacke said in 1958 – it was after the letter of 19 December 1958. – I am talking about prior to Gillespie's letters in 1958 when he said that the (two first-named plaintiffs were bound by the 1947 Agreement.) Apart from that letter can you refer to any earlier letter or claim by the Hutt Timber & Hardware Co. that any of the plaintiff companies was bound by the 1957

10

20

30

40

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Cross - Examination (continued)

agreement, you know of any earlier occasion before 1958 when anyone on behalf of the defendant company stated to the plaintiff companies that they were bound by the 1947 agreement. Apart from whatever may be in the 1949 letter, do you know of any letter or statement to any of the three plaintiff companies that they were bound by the 1947 agreement? No. It follows that even if that letter be regarded as a communication to Jones Timber Co. you still can't point to any communication to R.O. Slacke Ltd.? No, Mr Slacke brought his share transfer in personally and I stamped it for him. As it was very close to the date I had addressed a letter to him it was still fresh in our minds and I asked Mr Slacke if he was agreeable to the 1947 agreement, and he said he was prepared to carry on on the same basis. When you were recording approval of the transfer, you drew up a minute which was subsequently confirmed and the transfers were approved, did it not seem desirable to make any mention in the minute of a stipulation about these companies being bound by the 1947 agreement? At the time I was under the impression they were willing to carry on and abide by the agreement. At that time, March 1950, or February 1950, the paid up capital was on the point of reaching £60,000? Yes. And you weren't really worried about the agreement? I knew quite well the £60,000 didn't mean anything. Had the Tokoroa project been evolved as early as that? No, that was later on. So the company's policy of expansion had not really gathered momentum then? Outside of Tokoroa it was more or less confined to the Hutt Valley. And those were subdivision works in which some of the plaintiff companies did not participate? Correct. You said previously that they participated in benefits from the profits which were rebated, but most of those rebates were not paid out in cash? Up to 1951 they would have. But this subdivision work was going on over a long period? Up to 1954/1955. Is it still going on. Not in the Hutt Valley, but in Auckland. This morning I thought you suggested the directors' resolution in 1961 with regard to capitalisation took the same form as the resolutions in earlier years? They were different. The position is that the 1961 resolution did refer to an agreement? Yes. Whereas the resolutions in 1956, 1958, 1959 and 1960 did not? You'd know that as well as I do. For the year ended – at the annual general meeting on 27 June 1956 was the resolution of the directors which was presented at that meeting on the motion of Tressider 'It was resolved on the motion of Mr Tressider seconded by Mr Christie that the whole of the profit for year ended 1955 be rebated to the shareholders in the form of fully paid up shares.' Next year there was a loss and then coming to the year 1958 the following resolution was passed by the directors, "That profit of £26,787 be rebated to the shareholders as per the transactions with the company and further that this amount be capitalised and issued to them as fully paid up shares." That was the directors' resolution presented to the general meeting. And on 19 May 1959 the directors resolved "That the profit of £23,548 for the year ended 30 November 1958 be rebated to the shareholders on the basis of their transactions with the company" and also on the same date a resolution for capitalisation of rebates "That the Board of Directors recommend to the Annual General Meeting that £23,523 for the rebate be issued as fully

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Cross - Examination (continued)

paid up shares." Then at a meeting of directors on 11/12 April 1960 it was resolved "That a sum of £49,850 be issued as fully paid up shares in payment of rebate due to shareholders." Then in 1961 on 27 April there appears this motion by the directors, "On a motion of Mr Browning, seconded by Mr Grimes following resolution was declared carried, that the company's net profit of £101,403 be rebated to the shareholders in terms of the agreement between company and shareholders and such rebate be paid in fully paid up shares". There does seem to be a formula there. With regard to the £101,000, that is satisfactory profit is it not? Yes. But your bank overdraft seems to be going on and not diminishing – I don't pretend to have your understanding of financial matters, but where is the money going? The profit the company makes is still in the pockets of the builders – they haven't paid their accounts.' – I think it is an indication of the state of the country as a whole. As far as the builders are concerned, they were only paying 6d – –

COURT: Do you mean that more than £101,000 is owing to the company by builders? Sundry debtors are £170,000. That represents timber sales. You have in recent years opened the door to all comers regarding sales? But they are still builders. – we have had some debtor clients in recent years who are non-builders. The company is doing more business and the debts increase. At the same time this business of being indebted to the bank and the pressure from the bank all ultimately stems from the directors own policy of expansion – if you put yourself to any degree in the hands of the bank, that was a deliberate choice on the part of the directors in embarking on their policy? (Inaudible) I just do what I'm told. Where is Mr Browning at the moment? He is in the office to-day. May I refer you to what he said at the 1960 Annual General Meeting on 26 April 1960 – "L. Wilson was advised that this year was the last required by the bank under its 3 year capitalisation scheme of £75,000. The chairman said the company must consider its future financial policy, and the company could be embarrassed by profits in the near future." Is that an instance of statements that have been deposed to by the chairman giving shareholders the hope that cash would be forthcoming very soon? Yes. If they are taken from the minutes. Then next year, profit as at 22 May 1961 £101,000 – "The company's budget for 1961 predicted a reduction of bank accommodation by £19,000" – and yet you still have these overdrafts you spoke of this morning? The bank have security outside the general account – the general overdraft is about £340,000 – it has gone up another £40,000 since the £19,000 reduction. All that happened at that meeting was that it was resolved to adopt this procedure of forcing more shares on shareholders? You don't want to create the impression that shares were forced on shareholders – they would take all they could get – when you could get them at a taxable cost of 6d it is quite a cheap advertisement. Going back to the 1947 agreement I suggest that when this company was formed, from the very beginning the basic intention was to pay rebates in cash? Well, I wasn't there when it was formed. Who would be able to tell us about that? Well, Mr Jones is the only one here. And you heard his

evidence – if he said the purpose of forming this company and the intention originally was that rebates would be paid in cash, you wouldn't dispute that? No. And that policy was followed for a number of years, of paying rebates in cash, wholly? No. Would you look at the 1947 agreement, at the Recital at the beginning of the agreement (reads) is that not right? (Witness: Do you imply that is retrospective?) Yes, I suggest that had been the practice to date. No, there had been only one rebate – there was a rebate of £3,200 for year ended November 1944, and here is the Memorandum which shows the subscription of new capital of £3,200. Was that when Mr Slacke took up an extra £250? Yes. Are you sure that is a rebate? I can't argue without looking up my records. Did you not make cash payments because you were not making profits? . . . This statement that the company annually rebates its profits, it is not correct up to 1947? It is a statement of what it does or will do. You were very familiar with the circumstances surrounding this 1947 agreement? Yes. And you received the correspondence out of which it grew? Yes. And I think following inspection of documents in this action your solicitors were asked to find your copies of correspondence, which had been lost. They had been destroyed. Your solicitors were good enough to obtain carbon copies from Mr Barnett's office – 6 August 1946.

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Cross-Examination (continued)

COURT: The real question is whether or not prior to 1947 the company annually rebated surplus income.

I suggest to you that the increase of capital you have referred to – the resolutions to which you have referred and the subsequent (allotment was) issue of capital which had nothing to do with rebates? In the evidence it has been stated that the capital – That is the resolution which had nothing to do with rebates but was an issue of capital in the ordinary way – outside cash? That is correct. I suggest too that the first reason for the 1947 agreement was that it had been intended to operate on a cash rebate basis but it was found that that wasn't working altogether equitably because the larger shareholders were not necessarily getting a proper return on their capital? That is not quite right – the reason of not trading in cash was that you wouldn't bring your bank overdraft down if you made profits and paid it out in cash wholly, but of course getting back to the larger shareholders there was that complaint that the smaller ones were paying on their capital. And wasn't that something that was pointed out to the company quite clearly by Mr Barnett – didn't he say that from the point of view of the larger shareholders this made their capital investment unfair, that the only way he could see of producing a fair position would be by providing first for a dividend and then for the rebates being split up between cash and shares? And was it not at first the intention to actually make the dividend at a fixed rate of 5% every year? That was in the original draft. And later was that modified to enable the directors to fix the rate each year? Yes. Similarly in the initial draft the limit was £70,000 for the capitalisation? Yes. And after discussion that was altered to "£60,000 or such amount as the directors may consider

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Cross - Examination (continued)

necessary on a consideration of the company's financial position when that figure had been reached"? Yes. So to sum it up, there really were the purposes of the 1947 agreement to get dividends provided for and to have a scheme of part rebates in cash and part used to paid up shares for a limited time? On a consideration of the financial position when that figure is reached. When you got to £60,000 you would have to take stock again and some other figure might have to be fixed? Yes. We know the dividends ceased in 1949 and the equalisation of capital ceased when you adopted your policy of 'total confiscation'. From then on everyone was delugedwith shares and there could be no question of equalising capital? 10 Yes. And one of the purposes of the 1947 agreement was to reduce the bank overdraft – it was not particularly successful in that respect? When you think of £19,000 as having been paid – – – The next thing I want to turn to is to the formula as to how you divided cash between cash payments and payments on shares. It didn't present any difficulties to you? No, on the basis Mr Browning told me to work it out on. If I put this to you – the agreement first of all says that there shall be a dividend at the rate to be fixed by the directors, and after that has been provided what you have left is the rebateable fund – I want you to assume a simple case where you have paid a dividend and rebateable funds left are £2,000 and you have 20 say 25 shareholders or thereabouts, all doing business with the company. Let us say that one shareholder, X, is entitled to a rebate of £40 out of that £2,000 because that represents his proportion of purchases – let us say he holds 10% of the shares in the company and let us further say that the directors decide that the amount to be paid out in cash and the amount to be devoted to new shares will be 50/50, £1,000 in cash and £1,000 for new shares? He is entitled to a rebate of £40, because he cannot get more than his rebate. Where does it say that in the agreement – would you look at clause 4 – could we do it step by step – (Reads clause 4 – fixed by directors). The total payout is fixed in the hypothe- 30 tical case at £1,000, and there shall be a percentage bearing the same ratio to the total funds – in this case £2,000 – my builder has 10% capital, shouldn't he receive 10% of £2,000? (OBJECTION)

You have said looking at clause 4 – the rebateable fund is £2,000– that follows from clause 3 which defines what the rebateable funds are. We will go back to clause 2 ....rebateable funds" – you told us you regard that as the balance after you paid dividend. Coming to clause 4 "... shareholding of the company" – is that right? I can only explain it that they fixed the rebate at £1,000.

COURT: Did Mr Barnett fix the proportions each year? No. 40

How did you fix them? Witness: With £2,000 they would fix say 50% to be paid in cash. His ratio is to correspond to his shareholding? Yes, 10% of the cash or rebateable funds? 10% of the cash. Even in my example, even assuming he is to get 10% of the cash – 10% of £1,000 would be £100, but in my example he is only entitled to a rebate of £40 based on his transaction – where do we go from there? He has no choice, he

can't be paid more than the rebate he has earned. If a person is unfortunate enough to earn more than his rebate he has to put up with it. Would you agree with me that all this is quite different – – (OBJECTION)

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Cross - Examination (continued)

Is there anything else in the agreement which in practice you found helpful in enabling you to work out a proper formula? No, only getting the total rebates due to each shareholder and then arriving at the amount of cash and the difference between cash and total rebate to the nearest £5.

MID - AFTERNOON ADJOURNMENT

We had been discussing an agreement which was drawn up in 1947 –
10 do you know whether that was ever circularised to shareholders? I couldn't say. Either before or after the signing? There was a meeting held in February or March 1947 in which it was thoroughly explained to the shareholders and agreed upon and that is the only reference I have in my mind. It would have been explained to them that the objects of the agreement were to provide dividends and payments in cash, and issue of new shares to be paid for the balance of rebate credits? Yes. And it would also have been explained that it was intended to operate until £60,000 or such other figure as the directors then fixed? Yes. As far as you know has that agreement been ever perused apart from the present litigation by any
20 solicitor – apart from Mr Barnett and the company's solicitors? I am not aware of it. As to the way in which you apportioned cash payments and payments on account of shares, what has become of your workings for the years when both cash and shares were received? They were never kept – they were just general working papers. The only workings which have been made available to the Court are workings for years in which everything was taken for shares? Yes. You told us something of the cash payment to Grimes & Browning referred to in your answers to Interrogatories – can you tell us something of the cash payment to James Murray Ltd. and G.W. Bennett Ltd. in November 1955? That money payable to Murray was
30 in payment of a debt and would have been payable in January – he didn't get payment at all. Your answer 12(g) says that James Murray Ltd. payment was – no, 12(a) that payment was in respect of rebates for 1951 and 1952? That is correct. The ordinary run of shareholders didn't get any payments in cash in respect of 1952 rebates did they? Not for 1952. And G.W. Bennett Ltd. was apparently in respect of rebates for the year ending 1954 – is that right? Yes. Did any other shareholder get cash that year? G.W. Bennett Ltd. owed us some money . . . . . These may be apparent exceptions but they are not real exceptions? No – regarding Murray he got cash because the bank didn't have any embargo at that
40 stage. Why was not cash payable to other shareholders at that stage? (Inaudible) It really suited your company to notionally pay cash? About this agreement in 1947, you mentioned on one or two occasions your own shareholding which is about 2,000 shares? Yes. And quite a number of these were allotted in the years between 1950 and 1955? Yes. They were allotted and paid up by rebate credits? 1,000 I bought in cash and another

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Cross - Examination (continued)

500 . . . How many you had paid up for as rebate credits? –the returns to the Registrar of Companies would show that. In the year ending November 1954 on 29 July 1954, were you allotted 415 shares? Yes. On 28 September 1955 were you allotted 330 shares? Yes. And on 11 November 1953 were you allotted 155 shares? Yes. And November 1952 542? I started off with 1,100. I got 150 in 1950, 100 in 1951, 155 in 1952, 45 in 1953 and 330 in 1954.

COURT: And you ceased to be a shareholder in 1960? No I am still a shareholder but I am not receiving rebates.

Those are rebate shares and were obtained by transferring rebate credits in your name to paid up shares? Yes. Under what particular provision of the 1947 agreement was that done? I was buying for a builder and I became a shareholder. You bought on behalf of someone who was not a shareholder? Yes. But when you received shares did you hold them yourself or did you regard them as being held in trust? The rebate scheme was open to all shareholders. I still own my rebate shares. 10

COURT: You participated in no rebate in the form of shares or otherwise . . .

With regard to the Tokoroa project, is it right that the directors originally gave the shareholders an estimate of approximately £70,000 for the cost of the Tokoroa mill? No the original estimate was £100,000 and the ultimate cost £250,000. People who are erecting a timber mill know they will have to have houses for workers? Yes. I want to clarify the position as to share allotments – when I refer to the plaintiffs' notices of 1958 you know what I am talking about – ? Yes. Could you tell us exactly what shares you claim to have issued to the plaintiff companies since the receipt of those notices? The notices were in July and December 1958. R.O. Slacke Ltd. – 665. When do you say that was allotted? It was entered here in June 1959. What is the next one? (The next lot was) allotted in October 1960. It was not only not registered until 1961 but the allotment was shown as having been made in 1961. 1719 shares were involved in this one. Is that the return in the name of Randolph O. Slacke? (Inaudible) Is that not the return of allotments made in June 1961? What happened there was the original allotments – instead of its being posted it out it was filed and I didn't discover it until the next year's allotment – the new girl instead of posting the allotment filed it away with the file. When you say in your return to the Registrar that the allotment was made in June 1961, that is not right? It is not the date of the directors' allotment. When do you consider you have made an allotment? When I make out the return to the Registrar. You select your own date really within striking distance of the date you sent the return in? A return of allotments is supposed to be made within a certain number of days? A month. So is the position that you get ready to make the return of allotments and then . . . This one is fairly right. That was £1,719 and the odd 20 30 40

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Cross - Examination (continued)

shillings and pence would be as shown in the rebate accounts. The next is 2106 allotted on 12 September 1961. Do you claim to have allotted any more shares to R.O. Slacke since then? No. In the case of R.O. Slacke Ltd. the 665 was allotted in 1959, I think you told us? 665 was relative to 1958. But the shares were allotted in 1959 but the money used to pay for the shares was Slacke's Ltd.'s rebate credit for November 1958? Yes. And was the credit for 1958 the exact amount £665. 19. 4? I haven't got that. But it is substantially the whole of the credit that was used to pay for those shares? Yes. In the allotment which was the subject to this minor administrative lapse in the company's office, that is the 1719 shares to R.O. Slacke Ltd. – what credit was used to pay for the 1719? £1,719. And you would leave the odd shillings and pence standing? Yes, that was for November 1959. And lastly the 2106 shares what credit was used to pay for them? The November rebate . . .
Could you do the other plaintiff companies in the same way the plaintiff companies gave you notice on 2 July 1958 – what is the first allotment of shares you claim to have made to them after that date? For 1957, 561. J.M. Construction Co. – August 1958 they were allotted. Are you sure about that date? I don't know – it has October here. I am suggesting it was November so I suggest your return to the companies office shows they were allotted on 4 November 1958 and the return was filed in December 1958? That would be 1957 rebate. You are satisfied they were allotted after the letter of July 1958? Yes. Then what was the next allotment to J.M. Construction Co.? 389 shares, June 1959. Were they paid for by using almost all the rebate credit for year ending November 1958? Yes. Then was the next figure one which was altered or transposed at some stage? Yes, 805 shares, allotted in either July 1961 or October. But they were paid for by using the rebate credit except for odd shillings and pence for the year ended November 1959? Yes. And lastly is it 1448? Yes. Allotted later in 1961, September, and paid for by using all the rebate credit except odd pence for year ending November 1960? Yes. Finally Jones Timber Co., – what is the first allotment which you claim to have made after July 1958? 1405, in November or December 1959. After 2 July 1958? Yes. And paid for out of the rebate for the year 1957? Yes. Then is there an allotment of 1120 in June, 1959, paid for by using rebate credit for 1958? Yes. There was about £2. 2. 0d over in the rebate credit? Yes. And then we come to 917 paid for from the rebate for year ended November 1959? Yes, and 6425 is the last allotted in 1961. The procedure has been to show the rebate credit for the years operations in respect of which the rebate accrues due as at 30 November of that year? Yes. And then that credit notionally stands in the books until it is transferred to shares which are normally issued in the following year? Yes. In fact they would invariably be issued after the Annual General Meeting? Yes. If a special resolution was not passed by the Annual General Meeting the credit would have to stand because you would not be able to utilise it for paying up your capital? No . . . Over the years in your returns of allotments to Registrar of Companies your practice was to describe this type of allotment as an allotment for consideration other than cash? That is so. But you

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Cross - Examination (continued)

never actually filed a contract or particulars of a contract showing what the consideration other than cash was? The first few years I used to take the rebate agreement along with me – they got to know me after a while. They never asked you to file it? No. At some stage they sighted the original agreement? Yes, for about three years. And thereafter you didn't take it along or post it to them? No. But in your answers to Interrogatories you said some of these were for other than cash, is that right? My interpretation of it was consideration other than cash. I filed it and the Registrar of Companies returned it. It is the position that on fuller consideration when the Interrogatory was put to you you formed the conclusion that the correct view was that the allotments were all for cash? The company makes a cash profit and in terms of the Directors' resolution it is set off by the issue of fully paid shares and therefore the consideration is in my opinion . . . . Your answer to the Interrogatory 17 (Read by Counsel) Your answer was 'No'. That was the answer you gave in your affidavit after full consideration of the position. I had to get legal advice on the Act – it was a bit complicated. 10

COURT: Your answer to the Interrogatory was made on legal advice as to how you should answer them? I got a legal interpretation.

You answered by saying that the company didn't claim that any of these shares were allotted other than by cash? In the first place we had a cash rebate and rebate agreement and we created shares, which . . . . Are you saying your answer to the Interrogatory is not correct? To be quite candid, I didn't know what the Interrogatory means. You regarded this as a case where cash was payable. The question is what is the consideration for the fully paid shares – what is set off against them is cash? Yes. Now that cash having originally been part of the total rebateable funds of the company, becomes shares only by first becoming the property of the shareholder customer? (OBJECTION) For many years your company has paid no income tax? Very negligible. The last time any substantial income tax was paid was when you paid dividends? Yes. And the sublime simplicity of this procedure you have been following is that you don't have to pay income tax? Yes. But you were in 1950 – wasn't the possibility then discussed of having debentures issued rather than shares to shareholders? I can't remember. Would you care to refresh your memory by the legal advice you obtained at the time – letter of 22 September 1950 from Mr Cleary; would you look at the middle paragraph of the second page – (Read by counsel) "Staples on Income Tax – Such a rebate need not necessarily be paid in cash although it must be dealt with in such a way that it becomes the absolute property of the members. It would be satisfactory for example if it were credited to the various accounts. If however the amount were held for any reason and not distributed, no deduction would be allowed. (Then following that was the advice given to the company) "It would, we think be competent for the members once the moneys have become their absolute property, to use the money by making a loan to the company, but we do not think they could be bound in advance to apply their 20 30 40

rebates in this way." That was the advice you received in 1950? And the debenture proposal was not proceeded with? No. While I am not asking you to express any opinion as to Mr Cleary's correctness, is it not a fact that for many years your directors have been aware that to obtain exemption from income tax it is necessary that the rebates shall be the absolute property of the members? When they 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. I follow that that is what you claim but what I am suggesting is that if your claim happens to be wrong, then the position is that the members have never signed away their property? (OBJECTION) In any case, the fact is that you have claimed a deduction of income tax each year pursuant to this section of the Income Tax Act pursuant to rebates – and you have not only claimed it, you have been granted it? That is correct. After this action was commenced you wrote a letter to R.O. Slacke Ltd. and similar letters to the other two plaintiff companies enclosing share certificates? Yes. I think only one of those letters has been put in – the one to R.O. Slacke Ltd. dated March 27 1962, in which you say "In accordance . . . up to date". Were letters in similar terms sent to J.M. Construction Co. and Jones Timber Co.? They were sent to all shareholders. Whose idea was it to send out these share certificates at that stage? That arose from a complaint we had from Auckland – they wanted share certificates and one of the directors from Auckland brought down the request, and the company issued complete fresh . . . For whatever reason, a decision was made by the Board of Directors? Yes. Resolution passed on 9 November 1961? The Official Seal was put on it at that date. Would you turn up the Directors' Minute Book and show us the resolution of 9 November 1961? The date of the meeting is 30 November – it says "On the motion of Mr Short . . . 1 – 85". What is the reference to 9 November? I think there is some error in that date. There is evidently some mistake in that letter – whatever decision was come to by the directors was after notice had been received that this action was commenced? It was because of the Auckland shareholders. But your decision to send out share certificates to all shareholders including plaintiff companies was taken by your directors after they had notice this action was commenced? It was taken after the July and November notices but the reason was the demand from Auckland. No, the notice that action was to be started, which was sent in November – the letter immediately before the issue of the writ, which was in November 1961 – 8 November 1961 – that was the date of Gillespie's acknowledgement of the notice which was dated 2 November 1961. – the decision of the directors to send out share certificates to the plaintiff companies amongst other shareholders was taken after receipt of this notice? Yes.

ADJOURNMENT UNTIL 10 a.m. 13. 7. 62.

RE - EXAMINED

You told Mr Cooke that the 1947 agreement didn't operate after 1954 with regard to the cash portion and the dividend portion? It didn't operate

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Re - Examination (continued)

in regard to the dividend portion after 1950 and the cash portion after 1954. Was that agreement superseded by any written or oral agreement in regard to cash and dividend? No, not to my knowledge. You told Mr Cooke that there was no recorded discussions after Macalister Mazengarb's letter of December 1958 and the second of Cunningham's letters of January 1960. Did either of those letters change the position which was raised by the July 1958 letters? No, the advice received from the company's solicitor was that it was still good and binding. You discussed the question of Grimes & Browning receiving cash as per your Interrogatory. What cash was that – where had it previously appeared? A certain proportion arose from cash rebates and a certain proportion arose from a share of land subdivision granted pro rata to the builders participating in a land scheme. The builders engaged on the scheme felt the return they were getting from the houses was not as great as if they went out and did speculative work on their own account. It was resolved to pay them 25% of the profit made on land subdivision. Did either of those portions of cash relate to cash in lieu of rebate shares – were rebate shares allotted them and cash given to Grimes & Browning? The cash they had there was cash they were entitled to by resolution of the directors, and the only way they could get shares was by Grimes & Browning applying for them. Once the company had created cash debits they could not treat it as otherwise. This cash you have been talking about – could it be described as frozen cash by the bank? Not all of it. What was the balance – were you talking about Grimes & Browning? Yes. I am sorry I was talking in a general way. The total rebate cash frozen was just over £20,000. And that was held to the credit of various shareholders? Yes. Would you look at the ledger sheets of the three plaintiffs – EXHIBIT B – in the case of each of the three typed papers there is a figure shown on the right hand side of the page – does that represent a cash credit owing by the company? Yes. Has that cash arisen out of the declaration of portion of cash for rebates in the earlier years? Yes. And is that the cash, or the nature of a cash entry which you have said has been frozen? That is right. R.O. Slacke Ltd. is shown as having a cash credit there? Yes. Has that any relation to his suggested set-off for goods? It would, I suggest, form part of it – the set-off they were paying . . . . There is a passage in the evidence where you said that once the directors declare a cash rebate that is legally owing to J.M. Construction Co. – when you say that are you referring to the cash shown as a credit in the ledgers? - - - - Would you put into your own words your understanding of the position (OBJECTION) (CONCEDED AFTER DISCUSSION THAT ENTITLED TO HAVE MATTER CLARIFIED). The passage on page 50 of the evidence reads "Once the directors declare a cash rebate that is legally owing to J.M. Construction Co. –" would you comment on that? What I meant was – my answer with regard to cash rebate is the balance that is left out of the total rebate after the shares have been charged against them, and that sum represents the shareholder's proportion of the total cash that the directors resolved shall be paid out. Those balances are the balances reflected in this exhibit. EXHIBIT B – in the last column. The company has made itself

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Re - Examination (continued)

liable for that amount in cash.

COURT: Take by way of illustration the declaration of the 30th November 1960 of a rebate of £1,448 in favour of J.M. Construction Co. – that figure is the amount, is it not, to which J.M. Construction Co. is entitled by way of rebate under your formula? Yes. It is a rebate, is it not, on the amount of purchases in respect of which payment has been made by J.M. Construction Co. or is owing by J.M. Construction Co.? Yes. And under your rebate agreement you say that you are entitled to capitalise it in the form of shares? Yes. But before you reach the process of capitalisation which you claim to be entitled to £1,448 must be a sum to which the J.M. Construction Co. is entitled subject to the agreement? Yes. And as a sum, is it not a sum that is the property of J.M. Construction Co. to be disposed of according to the agreement? Yes. And if it were not for the agreement, that sum would be utilised either by allowing a set-off or by actual payment? The agreement is the document we rely on. If it were not for the agreement the company would knock it off, as it were, the amount owing or – ? it might be cash in the first instance, but according to you it is cash to be disposed of in a particular way under the agreement? Yes. That I understand is in line with what was said in some other passages of evidence.

Who did the actual mathematics of applying the formula? I did. Once you had ceased purchasing goods yourself from the company did you receive any rebate shares? No. Was the formula applied to you in any way differently from any of the other shareholders? No. Does the Share Registrar show any dates on this question of allotment? Yes. EXHIBIT 21 – SHARE REGISTER. At what stage in the allotment of shares were the rebate chits sent out? They were sent out as soon as the figure had been arrived at. Were they sent out before or after the Return of Allotments was filed? Before. Some reference was made to a letter from Mr Cleary in 1950 – did the receipt of that letter lead to any change in the company's procedure as regards this rebating and capitalisation? No, the rebate agreement prepared by Barnett had been in force at least two years then, and continued in force. Are you in touch with the directors of the company apart from actual board meetings? Yes, they visit the office a number of times . . . . How often do you see Mr Browning? He is in Auckland possibly three weeks out of every four. And only spends about a week in a month down here? Yes. How long has that been going on? Since early 1951 he has been out of the Hutt very largely. He organised the building of the Tokoroa mill which took about two years. Have you other directors locally? Yes, five others.

COURT: What does Mr Browning draw as Managing Director from the company? £4,000 p.a. When was that increased to £4,000? I think from December 1960. Was that the subject of resolution at the Annual General meeting? Yes. Was it voted on by the shareholders there? Yes. You say now that Browning spends about 1 week in 4 on the affairs of the company?

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Re-Examination (continued)

He is engaged on the company's affairs in Auckland. – Most of our activities are centred there now. When you say he organised the erection of the Tokoroa mill for 2 years, do you mean he took any part in the building of it? Yes, Mr Browning is a carpenter by trade and he designed the sawmill and controlled its erection. Was there no architect? No. He supervised the building from time to time? Yes. I think you mentioned in your evidence that this policy of capitalisation of shares was supported by Mr Browning throughout although his firm was one of the largest shareholders in the company, did you not? Yes, it was a reluctant support. It may have been reluctant in the sense that the bank had some control over it, but the point you made was that if anyone suffered it was his firm because it was a large firm? Yes, it is the biggest shareholder. You also said that in 1960 with profits of £101,000 they were in a sense eaten up by the debits that had been incurred by various shareholders – has Mr Grime's firm a substantial debit? No, they do a lot of Government work and pay their account monthly – they have more than a month to month debit. Has the acquiescence, as it were, of the main body of the shareholders in this capitalisation of shares procedure, resulted in the main body of the shareholders going into debit? No. I understood you to reply to Mr Cooke that the profits of the company in 1960 at £101,000 disappeared in the form of various debits owing by shareholders? Substantially, and there were capital improvements going on. You told us that in 1960 £170,000 was owing to the company – is the major portion of that sum owing by shareholders? Very largely the shareholders. In effect, have not these shareholders been treating their right to cash rebates as justification for setting off or endeavouring to set off, or leaving unpaid, their various accounts? No, the reason is that money is very tight these days, but the position has not been made clear – these share rebates are no burden to the shareholders. They must be a burden to the shareholders, must they not, if they are brought into taxation at par value? They are not, they are brought in at 1/-. But if they were brought in at par they would be? Yes, and I can qualify this by saying that up to 1958 they had been paying at par value for them but due to a course of action taken by Jones Timber Co. representatives, all the shareholders were granted tax concession right back to 1954. Bringing their shares to 1/- in the £? Yes, and for every share in the Hutt Timber & Hardware Co. the Inland Revenue paid them back 9/6 in cash, which came to several thousand £s. Has not it another effect, that as long as these shares are treated by the Inland Revenue Department as worth only 1/- the bank will maintain its policy of refusing to allow your company to make any cash rebate? I said yesterday in evidence that 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. We are endeavouring to get to the stage where we can pay dividends. Won't the right to pay dividends continue to be controlled by the bank? Yes, but we do not anticipate being in a position to pay dividends for some time – the shareholders won't be being paid dividends, but against that they won't be incurring any liability by the acceptance of capitalised shares.

