Privy Council Appeal No. 22 *of* 1962

"Truth" (N.Z.) Limited – – – – – – – *Appellant*

v.

Gladys Valentine Howey – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH MAY, 1963

Present at the Hearing:
VISCOUNT RADCLIFFE.
LORD EVERSHED.
LORD DEVLIN.
LORD PEARCE.
SIR TERENCE DONOVAN.
[*Delivered by* VISCOUNT RADCLIFFE]

This appeal from a judgment of the Court of Appeal in New Zealand relates to the construction and application of section 41 of the National Expenditure Adjustment Act, 1932, an Act which dates from the days of the world-wide economic depression of the early 1930s. The economy of New Zealand itself, according to the evidence, felt the full impact of that depression in or about the year 1933; and the general purpose of the section now under consideration was to adjust the dividend rights of the holders of cumulative preference shares of any company registered under the Companies Act 1908 in such a manner as to reduce for the time being the measure of their claim in any distribution of its profits. The Act, no doubt, was part of a general legislative scheme for adjusting the incidence of monetary liabilities to meet conditions of exceptional economic depression and by so doing to establish means of relief as between, for instance, mortgagor and mortgagee or tenant and landlord. Consistently with this governing conception the dividend payable on cumulative preference shares was to be reduced by an amount of 20% for a period of three successive years, this reduction being regarded, presumably, as a means of preventing the holders of such shares from taking for themselves an inordinately large proportion of the total fund of profits that were likely to become available in those difficult years.

The terms of section 41 were as follows:—

> "41.—(1) The rate of dividend payable by any company registered under the Companies Act, 1908, on any cumulative preference shares heretofore issued by it is hereby reduced by twenty per centum thereof for the period of three consecutive financial years of such company, that first such year being the financial year that commences in the calendar year nineteen hundred and thirty-two:
>
> 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 centum per annum of the nominal value of such share.
>
> (2) The holders of not less in the aggregate than fifteen per centum 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 centum of the issued shares of any such class, may apply to the Supreme Court for relief from the operation of this section.

(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, 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."

In 1936 the provisions of this section, which had in the meanwhile been extended to cover five years instead of the original three, were made applicable for an indefinite future period. This change was effected by section 84 of the Mortgagors' and Lessees' Rehabilitation Act of 1936, subsection (1)(c) of which section declared that the 20% reduction of dividend was to be operative as " from the commencement of the financial year of the company that commences in the calendar year nineteen hundred and thirty-two ", without further limit as to time. The remaining subsections of section 41 of the 1932 Act, which related to the power of the Court, on application, to relieve from the operation of the section, were left in force unaltered.

The National Expenditure Adjustment Act, 1932, came into force on the 10th May, 1932. The appellant was a company within the scope of the provisions of section 41, since at that date it had an issued share capital of £125,007 divided into 50,000 7% cumulative preference shares of £1 each and 75,007 ordinary shares of the same denomination. The dividend on the preference shares was thus reduced by statute from 7% to 5·6%. As its financial year ended on the 30th September, the first financial year that was affected by the deduction was that beginning on the 1st October 1932.

It is not necessary to follow in any detail the subsequent financial fortunes of the company. Certainly, they have greatly improved. They are summarised in the judgment of McCarthy J. in the Supreme Court of New Zealand by the following sentences—" . . . 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 3s. 5d. on figures which could be suspected to be conservative, and its earnings on ordinary share capital have, over the last three years, exceeded 20%. It declared, for the year ending 31st March, 1960, a dividend of 12% on ordinary shares and 6% on the participating preference shares " (a second and separate class of preference shares which were issued in 1955).

Nothing therefore in the situation of the company itself or in the situation of the other classes of its shareholders suggests that it would be anything but just and equitable to restore to the 7% cumulative preference shareholders the dividend rights which were taken away from them by statute to meet the exceptional conditions of economic distress that prevailed thirty years ago. For those conditions too have changed very materially. The detailed statistical report by a firm of public accountants in Auckland, which was submitted to the Court on behalf of the respondents, justifies its conclusion " . . . whereas economic conditions during the years 1932 to 1934 inclusive were very depressed, those of the present time are, by comparison, very buoyant." This conclusion has in effect been accepted as well founded by both the Courts in New Zealand that have given judgment in the matter, and their Lordships feel no doubt that it is right to proceed on the basis that " the economic position of New Zealand has greatly changed from the position as it was in 1932; there has been a substantial improvement " (see the judgment delivered by Gresson P. in the Court of Appeal).

