

~~QE 1.5.4~~

11 1963

In the Privy Council

No. 22 of 1962

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

"TRUTH" (N.Z.) LIMITED, a duly incorporated company having its registered office at Wellington

Appellant

AND

GLADYS VALENTINE HOWEY, of Auckland, Gentlewoman

Respondent

RECORD OF PROCEEDINGS

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

INDEX OF REFERENCE

74113

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PART II

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In the Privy Council

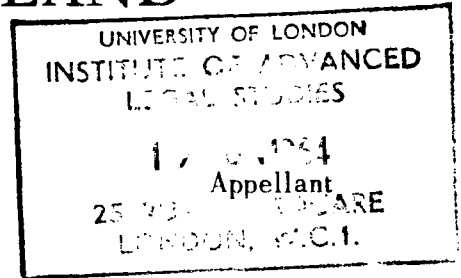
ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

"TRUTH" (N.Z.) LIMITED, a duly incorporated company having its registered office at Wellington

AND

GLADYS VALENTINE HOWEY, of Auckland, Gentlewoman



Respondent

RECORD OF PROCEEDINGS

No. 1

NOTICE OF MOTION FOR RELIEF

IN THE SUPREME COURT OF NEW ZEALAND WELLINGTON DISTRICT WELLINGTON REGISTRY

M. No. 47/60 In the Supreme Court of New Zealand No. 1 Notice of Motion for Relief 30th March, 1960

IN THE MATTER

of the National Expenditure Adjustment Act 1932

BETWEEN

GLADYS VALENTINE HOWEY, of Auckland, Gentlewoman

Plaintiff

AND

"TRUTH" (N.Z.) LIMITED, a duly incorporated company having its registered office at Wellington

Defendant

TAKE NOTICE that on Friday the 8th day of April 1960 at 10 o'clock in the forenoon or so soon thereafter as counsel can be heard, counsel for the above-named plaintiff will move this Honourable Court at Wellington FOR AN ORDER by way of relief against the operation of Section 41 of the National Expenditure Adjustment Act 1932 THAT as from the 31st day of March 1960 the rate of dividend payable on the Seven pounds (£7) per centum per annum (reduced by operation of the above Act to Five pounds twelve shillings (£5. 12. 0) per centum per annum) cumulative preference shares forming part of the share capital of the abovenamed defendant "Truth" (N.Z.) Limited be Seven pounds (£7) per centum

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In the
Supreme
Court of
New Zealand
No. 1
Notice of
Motion for
Relief
30th March,
1960

per annum instead of Five pounds twelve shillings (£5. 12. 0) per centum per annum the rate to which it was reduced by the said section AND FOR AN ORDER as to the costs of and incidental to this application AND FOR SUCH FURTHER OR OTHER ORDER as in the circumstances may appear just UPON THE GROUNDS that taking into consideration the economic position of New Zealand as well as the conditions of the parties it is just and equitable that an order should be made for relief from the operation of the said section AND UPON THE FURTHER GROUNDS appearing by the affidavit of Howard Neville Robieson filed herein and other affidavits to be filed herein.
DATED this 30th day of March 1960.

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H.N. ROBIESON

Solicitor for the abovenamed Plaintiff

TO: The Registrar of the Supreme Court at Wellington.

AND TO: The abovenamed defendant "Truth" (N.Z.) Limited.

THIS Notice of Motion is filed by HOWARD NEVILLE ROBIESON Solicitor for the abovenamed plaintiff, whose address for service is at the offices of Messieurs Robieson and Olphert, 142 Featherston Street, Wellington.

No. 2

AFFIDAVIT OF HOWARD NEVILLE ROBIESON

In the
Supreme
Court of
New Zealand
No. 2
Affidavit of
Howard
Neville
Robieson
30th March,
1960

I, HOWARD NEVILLE ROBIESON of Wellington, Solicitor, make oath and say as follows:-

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1. THAT I am a solicitor of the Supreme Court of New Zealand practising in Wellington.

2. THAT I am duly authorised and instructed by the abovenamed plaintiff to file a motion for relief against the operation of Section 41 of the above mentioned Act in respect of the cumulative preference shares of the defendant company.

3. THAT I have caused search to be made and have made enquiries from the defendant company and as a result of such search and enquiries I have ascertained that the defendant company issued capital of £50,000 in 50,000 one pound (£1) preference shares carrying a cumulative dividend of Seven pounds (£7) per centum per annum and that by operation of the said Section 41 the dividend thereon was reduced to Five pounds twelve shillings (£5. 12. 0) per centum per annum.

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4. THAT acting on instructions from the abovenamed plaintiff I have been in communication with certain of the holders of the said preference shares and have received from the holders of not less in the aggregate than fifteen per centum (15%) of the said cumulative preference shares written appointment of the abovenamed plaintiff to make application on their behalf for relief from the operation

of the said Section 41.

SWORN at Wellington this }
30th day of March 1960 }
before me:

H.N. ROBIESON

C.G TURNER

A Solicitor of the Supreme Court of New Zealand

No. 3

AFFIDAVIT OF ERNEST DAWSON WILKINSON

In the
Supreme
Court of
New Zealand
No. 2
Affidavit of
Howard
Neville
Robieson
30th March,
1960
(continued)

In the
Supreme
Court of
New Zealand
No. 3
Affidavit of
Ernest
Dawson
Wilkinson
24th August,
1960

10

I, ERNEST DAWSON WILKINSON of Auckland, Public Accountant, make oath and say as follows:-

1. I am a Public Accountant practising in the City of Auckland. I have been in practice as a Public Accountant for 38 years. I was a member of the Royal Commission appointed in the year 1955 to enquire into monetary banking and credit systems.

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2. ANNEXED hereto and marked "A" is a report dated the 25th day of July, 1960 prepared by me at the request of the solicitors for the abovenamed plaintiff and drawing a comparison between the economic condition of New Zealand at the time of the passing of The National Expenditure Adjustment Act, 1932 and the economic condition of New Zealand at the present time. The statistics set out in such report were obtained by me from the sources stated therein. In my opinion the views which I have expressed in my report are correct and are supported by such statistics.

SWORN at Auckland this }
24th day of August 1960 }
before me:

E.D. WILKINSON

BOWEN CLENDON

A Solicitor in the Supreme Court of New Zealand

In the
Supreme
Court of
New Zealand

No. 3
Affidavit of
Ernest
Dawson
Wilkinson
24th August,
1960
(continued)
Exhibit A
Report of
Ernest
Dawson
Wilkinson
25th July 1960

EXHIBIT A
REPORT OF ERNEST DAWSON WILKINSON

WILKINSON, CHRISTMAS, STEEN & CO.
Public Accountants
Auckland

25th July, 1960.

Messrs. Robieson & Olphert,
Barristers and Solicitors,
P.O. Box 208,
WELLINGTON C.1.

Dear Sirs,

You have asked me to draw a comparison between the economic conditions prevailing in New Zealand at the time of the passing of the National Expenditure Adjustment Act 1932, and those of recent years - say 1955 to 1959 inclusive.

During the years 1931 to 1934 inclusive, New Zealand, in common with most other countries of the world, passed through one of the most severe economic depressions in history. The full impact of this depression, in so far as the New Zealand economy is concerned, was felt in or about the year 1933. It was the very circumstances mentioned above which gave rise to the passing of the National Expenditure Adjustment Act of 1932.

On the other hand, the years 1951 to 1959 inclusive, were probably the most prosperous years in New Zealand's history. It is true that during the latter part of 1957 there was a mild recession in the economic circumstances of this country, brought about by a fall in export income due to a sharp drop in the overseas prices for butter and to a lesser extent, for wool and meat. Since then however, prices in nearly all of the categories have shown quite a marked recovery and, although the outlook in respect to prices for butter during 1960/61 season is less promising than it was four or five years ago, there would appear to be every reason to hope that overseas prices for this commodity will, during the year referred to, be better than those experienced for the 1957/58 dairy season.