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Re - Examination (continued)

Another point, yesterday I put in a statement showing the cash the plaintiff companies had actually received between 1949 and 1954. With regard to the original shareholders – not the Auckland ones – they had their original capital back four times in cash rebates so that the capital there now is rebate capital – the shares they now own are largely rebate shares which cost them only 6d income tax. Another point – you mentioned that in issuing share certificates you issued about 85 – in 1949 I take it the shareholders would be about half that number or less? Yes, approximately 35. Between 1947 and 1949 did you have any shareholders who were not in your view bound by this agreement? Not in my view. Did you have any shareholders who were expressly excluded from the agreement? No, no-one was excluded from the agreement. Between 1947 and 1949 was W.E. Jones Ltd. a shareholder in your view bound by the agreement? Yes. When he purported to transfer 2,500 of his shares, 1,500 to one company and 1,000 to the other, you imposed the condition that the transferees would likewise be bound by the agreement? Yes. If you had accepted the two shareholders, the two plaintiffs, J.M. Construction Co. and Jones Timber Co. without the imposition of that condition, would they have been entitled to anything more than any dividend which the company had paid on shares? Not if they did not agree to the terms of the rebate. Would there have been any payment or rebate to them if they had not so agreed? We would not have committed ourselves to such a (policy). It comes to this, would it have been possible to make any exception in their favour as against the conditions against which some 33 shareholders held their shares? No, all the shares carried the same privileges. Would you be prepared to accept Jones Timber Co. and J.M. Construction Co. if they declined to accept the position? No, we would not have registered the transfer. Do you know whether any of the shareholders under any resolution became entitled to rebates from 1947 on other than as signatories to the agreement? Yes, there was Mr Hewinson who got cash rebates, who hasn't signed – he was in 1955. Prior to the 1947 agreement were shareholders at that time receiving from the point of view of practice, cash rebates? I don't think they received anything – there was no actual cash rebate ever declared, and the first dividend in 1948 – there has been no dividend on capital either. If the Jones Timber Co. and J.M. Construction Co. had become shareholders relieved from the obligation of coming under the agreement they would have had to pay retail prices? They were paying retail prices. Subject to the ordinary trade discount? Yes, 2½%. In regard to Mr Slacke, when his company was formed in 1949 was there any change made in the Register as between Slacke and R.O. Slacke Ltd. A share transfer went through – it is an exhibit – that was in November 1949. And from then on was R.O. Slacke Ltd. treated in the same way as other shareholders? Yes.

Cross - Examination

You told his Honour that Mr Browning's present salary had been fixed at £4,000 from 1960? It dated back and was retrospective from the passing

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Cross - Examination (continued)

of the resolution in 1960. That figure was fixed at the General meeting? Yes. Since then was a circular sent out for a general meeting to be held in May 1961 which gave notice of a proposal to alter the company's articles by omitting part of Article 81 (a) (d) and at the foot of that circular was this statement – "Clause 81(d) this clause in the Company's Articles of Association reads as follows – 'the remuneration of the Managing Director shall from time to time be fixed by the company in general meeting'." And then the note at the foot of the circular goes on to say "This clause was included in the Articles of Association at the request of M.O. Browning when the company was formed but the directors are now of the opinion that this clause is no longer necessary and that the remuneration of the Managing Director should in future be fixed by the Board in accordance with the usual practice followed by other campanies" – what was the purpose of altering the Articles so as to leave this matter to the Board? At one stage the shareholders assented to a proposal to increase Mr Browning's salary from £3,000 to £4,000 but since then the Articles have been altered to provide that the Board shall fix his remuneration and not the shareholders. What is the reason for that subsequent alteration? A few of our directors are outside, Mr (Ian Cook) a public accountant, and Mr Hanna, who used to be a director of the Reserve Bank and now represents the Bank of New Zealand on our Board – they considered the power of the shareholders generally to regulate the salary of the Managing Director was most unusual and not a custom followed in any company where the power to regulate the Managing Director's salary rested wholly with the Board of Directors. They considered that Hutt Timber & Hardware Co. should fall into line with accepted practice in other big companies. That was the purpose for which the change was made in the Articles of Association. Are you suggesting that Mr Hanna or anyone else succeeded in talking Browning to agreeing with this (OBJECTION). Turning to some other matters arising out of His Honour's questions, you suggested to His Honour that those companies and others had had certain cash returns on capital and you referred in that connection to the cash rebates they had in the earlier years? Yes. Is it not more correct to say that any rebates were not in any form returns on capital but were returns from the trading operations of the companies concerned? No, a dividend is a return from the trading of the company. A dividend is a return on its capital? Yes. But rebates are part of his trading transactions with the Hutt Timber & Hardware Co. and any benefit he gets by way of rebate arises from his trading activities, does it not? The rebate arises from trading activities but the cash that is paid is in direct ratio to his capital – the same percentage applies to all shareholders. That is a question going to the operation of your formula – but the rebate has to be earned by placing orders with the defendant company? Yes, that is correct. And the rebateable funds are arrived at on the basis of the company's surplus for the year and the share of those rebateable funds credited to the shareholders depends entirely on the volume of their transaction as customers? Yes. From a point of view of a return depending simply on capital investment, the last return from your company was in 1949? The dividend – yes. Lastly, you have

10

20

30

40

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Cross - Examination (continued)

suggested that some shareholders had had income tax assessments re-opened in past years – what is the earliest year in the case of any shareholder where to your knowledge the income tax authorities have re-opened the assessment? 1954. You have referred to 1/- a share accepted by the Inland Revenue Department – did you mean by that that 1/- a share had been accepted by all shareholders since 1954? Yes, it was open to all shareholders. First the(revaluation) wouldn't go beyond 1958, but there have been one or two tax investigations of certain shareholders and discrepancies have been found in their accounts and their accounts were re-opened back for ten years, and for some reason I have not been able to fathom the Department gave them a concession from 1954 onwards and that became generally known and pressure was put on the Department by other shareholders – they refused to re-open (the Department refused) and then they were taxed with the question does a person have to be dishonest to get something out of the Inland Revenue Department and that was a question Mr Macken couldn't answer and I think to save his face he gave it to everyone. What I am suggesting to you is that at the present time the Tax position is uncertain because is it not a fact that on behalf of groups of shareholders other than the plaintiffs in the present case, certain public accountants and taxation consultants have been negotiating with the Inland Revenue Department as to what values will be accepted for shares over a number of recent years? I wouldn't say a number, I know of 1960. That is the last year that has been returned, of course. The year ending 1961 is now in issue isn't it? No, we haven't done anything about our cash rebate yet. Is it not a fact that at least two years are at present under discussion with the Tax Department and for one year a figure of 13/- has been suggested and for another year a figure of 7/-? As the company issuing the shares we cannot take any part in that. But it has come to your knowledge? Yes, I am aware the Department is considering a higher figure than 1/- but so far nothing has come of it. The position is simply fluid at the present time? Yes – a figure of £1 could be ridiculous in view of their past action. These negotiations have been on behalf of shareholders other than the plaintiffs? I don't know really. Are you also aware that the Commissioner has referred to the Crown Law Office some question as to his power to agree to any compromise figure? No– what do you mean by compromise figure? Some figure between 1/- and £1? I haven't heard that one – I believe it is a question of the resolution creation of rebate. The previous opinion was that the creation of the rebate and the issuing of fully paid shares in satisfaction of it was contemporaneous and that was the opinion given by the Department itself. I feel that the only way that they think they can get out of the present impasse is to try to separate creation of rebate and later creation of shares. The suggestion is that the Department may have looked at the matter in the wrong way in the past, and that the true way of looking at the matter is that there are these two stages, payment of a rebate first and secondly the use of that payment to pay up shares – is that right? I couldn't answer that – the Department has never been in touch with us on it. But this is a matter we discussed in cross-examination yesterday – to entitle your company

In the Supreme Court of New Zealand

Defendant's Evidence No. 13 L.R. Bowen

Cross - Examination (continued)

to tax exemption under the section regarding rebates it was essential that the rebate be the actual property of the recipient? That goes without saying once you declare a rebate you immediately transfer the right from the company to whom it is due.

MID MORNING ADJOURNMENT

NO. 14

In the Supreme Court of New Zealand

Defendant's Evidence No. 14 M.W. Downes

Examination

MAXWELL WILSON DOWNES

I am a public accountant practising in Wellington and a member of firm of Watkins Hull Wheeler and Johnston. It has been in existence for a number of years. My firm has audited accounts of Hutt Timber & Hardware Co. commencing with year ending November 1956. I do the audit myself personally. Each year on my audit I have access to a schedule showing allocation of rebates. Looking at EXHIBIT 11, I have a schedule prepared in that form – I work from the handwritten schedule each year and it
10 follows the form of this exhibit. I check as to the amount of revenue – total revenue distributed as shown in that schedule – total profit or revenue. I check the allocation of the rebate shares in accordance with purchases of individual shareholders to total surplus. We do not check them all in detail, we test-check them. I check on the correctness of the resulting nominal capital. I check on the allocation of shares as per the schedule and the entry in the share register – we actually balance the share register with the accounts – we balance those two figures. I check the resolutions, the Directors' resolution rebating the profit and the shareholders' resolutions increasing the capital and applying rebate to the fully
20 paid shares. When we are test-checking individual distributions, we would select a certain percentage of the shareholders listed here and from their records of sales, in other words their account in the ledger, we would add their total sales, and check against the company's calculation. During the period when we have conducted the audit we have found no irregularities in the procedure I have described.

Cross - Examination

CROSS - EXAMINED

Do you know how many firms have audited the books of Hutt Timber & Hardware Co. since its incorporation? No I couldn't say definitely. Your firm commenced with the year ending November 1956? Yes. Are you
30 familiar with an agreement entered into between the company and its shareholders in 1947? I would say that when we first took over the audit I had seen it but I would not like to say I am familiar with it. Are you aware that prior to the time your firm audited the books this agreement provided for rebates to be paid partly in shares and partly in cash? Yes. And are you aware that there is a formula set out in the agreement to be applied by the directors and providing the basis for the distribution of cash and shares?

In the Supreme Court of New Zealand

Defendant's Evidence No. 14 M.W. Downes

Cross - Examination (continued)

Yes. Has it ever fallen to your lot to apply that formula in any way? No. Would you agree that the workings, or the working out of the distribution between cash and shares by a member of the company would be a prime document and should be kept by the company? They have never in the time we have been auditing paid out the rebate in cash. If it had been necessary while you were auditing to apply the formula, would you also regard it as necessary to keep those workings in the books of the company? There is a statutory requirement to keep records I think for ten years. If you had had to apply the formula would you have ensured that those workings be preserved? It wouldn't be of any value to me after I had seen it was done correctly. That would be up to the accountant. There is a rebate ledger – does that rebate ledger indicate whether past auditors have checked the working out of the formula? No, it didn't – it is not necessarily recognised audit practice to check such. There are no chits on that ledger? No, there would be no no entries since our time. 10

COURT: What has been kept, I take it, has been a record of the various purchases each year by the shareholders? Yes. And a record of the capital each shareholder has an interest in? And there has been kept some record of the rebates which it is claimed these shareholders are entitled to from year to year? Yes. The actual working out of the formulas whereby the rebates were arrived at – would that be regarded as part of the books of the company? No, I don't think they would. But you say that with the other information the method of applying the formula could be worked out again? Yes. 20

CASE FOR DEFENDANT.

NO. 15

REASONS FOR JUDGMENT OF LEICESTER J.

The plaintiffs were duly incorporated as private companies in 1949. The first-named and the third-named have each carried on the business of builders and the second-named that of builders' merchants, the defendant that of the builders' supplier. It was incorporated as a private company in 1943 with a capital of £29,200. In 1949, as its members then exceeded twentyfive and as it desired to pay dividends and qualify for a listing on the stock exchange, it became a public company. In the same year one of its original shareholders, W.E. Jones Limited, transferred 1,000 of its shares in the defendant to J.M. Construction Company Limited which was then formed to take over the housebuilding side of its operations, and 1,500 of such shares to Jones Timber Company Limited formed to take over its merchandising side. The acquisition of the shares at this particular time enabled the two companies to obtain supplies then difficult to procure. Such benefits as accrued to W.E. Jones Limited in proportion to its shareholding in the defendant were taken over by the two newly-formed companies at valuation. The third-named plaintiff, when incorporated in 1949, took over some of the shares in the defendant owned by R.O. Slacke, a signatory to the defendant's Articles. With the exception of Jones Timber Company Limited which ceased to purchase builders' supplies from the defendant in 1961, each of the plaintiffs has remained a shareholder in the defendant and continued at all material times to purchase such supplies upon terms that the defendant would annually make rebates to shareholders who were purchasers of these supplies from it. It is claimed by the defendant that the rebates were to be made under and in accordance with an agreement between shareholders and the company dated 28 November 1947 (and hereinafter referred to as "the 1947 agreement"), the provisions of which are as follows:

"AN AGREEMENT made this 28th day of November, One thousand nine hundred and fortyseven (1947) BETWEEN the persons firms and companies whose names appear in the first column of the Schedule hereto (hereinafter called 'the Builders' and individually referred to as 'each Builder') each with the other and others and with Hutt Timber and Hardware Company Limited a company incorporated in New Zealand with its registered office in Park Avenue City of Lower Hutt (hereinafter called 'the Company') WHEREAS the Builders are shareholders in the Company each owning the number of shares specified opposite the Builders' respective names in the second column of the Schedule hereto AND WHEREAS the Builders are respectively engaged in the building trade and purchase supplies required for their respective businesses from the Company AND WHEREAS the Company annually rebates to the Builders its surplus revenue making such rebate pro-

In the Supreme Court of New Zealand

No. 15 Reasons for Judgment of Leicester J

28th September 1962.

(continued)

portionately according to the transactions of the respective Builders with the Company during the year current when the rebate is made AND WHEREAS such rebates have no relation to the capital subscribed and in consequence the larger investors are at a disadvantage in that no dividend bonus or other payment is made to them in respect of the capital contributed by them AND WHEREAS the Company is indebted to its bankers and is desirous of increasing its capital and of retaining and transferring to capital account a proportion of the funds rebateable to the Builders

NOW THEREFORE THIS AGREEMENT WITNESSETH and the Builders agree each with the other and others and with the Company and the Company agrees with the Builders and each of them individually as follows:- 10

1. In respect of each financial year ending after the execution of this Agreement the Company shall provide out of the profits (if any) a dividend on the paid up capital of the Company for the time being such dividend being at a rate to be fixed by the Directors annually and to be declared only after proper provision has been made by the Directors for depreciation maintenance and all other proper allowances.

2. ALL surplus revenue of the Company in each year after making provision for the dividend afore-said shall be rebated to the Builders in proportion to their respective transactions with the Company. 20

3. THE monies to be rebated to the Builders in accordance with the preceeding paragraph (hereinafter referred to as 'the rebateable funds') shall be credited to the Builders in the books of the Company and such percentage as shall not be required for capitalisation in accordance with the subsequent provisions of this Agreement shall be paid in cash to the respective Builders entitled thereto.

4. THE amount to be paid out to the respective Builders from the rebateable funds each year shall be fixed by the Directors and shall be a percentage bearing the same ratio to the total of the rebateable funds as the shareholding of the respective builders bears to the total capital for the time being of the Company and the balance shall be retained to be applied as hereinafter provided. 30

5. AT the end of each financial year the Company shall increase its capital by an amount equivalent to the total of the rebateable funds retained by the Company and held to the Credit of the respective Builders or any of them in terms of the proceeding clause of this Agreement and each of the Builders in respect of whom funds are retained shall subscribe for additional shares in the capital of the Company to an amount equivalent to the funds retained by the Company on his account provided however that in order to avoid fractions the 40

amount retained shall in each case be £5 or a multiple of £5 and any odd amount shall be paid to the Builders entitled thereto in addition to the amount payable as hereinbefore provided for.

In the Supreme Court of New Zealand

No. 15 Reasons for Judgment of Leicester J.

28th September 1962.

(continued)

6. ON registration of the increase of capital each Builder who has agreed to subscribe for a proportion thereof hereby authorises the Company to apply the funds standing to his credit in rebate account against his liability for calls in respect of the additional shares subscribed for by him so that the shares subscribed for shall be issued to him credited as fully paid up and shall thereupon rank 10 with all other shares for dividend.

7. THIS process shall be repeated at the end of each financial year 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.

8. NO Builder will in the meantime sell or transfer any shares owned by him to any person firm or company that is not a party to to this Agreement without the consent and approval of the Directors of the Company which shall only be given in the event that a trans- 20 feree agrees to subscribe this Agreement and to become bound by the terms thereof.

9. THE Secretary for the time being of the Company is hereby authorised to subscribe the Memorandum of Association in respect of any increase in capital of the Company in the names of the respective builders for the additional share to be taken up by them in any increase of capital in terms of this Agreement."

The Schedule shows the number of shares held to be 32,400 and the number of shareholders to be thirty-six. The agreement was never signed by any of the plaintiffs. According to the Interrogatories, the defendant 30 now has a paid-up capital of £500,920 and its balance sheet made up to 30 November 1961 shows total assets of £1,325,896. Following the execution of the 1947 agreement it paid dividends of 3 per cent for the year ended 30 November 1948, 2½ per cent for the year ended 30 November 1949, but for year ended 30 November 1950 no dividends were recommended and none has since been paid. Although not registered as a co-operative concern it has operated from its inception upon such a basis; and a method of rebating to shareholders was in existence prior to the 1947 agreement. From 1949 to 1951 its rebates were paid partly in cash and partly by the issue of shares. Its last cash rebate paid in 1953 was for the year ended 30 40 November 1951. Since 1955 all rebates have been capitalised in the form of paid-up share capital. Some portion of the rebates was placed to the credit of the plaintiffs and some used as shares. It is said that precise notification as to what was done by the defendant was infrequently received

by the plaintiffs with the result that records for the earlier years are not clear. However, in 1955 they seem to have adopted the practice of setting-off credits against the price of goods debited to them by the defendant, and this practice has since been maintained. Down to 1958 the plaintiffs, apart from complaining amongst themselves and to other shareholders, were apparently discouraged from taking any positive stand against the situation because at each annual meeting of the defendant promises were made that the following year would see a return by the defendant to the earlier practice of paying rebates in cash. It is not denied by the plaintiffs that for a period of some eight years prior to 1955 they accepted year by year the right of the defendant to capitalise in the manner it did, and such capitalisation was part of the general rebating of profits scheme. The method of arriving at the rebateable funds has been to take the defendant's surplus for the year and credit to the shareholder a proportion of the funds in accordance with the volume of his transactions. The intention behind the scheme was that the shareholder with the most shares would irrespective of his rebates get cash in relation to his shareholding, those with the smaller shareholding to receive more shares than cash in an endeavour to equalise the shares. It would seem, however, that once a cash rebate was declared this would, upon the declaration, legally belong to the shareholder who could, at least before such cash rebate was replaced by allocated shares, have forced the defendant to pay what was due. The practice of the defendant has been to allot the rebate shares each year and place the shareholders on the register in respect of each allotment. Its procedure has been to show the rebate credit as at 30 November each year, and to allow such credit to stand notionally in its books until transferred to shares normally issued in the following year.

During the years 1953 to 1958 the defendant entered upon an elaborate scheme of expansion by the purchase of mills, forests, and rural property, a sum of almost £500,000 being involved. In its early stages it had arranged an overdraft with the Bank of New Zealand which did not exert any pressure upon it in the first few years after the 1947 agreement was executed; but in the 1953–54 period its attitude substantially hardened. Even in the years 1947–49 the defendant had not a great deal of liquid cash and was working on the overdraft. This fact bears upon the capitalisation provisions which were designed to help reduce the overdraft. Surplus revenue of the defendant was distributed in one form or another to shareholders and was taxable to them. At the time of the hearing, the general overdraft was in the region of £340,000 and the housing overdrafts nearer £500,000. In 1953 the cash rebates declared by the defendant were not paid out as the bank issued instructions that they were to be frozen. Not all the shareholders at this time acceded to the circularised request of the defendant that future rebates should be capitalised. The plaintiff companies left the amount of their rebates as a credit in the defendant's books. The dissatisfaction of the shareholders was allayed by the statement that the defendant hoped to reduce or eliminate the overdraft within three or four years and that, although cash rebates could not be

paid out until the bank was satisfied, there was reason to believe that it would be so satisfied within that period. It is difficult now to see the basis for this expectation since at the time of the hearing the defendant would appear to be as much in the hands of the bank as it ever was, and the restriction imposed against any issue of the rebates in cash still remains. Shareholders have been advised by the defendant that as from the end of this year its policy is to be changed and it will pay its own income tax. If this particular expectation is realised, it cannot amount to any great solace to the plaintiffs in a situation where shareholders have had imposed upon them increasing numbers of rebate shares of a diminishing value. Unless this process of watering the shares ceases, it is the view of the plaintiffs that the defendant will be unable in the future to pay a reasonable dividend. Whatever may have been the effect of expansion, the fact remains that the only method by which the overdraft can be reduced is for the bank to continue to take shareholders' funds. It cannot be ignored, of course, that from the point of view of the defendant the merit of its rebating system has been that, for taxation purposes it is able to claim that it has no surplus revenue or profits upon the ground that the whole of the excess of income over expenditure is rebated to members in proportion to the size of their transactions with it. Upon this basis the defendant has been able to claim that the rebates are deductible as expenditure under s.145 of the Land and Income Tax Act 1954. In every year of the defendant's operations with the exception of that ended on 30 November 1956 (in which year a loss was in fact made) these rebates have been credited to the shareholders. According to the evidence given on behalf of the defendant the rebates have been proportionate to customers' transactions with the company and declared on the basis of their being credited to payment of share capital. Nevertheless, no consistent principle or basis seems to have been adopted as to what amount of the rebate was to be left standing to the credit of each shareholder. Save for odd shillings and pence, the defendant from 1955 onwards has embarked upon a policy of appropriating all the credits to shares which, in the hands of the plaintiffs, were treated by the Inland Revenue Department as income and at one stage as income of an amount equal to the nominal value of the shares. In the result, the plaintiffs have been required to pay tax on the shares to the Department while receiving no return on their capital invested. It is not surprising, therefore, that this dissatisfaction grew to an extent that led the plaintiffs to demand a cessation by the defendant of the issue of further shares. Following earlier correspondence on the subject (in which correspondence the defendant's solicitors claimed that their client still relied on the 1947 agreement), Messrs. Robinson and Cunningham, solicitors for J.M. Construction Company Limited and Jones Timber Company Limited, wrote on 10 December 1957 to the defendant as follows:

> "We have been consulted by the Jones Timber Co. Ltd. and also by the J.M. Construction Co. Ltd. with regard to your dealings with rebates due to them, and in particular with the income tax position arising thereout.

In the Supreme Court of New Zealand

No. 15
Reasons for Judgment of Leicester J.

28th September 1962.

(continued)

"The effect of your procedure is that, instead of receiving rebates, they have been merely credited with them and the credits largely applied to the issuing of new shares in your Company.

"The Jones Timber Co. Ltd. and the J.M. Construction Co. Ltd. asked us to consider the legal position arising out of this procedure for income tax purposes, but we have pointed out that a prior matter is that this precedure seems to us to have no legal basis.

"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. Many years ago it seems that there was some fairly loose form of agreement with some other firms and companies, but even if that would bind the signatories thereto – a point which appears to us to be doubtful – it certainly would not bind the Jones Timber Co. Ltd. or the J.M. Construction Co. Ltd. which were not parties.

"Furthermore there are certain provisions in it, such as clause 4, which fix the cash payments by reference to the capital of the Company, and they appear to contravene the provision of the Land and Income Tax Act relating to co-operative concerns.

"The whole matter seems to be in a very unsatisfactory position and our clients find themselves credited with large numbers of shares which are unsaleable in lieu of cash returns from their businesses. Yet they are being taxed as if they had actually received the moneys.

"Obviously they cannot accept this erroneous basis, and while they do not wish to embarrass your Company unduly, some adjustments will have to be made, both as regards past and future procedure.

"The correct method would appear to be to reverse the purported issue of shares which were illegally effected, although if you have purchasers therefor it would no doubt enable a short cut to be taken, and without prejudice to their contention that the shares have been illegally allotted to them in the past, they would allow your Company to rectify the position by disposing of the shares already issued at their nominal value and giving an assurance that the previous procedure will not be followed in future.

"This procedure of issuing shares in lieu of rebates is doubly embarrassing and undesirable for income tax purposes because, if the amounts were left as credits only, then, if they turned out to be bad debts, they could eventually be written off. The Tax Department, however, insists that they can never be written off if your Company has the power to pay debts by issuing shares.

"An alternative to having the position rectified through your company is to contest the matter direct with the Income Tax Department on the basis that the purported issue of shares was illegal, but our clients considered that they should advise you of the position first.

Will you please let us hear from you hereon."

The defendant's solicitors replied on 26 February 1958. (Their letter is erroneously dated 26 September 1958.)

It reads:

"We have been asked to advise the Hutt Timber and Hardware Co. Ltd. in respect of a letter recently addressed by you to that Company concerning the capitalisation of rebates available to the above named companies.

"We propose in the first place to consider some of the statements made in your letter. While we may accept as a general proposition that a company may not issue shares in payment of its debts without authority it is clear that such authority exists in respect of both the Jones Timber Company and the J.M. Construction Co. Ltd. That authority is explicit and in any case the acceptance by those two companies of the situation and the dealings in shares of the Hutt Timber Co. Ltd. which both these companies have made must operate as an estoppel and we propose to advise our client company accordingly.

"You make a reference to a 'fairly loose form of Agreement'. The Agreement does not warrant such a title from you. The Agreement in fact was a properly prepared and executed Agreement and it has been operated upon by your client companies and by the Hutt Timber Company for many years. We have informed our client company that the incidence of income tax as it affects your client companies is not a matter of concern to the Hutt Timber Company which has acted throughout with the consent and co-operation of its shareholders who in turn have acquiesced in the situation over many years.

"It is not correct to say that the shares in our client company are unsaleable. As we have pointed out in fact your client company has indeed sold shares over recent years, indeed the Jones Timber Company has made efforts recently to sell the balance of the shares which it has held.

"We cannot advise our client company either that there is any contravention of the provisions of the Land and Income Tax Acts in respect of co-operative concerns. In making this statement however we assume that you are referring to Section 145 of the Act. If you are we would point out to you that the shares received by way of rebate by your client companies were acceptable to them and the amount of

rebate payable was not based upon capital but only upon that portion of it payable in cash. This does not appear to us to be a contravention of the Act. Incidently the Tax Department has approved the form of Agreement under which the companies operate.

"We shall be glad to confer with you further upon this matter and in the meantime we ask for your comments on the matters contained in this letter."

On 12 March 1958 Messrs. Robinson and Cunningham again wrote to the defendant's solicitors:

"We have your letter bearing date the 26th September (February), 1958, and regret to note that your company – apparently intends to do nothing in this matter. 10

"You state that you have advised your client company that the incidence of income tax as it affects our client company 'is not a matter of concern to the Hutt Timber Co.' It seems to us that the primary consideration of a so-called co-operative company should be how its actions affect its members, and if this is not the case, then it is failing in its purpose.

"As to whether the agreement should be termed a loose one, we did not use this term in any deprecatory sense. It was loose at the time of its execution in that it left shareholders in an indefinite position, and it was still looser in its application because what purported primarily to be an authority to capitalise up to £60,000 has apparently been carried on to hundreds of thousands. 20

"We think it is a pity that the Hutt Timber Co. takes the stand that it is not concerned with the effect of its actions, but as it does so, and as our client's right of objection to its income tax assessment is on the point of expiry we have now taken the matter up with the Income Tax Department."

This letter was answered on 14 March 1958 in these terms: 30

We have had your letter of the 12th March. You appear to be anxious to put into our letter things which were not said in it. It is we think quite wrong of you to take from the phrase that we felt that the incidence of income tax was not a matter of concern to the Hutt Timber Company, the inferences which you have done. You in your turn have failed to take into consideration the beneficial effects that your client company have from their ability to trade with Hutt Timber & Hardware Co. Limited. No purpose could be served in writing the type of letter to which we are now replying, and we propose to let the matter rest at that unless you desire to approach us again after 40

your discussions with the Income Tax Department."

Messrs. Robinson and Cunningham, on 2 July 1958, then proceeded to give the following notice:

"As we understand that there is a suggestion that your company proposes to issue further shares to shareholders in satisfaction of rebates, we send you this formal notice confirming our previous advice in correspondence that no person has authority to apply for such shares on behalf of either of the above companies and if any such move is made our companies will take action.

10 "We are sending a copy of this notice to your solicitor and also the Registrar of Companies explaining the position."

At this stage nothing further was heard from the defendant's solicitors and Messrs. Robinson and Cunningham on 29 January 1960 wrote again as follows:

"On the 2nd July, 1958, we informed you on behalf of both the above companies that no person had any authority to apply on their behalf for further shares in your company. This confirmed our previous intimation to the same effect. We have now been informed that further shares have in fact been allotted.

20 "Our clients repudiate these shares and further advise you that any person purporting to apply for them on their behalf or being in any way concerned in their issue does so at his peril."

The defendant did not accept this intimation, with the result that a further letter dated 2 November 1961 was written by Messrs. Robinson and Cunningham, and reads:

"Some time ago we gave you notice on behalf of the above companies warning you against any purported issue of shares to the above companies and advising you that no such person had any authority to apply on their behalf for such shares.

30 "It appears that this warning has been disregarded and that shares have been issued. Our clients have therefore instructed us to take the necessary legal proceedings.

"This letter is therefore a letter preliminary to action advising you that proceedings are in the course of preparation and will be served on you in due course."

Separate notice was sent to the defendant on behalf of R.O. Slacke Limited by its solicitors, Messrs. Macalister, Mazengarb, Parkin and Rose, on

10 December 1958. The notice reads:

> "On behalf of the abovenamed company we hereby give you notice that our client company is not prepared to accept any further shares in payment of rebates. Any arrangement or agreement which may have been made with our client company regarding the issue of shares in payment of rebate is hereby terminated."

This letter was replied to on 19 December 1958 by the defendant's secretary in these terms:

> "Your letter re issue of future shares to R.O. Slacke Ltd. has been received. It has been handed to our solicitors for reply in the New Year."

The repudiation of R.O. Slacke Limited was likewise ignored or overlooked by the defendant, which on 27 March 1962 wrote:

> "In accordance with a Resolution of Directors passed on 9th November, 1961, fresh Share Certificates were to be issued to all Company Shareholders.
>
> "We accordingly forward you Certificate No. 70 for 10,398 shares shown as held by you at that date.
>
> "Would you kindly sign and return the receipt for the Certificate and also return any old Certificate you may have in your possession as the enclosed Certificate brings Shareholding up to date."

