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Judgment
5 7, 1964

IN THE PRIVY COUNCIL No. 39 of 1964

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

Between

J.M. CONSTRUCTION COMPANY LIMITED
AND JONES TIMBER COMPANY LIMITED

Appellants

and

HUTT TIMBER AND HARDWARE COMPANY LIMITED

Respondent

- CASE FOR RESPONDENT -

MacFarlanes,
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BETWEEN

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AND

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CASE FOR THE RESPONDENT

RECORD

1. This is an Appeal from the Judgment dated 12th December 1963 of the Court of Appeal of New Zealand (North P., Turner and McCarthy JJ.) allowing in part an appeal from a Judgment dated 28th September, 1962, and a Supplementary Judgment dated 30th November 1962, of the Supreme Court of New Zealand (Leicester J.) p.154 p.134 p.129

2 The action was brought by the Appellants and another company, R.O. Slacke Limited, against the Respondent, being commenced by Writ of Summons dated 25th January 1962.

3 In their Statement of Claim the Appellants alleged (inter alia) that they were, and at all material times had been, shareholders in the Respondent Company and purchased builders' supplies at all material times from the

RECORD

Respondent Company; further that such purchases were on the terms that the Respondent 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 certain rebates as set out in paragraph 5 of the Statement of Claim (as amended by leave at the hearing in the Supreme Court) were due from the Respondent to the Appellants; that the Respondent failed to pay to the Appellants the said rebates and in purported satisfaction purported to allot to the Appellants shares in the Respondent Company of a nominal value corresponding to the amounts due in respect of the said rebates, particulars of which were given in paragraph 6 of the Statement of Claim (amended as aforesaid). The Appellants further alleged that the purported allotments were made without authority and wrongfully and contrary to the express instructions of the Appellants and that no notices of allotment were given to the Appellants. The Appellants claimed declarations that the shares were allotted without authority, and wrongfully; orders that the register of members of the Respondent Company be rectified; and judgments for sums of money as set out in the prayer for relief (amended as aforesaid).

p.2,ll.11-13
p.2,ll.14-18
p.2,ll.19-27
p.23,ll.9-21
p.2, ll. 28-39, p.28, ll. 22 - 35.
p.3,ll.1-5
p.29,ll 1-5
p.3,ll.7-19
p.29,ll.6-17

4. In its Statement of Defence the Respondent alleged (inter alia) that rebates were to be made under and in accordance with an Agreement or Deed dated 28th November 1947; that the said Agreement or deed was in full force and binding upon the Appellants; that the Appellants were accordingly bound to receive the respective

p.4,ll 13-20
p.5,ll.12-19

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allotments of shares made to them. In particular, in paragraph 4 of its Statement of Defence, the Respondent denied the Appellants' allegation that the Appellants were entitled to receive payment (i.e. in cash) of a proportionate amount of the excess of income over expenditure in the respective years in which purchases were made. p.5,ll.23-31 p.4,ll.19-20

5. In paragraph 19 of its Statement of Defence the Respondent alleged that the goods were sold by the Respondent to the Appellants, 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 Appellants were properly allotted in pursuance of the contract between the Respondent and the respective Appellants in relation to the sale and purchase of such goods. p.6,ll.23-30

6. The Respondent further alleged in paragraph 24 (a) to (e) of its Statement of Defence that the said agreement was the basis of the dealing between the Appellants and the Respondent; that the Appellants acquiesced therein and induced the Respondent to make such distribution in lieu of the distribution of money to shareholders in any other way; that the Appellants had acted in accordance with the rebate agreement along with all other shareholders for many years prior to 1958 and since that year. In paragraph 27 the Respondent alleged further acts or conduct on the part of Appellants during relevant times which are also material to an examination of the issues arising between the Appellants and the Respondent. p.7, ll.18-19 p.7, ll.22-25 p.7,ll.26-28 p.8,ll.10-23.

7 The Respondent also raised alternative defences of estoppel and waiver. pp.7-8 (estoppel) p.7,ll.2-3 (waiver)

RECORD

8. The action was heard on the 9th, 10th, 11th, 12th, 13th, 19th and 20th July 1962 before Leicester J. In his reasons for judgment the Learned Judge set out the history of the Company and its activities and recited the terms of the 1947 Rebate Agreement. He then moved to the practice of the Respondent Company over the years, the Company's overdraft position, the effect of allotting shares upon the incidence of income tax, and then set out in detail correspondence passing between the solicitors for the parties. The Learned Judge then discussed the construction to be placed on the 1947 Rebate Agreement, the allotments made by the Respondent subsequent to Appellants' notices of repudiation, and the defence contentions. The Learned Judge then gave reasons for holding that the 1947 Agreement had expired, or alternatively that performance had become something totally different He dismissed Appellants' contentions that Clause 4 of the Agreement was uncertain, and that the Agreement was repugnant to an agreement made with Auckland shareholders in 1959. The Learned Judge then discussed the effect of the Appellants' notices of 2nd July 1958; and proceeded to reject the Respondent's contention that an estoppel had arisen.