It is fair to say that the economic conditions of the present time are very prosperous compared with those of the years 1932 to 1934 inclusive. The prosperity of recent years has been accompanied by a marked degree of inflation of prices but even after taking this fact into account it is acknowledged by most economists that the purchasing power of the average income of today is greatly in excess of that of the years 1932 to 1934.

A mere expression of opinion such as I have made herein, unsupported by evidence, would be of little real value. Accordingly, I set out hereunder a

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number of series of statistics relating to significant sections of the economy, which I believe fully support the opinions which I have expressed herein. These statistics are shown in respect to the period 1932 to 1934 inclusive, and also for the years 1956 to 1959 inclusive, where available.

They deal with the following matters:

	Population
	Unemployment
	Factory Production
10	Gross Farming Income
	Gross National Income
	Comparison of Prices and Wage Rates by Index Numbers.

In the
Supreme
Court of
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No. 3
Affidavit of
Ernest
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24th August,
1960
(continued)
Exhibit A
Report of
Ernest
Dawson
Wilkinson
25th July 1960
(continued)

In each case a line is drawn between the statistics for the periods in respect to which the comparisons are made. These statistics are all taken from the New Zealand Official Year Book and the Monthly Abstract of Statistics.

They are as follows:

Population:

	Year ending December	
	1932	1,525,545
20	1933	1,538,028
	1934	1,550,125
	<hr/>	
	1956	2,209,132
	1957	2,262,814
	1958	2,315,900
	1959	2,359,746

Unemployment:

	Year ending December 31	Registered Unemployed Males only
	1932	69,281
30	1933	70,273
	1934	56,838
	<hr/>	
	1956	240
	1957	368
	1958	733
	1959	1,096

I should point out that the registered unemployed during the years 1932 to 1934 inclusive, include persons working full time in industry but with assistance from the Unemployment Promotion Fund. It is, I think, however, clear that in

In the
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No. 3
Affidavit of
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24th August,
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(continued)
Exhibit A
Report of
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Dawson
Wilkinson
25th July 1960
(continued)

almost all cases these persons included in the above category would not have been employed without assistance from the Fund. They represent in each of the years above mentioned approximately one-third of the total number of registered unemployed.

Factory Production:

Year	Value of Production	Added Value in Production	No. of Persons Engaged	Salaries and Wages Paid
	£000	£000		£000
1931/32	60,751	21,884	62,335	11,119
1932/33	60,159	21,214	62,583	10,674
1933/34	65,908	22,395	65,961	10,729
1955/56	586,047	201,169	158,148	107,871
1956/57	601,900	207,006	156,651	110,868
1957/58	645,109	227,191	162,985	119,989
1958/59	654,205	240,807	168,772	128,318

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Gross Farming Income:

Year	£M
1931/2	38.5
1932/3	38.1
1933/4	48.2
1955/56	277.7
1956/57	307.3
1957/58	297.0
* 1958/59	283.7
* Provisional	

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Gross National Income:

Year	£M
1938/39	232
1950/51	697
1956/57	1029
1957/8	1084
* 1958/59	1137
* Provisional	

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Statistics in respect to National Income Accounts are of comparatively recent origin, the first year in respect to which they became available was the year ended 31st March 1939. I show these statistics however, as they are an indicator of the rapid rise in the prosperity of the country which has occurred since the

end of the second World War. There is, I think, no doubt whatever that if National Income statistics were available for the years of the depression they would be far below those of the year 1939.

Comparison of Prices and Wage Rates by
Index Numbers (Base - 1955 - 1000):

Year Ending December 31	Retail Prices	Wholesale Prices	Effective Weekly Wage Rate - Adult Males	Nominal Weekly Wage Rates - Adult Males
1932	443	344	765	339
1933	420	354	779	327
1934	427	356	773	330
1955	1000	1000	1000	1000
1956	1035	1038	1019	985
1957	1057	1050	1067	1009
1958	1104	1080	1078	976
1959	1146	1092	1098	958

NOTE:

Effective weekly wage rate is obtained in each case by dividing the nominal (or money) wage rate index number by the corresponding retail price index number - the two series having first been brought to a common base - and multiplying by 1000.

The comparisons of the various statistical series which I have made herein, all of which relate to significant sections of the economy, fully support the opinion which I have expressed, that whereas economic conditions during the years 1932 to 1934 inclusive, were very depressed, those of the present time are, by comparison, very buoyant.

Yours faithfully,

E.D. Wilkinson

No. 4

AFFIDAVIT OF MURIEL JOYCE SUTHERLAND

I, MURIEL JOYCE SUTHERLAND of Wellington, Company Secretary make oath and say as follows:-

1. I am the Secretary of "Truth" (N.Z.) Limited the abovenamed Defendant.

In the
Supreme
Court of
New Zealand
No. 3
Affidavit of
Ernest
Dawson
Wilkinson
24th August,
1960
(continued)
Exhibit A
Report of
Ernest
Dawson
Wilkinson
25th July 1960
(continued)

In the
Supreme
Court of
New Zealand
No. 4
Affidavit of
Muriel Joyce
Sutherland
1st September
1960

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In the
Supreme
Court of
New Zealand
No. 4

Affidavit of
Muriel Joyce
Sutherland
1st September
1960
(continued)

The facts deposed to by me in this affidavit have been ascertained by me from the records of the company in my custody.

2. THE company was incorporated under the provisions of the Companies Act 1908 on the 14th day of March 1928. The nominal capital at that date was £200,000 divided into 100,000 ordinary shares of £1 each and 100,000 7% cumulative preference shares of £1 each.

3. ON the 9th day of December 1953 the nominal capital of the company was increased to £210,000 by the creation of 10,000 additional ordinary shares of £1 each.

4. ON the 9th day of December 1955 the nominal capital of the company was increased to £260,000 by the creation of an additional 50,000 ordinary shares of £1 each. On the same date the existing 100,000 preference shares were subdivided into two classes of which 74,000 remain on the original basis and 26,000 were converted to 5% (participating to 6%) cumulative preference shares. The reason for this subdivision is set forth in paragraph 10 of this affidavit. 10

5. ON the 17th day of June 1960 the nominal capital of the company was increased to £300,000 by the creation of 40,000 additional ordinary shares of £1 each.

6. ON 1st April 1932 the paid up capital of the company consisted of 75,007 fully paid up ordinary shares and 50,000 fully paid up 7% cumulative preference shares. The subsequent alterations to the paid up capital of the company were as under: 20

- (a) On 30th September 1951 18,256 ordinary shares were issued to ordinary shareholders at par.
- (b) On the 14th day of October 1953 an additional 10,000 ordinary shares were issued to existing ordinary shareholders at par.
- (c) On the 9th day of December 1955 an additional 23,477 ordinary shares were issued to existing ordinary shareholders at a premium of 5/- per share.
- (d) On the last mentioned date 11,756 5% (participating to 6%) cumulative preference shares were issued at par.
- (e) On the 17th day of June 1960 63,370 B ordinary shares were issued as a bonus issue in the ratio of 1 B ordinary share for every two ordinary shares held by ordinary shareholders on the 17th day of June 1960.

