Twin Enterprises Pte Ltd v Lim Heng Wah Peter
[2000] SGHC 288

Case Number : Suit 1712/1994, RA 600217/2000

Decision Date : 29 November 2000

Tribunal/Court : High Court

Coram : MPH Rubin J

Counsel Name(s) : Tan Siah Yong (Piah Tan & Partners) for the defendant/appellant; Anil Changaroth (Lim & Lim) for the plaintiffs/respondents

Parties : Twin Enterprises Pte Ltd — Lim Heng Wah Peter

29 November 2000

MPH Rubin J

1 This is perhaps the third round in a slugging match between the plaintiffs (Twin Enterprises Pte Ltd) and the defendant (Peter Lim Heng Wah). The first round was some time in 1998 before Khoo J who heard a suit by the plaintiffs against the defendant to recover the balance of a trading account between the parties.

2 The hearing before Khoo J spanned a period of eight days. The background facts as stated by Khoo J and his decision were as follows.

3 The plaintiffs are a company effectively owned by Mr Fung. Mr Fung had known the defendant Mr Lim for many years. In the late 1980's, the Vietnam market was starting to open up. The defendant, who began to spend much time in Vietnam, collaborated with various Singapore companies in the import and export of goods into and out of Vietnam. He acquired much knowledge and experience of doing business there. Mr Fung did not have much of such knowledge and experience. But he had money, or at least good credit rating in Singapore. The two gentlemen decided to team up. In early 1990, they entered into discussions. They arrived at an arrangement by which the defendant would source for goods in Vietnam and send them to the plaintiffs for sale in Singapore and Hong Kong. Rattan was the main commodity envisaged at the beginning, but later on other things like shipping containers and rubber were also included. Mr Fung, on the other hand, would send goods for which there was a demand in Vietnam. In the event these included beer and second-hand motor cycles.

4 The purchases in Vietnam were funded by money sent by Mr Fung or from the proceeds of the sale of goods Mr Fung sent to the defendant. The parties agreed to share equally the profit made on the goods sent to and from Vietnam. Mr Fung was entrusted with the keeping of the accounts.

5 The trading arrangement started in February 1990. Money was handed or remitted to the defendant. Goods including large shipments of beer were sent to him. The defendant in turn sent rattan and other things to or to the account of the plaintiffs. The relationship, however, did not last very long. It appeared that Mr Fung ceased to send any money or goods after August 1991. By October 1991, he had decided to team up with someone else, without telling the defendant. The arrangement with the defendant was all but gone. Mr Fung made reference to difficulty with the proceeds of the large beer shipments sent to the defendant and large unsettled balances in the account as the reason for his allowing the arrangement to come to an end.

6 Mr Fung was entrusted with the keeping of accounts. But neither he nor his secretary Nelly Tan was a trained bookkeeper. They did not use a proper set of account books, nor did they follow any conventional accounting procedure. They had, instead, three hard-cover exercise-type books in which cash advances and the prices and incidental costs of shipments of goods were jotted down, shipment by shipment.

7 The original books were produced at the trial. The pages had a haphazard and amateurish look about them. According to Khoo J, they were an *`accountant's nightmare'.* Entries were made, some were blanked out or crossed out and corrected. Some pages of one book had been torn out. Mr Fung said that they were "daily workings" of the company, "not official records". However, there might still be method in the madness. Defence counsel, who presumably had seen the books, did not make much of a point of it

8 The plaintiffs' claim was based on a set of statements sent to the defendant in August 1992. These statements were basically, in two parts. First, there was an account of the cash remittances and goods sent to the defendant, as well as goods sent from the defendant (the "remittances and purchases account"), and, secondly, an account of the profit made on goods sent to and from the defendant (profit and loss account). The remittances and purchases account showed a total balance of $686,023.97 in the plaintiffs' favour. There was another statement showing a sum of $62,926.80 in favour of the plaintiffs on account of shipments of sanitary ware. In favour of the defendant was his half share of profit, his share being shown as $120,910.22. The plaintiffs' claim was, in sum, the net balance between the two sets of credits.

