

GE1.44

11/1963

No. 22 of 1962.

# In the Privy Council.

**ON APPEAL**  
*FROM THE COURT OF APPEAL OF NEW ZEALAND.*

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED LEGAL STUDIES  
**19 JUN 1964**  
25 RUSSELL SQUARE  
LONDON, W.C.1.

BETWEEN

“ TRUTH ” (N.Z.) LIMITED, a duly incorporated  
company having its registered office at Wellington *Appellant*

74112

AND

10 GLADYS VALENTINE HOWEY of Auckland,  
Gentlewoman . . . . . *Respondent.*

## Case for the Respondent.

RECORD.

1. This is an appeal from a Judgment of the Court of Appeal of New Zealand (Gresson, J., President, North, J., and Cleary, J.) dated the 15th March, 1962, allowing an appeal from the Judgment of McCarthy, J., dated the 22nd September, 1960, which latter Judgment dismissed the application of the Respondent (representing the holders of more than 15 per centum of the First Preference Shares hereinafter mentioned) for relief from the operation of Section 41 of the National Expenditure Adjustment Act, 1932. Leave to appeal to Her Majesty in Her Privy Council was granted to the Appellant “ Truth ” (N.Z.) Limited (hereinafter called “ the Company ”) by an Order of the said Court of Appeal dated the 5th June, 1962. pp. 20-23. pp. 15-19.

2. The Company was incorporated on the 14th March, 1928, under the Companies Act, 1908, with an authorised capital of £200,000 divided into 100,000 Ordinary Shares of £1 each and 100,000 Preference Shares of £1 each carrying a cumulative dividend of £7 per centum per annum. On the 10th May, 1932 (the date on which the said Act was passed and came into force), 75,000 of the said Ordinary Shares had been issued and were fully paid up and 50,000 of the said Preference Shares had been issued and were fully paid up. By the operation of the said Section 41 the rate of dividend payable on the said issued Preference Shares (hereinafter called “ the First Preference Shares ”) was reduced to £5 12s. 0d. per centum per annum. The full text of the said Section 41 as amended by Section 84 (1) (c) of the Mortgagors’ and Lessees’ Rehabilitation Act, 1936, is set out in the Judgment of McCarthy, J. p. 8.

pp. 16-17.

- pp. 7-10. 3. The changes in the authorised and issued capital of the Company from the 10th May, 1932, until the 17th June, 1960, are set out in the Affidavit of Joyce Sutherland sworn on behalf of the Company on the 1st September, 1960, and are summarised in the Reasons for the Judgment of McCarthy, J.
- p. 17.
- p. 24. 4. The said application by the Respondent was made under subsection (2) of the said Section 41 and claimed the restoration of the dividend on the First Preference Shares to £7 per centum per annum. The Court of Appeal of New Zealand by its said Judgment ordered that as from the 1st April, 1961, the said dividend be restored to £7 per centum per annum. 10
- pp. 11, 12. 5. Since the 10th May, 1932, the business of the Company has prospered and the position of the holders of Ordinary Shares of the Company has greatly improved relative to the position of the holders of the First Preference Shares. In the financial year of the Company which ended on the 30th September, 1932, the net profit of the Company (before tax) was £7,003.8.4 and the financial backing for the then issued Ordinary Shares of the Company (taking into account the sum of £56,132.2.6 included in the Balance Sheet of the Company in respect of goodwill) was approximately equal to the amount paid up thereon. In the financial year of the Company which ended on the 31st March, 1960, the net profit of the Company was £77,304 and the financial backing for the Ordinary Shares of the Company (which had been increased by the issue to the Ordinary Shareholders of the further Ordinary Shares referred to in the said Affidavit of Joyce Sutherland) was equal to £2.3.5 for each of the then issued Ordinary Shares of the Company without taking into account any figure for goodwill which had been written off in the accounts of the Company. In the years ending 31st March, 1958, the 31st March, 1959, and the 31st March, 1960, the Company paid dividends of 10 per centum, 10 per centum and 12 per centum respectively on the then issued Ordinary Shares of the Company. 20
- pp. 7-10.
- pp. 3-7. 6. At the time when the said Act was passed New Zealand (in common with most other countries of the world) was passing through one of the most severe economic depressions in history. On the other hand the years 1951 to 1959 inclusive were years of great prosperity and at the date of the said application economic conditions were very prosperous compared with the years 1932 to 1934. 30
- p. 9. 7. All the holders of First Preference Shares acquired their holdings of First Preference Shares after the 10th May, 1932, either by purchase or (in the case of one person holding 500 of the First Preference Shares) by testamentary gift.
- pp. 15-19. 8. In the Reasons for his said Judgment McCarthy, J., accepted (as was conceded by the Company) that the Company had prospered and was in a satisfactory condition and could well afford to comply with the terms on which the First Preference Shares were issued but said that as all the holders of First Preference Shares had acquired their respective holdings of First Preference Shares since the 10th May, 1932, they had not suffered from the operation of the said Act and were not entitled to relief under subsection (2) of the said Section 41. 40

9. The Reasons for the Judgment of the Court of Appeal of New Zealand were given by Gresson, J. He said that the said Act had a continuing operation and that the persons on whose behalf the application was made could properly be said to be applying for relief from the continuing operation of the said Act; the fact that persons had acquired shares affected by the said Act after the passing thereof could be taken into account as affecting "the conditions of the parties" within subsection (4) of the said Section 41 but that in this case McCarthy, J., had attached too much weight to this feature which "instead of being a feature which could be taken into consideration was elevated into the determining factor."

10. The Respondent respectfully submits that this appeal ought to be dismissed with costs for the following (among other)

### REASONS

- (1) BECAUSE having regard to the changes in the economic position of New Zealand since the said Act was passed and to the prosperity of the Company and other circumstances of the case it is just and equitable that the rate of dividend originally payable on the First Preference Shares be restored.
- 20 (2) BECAUSE the decision of the Court of Appeal of New Zealand was right.

L. H. HERD.

J. E. VINELOTT.

*Counsel for the Respondent.*

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“TRUTH” (N.Z.) LIMITED

*Appellant*

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Case for the Respondent.

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