

PARTIES: PHUOC VAN TRAN

v

VAN THANH BUI

TITLE OF COURT: THE SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: THE SUPREME COURT OF THE NORTHERN
TERRITORY EXERCISING TERRITORY
JURISDICTION

FILE NO: No. 159 of 1994

DELIVERED: Darwin 8 September 1995

JUDGMENT OF: Kearney J

REPRESENTATION:

Counsel:

Plaintiff: Mr A. Wyvill
Defendant: Mr D. Norman

Solicitors:

Plaintiff: David Francis & Associates
Defendant: Dennis Norman & Associates

Judgment category classification: B
Judgment ID Number: kea95034.J
Number of pages: 66

kea95034.J

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 159 of 1994

BETWEEN:

PHUOC VAN TRAN
Plaintiff

AND:

VAN THANH BUI
Defendant

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 8 September 1995)

The respective claims

In this action the plaintiff sues the defendant for damages for his alleged wrongful breach of their contract of 29 January 1994. The defendant counterclaims for a hire fee due and payable to him under the contract, or the same sum as damages for an alleged breach by the plaintiff of their contract; he also seeks damages for loss of profits he would have gained from their contract.

The contract between the plaintiff and defendant, Exhibit P2, was a "bush agreement" made without benefit of lawyers, written by the defendant in the Vietnamese language.

Exhibit P1 is an accurate translation of Exhibit P2 in English,
viz:-

"Contract for hiring crab licence, canoe
and selling crabs

I, TRAN VAN PHUOC, residing at 57 Mahogany Cresc.,
Karama NT; Driver Licence No 978886, agree to hire the
crab licence of Mr BUI VAN THANH No 1536 and his Canoe
No ILIGI with the price of \$15,000.00 from March 1994
to December 1994.

I agree to sell crabs to Mr Thanh for the whole year
1994 to deduct the amount of money I do not give in
advance to Mr Thanh for hiring the licence.

I agree to pay back Mr Thanh a further 10% of crabs
value after the expenses.

I agree to take total responsibility in compensating
all the damage if I do not fulfil the contract. If I
do not sell crabs to Mr Thanh until the end of the
contract, Mr Thanh has the right to take his licence
back and will not return \$15,000.00 to me.

Mr Thanh will have the canoe fully inspected at Yamaha
company and will pay for that to be done. At the end
of the season 30/12/1994, I will ask and will pay for a
full inspection of the canoe at Yamaha company.

(signed by the defendant)

(signed by the
plaintiff)

Date: 29/01/1994
Signed by the licence's owner

Date: 29/01/1994
Signed by the
licence's hirer"

It is common ground that the contract meant that the
plaintiff was to bear all expenses involved in the crab-catching
enterprise; if those expenses were in fact pre-paid by the
defendant as a matter of convenience, the plaintiff was to
reimburse him. It is also common ground that the hiring "price"
of \$15,000 was to be paid by the plaintiff by having it deducted
from the value of crabs which he caught and sold to the defendant

from time to time, until the \$15,000 had been paid in full. Any expenses pre-paid by the defendant were to be reimbursed by the plaintiff in the same way; so was the 10% of the "crabs value after the expenses", payable by the plaintiff to the defendant. That is to say, the plaintiff was not to enjoy any proceeds from the sale of the crabs he caught, until these sums had first been paid.

In essence, the plaintiff claims that the defendant wrongfully repudiated their contract Exhibit P2 towards the end of June 1994 by seizing the "canoe", and since then has prevented the plaintiff from using it to catch crabs; as a result the plaintiff has suffered loss of the profits he would have made from crab-catching under the contract. His claim is for \$39,555 as at 23 April 1995, plus \$8.27 interest per day thereafter, and generally as per his substituted particulars of damage of 24 March 1995.

The defendant resists this claim, contending that the plaintiff in breach of the contract failed to deliver to him any of the crabs he caught. Accordingly, he contends, he was entitled under the express provision of the contract "If I do not - - - to me" (p2), to terminate the contract by permanently removing the boat from Roper Bar as he did in June; and he is entitled to counterclaim for the losses he has sustained by the plaintiff's failure to perform the contract, by failing to "sell crabs" to him. He counter-claims for the hire "price" of \$15,000 in terms of the contractual provision "If I do not - - - to me" (p2); alternatively, he seeks the \$15,000 as damages for breach

of contract. He also claims as damages the loss of profit he would have gained from his arrangement to on-sell the crabs which the plaintiff had contracted to sell him "for the whole year 1994"; he assesses those damages at \$30,000 (\$3 per kg. x an estimated catch for 1994 of 10,000 kgs.).

Sometimes in this judgment, for clarity of exposition, I will refer to the defendant as "the son", and his father Van An Bui as "the father". They come from Vietnam, as does the plaintiff; their lack of familiarity with English, a lack shared by many of the witnesses, was an added difficulty in the case.

The background to the contract Exhibit P2

The plaintiff lived at the defendant's house from the beginning of 1993. He worked for the defendant for some part of the 1993 season, catching crabs at Roper Bar from the defendant's boat. He was paid 50% of the value of the catches, less expenses. Once caught and landed, the crabs were put on the defendant's truck, being loaded thereon by the defendant and his father according to the plaintiff, and transported by the defendant to Darwin for sale. The plaintiff was not then aware that the defendant's father disapproved of the defendant's wife. He said he now knew the father had formerly had his own business, 'Bui's Seafood Supplies', conducted since 1993 by his daughter, defendant's sister Kim Loan Thi Bui (herein 'Ms Kim' or 'the sister'). He said he now knew that that was a different business to the defendant's business, but he had come to know that "only after this thing happened". At transcript p45 he said the

defendant told him that the businesses were separate "at the first catch" in March 1994.