(f) The present paid up capital of the company is:-

Ordinary shares	£ 190,110
Cumulative preference shares	50,000
Participating preference shares	11,756

Total	<u>£ 251,866</u>
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7. ON the 1st day of April 1932 the whole of the issued ordinary shares in the company were held by "Truth" & "Sportsman" Limited, a company incorporated in Australia and the issued preference shares were held by the undermentioned persons:

	Ezra Norton of Sydney, Newspaper Proprietor	1,971	
	Joan Shashoua of Sydney, Married Woman	29,359	
	Ada Norton-Culhane of Sydney, Married Woman	4,670	
	Eliza Young of Wellington, Spinster	5,000	
	William Herbert Brown, Margaret Street, Sydney	3,000	
10	Julian Cecil Rogalsky of Sydney	500	
	Stephen John Simpson of Centennial Park, Sydney	3,000	
	Joseph Bolt of Ranwick Sydney	500	
	Edith Raymond of Box 2522 G.P.O. Sydney	500	
	Michael Treimuth c/o W.A. Windeyer Fall & Co. Sydney	500	
	Blanche May Mann of 75 Lang Road, Centennial Park, Sydney	500	
	Ernest Westrup of 76 Prospect Road, Sydney	500	
		50,000	

8. NONE of the persons referred to in paragraph 7 of the affidavit are now shareholders in the company. The shares held by Joan Shashoua passed by Transmission to Ezra Norton, Edwin Archie Jacobs and Russell Stuart Hicks in the year 1945. The shares held by Michael Treimuth were transferred by way of gift on the 29th day of April 1959. The remaining shareholders listed in paragraph 7 hereof transferred their shares by way of sale on various dates between the 29th day of October 1935 and the 4th day of October 1954. The shares of Joan Shashoua which passed by Transmission to Ezra Norton and others were sold by the transferees on or before the 27th day of February 1951.

9. THE abovenamed Plaintiff Gladys Valentine Howey acquired 300 cumulative preference shares in the capital of the company in the year 1951 and the transfer of the said shares to her was registered on the 16th day of July 1951. The said Plaintiff subsequently applied for an allotment of 75 5% (Participating to 6%) Preference shares and such shares were issued to her on the 23rd day of November 1955.

10. IN the year 1955 when it was proposed to allot further Preference Shares, the Capital Issues Committee refused to consent to the issue of further 5.6% cumulative Preference Shares, and required the terms of issue of further Preference Shares to be altered to provide for a dividend of 5% (Participating to 6%). It was for this reason that the Participating Preference Shares were created.

11. ANNEXED hereto and marked "A" is a statement showing to the nearest pound for each year since 1932, the total shareholders' funds of the company, the total shareholders' funds less Preference capital, the net profits earned before and after tax, Preference and Ordinary dividends paid and the balance carried forward in the Profit and Loss Appropriation Account.

In the
Supreme
Court of
New Zealand
No. 4
Affidavit of
Muriel Joyce
Sutherland
1st September
1960
(continued)

12. ANNEXED hereto and marked "B" is a true copy of the accounts of the company as at 30th September 1932.

13. ANNEXED hereto and marked "C" is a true copy of the accounts of the company as at 31st March 1960.

SWORN at Wellington this
1st day of September 1960
before me:-

}

M.J. SUTHERLAND

R.A. ROUSE

A Solicitor of the Supreme Court of New Zealand

EXHIBIT A

STATEMENT FOR THE YEARS 1932 TO 1960

YEAR ENDED:-	Total Shareholders Funds	Shareholders Funds Less Preference Capital	Net Profit Before Tax	Net Profit After Tax	Preference Dividends Paid	Ordinary Dividends Paid	Balance in P. & L. Account Carried Forward
30 September 1932	137240	87240	7003	5180	3500	Nil	3782
30 September 1933	134916	84916	3618	2548	2800	Nil	3498
30 September 1934	143790	93790	14620	10375	2800	4500	10697
30 September 1935	134113	84113	13202	9658	2800	4500	5483
30 September 1936	146096	96096	14266	7666	2800	2250	7709
30 September 1937	150411	100411	12699	7661	2800	Nil	12193
30 September 1938	144486	94486	2771	1925	2800	Nil	10941
30 September 1939	143735	93735	3197	371	-	Nil	10934
30 September 1940	144340	94340	1731	319	-	Nil	10876
30 September 1941	143590	93590	4355	652	-	Nil	9422
30 September 1942	152659	102659	9840	5980	2800	Nil	12602
30 September 1943	157799	107799	12202	2691	-	Nil	15293
30 September 1944	158508	108508	10556	2841	2800	Nil	15334
30 September 1945	156844	106844	10844	3128	4200	Nil	14262
30 September 1946	144345	94345	9568	4376	2800	Nil	15838
30 September 1947	139349	89349	13224	5717	2800	Nil	10842
30 September 1948	141717	91717	12214	5168	2800	Nil	13201
30 September 1949	147433	97433	17977	6957	2800	Nil	17268
30 September 1950	150756	100756	17253	6557	2800	Nil	20823
31 March 1951	151874	101874	9016	3572	11200	Nil	10867
31 March 1952	180894	130894	46467	17063	2800	Nil	10031
31 March 1953	189824	139824	36049	11729	2800	Nil	18961
31 March 1954	213488	163488	36356	16464	2800	Nil	14625
31 March 1955	236921	186921	58812	29314	2800	5163	18058
31 March 1956	275827	209071	51887	14302	2984 (x)	10822	15862
31 March 1957	284003	217247	45557	21803	3505 (x)	12674	24043
31 March 1958	298869	232113	70720	31065	3505 (x)	12674	38904
31 March 1959	322488	255732	78603	39174	3505 (x)	12674	62523
31 March 1960	336839	270083	77304	31381	3505 (x)	15209	75373
					<u>£ 83,504</u>	<u>£ 80,465</u>	

R.A.R.

(x) includes £ 2800 paid on 5.6% Cumulative Preference Shares

In the
Supreme
Court of
New Zealand
No. 4
Affidavit of
Muriel Joyce
Sutherland
1st September
1960
(continued)
10 Exhibit A
Statement for
the years
1932 to 1960

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EXHIBIT B
 COPY OF ACCOUNTS OF DEFENDANT COMPANY
 AS AT 30TH SEPTEMBER 1932
"TRUTH" (N. Z.) LIMITED
 BALANCE SHEET AS AT 30th SEPTEMBER, 1932

In the
 Supreme
 Court of
 New Zealand
 No. 4
 Affidavit of
 Muriel Joyce
 Sutherland
 1st September
 1960
 (continued)
 Exhibit B
 Copy of
 Accounts of
 Defendant
 10 Company as
 at 30th
 September
 1932

LIABILITIES		ASSETS	
	£ s d	£ s d	£ s d
10	Authorised Capital -		
	100,000 7% Cumulative Preference Shares		
	of £1 each	100,000 0 0	
	Less Unallotted, 50,000 Shares	50,000 0 0	
		50,000 0 0	
	100,000 Ordinary Shares of £1 each	100,000 0 0	
	Less Unallotted, 25,000 Shares	25,000 0 0	
		75,000 0 0	
	Sundry Creditors	2,698 0 10	
	Reserves:		
	Income Tax	3,622 12 3	
	Bad Debts	500 0 0	
20	Contingencies	1,544 10 0	
	Equalisation of Dividends	1,000 0 0	
		6,667 2 3	
	Profit and Loss Appropriation Account	5,473 12 4	
		£139,838 15 5	£139,838 15 5

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PROFIT AND LOSS APPROPRIATION ACCOUNT AS AT 30th SEPTEMBER, 1932.

1932 - Sept. 30	£ s d	1931 - October 1	£ s d
To Interim Dividends paid on		By Balance brought forward	3,018 12 5
7% Cumulative Preference Shares	2,625 0 0		
Reserve for Taxation	1,923 8 5	1932 - September 30	
" Balance	5,473 12 4	By Profit for twelve months ended 30/9/1932	7,003 8 4
	£ 10,022 0 9		£ 10,022 0 9

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We have audited the books and vouchers of "TRUTH" (N.Z.) LIMITED for the year ended 30th September, 1932, and certify that all our requirements as Auditors have been complied with. In our opinion, the above Balance Sheet is so drawn up as to disclose a true and correct view of the affairs of the Company at 30th September, 1932, as disclosed by the books.

Wellington, 8th November, 1932.

(Sgd) G.O. SUTTON & RUSSELL,
 Auditors.