In the opinion of Mr.G.I. Hooper, a director and executive of both the J.M. Construction Company Limited and Jones Timber Company Limited, from 1950 onwards the rebate shares allocated to these companies were, from a taxation aspect, a definite liability. He concedes that they increased the assets of the companies, but in his own view were at the time of the hearing not worth more than 1/- per share. This was the amount at which, on the reopening of assessments, the Inland Revenue Department had agreed to fix the value of such shares as were allocated for the 1954, 1955, and 1956 years. What the attitude of that Department is in respect of their value between 1956 and the present time is by no means clear. This revaluation of the shares on the part of the Department has been the cause of considerable feeling by the managing director of the defendant who, at a meeting of the defendant shareholders in December 1955, claimed that in obtaining valuations of the rebate shares at lower than their par value some of the shareholders had "gone behind the company's back"; and he was most disturbed at such valuation. After the J.M. Construction Company Limited and Jones Timber Company Limited had given notice that they would accept no further rebate shares it was discovered by the auditor that more shares in fact had been placed in their names although

no allotments or share certificates had been received. This situation led to the writing by Messr. Robinson and Cunningham of the repudiation letters to which reference has earlier been made; it also gave rise to the plaintiffs decision that only litigation would settle their position. It would seem that R.O. Slacke Limited has not, since 1958, shown the rebate shares in its accounts although prior to that, when they were assessed at par, it did so. Some confusion has arisen as to the period in respect of which the shares in its case were assessed at 1/- per share; but it seems that in its year ended 31 August 1959 it showed the rebate shares as an
10 asset and then wrote them off as a bad debt. Its present position with the Inland Revenue Department seems unsettled and no doubt the Department in its case, as in the case of other shareholders, is awaiting the result of this litigation. The laissez faire attitude on the part of the directors of the plaintiff companies towards the defendant's policy is somewhat surprising in the circumstances. During the period from 1949 onwards directors, often accompanied by well-qualified advisers, attended the meetings of the defendant: indeed, one of the directors of J.M. Construction Company Limited is recorded as having been present at every meeting. Notices of each year's capitalisation resolution with annual
20 accounts attached were sent to the defendant's shareholders. On the other hand, the plaintiffs seek to highlight Mr. Browning, the managing director, as an overpowering figure at these meetings, who promised that the year following each meeting would see the return of cash rebates and the unlamented demise of share capitalisation. I am inclined to think, nevertheless, that Mr. Browning's philosphy was that of Rabbi Ben Ezra to "grow old along with me; the best is yet to be". He kept reminding the shareholders at annual meetings that the defendant was in the hands of the bank; and he himself was by no means unaffected by this fact since his firm was by far the largest of the defendant's shareholders. It is suggested
30 by the defendant's secretary that Mr Hooper's attendance at the meeting held in December 1959 and his statement there that his companies were having a taxation value of 1/- placed on the rebate shares gave the defendant's directors the impression that "they had sort of forgone their resolution not to take further shares."

"His very attendance subsequent to the repudiation of shares," says the witness (at p. 45), "made us think he was back in the fold again."

In their Statement of Claim, as amended at the hearing, the plaintiffs say:

"3. THE Plaintiff companies are and have at all material times
40 been, shareholders in the Defendant Company and they purchased builders' supplies at all material times from the Defendant Company.

"4. SUCH purchases were on the terms that the Defendant Company would annually rebate and pay shareholders pro rata according to the value of their respective purchases an amount equal to its excess of

income over expenditure for the respective years in which such purchases were made.

"5. FOR the years which ended on the 30th days of November 1957, 1958, 1959 and 1960, the following rebates inter alia, were due from the Defendant Company to the first two Plaintiffs and for the years which ended on the 30th days of November, 1958, 1959 and 1960 the following rebates, inter alia, were due from the Defendant Company to the third Plaintiff:–

Year ended	J.M. Construction Co. Ltd.	Jones Timber Co. Ltd.	R.O. Slacke Ltd.
30 . 11 . 57	£ 561	£1,405	–
30 . 11 . 58	£ 389	£1,120	£ 665
30 . 11 . 59	£ 805	£ 917	£1,719
30 . 11 . 60	£1,448	£6,425	£2,106
	£3,203	£9,867	£4,490

"6. THE Defendant Company failed to pay to the Plaintiff companies the rebates referred to in paragraph 5 hereof. In purported satisfaction of the said rebates the Defendant company purported to allot to the Plaintiff companies shares in the Defendant company of a nominal value corresponding to the amounts due in respect of the said rebates. Particulars of such purported allotments, as far as the Plaintiff companies have been able to ascertain, are as follows:–

Date of Return to Registrar of Companies	J.M. Construction Co. Ltd.	Jones Timber Co. Ltd.	R.O. Slacke Ltd.
4 . 12 . 1958	561	1,405	–
21 . 8 . 1959	389	1,120	665
18 . 7 . 1961	805	917	1,719
10 . 9 . 1961	1,448	6,425	2,106

"7. THE purported allotments of shares referred to in Paragraph 6 hereof were made by the Defendant company without authority and wrongfully and contrary to the express instructions of each of the Plaintiff companies, and no notices of allotment were given to the Plaintiff companies.

"WHEREFORE the Plaintiff companies severally pray as follows:

(a) Declarations that the shares referred to in Paragraph 6 hereof were allotted to the respective Plaintiff companies without authority and wrongfully.

(b) Orders that the register of members of the Defendant company be rectified by removing therefrom the names of the respective Plaintiff companies in respect of the said shares.

(c) The Plaintiff J.M. Construction Company Limited prays judgment for the sum of £3,203, the Plaintiff Jones Timber Company prays judgment for the sum of £9,867, the Plaintiff R.O. Slacke Limited prays judgment for the sum of £4,490, being the debts due for the abovementioned rebates."

The case for the plaintiffs is based upon the general proposition that a company cannot force shares upon a person without his consent and that the proposition is equally clear in the case of both private and public companies. It is contended in consequence that the defendant is required to prove the application over all material times of the 1947 agreement or, presumably, some collateral agreement in the same terms. The scheme of the 1947 agreement is that rebates are to be fixed after a dividend has been paid and that of these rebates portion is to be paid in cash and portion is to be used for shares. There is nowhere to be found in evidence that the shares were to be in lieu of rebates in cash. The plaintiffs contend that while the agreement was entered into between the defendant and some thirtysix shareholders in 1947, the fact remains that none of the plaintiffs ever executed or consented to be bound by the agreement; and, in any event, that the agreement was incapable of authorising the course which the defendant has followed. Stress is laid upon the fact that, at any rate since 1955, this course has been to appropriate all the surplus to shares without any dividend and without paying anything in cash. It is said on behalf of the plaintiffs that to do this is so much beyond the terms and the purview of the agreement that nothing can be found in it which could possibly warrant the adoption of such a course: alternatively, it is urged that what is done amounts to a fundamental breach of the agreement entitling the plaintiffs to claim that they are no longer bound by it. Mr Cooke draws attention to the fact that one of the cardinal purposes of the agreement was to provide for dividends and that none has been paid since the year ended 30 November 1949. He submits that the effect of clauses 3, 4, and 5 is that of the rebateable funds some portion is to be paid in cash in each year, there being reference in this connection to a percentage, and the balance applied to new shares. Annual payments in cash have not been made for many years, the last received by the plaintiffs being in 1953 and that for the year ended 30 November 1951. With reference to clause 7 of the agreement, it is claimed that the manifest intention was that if the directors thought a larger amount of capital than £60,000 was necessary, they had to fix such larger amount on a consideration of the company's financial position when the £60,000 was reached. No such amount was in fact fixed by the defendant. Further, so far as clause 4 of the agreement is concerned, Mr Cooke submits that this is so unintelligible that the whole agreement fails through uncertainty. "The more one attempts to find an intelligible meaning for it", he says, "the more it defies

In the Supreme Court of New Zealand

No. 15 Reasons for Judgment of Leicester J.

28th September 1962

(continued)

interpretation"; and it therefore follows that the 1947 agreement in this regard is not sufficiently definite to enable the Court to give it a practical meaning. From the provisions in the agreement which refer to subscribing and filing a memorandum and authorising the secretary to sign such memorandum – all of which provisions are appropiate to the case of a private company and not to that of a public one – it is argued that once the defendant ceased to be a private company then the agreement was not intended to be further applicable. Finally, it is submitted by Mr. Cooke that there are in existance two different agreements, one the 1947 agreement and one entered into by the defendant in 1959 with Auckland builders 10 which provides that the surplus funds of the company are to be repaid to such builders. He claims that if the 1947 agreement still stands, then the whole of the surplus funds under it are to be repaid to the Hutt Valley builders and that both agreements provide for the division of the same funds so that, in entering into the 1959 agreement, the defendant must be taken to recognise that what it is doing is inconsistent with the 1947 agreement which, in such circumstances, could no longer be regarded as binding.

As has been earlier noted, the defendant wrote to R.O. Slacke Limited on 27 March 1962 enclosing a share certificate for 10,398 shares which 20 included substantial allocations for the 1959/61 years. It was stated therein that the certificate was issued in accordance with the resolution of directors passed on 9 November 1961. This resolution, which led to similar certificates being issued to the two other plaintiffs, seems to have been passed in complete disregard of the letter of 2 November 1961 written by Messrs. Robinson and Cunningham and warning the defendant against the purported issue of shares to the Jones Timber Company Limited and J.M. Construction Company Limited, and advising that no person had any authority to apply on their behalf for such shares. The letter further stated that it was preliminary to proceedings then in the course of 30 preparation. Save where demand was made or the shareholder had died, the practice of issuing share certificates in respect of the capitalisation of rebate shares seems to have been abandoned since 1947, but it is claimed for the defendant that the reason why they were issued after the notices was that a request had been received from Auckland to recommence issuing them. The position, in short, was that all three plaintiffs were put on the register for rebate shares issued after their letters of repudiation without notices of allotment or share certificates although, after the action was commenced, certificates for large numbers of shares were in fact sent to them. Under cover of a letter of 19 April 1962 the share certificates were 40 returned by the plaintiffs' solicitors; and again, on 18 June 1962, they wrote to the defendant and, referring to the statement in the directors' report that for the year ended 30 November 1961 it was proposed to rebate the whole of the profits to shareholders in the form of fully-paid shares, said that proceedings had already been issued on behalf of the plaintiffs and that under the circumstances the defendant had no authority to issue any shares whatsoever to any of them. The defendant did not accept the

repudiations put forward on behalf of the plaintiffs but continued to credit them with rebates and to maintain the attitude of ignoring the plaintiffs. They for their part, having a substantial investment in the defendant, continued to trade with it although they would have been under no financial disability had they transferred their trading accounts to other merchants. On the other hand, the defendant made no demur about accepting orders from the plaintiffs who claim by reason of the timber situation that it was only too glad to do so. In the case of R.O. Slacke Limited, further differences appear to have arisen in regard to the right of that company to 10 offset not only amounts that had been lying uncapitalised for some years by way of rebate credits, but also part of the cash value of rebate credits since 1958. In the result, the defendant since the issue of proceedings has refused to permit its trading account of some £2,400 to be further increased by the supply of more orders from that company. Notice to this effect was furnished by the defendant on 5 February 1962.

Section 60 of the Companies Act 1955 requires a company, whenever it makes an allotment of shares otherwise than in cash, to file the contract in writing setting out the title of the allottee to the allotment or, where the contract has not been reduced to writing, the prescribed particulars of the 20 contract. No such contracts or particulars have been filed in the present case; nor is there any reference to the 1947 agreement in returns of allotment prior to 1959. The answer of the defendant's secretary to the enquiry as to why there had been no reference to the 1947 agreement – viz., that there was no reason at all – I do not find convincing if, in fact, any importance was attached at the time of such returns to the agreement. The attitude of the plaintiffs to it at the time they became shareholders is not without its importance. On 10 November 1949 the defendant wrote to W.E. Jones Limited in the following terms:

> "I am holding two share transfers from you for registering – one to 30 Jones Timber Co. Ltd. for 1500 shares and one to J.M. Construction Co. Ltd. for 1000 shares.
>
> "I would point out to you that the Directors cannot register these unless the transferee agrees to the conditions in the rebate agreement between all shareholders and this company. This will mean that the Directors have the power to capitalise such of the rebates received by Jones Timber Co. Ltd. and J.M. Construction Ltd. as they may deem fit.
>
> "If I do not hear from you to the contrary in a fortnight, I will presume that these terms are agreed to."

40 No reply appears to have been received to this letter. The transfers were approved on 23 February 1950 without any qualification or reservation and without reference to the 1947 agreement. Even if it were to be taken that the letter addressed to W.E. Jones Limited was in reality addressed

In the Supreme Court of New Zealand

No. 15 Reasons for Judgment of Leicester J.

28th September 1962

(continued)

to the two first-named plaintiffs, it does not seem to me that the 1947 agreement could be imposed on them, as the defendant seeks to do, upon the ground that their failure to answer the letter was to be deemed consent. The offeror is not entitled arbitrarily to impose contractural liability on an offeree by such means. Felthouse v. Bindley (1862) 11 C.B. (N.S.) 869. The secretary for the defendant says that in drawing up the minute as to the approval of the transfers it did not seem to him desirable to make reference to the plaintiffs being bound by the 1947 agreement because he was under the impression that they were willing to carry on and abide by such agreement. He further says, while acknowledging that no written or oral reply was received to his letter to W.E. Jones Limited, that his directors, if advised that the plaintiffs were not prepared to agree to the capitalisation of rebates scheme, would have instructed that the share transfers be returned. On the other hand, Mr Hooper claims that he told the defendant's secretary that as the capitalisation figure of £60,000 had nearly been reached he considered it unnecessary for his two companies to sign the 1947 agreement, and further that his directors considered that in such circumstances there was no purpose in so signing. Little importance or consideration appears to have been attached by any of the parties to clause 7 of the 1947 agreement giving the directors the right to fix a larger sum than £60,000 if they considered it necessary on a consideration of the company's financial position when that figure had been reached. If the purpose of the 1947 agreement, as is suggested by the defendant, was to introduce among shareholders an equalisation of capital policy, then this would necessarily have ceased when the capitalisation consisted solely of shares. So far as R.O. Slacke Limited was concerned, no request appears ever to have been made to it to enter into the 1947 agreement although R.O. Slacke himself was a signatory to it. The transfer of Mr Slacke's shares to the company was brought in by him personally to the defendant's secretary who stamped it for him and allegedly asked if he was agreeable to the 1947 agreement, upon which Mr Slacke is stated to have said that he was prepared to carry on on the same basis. As in the case of the other two companies, the approval of his transfer was made simpliciter by the defendant's directors without any stipulation in regard to the 1947 agreement. Mr B.C. Odlin, an accountant, and secretary to R.O. Slacke Limited since 1954, claims that the first suggestion made to him that the company was bound by the 1947 agreement was in 1961. Correspondence has been produced of a sale in 1955 by the Jones Timber Company Limited of 1,500 of its rebate shares to a Mr C.H. Hewinson, and in his case no requirement that he should become bound by the 1947 agreement appears to have been made by the defendant. Mr Hooper is unable to recall any reference being made at any meeting of the defendant to the 1947 agreement. According to him, it was put to shareholders that the policy of capitalisation of shares should continue, not because the 1947 agreement so provided, but because there could be no cash rebates without the authority of the bank and the defendant had no option but to carry out the policy so dictated. It is to be noted that in a letter dated 23 March 1954 and written by the manager of the bank to the managing

director of the defendant giving approval to an increase of overdraft limit to £160,000, it is mentioned that "approval has been given on the definite understanding that 50% of all declared rebates will be capitalised and no rebates at all will be withdrawn in cash without the bank's prior approval". Nor is it without significance to observe that in a circular dated 29 July 1955 and sent to shareholders in regard to the respective amounts due to them for rebates granted during the year ended 30 November 1953, the managing director says – "Please indicate whether you are prepared to capitalise the whole of the sum or portion of same. It would be appreciated if you would capitalise the whole amount, and we consider it would be in your interests to do so, as it may be some considerable time before the Company will be able to make payment of same and therefore you might just as well have this amount credited to you as shares and you could participate in regard to purchases accordingly". This request, to my mind, is inconsistent with the defendant's contention that those who signed the 1947 agreement or later became bound by it or a collateral agreement in similar terms, were regarded by the defendant throughout the material period as required to accept the capitalisation of rebate shares whether or not they wished to do so. If any obligation to accept rebates only in shares had been regarded by the defendant as compulsive because of the 1947 agreement, the circular would have been differently worded.

As a basis for the defence case, Mr Relling submits that the plaintiffs accepted rebates on their purchases over a number of years in the form of shares and they became part and parcel of the defendant's policy which now binds them to an agreement precluding them from rejecting shares allotted after 1958. It is contended that under this agreement with the shareholders the defendant had a right to capitalise and issue the shares and that it was an agreement which could be ended only by the shareholders generally. If they could not reach agreement with the defendant, then the suggestion is that the only correct method of determining the agreement would have been to vote out the existing Board of Directors and to elect instead their own Board willing to terminate the arrangement. He argues that the only agreement as to rebates was that they must be accepted subject to the condition that the defendant had the right to allot shares and/or cash, and that there was never any agreement with the plaintiffs that rebates should be issued solely in cash. So far as the £60,000 limit, reached in 1950, is concerned, Mr Relling submits that from year to year that limit has been extended and that the plaintiffs had full notice of the resolutions so to do. It was canvassed fully, he says, at each meeting and there was no protest that the defendant was going beyond the agreement; but even if there had been a breach of that clause, he submits it was not a fundamental breach giving to the plaintiffs the right to repudiate. He does not deny that, upon his interpretation of this position, the shareholders would be faced with increases in overdraft and the thrusting upon shareholders during this process of more and more unsaleable shares. He concedes that if it were to be held that in 1958 there was no agreement of the kind he puts forward then, apart from

In the Supreme Court of New Zealand

No. 15 Reasons for Judgment of Leicester J.

28th September 1962

(continued)

questions of estoppel and waiver, the defendant would not be in a position to force shares upon the plaintiffs.

These contentions are also put forward by Mr Mathieson in his lengthy concluding argument. He submits that each of the plaintiffs is bound by the terms of the contract independent of the 1947 agreement and evidenced by conduct to accept rebates in the form in which they have been made by the defendant including the method of rebating by share payments. He contends that the terms of this contract are identical with those o t the 1947 agreement entered into by the defendant and the shareholders who actually signed such agreement, and as a consequence the plaintiffs are in exactly the same position as the signatories to the 1947 agreement which in his view has entitled the defendant to do what it has done at all material times. He argues that the contract has never been effectually terminated and the plaintiffs therefore remain still bound by its terms, the respective notices in July and December 1958 representing mere attempts at unilateral repudiation which the defendant has not elected to accept. As alternative submissions, he says that each of the plaintiffs is now estopped from denying that it is bound by the terms of its contract with the defendant, and this estoppel remains completely unaffected by the 1958 notices. He further says that the plaintiffs have waived any rights they may have had to payment of rebate in cash only.

The pith of the case seems to me to lie in a consideration of the 1947 agreement (or the collateral agreement which included its terms) and in these questions of estoppel and waiver. The plaintiffs are, of course, separate legal entities from W.E. Jones Limited or R.O. Slacke personally who were signatories to the agreement, whereas the plaintiffs were not, and it seems to be clear that the defendant cannot set up any privity of contract based on the 1947 agreement as such; nor can the plaintiffs as strangers to that agreement take advantage of its provisions on the ground that it was intended to benefit them. None of the exceptions to this general rule touch the present case. **Midland Silicones Ltd. v. Scruttons Ltd.** (1962) 2 W.L.R. 186. I think that the surrounding circumstances are such that the directors, managers, or secretaries of the plaintiffs, and thus the plaintiffs themselves, must be charged with full knowledge, when the share transfers were approved, of the existence of the 1947 agreement; but I find greater difficulty in accepting Mr Mathieson's submission that the defendant has at all times acted in accordance with the proven rights under that agreement and has never gone outside it. Although its directors could not be compelled to pay dividends, it is fair to say that it went outside the 1947 agreement when it failed to do so; it went outside it when on the sum of £60,000 as capital being reached, it failed on a consideration of its then financial position to fix a larger amount and adopted the procedure unauthorised by the agreement of adding year by year to the initial figure by capitalisation resolutions; and in particular, whether driven to it or not, the defendant went outside it when it departed from its avowed intention and purpose of equalising the shareholders' capital and did so by capital-

ising to shares all the rebates and thus rendering an equalisation policy impossible. It is claimed by the defendant that its conduct in allocating shares from 1954 onwards and the conduct of the plaintiffs in accepting these is inexplicable except on the basis of an agreement identical in its terms with the 1947 one. In my view, this does not logically follow at all. It is true that by 1954 neither dividends nor cash rebates were being paid, and that from 1955 onwards until the 1958 notices the plaintiffs accepted without complaint to the defendant the allocation to them of such rebate shares. By such conduct I do not doubt that they are now estopped from denying that they must accept the shares at least to the dates of the respective notices and I do not understand Mr Cooke to argue otherwise; but I cannot agree with Mr Mathieson's proposition that the whole course of the defendant's conduct from 1949 onwards was attributable to reliance upon the implied representation that, in failing to answer its secretary's letter of 10 November 1949 (and this has an application only to the two firstnamed plaintiffs) combined with their respective conduct in following the course of the other shareholders, the plaintiffs consented to be bound by the 1947 agreement or the collateral one that included its terms. If the plaintiffs can be said because of the position of their directors, managers, or secretaries, to become charged from 1949 with the knowledge of the 1947 agreement, they can equally be said to have known prior to 1949, when the defendant carried on its operations as a private company, that it annually rebated to shareholders **pro rata** according to the value of their respective purchases an amount equal to its excess of income over expenditure for the respective years in which such purchases were made. What the plaintiffs did until 1958 appears to me to be little more than to acquiesce in or be complacent about the variations in the manner in which the defendant carried out its rebating scheme.

In the Supreme Court of New Zealand

No. 15 Reasons for Judgment of Leicester J.

28th September 1962

(continued)

10

20

It is not contended that the 1947 agreement as such is binding on the plaintiffs, and the defendant bases its submissions upon an agreement in identical terms evidence by a course of conduct. The question for determination is whether, when the 1958 repudiation notices were given, any such agreement was in existence. I consider that the provision for dividends was a cardinal provision of the 1947 agreement: if they ceased to be paid after 1949, then it cannot be said that rebates were made pursuant to the terms of that agreement or the collateral one embodying its terms. I do not think that Clause 7 of the 1947 agreement is capable of a construction that gives the defendant the right to avoid fixing the "larger amount" when "that figure" (£60,000) has been reached, and to continue increasing "that figure" from time to time by capitalisation resolutions. If there is any ambiguity in the agreement, this must be resolved against the defendant. **Verba chartarum fortuis accipiuntur contra proferentem.** Apart, however, from these two considerations of the payment of dividend and the effect of clause 7, I find that, when the directors embarked upon a rebating policy radically different from that contemplated by the 1947 agreement in order to benefit the large shareholders who made small purchases only, the main purpose of the agreement failed: it became inoperative and its

30

40

In the Supreme Court of New Zealand

No. 15
Reasons for Judgment of Leicester J.

28th September 1962

(continued)

term expired; but if I am wrong in this respect, then it seems to me that the performance of the agreement by reason of these departures from its terms had become something totally different from what the 1947 agreement ever contemplated. "A party is deemed to have incapacitated himself from performing his side of the contract, not only when he deliberately puts it out of his power to perform the contract, but also when by his own act or default circumstances arise which render him unable to perform his side of the contract or some essential part thereof." Smith's Leading Cases (1929), 3rd ed., p. 40 cited by Devlin J. in Universal Cargo Carriers Corporation v. Citati (1957) 2 Q.B. 401, at p. 441. I have not overlooked the additional contention advanced by Mr Cooke that clause 4 of the agreement is uncertain because if the shareholders received in cash the same percentage of the total of the rebateable funds as their shareholding then all the rebateable funds would disappear in cash and there would be nothing left to capitalise. The only way, he contends, of avoiding that difficulty would be to strike out the words "total of rebateable funds" and substitute "the amount to be paid out from the rebateable funds" but even that would not end the difficulty since a shareholder in certain circumstances could get more cash than the total amount of his rebate. Unfortunately, the records whereby the precise rebates were settled have not been preserved. In his evidence, the defendant's secretary (Mr L.R. Bowen) gave a somewhat involved explanation of his method of ascertainment of rebates which I confess I did not find easy to follow. Mr Relling submitted that a proper appreciation of the working-out of rebate allowances could be had by the simple expedient of reading clauses 3 and 4 together. "It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the Court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain. In my opinion that requirement was not satisfied in this case." Scammell and Nephew Ltd. v. Ouston (1941) A.C. 251 per Lord Wright at p. 267. Nevertheless, it may well be that a contract of this kind in the present case would fall within the wider view of Viscount Maugham (ibid., p. 255) that "in order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done it would be impossible to hold that the contracting parties had the same intention; in other words the consensus ad idem would be a matter of mere conjecture. This general rule, however, applies somewhat differently in different cases. In commercial documents connected with dealings in a trade with which the parties are perfectly familar the Court is very willing, if satisfied that the parties thought that they made a binding contract, to imply terms and in particular terms as to the method of carrying out the contract which it would be impossible to supply in other kinds of contract." The onus is upon the plaintiffs to establish that the language of clause 4 is so obscure and so incapable of any definite or precise meaning as to preclude the Court from being able to attribute to the parties any particular contractual intention.

In the Supreme Court of New Zealand

No. 15
Reasons for Judgment of Leicester J.

28th September 1962

(continued)

In my opinion, that onus has not been discharged; and I do not rest this judgment upon the alleged uncertainty of the clause in question. Nor do I rest it upon any argument as to the repugnancy of the 1947 and 1959 agreements nor upon that of any difference of intention of the defendant as a private company with its intention as a public one.

The notices of the respective plaintiffs of July and December 1958 and the later confirmatory letters have been treated by the defendant as unilateral repudiations ineffective as a matter of law to bring their contracts to an end. "It is quite plain (and I refer, if it be necessary to quote
10 authority, to the speech of Lord Simon, L.C. in **Heyman v. Darwins Ltd.**) that if the conduct of one party to a contract amounts to a repudiation, and the other party does not accept it as such but goes on performing his part of the contract and affirms the contract, the alleged act of repudiation is wholly nugatory and ineffective in law." –**Howard v. Pickford Tool Co. Ltd.** (1951) K.B.D. at p. 420. 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. By treating the repudiations as inoperative and of no effect, it has kept alive for the benefit of the plaintiffs as well as its own the trading relat-
20 ions between them and has remained subject to all its own obligations and liabilities arising from them. Any doubt that it may have had from an appearance of apathy or acquiescence on the part of the plaintiffs from the 1958 notices down to and at the defendant's "Christmas party" meeting of 1959, when business affairs may well have been sublimated to the customary commercial manifestations of goodwill, must have been removed by the blunt warning given by Messrs. Robinson and Cunningham in their letter of 29 January 1960. As from the receipt of the 1958 notices, it was open to the defendant to cease to continue trading relations with the plaintiffs unless and until they withdrew the restrictions they had imposed
30 upon further capitalisation of their rebates by the issue of shares and unless and until they accepted the defendant's view that the terms of the 1947 agreement or the collateral one had not been discarded. It is, of course, true to say that the plaintiffs were not bound to trade with the defendant subsequently to the 1958 notices; but I think that, having given the notices and received no opposition on the part of the defendant to further trading, they were entitled to rely upon such benefits as would accrue to them from the non-interruption of trading between them. It is true also, as Asquith L.J. put it in **Howard's** case (ante at p. 421) that an unaccepted repudiation is "a thing writ in water and of no value to any-
40 body: it confers no legal rights of any sort or kind"; but the notices of 1958 were to my mind 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 agreements. The reasons given in 1958 for the repudiations, if such they were, are immaterial if there were at that time facts in existence which would have provided a good reason. **Universal Cargo Carriers Corporation v. Citati** (1957) 2 Q.B.D. 401, 443.

In the Supreme Court of New Zealand

No. 15 Reasons for Judgment of Leicester J.

28th September 1962

(continued)

In paragraph 24 of its Statement of Defence, the defendant pleads (inter alia):

"(d) They have acted in accordance with the rebate agreement along with all other shareholders for many years prior to 1958 and since that year and they have taken benefits and have been allotted and have received and accepted shares in satisfaction of the rebates accordingly and induced the defendant to act accordingly at all relevant times."

That the plaintiffs accepted shares in satisfaction of their rebates down to 1958 is undisputed. They do not, in their original or amended claims, seek judgment for any sum during the earlier period. I am unable to see, however, how it can be said by Mr Relling that they have since 1958 accepted shares in satisfaction of their rebates and induced the defendant to act accordingly. I am unable to regard inconclusive evidence as to conversations between Messrs. Hooper and Bowen and the lack of reiteration by the former during the defendant's meetings after 1958 as constituting a revival of any estoppel that may have existed prior to the notices. Mr Hooper was aware that the respective solicitors had the matter in hand and in maintaining his interest in the defendant's affairs it was not unwise of him to refrain from raising this controversial issue in their absence. In the same way, I do not agree that an estoppel against the plaintiff is created by the fact that after 1958 one of the directors of the J.M. Construction Company Limited attended the defendant's meetings and failed to vote against the capitalisation resolutions, nor by the fact that the conduct of Messrs. Hooper and Odlin gave Mr Bowen the impression that the plaintiffs had abandoned their 1958 attitude. Nor (upon any test as to a reasonable man would conclude) am I prepared to find that such conversations or ommissions on the part of Messrs. Hooper, Bowen, and Odlin, or any of them, amounted to waiver between the dates of the notices and those of allotment. In Commissioner of Inland Revenue v. Morris (1958) N.Z.L.R. 1126 Gresson P. and Cleary J. in their joint judgment state the effect of the authorities upon the principle in the following terms: "The essence of the doctrine is that a person is not permitted to enforce strict legal rights when it would be unjust that he should be allowed to do so having regards to the dealings which have take place between the parties. But those dealings must amount to one party having been led by the attitude of the other to alter his own position." See, also, Auckland Harbour Board v. Kaihe (1962) N.Z.L.R. 68 at p. 73. "Alteration of position for the purposes of estoppel in law does not require an active alteration of position. The expression ' altering his position' was used by Blackburn J. in his definition of estoppel in Knights v. Wiffen (1870) L.R. 5 Q.B. 660,, 665. Of it Farwell J. in Dixon v. Kennawar & Co. (1900) 1 Ch. 833, said: 'It is plain that when Blackburn J. uses the phrase 'alter his position' he does not mean that an active alteration is necessary, but that it is sufficient if the person to whom the statement is made rests satisfied with the position taken up by him in reliance on the statement, so that he

suffers loss.' " "Estoppels are odious", says Bramwell L.J. in Baxendale v. Bennett (1878) 3 Q.B.D. 525, at p. 529, "and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do." I hold that whatever has been said or done by the plaintiffs, or whatever they have failed to say or do, since the 1958 notices has not been contrary to the stand they took at the time of the notices nor has it been sufficient to raise any estoppel against them in the subsequent period. As an alternative argument, Mr Relling urges that the plaintiffs are estopped by their conduct from denying a state of affairs whereby the arrangement was to continue in force until revoked by agreement between the defendant and its shareholders generally: if such were the position, the Court would expect to find it written into the defendant's Articles. Even if it had been, any representations that it involved would have been representations of law, not of fact, and as such could not found an estoppel. Kai Nam (a Firm) v. Ma Kam Cham (1956) 1 All E.R. 783.