In December 1993 and January 1994, during the break in the crab-catching season, the plaintiff and defendant discussed the basis on which the plaintiff would work for the defendant in 1994. On 29 January 1994 the defendant went to the plaintiff's house with what became the contract Exhibit P2; they signed it that day. The plaintiff did not then know that the defendant had leased the licence and boat in question for the year 1994 only 5 days before from his sister Kim for \$13,000, by agreement dated 24 January 1994; see Exhibit D1. I note that Exhibit D1 is another handwritten "bush agreement". Annexed to it are 2 handwritten receipts, each for \$6500, the first dated 24 January 1994 the lease fee for the period 1 January - 30 June 1994, the second dated 15 July 1994 being the lease fee for the period 1 July - 31 December 1994.

The evidence as to the performance of the contract -
the plaintiff's case

(a) General

There were 5 or 6 crab fishermen working from Roper Bar in 1994 for the defendant or his father. They would stay at sea crabbing for 4-5 days, and return to camp together to hand over the crabs at a pre-arranged date. Initially, in the period March-May, they had to motor for some 7-8 kilometres, and so used more fuel than they needed later in the Dry season.

Mr Chunmy Chang, a Khmer-speaker, testified as follows. He had worked at Roper Bar from March 1994, catching crabs for the father. The crabbers camped together, at night. He delivered his crabs to the father. His evidence was quite difficult to follow, but he agreed that the father and son both attended at Roper Bar "with the truck". His own crabs were weighed by the father. He agreed that the son weighed "the crabs that he wants", and that the father and son were present together at the place of weighing. The crabs were put into trays, and in March 1994 all the trays of the crabbers, whether they worked for the father or for the son, were put on the same truck for transport to Darwin. However, after about 1½ months that truck broke down, and thereafter the father and son drove separate trucks, and their respective crabs were transported separately on these trucks. Sometimes the father's and son's vehicles were together at the same time at Roper Bar; sometimes it was a case of "different time, different day". He said:-

"- - - I see him [in context, this was a reference to the defendant] and his father weigh the crab with [the plaintiff]".

He indicated that the son stayed at Roper Bar "most of the time". He had never seen the plaintiff deliver crabs to anyone except the father or the son. He denied that the plaintiff had offered him \$1000 to come to court - "not one cent for me, nothing." Mr Chang said that at about 1am on a morning towards the end of June 1994, he saw the father and another person take away the boat the plaintiff had been using. I consider that Mr Chang was an honest witness, but his identification of the father must be

doubtful. I accept that initially the father and son attended at Roper Bar together, but had separate crabbers and weighed their respective crabbers' catches; after some time they ceased to attend together, after they had some "falling out"; general reference to the "bad blood" between them permeated much of the evidence, and is sufficiently established.

(b) The plaintiff's account

The plaintiff gave his evidence through an interpreter, as follows; clearly, his English is very poor. He would spend about 5 days out crabbing, before returning to Roper Bar to deliver his catch. Between 19 March and 10 June 1994, a period of some 12 weeks, he caught by his records about 2952 kilograms of crabs. He handed all of his catches over, when landed and weighed, either to the defendant or to the father. He said that the defendant instructed him at Roper Bar when he started working "to deliver the crabs to my father because [he] owns the licence". He kept a record of the weight of his catches of crabs, and dates he made deliveries, but not of the person to whom the deliveries were made; in light of the son's instruction to deliver the crabs to the father, he thought this unnecessary.

I should say I do not accept this evidence of an express instruction by the son to deliver catches of crabs to the father. I consider it is clear that the son was from the start conducting a business quite separate from that of the sister (for whom the father worked) and, as part of that business, was

leasing the canoe and licence from her. There was no rational reason for the son to have given such an instruction to the plaintiff, and I do not accept that he did so.

The plaintiff says that on 25 March at Roper Bar the father showed a receipt dated 17 March, for the cost of fuel he had paid for the plaintiff's boat (\$368.56); this is Exhibit P6, and is made out to "Mr Bui". The father denies that this occurred; I accept the plaintiff's account. The plaintiff said his catch of 364kgs. of crabs, recorded on 25 March, was "delivered to father and son" who were "both there at the same time", and who weighed the catch. He said the defendant and his father "always work together". I accept that this was the case until about mid-April 1994. He recorded the value in his notebook Exhibit P4 on 24 March as "364 x 8.50", and said the father also wrote it down in his book; this was their usual recording procedure. The father said that the only record he ever made was "a little piece of paper" which he put in the particular crabber's pot, and which was later thrown away after his daughter Ms Kim had recorded it. I do not accept that account; I accept the plaintiff's account of the father having a book, apparently supported as it is by the evidence of Cang Van Bui, the defendant's brother, that the father kept a record in a notebook. The crabs were transported to Darwin in the father's truck.

The plaintiff says that the son was present, at various times, when this process of weighing and transporting of crabs

took place over the next 11 weeks; by his records this occurred on 14 occasions.

I should say that I do not accept that the son and the father always "worked together". It is clear that at some time there was a serious falling out between the two of them. However, I accept the plaintiff's evidence as to what occurred on 24 or 25 March 1994.

The plaintiff says that in May the father and son had an argument about the second son's licence; this appears to be a reference to the son's licence. On 4 May the motor of the plaintiff's boat gave trouble. The father transported it to Darwin. There the plaintiff took it to be repaired by a company nominated by the defendant. The repair invoice, Exhibit P5 of 5 May, is in the sum of \$270.58 and made out to "Bui Van Thanh", the defendant. The plaintiff said the sister Ms Kim advanced him the money to pay for these repairs. She does not admit that; she says she paid only certain fuel costs late in May and early June. The defendant says he did not pay it. I am satisfied that Ms Kim paid this account. After the repairs to the motor, the plaintiff says he continued crabbing, delivering his catches to the father, the son being present on most of these occasions.