p. 105,ll. 4-25
p. 105,l. 30 - p.107,l. 27
p. 107,l. 31 - p. 108,l. 27
p. 108,l. 28 - p. 109,l. 15
p. 109,ll. 15-36
p. 109,l. 39 - p. 114,l. 21
p. 117,l. 9 -
p 118, l. 18
p. 118,l. 1[illegible] - p. 119,l 15
p 121,l 22, p. 122,l. 21
p. 122,l 22
p. 124,l 10
p. 124,l. 10 - p 125,l 2
p. 125,ll. 2-5
p. 125,ll. 6-47
p. 126,l. 1 - p. 127,l, 19

His Honour therefore held that there should be rectification of the register.

p. 127,l. 21

9 His Honour then turned to the question whether the Appellants were consequently entitled to a cash judgment He held that the monetary claim in the action was not based upon any contractual obligation by the Respondent to pay rebates wholly in cash but upon the fact that, as part of the Respondent's

p. 127

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trading relations with the Appellants, and after receipt of their 1958 notices, it elected to declare rebates based upon the Appellants' notices and then, despite such notices, to apply the property of the Appellants in payment of fully paid rebate shares which the Appellants did not want. p. 127, ll 20-40

10 In the result Leicester J made the declarations and orders sought by the Appellants p 127,l 41- p 128 l 7.

10 11 In his supplementary judgment, Leicester J reiterated the view that estoppel should not operate against the Appellants subsequent to their respective notices and that no case had been established for the number of shares affected by the judgment to be diminished below that sought by way of rectification of register and judgment in the amended Statement of Claim p. 131,l 20 - p. 133,l 18 p 133,ll 11-14

12 From the whole of the declaration order and judgment of Leicester J. the present Respondent appealed on the ground that it was erroneous in law and in fact p 135

20 The appeal was heard on 11th, 12th, 13th, 14th and 15th November, 1963 Judgment was reserved and delivered on 12th December 1963. The Court allowed the appeal in part, making the orders set out at the end of North P 's judgment The appeal against the declarations and orders made was dismissed, and the appeal against that part of the judgment awarding cash sums to the Appellants was allowed p.145,l 41 p 146, l 5

13. North P in delivering judgment, first surveyed the facts at length, and then dealt with what His Honour termed "the first branch of the appeal". He discussed and rejected the Respondent's first submission on this branch of the appeal, viz. that the judgment under appeal transgressed the rule in Burland v. Earle (1902) A C 83 (p 136,l 10 - p. 140,l 27) (p 141, l 42 - p 142, l 29)

RECORD

The Learned President then discussed, and rejected the Respondent's contention that the Respondent was entitled by the 1947 Rebate Agreement to require the Appellants to accept shares in respect of rebates. He held that after receipt of the notices the Respondent was acting without legal authority and that the Appellants had not waived their rights of refusing to accept new shares allotted to them. He held that the Respondents were not obliged to accept the shares allotted to them and that on the first branch the appeal failed.

p. 142, l. 30 – p. 143 l 35

p. 143, ll. 9-12

p. 143, ll. 24-35

p. 143, ll. 36-43.

14 On the "second branch", relating to the awards of cash, North P. held that the Appellants must be able to point to a contract giving them the right to recover the amount of the rebates in cash. He said, however, that far from agreeing to pay rebates to the Appellants in cash, the Respondent throughout denied any such right There were no grounds whatever to justify a finding that the company ever agreed to pay to the Appellants their share of the surplus profits in cash.

p 143, l 43 – p. 144, l 2

p 145, ll. 14-15

p 145, ll 15-17

15 North P. also held that the resolutions passed by the Company with reference to rebates in the years in question did not create a debt between the Company and the Appellants

p. 145, ll 23-25

16. Turner J began his judgment by postulating four questions, and proceeded to answer them He first analysed the terms upon which the Appellants purchased goods from the respondent up to 2nd July 1958, and concluded that the understanding, which had contractual effect, was that Appellants would receive each year in due course, upon a resolution of the company duly passed in that regard, a rebate in proportion to the total of its

p 147, ll 15-27

p 147, l 28 – p. 148, l. 9

p. 148, l 17

RECORD

purchases from the Respondent during the year in question the amount to be fixed as being in the same proportion to the total amount of its purchases as was the case with other shareholder-customers. p. 148, ll. 11-16