EXHIBIT C
COPY OF ACCOUNTS OF DEFENDANT COMPANY
AS AT 31ST MARCH 1960
"TRUTH" (N. Z.) LIMITED

BALANCE SHEET AS AT 31st MARCH, 1960

	£	1960 £	£	1959 £	1958 £		£	1960 £	£	1959 £	1958 £
CURRENT LIABILITIES -						CURRENT ASSETS -					
10 National Bank of N.Z. Ltd. (Secured)				60,355	17,862	Cash at Bank	64,073		247	190	
Sundry Creditors and Accrued Charges	84,876			53,799	65,570	Sundry Debtors	96,745				
Staff Superannuation	59			1,239	992	Less Provision for Doubtful Debts	1,500				
Provision for Company Taxation (1959-60 Year)	45,923			39,429	39,655	Stocks	85,239		80,459	80,285	
Provision for Dividend	15,620			14,485	14,485	Payments in Advance	30		145	77	
Total Current Liabilities			146,478	169,307	138,564	Total Current Assets		244,587	256,008	205,458	
DEFERRED LIABILITIES -						INVESTMENTS AND ADVANCES -					
20 Mortgages on Properties	112,439			117,029	91,040	Mortgages on Property	10,500		11,500	12,000	
Total Deferred Liabilities			112,439	117,029	91,040	Advances to Staff	69		644	867	
SHAREHOLDERS' FUNDS -						Short Call Deposit	20,000				
Capital:						Total Investments and Advances		30,569	12,144	12,867	
74,000 5.6% Cumulative Pref. Shares of £1 each	74,000			50,000	50,000	FIXED ASSETS -					
Less Unallotted Shares	24,000					Land and Buildings (at Book Value 31/3/56) Plus Additions at Cost)	234,162				
30 26,000 5% Cumulative Participating Pref. Shares of £1 each	26,000			11,756	11,756	Less Depreciation	30,548	203,614	208,829	178,397	
Less Unallotted	14,244					Plant and Machinery (at Book Value 31/3/56, Plus Additions at Cost)	171,239				
160,000 Ordinary Shares of £1 each	160,000			126,740	126,740	Less Depreciation	69,903	101,336	111,583	117,279	
Less Unallotted	33,260					Fixtures and Fittings (at Book Value 31/3/56, Plus Additions at Cost)	18,573				
260,000 Paid Up Capital	188,496			188,496	188,496	Less Depreciation	8,651	9,922	13,463	6,769	
RESERVES						Motor Vehicles (at Cost)	10,252				
Capital Reserves:						Less Depreciation	4,524	5,728	6,797	7,703	
Premium on Shares	5,869			5,869	5,869	Total Fixed Assets		320,600	£340,672	£340,148	
Capital Profits	1,501										
Revenue Reserves:											
General Purpose	60,000			60,000	60,000						
Dividend Equalisation Reserve	5,600			5,600	5,600						
Unappropriated Profits	75,373										
50 Total Shareholders' Funds			336,839	322,488	298,869						
			£595,756	£608,824	£528,473						

J.H. DUNN }
PERCY COYLE } Directors

£595,756 £608,824 £528,473

In the
Supreme
Court of
New Zealand
No. 4
Affidavit of
Muriel Joyce
Sutherland
1st September
1960
(continued)
Exhibit C
Copy of
Accounts of
Defendant
Company as
at 31st
March 1960

PROFIT AND LOSS ACCOUNT FOR YEAR ENDED 31st MARCH, 1960

	£	1960 £	£	1959 £	1958 £
Gross Revenue, less Expenses, before charging the following expenses and crediting					
Investment income as set out below			111,462	118,711	109,877
Less Depreciation of Fixed Assets		25,590		31,487	32,749
Interest on Mortgages		5,723		5,948	4,454
Directors' Fees		1,600		1,600	1,000
Managerial Payment - Chairman of Directors		1,000		1,000	1,000
Auditors' Fees		750		750	700
			<u>34,663</u>	<u>40,785</u>	<u>39,903</u>
Add Interest from Investments and Advances			76,799	77,926	69,974
			505	677	746
Nett Profit - Before Provision for Taxation			77,304	78,603	70,720
Less Provision for Taxation			45,923	39,429	39,655
TAX PAID PROFIT FOR YEAR			31,381	39,174	31,065
Add Unappropriated Profits from Previous Years			62,706	39,528	24,018
AVAILABLE FOR DISTRIBUTION			94,087	78,702	55,083
DIVIDENDS FOR YEAR -					
5.6% Preference Shares for Half Year ended 30/9/1959			1,400		
5.6% Preference Shares for Half Year ended 31/3/1960			1,400		
Interim Dividend paid on Participating Preference Shares			294		
PROVISION AS PER BALANCE SHEET:					
Participating Preference Shares bringing total for year to 6%	411				
Ordinary Shares, 12%	15,209				
		<u>15,620</u>	<u>18,714</u>	<u>16,179</u>	<u>16,179</u>
UNAPPROPRIATED PROFITS CARRIED FORWARD			<u>£ 75,373</u>	<u>£ 62,523</u>	<u>£ 38,904</u>

In the
Supreme
Court of
New Zealand
No. 4
Affidavit of
Muriel Joyce
Sutherland
1st September
1960
(continued)
10 Exhibit C
Copy of
Accounts of
Defendant
Company as
at 31st March
1960
(continued)

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Comparative Figures Over the Past Four Years

	1960 £	1959 £	1958 £	1957 £
Gross Revenue	746,699	632,906	750,589	480,373
Expenses	669,395	554,303	679,869	434,816
Profit before providing for Taxation	77,304	78,603	70,720	45,557
Taxation	45,923	39,429	39,031	23,778
Tax Paid Profit	31,381	39,174	31,689	21,779
Dividends Paid	18,714	16,179	16,179	16,179
Profit Retained in Business	12,667	22,995	15,510	5,600
% Earnings to Ordinary Share Capital	21.98%	28.14%	22.23%	14.43%
Nett Tangible Assets per Share -				
Preference (both Classes)	£5/9/1	£5/4/5	£4/16/9	£4/12/-
Ordinary	£2/3/5	£2/1/1	£1/17/7	£1/15/-

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AUDITORS' REPORT TO MEMBERS OF TRUTH (N Z) LTD

We have obtained all the information and explanations that we have required. In our opinion proper books of account have been kept by the Company 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 Sheet, and the Profit and Loss Account are properly drawn up so as to give respectively a true and fair view of the state of the Company's affairs as at 31st March, 1960 and of the results of the business for the year ended on that date.

In the
Supreme
Court of
New Zealand

No. 4
Affidavit of
Muriel Joyce
Sutherland
1st September
1960

(continued)
Exhibit C
Copy of

Accounts of
Defendant
Company as
at 31st March
1960
(continued)

10

According to such information and explanations, the Accounts, the Balance Sheet and the Profit and Loss Account give the information required by the Companies Act, 1955, in the manner so required.

Wellington, N.Z.
25th May, 1960.

WATKINS, HULL, WHEELER & JOHNSTON,
Public Accountants,
Auditors.

No. 5.

REASONS FOR JUDGMENT OF McCARTHY J.

Hearing September 12, 1960

Counsel - Herd for Plaintiff
Dunn for Defendant

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Judgment September 22, 1960

In the
Supreme
Court of
New Zealand

No. 5
Reasons for
Judgment of
McCarthy J.
22nd September
1960

Motion for order under S.41 of the National Expenditure Adjustment Act, 1932.

The plaintiff brings, on behalf of herself and upwards of 15% of the holders of a certain class of cumulative preference shares in the capital of "Truth" (N.Z.) Limited, a motion for relief from the future operation of S.41 of the National Expenditure Adjustment Act 1932 which has had the effect of reducing the dividend rate of 7%, attached to the shares at the time of issue, to 5.6%.

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The company was incorporated in 1928 with a nominal capital of £200,000, divided into 100,000 ordinary shares of £1 each and 100,000 7% cumulative preference shares of £1 each. As at the date of coming into operation of the National Expenditure Adjustment Act 1932, namely 10 May 1932, the paid up capital of the company consisted of 75,007 fully paid ordinary shares and 50,000 fully paid 7% cumulative preference shares. Since that date, there have been various alterations in the capital structure and the present nominal capital of the company stands at £300,000 and consists of 74,000 cumulative preference shares of £1 each, 26,000 5% cumulative participating preference shares of £1 each and 200,000 ordinary shares of £1 each. The present issued capital amounts to £251,866,

In the
Supreme
Court of
New Zealand

No. 5
Reasons for
Judgment of
McCarthy J.
22nd September
1960
(continued)

being made up of 50,000 cumulative preference shares of £1 each (the class concerned in the instant application), 11,756 5% (participating to 6%) cumulative preference shares of £1 each, and 190,110 ordinary shares of £1 each.