9 Mr Fung said that the figures in all these statements were extracted from the books referred to earlier. According to him, the accounting was done, broadly, as follows. The defendant was credited with the cost of the goods sent by the defendant. He was debited with the value of the goods as well as the money sent to him in Vietnam. In respect of these goods, if the defendant confirmed that he had a buyer who had agreed to buy them at a certain price, the defendant would be debited with the price. If there was no confirmed buyer, the defendant would be debited with the price payable by the plaintiffs. The values of these goods and the monies sent to the defendant were shown as "remittances" in the accounts. In respect of the rattan and other goods sent by the defendant to the plaintiffs, the defendant would tell him over the phone how much they cost. *Mr Fung would take his word for it, and credit him with the amount. The amounts credited to the defendant for all the shipments are reflected as "Purchases " in the accounts. The profit and loss accounts reflect, basically, the difference between the cost of the goods and the sale price to third parties.* [Emphasis added]

10 Both Mr Fung and Nelly Tan said that in the course of the trading arrangement the defendant made regular visits to Singapore. He would visit the plaintiffs' offices. He had the opportunity to look at the account books. Nelly Tan also said that sets of accounts were given to him every few months. The point they sought to make was that the defendant knew all along the contents of the accounts and had not raised any objections (Khoo J however discounted this evidence). *The state of the "account books" as described above was such that Khoo J did not see how any account in any meaningful sense could have been given to the defendant.* However, it would seem that some time in 1991, nobody knows exactly when, the defendant was provided with partial accountsof remittances and purchases. There was also a set of profit and loss statements dated 15 October 1991 which the defendant admitted to having received. No one was sure when this was given to the defendant. Although dated 15 October 1991, this set of statements, strangely, included some entries dated later.

11 Both Mr Fung and Nelly Tan claimed that copies of credit notes were given to the defendant

on his visits, or faxed to him. It was hard to attach much value to the evidence. Khoo J felt that this was probably done haphazardly. He did not think a system or a procedure was in place.1

12 At the trial, the plaintiffs were given leave to amend their statement of claim to add a plea of account stated. However, this was not seriously pursued, and rightly so. There was no regular rendering of accounts, by word or conduct.

13 In the end after dealing with several contentions and legal issues including an aspect of illegality, Khoo J rejected the plaintiffs' claim based on `account stated' and ordered an inquiry and taking of accounts between the parties.

14 Although Khoo J, in arriving at his conclusions thought there was everything to be said for accepting the plaintiffs' evidence rather than the defendant's since the defendant did not appear to be a very impressive witness and rather unhelpful (see para 36 of his judgment) yet he rejected the plaintiffs claim based on account stated. Having rejected it, he ordered that it would be appropriate to order inquiries and taking of accounts and these should encompass the items in the accounts which were disputed by the defendant, excluding certain items and matters in respect of which the learned judge had his specific findings.

15 Subsequent to the order of Khoo J the second round followed and an account and inquiry was taken by the learned assistant registrar. He made his findings on 30 May 2000 allowing or disallowing items. The concluding part of the learned assistant registrar's findings reads as follows:

> 3 1 **In the light of my findings, the plaintiffs will have to redraw the profit and loss account in order to ascertain each party's half share of the profits, if any, or losses.** Only then can a final account be taken of the monies due from one party to the other. Excluding the defendant's half share of the profit, there is presently a sum of $258,294.65 due from the defendant to the plaintiffs, calculated as follows:

(1)	Remittances made to the defendant	$ 3,135,160.35
(2)	Less: Purchases made by the defendant	$ 2,911,350.19
(3)	Less: Reimbursement of the defendant's extraordinary expenses	$ 68,342.31
(4)	Add: The plaintiffs' claim in respect of the sanitary ware transaction	$ 62,926.80
(5)	Add: Housing loan	$ 40,000.00
		$ 258,394.65

32 I therefore make the following orders for the further conduct of this action:

(1) The plaintiffs are to redraw the profit and loss account in accordance with these

findings, and shall file and serve the amended profit and loss account within 21 days from the date of this order. The said profit and loss account shall explain in detail how the total for each item on the account is arrived at.