It is strongly contended by the defence if I should find, as I do find, that there should be a rectification of the register, then the shares would be left standing as unallotted and the plaintiff would not be entitled to cash. It is submitted that the rebates had a condition attached to them giving the directors the right to allot shares and/or cash: at no time did the shareholders become entitled to a rebate fully in cash. 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. This argument finds support in the evidence of the defendant's secretary "that there was no suggestion by any of the plaintiffs when they commenced trading that they were doing so only on the basis that they would get cash only for rebates. To my knowledge neither I nor any officer of the company suggested to the plaintiffs that cash only would be paid for rebates". The argument is attractive in its simplicity but in my opinion it contains a root fallacy. 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.

In the result, therefore, I am prepared to make the declarations sought in subparagraph (a) of the prayer of the claim and the orders sought in subparagraph (b) thereof, subject to the right of the defendant to be heard as to the precise number of shares that are involved in such declarations or orders. Their effect will be that the shares in question remain as unallotted shares. Although I find the application of allocations of these

In the Supreme Court of New Zealand

No. 15
Reasons for Judgment of Leicester J.

28th September 1962

(continued)

shares to be invalid, the allocations themselves are in order and stand to the credit of the plaintiffs. Mr Mathieson has asked that, if the defence contentions are not upheld, an opportunity be afforded to counsel for the defence of being heard upon the issue as to the final form of judgment. This will, of course, include an order for such sums under subparagraph (c) of the prayer of the claim as are due to be paid by the defendant to the plaintiffs. I am also prepared to hear counsel upon any question of costs.

NO. 16

SUPPLEMENTARY REASONS FOR JUDGMENT OF

LEICESTER J.

In the
Supreme
Court of
New Zealand

No. 16
Supplementary
Reasons for
Judgment of
Leicester J.

30th November,
1962.

At the conclusion of the main judgment in this action, delivered on 28th September 1962 I said:

"In the result, therefore, I am prepared to make the declarations sought in subparagraph (a) of the prayer of the claim and the orders sought in subparagraph (b) thereof, subject to the right of the defendant to be heard as to the precise number of shares that are involved in such
10 declarations or orders. Their effect will be that the shares in question remain as unallotted shares. Although I find the application of allocations of these shares to be invalid, the allocations themselves are in order and stand to the credit of the plaintiffs. Mr Mathieson has asked that, if the defence contentions are not upheld, an opportunity be afforded to counsel for the defence of being heard upon the issue as to the final form of judgment. This will, of course, include an order for such sums under subparagraph (c) of the prayer of the claim as are due to be paid by the defendant to the plaintiffs. I am also prepared to hear counsel upon any question of costs."

20 The plaintiffs now seek declarations that the shares allotted to the respective plaintiff companies since the date of their notices have been so allotted without authority and wrongfully from orders for rectification of the register of members of the defendant company, and a formal judgment of the amounts to which subsequent reference is made. In view of the argument submitted on behalf of the defendant at this hearing, it is desirable again to set forth the notices which represent basic factors in the case. That of the two firstnamed companies, as sent by their solicitors to the defendant and 2 July 1958, was in the following terms:

"As we understand that there is a suggestion that your company
30 proposes to issue further shares to shareholders in satisfaction of rebates, we send you this formal notice confirming our previous advice in correspondence that no person has authority to apply for such shares on behalf of either of the above companies and if any such move is made our companies will take action.

"We are sending a copy of this notice to your solicitor and also

In the Supreme Court of New Zealand

No. 16 Supplementary Reasons for Judgment of Leicester J.

30th November 1962.

the Registry of Companies explaining the position."

That sent to the defendant on behalf of the thirdnamed plaintiff company on 10 December 1958 reads:

"On behalf of the abovenamed company we hereby give you notice that our client company is not prepared to accept any further shares in payment of rebates. Any arrangement or agreement which may have been made with our client company regarding the issue of shares in payment of rebate is hereby terminated."

During the initial hearing of this matter, the plaintiffs amended their statement of claim, and those portions of the amendment which are relevant to the present judgment are as follows: 10

"5. FOR the years which ended on the 30th days of November 1957, 1958, 1959 and 1960, the following rebates, inter alia, were due from the Defendant Company to the first two plaintiffs and for the years which ended on the 30th days of November 1958, 1959 and 1960 the following rebates inter alia, were due from the defendant company to the third plaintiff:–

Year ended	J.M. Construction Co. Ltd.	Jones Timber Co. Ltd.	R.O. Slacke Ltd.
30 . 11 . 57	£ 561	£1,405	–
30 . 11 . 58	£ 389	£1,120	£ 665
30 . 11 . 59	£ 805	£ 917	£1,719
30 . 11 . 60	£1,448	£6,425	£2,106
	£3,203	£9,867	£4,490

20

"6. THE Defendant Company failed to pay to the Plaintiff companies the rebates referred to in paragraph 5 hereof. In purported satisfaction of the said rebates the Defendant Company purported to allot to the plaintiff companies shares in the Defendant Company of a nominal value corresponding to the amounts due in respect of the said rebates. Particulars of such purported allotments, as far as the Plaintiff companies have been able to ascertain, are as follows:– 30

Date of Return to Registrar of Companies	J.M. Construction Co. Ltd.	Jones Timber Co. Ltd.	R.O. Slacke Ltd.
4 . 12 . 1958	561	1,405	–
21 . 8 . 1959	389	1,120	665
18 . 7 . 1961	805	917	1,719
10 . 9 . 1961	1,448	6,425	2,106

In the Supreme Court of New Zealand

No. 16
Supplementary Reasons for Judgment of Leicester J.

30th November 1962.

(continued)

As debts due in respect of the particular rebates capitalised subsequent to the dates of the aforesaid notices, judgment is sought by the J.M. Construction Company Limited for the sum of £3,203 by the Jones Timber Company Limited for the sum of £9,867 and by R.O. Slacke Limited for the sum of £4,490.

There is no dispute between the parties that the shares set out in paragraphs 5 and 6 above were entered upon the defendant's register in the names of the respective companies. Mr Cooke seeks judgment for the par value of these shares in reliance on the view of the Court that "once
10 a cash rebate was declared this would, upon the declaration, legally belong to the shareholder who could, at least before such cash rebate was replaced by allocated shares, have forced the defendant to pay what was due". He relies also on the further view of the Court that "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".

20 So far as the defendant's trading year ended 30 November 1957 is concerned, the rebates were declared before the end of June 1958 and the first of the notices given a few days later. However, the shares were not issued to the plaintiffs until November and December in that year. It seems to me that even if there had been a tacit acquiescence or authority on the part of the plaintiffs prior to the end of the 1957 year as to the methods of trading between them and the defendant, the latter was not entitled to utilise the rebates of the plaintiffs once any such tacit acquiescence or authority was unequivocally withdrawn. In the case of the two firstnamed plaintiffs, their solicitors had on 10 December 1957 pointed out
30 that a company was not able to issue shares in payment of its debts without the most express and explicit authority and acceptance by the creditor, and that no such authority had been given by these companies. It was also pointed out by the solicitors at that time that their clients were unable to accept the erroneous basis upon which the defendant had been proceeding and, while not wishing to embarrass the defendant unduly, adjustments would have to be made both in regard to past and future procedure. It is thus clear that when the rebates were declared before the end of June 1958 the defendant must have known of the disinclination of the plaintiffs to have them capitalised in the form of shares. It would
40 inevitably follow that, at least subsequent to the notices, the issue of further shares was without authority and wrongful and that the register should be rectified in respect of such shares. Nevertheless, Mr Relling, in an elaborate argument, submits that there was no repudiation of the system of dealing between the parties until the notice of 2 July 1958. He contends that prior to that time rebates had been worked out on the annual basis of the previous year's trading; that notices of the proposed resolution

In the Supreme Court of New Zealand

No. 16 Supplementary Reasons for Judgment of Leicester J.

30th November 1962.

(continued)

had been sent out in advance of the general meeting at which rebating resolutions for capitalisation were carried; and that, no formal protest having been received by the defendant prior to such general meeting, it had been led by the plaintiffs to believe that they were agreeable to accept for the year ending 30 November 1957 the same capitalisation of shares procedure as they had done for previous years. By such conduct, he says, the plaintiffs have induced the defendant to rest satisfied with previous arrangements made with shareholders generally, and are now estopped from maintaining that the defendant was not entitled to issue shares in respect of that year's trading. Upon the same argument in reference to the trading year ended on 30 November 1958 (and in respect of R.O. Slacke Limited also for that as well as the next trading year) he contends that the directors, not having had notice before the general meeting, were justified in thinking that the plaintiffs acquiesced in the situation, and that therefore they had the power to recommend the resolution as to rebating and capitalising and to act upon this resolution when carried. If this concept of estoppel is accepted, then is is claimed that there is no basis by implication or otherwise for any apportionment of a completed year of trading partly into cash and partly into shares. It is stated that the company would have to work out its net profit up to a particular day only and that, as rebates were arrived at upon an annual basis the whole year must stand or fall together. If this argument is sound, there would be no rectification of the register and no judgment in favour of the firstnamed plaintiffs for the years ended November 1957 and November 1958 and, in respect of R.O. Slacke Limited, for the years ended November 1958 and November 1959.

I am not aware of any authority which would justify the application of the doctrine of estoppel in the manner sought by the defendant, nor do I see any reason to recede from the view expressed in the latter portion of the main judgment that estoppel should not operate against the plaintiffs subsequent to their respective notices. Acquiescence, where there is a duty on that part of the person acquiescing to assert a right, amounts clearly to a representation by him, but in order for the estoppel to arise it is essential that such duty should exist and that knowledge of the thing done should be brought home to the acquiescing party. Everest and Strode "Law of Estoppel", 2nd Edition pp. 342, 343. I do not think that it can be said that until such shares became onerous in the manner described in evidence there was any duty upon the plaintiffs to assert a right to resist payment of rebates by capitalisation of shares. From that particular date it would appear that the difficulties which the plaintiffs were facing in regard to the procedure adopted by the defendant were known to its directors. While it is true that the plaintiffs acquiesced in a method of trading whereby rebates were given, the important fact is that, for its defence to succeed, the representation relied upon by the defendant to found an estoppel must be a representation in respect of the utilisation of the rebates in the manner complained of and not merely as to the declaration of rebates as such resulting from the continued course of trading. The evidence does not

In the Supreme Court of New Zealand

No. 16 Supplementary Reasons for Judgment of Leicester J

28th November 1962

(continued)

indicate that there was ever a representation of a character required to found an estoppel in respect of the use of the rebates by way of capitalisation: on the contrary, at least since December 1957 the evidence shows that the plaintiffs objected to their rebates being used in this fashion. The plaintiffs should not be deprived of their legal rights unless they have acted in such a way as would make it inequitable to set up such rights. It suited the defendant to continue trading with the plaintiffs after knowledge that the plaintiffs questioned the propriety of the measures it was adopting in respect of such rebates. When notice was given on 2 July 1958, the existence of the resolution passed at the June meeting was no justification for the conversion of the rebates into shares, and it seems to me that no case has been established for the diminution of the number of shares below that sought by way of rectification of register and judgment in the amended statement of claim. 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.

I therefore make the declaration asked for in paragraph 6 of the amended statement of claim. I order that the register of members of the defendant company be rectified by removing therefrom the names of the respective plaintiff companies in respect of such shares. I further order that judgment be entered in favour of J.M. Construction Company Limited for the sum of £3,203, for the Jones Timber Company Limited for the sum of £9,867, and for the Plaintiff R.O. Slacke Limited for the sum of £4,490. In regard to costs, it was pointed out by Mr Cooke that upon scale assessed on a claim for a total of £17,500 together with allowances for interlocutory matters, an amount of £810. 15. 0 would subject to Rule 568 be due to the plaintiffs. It would appear that the interlocutory matters and in particular discovery and inspection of documents involved a great deal of time and that factor, together with the six days of hearing, brings the case into the category of those exceptional ones where an amount of more than £300 can in the discretion of the Court be allowed. Upon a consideration of all the circumstances, I think that this is a proper case to exercise that discretion and I allow the plaintiffs as against the defendant a total sum of £500 for costs and disbursements, this sum to cover in addition the argument which has led to this supplementary judgment.

NO. 17

In the Supreme Court of New Zealand

No. 17. Formal Judgment of Supreme Court

30th November 1962

FORMAL JUDGMENT OF SUPREME COURT

FRIDAY the 30th DAY OF NOVEMBER. 1962.

THIS ACTION coming on to trial on the 9th, 10th, 11th, 12th, 13th, 19th, and 20th days of July, 1962 before His Honour Mr Justice Leicester, after hearing the Plaintiff Companies and the Defendant Company and the evidence then adduced, and after hearing supplementary argument on the 14th day of November 1962, This Honourable Court DOTH HEREBY DECLARE that the shares referred to in the schedule annexed hereto are allotted to the respective Plaintiff Companies without authority and wrongfully AND IT IS HEREBY ORDERED that the register of members of the Defendant Company be rectified by removing therefrom the names of the respective Plaintiff Companies in respect of the said shares AND IT IS ADJUDGED that there be recovered from the Defendant Company by the Plaintiff J.M. Construction Co. Limited the sum of £3,203, by the Plaintiff Jones Timber Co. Limited the sum of £9,867 and by the Plaintiff R.O. Slacke Limited the sum of £4,490 AND IT IS FURTHER ORDERED that the Defendant Company do pay the Plaintiff Companies a total sum of £500 for the costs and disbursements.

By the Court

A.W. Kelly

L.S.

Deputy Registrar

In the Court of Appeal of New Zealand

No. 18 Notice of Motion on Appeal

26th February 1963.

NO. 18

NOTICE OF MOTION ON APPEAL TO COURT OF APPEAL

1.

No. C.A. 9/63.

IN THE COURT OF APPEAL OF NEW ZEALAND.

BETWEEN HUTT TIMBER AND HARDWARE COMPANY LIMITED

Appellant .

AND J.M. CONSTRUCTION COMPANY LIMITED, JONES TIMBER COMPANY LIMITED and R.O. SLACKE LIMITED.

Respondents .

10

TAKE NOTICE that this Honourable Court will be moved by Counsel for the abovenamed Appellant on Monday the 1st day of April 1963 at 10 o'clock in the forenoon or so soon thereafter as Counsel may be heard ON APPEAL from the whole of the declaration order and judgment of the Supreme Court of New Zealand delivered and made by the Honourable Mr. Justice Leicester on the 30th day of November 1962 in Action No. A. 14/62 in the Wellington Registry of the Wellington District of the Supreme Court of New Zealand wherein the abovenamed appellant is the defendant and the abovenamed respondents are the plaintiffs UPON THE GROUNDS that the said declaration order and judgment are erroneous in law and in fact. DATED at Wellington this 26th day of February 1963.

20

'N.T. Gillespie'

Solicitor for Appellant.

NO. 19

REASONS FOR JUDGMENT OF NORTH P.

An appeal from the judgment of Leicester J. declaring that certain shares were allotted to the respondents without authority and wrongfully, and ordering that the register be rectified by removing therefrom the names of the three respondents in respect of such shares, and further adjudging that the respondent J.M. Construction Co. Ltd., recover from the appellant the sum of £3,203, the respondent Jones Timber Co. Ltd., the sum of £9,867 and the respondent R.O. Slacke Ltd., the sum of £4,490.

The facts are very fully recorded in the judgment under appeal, but it may be helpful if I review the principal facts and circumstances leading to this dispute between the appellant (which it will be convenient to refer to as "the company") and three of its shareholders. The company was incorporated as a private company in September 1943 with a capital of £29,200 divided into 29,200 fully paid shares of £1 each. The primary object was to carry on at Lower Hutt or elsewhere the business of timber merchants sawmill proprietors and the like. The 22 subscribers to the memorandum and articles of association were either individual builders or building companies. From this modest beginning there has developed a public company with a paid up capital of £500,920, assets totalling £1,325,896, and a bank overdraft in the region of half a million pounds.

The genesis of the dispute can be traced to the lax way in which the company's affairs have been conducted. The company was formed on conventional lines with articles which provided for dividends to be paid to the shareholders in proportion to the amounts paid up or credited as paid up on the shares. But either from the beginning or very shortly after incorporation, without any attempt being made to alter the articles, the members appear to have decided that it would suit them better if the profits were distributed among the shareholders in the form of rebates calculated according to the value of the transactions between each of them and the company during the year current when the rebate was made. This irregular way of dealing with the profits earned by the company continued until the year 1947, when it was recognised that the method adopted was unfair to the larger shareholders who consequently received no return on the capital they had invested. In order to adjust this inequality and at the same time presumably to satisfy the requirements of its bankers, the agreement dated 28 November 1947 (which is recorded in the judgment in the Court below) was signed by all the then members of the company, some 36 in number. How it came about that a private company had 36 members

was not explained to us, nor indeed, was any reason given why the articles were not altered to conform to the wishes of the shareholders. As the agreement records, one of the principal reasons for its execution was the need to retain part of the profits earned by the company and so build up its capital structure. At the time it appears to have been the hope of the directors that the capitalisation of rebates would not be necessary once the capital of the company reached £60,000, but provision was made in clause 7 for the arrangement to continue after that sum had been reached if the directors then thought that it was necessary to fix a larger amount.

10 In 1949 the company was registered as a public company and thereafter the number of shareholders increased. Among the new shareholders were the three respondent companies, who acquired their shares from existing shareholders. The three transfers were all registered on 22 February 1950. None of the respondents signed the agreement of 28 November 1947 nor was it shown that they had ever expressly agreed to be bound by its terms. In the following month the capital of the company reached £60,000 but although no resolution was passed by the directors fixing a larger amount in lieu thereof, the policy of capitalising rebates continued unabated, and indeed the pace accelerated, for as the bank 20 overdraft grew, the bank increasingly was unwilling to provide the funds for the payment either of dividends or of cash rebates. Thus no dividends at all were declared after 1950 and no rebates were paid in cash after 1953 – though for a short period a proportion of the rebateable funds was credited to the shareholder-purchasers in the books of the company. In later years, substantially the whole of the net profits was capitalised. On 29 July 1955 the company circularised its shareholders as follows:

> "Re application for portion of the 75,000 new shares from information "to hand it appears that the Auckland Builders will subscribe up to "approximately 50,000 of these shares.
>
> 30 "This being so, there will be available somewhere in the vicinity of "25,000 shares to existing shareholders, and you are asked to indicate "on the application form what shares you wish to take up of this new "shareholding.
>
> "Before doing so, we request that you capitalise the rebates which "accrued to you during the year ending November 1953, your amount "of same being £505.
>
> "Please indicate whether you are prepared to capitalise the whole of "the sum or portion of same. It would be appreciated if you would "capitalise the whole amount, and we consider it would be in your 40 "interests to do so, as it may be some considerable time before the "Company will be able to make payment of same and therefore you "might just as well have this amount credited to you as shares and "you could participate in regard to purchases accordingly . . ."

In the Court of Appeal of New Zealand

No 19 Reasons for Judgment of North P.

12th December 1963

(continued)

Apart from the fact that the policy adopted by the company – and accepted with some murmurings from the shareholders – enabled the company to retain in the business the profits it earned, the distribution of rebates by way of new shares secured for the company immunity from income tax. But this great advantage was obtained at the expense of its shareholders, for the new shares were treated by the Income Tax Department each year as taxable income in their hands. It was this aspect of the matter which first caused the legal advisers of the three respondents to investigate the position, and it was their investigation that led to the present proceedings being brought. A selection from the correspondence between Messrs. Robinson and Cunningham, solicitors for the J.M. Construction Co. Ltd. and Jones Timber Co. Ltd., and the solicitors for the company, is recorded in the judgment under appeal. It will be observed that in response to pointed inquiries the company's solicitors gave the explanation for the course which was being followed, that the company was acting under the authority of the agreement of November 1947. Messrs. Robinson and Cunningham, on being acquainted with the terms of this agreement, questioned the right of the company to act in the way it was doing, but the company was adamant and maintained it was entitled to continue the course it was following even although the authority conferred on the directors was being used to capitalise profits to the total of several hundred thousand pounds. This attitude resulted in Messrs. Robinson and Cunningham, on 2 July 1958 giving the company the following notice:

"Dear Sir,

"re Jones Timber Co. Ltd.
"J.M. Construction Co. Ltd.

"As we understand that there is a suggestion that your Company "proposes to issue further shares to shareholders in satisfaction of "rebates, we send you this formal notice confirming our previous "advice in correspondence that no person has authority to apply "for such shares on behalf of either of the companies and if any such "move is made our companies will take action.

"We are sending a copy of this notice to your Solicitor and also "to the Registrar of Companies explaining the position.

Yours faithfully,

"ROBINSON & CUNNINGHAM."

On 10 December 1958 a more emphatic notice was given by Messrs. Macalister Mazengarb Parkin and Rose, Solicitors for the Respondent , R.O. Slacke Ltd. This letter read:

"Dear Sir,

"re: R.O. Slacke Ltd.

"On behalf of the above-named Company we hereby give you "notice that our client Company is not prepared to accept any further "shares in payment of rebates. Any arrangement or agreement which "may have been made with our client Company regarding the issue of "shares in payment of rebates is hereby terminated.

" Yours faithfully,

"MACALISTER MAZENGARB PARKIN & ROSE."

10 Notwithstanding the receipt of those notices the company determined to pursue the policy the directors had laid down and in 1959 decided to ask a number of its Auckland shareholders – who had taken up shares after 1947 – to sign an agreement similar in form to the agreement executed by the Wellington shareholders in 1947. This agreement is dated 14 July 1959; it recited the earlier agreement and stated that it was supplemental to that agreement. In general terms it followed the lines of the earlier agreement but it differed in two principal respects. In the first place, while it recited that the rebates had no relation to the capital subscribed by the shareholders and that in consequence the larger investors 20 were at a disadvantage in that no dividend bonus or other payment was made to them in respect of capital contributed by them, the operative part of the agreement contained no provision for the payment of a dividend. This appears to have been due to an oversight on the part of the draftsman for clause 2 provided that the surplus income, "after making provision for the dividend aforsaid" should be rebated to the builders in proportion to their respective transactions with the company. In the second place, no effort was made to limit or define the period during which the process of capitalisation of rebates might continue; it was left to the discretion of the directors to determine this "on a consideration of the company's fin- 30 ancial position and of "its indebtedness to its bankers."

Armed with this further authority the company continued its policy of capitalising the rebateable funds. Thus after the receipt of the notice it had received from the first two respondents, in June 1958, it purported to allot shares to them in respect of the rebateable funds available for the year ending 30 November 1957, though it requires to be added that it did so on this occasion in pursuance of resolutions passed prior to the receipt of the notice. In the following year, namely on 19 May 1959 the directors resolved "that the profit of £23,546 . 19 . 2 for the year ending 30th November 1958 be rebated to the "shareholders on the basis of their trans-

"actions with the company," and the directors further resolved to "recom-"mend to the Annual General Meeting that £23,523 of the rebate be issued "as fully paid up shares." These two resolutions of the directors were adopted by the members of the company at the annual meeting held on 29 May 1959, and the necessary resolution was passed increasing the capital of the company and in due course the new shares were allotted. Then, on 11 and 12 April 1960, the directors resolved "that the company "profit of £49,882 . 6 . 3 be rebated to the shareholders in terms of the "agreement between the company and its shareholders re distribution of "annual profits," and it was further resolved "that the sum of £49,850 be "issued as fully paid up shares in payment of the rebate due to the share-"holders." Once again, at the annual meeting, on 26 April 1960, the resolutions of the directors were adopted and a resolution was passed providing for a further increase in the capital of the company accordingly, and the new shares were duly allotted. Then, on 27 April 1961 the directors resolved "that the company's net profit of £101,403 . 9 . 4 be rebated "to the shareholders in terms of the agreement between the company and "the shareholders and that such rebate be paid in fully paid shares." Once again, the members at the annual meeting approved of the recommendation and passed the necessary resolution for an increase in the capital of the company, and the shares were duly allotted. In this connection, it is desirable that I should add for the sake of completeness, that I have recorded these resolutions from the extract from the minute books supplied by counsel, but I have noticed that in some of the years the increase in capital did not exactly coincide with the directors' resolution to capitalise the rebateable funds. I am not aware of the explanation for these discrepancies, but have concluded that they are of no significance.

In January 1962 these proceedings were commenced. The three respondents, in their statement of claim framed their action on an implied contract. Each alleged that at all material times they were shareholders in the company; that they had purchased their respective builders' supplies on terms that the defendant company would annually rebate and pay shareholders pro rata according to the value of their respective purchases an amount equal to its excess of income over expenditure for the respective years in which such purchases were made; that for the years ending the 30th November 1957, 1958, 1959 and 1960, certain stated rebates were due from the company for the first two named respondents, and for the years ending 30 November 1958, 1959 and 1960, certain stated rebates were due from the company to the third respondent; that the company had failed to pay these rebates and in purported satisfaction of the rebates had purported to allot the respondents shares in the company at a nominal value corresponding to the amounts due in respect of these rebates; that the purported allotment of the shares was made without authority and wrongfully and contrary to the express instructions of the respondents. The respondents accordingly sought declarations that the allotment of the shares was made without authority and wrongfully, orders for the rectification of the register by the removal of the respondents' names from the

register in respect of such shares and judgment for the amounts of the rebates declared in each of the years since the respondents gave notice that they would no longer accept shares in satisfaction of the rebates they claimed to be due to them. The company in its defence admitted that the respondents' purchases of builders' supplies were made on terms that the company would annually make rebates to shareholders who were purchasers from it of building supplies during the year, but it claimed that these rebates were to be made under and in accordance with the provisions of the agreement of 28 November 1947; that the rebates were payable to the respondents as purchasers of goods from the company and the goods were sold by the company to them and the rebates became available only on the condition of capitalisation of those portions of the rebates which were in fact capitalised; that the rebates were satisfied and the shares so allotted to the respondents were properly allotted in pursuance of the terms of the contract between the company and the respondents in relation to the sale and purchase of such goods; and that the respondents having become bound by the rebate agreement or otherwise becoming bound to accept shares in satisfaction of rebates, could not by notice purporting to be no longer bound so to do, effectively cease to be so bound while still purchasing goods and claiming to be entitled to rebates from the company.

The case was heard by Leicester J. and occupied seven days. On these facts and on a consideration of the evidence, that learned Judge reached the conclusion that the company was not entitled to rely either on the agreement of 28 November 1947 or on a collateral oral one in the same terms as giving it authority to insist on the respondents accepting shares in satisfaction of their respective proportions of the rebateable funds for each of the years following the receipt by the company of their notices of objection. He held that the company was mistaken in regarding the 1947 agreement or a collateral oral one as being still in existence when it received the notices from the respondents in July and December 1958, for in his opinion whichever way the matter be looked at, the agreement had become inoperative and its term had expired. Accordingly, he held that the shares in question had been allotted to the respondent companies without authority and wrongfully, and they were entitled to orders rectifying the register of members by removing therefrom the names of the three respondents in respect of such shares. The learned Judge then went on to consider whether the respondents were right in their contention that they were entitled to be paid in respect of each of the years in question their proportions of the rebateable funds in cash, and for the reasons given by him, he held that the three respondents were so entitled. From this judgment the company has now appealed.

The first branch of the appeal dealt with the declaration and order made in the Court below relating to the shares which had been allotted to the respondents. Sir Wilfred Sim's first submission was that the learned Judge in the Court below had been persuaded to concern himself in the internal affairs of a limited liability company functioning intra vires and that his

In the Court of Appeal of New Zealand

No. 19 Reasons for Judgment of North P.

12th December 1963

(continued)

judgment consequently transgressed the rule in **Burland v. Earle** (1908) A.C. 83. The point he made was that the Court was being asked to set aside resolutions passed at annual meetings of the company which he claimed were within the authority of the company. It is of course quite true as Burland's case shows that the Court has no jurisdiction to interfere in the internal management of companies acting within their powers; but the point that is made by Mr. Cooke for the respondents is that the resolutions in question were passed in breach of contract. It is true that the respondents are shareholders and not merely purchasers of goods, but they claim that they were parties to an oral contract made between the company and each of them, a term of which was that at the end of each year the available profits of the company would be distributed among the purchaser-shareholders in the form of rebates calculated on the value of the purchases made by each of them in the current year. There is no principle of law which prevents a shareholder suing a company for moneys due under a contract if he is able to prove the existence of a contract between himself and the company. Thus once a dividend is declared, a shareholder has a right to sue for the amount due to him, but this is because the articles of association constitute a contract between him and the company. Likewise, there may be a contract to distribute profits or surplus funds on some such basis as is suggested here. A typical example is the case of co-operative dairy companies. Sometimes such a contract is to be found in the articles themselves, sometimes aliunde. Either way unless there is some special requirement to the contrary, once a declaration is made a debt is created between the supplier and the company. See **Shalfoon v. The Cheddar Valley Co-operative Dairy Co. Ltd.** (1924) N.Z.L.R. 561, 574, per Salmond J. **Gilbert v. Kaupokonui Co-operative Dairy Factory Co. Ltd.** (1930) G.L.R. 107. The first submission, in my opinion, cannot be accepted.

Sir Wilfred Sim's next submission was that the company, in requiring the respondents to accept shares in respect of the rebates declared in their favour for the years in question, was entitled to rely for authority on the agreement dated 28 November 1947. This agreement, it will be recalled, was executed by the then members of the company when it was a private company. 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 they would no longer accept shares in satisfaction of any rebates due to them. Apart from the difficulty that the respondents did not sign the 1947 agreement and the further difficulty that by 1958 there was a considerable body of shareholders who had not signed the agreement either, 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. The circular letter of 20 July 1955 confirms the view I take of the matter. But even

if it be accepted in favour of the appellant's argument that immediately prior to the receipt of these notices, there was in existence an oral agreement whereby the shareholders of the company, who were also purchasers of goods, had agreed to divide the available profits among themselves by way of rebates to be satisfied by the issue of new shares, and even assuming such an agreement was legally binding on the company, that agreement was for no specific period, and in my opinion could be brought to an end at any time on reasonable notice. Therefore, it is plain, in the view I take of the case, that the company, in pursuing its policy of granting rebates and then satisfying the amounts by the issue of new shares was acting without legal authority after the notices were served on the company. The company could not fall back on the articles of association, for these provide for the distribution of bonus shares on a quite different basis. The truth of the matter is that the directors year by year found themselves quite unable to carry out the plan which had been formulated when the company was a small private company, and later likewise found themselves unable to carry out the terms of the agreement of November 1947. In result, as each 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. From the company's point of view, this policy had the added advantage that its bankers were not even called upon to find the necessary money to enable the company to meet its income tax obligations. In concluding this branch of the argument second counsel for the appellant submitted that even so the respondents by their subsequent conduct had waived any rights they might earlier have possessed of refusing to accept the new shares that were allotted to them. In my opinion this is not so. The respondents declared their attitude in clear terms in the notices each of them served on the company and the fact that directors of the three companies may have been present at subsequent annual meetings is quite insufficient to lay the necessary foundation for such an argument. At best their director's subsequent conduct was equivocal, nor is it easy to see what duty lay on them to protest at meetings of the company. **Mercantile Bank of India Ltd. v. Central Bank of India Ltd.** (1938) A.C. 287.