17. Secondly, Turner J. held that it was within the power of the Respondent to discharge its obligations, up to 2nd July 1958, by the allotment of shares, this being founded not on the 1947 Agreement but on the ground that Appellants were entitled only to the same treatment as others got. p. 148, l. 41 to p 149, l. 6

18 The third question was whether the Appellants were entitled on 2nd July 1958, to give notice declining to take further rebates in the form of shares. His Honour proceeded to hold that the Appellants were entitled to refuse the shares but that it did not follow that they were entitled to any cash rebate in place of those shares p. 149, ll. 7-9 (p 149, ll. 17-19 p 149, ll. 23-24

19. Fourthly, His Honour held that the Appellants could not found a cause of action on any resolution of the Company; the resolutions declaring rebates were not to be likened to resolutions declaring dividends; the Appellants' rights were "contract or nothing" It was important to look at the resolutions as a whole. (p. 150, l. 32 - p 151, l. 20 (p. 150, ll. 32-36 p. 150, ll. 36-37 p. 151, ll. 4-5

20 Finally, His Honour held that consideration of estoppel had no place in the resolution of the case before the Court p 151, ll. 21-47

21 McCarthy J , the third member of the Court of Appeal, agreed with the conclusions at which North P had arrived. p 153

22. With regard to certain of the reasons given by

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the Court of Appeal the Respondent humbly submits -

A. That in so far as the judgment upholds the judgment of Leicester J. in ordering that the register of the Company be rectified with regard to the shares referred to in the Statement of Claim the judgment is right. The Respondent acknowledged in the Court of Appeal, upon the ground that no right exists in law to force the ownership of property upon any person contrary to his will, that it was not entitled to register the Appellants in respect of such shares as the Appellants had repudiated the issue to them or any of them; but the election of the Appellants not to take such shares could not and did not entitle the Appellants to any right to be paid in cash the rebates in respect of which the said shares were issued. The Respondent will repeat this acknowledgment on the present Appeal and will submit that the judgment of the Court of Appeal was right in that it directs rectification of the share register and also right in that it refused to the Appellants judgment for payment in cash for the rebates in question.

B. That in so far as the judgment of the Court of Appeal held that at the relevant dates the agreement of 1947 was not binding upon the Appellants the Respondent respectfully submits that the same was either (1) directly binding upon each of the Appellants; or (2) was binding as varied by performance or the course of dealing between the parties; or (3) was evidence as to the course of dealing and such

(p. 142, ll. 34 - p. 147, l. 28 - p. 148, l. 31

course of dealing is the basis upon which the rights of the Appellants and the obligations of the Respondent were and are to be determined.

C. That any rights of the Appellants to payment of rebates in cash (the Respondent contending that none such arose) were dependent upon resolutions of the Directors, and of general meetings of shareholders of the Respondent Company, which were conditional upon profits and determined annually by and as part of the internal affairs of the Respondent Company, and were so decided for the years in question to which this action relates. Whether or not rebates were issued, to what amount and in what form and upon what terms of payment were matters for the administrative discretion of the Directors and the Company taking into account the total circumstances of the Company at the relevant time, and were so determined. It will be submitted that for the Court to determine for the Company what the latter's decision should be would be a violation of the long-established principle in Burland v Earle (1902) A.C. 83, and similar authorities, and should therefore not take place.

pp.201-204

23. The Respondent humbly submits that the orders made in the judgment appealed from were right for the reasons set out in paragraph 22 hereof and for the following among other

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REASONS

1. Because there was no agreement, express or implied, or enforceable obligation of any kind by virtue of which the Appellants became entitled to demand payment in cash of rebates declared by the Company in the years in respect of which the action was brought.

2. Because the Appellants cannot found a cause of action for a cash judgment on any resolution of the Company; and in particular because the resolutions passed by the Company with reference to rebates in the years in question did not create a debt between the Company and the Appellants.

3. Because there is no other basis upon which the Appellants are entitled to demand payment of rebates in cash in respect of the years in question.

4. For the substantial reasons given in the judgments of the Court of Appeal.

AND ALTERNATIVELY, if the foregoing reasons are not accepted, the Respondent humbly submits that, in any event, having regard to the date of the appellants' notices and/or the termination of the Company's trading year on the 30th November of each year and/or the dates of Directors' and Company Annual General Meetings and/or the dates of allotment of shares, the Appellants are not entitled to the whole of the cash amounts claimed by them in their Amended Statement of Claim and for which Leicester J. gave judgment. p.28 p. 134

W.J. SIM

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