(2) The defendant shall file and serve an affidavit that exhaustively lists the specific discrepancies which the defendant alleges are present in the redrawn profit and loss account, and that provides full particulars of the discrepancies with supporting documentary evidence, if any, within 21 days from the date of service of the redrawn profit and loss account on the defendant.

(3) The plaintiffs shall file and serve an affidavit in reply within 21 days from the date of service of t he defendant's affidavit on the plaintiffs.

(4) The further hearing of the taking of accounts shall be adjourned to a date to be fixed by the Registry in the week beginning 7 August 2000 for final submissions on the accuracy or otherwise of the redrawn profit and loss account.

(5) Parties shall be at liberty to apply.

[Emphasis added.]

16 Then there was this third round before me. This was the appeal by the defendant against the findings of the assistant registrar. However, by the time the appeal came up for hearing it was limited to only one item in the finding that was in relation to an amount of $177,000 which the defendant contended should not have been credited to the plaintiffs. Before I set out the arguments advanced in this appeal on behalf of both parties, it is useful to reproduce para 15 of the learned assistant registrar's findings around which the contention revolved. The said para reads:

15 Item 15 - 12,000 cartons of beer; item 16 - 22,500 cartons of beer; and item 29 - 20,000 cartons of beer. These items should be reduced to a total of $855,100. It is not disputed that these 54,500 cartons of beer were in fact received by the defendant. The onus is on the defendant to account for the goods received by him. The plaintiffs claim that 12,000 cartons of beer were purchased at $189,600 and sold a $197,640 or US$108,000 (item 15). The plaintiffs also claim that 22,500 cartons of beer were purchased at $355,500 and sold at $368,550 or US$202,500 (item 16). The plaintiffs purchased the remaining 20,000 cartons of beer at $310,000, but there is no invoice to confirm that beer was sold at $318,620 (item 29). At the very least, the defendant received goods worth a total of $855,100. He must therefore account for the proceeds of sale of these goods. It is not enough for the defendant to claim that he cannot remember the actual selling price or whether he was able to collect all the money due. Nor is it sufficient for the defendant to simply say he was unable to collect money from an acknowledged debtor without explaining what efforts he made to collect those debts. The defendant was given the benefit of doubt in relation to his allegation that he incurred a bad debt of US$12,000 in relation to the sale of the bikes because he explained why he was unable to collect the money, the reason being that the debtor had been jailed. However, the defendant provided no explanation as to why he was unable to collect the debt from Yuri. Thus, while the plaintiffs may not have proved that the defendant received the total sum of $868,430 (comprising the sums of $197,640, $352,170 and $318,620 under items 15, 16 and 29 respectively), the plaintiffs should be credited with at least the cost of the beer, i.e. $855,100. Accordingly, the account of remittances credited to the plaintiffs should be reduced by only $13,330. These transactions should be reflected in the profit and loss account as transactions that did not make any profits or losses.

17 As mentioned earlier, the appeal was confined to only one item ie, $177,000 which according to the defendant was raised by him at the inquiry stage but there was no finding made by the learned assistant registrar in his grounds. In this regard the submission by defendant's counsel as appears at paras 4 to 7 and 13 to 20 requires reproduction in full and reads as follows:

B Subject Matter of Appeal

4. The subject matter of the appeal before the Court is confined only to paragraph 15 of the Ground of Decision of the Learned Assistant Registrar (page 33 of the BOD 1).

5. The Assistant Registrar's decision under this paragraph was

(1) Under the Account of Remittances by the Plaintiffs, the Plaintiffs are to be credited with a sum of $855,100 being the cost of the beer for the three (3) transactions under items 15, 16 and 29 of the Account of Remittance:-

i . Item 15 relates to purchase of 12,000 cartons of beer for $189,600

ii Item 16 relates to purchase of 22,500 cartons of beer for $355,500

iii Item 29 relates to purchase of 20,000 carton of beer for $310, 000

(see Account of Remittance pages 44 to 45 of BOD 1).