The National Expenditure Adjustment Act 1932 was passed as one of the emergency measures taken to meet the economic depression of the early 1930s. As originally enacted it was to have a limited duration. It effected compulsory reductions in salaries, pensions, interest, rent and certain other fixed charges including dividends on cumulative preference share capital. Section 41 applied to cumulative preference shares, and provided for a reduction of 20% in the rate of dividend payable by any company in respect of any such shares with a proviso that the section should not operate to reduce the rate of dividend below 5% per annum. This reduction was to operate for a period of three consecutive financial years, the first being the financial year which commenced in the year 1932; but the operation of the Act was subsequently extended by amending legislation until finally in 1936 the temporary nature of the Act was removed and it was made of permanent effect.

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Section 41 as it now stands reads:

“41. Provision for the reduction of dividends on cumulative preference shares -

(1) The rate of dividend payable by any company registered under the Companies Act 1955 on any cumulative preference shares heretofore issued by it is hereby reduced by 20 per cent thereof from the commencement of the financial year of the company that commences in the calendar year nineteen hundred and thirty-two:

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Provided that this subsection shall not operate to reduce the rate of the dividend on any cumulative preference share below the rate of five per cent per annum of the nominal value of such share.

(2) The holders of not less in the aggregate than fifteen per cent of the cumulative preference shares heretofore issued by any company as aforesaid, or, where there are two or more classes of such shares, the holders of not less in the aggregate than fifteen per cent of the issued shares of any such class, may apply to the Supreme Court for relief from the operation of this section.

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(3) An application under the last preceding subsection may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

(4) On any such application, the Court, after hearing the applicant, the company, and any other persons who apply to the Court to be heard and who appear to the Court to be interested in the application,

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may make such order as in the circumstances it thinks just and equitable, taking into consideration the economic position of New Zealand as well as the conditions of the parties.

(5) Any order made by the Court granting relief from the operation of this section shall apply to all the shares of the class represented by the applicant."

As far as I am aware this section has not hitherto been the subject of a considered judicial judgment.

In the
Supreme
Court of
New Zealand

No. 5
Reasons for
Judgment of
McCarthy J.
22nd September
1960
(continued)

10 As I have indicated, the plaintiff seeks on behalf of herself and not less than 15% of the holders of the preference shares in question an order granting relief under subs. (2). The affidavit supporting the application does not, to my mind, adequately meet the technical requirements of proof of her right, under subs. (3), to appear for those whom she seeks to represent; but she claims to hold the necessary written authorities, and Mr Dunn having been supplied with all the information in that respect which he requires, concedes her right to represent a substantial proportion of the shareholders of the particular class, certainly more than 15%.

20 In 1932 the company, along with so many others, was feeling the effect of the economic state of the country, and, whilst it appears that the cumulative preference shares were adequately covered by asset backing and the ability of the company to earn profits, the position of the ordinary shareholders was not as satisfactory as might have been desired, for the balance sheet included a substantial figure for goodwill, an asset which in those years might have had little value. But in the intervening period the company has prospered, and is now in a satisfactory and, indeed, handsome financial position. The financial backing of its ordinary shares has risen to £2.3.5 on figures which could be suspected to be conservative, and its earnings on ordinary share capital has, over the last three years, exceeded 20%. It declared, for the year ending 31 March 1960, a dividend of 12% on ordinary shares and 6% on the participating preference shares.

30 The cumulative preference shares with which this application is concerned were issued as 7% cumulative preference shares. As I have said, the effect of the National Expenditure Adjustment Act 1932 was to reduce the dividend rate to 5.6%. The plaintiff now claims that the shares should be relieved of the burden of this Act and the original dividend rate for which the company covenanted restored. There is no doubt that the company is in a position to comply with the obligation which it assumed when it sought this preference capital, and there might appear, at first sight at least, good equitable reasons for ordering some relief, if not total relief, from the provisions of S.41. However, Mr. Dunn contends to the contrary and I must now consider his submission.

40 In 1932 the preference shares in question were held by a number of different shareholders, details of which shareholding are set out in the affidavits. I do not need to describe them. In the intervening years, the shareholding has been

In the
Supreme
Court of
New Zealand
No. 5
Reasons for
Judgment of
McCarthy J.
22nd September
1960
(continued)

wholly changed. None of the 1932 shareholders remains on the register. The present shareholders, with the exception of one case, have all acquired their shares by purchase. The Court, in the absence of evidence to the contrary can only assume that these purchases followed the usual pattern and were effected at prices which took into account the asset backing to the shares and the rate of dividend actually being paid. When, as appears always to have been the case in these shares, the asset backing to a cumulative preference share is satisfactory and the company is operating on a reasonable profit basis, the price is substantially, if not wholly, controlled by the rate of dividend paid. I would think, therefore, that the dividend of 5.6% being paid on these shares would have been the predominant factor controlling the price at which they were traded from time to time. In the one case where the shares were not acquired by purchase, they were acquired by testamentary gift. The amount involved is only 500 shares. The fact that none of the existing shareholders were on the register at the time when the Act came into force leads Mr Dunn to submit that there is no room for an order granting relief from the operation of the section because none of these particular shareholders now applying sustained any reduction from which relief might be sought. When they acquired their shares, the reduction had already been effected and their purchases were made at a price that took into account the reduced rate of dividend. It is not for them, submits Mr Dunn, to seek relief from an Act from the operation of which they have not suffered. The Act did not "operate" against their interests and therefore there is nothing in respect of which relief can be granted.

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There is no evidence before me as to the terms upon which the various sales and purchases were effected. As I have said, I can only assume in the absence of evidence to the contrary, that the sale prices were controlled by the factors to which I have already referred and that, in fact, the present shareholders did not suffer from the operation of the Act. It may be that some distinction can be drawn in the case of the party who acquired his shareholding by testamentary gift, but the number of shares involved there is very small and would not, in any event, justify an order which having regard to subs. (5) would affect all the shareholders.

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The power to grant relief, though in terms discretionary in that the Court may make such order as in the circumstances it thinks just and equitable, is restricted in the matters which it may take into consideration to (1) the economic position of New Zealand and (2) the conditions of the parties. I have before me affidavit evidence directed to the substantial economic improvement in this country between 1932 and the present time and the overall satisfactory position which rules today. No attempt, however, has been made to establish hardship or other special circumstances on the part of the shareholders concerned in the application nor have I any information pointing to special matters affecting the acquisition of the shares by any particular party, assuming for the moment that those matters are material. The case is put solely on the proposition that bearing in mind the present economic position of New Zealand and the current financial position of the company, it is just and equitable that an order should be made compelling the

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company to resume in full the obligation which it covenanted to meet when the preference shares were subscribed. As I have said, I have no doubt that the company is able to meet its original obligation, and if the shareholders now applying had suffered as a result of the reductions effected by the Legislation, then their position would be very strong. But the point raised by Mr Dunn seems to me to be fatal to the application as it now stands. It would not, I think, be equitable and just, merely because the company is reaping a benefit to which it might not in these days have strong moral claims, to grant some increase to persons who, as far as the evidence before me goes, have not suffered from the impact of the Act.

In the
Supreme
Court of
New Zealand
No. 5
Reasons for
Judgment of
McCarthy J.
22nd September
1960
(continued)

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At one stage there was, I thought, a matter which might have justified some relief. I was told at the Bar that the Capital Issues Committee has fixed 5¼% as being the maximum permissible rate for cumulative preference shares, and it could be that the fact that the shares here in question carry a rate below that now permitted by the Committee, will have some effect upon their price in the share market and that that calls for some adjustment which would at least keep them at par. However, upon further consideration I have decided there is, again, insufficient evidence before me to warrant my taking any such action.