It is convenient at this point to deal with the evidence relating to 2 allegations put to the plaintiff in cross-examination. First, the plaintiff denied having sold any of the crabs he caught to one Phan Van Tran, the person for whom he worked later in 1994; the subject was put to him tersely in cross-examination:-

"Did you not sell crabs to Phan [Van] Tran?---No."

The defendant called as a witness his older brother Cang Van Bui who said he had worked for the defendant in April 1994 "training an employee for him" as a crabber. This employee was clearly one Matos Mac. While on a boat with Matos, Cang said he had seen the plaintiff in his boat approach the boat of Phan Van Tran, a crabber who worked for himself. On another occasion he saw their two boats "anchored very close to each other" and testified (transcript p154) -

"When I was about 20 metres close to their boats I saw [the plaintiff] taking one pot of crab from his boat and - - - handing over the pot of crab into [Phan Van Tran's] boat. I repeat, a container, a large container of crabs - - - ."

He said he had later told his brother, the defendant - "Your crabs are crawling away". This was when he "was standing on the bank of Roper River where many people were giving their crabs to owners of their licences."

I should say here that I reject the evidence of Cang on this point. It is not credible that he would have said to the defendant, his employer (and his brother), simply that "your crabs are crawling away", without further detail; or that the defendant would not have sought elaboration, and then immediately have taken up the matter with the plaintiff. I did not find the defendant to be a 'shrinking violet'. This alleged incident was not dealt with by the defendant in his evidence, at all. Cang was not in my opinion a disinterested witness.

Second, the plaintiff denied that he had asked Matos Mac to come to Court and falsely testify that the defendant had

purchased the plaintiff's crabs. It will be recalled that it was not the thrust of the plaintiff's evidence that the defendant had purchased his crabs. He said he and Mr Matos, a man from East Timor, did not have a common language other than English and where that was not an effective means of communication "we just use sign [language]"; as, similarly, he communicated with Mr Chang, the Khmer speaker.

Matos Mac was called as a witness by the defendant. He confirmed that in April he was "training" as a crabber for the defendant, with the defendant's brother Cang Van Bui. He worked for the defendant "only around a month". I note that he said nothing about the alleged encounter between the plaintiff and Phan Van Tran to which Cang Van Bui had deposed. He testified however that the plaintiff had approached him one evening in May-June 1994, when the crabbers were having dinner at the river, and put to him in English that he would pay Matos \$1000 if he would come to Court "to be my witness" and say that the defendant had bought the plaintiff's crabs. Mr Matos was working for the father by that time. He said at transcript p170 that his response was:-

"Is not true. - - - his [that is, the defendant's] father buy your crab, not him". I say: "You got nothing through him there, no paper, no nothing. How can you put people in the Court?" I say: "By the law you can't do like this."

He said the plaintiff made the same offer to Chunmy Chang, then present. I note that that suggestion was never put to Mr Chang.

I should say at this point I reject Mr Matos' evidence on this aspect. Nothing was put to the plaintiff in cross-

examination about his suggested bribe of \$1000 to Matos Mac, to give false evidence. It is inherently improbable that the plaintiff was contemplating any court action at the time, if the conversation occurred before he left Roper Bar on 10 June. I note that Mr Matos is married to the defendant's wife's niece; I do not think that he was an impartial witness. However, I accept his evidence to the effect that he observed that the plaintiff "had always given the crabs to the defendant's father" in April and May 1994; I note that this conflicts with the evidence of the father and the sister Ms Kim that the plaintiff sold no crabs to the father until late in May.

During this period the plaintiff said his running expenses were paid for by the defendant, his father, or his sister Ms Kim. I consider that his expenses were paid by Ms Kim's enterprise.

By 10 June 1994, the plaintiff said, he had nothing in hand from his crab-catching activity over the previous 3 months, apart from some \$450 in cash each month his wife said she received from the sister Ms Kim, from the sale to the father of one-claw crabs; Ms Kim denies making those payments. By this time the plaintiff believed from his records of crab catches and prices per kg. that he had caught two-claw crabs to the value of some \$23,000, and that there was therefore now some money due and payable to him under the contract after deducting from the value of his catches the \$15,000 hire "price", his expenses pre-paid to date by the defendant or the sister, and the 10% of the nett value of crabs due to the defendant under the contract. On

10 June, after receiving a message from his wife, he travelled from Roper Bar to Darwin, seeking payment. His account of what happened there is as follows.

At Darwin he spoke to the defendant who told him he "would like to cancel the contract". The defendant told him to go to the defendant's father's house to be paid "because the father had weighed the crabs". He went there; it seems this was 14 June. The sister Ms Kim was there. She did some calculations, applying the contractual arrangements in Exhibit P2 to the records she held, and gave the plaintiff a cheque for \$2699.65.

How this sum was in fact derived, goes to matters at the root of this litigation. According to the plaintiff it was derived as follows:-

Value of total catches of crabs to date, as delivered to the father:		\$23,234.40
less contract hiring price:	\$15,000.00	
less expenses paid by the father, to be reimbursed, to date:	\$ 3,568.12	
less 10% of (\$23,234.40-\$3,568.12), as per contract:	<u>\$1,966.63</u>	<u>\$20,534.75</u>
Cheque to plaintiff, for balance due:		\$ 2,699.65
		=====

The plaintiff's wife's evidence was that she took part in this calculation with Ms Kim in the sense that "she [Kim] calculated and I - - - sat there and watched" (transcript p56), "the contract formula" being used.

Ms Kim gave a very different account of how the amount of \$2699.65 was arrived at. She said that it was calculated as follows:-

Value of two-claw crabs purchased by the father from the plaintiff:	\$3,660
less fuel purchased by the father for the plaintiff:	<u>\$ 960.35</u>
Cheque to plaintiff, for balance due:	\$2,699.65 =====

For her working sheet, see Exhibit P15 at p37.