(2) The Defendant has not established his inability to collect the alleged bad debts and his claim for bad debt was disallowed.

6. There was nothing said by the Learned Assistant Registrar on the deduction of the sum of $177,000/which the Defendant claimed was paid for the beer directly to the supplier Thai Pore Pte Ltd.

C Reasons for Appeal

7. The Defendant submits that the Learned Registrar erred in considering the claim for deduction of the sum of $177,000 from the price of the beer sent to him that was paid directly to the supplier of the beer one Thai Pore Pte Ltd. for this is contrary to the documentary evidence before the Court as well as the position taken by the Plaintiffs both at the trial and the inquiry before the Learned Assistant Registrar.

E Defendant's position

13. In the Defendant's Affidavit dated the 11/10/97 filed in answer to interrogatories made by the Plaintiffs as early as the 22/7/97, at paragraph A4(h) (page 145), (pages 25 to 28 at pages 26/27), the Defendant made the following statement:

(1) There were a total of 54,500 carton of beer in the 26 containers

(2) He sold 38,500 cartons to a Cambodian by the name of Yuri (or sometime spelt You

Ri)

(3) He sold the other 16,000 cartons to another Cambodia

(4) As to the sale to Yuri had had handwritten accounts which were written by Yuri himself

(5) Yuri paid him a total of $US132,447 in cash to him

(6) Yuri was told to pay the sum of US$163,927 directly to a rubber supplier in part payment of rubber which they had bought from the rubber supplier. This is the transaction for 400T of rubber dated 10/9/90 in the Purchase Section of the Statement of Account 1(see page 49 of BOD 2)

(7) This leaves a sum of US$30,876 which was never paid by Yuri

1 4 . The rubber transaction reflected in the Purchase Section of Statement of Account 1(which is prepared by the Plaintiffs) shows an entry

Date	**Item**	**US$**	**Exchange rate**
10/9/90	By Mekong Express - 400 T Rubber	279,250/-	1.77

15. The Defendant reaffirmed these facts in his Affidavit in chief on the 11th October 1997 (pages 29 to 39 of BOD 2). In paragraph 52 the Defendant repeats that

(1) He sold 38,500 carton to a Cambodian by the name of Yuri

(2) Yuri wrote the account and he obtained a corresponding English translation of it "PL 7" (pages 33 to 38 of BOD 2).

(3) He remembers Yuri having paid a total of US$132,447 in cash to him.

(4) On the Plaintiffs' instructions he then asked Yuri to pay US$163,927 directly to a rubber supplier in part payment of rubber which they had bought from the supplier. This is the transaction under Mekong Express.

(5) He further says that Yuri never paid up the balance of US$30,876 and is a case of bad debt.

16. ***The Defendant therefore has all along at the trial and at the inquiry and taking of accounts stated that a sum of $177,000% payable by Yuri was paid directly by Yuri to the supplier. This is evident from the statement of account keep by Yuri (page 34 of BOD 2). In addition to that the Defendant has always stated that there was bad debts for the beer.***

17. ***The Plaintiffs was never cross-examined on the claim made by him of the***

$177,000, nor was it put to him that this was not so. (see pages 1 to 13 of BOD 2).

18. ***In fact the document which is issued by Thai Pore Pte Ltd is exhibited by the Plaintiffs themselves in their Affidavit support the statement of the Defendant and this amount was accordingly deducted from the price due under the invoice for the 20,000 cartons of beer (see page 65 of BOD 2). The invoice dated the 27/8/90 for the 20,000 cartons of beer reflect a credit of $177,000% being payment to be made in Phnom Penh to Chief Engineer of Mekong Express.***

19. ***The Plaintiffs in their submission in fact never disputed the Defendant's position that the proceeds of the beer was paid and this is because their own documents evidenced it. In fact this was never challenged by the Plaintiffs when they cross-examined the Defendant (see Notes of Evidence) (pages 1 to 13 of BOD 2). The contention of the Plaintiffs was merely that there were no bad debts and that even if there was this was never informed to them and that the Defendant's claim of bad debt therefore cannot be sustained.***

F Conclusion

20. It is therefore submission that from the documents and from the evidence before the Court and fortified by the position all along taken by the Plaintiffs that a sum of $177,000 should be deducted from the amount of $855,100. The remittance to be credited to the Plaintiffs should be reduced accordingly to $678,100.