The motion is dismissed. As Mr Dunn does not seek an order for costs, none will be made.

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Solicitors for the Plaintiff: Robieson and Olphert,
Wellington.

Solicitors for the Defendant: Alexander, J.H. and Julia Dunn,
Wellington.

No. 6

FORMAL ORDER OF THE SUPREME COURT

THURSDAY THE 22ND DAY OF SEPTEMBER 1960

BEFORE THE HONOURABLE MR. JUSTICE McCARTHY

UPON reading the notice of motion of the plaintiff dated the 30th day of March, 1960, and the affidavits of Howard Neville Robieson, Ernest Dawson Wilkinson and Muriel Joyce Sutherland filed herein, and upon hearing Mr. Herd of Counsel on behalf of the plaintiff and Mr. Dunn of Counsel on behalf of the defendant, the Court hereby orders that the said notice of motion of the plaintiff be dismissed.

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By the Court

E.A. Gould
Deputy Registrar

L. S.

In the
Supreme
Court of
New Zealand
No. 6
Formal Order
of the Supreme
Court
22nd September
1960

In the Court
of Appeal of
New Zealand
No. 7
Notice of
Motion on
Appeal
20th December
1960

No. 7

NOTICE OF MOTION ON APPEAL TO
COURT OF APPEAL
IN THE COURT OF APPEAL OF NEW ZEALAND

No. C.A. 63/60
M. 47/60

BETWEEN

GLADYS VALENTINE HOWEY, of Auckland, Gentlewoman Appellant
AND

"TRUTH" (N.Z.) LIMITED, a duly incorporated company Respondent
having its registered office at Wellington

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TAKE NOTICE that this Honourable Court will be moved on Monday the 6th day of February 1961 at 10 o'clock in the forenoon or so soon thereafter as Counsel can be heard ON APPEAL from the judgment of the Supreme Court of New Zealand delivered by the Honourable Mr Justice McCarthy at Wellington, which judgment bears date the 22nd day of September, 1960, wherein it was ordered that the appellants motion for relief under the National Expenditure Adjustment Act, 1932 be dismissed UPON THE GROUNDS that the said judgment is erroneous in fact and law.

DATED at Wellington this 20th day of December, 1960.

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H.N. ROBIESON

Solicitor for the Appellant

To: The Registrar of the Court of Appeal of New Zealand, Wellington.
and To: The Registrar, Supreme Court, Wellington.
and To: The abovenamed Respondent.

In the Court
of Appeal of
New Zealand
No. 8
Reasons for
Judgment of
Court of
Appeal
(delivered by
Gresson P.)
15th March 1962

No. 8

REASONS FOR JUDGMENT OF COURT OF APPEAL

Delivered by Gresson P.

This appeal is from the judgment of McCarthy J. who dismissed an application made under s.41 of the National Expenditure Adjustment Act 1932 in which the appellant sought an Order that as from the 31st March 1960 the rate of dividend on the cumulative preference shares forming part of the share capital of the respondent company which was fixed at £7 per centum per annum but which had been reduced by the operation of the statute to £5.12.0d per centum per annum

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should be restored to the rate of £7 per centum per annum. The statutory reduction when first introduced was limited to a period of three years; it was subsequently extended to five years, and in 1936, by virtue of the Mortgagors' and Lessees' Rehabilitation Act 1936, s.84(1)(c), made permanent, with however the provision contained in s.41 permitting an application to the Court for relief from the statutory reduction.

Particulars as to the incorporation of the company, the issue of its capital, and subsequent alterations in the capital structure are set out in the judgment appealed from, and it is sufficient to say that the application was brought on behalf of upwards of fifteen per cent of the holders of a particular class of cumulative preference shares. But it is a relevant consideration that the present holders of these cumulative preference shares were none of them shareholders in 1932 when the statutory reduction was imposed. The present applicants, with one exception, acquired their shares subsequently by purchase. It was the view of McCarthy J. that if the shareholders now applying had been original shareholders who had suffered as a result of the reductions imposed by the Legislature, they would be in a strong position, but that in as much as they had acquired their shares at a time when the maximum dividend was £5.12.0d per share, it was reasonable to assume that the price paid by them was at least influenced if not controlled by the dividend that was then payable. It was on this ground chiefly that the learned Judge refused an Order.

It was not disputed that the Court had a discretion in the matter and that the discretion was governed by subs. (4) of s.41 which permits the Court, after hearing the applicant, the company, and any other persons who should apply to the Court to be heard and who should appear to the Court to be interested in the application, to make such Order "as in the circumstances it thinks just and equitable, taking into consideration the economic position of New Zealand, as well as the condition of the parties". The economic position of New Zealand has undoubtedly greatly changed from the position as it was in 1932; there has been a substantial improvement, and it would appear "just and equitable" from this point of view that the restrictions imposed in 1932 should now be lifted. As regards the conditions of the parties, it is to be observed that these are very general words. The same words are used in s.38, which enables a mortgagee or a landlord to apply to the Court for relief. That section goes further than s.41 in that it specifies particular grounds upon which the applicant may apply for relief, one or more of which must be established by the applicant before the Court is required to consider whether it is just and equitable to make an Order, "taking into consideration . . . the conditions of the parties". The only case in which this Court has given consideration to the provisions of s.38 appears to be *Woolworths (N.Z.) Limited v. Dawson* (1933) N.Z.L.R. 508, but no real assistance is to be gained from that case as to the matters that may fall to be considered under the phrase "the conditions of the parties". No doubt as between a mortgagor and a mortgagee, or as between a landlord and a tenant, it may well be that their respective financial positions should be regarded as highly relevant for consideration, but it seems

In the Court
of Appeal
New Zealand

No. 8

Reasons for
Judgment of
Court of
Appeal

(delivered by
Gresson P.)
15th March 1962
(continued)

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In the Court
of Appeal of
New Zealand
No. 8
Reasons for
Judgment of
Court of
Appeal
(delivered by
Gresson P.)
15th March 1962
(continued)

difficult to attach the same importance to this factor as between a company and its shareholders. The latter might be a very numerous class, some in straitened circumstances, some quite affluent, and it would be difficult to attribute to the Legislature an intention that the individual financial position of each of the shareholders comprised in the class affected by the application could or should be considered. It is expressly provided in s.41 (5) that an Order granting relief shall apply to all shares of the class represented by the applicant, so that there is no power to differentiate between individual shareholders, although the applicant need represent only fifteen per cent of the shares of the class. This being so, we think that as between a company and its shareholders, and especially in the present case where the class is numerous, we may view the matter quite broadly and have regard to the holders of the preference shares as a group of investors in the company. Approaching the matter in this way, it should be noted that from 1937 to 1954 no dividends were paid on ordinary shares. Since 1955, however, they have received increasing amounts by way of dividends, and in 1960 a dividend of 12% was paid. Later in 1960 there was a bonus issue of ordinary shares in the ratio of 1 share for every 2 ordinary shares held. The £50,000 of capital held by the cumulative preference shareholders has throughout represented a substantial portion of the total capital employed in the business of the company. The net profits of the company have been steadily increasing, and for each of the three years ending 31st March 1960 were in excess of £30,000 after provision for tax. So far as the company is concerned it is, therefore, well able to pay a restored rate of £7 per centum, which we were told would only involve an extra payment of about £700 per annum.