A few days later, on 16 June 1994, the plaintiff said he was summoned to attend again at the father's house. He was told "to bring my copy of the contract [Exhibit P2]". The defendant was present. He took the plaintiff's copy of the contract (Exhibit P2) and wrote "Cancelled" on the back of it, in Vietnamese. The father kept this document; I note that no such document has been discovered on third party discovery by the father, or is in evidence. The defendant then left. The defendant denies all of this. The father then put a contract in front of the plaintiff to sign. It was written in English, which the plaintiff cannot read. He said he wanted to get some advice before signing it. He did not wish to contract with the defendant's father, because he did not trust him. He did not agree at any time to the contract Exhibit P2 being cancelled. He went to see the defendant, told him he was returning to Roper Bar in 3 days time, and would thereafter deliver his catches of crabs to the defendant.

I observe in passing that this contract said to emanate from the father is not in evidence before me. I have no knowledge of its contents; it is mere speculation that it may have been such that, if entered into, this litigation may not have ensued. In any event, that did not occur, and events moved to a climax; clearly the defendant now wanted nothing more to do with the plaintiff. The plaintiff returned to Roper Bar about 24 June 1994. On arrival, he found that the boat the subject of his contract Exhibit P2 had been removed; I note that the defendant admits he had removed it. The plaintiff then returned to Darwin. He did not attempt to contact the defendant or his father again. After about 1 month, he got a job catching crabs for Phan Van Tran earning, he agreed, about \$15,000 in the remainder of 1994; I note that this should be adjusted to \$21,748.00.

He estimated that under his contract Exhibit P2 his average catch would have been about 1000kgs. of crabs per month for the last 6 months of the contract to the end of 1994; he would have worked to the end of December 1994. He estimated he would have received an average price of \$10.66 per kg. for crabs caught, and that his expenses would have been about \$500 per month. See generally the particulars of damage handed up on 24 March 1995 by Mr Wyvill of counsel for the plaintiff, earlier referred to.

(c) The plaintiff's wife's evidence

The plaintiff's wife Mai Thi Nguyen said she kept a record of the plaintiff's catches of two-clawed crabs in a

notebook, Exhibit P7. She obtained the information which she there recorded for the catch for 25 March 1994 - "364 x 8.50 = 3094.05" (sic) - from the son, at his house in Darwin.

Thereafter, it appears from her evidence that she attended at the father's house in Darwin after every catch had been brought back to Darwin, and recorded in Exhibit P7 the information as to weight and value per kilogram of crabs caught, which the father gave her.

She said that the daughter Ms Kim gave her about \$450 cash each month for one-claw crabs the plaintiff had caught; the son had told her to go to his father for payment for the one-claw crabs, when she had earlier approached him for payment. I note that Ms Kim denied that she had ever purchased one-claw crabs from the plaintiff, or paid his wife for them. She said she kept a record in a book of payments made to crabbers for one-claw crabs; she chose not to produce the book to the Court. Whether it would have assisted, I do not know. I do not accept Ms Kim's evidence on the point of payment for the plaintiff's one-claw crabs; I prefer that of the plaintiff's wife.

She said that at the time she received monies from time to time for the one-claw crabs, the father and the daughter Kim would also give her the invoices or receipts for expenses which the father had meanwhile incurred for the plaintiff. According to the plaintiff's wife these invoices total 24 in all (Exhibit P8); I note that they are nearly all for fuel, extend from 23 March to 8 June 1994, and total \$3371.05. Nearly all are cash sales dockets; one is an invoice addressed to "Mr Bui"; another

invoice is addressed to "Mr Bui", giving the father's address; 18 have the plaintiff's name written on the back. The total of \$3371.05 does not include the item \$368.56 for fuel on 17 March (Exhibit P6).

She said that when eventually in June 1994 on behalf of her husband she sought payment of the balance monies due for catches of two-clawed crabs to that time, the father told her:-

"- - - I didn't work with you. I work with your husband."

I accept her evidence on that point. She then wrote to her husband at Roper Bar; this accounted for his return on 10 June.

She said that she was present at the meeting on 14 June at the father's house, when she received a cheque for \$2699.65; she had taken part with the daughter Kim in calculating that sum, using "the contract formula", in the sense that she "sat there and watched". Her husband, the father and his two daughters Ms Kim and Ms Tau were also present. She said that she asked the father -

" - - - to sign a receipt saying that he receive (sic) the \$15,000 I paid to him."

The father refused to do so. About 1 hour later, at the son's house which was nearby - this was before she received the cheque for \$2699.65 - she spoke to the son, informing him that his father "didn't want - - - to sign that he [the father] received 15,000". She said that the son's response was that -

"- - - he didn't know, because - - - the father bought the crabs."

That was the last time she spoke to the son about the crabbing at Roper Bar.

She said that the son had never told her at any time that the plaintiff was delivering the crabs to the wrong person. She denied Mr Norman's suggestion that the son had telephoned her on at least 4 occasions in April-May 1994, expressing his concern that the plaintiff was not supplying him with any crabs. I note here that in his evidence (transcript p66) the son first said he had never spoken to her about the crabs; but he said later (transcript p73) that he telephoned 4 times, and spoke to her on the fourth occasion. I accept the plaintiff's wife's evidence in that I do not consider that the defendant ever raised his concerns in April/May about non-delivery of crabs with the plaintiff or his wife.

She said that she was present at the meeting at the father's house on 16 June 1994 where the cancellation of the contract Exhibit P2 was discussed, and her husband was asked to enter into a new one with the father; her account generally followed her husband's account.

She produced notes of the plaintiff's subsequent earnings from crab-catching from 4 August to 14 December 1994, showing total earnings of \$21,748.00.

The evidence as to the performance of the contract -
the defendant's case

The thrust of the defendant's case was that he had had no partnership or agency arrangement with his father and sister Ms Kim, and had never received any crabs from the plaintiff pursuant to the contract Exhibit P2 (p2). He was therefore

justified under that contract (p2) in terminating it, as he had done late in June 1994 by seizing the boat, and in counterclaiming for damages for the plaintiff's breach.