It was in these circumstances that on the 30th March, 1960 the respondent started the present proceedings under section 41 of the 1932 Act, claiming relief against the operation of the section by the restoration of the cumulative

preference dividend to its full 7%. She represented not less than 15% of the then holders of those shares, but it is not in dispute that none of the persons who were holders at the 10th May, 1932 remained on the register as a shareholder at the date of the application. With one exception the present shareholders have all acquired their shares by purchase since May 1932.

The application was dismissed by McCarthy J. by an order dated 22nd September, 1960 made in the Supreme Court. On appeal to the Court of Appeal the appeal was allowed and on the 15th March, 1962 an order of that Court restored the rate of dividend from 5·6% to 7% as from the 1st April, 1961.

Two arguments have been presented to their Lordships on behalf of the appellant company, which has been treated throughout as representing the ordinary shareholders and as opposing the respondent's application in their interest. The first argument is to the effect that, as the respondent and those on whose behalf she appears acquired their holdings after the coming into force of the Act of 1932, they are not qualified to make an application for " relief " under the Act, since they had never " suffered " from its operation.

This point can either be put as one of jurisdiction, as it was before their Lordships, or as a submission that it cannot be just and equitable within the meaning of section 41 to relieve persons who acquired their shares at a time when the statutory reduction of dividend was in force. In the latter form it commended itself to McCarthy J. in the Supreme Court and was in fact the sole ground for his dismissing an application to which, it appears, he would otherwise have been ready to accede.

In either form the argument is, in their Lordships' opinion, unmaintainable. When in 1936 the legislature declared that the reduction of dividend was to endure for an indefinite period, it preserved unaltered the right of shareholders to apply to the Court for relief from the operation of the section. Their right therefore endures co-terminously with the reduction. The statute has a continuing operation until, if ever, relieved against, and there is no good reason at all for imposing upon the words in subsection (2) " The holders of not less in the aggregate than fifteen per centum of the cumulative preference shares heretofore issued by any company as aforesaid . . . " the unexpressed condition that those holders can only be persons who held their shares at the coming into force of the Act.

There is nothing in the provisions of the Act about applicants having to be " sufferers " from its operation. The phrase would in any event beg the question rather than solve it. For, if a person acquires shares from an existing holder, prima facie he takes over with the shares all the rights as well as the liabilities attaching to those shares; and if the rights include the liberty to apply to the Court to have the statutory reduction of dividend removed, given the proper circumstances, the new holder succeeds both to the detriment imposed by subsection (1) of section 41 and to the chance of relief under subsection (2).

In their Lordships' view it is not only that the holders making an application do not have to be persons who held their shares at the coming into force of the Act: it is not even a relevant consideration, when measuring what is just and equitable, that applicants may have bought their shares in the market after that date. There can be no sound general assumption that such purchasers would have paid only for the right to receive in perpetuity the reduced dividend. On the contrary it is just as, if not more, likely that they or some of them will have bought the shares subject to the statutory bar with the knowledge that they carry a chance of relief and the expectation that it will be granted at some date in the future. Shareholders' right to equitable relief must be determined therefore without regard to the date when they purchased their shares.

The second argument placed before their Lordships on behalf of the appellant was that, as subsection (4) of the section directed the Court to " take into consideration the economic position of New Zealand as well as the conditions of the parties " when deciding whether to grant relief, it had no power to make an order in favour of applicants unless it had before it relevant

information as to their present condition. Admittedly, no such evidence had been tendered with regard to the respondent and those whom she represented. It is difficult to say what such an argument would lead to in practice, if it were attempted to give effect to it. Apparently, the Court would be required to investigate the personal circumstances of each of the 15% of the shareholders represented on the application and, possibly, match them against the personal circumstances of all others who could be regarded as " parties," the company and other classes of shareholders capable of being " interested " in the application. Even so, it is impossible to see that such investigations would throw any useful light on the practical question, what was just and equitable in the circumstances; the less so, since by subsection (5) an order of the Court granting relief to applicants enures for the benefit of all the holders of shares of their class.

Their Lordships regard this argument as unfounded. In their view it is effectively disposed of by what is said with regard to it in the judgment of Gresson P. in the Court of Appeal. They will adopt his words:— " 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 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 section 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 15% 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."

So regarded, they have a claim to the restoration of their full dividend which seems to their Lordships, as it seemed to the members of the Court of Appeal, a wholly proper case for the grant of relief under the Act. The statute must not be read as requiring an investigation of personal circumstances as a condition of relief. While it is not necessary to say that no case can ever arise under the Act in which it would be right to inquire into such circumstances, it is enough to say that for the reasons given in the Court of Appeal the present is not one of them.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs.

(87638) Wt. 8052/97 80 5/63 Hw.

In the Privy Council

" TRUTH " (N.Z.) LIMITED

v.

GLADYS VALENTINE HOWEY

DELIVERED BY
VISCOUNT RADCLIFFE

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