[Emphasis added.]

18 The plaintiffs' arguments as appear from paras 5 to 15 are *as follows:*

5. The Defendant however is of the view that the Registrar's findings are erroneous on the transaction pertaining to the 20,000 cartons of beer.

20,000 CARTONS OF BEER

The Plaintiffs' contention

6. The 20,000 cartons of beer were purchased by the Plaintiffs at $310,000.00 and were subsequently sold for a profit at $318,620.00. However on the invoice that was tendered to the Plaintiffs, the following endorsement was contained therein:-

"Less: Payment to be made in Phnom Penh to Chief Engineer of Meking Express

Mr Tan

US$100,000.00 @ 1.77"

Copies of the invoice and corresponding Bill of Lading are found on pages 44 and 45 respectively.

7. The Plaintiffs duly paid the sellers of the beer, ThaiPore Enterprise Pte. Ltd, the sum of $100,000.00 in part payment thereof on 12th September 1990. A copy of the receipt and the Plaintiff's bank statement are found on pages 46 and 47 respectively.

8. As to the balance of $210,000.00, the Plaintiffs offset the same from moies due by Thai-Pore Enterprise Pte. Ltd to them. However, when Thai-Pore Enterprise Pte. Ltd failed to make payment of the same, the Plaintiffs commenced legal proceedings for the recovery thereof. A copy of the statement of account as at 3lst January 1991 and the Writ of Summons are found on pages 48 and 49 to 52 respectively.

The Defendant's contention

9. ***In contrast however, the Defendant's version of events pertaining to this transaction is slightly different. He contends that out of the proceeds of sale that he received, he paid the sum of $177,000.00 to the said Chief Engineer of Meking Express, being payment of a debt incurred by the Plaintiffs. The Defendant submits that this amount should therefore be reflected as a payment made by him on the Plaintiffs' behalf. In support thereof, the Defendant has produced a statement indicating that this sum was paid and a copy of this statement together with the translation in the Cambodian language and in Mandarin are found on pages 53 to 58.***

10. ***The Defendant further refers to an invoice dated 15" September 1990 and a corresponding Bill of Lading, both of which indicate that the Plaintiffs were to pay a sum of $266,630.00 for rubber. The Defendant claims that the sum of $177,000.00 was paid towards this debt. Copies of the invoice and Bill of Lading are found on pages 59 and 60 respectively.***

Rebutting the Defendant's contention

11. If the Defendant's contention is to be accepted, it must be the case that the Plaintiffs' alleged debt for the rubber, was due and accruing before the invoice for the beer from Thai-Pore was issued. However a perusal of the dates of the invoices for the rubber and beer, reveals that the invoice for beer was issued before that of the rubber. This means that when the invoice for the beer was issued, the Plaintiffs did not at that juncture owe any monies for the rubber, the invoice of which is found on page 59.

12. In addition, if the Defendant's submissions on this issue were taken at their best and the Plaintiffs were owing monies on the aforesaid invoice for rubber, the same would not be reflected as a reduced payment to ThaiPore. The fact that Thai-Pore were prepared to receive less monies under their invoice, lends credence to the fact that the sum of $177,000.00 was in fact a debt owing by Thai-Pore and not the Plaintiffs.

13. ***Likewise, it is pertinent to note that despite the Defendant's contention that he paid the sum of $177,000.00 to Thai-Pore Enterprise Pte. Ltd. on behalf of the Plaintiffs, he has neglected to provide the court with a receipt thereof.***

14. Furthermore, if the Defendant's contention is to be accepted on this issue, the Defendant would have made an effort to tender an affidavit from the said Mr Youree or from an official from Thai-Pore Enterprise Pte Ltd, and likewise have them examined during the trial. However, as neither were done, the only document allegedly in support of the Defendant's arguments herein, is a statement, which incidentally was not produced by the Defendant to the Plaintiffs until after the suit herein was commenced, as indicated by the Defendant during cros-examination on page 119 of the Notes of Evidence at paragraph E:-

Q : Affidavit 1 page 145 (Cambodian handwriting): you are able to produce this. There is

no reason why you can't produce record of your collection for the 16,000 cartons.

