



LEVER BROTHERS & UNILEVER – A PRACTICAL PROBLEM OF SOURCE?



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***Commissioner for Inland Revenue v Lever Brothers
and Unilever Ltd:
A PRACTICAL PROBLEM OF SOURCE?***

THIS CASE DEALT WITH THE PROBLEM OF LOCATING THE SOURCE OF INTEREST AND THE “PRACTICAL MAN” PRINCIPLE WAS INVOKED BY ALL THREE JUDGES

For the person whom Lord Atkin had in mind was the practical man and not the legal theorist who, by resolutely shutting his eyes to all the facts, could prove that black was white.

Davis AJA

**Lord Atkin was the Judge in *Rhodesian Metals Ltd (in Liquidation) v COT*,
1940 AD 432, 11 SATC 244**



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OVERVIEW

- THE CONTRIBUTION THE STORY MAKES
- INTRODUCTION – THE LEVER BROTHERS COMPANY
- FACTS OF THE CASE
- THE HISTORICAL CONTEXT
- THREE JUDGMENTS
- THE JUDGES
- THE “PRACTICAL MAN”
- PRINCIPLES OF A SOURCE-BASED SYSTEM





THE CONTRIBUTIONS

THE LEVER BROTHERS STORY MAKES THE FOLLOWING CONTRIBUTIONS:

- IN-DEPTH ANALYSIS OF THE FACTS AND THE JUDGMENTS – CHALLENGES THE ACCEPTED INTERPRETATION OF THE *RATIO DECIDENDI*
- THE SOCIAL CONTEXT – PEDAGOGICAL CONTRIBUTION, THROUGH INCREASED ACCESSIBILITY AND INTEREST FOR SCHOLARS
- THE “PRACTICAL MAN” – AN AS YET UNRESEARCHED AREA