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The restoration of rate would in effect be at the expense of the ordinary shareholders inasmuch as the payment would reduce the amount available to pay a dividend to those shareholders. The issue is in substance one between the applicant preference shareholders and the ordinary shareholders. We were informed by counsel that the ordinary shareholders had had notice of the application, had considered it, and had elected not to be separately represented but to leave the company to represent them which had accordingly opposed the application in their interest. Mr Dunn argued that before an Order could be made the preference shareholders represented by the applicant must be able to show that they themselves had suffered from the operation of the statute. Unless this were so, he said, there was no room for an application "for relief from the operation of this section" within the meaning of those words in s.41(2), and the fact was that not only the applicant and those she represented, but all present holders of cumulative preference shares who would benefit from the making of an Order, had acquired their shares after the reduction was first imposed. We cannot agree with this argument. It would be an anomalous result if an Order could be made for the benefit of all preference shareholders if fifteen per cent of the shares issued before 1932 were still fortuitously held in the same ownership, but otherwise no Order could be made. The same argument would preclude an application for relief by a mortgagee or a landlord if there had been a transfer of the mortgage

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or a change of ownership of the land leased, for it could equally be said than an applicant in such circumstances was not "aggrieved by the operation of this Part of this Act" within the words of s.38. We do not think that this is the meaning or effect of the legislation. The Act has a continuing operation, and the holders of the shares for the time being can properly be said to be applying for relief from this continuing operation of the statute. No doubt the fact that the shares were acquired after the Act came into force can be taken into account as affecting "the conditions of the parties", but, with respect, we think that in the Court below too much weight or importance was attached to this matter, and instead of being a feature which could be taken into consideration it was elevated into the determining factor. We do not think it should have been given this importance, particularly with a class of 50,000 shares where changes in ownership might commonly be expected. It may be that the current dividend rate of £5.12.0d operating at the time of purchase of each parcel may have depressed the value of the shares but in the absence of any evidence as to the price paid by the purchasers and fuller particulars as to the dates of purchase, this is all rather speculative. In the case of shares purchased between 1935 and 1936, the purchasers may well have been influenced by the knowledge that the statute was only a temporary one, due shortly to expire. Those who purchased their shares after 1936 may have had some regard to the right conferred by the statute to apply for relief from the operation of the Act. But whichever way the matter is looked at, we do not think that the fact that the present preference shareholders acquired their shares after 1932 constitutes in the present case any sufficient reason for refusing the relief sought.

It is therefore our view, after taking into consideration the requirements of the statute which we have discussed, and particularly having regard to the very strong financial position of the company, which now earns a net profit over five times greater than it was in 1932, that it is "just and equitable" that an Order granting relief should be made. It was not suggested in argument that, if relief were granted, the rate of dividend on the cumulative preference shares should not be restored to 7 per centum per annum.

We accordingly allow the appeal and make an Order as was sought by the Motion but to operate from the 1st April 1961, which was agreed by counsel as an appropriate date from which the Order, if made, should take effect.

As to costs, we think the appellant should have costs in the Supreme Court which we fix at forty guineas and disbursements, and in this Court we allow the appellant sixty guineas and disbursements.

Solicitors for Appellant

Robieson & Olphert, Wellington.

Solicitors for Respondent

Alexander, J.H. and Julia Dunn, Wellington.

In the Court
of Appeal of
New Zealand

No. 8

Reasons for
Judgment of
Court of
Appeal
(delivered by
Gresson P.)

15th March 1962
1962

(continued)

In the Court
of Appeal of
New Zealand

No. 9

FORMAL ORDER OF COURT OF APPEAL

No. 9
Formal Order
of Court of
Appeal
15th March
1962

Before the Honourable Mr. Justice Gresson, President.
the Honourable Mr. Justice North.
the Honourable Mr. Justice Cleary.

Thursday, the 15th day of March, 1962.

UPON READING the Notice of Motion on Appeal and upon reading the case on appeal filed herein and UPON HEARING Mr. Cousins of counsel on behalf of the appellant and Mr. Dunn of counsel on behalf of the respondent THIS COURT DOTH ORDER that as from the 1st day of April, 1961, the rate of dividend payable on the Seven pounds (£7) per centum per annum (reduced by operation of the National Expenditure Adjustment Act 1932 to Five pounds twelve shillings (£5.12.0) per centum per annum) cumulative preference shares forming part of the share capital of the abovenamed respondent "Truth" (N.Z.) Limited be Seven pounds (£7) per centum per annum instead of Five pounds twelve shillings (£5.12.0) per centum per annum the rate to which it was reduced by section 41 of the said Act AND DOTH FURTHER ORDER that the respondent do pay to the appellant costs of sixty guineas in this Court and disbursements to be fixed by the Registrar and costs of forty guineas in the Supreme Court and disbursements to be fixed by the Registrar.

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By the Court

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A.W. Kelly

Deputy Registrar

L.S.

No. 10

In the Court
of Appeal of
New Zealand

ORDER OF COURT OF APPEAL GIVING FINAL LEAVE TO APPEAL TO
HER MAJESTY IN COUNCIL

No. 10
Order Giving
Final Leave to
Appeal to Her
Majesty in
Council
5th June 1962

Before: THE HONOURABLE MR JUSTICE GRESSON, PRESIDENT
THE HONOURABLE MR JUSTICE NORTH
THE HONOURABLE MR JUSTICE CLEARY

TUESDAY THE 5th DAY OF JUNE, 1962

UPON READING the Notice of Motion filed herein and the Affidavit of Thomas George Goddard sworn and filed in support thereof AND UPON HEARING Mr Dunn of Counsel for the Respondent and Mr Herd of Counsel for the Appellant THIS COURT DOTH ORDER that the Respondent do have final leave to appeal to Her Majesty in Council from the Judgment of this Honourable Court pronounced herein on the 15th day of March 1962

By the Court

A.W. Kelly

DEPUTY REGISTRAR

L.S.

PART II
DOCUMENTS PUT IN BY CONSENT
Circular Letter From Plaintiff's Solicitors To
Preference Shareholders

Exhibits
Documents put
in by Consent
Circular letter
from Plaintiff's
Solicitors to
Preference
Shareholders
12th July 1960

Dear Sir/Madam,

re: Truth (N.Z.) Ltd.

7% - 5.6% Cumulative Preference Shares

This circular is being sent to all persons holding shares in the above issue.

10 As you probably know these shares were originally issued at 7% but the National Expenditure Adjustment Act of 1932 imposed a reduction of 20% on all such preference share issues with the result that since that date a dividend of 5.6% has been payable.

The Act, which is still in force, makes provision for an application to the Court for relief.

The holders of not less than 15% of the shares concerned are entitled to make the application, or alternatively, they can appoint one or more of their number to make the application on their behalf.

20 Preference shareholders holding more than 15% of the shares have authorised Miss G.V. Howey of Auckland to make the necessary application on their behalf, and we have been instructed to act in the matter.

Before we were instructed Miss Howey had written to "Truth" regarding the matter. "Truth" pointed out, quite correctly, that it was not within the powers of the directors or the company to increase the dividend voluntarily or by agreement, and the only procedure open to the preference shareholders is to make an application to the Court as mentioned above. "Truth" offered to provide facilities for the holding of a meeting of preference shareholders if they wished to discuss this matter but did not otherwise indicate their attitude towards the proposal.

30 There are 50,000 of the 5.6% preference shares on issue and they are held by 65 shareholders scattered fairly widely over New Zealand. It seemed to us rather doubtful if any good purpose would be served by calling a meeting and it would, of course, involve expense and delay. It seems probable that the only preference shareholders who might not be in favour of the proposed application would be those who also have substantial holdings of ordinary shares.

We are of opinion that the application should be successful in obtaining an increase of the dividend payable on the above shares if not complete restoration to 7%. The matter is of importance to shareholders when it is remembered that any increase granted by the Court would not be just for the one year but annually

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 (continued)

for the future; and furthermore, any increased rate of dividend should result in some increase in the market value of the shares.

The question of legal costs and expenses in connection with the application is not without difficulty in cases such as this. It is possible for the Court to order that the company pay costs or at least make some contribution to them, but we cannot of course say whether the Court would do so in the present case.

Any costs payable by the preference shareholders should we feel be contributed by them in proportion to their shareholding. A convenient way of effecting this would be for "Truth" to deduct a proportionate part of the costs from the next dividend. This could be done either as a result of a Court Order or by agreement between the shareholders and the company. Failing such an order or agreement the applicant would look to individual shareholders for payment. In the case of smaller shareholders a share of costs in the proportion that their shareholding bears to 50,000 would be small.