A: These documents were recovered after the start of the court case. We had to search.

15. Having taken into account the aforesaid, the Registrar was correct in not accepting the Defendant's submissions on this issue. The Registrar was however prepared to accept that at the very least, the Plaintiffs had sent and "the defendant received goods worth a total of $855,100. ... ***Thus, while the plaintiffs may not have proved that the defendant received the total sum of $868,430 (comprising the sums of $197,640, $352,170 and $318,620 under items 15, 16 and 29 respectively), the plaintiffs should be credited with at least the cost of the beer, i.e. $855,100." (page 8 of the Grounds of Decision). This therefore means that the court accepted that the Plaintiffs had paid the sum of $855,100.00 for the beer and that correspondingly, the Defendant had not paid the sum of $177,000.00 on behalf of the Plaintiffs, as alleged.***

Conclusion

19 As regards the figure of $177,000 which was in contention before me, there was little dispute that this sum indeed featured in an invoice dated 27 August 1990 from one Thai-Pore Enterprises Pte Ltd (page 65 of the Bundle of Documents). This is the very invoice which details the purchase of 20,000 cartons of beer referred to in paragraph 15 of the learned assistant registrar's grounds of decision. The said invoice states that the price of the 20,000 cartons of beer is $310,000. Immediately beneath this entry there is a reference to a sum of $177,000 as being payment to be made in Phnom Penh to one Chief Engineer of Mekong Express, Mr Tan. This document, I was informed, was at all times in the possession of the plaintiffs and consequently produced by the plaintiffs as part of their exhibits at the inquiry below.

20 Counsel for the defendant submitted that the issue as respects this sum was specifically raised before the learned assistant registrar but unfortunately there was no specific finding on this by the learned assistant registrar. Counsel's submission was that the defendant at all times maintained that this sum of $177,000 was paid for the beer directly to the supplier Thai-Pore Pte Ltd (para 16 of counsel’s submission).

21 Defendant’s counsel then highlighted the aspect (paragraph 17 of his submission) that it was never suggested or put to the defendant during the inquiry hearing that the amount of $177,000 was never paid to the supplier of beer for account of the plaintiffs. Counsel went on to submit (paragraphs 18 and 19 of his submission) that the invoice bespoken was in fact produced by the plaintiffs in their affidavit and curiously the defendant was never at any stage of the hearing challenged on this. The omission to croo-examine the defendant on this very aspect was conceded by plaintiffs’ counsel in his submission (paragraph 2.2 (c)).

22 In the main, the arguments by both counsel revolved around the question as on whom the burden of proof lay. Plaintiffs’ counsel contended that it lay on the defendant. The defendant’s counsel’s reply was that the defendant had discharged his onus by relying on the entry in the said invoice which was produced by the plaintiffs and had been in their possession for a very long period of time on which there was no query raised by the plaintiffs all this while. Counsel for the defendant also argued that at any rate, the plaintiffs’ failure to challenge the claim of the defendant effectively prevented the plaintiffs from raising this issue any further. Implicit in this argument was the submission that had the defendant been challenged, he might well have been in a position at the trial to offer an acceptable explanation or alternatively would have attempted to produce additional material or offered a plausible explanation to support his case.

23 It should be observed at the outset that it was on account of the unsatisfactory state of accounts kept by the parties, Khoo J in the first instance rejected the claim of the plaintiffs based on account stated and ordered the taking of accounts.

24 The learned assistant registrar who conducted the inquiry had indeed a difficult task before him, which I would say had been carried out by him admirably and with great competence. The only missing item in his findings was the averment of the defendant as respects this sum of $177,000. Despite a positive averment by the defendant on which there was neither cross-examination nor any challenge by the plaintiffs, this item seemed to have eluded the scrutiny. When the matter came up on appeal, I was at the outset minded to remit the matter to the learned assistant registrar for re-evaluation. But then I was prevailed upon by counsel that all that needed to be presented was on the record and the court hearing the appeal was well entitled to draw proper inferences and arrive at a conclusion based on available evidence.