THE LEVER BROTHERS COMPANY

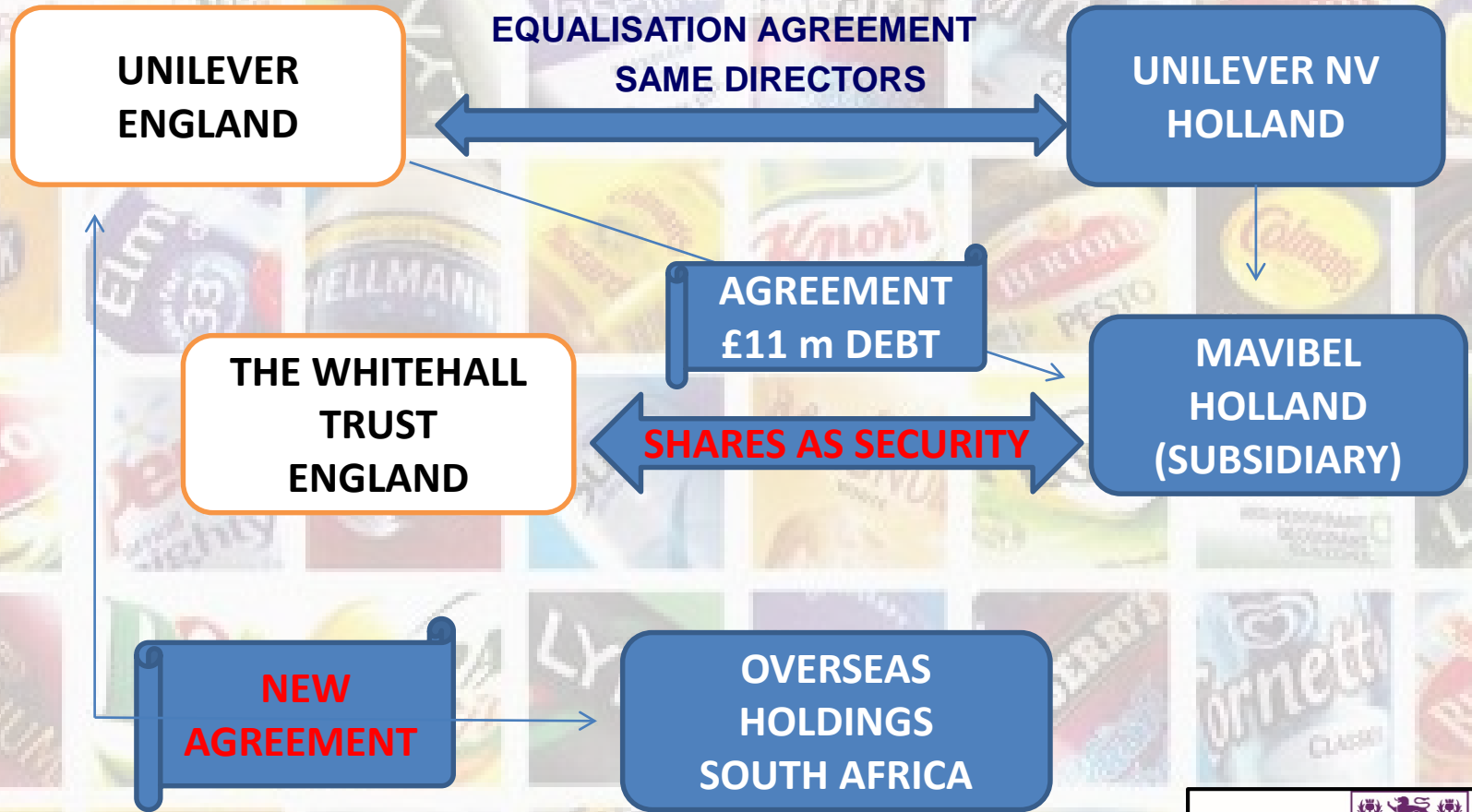
ONCE UPON A TIME

- WILLIAM HESKETH LEVER (VISCOUNT LEVERHULME) – PHILANTHROPIST AND ART COLLECTOR
- SON OF A GROCER, PARTNER AT 20
- BRANDING AND PACKAGING SOAP – INCREASE IN SALES
- CUTTING OUT THE MIDDLE MAN . . . PORT SUNLIGHT
- EMPLOYEE BENEFITS – CORPORATE SOCIAL RESPONSIBILITY
- MERGER WITH THE MARGARINE UNION – THE BIRTH OF *Unilever*





THE FACTS OF THE CASE





THE FACTS OF THE CASE

- **FIRST AGREEMENT: SALE OF SHARES AND DEBT BY LEVER BROTHERS TO MAVIBEL IN RETURN FOR INTEREST-BEARING INDEBTEDNESS OF £11 MILLION IN DECEMBER 1937**

MARCH 1936 – HITLER MARCHED INTO THE RHINELAND
INVOLVED IN THE SPANISH CIVIL WAR
MARCH 1938 – GERMAN TROOPS IN AUSTRIA
SEPTEMBER 1938 – MUNICH AGREEMENT

- ***OVERSEAS HOLDINGS* INCORPORATED IN MARCH 1939**
- **FIRST AGREEMENT AMENDED – WAR CLAUSE INSERTED IN APRIL 1939**

SEPTEMBER 1939 – HITLER INVADED POLAND
ENGLAND AND FRANCE DECLARED WAR ON GERMANY

- **SECOND AGREEMENT – *OVERSEAS HOLDINGS*
STEPS INTO *MAVIBEL'S SHOES* (MARCH 1940)**





THE COMMISSIONER'S ASSESSMENT

- INTEREST PAID BY OVERSEAS HOLDINGS TO LEVER BROTHERS IN LONDON – 1940-1942
- OUT OF DIVIDENDS EARNED IN AMERICA FROM LEVER BROTHERS COMPANY OF BOSTON ON SHARES HELD IN TRUST BY THE WHITEHALL TRUST
- ASSESSED LEVER BROTHERS IN THE UNION OF SOUTH AFRICA ON INTEREST – BEING FROM A SOUTH AFRICAN SOURCE
- GROUNDS – THE DEBT IS THE SOURCE; AND
- IT IS SITUATED WHERE THE DEBTOR IS





WATERMEYER CJ'S JUDGMENT

- **TWO PROBLEMS (QUESTIONS):**
 - **WHAT IS THE SOURCE OF 'MONEY' RECEIVED BY THE TAXPAYER?**
 - **WHERE IS THIS SOURCE LOCATED?**
- **THE PROVISION OF CREDIT IS THE ORIGINATING CAUSE (SOURCE)**
- **TO LOCATE THE SOURCE HE REFERRED TO EXISTING PRECEDENT – LOCAL AND FOREIGN**

CONCLUSION: NO BUSINESS WAS CARRIED ON IN SOUTH AFRICA, NO CONTRACT WAS MADE HERE, NO CAPITAL ADVENTURED OR SERVICES RENDERED IN SOUTH AFRICA, NO OBLIGATION PERFORMED IN SOUTH AFRICA