In the Court of Appeal of New Zealand

No. 19 Reasons for Judgment of North P.

12th December 1963.

(continued)

In these circumstances I do not see any answer to Mr. Cooke's submission that the respondents were not obliged to accept the shares that were allotted to them and this first branch of the appeal in my opinion accordingly fails. What the position may now be as between the shareholders interse cannot be investigated in these proceedings. The respondents no doubt would be estopped from asserting a claim in respect of the allotments of shares prior to 1958, and indeed they accept that position. Wilsher v. **The Whakaronga Co-operative Dairy Co. Ltd.** (1917) G.L.R. 35.

It remains then to consider the second branch of the appeal. Sir Wilfred Sim argued that on any view of the case, the respondents were not entitled to recover the amount of the rebates in cash. As he rightly

In the Court of Appeal of New Zealand

No. 19
Reasons for Judgment of North P.

12th December 1963.

(continued)

said, the respondents must be able to point to a contract which gave them that right. If I understood correctly Mr. Cooke's submissions on this branch of the case, his primary contention was that the money claim rested on the terms of trading between the company and each of the respondents, but he went on to submit, in the alternative, that just as the declarations of dividends created a debt as between a company and individual shareholders so here the declaration of the rebates enabled the respondents to sue in debt. It would appear that it was the latter submission which largely found favour with Leicester J. although he did at one stage in his judgment refer to a trading relationship existing between the company and the respondents. But he said quite early in his judgment: 10

"It would seem that once a cash rebate was declared this would upon "the declaration legally belong to the shareholder who could at "least before such cash rebate was replaced by allocated shares "have forced the defendant to pay what was due."

In the concluding passage in his judgment he said:

"It is strongly contended by the defendant...that the rebates had a con- "dition attached to them giving the directors the right to allot shares "and/or cash and at no time did the shareholders become entitled to a "rebate fully in cash. The defendant claims that the plaintiff must 20 "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. This argument finds support in the evidence of the "defendant's secretary 'that there was no suggestion by any of the "plaintiffs when they commenced trading that they were doing so "only on the basis that 'they would get cash only for rebates.' The "argument is attractive in its simplicity but in my opinion contains "[illegible] The monetary claim of this action is not [illegible] upon "[illegible] obligation by the defendant [illegible] pay [illegible] "[illegible] that as part of its trading relationship with the "plaintiffs after the 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."

In my opinion, and with great respect for the views which found favour with the learned Judge, these two conclusions are unsound. It is I think a fair deduction from the evidence that at least from early days the intention of those associated with the company was to pay the available profits of the company to the shareholders who traded with the company. This was an irregular arrangement quite contrary to the articles of association, 40 but no doubt, while all the shareholders acquiesced, no one could be heard to complain. But by 1947 it was recognised that a portion at least of the available profits or surplus funds should be paid in dividends and subject thereto a portion should be capitalised in order to meet the con-

ditions imposed by the company's bankers. It was expected that the company would be able to revert to its earlier policy when the capital of the company reached £60,000, but as I have endeavoured to show in my summary of the facts, the company expanded so rapidly that by 1958 it had become necessary to capitalise the whole of the profits or surplus funds, and indeed that policy had been in force for several years prior to the respondents giving notice that they would no longer accept shares in satisfaction of future rebates. While the respondents as I have already held, were fully entitled to serve such notices, they could not dictate the
10 future terms of trading. 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 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. In my opinion, the respondents failed to make out the allegation contained in their statement of claim that their purchases were made on terms that the company would
20 annually rebate and pay shareholders pro rata accordingly to the value of the respective purchases an amount equal to its excess of income over expenditure for the respective years in which such purchases were made. Nor do I think that the resolutions passed by the company with reference to rebates in the years in question did create a debt between the company and the respondents. I cannot accept Mr. Cooke's submission that the declaration of rebates should be treated in the same way as a declaration of dividends. The declaration of a dividend is a prerequisite to the right of a shareholder to sue on the contract contained in the articles of association. There is nothing in the articles of association which in my opinion
30 even faintly discloses a contract such as is asserted by the respondents. On the contrary, the articles are drawn on the basis that the profits of the company are to be distributed among the shareholders according to the amount paid up on their shares. In my opinion it was vital for the respondents to establish a contract aliunde the articles of association and this they failed to do so. Even however if it had been possible to found a cause of action on the resolutions declaring rebates in each of the years in question, in my opinion it does not lie with the respondents to say that they prefer cash to shares. They must accept or reject the terms of the resolutions in their entirety. In my opinion the appellant succeeds on this
40 branch of the case.

The Court being unaninous on both branches of the case the following orders are made: The appeal against the declaration of the learned Judge in the Court below that the shares referred to in the schedule annexed to the formal judgment were allotted to the three respondents without authority and wrongfully, and the order that the register of members of the company be rectified by removing therefrom the names of the three respondents in respect of such shares, is dismissed. The appeal against the judgment of

In the
Court of
Appeal of
New Zealand

No. 19
Reasons for
Judgment of
North P.

12th December
1963.

(continued)

the Court below awarding the respondent J.M. Construction Co. Ltd. the sum of £3,203, the respondent Jones Timber Co. Ltd., the sum of £9,867 and the respondent R.O. Slacke Ltd. the sum of £4,490, is allowed. In the circumstances, no order for costs is made other than an order that the respondents pay half the costs of the printing of the case.

NO. 20

In the Court of Appeal of New Zealand

No. 20 Reasons for Judgment of Turner J.

12th December 1963

REASONS FOR JUDGMENT OF TURNER J.

There is no need for me to re-state the facts, which have been comprehensively summarised in the judgment which the learned President has just delivered. I can proceed at once to state the questions, the answers to which appear to me to determine this appeal. I will address myself in the first place to a consideration of appellant company's appeal as it stands on the case against the first respondent. It will presently be seen that all that I have to say in respect of this appeal applies with equal force
10 as between appellant and the second respondent. As between appellant and third respondent, the facts show some small differences (as for instance as regards the date of the "notice" given to appellant) but the principles upon which the appeal falls to be determined will be found again to be identical.

Considering then in the first place the case between the appellant and the first respondents (to whom I refer in this part of the judgment simply as "respondent") I think that the appeal may be solved by asking and answering four questions: 1. What were the terms upon which respondent purchased goods from appellant up to the date of the notice of July 2nd
20 1958? 2. If these terms entitled respondent to rebates from appellant was it within the power of appellant to discharge its obligations by the allotment of shares? 3. If so, was it open to respondent to withdraw from appellant the power to allot shares; and if it did this could respondent insist upon a cash rebate being paid? 4. What was the effect of the resolutions passed at the general meetings of appellant company after July 2nd 1958 purporting to resolve upon a rebate and to allot shares in satisfaction therefor?

As to the first of these questions I have no doubt, any more than had Leicester J., that the evidence shows that respondent purchased from
30 appellant, up to the date of the notice of July 2nd 1958, upon terms that it would in due course receive some rebate in respect of its purchases. But I do not think that it can possibly be contended that the terms upon which respondent made its purchases included expressly or by implication all of the details of the 1947 agreement. It is plain that the detailed terms of this agreement were never brought to the notice of the respondent at any time before July 1958. It must be remembered that the 1947 agreement was prepared and executed by the parties thereto, before respondent became a shareholder. It is true that, upon its transfer of shares being

In the Court of Appeal of New Zealand

No. 20 Reasons for Judgment of Turner J.

12th December 1963

(continued)

submitted for the approval of appellant's directors, the "rebate agreement" was specifically mentioned in correspondence between appellant and W.E. Jones Ltd., the transferor of the shares; and that letter contained a reference to the appellant's power to capitalise rebates. Respondent, however, contends that it did not become bound by this letter; and it does not emerge on any finding of fact by the learned trial Judge that the details of the agreement were ever communicated to respondent, far less that it became a party to the agreement, or became bound by its details, or entitled to the advantage of them. I think that the evidence is conclusive that all respondent did was to purchase its goods from appellant upon the understanding that it would receive each year in due course, upon a resolution of the company or its directors being duly passed in this regard, a rebate in proportion to the total of its purchases from appellant during the year in question, the amount of this rebate to be fixed as being in the same proportion to the total amount of its purchases as was the case with other shareholder-customers. 10

This understanding had contractual effect as between respondent and appellant, and every time that respondent purchased goods from appellant such a contract was impliedly entered into between them. If appellant had at the end of the year distributed its profits by way of rebate to purchasers in some manner which awarded respondent less than its proper proportion of rebate, respondent could have insisted, under its implied contract, on being paid a proper amount having regard to the amounts resolved upon at the company's annual meeting as payable to other shareholders. But the obligation of appellant company can be placed no higher than to treat the respondent in the same way as other shareholder-purchasers, and I cannot think that respondent can contend – that it was entitled under its implied contract to insist, as regards itself, on the performance in meticulous detail of every obligation set out in the 1947 agreement as owed by appellant company to those shareholders who had actually signed that agreement. 20 30

This being so, I readily conclude that in respect of each year's rebate respondent had no claim against appellant company until after the meeting at which appellant company's shareholders resolved to distribute the profits or a part of them by way of rebate. At such meeting it must be remembered respondent was entitled to attend and vote as a shareholder. Once the resolution had been passed, and the profits allocated, then respondent could sue for them under its original implied contract, for the condition precedent necessary to determine the quantum had then been fulfilled by the passing of the resolution allocating profits as rebate. 40

I now address myself to the second of the three questions with which I began, remembering that I am still considering the period before and up to July 2nd 1958. During this period, if the shareholders chose at the meeting to distribute the profits by allotting shares and not by paying cash, respondent could, in my opinion, have no complaint. It will be seen

that this conclusion follows as a logical corollary to the answer to the first question, and that appellant company's right to proffer respondent's rebate in the form of shares is not founded upon the 1947 agreement but simply on the ground that respondent was entitled only to the same treatment as others got; and if all they received was a rebate in the form of shares that was all respondent could require at appellant's hands.

I now come to the third question: whether respondent was entitled on July 2nd 1958 to give notice declining to take future rebates in the form of shares; and if so whether the giving of such a notice resulted in an obligation on the part of the company to pay future dividends in cash, or whether its effect was simply as a disclaimer by respondent of the shares to which the company's resolutions would otherwise have entitled it. For the reasons which I have already expressed it appears to me that respondent was never entitled to any more than whatever rebate was in fact resolved upon by the company, which, of course, was obliged by its contract to treat respondent as favourably – but no more favourably – than its other shareholder-customers. But it was always open to respondent, by giving proper notice, to intimate that it would not in the future accept any shares which might purport to be allotted to it by resolution at the annual meeting, for no-one can be compelled to take shares in a company against his will, even if they are issued **gratis**. If, however, it refused – as it did refuse and as it was entitled to refuse – to accept such shares, it does not follow that it was entitled to any cash rebate in place of those shares. Its contract never entitled it to more than what others received by virtue of the company's resolution, and if it refused to accept an award made upon this basis it was not entitled to ask for anything in lieu of the award which it had declined. Indeed if – as I believe to be the position – respondent's right to a rebate arose anew out of each separate purchase of goods, it may be argued that after July 2nd 1958 there was no contract which bound appellant to give any rebate at all in respect of further purchases, because the parties were never **ad idem** thereafter as to the terms as to rebate upon which such purchases were made. It does not seem to me to matter whether the facts be so regarded, or whether the former implied contract to make some rebate still continued; the result must be the same, for on either view respondent has failed to make out a contractual right to be paid a rebate in cash unless a cash rebate was resolved upon by the meeting.

Alternatively (and this brings me to the fourth and last question) Mr Cooke put his case on the resolutions of appellant company in general meeting, resolving upon the rebate to be allotted to each customer-shareholder. It will be convenient to illustrate this submission by what was done in some one particular year (though I think that the result is the same for all years under review) and in order not to be confused by any consideration of broken periods I will examine the proceedings of the annual meeting of April 1960. At a directors' meeting on the 11th and 12th April of that year the following resolutions are recorded:

In the Court of Appeal of New Zealand

No. 20 Reasons for Judgment of Turner J.

12th December 1963

(continued)

(a) "That the company profit of £49,882. 6. 3d. be rebated to the shareholders in terms of the agreement between the company and its shareholders are distribution of annual profits".

(b) "That the sum of £49,850 be issued as fully paid-up shares in payment of the rebate due to shareholders".

At the shareholders' meeting on the 26th April the following resolutions were passed:

(a) "That the annual report of the directors and the accounts for the year ending November 30th 1959 as presented to the shareholders at this meeting be received and adopted." 10

(b) "That the capital of the company be increased by the addition thereto of the sum of £43,430 beyond the present registered capital of £356,875 and the same be divided into 43,430 shares of £1 each subject to the same conditions as the original issue.

I have already said that up to the date of the annual meeting respondent had no basis for presenting any liquidated claim. Until then it was open to the shareholders, no doubt, to deal in annual meeting with the profits of the company as they might think fit in accordance with the Articles of Association. Until the resolutions were passed respondent 20 had an inchoate right to be paid, when the amount was determined, and, subject to its being determined, the same rebate (i.e. a rebate in the same proportion to its purchases) as other shareholders: but until the amount of its rebate was determined it had no crystallised right. When the amount was determined it had a cause of action ; but not to any cash payment, unless others also became so entitled. No doubt if a resolution had been passed entitling other shareholder-customers to a cash rebate, respondent would also have been so entitled – but not, it must be made clear by virtue of the resolution, except in so far as the resolution represented the fulfilment of a condition precedent without which respondent would be 30 entitled to nothing.

Mr Cooke attempted to found a cause of action on the resolution itself. This submission, in my opinion, contains an essential fallacy. The resolution declaring the rebate cannot be likened to a resolution declaring a dividend pursuant to the Articles, which has the consequence of creating a liability as between the company and its shareholders. This was not a liability created pursuant to the Articles. Respondent's rights are contract or nothing. As customer, respondent was entitled to participate in any rebate declared up to July 1958. After July 1958 it may be doubtful whether it continued to be so entitled: but assuming in its favour that 40 it was still entitled to a rebate, this followed by virtue of its purchases of goods, and not in any way from the fact that it was a shareholder. As

shareholder it had no rights to a rebate, except in so far as it purchased goods as a customer. In these circumstances it is in my opinion useless to attempt to found a cause of action on any resolution of the company. But even if it were possible to do so the resolutions of each general meeting must, in my opinion, be looked at as a whole, and it is perfectly clear that the proceedings of any one meeting must be interpreted as the passing of a composite or mixed resolution deciding **uno flatu** to give a rebate and to give it in shares. That rebate – one in shares – is all that respondent can be entitled to. It can disclaim it – but if it does it
10 cannot claim cash in lieu. It is in this regard that, with respect, I find myself in complete disagreement with Leicester J., who appears to have thought that the resolutions were separable, and that there was something in the nature of a **scintilla temporis** discernible between them (the conception is referred to in such cases as **Coventry Permanent Economic Building Society v. Jones** (1951) 1 All. E.R. 901 and **Woolwich Equitable Building Society v. Marshall** (1951) 2 All. E.R. 769) in which a right could vest in respondent to participate in a cash rebate before the decision was made to appropriate the cash towards a new allotment of shares. To my mind it is impossible to treat what took place at these meetings as
20 other than one composite indivisible whole.

Considerations of estoppel seem to me to have little place in the resolution of the questions immediately involved in this case. It is of course clear that, even if respondent could not have been compelled to accept shares up to July 2nd 1958, it did in fact acquiesce in being allotted its rebates in shares up to that date, and that it is now estopped from resiling from that acceptance. But so doing it must be taken, as Leicester J. held, as acquiescing only up till the point at which it gave notice that it would no longer accept shares; and when its solicitors gave notice on July 2nd 1958 that it would no longer accept shares, that notice terminated
30 any arrangements thitherto subsisting binding it to acceptance. I reject Mr Mathieson's submission that respondent's conduct at the general meetings could support an estoppel, by which it was precluded from contending that it no longer agreed to accept shares, and for at least two reasons. First, when an estoppel by conduct is set up, all the conduct of the party must be considered together. Second the result must be a clear and unambiguous representation. In the light of the definite notice contained in Mr Cunningham's letter, which was never withdrawn, it appears to me impossible to say that the whole of the conduct of respondent taken together amounted to an unambiguous representation. But the rejection of
40 Mr Mathieson's submission takes the matter only to the point of concluding that respondent was free to reject the shares. This does not mean, as I have held, that respondent became entitled to cash in lieu of the shares that it rejected. By the terms of its implied agreement it might have been entitled, had it cared to accept it, still to participate in such a distribution as might be resolved upon; but if it declined to participate in a distribution of shares it could not expect its disclaimer to entitle it to preferential terms and an award of cash.

In the
Court of
Appeal of
New Zealand

No. 20
Reasons for
Judgment of
Turner J.

12th December
1963

(continued)

The result of all this should, in my opinion, be that this appeal should be allowed in part. Respondent should be given the declaration sought (and granted in the Court below) in respect of all shares allotted after the notice of July 2nd 1958. Respondent will be entitled also to an order of rectification in respect of the same shares. But on the monetary claim, judgment should be for appellant. The same result should follow the appeal as against the second respondent; in respect of the third respondent the result should again be the same, except that it must be remembered that the requisite notice was not given until December 10th 1958 in this case. I concur in the order as to costs which will be proposed by the learned President. 10

NO. 21

In the Court of Appeal of New Zealand

No. 21 Reasons for Judgment of McCarthy J.

REASONS FOR JUDGMENT OF McCARTHY J.

12th December 1963.

As I agree with the conclusions at which the learned President has arrived, and, as I do so substantially for the reasons which he has stated, it is unnecessary for me to write a separate judgment. I concur in the order proposed.

In the
Court of
Appeal of
New Zealand

No. 22
Formal
Judgment of
Court of
Appeal

12th December
1963.

NO. 22

FORMAL JUDGMENT OF COURT OF APPEAL

Thursday the 12th day of December, 1963.

This appeal coming on for hearing on the 11th, 12th, 13th, 14th and 15th days of November, 1963 AND UPON HEARING Sir Wilfred Sim, one of her Majesty's Counsel, and Mr Mathieson of Counsel for the Appellant and Mr Cooke, Mr Cunningham and Mr Jeffries of Counsel for the Respondents THIS COURT DOTH ORDER that the appeal against the declaration in the Supreme Court that the shares referred to in the Schedule annexed to the Formal Judgment in such Court were allotted to the three Respondents without authority and wrongfully and the order that the Register of Members of the Appellant Company be rectified by removing therefrom the names of the three Respondents in respect of such shares BE AND THE SAME IS HEREBY DISMISSED AND THIS COURT DOTH FURTHER ORDER that the appeal against the Judgment of the Supreme Court awarding the Respondent, J.M. Construction Company Limited the sum of £3203. 0. 0., the Respondent, Jones Timber Company Limited, the sum of £9,867. 0. 0. and the Respondent, R.O. Slacke Limited, the sum of £4,490. 0. 0. BE AND THE SAME IS HEREBY ALLOWED:
AND IT IS FURTHER ORDERED that the Respondents shall pay to the Appellant half the cost of the printing of the Case on Appeal.

10

BY THE COURT

20

L.S.

G.J.GRACE

DEPUTY REGISTRAR

NO. 23

In the Court of Appeal of New Zealand

No. 23 Order Granting Final Leave to Appeal to The Privy Council.

4th May 1964.

ORDER GRANTING FINAL LEAVE TO APPEAL

TO THE PRIVY COUNCIL

BEFORE:

THE HONOURABLE MR. JUSTICE NORTH, PRESIDENT.
THE HONOURABLE MR. JUSTICE TURNER
THE HONOURABLE MR. JUSTICE McCARTHY

Monday the 4th of May 1964.

UPON READING the Notice of Motion of the abovenamed Respondents, J.M. Construction Company Limited and Jones Timber Company Limited dated the 28th day of April 1964 filed herein and the Affidavit of Thomas Allan Cunningham filed in support hereof:

AND UPON HEARING Mr. Cunningham of Counsel for the said two Respondents and Mr. Mathieson of Counsel for the above-named Appellant:

THIS COURT DOTH ORDER that the above-named Respondents, J.M. Construction Company Limited and Jones Timber Company Limited, do have final leave to appeal to Her Majesty in Council from the judgment of this Honourable Court pronounced herein on the 12th day of December, 1963, in-so-far as such judgment relates to allowing the appeal against the judgment of the Supreme Court awarding the Respondent, J.M. Construction Company Limited the sum of £3,203, and the Respondent, Jones Timber Company Limited the sum of £9,867.

BY THE COURT,

L.S. G.J. GRACE

REGISTRAR

Exhibit A

PART 11 EXHIBITS

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

EXHIBIT A.

FILE OF CORRESPONDENCE BETWEEN PARTIES AND THEIR RESPECTIVE SOLICITORS.

ROBINSON & CUNNINGHAM

Attention Mr Gillespie

24th September, 1957.

Messrs. Hogg, Gillespie, Carter & Oakley,
Solicitors,
P.O. Box 63,
LOWER HUTT. 10

Dear Sirs,

re Jones Timber Co. Ltd. – Hutt Timber & Hardware Co. Ltd.

We have been consulted by the Jones Timber Co. Ltd. with regard to taxation on rebates allowed by the Hutt Timber & Hardware Co. Ltd.

The Jones Timber Company buys timber from the Hutt Company, which apparently operates as a co-operative concern, although we can see nothin the Articles which sets out the basis of its operations. It credits its shareholders with rebates on their purchases, and thus apparently makes no income itself. However as far as the Jones Timber Company is concerned it has had very little of these rebates in cash. Most of it seems by 20 some process to have been turned into additional shares in the Hutt Company. Whether all of its customers are treated in this way is not clear.

At one time apparently these shares could be occasionally disposed of but latterly it has become very difficult because the Hutt Company seems to have the habit of issuing fresh capital to anyone willing to take it up, thus making existing shares very hard to dispose of.

One of the main difficulties, as far as the Jones Timber Company is concerned, is that the Tax Department is assessing it as if these rebates

credited were equivalent to cash. We have told the Jones Timber Company that before we can advise them as to this taxation position we must see the provisions of the Articles, or the other arrangements, under which they are forced to take shares in lieu of cash. So far the Jones Timber Company has merely supplied us with a copy of the Memorandum and Articles of Association of the Hutt Company as drawn up in 1943.

There is nothing in these documents which would cover the operations of arbitrarily issuing shares instead of cash for rebates on purchases. Either the Hutt Company is operating illegally, or else there is something far more drastic which enables it to do this.

We understand that you act for the Jones Timber Company and we would ask you therefore whether you could obtain for us exact details as to the basis on which the Jones Timber Company is forced to take these shares in lieu of cash. The Memorandum and Articles of Association show the Hutt Company as a private company and there is no indication in the Articles that it is a co-operative company. It is obvious, therefore, that substantial changes and other provisions exist, with regard to which our clients have not supplied us with details.

Yours faithfully,

ROBINSON & CUNNINGHAM

Exhibit A
File of Correspondence between Parties and their Respective Solicitors
24th September 1957 to 4th July 1962.
(continued)

HOGG, GILLESPIE, CARTER & OAKLEY.

26th September, 1957.

Messrs. Robinson & Cunningham,
Solicitors,
P.O. Box 28,
MASTERTON.

Dear Sirs,

re Jones Timber Co. Limited – Hutt Timber & Hardware Co. Limited.

We have your letter of the 24th September and will give immediate attention to the matters which you raised and will communicate with you just as soon as it is possible. 10

Yours faithfully,

HOGG GILLESPIE CARTER & OAKLEY

N.T. Gillespie.

HOGG, GILLESPIE, CARTER & OAKLEY.

4th October, 1957.

Messrs. Robinson & Cunningham,
Solicitors,
P.O. Box 28,
MASTERTON.

Dear Sirs,

Jones Timber Co. Ltd. Hutt Timber & Hardware Co. Ltd.

We refer to your letter of the 24th September. On the 28th November
10 1947 an Agreement was executed between the Hutt Timber & Hardware Co. Ltd. and a number of persons, firms and companies holding shares in that Company the purport of the Agreement being as follows:–

1. Recitals. The Company annually rebates to the shareholders its surplus revenue according to the transactions of the respective builders in the Company.

   Such rebates have no relation to the capital subscribed and consequently larger investors are at a disadvantage in that no dividend is made to them in respect of the capital contributed.

   That the Company is indebted to its Bankers and desires to
20 increase its capital and retain and transfer into capital account a proportion of the funds rebateable to the builders.

2. Operative Sections.
   (a) The Company is to provide a dividend on the paid up capital of an amount to be fixed by the Directors.
   (b) All surplus revenue is to be rebated to the builders in proportion to their respective transactions.
   (c) The moneys so rebated are to be credited to the builders in the books of the Company and such proportion as is not required for capitalisation goes to the builders.
30 (d) The amount which the builders are to receive is to be fixed by the Directors and is to be a percentage bearing the same ratio to the total of the rebateable funds as the shareholding of the respective builders bears to the total capital for the time being of the Company.

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

(e) At the end of each financial year the Company is to increase its capital by an amount equivalent to the total of the rebateable funds and each of the builders, i.e. the shareholders, is to subscribe for additional shares to an amount equivalent to the funds so retained by the Company.
(f) Each shareholder authorises the Company to apply the funds standing to his credit in the rebate account against his liability for calls in respect of the additional share capital.
(g) The process is to be repeated until the capital has reached £60,000 or such larger amount as the Directors may consider necessary.
(h) No builder is in the meantime to sell or transfer his shares to any person, firm or company who is not a party to the Agreement without the consent and approval of the Directors.
(i) The Secretary is authorised to subscribe the Memorandum of Association in respect of any increase of capital in respect of the individual builders.

On the 5th July 1949 Wilfred E. Jones Ltd. which was a signatory to the above document submitted to the Directors of Hutt Timber & Hardware Co. Ltd. two share transfers one from Wilfred E. Jones Ltd. to the Jones Timber Co. Ltd. of 2500 shares and one from Wilfred E. Jones Ltd. to J.M. Construction Ltd. of 1000 shares. Mr Jones was informed on the 10th July 1949 when the share transfers were submitted for registration that the power to capitalise rebates for Wilfred E. Jones Ltd. would also apply to a capitalisation of the rebates due to Jones Timber Co. Ltd. and J.M. Construction Co. Ltd. if the Transfers were registered and this was accepted by Wilfred E. Jones Ltd.

We can say that if any attempt were made at the present time to abrogate the terms of the Agreement of the 28th November 1947 the Bank of New Zealand as Debenture Holder might take a serious view of the situation as it is a term of the Bank's advances that the capital must be built up in the manner prescribed.

We trust that this information will be sufficient to enable you to advise the Jones Timber Co. Ltd. on the question of taxation which has been referred to you.

Yours faithfully,

HOGG, GILLESPIE CARTER & OAKLEY

N.T. Gillespie

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

7th October 1957.

Messrs. Hogg, Gillespie, Carter & Oakley,
Solicitors,
P.O. Box 63,
LOWER HUTT.

Dear Sirs,

Jones Timber Co. Ltd.
Hutt Timber & Hardware Co. Ltd.

We thank you for your letter of the 4th October.

10 It had seemed to us that there must be some such Agreement in existence to justify the operations which have been carried out.

The Company's tax liability will depend upon the precise construction of the whole document, and it would be dangerous for us to attempt to work on extracts. We would ask you, therefore, to obtain for us a full copy of the document and any modifications or additions which have been made to date. In any case this will be necessary if the Company takes a case.

Yours faithfully,

ROBINSON & CUNNINGHAM.

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

9th October 1957.

Messrs. Robinson & Cunningham,
Solicitors,
P.O. Box 20,
MASTERTON

Dear Sirs,

Jones Timber Co. Ltd.
Hutt Timber & Hardware Co. Ltd.

We have your letter of the 7th October and as requested send you herewith a copy of the Agreement which was referred to in our letter of the 4th October. 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 upon by the Company. 10

Yours faithfully,

HOGG, GILLESPIE CARTER & OAKLEY

N.T. Gillespie

Note: Agreement enclosed is that in Exhibit 1 of Defendants Exhibits.

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

10th December 1957

The Secretary,
The Hutt Timber & Hardware Co. Ltd.,
Park Avenue,
LOWER HUTT.

Dear Sir,

We have been consulted by the Jones Timber Co. Ltd. and also by the J.M. Construction Co. Ltd., with regard to your dealings with rebates due to them, and in particular with the income tax position arising thereout.

10 The effect of your procedure is that, instead of receiving rebates, they have been merely credited with them and the credits largely applied to the issuing of new shares in your Company.

The Jones Timber Co. Ltd. and the J.M. Construction Co. Ltd. asked us to consider the legal position arising out of this procedure for income tax purposes, but we have pointed out that a prior matter is that this procedure seems to us to have no legal basis.

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 20 Co. Ltd. or the J.M. Construction Co. Ltd. Many years ago it seems that there was some fairly loose form of agreement with some other Firms and Companies, but even if that would bind the signatories thereto – a point which appears to us to be doubtful – it certainly would not bind the Jones Timber Co. Ltd. or the J.M. Construction Co. Ltd. which were not parties.

Furthermore there are certain provisions in it, such as clause 4, which fix the cash payments by reference to the capital of the Company, and they appear to contravene the provision of the Land and Income Tax Act relating to co-operative concerns.

30 The whole matter seems to be in a very unsatisfactory position and our clients find themselves credited with large numbers of shares which are unsaleable in lieu of cash returns from their business. Yet they are being taxed as if they had actually received the moneys.

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

Obviously they cannot accept this erroneous basis, and while they do not wish to embarrass your Company unduly, some adjustments will have to be made, both as regards past and future procedure.

The correct method would appear to be to reverse the purported issue of shares which were illegally effected, although if you have purchasers therefor it would no doubt enable a short cut to be taken, and without prejudice to their contention that the shares have been illegally allotted to them in the past, they would allow your Company to rectify the position by disposing of the shares already issued at their nominal value and giving an assurance that the previous procedure will not be followed in future. 10

This procedure of issuing shares in lieu of rebates is doubly embarrassing and undesirable for income tax purposes because, if the amounts were left as credits only, then, if they turned out to be bad debts, they could eventually be written off. The Tax Department, however, insists that they can never be written off if your Company has the power to pay debts by issuing shares.

An alternative to having the position rectified through your company is to contest the matter direct with the Income Tax Department on the basis that the purported issue of shares was illegal, but our clients consider that they should advise you of the position first. 20

Will you please let us hear from you hereon.

Yours faithfully,

ROBINSON & CUNNINGHAM.

19th December 1957.

Messrs. Robinson & Cunningham,
P.O. Box 28,
MASTERTON

Dear Sirs,

I must apologise for not answering your letter dated 10th December earlier. I am taking this matter up with our Solicitors in the New Year and will give you a full answer then.

Yours faithfully,

10 HUTT TIMBER & HARDWARE CO. LIMITED.

Secretary.

11th February, 1958.