25 In my view, the submission on behalf of plaintiffs' counsel that the defendant had not discharged his onus seemed to ignore the reliance by the defendant on the plaintiffs' own document. Also, to the detriment of the plaintiffs there was no cross-examination on this.

26 It is perhaps instructive at this point to make reference to the rule in ***Browne v Dunn*** (1894) 6 R 67 (HL) which is well-entrenched in our jurisprudence – both in the realm of criminal law and civil proceedings. It should be remembered that the said rule has two aspects. In its first aspect the rule in ***Browne v Dunn*** is a rule of practice or procedure designed to achieve fairness to witnesses and a fair trial between the parties. In its second aspect it is a rule relating to weight or cogency of evidence (see ***Bulstrode v Trimble*** [1970] VR 840 at 843 – per Newton J). The said rule has been well-formulated by Hunt J in ***Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation*** [1983] 44 ALR 607 at 623 as follows:

> It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon interferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn.

27 Later on Hunt J at page 630 (*supra*) added:

> … Secondly, and far more significantly, it gives the party calling the witness the opportunity to call corroborative evidence which in the absence of such a challenge is unlikely to have been called. Thirdly, it gives the witness the opportunity both to explain or to qualify his own evidence in the light of the contradiction of which warning has been given and also, if he can, to explain or to qualify the other evidence upon which the challenge is to be based …

28 As I see it, the question as to on whose shoulders the burden lay in civil proceedings becomes somewhat academic when one contestant leads his opponent to believe that the former does not intend to challenge the assertion of the other.

29 In my opinion, the plaintiffs by their failure to challenge or cross-examine the defendant on his averments as to the sum of $177,000 in a way lulled the defendant into believing that the claim for such sum was not put in issue. Had there been a challenge, as had been done apparently rather

spiritedly in regard to other items, it might well be that the defendant would have called for additional ammunition to fight his cause. The failure by the plaintiffs, doubtless, represented the sort of conduct described by *Alexander Pope* in the well-known passage in which he criticised those who were willing to wound and yet afraid to strike.

30 This is a case where an inquiry was being held to determine the credit and debit sides of each parties. Strictly speaking in an inquiry of this nature the plaintiffs and the defendants bear an equal burden in establishing their respective standpoints and the standard of proof is one of balance of probabilities.

31 In my determination, the non-cross-examination of the defendant on this matter most certainly weakened the plaintiffs' claim for the credit claimed. Moreover, the plaintiffs who had this particular invoice with them for quite sometime - bearing in mind the invoice dated back to a transaction in 1990 - should have been prompt in seeking clarification or raised a query over this item much earlier had they wanted to. Such a failure on the part of the plaintiffs indeed affected the overall weight to be given to the plaintiffs' evidence and tended to tilt the scale now in favour of the defendant. The learned assistant registrar unfortunately had omitted to deal with this aspect in his ground. Having regard to the material placed before me and the arguments presented, I am of the view that the plaintiffs are not entitled to the credit of $177,000.

32 A postcript is perhaps warranted at this stage. In this appeal the only matter which was in issue before me was in relation to a credit entry of $177,000. After considering all the arguments, the issue was decided by me in favour of the defendant. The plaintiffs being dissatisfied with my decision have filed a notice of appeal. Section 34 of the Supreme Court of Judicature Act provides that except with the leave of the Court of Appeal or a Judge, no appeal shall be brought to the Court of Appeal (amongst other things) when the amount or value of the subject matter at the trial is $250,000 or less. Although the said section bespeaks the value of *subject matter at the trial* it is also in my view intended to refer to the amount of the *subject matter on appeal* as well. Since the appeal before me was limited only to a sum of $177,000 it would appear to me that leave is a pre-requisite to an appeal to the Court of Appeal. However, at the time of my releasing my grounds of decision, I am not made aware of any such leave being obtained.

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