THUS: SOURCE NOT IN SOUTH AFRICA





THE *KERGEULEN* CASE (1939)

- **THE BASIC PRINCIPLES OF SOURCE AND RESIDENCE: EQUITY AND EFFECTIVENESS**

SOURCE: A COUNTRY THAT PRODUCES WEALTH BY REASON OF ITS NATURAL RESOURCES OR ACTIVITIES OF ITS RESIDENTS IS ENTITLED TO A SHARE OF THE WEALTH

RESIDENCE: FOR THE PROTECTION AND PRIVILEGE OF RESIDENCE, THE RESIDENT MUST CONTRIBUTE TO THE COST OF GOOD ORDER AND GOVERNMENT

EFFECTIVENESS: THE COUNTRY HAS EFFECTIVE MEANS TO ENFORCE THE LEVY

- **WATERMEYER DID NOT REFER TO THESE PRINCIPLES**





SCHREINER JA's DISSENTING JUDGMENT

- **DISMISSED WATERMEYER CJ's ARGUMENTS:**
 - **THE 'ACTIVITIES' TEST IS NOT RELEVANT**
 - **WHERE THE CONTRACT OF LOAN IS MADE AND WHERE THE INTEREST IS PAYABLE IS NOT RELEVANT –**
“NATURAL TO SUPPOSE THAT [PARLIAMENT] ENVISAGED . . . AS THE SOURCE THE PLACE FROM WHICH THE INTEREST WOULD ORDINARILY COME”
 - **INTEREST IS THE 'FRUIT' OF THE MONEY (VISSER INCORRECTLY ALLUDED TO)**
- **QUOTED ONLY ONE FOREIGN CASE**
- **CONCLUDED: THE DEBT IS THE SOURCE AND IS SITUATED WHERE THE DEBTOR RESIDES**





THE LIVES OF THE JUDGES

ERNEST FREDERICK (“BILLY”) WATERMEYER

- CAMBRIDGE SCHOLAR AND SPORTSMAN
- RETURNED TO ROMAN-DUTCH LAW PRINCIPLES
- KNOWLEDGE OF MATHEMATICS STOOD HIM IN GOOD STEAD
- HABIT OF WINNING CASES – CLEAR AND LUCID MIND
- KEEN KNOWLEDGE OF HUMAN NATURE; PATIENT AND CAREFUL; FAIRMINDED AND FREE FROM PREJUDICE
- DESCRIBED “BY ALL MEMBERS OF THE FAIREST SEX AS THE HANDSOMEST OF THE CAPE JUDGES”





THE LIVES OF THE JUDGES

OLIVER DENEYS SCHREINER

- EXTRAORDINARY INTELLECT, NOT AN ELOQUENT SPEAKER
- CAMBRIDGE GRADUATE, BUT “HAD ATTENDED ONLY ONE LECTURE ON ROMAN-DUTCH LAW”
- WOUNDED AT THE SOMME IN WORLD WAR 1; AWARDED THE MILITARY CROSS (“MY ELBOW GOT IN THE WAY OF A BULLET”)
- HARDWORKING; CONSCIENTIOUS; OPTIMISTIC; NOT SWAYED BY EMOTION; COURTEOUS
- LOVE OF FAST CARS: “UNTIL MY CHILDREN ARE QUALIFIED IN THEIR CAREERS, I WOULD PREFER NOT TO BE DRIVEN BY OLIVER” (SIR ALFRED DENNING)
- “THE GREATEST CHIEF JUSTICE SOUTH AFRICA DID NOT HAVE” (KAHN)





LIVES OF THE JUDGES

REGINALD PERCY DAVIS

- OXFORD GRADUATE; RUGBY PLAYER AND KEEN RUGBY SUPPORTER
- A STOUT UPHOLDER OF THE ROMAN-DUTCH LEGAL SYSTEM
- “HAD NEVER DISAGREED WITH HIS GREAT FRIEND WATERMEYER IN THE DECISION OF A CASE” (RECOUNTED BY SCHREINER)
- ONE OF THE TWO MEN WHO BROUGHT UP THE REAR IN THE HANDSOMENESS STAKES, BY VOTE OF THE CAPE BAR (KAHN)
- IRASCIBLE – ATTACKED A MAN WITH AN UMBRELLA WHO WAS SITTING IN HIS RESERVED SEAT (KAHN)





BUT IS THE “PRACTICAL MAN” THE REAL PROBLEM?