(a) The defendant's account

I found the defendant to be a confident witness, fairly aggressive at times. He was never intimidated. He said that in 1991 he first met the plaintiff, who came to work for him in January 1993. From June 1993 to June 1994 he was engaged in a business, in partnership with his wife Nguyen Thi Thung. I note that he did not make discovery of any documents relating to that business partnership.

He said he was never part of, or had anything to do with, a crab-supply business which his sister Ms Kim conducted, called 'Bui Seafood Supplies'. He said that when he took the plaintiff to Roper Bar in March 1994 he told the plaintiff "you must be give crab to me." I do not accept that.

He said that he was not on friendly terms with his father; they "argue all the time", and "we never talk to [each other]". He stated the reason as follows:-

"- - - when my workers [catch] a lot [more crabs] than [his workers do], - - - then [he is] getting angry and so he [tries] to get my workers' [crabs], sometimes. That's why, when I know it, I never talk to him. I just argue [with] him all the time before, and say: 'Why do you want all the time buy crab from my worker?'".

He said that his father never spoke to the defendant's wife; I note her evidence was that she had never been in the father's house. Clearly, for a variety of reasons, many of which I think

remain undisclosed, the relationship between the father and the son came to be bitter.

He had leased the boat and crab licence no 1536 from his sister Ms Kim on 24 January 1994, as per their agreement Exhibit D1. On 29 January 1994 he had entered into the contract Exhibit P2 with the plaintiff. In the light of his commitments under his contract with Kim (Exhibit D1) he needed to receive crabs from the plaintiff, as he had to pay \$13,000 to Kim for his lease. He drove to Roper Bar every 4 to 7 days between March and June 1994, to collect crabs. The one-way trip takes nearly 12 hours. He never travelled there with his father.

He said that he had received no crabs from the plaintiff between March and June 1994. He said:-

"- - - I speak to [the plaintiff] - - - one more or two more time because I didn't see my crab coming in - - -

- - - Last time he says 'I'm sick. I can't do check the pot. Can't do this, can't do that', and then he didn't give to me the crabs. Last time I try to cancel the licence, but I got no reason."

I should say that I find it incredible that if the defendant received no crabs at all from the defendant during this period of 12 weeks from March to June 1994, a time when he was visiting Roper River "every 4 to 7 days", and was dissatisfied with it, he would not have quickly taken action to terminate the contract, had it not been for his father's involvement. He did not present to me as a man who would not stand up for his rights. It is inconceivable that he would have spoken to the plaintiff only once or twice, about the lack of crabs. The truth of the matter, I am satisfied, is that stemming from his complex familial

relationship with his father, he did not directly challenge either the plaintiff or his father, though he was very well aware that the father was taking the plaintiff's catches of crabs. See his evidence at transcript pp83-85, at pp22-3.

He said that he knew nothing about the payment of \$2699.65 to the plaintiff by Kim "because that's crabs he sell to my sister. I really don't know about it." I accept that.

He said he had had 4 other workers catching crabs for him at times between March and June 1994: his brothers Chac Van Bui and Cang Van Bui; and Matos Mac and Loy Wang Tung. At Roper Bar he would weigh his crabbers' catches. He produced a small book Exhibit D2, in which he said he entered details of each crabber's catches, on the dates he weighed them. There is no record there of any catches by the plaintiff. I note that one page, between the page headed "Week 4" and "Week 6" is missing, as is a page at the end of the "Notes" near the beginning. I also note that amongst other dates on which the diary records he was present at Roper Bar collecting crabs, are 10 April, 28 April and 19 May; these were days on which his father is recorded by the plaintiff as having collected crabs from him at Roper Bar. However, I accept that he received no crabs from the plaintiff.

He gave evidence that he on-sold crabs he bought, making a clear profit of \$3.00 per kilo. He said that he and his father went to Roper Bar in separate trucks, and at different times of the day. They had never used the same truck; I am satisfied that initially they did use the same truck.

On the question of the plaintiff selling his catches of crabs to the father his evidence at transcript pp83-85 was:-

"[MR WYVILL:] Did you ever tell Phuoc [the plaintiff], when you saw him at Roper Bar, to stop giving the crabs to your father?---I see him but when I coming in my father not there, but he's work there, he say he's sick or has problem.

Answer the question please. Did you ever say to Phuoc to stop giving the crabs to your father?---I didn't say to him anything about it."

I note that he never varied from that answer. I found it surprising and this led to the following:-

"HIS HONOUR: Well surely you would have spoken to him about that?---Yes, I speak to him in there.

- - -

MR WYVILL: And what did you say to him?---I just say 'Where my crab'.

And what did he say?---He say 'Oh today engine broken, something wrong we can't check the pot'. He just say that, and I keep quiet."

As I noted earlier, the suggestion that the defendant would do nothing for 12 weeks in the face of such lame excuses from the plaintiff as he said he was getting, is unbelievable, were it not for his father's involvement. His evidence continued:-

"Which day was that?---Many days here when I come to pick it up, some time I see him, some time he miss - he didn't come back to see me. So you ask me exactly (inaudible) how I remember.

Did you ever ask your father to give you the crabs that Phuoc had given him?--- - - - sometimes I cross the route with my father, then I know that he has weigh the crab. Maybe his own crab or his crab from Phuoc, but I cannot know [until] - - - I already arrive at the spot, crabbing. Then I found that Phuoc has no crab for me, but I cannot know - - - if he has sold [to] my father or to any other group, if it's sold to another group or licence holder. I don't have the evidence, so I cannot say - - - to which - - - group [or] holder of licence:

but when I - - - finally was there at the spot, then Phuoc didn't have any crab for me.

I will ask it again. Did you ever ask your father to give back the crabs that Phuoc was giving him?---No, - - - because I don't know he got the crab from Phuoc or not, and I never miss [sic, see] him in there. That's why I didn't ask.