The Manager,
Hutt Timber & Hardware Co. Ltd.,
P.O. Box 80,
LOWER HUTT.

Dear Sir,

We duly received your letter of the 19th December and are awaiting
20 your further reply. The matter is somewhat urgent as our clients wish us to take further steps.

Yours faithfully,

ROBINSON & CUNNINGHAM.

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

February 14th, 1958.

Messrs. Robinson & Cunningham,
P.O. Box 28,
MASTERTON.

Dear Sirs,

With reference to your further correspondence re Rebates to Jones Timber Co. Ltd. and J.M. Construction Co. Ltd, Mr N.T. Gillespie, our Solicitor, has been handed the matter for reply.

Yours faithfully,

HUTT TIMBER & HARDWARE CO. LIMITED 10

L.R. Bowen
Secretary.

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

26th February, 1958.

Messrs. Robinson & Cunningham,
Solicitors,
MASTERTON.

Dear Sirs,

Hutt Timber & Hardware Company Ltd.
Jones Timber Company Ltd.
J.M. Construction Co. Ltd.

We have been asked to advise the Hutt Timber & Hardware Co. Ltd. in
10 respect of a letter recently addressed by you to that Company concerning the capitalisation of rebates available to the above named Companies.

We propose in the first place to consider some of the statements made in your letter. While we may accept as a general proposition that a Company may not issue shares in payment of its debts without authority it is clear that such authority exists in respect of both the Jones Timber Company and the J.M. Construction Co. Ltd. That authority is explicit and in any case the acceptance by those two Companies of the situation and the dealings in shares of the Hutt Timber Co. Ltd. which both these Companies have made must operate as an estoppel and we propose to advise
20 our client Company accordingly.

You make a reference to a "fairly loose form of Agreement". The Agreement does not warrant such a title from you. The Agreement in fact was a properly prepared and executed Agreement and it has been operated upon by your client Companies and by the Hutt Timber Company for many years. We have informed our client Company that the incidence of income tax as it affects your client Companies is not a matter of concern to the Hutt Timber Company which has acted throughout with the consent and co-operation of its shareholders who in turn have acquiesced in the situation over many years.

30 It is not correct to say that the shares in our client Company are unsaleable. As we have pointed out in fact your client Company has indeed sold shares over recent years, indeed the Jones Timber Company has made efforts recently to sell the balance of the shares which it has held.

We cannot advise our client Company either that there is any con-

travention of the provisions of the Land and Income Tax Acts in respect of co-operative concerns. In making this statement however we assume that you are referring to Section 145 of the Act. If you are we would point out to you that the shares received by way of rebate by your client Companies were acceptable to them and the amount of rebate payable was not based upon capital but only upon that portion of it payable in cash. This does not appear to us to be a contravention of the Act. Incidentally the Tax Department has approved the form of Agreement under which the Companies operate.

We shall be glad to confer with you further upon this matter and in the meantime we ask for your comments on the matters contained in this letter. 10

Yours faithfully,

HOGG, GILLESPIE, CARTER & OAKLEY.

N.T. Gillespie.

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

12th March, 1958.

Messrs. Hogg, Gillespie, Carter & Oakley,
Solicitors,
P.O. Box 63,
LOWER HUTT.

Dear Sirs,

re Hutt Timber & Hardware Co. Ltd.
Jones Timber Co. Ltd.
J.M. Construction Co. Ltd.

10 We have your letter bearing date the 26th September (February), 1958 and regret to note that your Company – apparently intends to do nothing in this matter.

You state that you have advised your client Company that the incidence of income tax as it affects our client Company "is not a matter of concern to the Hutt Timber Co." It seems to us that the primary consideration of a so-called Co-operative Company should be how its actions affect its members, and if this is not the case, then it is failing in its purpose.

As to whether the agreement should be termed a loose one, we did not use this term in any deprecatory sense. It was loose at the time of 20 its execution in that it left shareholders in an indefinite position, and it was still looser in its application because what purported primarily to be an authority to capitalise up to £60,000 has apparently been carried on to hundreds of thousands.

We think it is a pity that the Hutt Timber Co. takes the stand that it is not concerned with the effect of its actions, but as it does so, and as our client's right of objection to its income tax assessment is on the point of expiry we have now taken the matter up with the Income Tax Department.

Yours faithfully,

30 ROBINSON & CUNNINGHAM.

Exhibit 'A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

14th March, 1958.

Messrs. Robinson & Cunningham,
Solicitors,
P.O. Box 28,
MASTERTON.

Dear Sirs,

re **Hutt Timber & Hardware Co. Limited**
Jones Timber Co. Limited
J.M. Construction Co. Limited.

We have your letter of the 12th March. You appear to be anxious to put into our letter things which were not said in it. It is we think quite wrong of you to take from the phrase that we felt that the incidence of Income Tax was not a matter of concern to the Hutt Timber Company, the inferences which you have done. You in your turn have failed to take into consideration the beneficial affects that your client Company have from their ability to trade with Hutt Timber & Hardware Co. Limited. No purpose could be served in writing the type of letter to which we are now replying, and we propose to let the matter rest at that unless you desire to approach us again after your discussions with the Income Tax Department. 10

Yours faithfully, 20

HOGG, GILLESPIE CARTER &

OAKLEY.

N.T. Gillespie.

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

2nd July, 1958.

The Secretary,
The Hutt Timber & Hardware Co. Ltd.,
Holland's Crescent,
LOWER HUTT.

Dear Sir,

re **Jones Timber Co. Ltd.**
J.M. Construction Co. Ltd.

As we understand that there is a suggestion that your company proposes to issue further shares to shareholders in satisfaction of rebates, we send you this formal notice confirming our previous advice in correspondence that no person has authority to apply for such shares on behalf of either of the above companies and if any such move is made our companies will take action.

10

We are sending a copy of this notice to your Solicitor and also to the Registrar of Companies explaining the position.

Yours faithfully,

ROBINSON & CUNNINGHAM.

REGISTER

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

2nd July, 1958.

The Registrar of Companies,
WELLINGTON.

Dear Sir,

re Jones Timber Co. Ltd.
J.M. Construction Co. Ltd.

The Hutt Timber & Hardware Co. Ltd. is, we understand, a private company in which the above two companies have shares.

In the past the Hutt Timber & Hardware Co. Ltd. has issued shares in payment of rebates on purchases to its customers, which include our two client companies above-mentioned. 10

We have instructed the Secretary of the Hutt Timber & Hardware Co. Ltd. that no person has any authority to sign any application for any such shares on their behalf, and we accordingly also notify you that this is the position.

We enclose herewith a copy of our letter to the Secretary of the Hutt Timber & Hardware Co. Ltd.

Yours faithfully,

ROBINSON & CUNNINGHAM.

ENCLOS. 20

-2nd July, 1958.

Messrs. Hogg, Gillespie, Carter & Oakley,
Solicitors,
P.O. Box 63,
LOWER HUTT.

Dear Sirs,

re Jones Timber Co. Ltd
J.M. Construction Co. Ltd

Further to our previous correspondence we enclose herewith copy of a notice which has been sent by registered letter to the Secretary of the
10 Hutt Timber & Hardware Co. Ltd and also to the Registrar of Companies.

Yours faithfully,

ROBINSON & CUNNINGHAM

ENCLOS.

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

7th July, 1958.

Messrs. Robinson & Cunningham,
Solicitors,
P.O. Box 28,
MASTERTON

Dear Sirs,

Hutt Timber & Hardware Company Limited.

I acknowledge receipt of your letter of 2 July advising that no person has any authority on behalf of Jones Timber Co. Limited or J.M. Construction Co. Limited, to sign a application for any shares which might be issued. 10

Yours faithfully,

(K.L. Westmoreland)

Deputy Registrar of Companies

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

10th December, 1958.

The Manager,
Hutt Timber and Hardware Co. Ltd.,
Park Avenue,
LOWER HUTT.

Dear Sir,

re R.O. Slacke Ltd.

On behalf of the above-named Company we hereby give you notice that our client Company is not prepared to accept any further shares in
10 payment of rebates. Any arrangement or agreement which may have been made with our client Company regarding the issue of shares in payment of rebates is hereby terminated.

Yours faithfully,

MACALISTER MAZENGARB PARKIN & ROSE

19th December, 1958.

Messrs. Macalister, Mazengarb, Parkin & Rose,
P.O. Box 123,
LOWER HUTT.

Dear Sirs,

20 Your letter re issue of future shares to R.O. Slacke Ltd. has been received. It has been handed to our solicitors for reply in the New Year.

Yours faithfully,

HUTT TIMBER & HARDWARE CO. LTD.
L.R. Bowen
Secretary.

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

29th January, 1960.

The Secretary,
The Hutt Timber & Hardware Co. Ltd ,
Holland s Crescent,
LOWER HUTT.

Dear Sir,

re Jones Timber Co. Ltd
J.M. Construction Co. Ltd

On the 2nd July, 1958 we informed you on behalf of both the above Companies that no person had any authority to apply on their behalf for further shares in your Company. This confirmed our previous intimation to the same effect. We have now been informed that further shares have in fact been allotted.

Our clients repudiate these shares and further advise you that any person purporting to apply for them on their behalf or being in any way concerned in their issue does so at his peril.

Yours faithfully,

ROBINSON & CUNNINGHAM.

2nd November, 1961.

The Secretary,
The Hutt Timber & Hardware Co. Ltd ,
P.O. Box 80,
LOWER HUTT.

Dear Sir,

re **Jones Timber Co. Ltd**
J.M. Construction Co. Ltd

Some time ago we gave you notice on behalf of the above Companies
10 warning you against any purported issue of shares to the above Companies and advising you that no person had any authority to apply on their behalf for such shares.

It appears that this warning has been disregarded and that shares have been issued. Our clients have therefore instructed us to take the necessary legal proceedings.

This letter is therefore a letter preliminary to action advising you that proceedings are in the course of preparation and will be served on you in due course.

Yours faithfully,

20 ROBINSON & CUNNINGHAM.

A.R. REGISTERED LETTER

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

8th November, 1961.

Messrs. Robinson & Cunningham,
Solicitors,
Box 28,
MASTERTON.

Dear Sirs,

Jones Timber Co. Ltd. –
J.M. Construction Co. Ltd –
Hutt Timber & Hardware Co. Ltd

Your letter of the 2nd November addressed to our client Company has been handed to us for attention. 10

We are authorised to accept service of proceedings.

It occurred to us, however, that a discussion with your Mr Cunningham might be advantageous to all parties and we would be pleased to fall in with any arrangements which Mr Cunningham cares to make if he feels that an interview is desirable.

It, of course, will be without prejudice to either parties' rights and obligations.

Yours faithfully,

HOGG, GILLESPIE, CARTER & OAKLEY 20

N.T. Gillespie

25th January, 1962.

Messrs. Hogg, Gillespie, Carter & Oakley,
Solicitors,
P.O. Box 63,
LOWER HUTT.

Dear Sirs,

Jones Timber Co. Ltd –
J.M. Construction Co. Ltd
Hutt Timber & Hardware Co. Ltd

10 We duly received your letter of the 8th November, 1961 and regret that circumstances have delayed an earlier reply.

In view of the attitude taken on behalf of your client on the previous occasion, our clients consider that they have no alternative but to proceed with the action.

Yours faithfully,

ROBINSON & CUNNINGHAM.

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July, 1962.

(continued)

February 5th, 1962.

Messrs. R.O. Slacke Ltd.,
1 Mitchell Street,
LOWER HUTT.

Dear Sirs,

Late last year when I discussed your account with your Accountants, they claimed a set-off of rebates against what was owing. This was disputed but recently the Company was served with a Writ claiming over £4000 as a cash rebate due.

It would appear that you are not prepared to make any payment on your account but intend to build up an account with us with a permanent set-off until you reach the equivalent of your claim. 10

Your account now stands at £2,426. 5. 9d and until some legal judgment is given on your claim against the company, I am instructed not to permit your credit to increase further.

Instructions have accordingly been given to the Timber Office to supply no more orders to your firm until further notice.

Yours faithfully,

HUTT TIMBER & HARDWARE CO. LIMITED

L.R. Bowen,
Secretary. 20

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

13th February, 1962.

Messrs. Martin, Murphy & Jeffries,
Solicitors,
CML Building,
LOWER HUTT.

Dear Sirs,

Hutt Timber & Hardware Co. Ltd.
J.M. Construction Ltd. and Ors.

We desire to thank you in the first place for giving us time to file the
10 Statement of Defence in this matter.

It is hoped that the document will be in your hands by the end of this current week.

We desire to inform you that an error has been made in the typing of the return of allotments of the shares allotted in the year 1959. The figures should be 805, 917 and 1,719 instead of 1,334, 805 and 1,719 as shown.

This has arisen from a typing error in the office of the Secretary and the Registrar of Companies has intimated that he desires the amended statement to be filed immediately.

20 This is being done.

We naturally regret any inconvience to which you have been put but we are in our Statement of Defence stating in respect of Clause 6 of the Statement of Claim that the amended figures should be as above set out.

Yours faithfully,

HOGG GILLESPIE CARTER & OAKLEY

T. Gillespie.

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

March 27th, 1962

The Manager,
Messrs. R.O. Slacke Ltd.,
1 Mitchell Street,
LOWER HUTT.

Dear Sir,

In accordance with a Resolution of Directors passed on 9th November, 1961, fresh Share Certificates were to be issued to all Company Share - holders.

We accordingly forward you Certificate No.70 for 10,398 shares shown as held by you at that date. 10

Would you kindly sign and return the receipt for the Certificate and also return any old Certificates you may have in your possession as the enclosed Certificates brings your Shareholding up to date.

Yours faithfully,

HUTT TIMBER & HARDWARE CO.
LIMITED.

L.R. Bowen.
Secretary.

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

19th April, 1962.

Messrs. Hogg, Gillespie, Carter & Oakley,
Barristers & Solicitors,
P.O. Box 241,
WELLINGTON.

Dear Sirs,

re J.M. Construction Co. Ltd., Jones Timber Co. Ltd. and R.O. Slacke v. Hutt Timber & Hardware Co. Ltd. A. 14/62 (Wellington Registry) – Supreme Court.

10 We are instructed to write to you on behalf of the three abovenamed Plaintiff Companies with reference to letters written to them by your client Company the abovenamed Defendant, Hutt Timber & Hardware Co. Ltd., dated 27th March, 1962,which letters enclosed certain Share Certificates.

As your client Company is well aware these Share Certificates purport to be in respect of, inter alia, shares which that Company has apparently purported to allot to the Plaintiff Companies in 1959 and thereafter notwithstanding that the Plaintiff Companies gave notice that they would accept no further shares in payment of rebates. In the abovementioned action the Plaintiff Companies claim, inter alia, declarations that
20 such shares were allotted without authority and wrongfully, and orders that the register of members of your client Company be rectified by removing the names of the Plaintiff Companies in respect of such shares.

Since the attitude of the Plaintiff Companies is that they declined to accept, repudiate and disclaim the shares in the Hutt Timber & Hardware Co. Ltd. which the Directors of that Company have apparently purported to allot contrary to their express instructions, we are instructed to return the Share Certificates herewith.

As far as the future is concerned we again reiterate that the Plaintiff Companies will accept no further shares in purported payment of rebates.

30 We may say that the Share Certificate in respect of R.O. Slacke Ltd. appears to be obviously incorrect in at least one other respect in that it wrongfully shows R.O. Slacke Ltd. to have been a subscriber to the Memorandum of Association in 1943 and to have acquired further shares

Exhibit A.

File of Correspondence Between Parties and their Respective Solicitors

24th July 24th September 1957 to 4th July, 1962.

(continued)

in 1945 and 1948.

We would add that in drawing attention to the specific matters referred to above we should not be understood to admit that there are no other errors in the rejected certificates as there maybe others not within our own knowledge.

We are sending a copy of this letter to the Registrar of Companies.

Yours faithfully,

MARTIN, MURPHY & JEFFRIES.

19th April, 1962.

The Registrar of Companies,
Companies Office,
WELLINGTON.

10

Dear Sirs,

re: Hutt Timber & Hardware Co. Ltd.

We enclose a copy of the letter we have today sent to the solicitors of the abovenamed Company, which is self explanatory.

We request that that copy and the present letter be placed on the above Company's file in your office.

Yours faithfully,

MARTIN, MURPHY & JEFFRIES.

20

18th June, 1962.

The Chairman of Directors,
Hutt Timber and Hardware Co. Ltd.,
Naenae,
LOWER HUTT.

Dear Sir,

J.M. Construction Co. Ltd., Jones Timber Co. Ltd. and R.O. Slacke Ltd., v. Hutt Timber & Hardware Co. Ltd.

10 Our client companies have received copies of the Annual Accounts of your company for the year ended 30th November 1961. It is noted in the Directors' Report the following statement:—

> "It is again proposed to rebate the whole of the profits this year to Shareholders in the form of fully paid up shares".

In view of this proposed action by your company we again reiterate, on behalf of the three plaintiff companies which have issued proceedings, that under no circumstances have you any authority to issue any shares whatsoever to any of our client companies.

Yours faithfully,

20 MARTIN, MURPHY & JEFFRIES.

Exhibit A

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962.

(continued)

June 19th, 1962

Messrs. Martin, Murphy & Jeffries,
P.O. Box 153,
LOWER HUTT.

Dear Sirs,

Your letter of 18th June, regarding the issue of fully paid shares to the Companies who are taking action against this Company, has been noted.

The Directors' policy in this instance will depend upon the outcome of the lawsuit.

Yours faithfully, 10

HUTT TIMBER AND HARDWARE CO.LTD.

L.R. BOWEN
Secretary

per: A. Baldwin.

28th June, 1962.

R.B. Cooke Esq.,
Druids Chambers,
Woodward Street
WELLINGTON.

Dear Sir,

re: **Hutt Timber and Hardware Company Ltd ats. Jones & Ors.**

Attached is copy of the Auckland Rebate Agreement. This has only just been traced in the Company's Auckland Office.

10

You may inspect the original of this document if you wish.

Yours faithfully,

HOGG GILLESPIE CARTER & OAKLEY

E. Hogg.

Note: Enclosure is Exhibit 18.

Exhibit A.

File of Correspondence between Parties and their Respective Solicitors

24th September 1957 to 4th July 1962

(continued)

4th July, 1962.

Messrs. Hogg, Gillespie, Carter & Oakley,
Barristers & Solicitors,
P.O. Box 241,
WELLINGTON.

Dear Sirs,

J.M. Construction Company Limited and Others v. Hutt Timber and Hardware Co. Ltd.

There is a matter in connection with the pleadings in this case which we desire to mention. 10

A conflict exists between paragraphs 5 and 6 of the Statement of Claim on the one hand and paragraph 5 of the Statement of Defence on the other regarding the number of shares which the defendant company purported to allot in 1961 and the amount of the 1959 rebates. Your letter to us of the 13th February 1962, appears to have a bearing on this matter, although it states that a typing error was made in the return of the shares allotted in 1959. Exactly what the defendant company has done is not altogether clear to us, and we think we should therefore make it clear that the plaintiff companies will ask the Court to rectify the register by removing their names in respect of any shares that the defendant company may have 20 purported to allot to them after their respective Solicitors letters to the defendant company giving express instructions that they would accept no further shares in satisfaction of rebates, which letters were dated respectively the 2nd July, 1958 and the 10th December, 1958. Similarly judgment will be asked for the amount of any rebates that the defendant company has purported to apply to the payment of shares issued after receipt of those letters.

In this connection a further specific point has come to notice in the course of preparing for trial. In the case of J.M. Construction Company Limited and Jones Timber Company Limited, the defendant company after 30 receiving the letter of 2nd July, 1958, apparently purported to make an allotment of shares in 1958 and to apply in payment rebates due for 1957. The amounts involved appear to be respectively £561 and £1,405. It is therefore proposed at the hearing to apply for an amendment to the Statement of claim to claim rectification of the register as regards these shares also and judgment for the amounts mentioned.

Yours faithfully,
MARTIN, MURPHY & JEFFRIES.

Exhibit 8

Memorandum and Articles of Association of Hutt Timber and Hardware Co. Ltd.

6th September 1943.

EXHIBIT 8.

MEMORANDUM AND ARTICLES OF ASSOCIATION

of

HUTT TIMBER AND HARDWARE COMPANY LIMITED

MEMORANDUM OF ASSOCIATION.

I. The name of the Company is "Hutt Timber & Hardware Co., Limited.

II. The Company is a private Company under Part VIII of "The Companies' Act, 1933".

III. The objects for which the Company is established are :–

10 (a) To carry on at Lower Hutt or elsewhere all or any of the businesses of timber merchants. sawmill proprietors and timber growers and millers and buyers, sellers, importers and exporters of and dealers in timber and wood of all kinds.

(b) To manufacture, prepare for market and deal in articles of all kinds in the manufacture of which timber or wood is employed.

(c) To carry on all or any of the businesses of kiln dryers prefabricators of buildings and parts thereof, joinery merchants, sash and door manufacturers, glaziers and paint and oil manufacturers and dealers.

20 (d) To carry on all or any of the businesses of buyers, sellers, importers, exporters, wholesalers, retailers, and manufacturers of and dealers in hardware of all kinds, plumbers' requisites, electrical fittings of all kinds, iron and steel, copper and other metals, cement, asbestos, plasterboard, wall-board, plastics, tools, machinery and all other articles or things of whatsoever kind necessary for or likely to be used in or about the construction of any building.

(e) To carry on the business of general warehousemen and merchants and indentors of materials and merchandise of all types likely to
30 be required in connection with any of the objects hereof.

(f) To carry on the business of importers of all raw materials and products used or likely to be used in the manufacture of any article or thing required or necessary for any of the businesses set out in the

Exhibit 8

Memorandum and Articles of Association of Hutt Timber and Hardware Co. Ltd.

6th September 1943.

(continued)

preceding or subsequent paragraphs hereof.

(g) To carry on all or any of the businesses or trades of builders, contractors, merchants, plumbers, electricians, paper-hangers, painters, plasterers, tilers, bricklayers, drain-layers, joiners, engineers and metal founders.

(h) To carry on in all their respective branches in New Zealand or elsewhere the businesses of cartage contractors, common carriers and furniture removers and buyers, sellers, importers, exporters, hirers, assemblers and manufacturers of and dealers in motor trucks, motor vans, motor cars, motor cycles and other motor vehicles and tyres, oils, petrol, parts and accessories therefor. 10

(i) To carry on in all their respective branches at Lower Hutt and elsewhere in New Zealand the businesses of garage proprietors, petrol resellers, service station proprietors, body-builders, paint-sprayers, automotive engineers, mechanical and other engineers, tyre-retreaders, taxi-cab proprietors, car renters and all other businesses in any manner akin to the same or any of them.

(j) To buy sell manufacture import export alter improve exchange deal in consign or accept on consignment construct maintain repair let on hire and otherwise deal and trade in all kinds of stock-in-trade plant machinery apparatus materials and things which may be necessary or convenient or which may seem necessary advisable or capable of being profitably dealt with. 20

(k) To make and enter into contracts and engagements for any of the purposes of the Company and for the supply of plant and machinery of every description and for the supply of material of any kind manufactured or otherwise.

(l) To purchase take on lease or in exchange hire or otherwise acquire any estate or interest in any real or personal property and in particular any buildings easements machinery plant or stock-in-trade and any rights or privileges. 30

(m) To purchase accept or renew leases for terms of years rent hire or acquire on any other tenure land stores warehouses factories workshops and other buildings wherein the business of the Company may be carried on or be intended to be carried on and any land stores warehouses factories workshops offices and buildings for the time being owned or occupied by the Company to dispose of or deal with by sale lease or otherwise as to the Company shall seem fit.

(n) To erect construct alter repair and maintain any factories works buildings or machinery on any property of the Company or on the 40

property of any other person or Company.

(o) To apply for purchase or otherwise acquire in any part of the world trade marks copyrights or designs or any patent rights licenses privileges information concessions and the like conferring any exclusive or non-exclusive or limited right to use any invention which may seem capable of being used for any of the purposes of the Company or the acquisition of which may seem calculated directly or indirectly to benefit the Company AND to use exercise develop or grant licenses in respect of or otherwise turn to account
10 the property rights or information so acquired.

(p) To acquire and undertake the whole or any part of the business property and liabilities of any person or Company carrying on any business or possessed of property suitable for the purposes of this Company.

(q) To enter into any arrangements with any Governments or authorities municipal local or otherwise that may seem conducive to the Company's objects or any of them and to obtain from any such Government authority any rights privileges and concessions which the Company may think it desirable to obtain and to carry out
20 exercise and comply with any such arrangements rights privileges and concessions.

(r) To borrow or raise or secure the payment of money in any manner the Company may think fit in or beyond New Zealand and in particular by the issue of mortgages mortgage debentures debentures charges bonds obligations or any other securities charged upon all or any of the Company's property present and future inclusive or exclusive of its unpaid calls or uncalled capital or any part thereof and to redeem or pay off any such securities and to borrow money from its bankers or its members or otherwise with or without
30 security.

(s) To appoint agents in any part of the world for all or any of the purposes of the Company and to remunerate such agents for their services by salary or by commission or partly by salary and partly by commission and to act as agents and accept the agency for any person or company.

(t) To appoint attorneys or delegates in any part of the world with all or any of the powers of the Company and including powers of substitution or sub-delegation with power from time to time to alter or revoke or vary the terms of any Power of Attorney or delegation.

40 (u) To enter into partnership or into any arrangement for sharing profits union of interests co-operation joint adventure reciprocal concession

Exhibit 8

Memorandum and Articles of Association of Hutt Timber and Hardware Co. Ltd.

6th September 1943.

(continued)

or otherwise with any person firm or company carrying on or engaged in or about to carry on or engage in any business manufacture or transaction which this Company is authorised to carry on or engage in or any business manufacture or transaction capable of being conducted so as directly or indirectly to benefit this Company AND to lend money to guarantee the contracts of or otherwise assist any such person firm or Company and to take or otherwise acquire shares and securities of any such company and to sell hold re-issue with or without guarantee or otherwise deal with same.

(v) To sell lease convert into money or otherwise dispose of the whole business and undertaking of the Company or of any portion of the business and undertaking of the Company or of any portion of the property assets estate and effects of the Company and in consideration or part consideration for any dealing with the property of the Company to accept either cash Promissory Notes Bills of Exchange or any other mercantile instruments whatever or shares debenture stock mortgages mortgage debentures debentures charges bonds obligations or any other securities of any company. 10

(w) To promote any company or companies for the purpose of acquiring all or any part of the property and liabilities of the Company or for any other purpose which may seem directly or indirectly calculated to benefit this Company. 20

(x) To amalgamate with any person or company carrying on business or having objects altogether or in part of a like or similar nature to the objects of this Company or to acquire any such business or any interest therein either by purchase or otherwise and to accept or make payment in cash Promissory Notes Bills of Exchange or any other mercantile instruments whatever or in shares debenture stock mortgages mortgage debentures debentures charges bonds obligations or any other securities upon such terms as the Company may think expedient. 30

(y) To sell improve develop exchange bail lease manage mortgage dispose of turn to account or otherwise deal with all or any part of the property and rights of the Company.

(z) To manage improve and deal with any real or personal property which may come into the possession of the Company as security for any debt in such manner as to the Directors shall seem fit with as full powers as an individual would have in the like case.

(aa) To adopt such means of making known the products and businesses of the Company as may seem expedient. 40

(bb) To contribute or give in money or goods to any public or charitable

object and to give donations to any present or past servants or officers of the Company and to customers of the Company.

Exhibit 8

Memorandum and Articles of Association of Hutt Timber and Hardware Co. Ltd.

6th September 1943.

(continued)

(cc) To sign draw make accept endorse discount execute and issue cheques Promissory Notes Bills of Exchange and other negotiable or transferable instruments and mercantile instruments and documents of every description.

(dd) To lend money with or without security provided that any such loan shall only be made with the unanimous consent of all the Directors.

(ee) To carry on any other business wholesale or retail whether manufacturing or otherwise which may seem to the Company capable of being conveniently carried on in connection with the above ojects or calculated directly or indirectly to enhance the value of or render profitable any of the Company's property or rights for the time being.

(ff) To make provisions in the Articles of Association limiting the right of transfer of shares in the Company and for the permanent tenure by specified persons of the Office of Director of the Company,

(gg) To do all such other things as may be incidental to or which the Directors may consider conducive to the attainment of the above objects or any of them.

IV. The liability of the members is limited.

V. The capital of the Company is Twenty-nine thousand two hundred pounds (£29,200) divided into Twenty-nine thousand two hundred (29,200) fully-paid shares of One pound (£1) each with power to reduce or increase its capital and to issue any part of its increased capital with or without any preference priority or special privilege or subject to any postponement of rights or to any conditions or restrictions and so that unless the conditions of issue shall otherwise expressly declare every issue of shares whether declared to be preference or otherwise shall be subject to the powers hereinbefore contained.

DATED this 6th day of September 1943.

(Signatures not printed)

Exhibit 8

Memorandum and Articles of Association of Hutt Timber and Hardware Co. Ltd.

6th September 1943.

(continued)

ARTICLES OF ASSOCIATION.

NOTE: There are 118 clauses in the Articles of Association – not printed, except as follows:

ALTERATIONS OF CAPITAL

41. The Company may so far alter the conditions of its Memorandum of Association as by Ordinary Resolution:–

(a) To consolidate and divide its share capital into shares of larger amount than its existing shares, or

(b) To cancel any shares not taken or agreed to be taken by any person, or 10

(c) To divide its share capital or any part thereof into shares of smaller amount than is fixed by its Memorandum of Association by subdivision of its existing shares or any of them subject neverthless to the provisions of the Statutes, and so that as between the resulting shares, one or more of such shares may by the resolution by which subdivision is effected be given any preference or advantage as regards dividend, capital, voting or otherwise over the others or any other of such shares;

and by Special Resolution :–

(d) To reduce its capital and any capital redemption reserve fund in any manner authorised and subject to any conditions prescribed by the Statutes. 20

INCREASE OF CAPITAL

42. The Company may from time to time, by special resolution increase its share capital by the creation of new shares, such new capital to be of such amount and to be divided into shares of such respective amounts and (subject of any special rights for the time being attached to any existing class of shares) to carry such preferential, deferred or other special rights (if any), or to be subject to such conditions or restrictions (if any),in regard to dividend, return of capital, voting or otherwise, as the resolution directs. 30

43. Unless otherwise determined by the Company in General Meeting, any new shares from time to time to be created shall be offered to the

members in proportion as nearly as may be to the number of shares held by them. Such offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, shall be deemed to be declined, and, after the expiration of such time, or on the receipt of an intimation from the person to whom the offer is made that he declines to subscribe for the shares offered, the Directors may, subject to these Articles, dispose of the same by having them subscribed in such manner as they think most beneficial to the Company. The Directors may, in like manner, dispose of any such new or original shares as
10 aforesaid, which by reason of the proportion borne by them to the number of persons entitled to such offer as aforesaid or by reason of any other difficulty in apportioning the same cannot in the opinion of the Directors be conveniently offered for subscription in manner hereinbefore provided.