- ALL THREE JUDGES DEFERRED, TO A GREATER OR LESSER EXTENT , TO THE PRACTICAL MAN IN THEIR JUDGMENTS, BUT THE “CONCLUSION” OF EACH ONE’S PRACTICAL MAN DIFFERED, AS WELL AS THE WEIGHT ACCORDED TO HIM
- WATERMEYER CJ EXPRESSED DIFFICULTY IN DIFFERENTIATING THE REASONING OF THE PRACTICAL MAN FROM THAT OF A THEORETICAL LAWYER, BUT “THE PRACTICAL MAN COULD NOT EVER COME TO THE CONCLUSION THAT THE MONEY CAME FROM A SOURCE IN SOUTH AFRICA”
- SCHREINER JA REFERRED TO THE PRACTICAL BUSINESSMAN, WHO, AFTER THE MATTER WAS EXPLAINED TO HIM, WOULD PLACE THE LOCATION OF THE DEBT AT THE RESIDENCE OF THE DEBTOR, BUT WOULD PROBABLY INDICATE THAT THE BEST THING TO DO WAS TO ASK A LAWYER





BUT IS THE “PRACTICAL MAN” THE REAL PROBLEM?

- DAVIS AJA, WHILE CONCURRING WITH WATERMEYER’S JUDGMENT (“HIS GREAT FRIEND”), BASED HIS ENTIRE JUDGMENT ON THE PRACTICAL MAN PRINCIPLE AND HAD LITTLE DOUBT THAT THE ONE PLACE THAT THE PRACTICAL MAN WOULD NOT CHOOSE WOULD BE SOUTH AFRICA
- HE ALSO EMPHASISED TREASURY’S STIPLULATION THAT NO CAPITAL OR INTEREST COULD BE PAID FROM SOUTH AFRICAN FUNDS AND WAS OF THE OPINION THAT “BOTH THE TREASURY AND THE PRACTICAL MAN KNEW, AS A PRACTICAL HARD MATTER OF FACT, THAT NONE [OF THE FUNDS] HAD BEEN SO PAID”

THIS CALLS INTO QUESTION THE VALUE OF THE PRINCIPLE THAT “SOURCE SHOULD NOT BE SEEN AS A LEGAL CONCEPT; RATHER EMPHASIS SHOULD BE PLACED ON WHAT THE ‘PRACTICAL MAN’ WOULD REGARD AS THE REAL SOURCE OF INCOME”





THE HYPOTHETICAL PRACTICAL MAN

- WHAT WEIGHT SHOULD BE ACCORDED TO THE PRACTICAL MAN?
- NOT SUITED TO COMPLEX LEGAL ISSUES
- A 'LENS' THROUGH WHICH THE FACTS OF THE CASE CAN BE VIEWED
- PROBLEMS:
 - UNACKNOWLEDGED BIAS OF JUDGES
 - USED *EX POST FACTO* TO SUBSTANTIATE OWN JUDGMENT
- THE PRINCIPLE GUARDS AGAINST AN OVERZEALOUS APPLICATION OF LEGAL DOCTRINE





THE SOURCE PRINCIPLE TODAY: WATERMEYER'S JUDGMENT STOOD FOR FIFTY-FOUR YEARS

- **SECTION 9 INSERTED INTO THE INCOME TAX ACT IN 1998: DEEMED INTEREST TO BE FROM A SOURCE IN THE REPUBLIC AND SUBSTITUTED IN 2012**
- **SOUTH AFRICA CHANGED TO A RESIDENCE BASIS OF TAX**
- **DOUBLE TAX AGREEMENTS WERE ENTERED INTO (s108) – NO SUCH AGREEMENTS IN PLACE WHEN THE *LEVER BROTHERS* CASE WAS HEARD**

THE MAKING AVAILABLE OF THE CREDIT IS NO LONGER THE SOURCE OF INTEREST INCOME AND PLACE WHERE THE SOURCE IS SITUATED IS NO LONGER WHERE IT IS MADE AVAILABLE, BUT

WATERMEYER'S TWO-STEP TEST STILL APPLIES TO OTHER TYPES OF INCOME:

- ASCERTAINING THE ORIGINATING CAUSE
- LOCATING THIS ORIGINATING CAUSE





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