Are you now [saying] that you didn't know that your father was taking Phuoc's crabs?---Yeah, because when I come in there he just (inaudible) me. I never miss [sic, see] him there. He always go before me.

Did you ever ask you father whether he was taking Phuoc's crabs?---No.

Did you think it was possible that the crabs may have been given to your father?--- - - - I did not have at any time any evidence that the crabs come from Phuoc because I did not meet him [that is, his father] face to face, standing at the spot of crabbing and weighing the crabs which should be sold to me from Phuoc. And the evidence that I was having a lot of argument between my father and myself was that I refused to pay a certain sum of money, which I promised to - - - my sister, Kim - - -

To Kim?---To Kim. To Kim Loan. And I refused to [pay] her [because] I say that sometimes I crossed the path of my father, and I guess that he has purchased the crabs from Phuoc which should be sold to me.

You guessed that? You suspected that?---Yes.

Did you ask him then whether it was true or not?--- That's why I tell you, I argue with him. I don't want to meet him. I don't want to talk to him. But I talk to my sister [Kim] when go to the airport. That's why I got the reason to cancel the licence from Phuoc.

Did you ever suggest to your sister, who was owed this money, that she take it out of the crabs that Phuoc had sold her and your father?---I suspect it but I don't have any evidence of it. So I threaten her that I will cancel the licence so then I can lease the licence out to another person, and then, only then, can I repay her the sum of money that we have agreed between each other."

I should say here that I reject this evidence of the defendant to the effect that he was not well aware that the plaintiff was

selling his crabs to the father. It is wholly implausible. He says he "guessed" it was so, or "suspected" it. It seems that the family dynamics were such that the defendant felt unable to tackle the father directly about what he must have known was going on. Similarly, I reject the defendant's account that he tackled the plaintiff about the lack of crabs, was met with a series of obviously spurious excuses, and did nothing about it for 3 months. I do not assess the defendant as that sort of man. For whatever reason, I am satisfied he did not raise the matter of the sale of the crabs to the father, with the plaintiff; nor did he raise it with the father. I conclude that, fed up with what the father was doing, but for family reasons being unwilling or unable to tackle him directly, he eventually tackled the sister Ms Kim at the airport to the effect he deposed (p23).

He said that he bought crabs from crabbers other than his own workers, but had never been at Roper Bar collecting crabs at the same time as his father. About 1 week after he "rolled" his big truck, he hired a Landcruiser for his future trips to Roper Bar, on 22 April 1994.

He said he had not been present at his father's house when the plaintiff was handed a cheque for \$2699.65. He said that in June 1994 he had re-taken possession of the boat the subject of the contract Exhibit P2. Before doing so, he had telephoned the plaintiff -

"Before I try to cancel his licence, I ring him up. I give him a call for four time."

On the first three occasions he missed the plaintiff; on the fourth occasion he spoke to his wife, though he heard the plaintiff's voice in the background saying "Go ahead. He can do anything he likes". He told the wife that he was "going to cancel the contract." I accept his evidence about these telephone calls. He did not thereafter speak to the plaintiff, and he knew nothing about any contract being drawn up directly between the plaintiff and the father.

He agreed that the plaintiff came to see him in Darwin on 4 May 1994 to have the motor repaired. He admits he did not tackle the plaintiff about not supplying him with crabs, although some 6 weeks had elapsed at that time. His evidence (at transcript pp85-86) was as follows:-

"What else did you say to Phuoc at that time?---I didn't say anything.

You didn't say to him, 'Phuoc, why aren't you giving me these crabs that you've been catching over the last two months'?---Yes, because he tried to stolen [sic] all the crab on my money when he give back to me. That's why he didn't say. But I got no reason to catch him.

You didn't say anything to him about the fact he wasn't - - -?---No need to say. I want to cancel the licence, that's all.

You wanted to cancel the licence in May, did you? Why didn't you just keep the outboard and say, 'I'm not going to give it back to you until you start giving me the crabs'?---Wait a minute. On 5 May I did not have any evidence, tangible evidence, that he could have sold the crabs to other people. I suspected, and I know that he has sold, because I couldn't have any crabs from him, but I didn't have any evidence. So I cannot, therefore I cannot, just take away and not repair the motor boat."

I comment that to say that evidence would not have been readily available to him, on his many trips to Roper Bar since March, is incredible. His evidence continued:-

"At this time you had not received one single crab from Phuoc?---No.

Phuoc came after you, came to see you, in June asking for money?---No. No way, man. Because he didn't sell crab to me, how he coming to me he ask for money?

Did his wife ask you for money?---No.

They didn't come to see you in June of 1994 saying, 'Can you pay me for the crabs'?---No, only after that I got the lease ready, I try to cancel his licence. I just give him a call, four time, before I start cancel the licence.

Were you at a meeting on 16 June 1994 which was attended by you, your father, Phuoc and your sister, and Phuoc's wife?---No, I never meet him. That's why I argue how I meet him for. I just know my licence I want to get the money. I want my business, that's all.

Did you at any stage have a meeting with Phuoc where you wrote 'cancelled' on the back of a contract?---No, I don't think.

You don't think so?---No.

Is it possible that you may have?---100 percent. Because that licence I leased, I cancel the licence. I write before."

(b) The father's evidence

He drives for the business enterprise now conducted by his daughter Ms Kim. He had owned this business until 1993; it involves the buying and selling of crabs and the leasing out of crab licences. The son runs a similar, quite separate, business with his wife.

He said that he had had arguments with the son "quite a lot of times".

In 1994 he drove alone to Roper Bar 4 or 5 times a month. He never travelled with the son. There would be 20 to 40 boats there catching crabs. His evidence at pp95-96 was:-

"[MR NORMAN:] Would you, when you went to Roper, see other licence holders there?---Because each owner and each purchaser and seller of crabs would have his or her own spot I usually drove my vehicle to go and purchase and weigh my crabs at my own spot.