44. Except so far as otherwise provided by or pursuant to these Articles or by the conditions of issue, any new share capital shall be considered as part of the original ordinary share capital of the Company, and shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture and otherwise as the original share capital.

20 GENERAL MEETINGS

46. A General Meeting shall be held once in every calendar year, at such time and place as may be determined by the Directors, but so that not more than fifteen months shall be allowed to elapse between any two such General Meetings. The before-mentioned General Meetings shall be called Ordinary Meetings. All other General Meetings shall be called Extraordinary.

(47 to 53 not printed)

54. At all General Meetings a resolution put to the vote of the meeting shall be decided on a show of hands, unless before or upon the declaration of the result of the show of hands a poll be demanded by the Chairman or
30 by at least two persons for the time being present and entitled to vote at the meeting, or by the holder or holders in person or by proxy of at least one-twentieth part of the issued share capital of the Company and unless a poll be so demanded a declaration by the Chairman of the meeting that a resolution has been carried or has been carried unanimously, or by a particular majority, or lost, or not carried by a particular majority, shall be conclusive, and an entry to that effect in the Minute Book of the Company shall be conclusive evidence thereof, without proof of the number or proportion of the votes recorded in favour of or against such resolution.

DIVIDENDS AND RESERVE FUND

40 101. Subject to any preferential or other special rights for the time being

Exhibit 8

Memorandum and Articles of Association of Hutt Timber and Hardware Co. Ltd.

6th September 1943.

(continued)

attached to any special class of shares, the profits of the Company which it shall from time to time be determined to distribute by way of dividend shall be applied in payment of dividends upon the shares of the Company in proportion to the amounts paid up or credited as paid up thereon respectively, otherwise than in advance of calls.

102. The Directors may, with the sanction of a General Meeting, from time to time declare dividends, but no such dividend shall be payable except out of the profits of the Company. The Directors may, if they think fit, from time to time declare and pay to the members such interim dividends as appear to them to be justified by the position of the Company. No higher dividend shall be paid than is recommended by the Directors, and the declaration of the Directors as to the amount of the net profits shall be conclusive.

10

103. The Directors may, before recommending any dividend, set aside out of the profits of the Company such sums as they think proper as a reserve fund or reserve funds, which shall at the discretion of the Directors be applicable for meeting contingencies, for the gradual liquidation of any debt or liability of the Company, or for repairing or maintaining any works connected with the business of the Company, or shall, with the sanction of the Company in General Meeting, be, as to the whole or in part, applicable for equalising dividends, or for distribution by way of special dividend or bonus, or may be applied for such other purposes for which the profits of the Company may lawfully be applied as the Directors may think expedient in the interests of the Company, and pending such application the Directors may employ the sums from time to time so set apart as aforesaid in the business of the Company or to invest the same in such securities, other than the shares of the Company, as they may select. The Directors may also from time to time carry forward such sums as may be deemed expedient in the interests of the Company.

20

(104 relates to dividend warrants – 105 relates to profits of back-dated purchases – not printed)

30

CAPITALISATION OF RESERVES, ETC.

106. The Company in General Meeting may at any time and from time to time pass a resolution that any sum not required for the payment or provision of any fixed preferential dividend, and

(a) For the time being standing to the credit of any reserve fund or reserve account of the Company, including any sum carried to reserve as the result of a sale or re-valuation of the assets of the Company or any part thereof, or any premiums received on the issue of any shares, debentures or debenture stock of the Company, or

40

(b) Being undivided net profits in the hands of the Company, be capitalised, and that such sum be appropriated as capital to and amongst the shareholders in the proportions in which they would have been entitled thereto if the same had been distributed by way of dividend, and in such manner as the resolution may direct, and such resolution shall be effective; and the Directors shall in accordance with such resolution apply such sum in paying up in full any unissued shares in the capital of the Company on behalf of the shareholders aforesaid, and appropriate such shares and distribute the same credited as fully paid up amongst such shareholders in the proportions aforesaid in satisfaction of their shares and interests in the said capitalised sum or shall apply such sum or any part thereof on behalf of the shareholders aforesaid in paying up the whole or part of any uncalled balance which shall for the time being be unpaid in respect of any issued shares held by such shareholders, or otherwise deal with such sum as directed by such resolution. Where any difficulty arises in respect of any such distribution, the Directors may settle the same as they think expedient, and in particular they may issue fractional certificates, fix the value for distribution of any fully paid-up shares, make cash payments to any shareholders on the footing of the value so fixed in order to adjust rights, and vest any such shares in trustees upon such trusts for the persons entitled to share in the appropriation and distribution as may seem just and expedient for the Directors. When deemed requisite a proper contract for the allotment and acceptance of the shares to be distributed as aforesaid shall be filed in accordance with Section 53 of the Companies Act, 1933, and the Directors may appoint any person to sign such contract on behalf of the person entitled to share in the appropriation and distribution and such appointment shall be effective.

Exhibits 12, 13, 14 and 15

Resolutions extracted from Hutt Timber & Hardware Co. Ltd. Minute Books 1945 – 1961

EXHIBITS 12, 13, 14 and 15.

Note: **Four Minute Books of the Hutt Timber and Hardware Co. Ltd. were put in as Exhibits. The Resolutions set out hereunder are extracts therefrom.**

Directors' Resolution – 12th March, 1945 – Exhibit 15, Folio 81

"**Rebate:** – It was left to the Secretary to credit the rebate at rate of £600 per month as he thinks best."

Directors' Resolution – 26th April, 1945 – Ex. 15, F. 87.

"..................decided on the motion of Mr. Jones – that the scheme for increasing the capital by approximately £5,000 on the method outlined by Mr. Browning – that the discount on purchases for 1944 together with two thirds of estimated discount of 7½% for year 1945 be capitalised; capital to be on call after discount for 1945 has been declared." 10

Shareholders' Special Resolution – 30th May, 1945 – Ex. 15, F. 96.

"That the Authorised Capital of the Hutt Timber & Hardware Company Limited be increased by £3,200 such new shares to be subject to the same conditions as the original issue."

Shareholders' Resolution – 4th Annual General Meeting – 26th April, 1948 – Ex. 15, F. 150. 20

"That the capital of the Company is increased by the addition thereto of the sum of £7,240 beyond the registered capital of £32,400 and that the sum be divided into 7240 shares of £1 each."

Shareholders' Resolution – 5th Annual General Meeting – 23rd February, 1949 – Ex. 15, F. 154.

Resolved that the capital of the Company is increased by the addition thereto of the sum of £7,660 beyond the registered capital of £39,640 and that the sum be divided into 7660 shares of £1 each."

Exhibits 12, 13, 14 and 15

Resolutions extracted from Hutt Timber & Hardware Co. Ltd. Minute Books 1945 – 1961

(continued)

Directors' Resolution – 22nd February, 1950 – Ex. 13, F. 136.

"That a rebate of £19,000 be returned to shareholders on sales, of which 25% was to be paid in cash and the balance capitalised in terms of the agreement with the shareholders."

Directors' Resolution – 22nd February, 1950 – Ex. 13, F. 136.

"The following share transfers were approved –
W.E. Jones Ltd. to J.M. Construction Co. Ltd. 1000 shares.
W.E. Jones Ltd. to Jones Timber Co. Ltd. 1500 shares.
R.O. Slacke to R.O. Slacke Ltd. 1785 shares."

10 **Shareholders' Resolution – 6th Annual General Meeting – 9th March, 1950 – Ex. 15, F. 159.**

"Resolved that the capital of the Company is increased by the addition thereto of the sum of £14,225 beyond the registered capital of £47,300 and that the sum be divided into 14225 shares of £1 each."

Directors' Resolution – 19th March, 1951 – Ex. 13, F. 213.

"Resolved that £15,000 be paid as a cash rebate and the balance be capitalised in accordance with the existing agreement."

Directors' Resolution – 3rd April, 1951 – Ex. 13, F. 214.

"........resolved that of the profit of £24,449. 6. 7 be rebated and that
20 the sum of £8,475 would be capitalised in accordance with the agreement with shareholders and the balance of £15,974. 6. 7 be paid in cash."

Shareholders' Resolution – 7th Annual General Meeting – 3rd April, 1951 – Ex. 15, F. 169.

"The action of the directors in rebating the profit was approved and the following Resolution passed:–
'That the capital of the Company is increased by the addition thereto of the sum of £8,475 beyond the present registered capital of £61,525 and that the sum be divided into 8,475 shares of £1
30 each subject to the same conditions as the original issue.' "

Exhibits 12, 13, 14 and 15

Resolutions extracted from Hutt Timber & Hardware Co. Ltd. Minute Books 1945 – 1961

(continued)

Shareholders' Resolution – Extraordinary General Meeting – 23rd February, 1952 – Ex. 15. F. 182.

"That the capital of the Company is increased by the addition thereto of the sum of £50,000 beyond the present registered capital of £70,000 and that the sum be divided into 50,000 shares of £1 each subject to the same conditions as the original issue."

Directors' Resolution – 27th May, 1952 – Ex. 13, F. 282.

"It was decided to recommend to the General Meeting that £12,500 of the rebates be capitalised and the balance paid in cash."

Shareholders' Resolution – 8th Annual General Meeting – 27th May, 1952 – Ex. 12, F. 4. 10

" That the capital of the Company is increased by the addition thereto of the sum of £12,500 beyond the present registered capital of £120,000 and that the sum be divided into 12,500 shares of £1 each subject to the same conditions as the original issue."

Directors' Resolution – 22nd May, 1953 – Ex. 14, F. 49.

"That the Company's nett profit for the year ended November 30th, 1952 of £16,677. 11. 2. be paid to the shareholders by way of rebate, based upon their transactions with the Company. Further that the sum of £8,000 be capitalised in terms of the agreement between the shareholders and the Company." 20

Shareholders' Resolution – 9th Annual General Meeting – 16th June, 1953 – Ex. 12, F. 15.

"That the capital of the Company be increased by the addition thereto of the sum of £8,000 beyond the present Registered Capital of £132,500 and that the sum be divided into 8000 shares of £1 each subject to the same conditions as the original issue."

Directors' Resolution – 19th May, 1954 – Ex. 14, F. 101.

"That the net profit of £43,298. 4. 9 be rebated and that £23,000 be capitalised and £20,298. 4. 9 be paid out by way of cash in terms of the Agreement between the shareholders and the Company. " 30

Exhibits 12, 13, 14 and 15

Resolutions extracted from Hutt Timber & Hardware Co. Ltd. Minute Books 1945 – 1961

(continued)

Shareholders' Resolution – 10th Annual General Meeting – 9th June, 1954 – Ex. 12, F. 18.

"That the capital of the Company be increased by the addition thereto of the sum of £35,000 beyond the present registered capital of £140,500 and that the sum be divided into shares of £1 each, subject to the same conditions as the original issue."

Directors' Resolution – 5th July, 1955 – Ex. 14, F. 159.

"That 75% of the Present Rebate be capitalised and 25% paid in cash by March 1956, subject to Bank approval."

10 **Shareholders' Resolution – 11th Annual General Meeting – 6th July, 1955 – Ex. 12, F. 22.**

"That the capital of the Company be increased by the addition thereto of the sum of £31,500 beyond the present registered capital of £250,500 and the same be divided into shares of £1 each subject to the same conditions as the original issue."

Directors' Resolution – 1st May, 1956 – Ex. 14, F. 218.

"That the profit of the Company this year be paid out by way of Rebate."

Directors' Resolution – 27th June, 1956 – Ex. 14, F. 224.

20 "It was resolved that the whole of the profit for the year ending 1955 be rebated to the shareholders in the form of Fully Paid Up Shares."

Shareholders' Resolution – 12th Annual General Meeting – 28th June, 1956 – Ex. 12, F. 32.

"That the capital of the Company be increased by the addition thereto of the sum of £16,885 beyond the present Registered Capital of £288,560 and the same be divided into shares of £1 each subject to the same conditions as the original issue."

Directors' Resolution – 10th April, 1958 – Ex. 14, F. 309.

"That the profit of £26,787. 13. 1 be rebated to the shareholders as
30 per their transactions with the Company and further that this amount

Exhibits
12, 13, 14
and 15

Resolutions extracted from Hutt Timber & Hardware Co. Ltd. Minute Books 1945 – 1961

(continued)

be capitalised and issued to them as fully paid up shares."

Shareholders' Resolution – 14th Annual General Meeting – 19th June, 1958 – Ex. 12, F. 38.

"That the Annual Reports and Accounts for the year ended November 30th, 1957, as presented to the shareholders at this meeting be received and adopted."

Shareholders' Resolution – 14th Annual General Meeting – 19th June, 1958 – Ex. 12, F. 39.

"That the capital of the Company be increased by the addition thereto of £26,787 beyond the present registered capital of £305,445 and that the sum be divided into 26,787 shares of £1 each subject to the same conditions as the original issue." 10

Directors' Resolution – 19th May, 1959 – Ex. 14, F. 344

"That the profit of £23,548. 19. 2 for the year ending 30th November, 1958 be rebated to the shareholders on the basis of their transactions with the Company."

Directors' Resolution – 19th May 1959 – Ex. 14, F. 344.

"That the Board of Directors recommend to the Annual General Meeting that £23,523 of the rebate be issued as fully paid up shares."

Shareholders' Resolution – 20th May, 1959 – Ex. 12, F. 41. 20

"That the Annual Report of the Directors and the Accounts for the year ended 30th November, 1958, as presented to the shareholders at this meeting be received and adopted."

Shareholders' Resolution – 15th Annual General Meeting – 20th May, 1959 – Ex. 12, F. 42.

"That the capital of the Company be increased by the addition thereto of £24,145 beyond the present registered capital of £337,145 and that such sum be divided into 24,145 shares of £1 each subject to the same conditions as the original issue."

Directors' Resolutions – 11th and 12th April, 1960 – Ex. 14, F. 373.

Exhibits 12, 13, 14 and 15

Resolutions extracted from Hutt Timber & Hardware Co. Ltd. Minute Books 1945 – 1961

(continued)

"After further discussion the following resolution moved by Mr. Treseder and seconded by Mr. Grimes, was declared carried.

'That the Company profit of £49,882. 6. 3. be rebated to the shareholders in terms of the agreement between the Company and its shareholders re – distribution of annual profits.'

It was also agreed on the following resolution moved by Mr. Hart and seconded by Mr. Short –

'That the sum of £49,850 be issued as fully paid-up shares in payment of the rebate due to shareholders.'

10

Mr. Horlor considered that the time was coming when the Directors would have to give serious consideration to the total capital that the Company required.

On the motion of Mr. Treseder, seconded by Mr. Daily, the following resolution was declared carried:–

'That the Special Resolution increasing the ordinary capital of the Company by £43,430 be approved.' "

Shareholders' Resolution – 16th Annual General Meeting – 26th April, 1960 – Ex. 12 F. 43.

20

"That the Annual Report of the Directors and the Accounts for the year ending November 30th 1959, as presented to the Shareholders at this meeting be received and adopted."

Shareholders' Resolution – 16th Annual General Meeting – 26th April, 1960 – Ex. 12, F. 44.

"That the capital of the Company be increased by the addition thereto of the sum of £43,430 beyond the present registered capital of £356,875 and the sum be divided into 43,430 shares of £1 each subject to the same conditions as the original issue.

Directors' Resolution – 27th April 1961 – Ex. 13, F. 35.

30

"That the Company's net profit of £101,403. 9. 4 be rebated to the shareholders in terms of the Agreement between the Company and the shareholders and that such rebate be paid in fully paid shares."

Directors' Resolution – 27th April, 1961 – Ex. 13, F. 35.

"That the Directors recommend to the Shareholders that by Special Resolution the capital of the Company be increased to £550,000."

Exhibits
12, 13, 14
and 15

Resolutions
extracted
from Hutt
Timber &
Hardware
Co. Ltd.
Minute
Books
1945 – 1961

(continued)

Shareholders' Resolution – 17th Annual General Meeting – 22nd May, 1961 – Ex. 12, F. 47.

"That the Annual Report of Directors and Accounts for the year ending 30th November, 1960, as presented to the Shareholders at this meeting be received and adopted."

Shareholders' Resolution – 17th Annual General Meeting – 22nd May, 1961 – Ex. 12, F. 48.

"That the capital of the Company be increased by the addition thereto of the sum of £149,695 beyond the present registered capital of £400,305 and the sum be divided into 149,695 shares of £1 each subject to the same conditions as the original issue." 10

EXHIBIT G.

Exhibit G

Shareholding History of Jones Timber Co. Ltd. and J.M. Construction Co. Ltd. 1946 – 1951

Shareholding History of
Jones Timber Co. Ltd. and J.M. Construction Co. Ltd.

JONES TIMBER CO. LTD.

1st Authorised Capital		
1,000 shares of £1 each	W.E. Jones	950
	E. Jones	50
Increased 14th March 1946	W.E. Jones	1950
	E. Jones	50
10 to 3,000 shares of £1 each	G.W. Jones	1000
Increased 14th February 1949	W.E. Jones	5900
	E. Jones	100
to 9,000 shares of £1 each.	G.W. Jones	3000
Increased 4th July 1957	W.E. Jones	19500
	E. Jones	500
to 30,000 shares of £1 each.	G.E. Jones	10000
Increased 11th April 1961	W.E. Jones	19500
to 35,000 shares of £1 each	E. Jones	500
	G.W. Jones	10000
20	G.I. Hooper	3000
	E.A. Loval	2000

J.M. CONSTRUCTION CO. LTD.

Authorised Capital	W.E. Jones	3000
5,000 shares of £1 each	S.C. Morris	2000
Transfer of Shares 22/12/1954	W.E. Jones	2600
to G.I. Hooper 400	S.C. Morris	2000
	G.I. Hooper	400
Transfer to W.M.A. Howell	W.E. Jones	2500
	S.C. Morris	1900
30 on 15th June 1956 200	G.I. Hooper	400
	W.M.A. Howell	200

Exhibit 1.

Agreement Dated 28th November 1947

EXHIBIT 1.

AGREEMENT DATED 28TH NOVEMBER 1947

AN AGREEMENT made this 28th day of November One thousand nine hundred and fortyseven (1947) BETWEEN the persons firms and companies whose names appear in the first column of the Schedule hereto (hereinafter called "the Builders" and individually referred to as "each Builder") each with the other and others and with Hutt Timber and Hardware Company Limited a company incorporated in New Zealand with its registered office in Park Avenue City of Lower Hutt (hereinafter called "the Company") WHEREAS the Builders are shareholders in the Company each owning the number of shares specified opposite the Builders' respective names in the second column of the Schedule hereto AND WHEREAS the Builders are respectively engaged in the building trade and purchase supplies required for their respective businesses from the Company AND WHEREAS the Company annually rebates to the Builders its surplus revenue making such rebate proportionately according to the transactions of the respective Builders with the Company during the year current when the rebate is made AND WHEREAS such rebates have no rèlation to the capital subscribed and in consequence the larger investors are at a disadvantage in that no dividend bonus or other payment is made to them in respect of the capital contributed by them AND WHEREAS the Company is indebted to its bankers and is desirous of increasing its capital and of retaining and transferring to capital account a proportion of the funds rebateable to the Builders NOW THEREFORE THIS AGREEMENT WITNESSETH and the Builders agree each with the other and others and with the Company and the Company agrees with the Builders and each of them individually as follows:–

1. IN respect of each financial year ending after the execution of this Agreement the Company shall provided out of profits (if any) a dividend on the paid up capital of the Company for the time being such dividend being at a rate to be fixed by the Directors annually and to be declared only after proper provision has been made by the Directors for depreciation maintenance and all other proper allowances.

2. ALL surplus revenue of the Company in each year after making provision for the dividend aforesaid shall be rebated to the Builders in proportion to their respective transactions with the Company.

3. THE monies to be rebated to the Builders in accordance with the preceding paragraph (hereinafter referred to as "the rebateable funds") shall be credited to the Builders in the books of the Company and such percentage as shall not be required for capitalisation in accordance with

Exhibit 1.

Agreement Dated 28th November 1947 (continued)

the subsequent provisions of this Agreement shall be paid in cash to the respective Builders entitled thereto.

4. THE amount to be paid out to the respective Builders from the rebateable funds each year shall be fixed by the Directors and shall be a percentage bearing the same ratio to the total of the rebateable funds as the shareholding of the respective Builders bears to the total-capital for the time being of the Company and the balance shall be retained to be applied as hereinafter provided.

5. AT the end of each financial year the Company shall increase its capital by an amount equivalent to the total of the rebateable funds retained by the Company and held to the credit of the respective Builders or any of them in terms of the preceding clause of this Agreement and each of the Builders in respect of whom funds are retained shall subscribe for additional shares in the capital of the Company to an amount equivalent to the funds retained by the Company on his account provided however that in order to avoid fractions the amount retained shall in each case be £5 or a multiple of £5 and any odd amount shall be paid to the Builders entitled thereto in addition to the amount payable as hereinbefore provided for.

6. ON registration of the increase of capital each Builder who has agreed to subscribe for a proportion thereof hereby authorises the Company to apply the funds standing to his credit in rebate account against his liability for calls in respect of the additional shares subscribed for by him so that the shares subscribed for shall be issued to him credited as fully paid up and shall thereupon rank with all other shares for dividend.

7. THIS process shall be repeated at the end of each financial year 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.

8. NO Builder will in the meantime sell or transfer any shares owned by him to any person firm or company that is not a party to this Agreement without the consent and approval of the Directors of the Company which shall only be given in the event that a transferee agrees to subscribe this Agreement and to become bound by the terms thereof.

9. THE Secretary for the time being of the Company is hereby authorised to subscribe the Memorandum of Association in respect of any increase in capital of the Company in the names of the respective Builders for the additional shares to be taken up by them in any increase of capital in terms of this Agreement.

IN WITNESS WHEREOF this Agreement has been executed on the day and year first hereinbefore written.

Exhibit 1.

Agreement Dated 28th November 1947

(continued)

Name of Shareholder.	Number of Shares Held	Signature	
Beazley, H.H.	1050	H.H. Beazley	
Bowen, L.R.	1100	L.R. Bowen	
Christie R.L.	800	L.R. Christie	
Daily D. Ltd.	3280	Common Seal D.Daily	
Bennett, G.	1000	G.U. Bennett	
Pepper A.G.	635	A.G. Pepper	
England & Carter	500	p.p.England &Carter W.J. England	10
Quin I.L.	700	I.L. Quin	
Fraser H.	150	H. Fraser	
Wood J.	150	J.M. Wood	
Grimes & Browning	3550	Common Seal L. Grimes,Director	
Horlor H.C.	1100	Hy. C. Horlor	
Hunter H.R.	1000	H.R. Hunter	
Muir H.F. & Sons	550	H.F. Muir for H.F. Muir & Sons	
Williams T.E.A.	700	T.E.A. Williams	20
McGowan W.H.	1000	W. McGowan	
Stunnell F.A.	500	F.A. Stunell	
Murray D.	540 [corrected to 6]	D. Murray	
Martin ~~Mootin~~ A.H.	470 [corrected to 5]	A.H. Martin	
Murray James	2000	James Murray	
Nielson E.	1500	E. Nielson	
Norman G.R.	1000	(Distributed among other shareholders)	30
Orr J.L.	750	J.L. Orr	
Lewis, C.	300	C. Lewis	
~~Russell G.C.~~	~~500~~	C. Lewis	
Triplow, R.D.	200	R.D. Triplow.	
Slacke R.O.	750	R.O. Slacke	
Stunell & Rosoman	900 ~~1400~~	p.p. Stunnell & Rosoman. G.M. Rosoman	
Treseder A.W.	1200	A.W. Treseder.	
Wm. Bates & Son Ltd.	500	Common Seal. Wm. Bates Kenneth Bates.	40

Carried forward: 26,275

Exhibit 1.

Agreement Dated 28th November 1947

(continued)

Name of Shareholder	Number of Shares held	Signature
Brought forward:	26,275	
Davis & Stephen	400	p.p. Davis & Stephen P. Davis.
Fitzpatrick C.A.	300	C.A. Fitzpatrick
Williams G.L.	300	G.L. Williams
Whitcher C.	600	C.A. Whitcher
Jones W.E. Ltd.	3,055	Common Seal. p.p.Wilfred E. Jones Ltd. Wilfred E. Jones Director.
Willson K.B.	980	K.B. Willson
Willson L.C.R.	490	Lloyd C.R.Willson
Wilson C.R.	500	Colin R. Wilson

THE COMMON SEAL of HUTT TIMBER AND HARDWARE COMPANY LIMITED was hereto affixed in the presence of:–)

COMMON SEAL

M.J. Browning)
)   Directors
L.G. Grimes)

L.R. Bowen
Secretary.

Exhibit 6

Summary of Share Transfer Forms 5th July 1949 and 17th November 1949

EXHIBIT 6.

Summary of Share Transfer Forms

TRANSFEROR:	Wilfred E. Jones Limited
TRANSFEREE:	Jones Timber Company Limited
CONSIDERATION:	£1,500. 0. 0
NUMBER OF SHARES:	1,500.
DATE OF EXECUTION:	5th July, 1949.

TRANSFEROR:	Wilfred E. Jones Ltd.
TRANSFEREE:	J.M. Construction Company Ltd.
CONSIDERATION:	£1,000. 0. 0
NUMBER OF SHARES:	1,000
DATE OF EXECUTION:	5th July, 1949.

10

TRANSFEROR:	Randall Owen George Slacke.
TRANSFEREE:	R.O. Slacke Limited.
CONSIDERATION:	£1,785
NUMBER OF SHARES:	1,785
DATE OF EXECUTION:	17th November 1949.

EXHIBIT 7.

Exhibit 7.

Letter, Hutt Timber and Hardware Co. Ltd. to W.E. Jones Ltd. 10th November 1949.

Letter, Hutt Timber and Hardware Co. Ltd. to

W.E. Jones Limited

10th November, 1949.

Messrs. W.E. Jones Ltd.,
P.O. Box 100,
LOWER HUTT.

Dear Sirs,

I am holding two share transfers from you for registering – one
10 to Jones Timber Co. Ltd. for 1500 shares and one to J.M. Construction Co. Ltd., for 1000 shares.

I would point out to you that the Directors cannot register these unless the transferee agrees to the conditions in the Rebate Agreement between all Shareholders and this Company. This will mean that the Directors have the power to capitalise such of the rebates received by Jones Timber Co. Ltd., and J.M. Construction Ltd., as they may deem fit.

If I do not hear from you to the contrary within a fortnight I will presume that these terms are agreed to.

Yours faithfully,

20 HUTT TIMBER & HARDWARE CO. LTD.

Secretary.

Exhibit E.

Extract from Hutt Timber & Hardware Co. Ltd. Directors Minute Book

22nd February 1950

EXHIBIT E.

Extract from Hutt Timber and Hardware Co. Ltd.'s Directors Minute Book.

Share Transfers:

The following share transfers were approved:–

W.E. Jones Limited to J.M. Construction Co. Ltd.	1000 shares
W.E. Jones Limited to Jones Timber Co. Ltd.	1500 shares
R.O. Slacke to R.O. Slacke Ltd.	1785 shares

Minutes confirmed on 30th day of March, 1950.

EXHIBIT B. Extracts from Hutt Timber and Hardware Co. Ltd. Ledger Accounts.

J.M. Construction Co. Ltd. Rebate Account.

Date	Item	Folio	Debit	Credit	Dr. or Cr.	Balance
1949 Nov. 30	By Rebate			97. 19. 4		
	By Dividend			25. 0. 0		
	To New Shares		97. 0. 0			
	To Cash	C344	19. 4			
	To Cash	C394	25. 0. 0			–. –. –
1950 Nov. 30	By Rebate			594. 2. 4		
	To New Shares		150. 0. 0			
	To Cash	C499	444. 2. 4			–. –. –
1951 Nov. 30	By Rebate			512. 15. 9		
	To New Shares		255. 0. 0			
	To Cash		257. 15. 9			–. –. –
1952 Nov. 30	By Rebate			301. 0. 7		
	To Shares		150. 0. 0		c	151. 0. 7
1953 Nov. 30	By Rebate			1389. 8. 10		
	To Shares		1135. 0. 0		c	405. 9. 5

Exhibit B

E tracts from Hutt Timber & Hardware Co. Ltd. Ledger Accounts

1949 to 1960.

Exhibit B

Extracts from Hutt Timber & Hardware Co. Ltd. Ledger Accounts

1949 to 1960

(continued)

J.M. Construction Co. Ltd. Rebate Account (continued)

Date	Item	Folio	Debit	Credit	Dr. or Cr.	Balance
1954 Nov. 30	By Rebate			1089. 3. 4		
	To Shares		850. 0. 0		c	644. 12. 9
1955 Nov. 30	By Rebate			271. 0. 4		
	To Shares		271. 0. 0		c	644. 13. 1
1957 Nov. 30	By Rebate			561. 14. 11		
	To Shares		561. 0. 0		c	645. 8. 0
1958 Nov. 30	By Rebate			389. 5. 3		
	To Shares		389. 0. 0		c	645. 13. 3
1959 Nov. 30	By Rebate			805. 2. 2		
	To Shares		805. 0. 0		c	645. 15. 5
1960 Nov. 30	By Rebate			1448. 0. 10		
	To Shares		1448. 0. 0		c	645. 16. 3

Note: The Ledger Accounts of Jones Timber Company Limited and R.O. Slacke Limited were in the same form as those of J.M. Construction Co. Ltd. and are not printed.

EXHIBIT 16.

Exhibit 16

Attendances at Hutt Timber and Hardware Co. Ltd. Annual Meetings 1950 to 1961.

Attendances at Hutt Timber and Hardware Company Limited

Annual Meetings

1950	W.E. Jones	R.O. Slacke	
	Increase of Capital – Seconded by W.E. Jones		
1951	S. Morris	W.E. Jones	
1952	W.E. Jones	S. Morris	R.O. Slacke
1953	G. Jones	S. Morris	R.O. Slacke
1954	W.E. Jones	S. Morris	R.O. Slacke
1955	S. Morris	G. Jones	R.O. Slacke
1956	S. Morris		
1957	S. Morris	G. Jones	
1958	S. Morris	R.O. Slacke	
1959	S. Morris		
1960	S. Morris		
1961	S. Morris		

10

Exhibit 3.
Forms of
Rebate
Chits
1950, 1952,
1955, 1960.

EXHIBIT 3.

Forms of Rebate Chits

HUTT TIMBER & HARDWARE COMPANY LTD.

Messrs. D. Daily Ltd.,
Melling Road,
LOWER HUTT.

Dear Sir,

Please be advised that your rebate for 30th Nov., 1950 amounted to £1890. 3. 7, of which £1210. 3. 7 will be payable in cash and the balance £680 will be issued to you as fully paid up shares in the capital of this Company. 10

For your own records your shareholding will now be 6330, fully paid up shares.

Yours faithfully,
HUTT TIMBER & HARDWARE CO. LTD.,
L.R. Bowen,
Secretary.

HUTT TIMBER & HARDWARE COMPANY LTD.

REBATES.

TO H.C. Horlor Ltd. 20

Total Rebate Credited to you is	£1941. 1. 2
Amount Payable in Cash	£ 901. 1. 2
Balance credited as fully Paid up Shares	£1040
Your previous Shareholding was	6255 now 7295.