Although, as we have said, Miss Howey has the authority of more than 15% of shareholders, she would prefer to have the support of as many shareholders as possible and it is, of course, reasonable that persons who seek to benefit from these proceedings should be willing to bear their share of the expenses.

Attached is a form of authority which has already been signed by shareholders who hold between them 12,800 shares.

We invite you to support the proposals by signing and returning this form to us.

With a view to assuring you that the application to the Court and our activities in connection with it have the support of substantial and responsible shareholders we mention that we have been authorised to commence proceedings in Miss Howey's name by The Public Trustee, The Provident Life Assurance Co. Ltd., F.A.M.E. Insurance Co. Ltd., The Government Life Insurance Office and the Dominion Life Assurance Office of New Zealand Limited.

The Act provides that any order made by the Court will be binding on all shareholders.

You are entitled to be separately represented in this matter and if such is your wish may we suggest that you immediately consult your solicitor.

Certain negotiations have taken place with the Directors of the company who called a meeting of ordinary shareholders for the purpose of discussing the matter. The result of that meeting has been communicated to us "without prejudice". Being "without prejudice" we cannot set it out in this circular as we may have to produce a copy of the circular in Court. The most we can say is that it is unlikely that any agreement can be reached.

Our clients would welcome your views on the matter and we would be obliged if you or your solicitor would communicate with us immediately.

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No fixture has yet been made for the hearing of the application but we intend to apply for a fixture at an early date and your prompt attention would be appreciated.

Yours faithfully,

ROBIESON & OLPHERT

Solicitors to the Applicant

12th July, 1960.
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in by Consent
Circular letter
from Plaintiff's
Solicitors to
Preference
Shareholders
12th July 1960
(continued)

FORM OF AUTHORITY TO PLAINTIFF

"TRUTH" (N.Z.) LIMITED

7% - 5.6% CUMULATIVE PREFERENCE SHARES

Exhibits
Documents put
in by Consent
(continued)
Form of
Authority to
Plaintiff

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THE UNDERSIGNED BEING THE HOLDER OF SHARES IN THE ABOVE ISSUE HEREBY AUTHORISES AND APPOINTS GLADYS VALENTINE HOWEY OF AUCKLAND, GENTLEWOMAN TO MAKE APPLICATION TO THE SUPREME COURT OF NEW ZEALAND FOR RELIEF FROM THE OPERATION OF SECTION 41 OF THE NATIONAL EXPENDITURE ACT, 1932 AND THE UNDERSIGNED AGREES TO PAY AND BEAR A SHARE OF THE COSTS OF THE APPLICATION IN THE PROPORTION THAT THE SHARES HELD BY THE UNDERSIGNED BEARS TO THE TOTAL SHARES HELD BY THOSE SHAREHOLDERS SUPPORTING THE APPLICATION.

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DATED AT THIS DAY OF 1960

LETTER FROM PLAINTIFF'S SOLICITORS.
TO DEFENDANT'S SOLICITORS

8th September, 1960.

Messrs. Alexander, J.H. & Julia Dunn,
Solicitors,
P.O. Box 1904,
WELLINGTON

Dear Sirs,

re: Howey v Truth (N.Z.) Limited

Exhibits
Documents put
in by Consent
(continued)
Letter from
Plaintiff's
Solicitors to
Defendant's
Solicitors
8th September
1960

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We set out hereunder particulars of preference shareholders who have authorised Miss Howey to bring these proceedings. We mention in explanation of the fact that the shareholders who originally authorised Miss Howey to proceed were all insurance companies that when at her request the company sent her a list of preference shareholders it was a list of names and addresses only without any indication of shareholding. As she wished to limit the number of shareholders to

Exhibits

Documents put in by Consent (continued) Letter from Plaintiff's Solicitors to Defendant's Solicitors 8th September 1960 (continued)

whom she made an initial approach on this matter she took the commonsense view that the insurance companies were the ones most likely to have substantial holdings and accordingly wrote to each of them. Having received favourable reply from each one she instructed us in the matter. Having ascertained that those indicating support held between them more than 15% of the issued preference shares of the class concerned we decided to issue the proceedings and to invite further support from other shareholders by means of a circular letter while awaiting a hearing.

The shareholders from whom we held written authorisation at the time the motion was filed were as follows:

Dominion Life Assurance Office	7,000 shares
F.A.M.E. Insurance Company	500 "
Government Life Insurance Commissioner	600 "
Provident Life Assurance Company	1,500 "
	9,600

The N.I.M.U. Insurance Company had indicated approval of the proposals and we were awaiting a formal authorisation signed by them when they advised us that they had disposed of their shareholding. The 3,200 shares concerned were purchased by The Government Insurance Commissioner but this was after the date when he signed the formal authority which showed him as the holder of 600 shares only. The transfer of these 3,200 shares may have been registered prior to the filing of the motion but we did not bother to enquire regarding this as we already had sufficient support to enable the proceedings to be commenced. However, the 3,200 shares added to the 9,600 shown above accounts for the figure of 12,800 mentioned in our circular letter.

Following the issue of the circular letter we obtained signed authorisation from the following shareholders:

Estate H. Anderson	200 shares
Mrs. M.L.E. Bremer	700 "
Mr. D. Campbell	200 "
Mr. T.I. Caseley	100 "
Lady Jeannie Duncan	3,000 "
Estate Late Sir Thomas Duncan	2,000 "
Mrs. H.M. Elworthy	3,000 "
Mrs. K.M.A. Fellows	200 "
Mr. H. Hamilton	400 "
Mr. J.M. Jeffs	900 "
Mr. C.T. Jepson	975 "
Mrs. B. McDonald	200 "
Mrs. E.M.K. Mason	112 "
Mr. G.E. Moody	1,000 "
Mr. P. Morris	500 "
Mr. G.O. Morrison	500 "

Mr. D.H. Moss & C.E.H. Pledger	3,000 <u>shares</u>	<u>Exhibits</u>
Mr. R. Moxon	200 "	Documents put
Public Trustee (Est. J.H. Marshall)	1,975 "	in by Consent
Puketoi Estates Ltd	5,000 "	(continued)
Mrs. V.M. Tews	300 "	Letter from
Mr. F. Tomlinson	600 "	Plaintiff's
Mr. G.A. Vincent	500 "	Solicitors to
		Defendant's
		Solicitors
	<u>25,562</u>	8th September
		1960

10 To the original list of those supporting the application before the motion was filed there should of course be added Miss Howey who holds 300 shares. (continued)

The total shareholding supporting the application therefore is now:

Original authorities	9,600
N.I.M.U. Shares transferred to Government Insurance Commissioner	3,200
Miss Howey	300
Authorities in response to circular	<u>25,562</u>
	<u>38,662</u>

Yours faithfully,
ROBIESON & OLPHERT

CERTIFICATE OF REGISTRAR OF COURT OF APPEAL
AS TO ACCURACY OF RECORD

I, GERALD RONALD HOLDER, Registrar of the Court of Appeal of New Zealand, DO HEREBY CERTIFY that the foregoing 29 pages of printed matter contain true and correct copies of all the proceedings, evidence, judgments, 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 19th day of June 1962.

G.R. Holder

REGISTRAR

L.S.

In the Privy Council

No. 22 of 1962

ON APPEAL FROM THE COURT OF APPEAL OF
NEW ZEALAND

BETWEEN

"TRUTH" (N.Z.) LIMITED Appellant

AND

GLADYS VALENTINE HOWEY Respondent

RECORD OF PROCEEDINGS

Wray, Smith & Co.,
1 King's Bench Walk,
Temple,
London, E.C. 4.

Solicitors for Appellant

Oswald Hickson, Collier & Co.,
Cromwell House,
6-9 Surrey St.,
Strand,
London, W.C. 2.

Solicitors for Respondent