You would stay sometimes overnight?---No, I never slept there.

- - -

Did you ever see your son at Roper Bar?---Very seldom but maybe once and each time like that I argue with him. - - -

- - -

MR NORMAN: Coming back from Roper have you met your son going to Roper?---Sometimes we cross road because I drove out to the spot three or four hours before he drove up.

Did you know [the plaintiff]?---Yes, I know him.

Did you see him at Roper?---Yes, I did see him.

And do you know what he was doing at Roper?---Towards the end of May '94. Phuoc did come to me to sell crabs. Then I ask my daughter if she would like to buy them. I telephone her and I ask her on the phone would she like to buy the crabs. Then - then we had bought from him four times around the period of the end of May and June. In the same period there was also a guy call Chunmy Cheng. That guy also worked with - with my daughter on contract, under contract, and the licence is 11/95. In the same period Phuoc sold to my daughter, crabs. And the guy called Chunmy Cheng has talked to Phuoc and this guy Chunmy Cheng also gave that little notebook to Phuoc but I could not see anything written on the little notebook which Chunmy Cheng exchange with Phuoc because I don't know English at all.

MR WYVILL: Your Honour, I just pause here to note that the rule of *Browne v Dunn* [(1893) 6 R 67] is being vigorously ignored by the defendant in this matter. None of this was put to Mr Cheng, none of it was put to my client. I don't want to stop proceedings or to stop

this evidence coming out, but perhaps Your Honour can note my objection.

HIS HONOUR: Yes, thank you for drawing it to my attention. Mr Norman can do whatever he wishes to do about that.

MR NORMAN : When you purchased crabs from Phuoc were you working on behalf of your son?---Because - - - this time that Phuoc sold the crabs to me, with the agreement of (inaudible), Phuoc sold it at a higher price than he would sell to my son, so my - - - daughter was not very much agreeable with my son, so we know that we have purchased the crab from - which should be sold to Trinh but we still purchase it because it's - Phuoc would like to sell it at a higher price.

Sir, I have no further questions. The breach of the rule [in *Browne v Dunn*] Your Honour, that's the first I've heard of what the witness said. He does have language difficulties. - - - "

His evidence at transcript pp100-101 was:-

"MR WYVILL: - - - you tell us, don't you, Mr Bui, that you - - - only bought crabs from - - - Mr Phuoc on four occasions in 1994; that's all you did?---Yes. In that period of time, end of May beginning of June, altogether I bought - - - crabs four times. During the same period of time, I saw Phuoc and the other guy, Chunmy Cheng [sic], exchange their notebooks and records of purchase and sale of crabs.

Mr Bui, do you understand the significance of telling untruths to his Honour?---I swear it's all the truth and I say it's the truth. If it's untrue, I'll be punished.

You did not buy any crabs, - - - from Mr Phuoc prior to the end of May?---No."

I should say that I reject the father's account that the plaintiff made the first approach, seeking to deliver crabs to him, and that this did not occur until "towards the end of May", and was limited to 4 sales. I have no doubt that it was the father who insisted that the plaintiff sell his crabs to him, and that this started from the beginning. I also reject his not-so-

slightly-veiled suggestion that Chunmy Chang had somehow "cooked the books" with the plaintiff; he made his allegation more specific at transcript pp115-6, set out at p32. These allegations were never put to Chunmy Chang (who worked for the father from March 1994) or the plaintiff; no one sought to have Mr Chang produce his notebook of his crab catches. It was clearly a piece of false evidence, fabricated by the father in an endeavour to lend credibility to his account that he bought crabs from the plaintiff at the latter's insistence on only 4 occasions, from the latter part of May 1994.

The father denied that he had taken the plaintiff's boat away from Roper Bar in June 1994; I accept that - it is not clearly established that he took part with the defendant in removing the boat.

I note at this point that it appears from the plaintiff's record (Exhibit P4) that he delivered crabs on 14 occasions: on 25 March, 2, 6, 10, 15, 19, 23 and 28 April, 4, 19, 24 and 30 May, and 4 and 10 June 1994. The same record shows a total weight of 2952.6 kgs of crabs delivered on those occasions, at prices varying from \$8.50 to \$7.00 per kg. According to the father, he received crabs from the plaintiff only on 4 occasions, which accords with Ms Kim's record (Exhibit P15) at p37; as I indicated above, I reject this evidence by the father, and I am satisfied he was buying the plaintiff's crabs from the beginning.

The father first denied that it was his name on the affidavit of discovery of 22 November 1994 (Document 21), saying that his name was "Bui Van An", and not "An Van Bui" as there set

out; more seriously, he also denied that the signature on that affidavit was his. That was patently false, as later appeared from the evidence of the attesting witness, Mr Carter. After Mr Carter testified, the father acknowledged that it was his signature on Document 21. This was a small, but effective, illustration of his approach to giving evidence.

He said that his daughter Ms Kim kept all the records of the kilograms of crabs which he bought at Roper River, entering that record in a book from scraps of paper on which he detailed his purchases at the time of purchasing at Roper Bar, and brought back to Darwin.

Mr Wyvill confronted the father with copies of various official Returns under the Fisheries Act, being the plaintiff's returns of crabs he had caught in March (145 kgs) April (655 kgs) and May (395 kgs) 1994, a total of 1195 kgs. These copy Returns had been produced on discovery by the daughter Ms Kim. She denied that she had filled out these returns; I have no doubt that she did. It is obvious that the plaintiff is functionally illiterate in English and there is material on these Returns relating to the sales of the crabs which I am satisfied came from Ms Kim. It can be seen that the Returns seriously understate the weight of crabs the plaintiff says he caught in those 3 months; according to the plaintiff's records he caught 2777.1 kgs in those months, not 1195 kgs. Mr Wyvill's cross-examination of the father continued at pp101-2:-

"MR WYVILL: What I am saying to you is this, Mr Bui, -
- - that the only reason your daughter had any
information about how many crabs Mr Phuoc [caught] was

because you had told her that he had given you crabs at Roper Bar in March?---Can you repeat?