(Year ended 30. 11. 1952)

Exhibit 3
Forms of
Rebate
Chits
1950, 1952,
1955, 1960.

HUTT TIMBER & HARDWARE CO. LIMITED

TO H.C. Horlor Ltd.

Your share of the Annual Profit by way of rebate on purchases amounts to £364. 15. 6

Of this amount, £364 will be issued as fully paid up shares.

Yours faithfully,

HUTT TIMBER & HARDWARE CO. LIMITED

L.R. Bowen,
Secretary.

10 ((1955))

HUTT TIMBER & HARDWARE CO. LIMITED.

REBATE – 30th November, 1960.

Your Rebate for the Year ended 30th November, 1960 amounts to

£. . . . .

Of this amount £. . . . . .will be issued in fully paid Shares.

L.R. BOWEN
SECRETARY.

Exhibit H.

Letters between Hutt Timber and Hardware Co. Ltd. and Shareholders

1954 – 1955.

EXHIBIT H.

Letters between Hutt Timber and Hardware Co. Ltd. and Shareholders

Jones Timber Company Ltd.

November 25th 1954.

The Secretary,
Hutt Timber & Hardware Co. Ltd.,
P.O. Box 80,
LOWER HUTT.

Dear Sir,

We wish to offer to your directors 1,500 (one thousand five hundred) fully paid shares at one pound per share in the Hutt Timber & Hardware Co. Ltd. 10

We would appreciate an early reply in order that the necessary transfers may be completed.

Yours faithfully,

p.p. JONES TIMBER CO. LTD.

Geo. Hooper.

Secretary.

JONES TIMBER COMPANY LTD.

Exhibit H.

Letters between Hutt Timber and Hardware Co. Ltd. and Shareholders

1954 – 1955.

(continued)

May 30th 1955.

The Secretary,
Messrs. Hutt Timber & Hardware Co. Ltd.,
P.O. Box 80,
LOWER HUTT.

Dear Sir,

With reference to our letter of the 25th November 1954 and our subsequent telephone conversations regarding the 1,500 shares placed at
10 the disposal of your directors we now wish to advise you that we intend to place the shares on the open market.

Six months has now elapsed since the shares were first offered to your directors for disposal and we consider that you have had ample opportunity and time to dispose of the shares.

We wish to advise that we intend to place the shares on the open market at the end of fourteen days from the date hereon.

Yours faithfully,

p.p. JONES TIMBER CO. LTD.

(sgd.) Geo. Hooper.

20 Secretary

Exhibit H.

Letters between Hutt Timber and Hardware Co. Ltd. and Shareholders

1954 – 1955. (continued)

HUTT TIMBER & HARDWARE CO. LIMITED

July 25th, 1955.

The Secretary,
Jones Timber Co. Ltd.,
P.O. Box 100,
LOWER HUTT.

Dear Sir,

Mr Hewinson approached me this morning with regard to an offer you had made to him to sell him 1500 shares in this Company, registered in the name of the Jones Timber Co. Ltd. 10

Mr Browning, the Managing Director, spoke to Mr Hewinson and explained the present share position to him very fully and I was instructed to write to you as follows:

No steps will be taken before 1st August to dispose of your shares to the present Shareholders in terms of the Articles of Association of this Company but should there be no shares available out of the new issue of 75,000 which the Company is issuing then all the Shareholders will be offered same pro rata.

You will be paid the £1500 on the 14th August, irrespective of who buys same. Mr Hewinson was informed and I am instructed to tell you 20 that should the present Shareholders not wishr to take up any of your shares, the same will be sold to him as per your offer, but we will still act as Agent for you and pay you the cash and accept Mr Hewinson's money in full payment.

I trust that this offer is acceptable to you.

Yours faithfully,

HUTT TIMBER & HARDWARE CO. LIMITED

L.R. Bowen
Secretary.

HUTT TIMBER & HARDWARE CO. LIMITED

Exhibit H.

Letters between Hutt Timber and Hardware Co. Ltd. and Shareholders

1954 – 1955.

(continued)

July 29th, 1955.

CIRCULAR TO SHAREHOLDERS:

Dear Sirs,

Re application for portion of the 75,000 new shares, from information to hand it appears that the Auckland Builders will subscribe up to approximately 50,000 of these shares.

This being so, there will be available somewhere in the vicinity of 25,000 shares to existing shareholders, and you are asked to indicate on
10 the application form what shares you wish to take up of this new shareholding.

Before doing so, we request that you capitalise the rebates which accrued to you during the year ending November 1953, your amount of same being £505.

Please indicate whether you are prepared to capitalise the whole of the sum or portion of same. It would be appreciated if you would capitalise the whole amount, and we consider it would be in your interests to do so, as it may be some considerable time before the Company will be able to make payment of same and therefore you might just as well have
20 this amount credited to you as shares and you could participate in regard to purchases accordingly.

Please forward to the Secretary the information required in the circular in regard to capitalisation of rebates, and the application for new shares, not later than the 9th day of August, 1955.

Yours faithfully,

HUTT TIMBER & HARDWARE CO. LIMITED

M.O. BROWNING,
MANAGING DIRECTOR.

Exhibit H.

Letters between Hutt Timber and Hardware Co. Ltd. and Shareholders 1954 – 1955.

(continued)

JONES TIMBER CO. LTD.

15th August, 1955.

The Secretary,
Hutt Timber & Hardware Ltd.,
Park Avenue,
LOWER HUTT.

Dear Sir,

We wish to offer to your Directors 2861 (two thousand eight hundred and sixty one) fully paid shares at £1 per share in the Hutt Timber & Hardware Co. Ltd. 10

We would appreciate an early indication if your Directors desire to avail themselves of our offer.

In the event of their not desiring to take up these shares, we have a buyer.

In offering these shares to your Directors, we do so not because of any lack of confidence in the company but because of the high percentage of rebates which are being capitalised each year. This year our percentage of rebate (to shares) was less than 9%, the balance being made up in shares. We had been under the impression as the result of discussion at the Annual Meeting that the cash rebate would be 25%. 20

Yours faithfully,

Jones Timber Co. Ltd.

Secretary.

J.M.CONSTRUCTION CO. LTD.

Exhibit H.

Letters between Hutt Timber and Hardware Co. Ltd. and Shareholders 1954 – 1955.

(continued)

15th August, 1955.

The Secretary,
Hutt Timber & Hardware Ltd.,
Park Avenue,
LOWER HUTT.

Dear Sir,

We offer to your directors 1,727 (one thousand seven hundred and twenty seven) fully paid shares at £1 per share in the Hutt Timber &
10 Hardware Co. Ltd.

We would appreciate an early indication if your Directors desire to avail themselves of our offer.

In offering these shares to your directors, we do so not because of any lack of confidence in the company, but because of the high percentage of rebates which are being capitalised each year.

J.M. Construction Co. Ltd.

Go. Hooper.

Secretary.

Exhibit H.

Letters be between Hutt Timber and Hardware Co. Ltd. and Shareholders 1954 – 1955.

(continued)

HUTT TIMBER & HARDWARE CO. LIMITED.

September 8th, 1955.

Messrs. Jones Timber Co. Ltd.,
P.O. Box 100,
LOWER HUTT.

Dear Sirs,

Your letter offering shares held by Jones Timber and J.M. Construction Co. was placed before the Directors at a meeting held recently.

The shares will be offered to the other Shareholders of this Company in accordance with the Articles of Association. If at the end of the stated 10 period of three months they are not all sold you will be entitled to deal with the balance yourself, bearing in mind, of course, that the approval of the transfer to your client rests with the Directors in terms of the Articles of Association.

Yours faithfully,

HUTT TIMBER & HARDWARE
CO. LIMITED.

L.R. Bowen.
Secretary.

EXHIBIT 9.

Letters from Bank of New Zealand to

Hutt Timber and Hardware Co. Ltd.

Exhibit 9

Letters from Bank of New Zealand to Hutt Timber and Hardware Co. Ltd. 1954 – 1956.

BANK OF NEW ZEALAND. LOWER HUTT.

23 March, 1954.

The Managing Director,
Hutt Timber & Hardware Co. Limited,
Park Avenue,
LOWER HUTT.

10 Dear Sir,

Referring to your letter of the 23rd ultimo, I am pleased to advise my Head Office has now approved – without time commitment – of an increase in your Company's Ordinary Account overdraft limit to £160,000 to cover the balance of the expenditure on the mill at Tokoroa and provide some working capital at that point. Approval has been given on the definite understanding that 50% of all declared rebates will be capitalised and that no rebates at all will be withdrawn in cash without the Bank's prior approval. We shall look for reductions in the advance as soon as practicable and wish the position received annually in this connection on receipt
20 of the Balance Sheet.

The interest rate on the Ordinary Account is to be now 4½% this being in consequence of the present hardening in interest rates and in conformity with the rates charged on similar enterprises. Rate on the Cottle Block Account remains meantime unaltered at 4%.

At present you have £2,000 tied up in an Imprest Account at Tokoroa. To save you interest I would suggest this £2,000 be transferred back to the main account here and your operations at Tokoroa be conducted on overdraft at our Tokoroa Branch within a limit of £2,000. This would mean that your Ordinary Account overdraft limit at Lower Hutt would then
30 be £158,000 with £2,000 available at Tokoroa. If this suits you please advise us and we will make the necessary arrangements in this connection.

Yours faithfully,
(sgd.) P.W. Barton
Manager.

Exhibit 9

Letters from Bank of New Zealand to Hutt Timber and Hardware Co. Ltd. 1954 – 1956.

(continued)

BANK OF NEW ZEALAND. LOWER HUTT.

21 March, 1956.

The Secretary,
Hutt Timber & Hardware Co. Ltd.,
Park Avenue,
LOWER HUTT.

Dear Sir,

We acknowledge receipt of your letter of the 6th instant with enclosed forecasted figures. The latter have been compiled on a monthly basis and forwarded to our Head Office. A copy is enclosed for your records. You will notice that we have included the timber sales in the months in which the relative receipts can be expected e.g. February sales are shown in March and so on. As additional receipts, we have included £2,000 for State Advances Corporation mortgage proceeds on a dwelling at Tokoroa and £3,000 on account of payment from Ministry of Works for subdivisional work at Upper Hutt. As additional outgoings, £7,500 has been included for bank interest and £3,500 as a payment to G.H. Cottle to bring the payments to the latter up-to-date in terms of the agreement with the State Advances Corporation.

It has been disappointing to find there is no prospect of your being able to bring the advance on Ordinary Account within £160,000 during the period covered by the forecast but on the definite understanding that the overdraft has reached its peak, continuance of the Ordinary Account (which includes the Wages Account) in terms of the forecast submitted is now approved – without time commitment – subject to the following conditions:–

1. No further capital expenditure other than that provided for in the forecast is to be incurred without the Bank's consent.

2. No cash rebates to be paid to shareholders.

3. A statement is to be submitted to the Bank each month showing particulars of the preceding month's expenditure and receipts, particulars of debtors and stock etc. vide the enclosed specimen. This statement is required not later than the 20th of the month, the first being due on or about the 20th April.

4. Commencing 1st proximo the combined Ordinary and Wages overdrafts will bear interest at the following rates:–

   Up to £185,000 4½%

In excess of £185,000 7%

The present rate is 4½% up to £160,000 with 5% on the excess. Interest rates on the other accounts remain unaltered viz. : –

4% on Cottle Block

5% on Nos. 2 and 3 Accounts.

As share call monies come to hand they are to be applied in reduction of the nominal limit of £185,000 on Ordinary Account until the latter is reduced to the old figure of £160,000.

We are not particularly happy regarding the insurance position on your
10 present high stocks and we wish you to give this matter further consideration. What insurance are you now carrying? Is the cost of insurance on sawn timber sufficiently high to be considered prohibitive – if the risk is remote, the premium should be low. Please look into this and advise us further.

Yours faithfully,

Manager.

Exhibit 19

Hutt Timber & Hardware Co. Ltd. Schedule of Shareholders' Rebates 1955 – 1960.

EXHIBIT 19. HUTT TIMBER AND HARDWARE COMPANY LIMITED
SCHEDULE OF SHAREHOLDERS' REBATES
1955 – 1960.

	1955	1957	1958	1959	1960
Albertson, G.W.	117. 13. 11	20. 3. 3	–	–	–
Arcus Joinery Co. Ltd.	35. 12. 5	192. 1. 4	117. 19. 8	230. 9. 2	565. 16. 8
Bates & Son Ltd.	230. 10. 9	565. 4. 0	–	–	–
Bates, K.	–	–	–	–	673. 16. 7
Bates, D.	–	–	–	–	673. 16. 6
Beamish, A.H. & Son Ltd.	46. 6. 8	1,002. 18. 10	936. 0. 5	2,311. 0. 0	2,798. 14. 9
Beazley, H.H.	188. 4. 0	32. 13. 8.	–	–	–
Bennett, G.W. Ltd.	4. 12. 2	–	–	–	–
Broadway Milling Co.Ltd.	154. 16. 3	1,555. 6. 3	1,879. 13. 8	3,072. 15. 0	7,979. 7. 6
–	–	–	–	–	–
J.M.Construction Co.Ltd.	271. 0. 4	561. 14. 11	389. 5. 3	805. 2. 2	1,448. 0. 10
Jones Timber Co. Ltd.	794. 14. 6	1,405. 13. 3	1,122. 2. 0	917. 6. 1	6,425. 18. 9
–	–	–	–	–	–
Slacke, R.O. Ltd.	185. 4. 0	529. 12. 0	665. 19. 4	1,719. 18. 10	2,106. 3. 0
–	–	–	–	–	–
–	–	–	–	–	–
Total Rebates for Respective years	£12,454. 14. 1.	26,787. 13. 1.	23,548. 19. 2.	49,882. 6. 3.	101,403. 9. 4.

NOTE: The complete Exhibit 19 showed full list of 66 names. It is condensed to specimens, including Plaintiffs – but totals are retained as in complete Exhibit.

EXHIBIT 14.

Exhibit 14.

Hutt Timber & Hardware Co. Ltd. Extracts from Directors Minute Book 11th July 1958 1st September 1958

Hutt Timber and Hardware Co. Limited.

Extracts from Directors' Minute Book.

11th July, 1958:

Rebate Shares – Jones Timber Co. Ltd:

A letter from the solicitor representing Jones Timber Co. Ltd., stating that this company would not accept any more shares in payment of Rebate was tabled.

The Secretary was instructed to take up the matter with the Company's
10 solicitors and get a ruling on same.

1st September, 1958:

Matters arising from Minutes:

The Secretary stated that the Company's lawyers instructed him to register the rebate shares in the name of Jones Timber Co. Ltd., and J.M. Construction Co. Ltd., as he considered they were estopped from denying the contract due to their past dealings in the same class of share.

Exhibit 18

EXHIBIT 18.

Agreement
Dated 14th
July 1959.

Agreement dated 14th July 1959.

THIS AGREEMENT made the Fourteenth day of July One thousand nine hundred and fiftynine (1959) is supplemental to a certain agreement made the 28th day of November 1947 and is made BETWEEN THE PERSONS FIRMS AND COMPANIES whose names appear in the first column of the Schedule hereto (hereinafter collectively called "the Builders" and individually referred to as "each Builder") each with the other or others of them AND with HUTT TIMBER & HARDWARE CO. LIMITED a Company duly incorporated and having its Registered Office in the City of Lower Hutt (hereinafter called "the Company") WHEREAS by the said Agreement dated the 28th day of November 1947 the Builders enumerated in the Schedule thereto were the shareholders of the Company at the time of the execution of the said Agreement AND WHEREAS the Company has extended its activites to the City of Auckland and its environs and has issued further capital some of which has been taken up by builders in the Auckland district being the builders hereinbefore referred to and more particulary described in the first column of the Schedule hereto AND WHEREAS the Builders are respectively engaged in the building trade and purchase supplies for their respective businesses from the Company AND WHEREAS the Company in pursuance of the policy established in 1947 has made annual rebates to the Builders of surplus revenue basing such rebates proportionately upon the transactions of the Builders with the Company for the year to which the rebate is applicable AND WHEREAS such rebates have no relation to the capital subscribed by the Builders or any other shareholders and in consequence the larger investors are at a disadvantage in that no dividend bonus or other payment is made to them in respect of the capital contributed by them AND WHEREAS the Company is indebted to its Bankers and is desirous of increasing its capital from time to time and in fact has so increased its capital since the execution of the Agreement of 1947 and is further desirous of retaining and transferring to a capital account a proportion of the funds rebateable to the Builders NOW THEREFORE THIS AGREEMENT WITNESSETH and the Builders do and each of them DOTH HEREBY AGREE with the other and others of them and with the Company and the Company HEREBY AGREES with the Builders and each of them individually as follows:—

1. THIS Agreement is collateral to and co-existent with and supplemental in respect of the additional shareholders described in the said Schedule to the said Agreement of the 28th November 1947.

2. ALL surplus revenue of the Company in each year after making provision for the dividend aforesaid shall be rebated to the Builders in proportion to their respective transactions with the Company.

Exhibit 18.

Agreement Dated 14th July, 1959.

(continued)

3. THE moneys to be rebated to the Builders in accordance with the preceding paragraph (hereinafter referred to as "the rebateable funds") shall be credited to the Builders in the books of the Company and such percentage as shall not be required for capitalisation in accordance with the subsequent provisions of this Agreement shall be paid in cash to the respective Builders entitled thereto.

4. THE amount to be paid out to the respective Builders from the rebateable funds each year shall be fixed by the Directors and shall be a percentage bearing the same ratio to the total of the rebateable funds as the shareholding of the respective Builders bears to the total capital for the time being of the Company and the balance shall be retained to be applied as hereinafter provided.

5. AT the end of each financial year the Company shall increase its capital by an amount equivalent to the total of the rebateable funds retained by the Company and held to the credit of the respective Builders or any of them in terms of the preceding clause of this Agreement and each of the Builders in respect of whom funds are retained shall subscribe for additional shares in the capital of the Company to an amount equivalent to the funds retained by the Company on his account provided however that in order to avoid fractions the amount retained shall in each case be £5 or a mutiple of £5 and any odd amount shall be paid to the Builders entitled thereto in addition to the amount payable as hereinbefore provided for.

6. ON registration of the increase of capital each Builder who has agreed to subscribe for a proportion thereof hereby authorises the Company to apply the funds standing to his credit in rebate account against his liability for calls in respect of the additional shares subscribed for by him so that the shares subscribed for shall be issued to him credited as fully paid up and shall thereupon rank with all other shares for dividend.

7. THE process herein set out shall be repeated and continued by the Directors at the end of each financial year for such period as the Directors may consider necessary on a consideration of the Company's financial position and of its indebtedness to its Bankers.

8. NO Builder will in the meantime sell or transfer any shares owned by him to any person firm or company that is not a party to this Agreement without the consent and approval of the Directors of the Company which shall only be given in the event that a transferee agrees to subscribe this Agreement and thus become bound by the terms thereof.

9. THE Secretary for the time being of the Company is hereby authorised to subscribe the Memorandum of Association in respect of any increase in capital of the Company in the names of the respective Builders for the additional shares to be taken up by them in any increase of capital in terms of this Agreement, and the presentation by the Secretary of a Memor-

Exhibit 18.

Agreement Dated 14th July, 1959.

(continued)

andum of Increase of Capital in accordance with the provisions of this clause shall be final and complete evidence of the authority of the Secretary so to act and the Builders do and each DOTH HEREBY INDEMNIFY the Secretary accordingly.

10. SUCH of the Builders as were shareholders of the Company in the years ended 30th November 1956, 1957 and 1958 DO HEREBY RATIFY AND CONFIRM the allocation to them of the shares respectively received by them in lieu of rebates in cash by the Company in those years or in any of them.

IN WITNESS WHEREOF this Agreement has been executed on the day and year first hereinbefore written. 10

THE SCHEDULE

Exhibit 18.

Agreement Dated 14th July, 1959.

(continued)

Name of Shareholder	Number of Shares held.	Signature
Beamish A.H. & Son Ltd.	3016	p.p. A.H. Beamish & Son Ltd. A.H. Beamish
Beamish Andrew Hewson	2967	A.H. Beamish
Broadway Milling Co. Ltd.	9588	C.R. Chadwick
Bronston Construction Co. Ltd.	649	p.p. Bronston Const. Co. Ltd. J.F. Goldstone
Donaldson Hubert Ian	1835	H.I. Donaldson
Greenwood John Rowland	1566	J.R. Greenwood
Harris John Porter	1743	J.P. Harris
Goldstone John Francis	3430	J.F. Goldstone
Jenkin H. & Sons Ltd.	4485	Jeo. Jenkin
Hart Arthur Joseph	4604	A.J. Hart
Norris & Sampson Ltd.	1940	E.R. Norris
Moore Frederick Victor	2651	Frederick V. Moore
Pope P.J. Ltd.	1599	P.J.H. Pope
Rose F.H. Ltd.	2352	R.H. Rose Ltd. p.p. F.H. Rose
Short Henry John	298	Henry J. Short
Short H.J. Ltd.	5695	p.p. H.J. Short Ltd. Henry J. Short
Willoughby William	1743	W.N. Willoughby
Youngman W. & Son Ltd.	4451	p.p. W. Youngman & Son Ltd. B.E. Youngman
Stunell John	1501	Jack Stunell

THE COMMON SEAL OF HUTT TIMBER & HARDWARE COMPANY LIMITED was hereto affixed in the presence of:—))) COMMON SEAL.

Henry J. Short Director.

A. Downey Branch Manager.

Exhibit D

Hutt Timber & Hardware Co. Ltd. Annual Accounts 30th November 1961.

EXHIBIT D.

Hutt Timber & Hardware Co. Limited

Annual Accounts

For the Year Ended 30th November 1961.

HUTT TIMBER & HARDWARE CO. LIMITED.

NOTICE is hereby given that a Special Meeting of Shareholders of the Hutt Timber & Hardware Co. Limited will be held in the Hutt Valley Power Board Hall, Lower Hutt, on Friday 22nd June, 1962, at the conclusion of the Annual General Meeting.

BUSINESS: To consider, and if thought fit, to pass the following resolution as a Special Resolution 10

"THAT THE CAPITAL OF THE COMPANY BE INCREASED BY THE ADDITION THERETO OF THE SUM OF £50,000 BEYOND THE PRESENT REGISTERED CAPITAL OF £550,000 AND THE SUM BE DIVIDED INTO 50,000 SHARES OF £1 EACH SUBJECT TO THE SAME CONDITIONS AS THE ORIGINAL ISSUE."

NOTICE is hereby given that the eighteenth Annual General Meeting of the Shareholders will be held as follows:

DATE OF MEETING: Friday 22nd June, 1962.
TIME OF MEETING: 8 p.m. 20
PLACE OF MEETING: Hutt Valley Power Board Rooms, Queens Road, Lower Hutt.

BUSINESS.

1. To receive and consider the Directors' Report and Balance Sheet for the year ending 30th November, 1961, and the report of the Auditors thereon.
2. To elect Directors in place of Messrs. M.O. Browning, J. Murray, and I.T. Cook, representing the Shareholders on the Lower Hutt Share Register. These Directors retire by rotation but, being eligible, offer themselves for re-election. 30
3. General Business.

By Order of the Board
L.R. Bowen
Secretary.

Exhibit D

Hutt Timber & Hardware Co. Ltd. Annual Accounts 30th November 1961.

(continued)

Hutt Timber & Hardware Co. Limited

Directors' Report For The Year Ended 30th November, 1961.

The Directors have pleasure in submitting their report and the Balance Sheet and Accounts for the year ended 30th November, 1961.

The Net Profit for the year was £85,864 compared to £101,403 for the previous financial year.

The main reason for this variation has been brought about by a change in the method of stock valuation.

This has resulted in a reduction of net profit by approximately £27,000.

10 It is again proposed to rebate the whole of the profits this year to Shareholders in the form of fully paid up shares.

Production and sales of timber have again increased on the previous year's totals.

The Company's housing schemes in Auckland continue to look bright. In addition to the Otara Scheme, the Company is in the course of negotiating for the purchase of a very desirable subdivisional area in the Pakuranga district.

In Lower Hutt all that is available at the moment are State and Group Housing contracts. The Company is securing what it can of these.

20 Since the last annual meeting, the Company's Pukuweka Sawmill at Manunui was totally destroyed by fire. Reconstruction of a modern band-resaw sawmill is almost complete and it is hoped that all Shareholders will be able to attend the re-opening of same and see it in operation. It will be the most up-to-date mill of its type in New Zealand.

The retiring Directors are Messrs. M.O. Browning, J. Murray and I.T. Cook, who, being eligible, offer themselves for re-election.

Messrs. Watkins, Hull, Wheeler & Johnston continue in office as Auditors and a Resolution with regard to their remuneration will be submitted to the Meeting.

30 For the Directors

M.O. Browning,

Chairman.

Exhibit D.

Hutt Timber & Hardware Co. Ltd. Annual Accounts 30th November 1961.

(continued)

HUTT TIMBER & HARDWARE CO. LIMITED

PROFIT AND LOSS ACCOUNT

FOR THE YEAR ENDED 30TH NOVEMBER, 1961

		1961		1960
Gross Revenue Less Expenses before charging the following Expenses		123418		136308
Less:				
Interest on Fixed Term Liabilities	5161		5495	
Depreciation	28680		26084	
Directors' Fees	2400		1875	
Auditors' Fees	1450	37691	1450	34904
Net Profit for Year rebated to Shareholders		£85727		£101404

AUDITORS' REPORT TO MEMBERS CF HUTT TIMBER & HARDWARE CO. LIMITED & HUTT TIMBER FORESTS LIMITED.

We have obtained all the information and explanations that we have required.

In our opinion proper books of account have been kept by the Companies so far as appears from our examination of those books. In our opinion, according to the best of our information and the explanations given to us and as shown by the said books, the Balance Sheets and Profit and Loss Accounts are properly drawn up so as to give respectively, a true and correct view of the state of the Companies' affairs as at 30th November, 1961, and of the results of its business for the year ended on that date. According to such information and explanations the Accounts, the Balance Sheets and the Profit and Loss Accounts give the information required by the Companies Act 1955 in the manner so required.

WATKINS, HULL, WHEELER & JOHNSTON,
AUDITORS.

Wellington,
23 May, 1962.

HUTT TIMBER & HARDWARE CO. LIMITED
BALANCE SHEET
AS AT 30TH NOVEMBER, 1961.

			1961	1960
Current Liabilities				
Bank of New Zealand (Secured)				
Ordinary Accounts	297002			375618
Group Housing	161261			149598
		458263		525216
Sundry Creditors		144676		165961
TOTAL CURRENT LIABILITIES			602939	691177
Fixed Term Liabilities (secured)				
Intercity Concessions Ltd.,		14850		18150
Land & Survey Department		9392		9643
Riverview Estate Ltd.,		4856		5856
Hickson's Timber Impreg. Ltd.		4493		3303
State Advances Corporation				
Bowater Block	–			1500
Tokoroa Houses	65989			68441
Manunui Houses	15698			16346
		81687		86287
Mortgages –				
Auckland Housing		2300		23836
TOTAL FIXED TERM LIABILITIES			117578	147075
Shareholders' Funds				
Authorised Capital 550,000 Ordinary Shares of £1 each		550000		400305
Less Unallotted Shares		47890		–
Less Calls In Arrears		1190		1190
		500920		399115
Capital Reserve		5090		–
Shareholders' Rebates		99369		115775
TOTAL SHAREHOLDERS' FUNDS			605379	514890
			1,325,896	1,353,142

			1961	1960
Current Assets				
Cash on Hand and Imprests		78		1525
Sundry Debtors –				
Trade	157943			139583
Group Housing	46139			77159
Loans to Staff	1196			1451
	205278			218193
Less Provision for Bad Debts	1000			1000
		204278		217193
Payments in advance				1506
Stock on Hand		238535		237813
Subdivisional Work in Progress		244678		285758
TOTAL CURRENT ASSETS			687569	
Advances to Hutt Timber Forests Ltd.			111589	93410
Investments				
Shares in Hutt Timber Forests Ltd., at Cost		49999		49999
Shares in Other Company at Cost		123		123
Life Insurance Managing Director		---		10358
TOTAL INVESTMENTS			50122	60480
Roading and Royalties Prepaid				
Roading		20549		19009
Royalties		36990		43627
TOTAL ROADING AND ROYALTIES PREPAID			57539	62636
Fixed Assets				
Land and Improvements (at Cost)		64885		64194
Buildings at Book Value 30. 11. 55				
Plus Additions at Cost less Disposals	302935			291411
Less Provision for Depreciation.	87041			78920
		215894		212491
Plant at Book Value 30. 11. 55				
Plus Additions at Cost Less Disposals	164913			143622
Less Provision for Depreciation	73994			64678
		90919		78944
Office Furniture & Equipment (at Book Value 30. 11. 55) Plus Additions at Cost Less Disposals	10668			10279
Less Provision for Depreciation	6426			5284
		4242		4995
Motor Vehicles (At Book Value 30. 11. 55)				
Plus Additions at Cost less Disposals	96150			79654
Less Provision for Depreciation	53013			47457
		43137		32197
TOTAL FIXED ASSETS			419077	392821
			1,325,896	1,353,142

M.O. BROWNING)
A.W. TRESEDER) Directors

NOTE: The basis of valuation of all stocks on Hand in the Company has been changed for the year ended 30 Nov. 1961.

CERTIFICATE OF ACTING REGISTRAR OF COURT OF APPEAL

AS TO ACCURACY OF RECORD.

I, GERALD JOSEPH GRACE, Acting registrar of the Court of Appeal of New Zealand, DO HEREBY CERTIFY that the foregoing 238 pages of printed matter contain true and correct copies of all the proceedings, evidence, judgment, decrees and orders had or made in the above matter, so far as the same have relation to the matters of appeal, and also correct copies of the reasons given by the Judges of the Court of Appeal of New Zealand in delivering judgment therein, such reasons having been given in writing: AND I DO FURTHER CERTIFY that the appellant has taken all the necessary steps for the purpose of procuring the preparation of the record, and the despatch thereof to England, and has done all other acts, matters and things entitling the said appellant to prosecute this Appeal. 10

AS WITNESS my hand and Seal of the Court of Appeal of New Zealand this 18th day of AUGUST 1964.

G.J. GRACE

ACTING REGISTRAR

L.S.

In the Privy Council

No. 39 of 1964.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

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

Appellants

AND

HUTT TIMBER AND HARDWARE COMPANY LIMITED

Respondents

RECORD OF PROCEEDINGS

Linklaters & Paines,
Barrington House,
59–67 Gresham Street,
London E.C.2.

Agents for:
Robinson & Cunningham,
Masterton,
New Zealand.

Solicitors for Appellants

MacFarlanes,
Dowgate Hill House,
London E.C. 4.

Agents for:
Hogg, Gillespie, Carter & Oakley,
Wellington,
New Zealand.

Solicitors for Respondent.

PRINTED BY "TRUTH" (N.Z.) LTD.