The reason why your daughter was able to fill out this [return] for March of 1994 was because you told her how much crab Mr Phuoc had given to you?---No, that's not true. That's false."

I do not accept that denial; I think it is clear that Ms Kim filled out the details in the Returns, understating the weight of crabs caught of which she had been made aware, for reasons that may be the subject of speculation elsewhere, but are not relevant in this case.

The father first denied that he had ever held a crab licence in his own name, but later admitted it, and that he had transferred it to his daughter Ms Kim. He said she had never been to Roper Bar, or done any crabbing.

He denied knowing anything about one of the receipts in Exhibit P8, a receipt in the sum of \$153.80 for repairs dated 3 May 1994, addressed to "Mr Bui, 16 Liverstonia (sic) Street, Karama". He agreed that that was his name and address, but said "anybody who buys something - - - can fill it in" (transcript p113). I consider it is clear that he or his daughter Ms Kim paid that bill, and the inference I draw is that at that date they were buying the plaintiff's crabs, contrary to their evidence. This immediately throws doubt upon the veracity of their derivation of the cheque for \$2699.65 in their calculations in Exhibit P15 (p37).

Similarly, the father denied knowledge of a receipt for repairs of 31 March 1994 in the sum of \$64.42. He denied paying any of the plaintiff's expenses, between March and June 1994. He

denied having seen any of the invoices in Exhibit P8, or the invoice Exhibit P6. Perhaps he left these matters to Ms Kim. He said that towards the end of May when the plaintiff sold him some crabs "it means that I have to give him some fuel four times"; however he said he had no record of the amount, or the cost. He did not recall being at Roper Bar on 25 March 1994. Mr Wyvill continued his cross-examination pp115-6:-

"[MR WYVILL]: See, your son [the defendant] gave evidence - - - that the two of you were at Roper Bar on 10 April 1994; is that correct?---Once I met him there and then I argue with him. And each time I met him at Roper River I argue. But only for the period of time end of May, beginning of June '94 where I bought crabs from Phuoc.

- - - please translate what he just said?
---I remember that each time I bought from Phuoc then I take record of the amount of crabs and then I also know about the same time I saw Phuoc selling crabs to another guy, Chunmy Cheng.

Phuoc is now selling crabs to Chunmy Cheng is he?---
Each time that I bought crabs from Phuoc, end of May and beginning of June, then I saw Mr Chunmy Cheng and Mr Phuoc exchanging the records and note book.

- - -

Mr Bui, do you remember Mr Phuoc coming round to your place?---I met him at my place to pay for the crabs he sold me for those four times and I have already told you about.

But this was on about 14 June?---No, I don't remember the exact date.

At that time was Mr Phuoc's wife there?---Yes, the wife of Mr Phuoc was there around June.

Did Mrs Phuoc, or Mr Phuoc's wife, did she and your daughter [Ms Kim] work out how much money Mr Phuoc was to be paid?---They calculate out how much money they should receive and - - - how much money my daughter should give to them."

I observe that on the face of it, this appears to acknowledge that the plaintiff and his wife took some part in the calculations which led to their receiving a cheque for \$2699.65. His evidence continued:-

"Did your daughter at that stage, or did you, give Mr Phuoc or his wife a whole bundle of invoices?---No.

Mr Phuoc's wife, did she often come to your place in April and May and ask for the one-claw crab money? ---No.

If you know, did you or your daughter give Mr Phuoc's wife the invoices at that time?---No.

At that meeting where you gave Mr Phuoc his cheque did you say anything to him about him not giving the crabs to your son?---Because this is done to compete with each other, so to buy and then sell out with more profit. So why do I have to tell Phuoc that he should give it to my son?

That's not the question I was asking, Mr Bui. The question I was asking was: Did you tell him that he was selling crabs to the wrong person?---No.

Did you have a meeting a couple of days later with Mr Phuoc and his wife?---Can you repeat the question?

A couple of days, one or two days, after you gave Mr Phuoc the cheque, did you have another meeting with him?---No.

Mr Bui, were you at Roper Bar on 24 June?---I can't remember the exact date.

Mr Bui, you and your son took my client's boat, didn't you, on that day?---No, I don't know."

He said that he did not take the plaintiff's boat away at the end of June, because "it's not my business". I did not find the father a credible witness.

(c) The sister's evidence

Kim Loan Thi Bui is a student aged 24; she is studying Accountancy at the University. I found her a cautious and stubborn witness, who adhered rigidly to a fixed account. She identified the lease of the licence, Exhibit D1, and the signatures thereon of her brother and herself, saying that the document was written out in English on 24 January by "my secretary", who proved also to be her sister Ms Tau Thi Bui. Ms Tau did not testify. Ms Kim had subsequently attended at the Fisheries Department; she appeared to agree (transcript p120) that this was for the licence to "be transferred" to the defendant. However, there is no proof that this ever occurred; no Department document recording any such transfer has been produced. It is possible that all she did was to take action to notify the Department about the plaintiff, when she found out "one week after" that the defendant had "re-lease it to Phuoc".

The Departmental form, Exhibit P3 dated 1 March 1994, refers to the appointment of the plaintiff to take control of a licensed operation under (the then) Section 13(2) of the Fisheries Act from the licensee Ms Kim. This is not a transfer of the licence to the defendant or to the plaintiff. The Act as it then stood may not have contemplated the transfer or leasing of licences; s14(1) required approval of "suitable" persons for the carrying on of "the fishing operations of the licensee", in the limited circumstances where that was permitted.

The then s13(2) had nothing to do with transfers; it was concerned with the appointment of a person to maintain

control of a licensee's fishing operation when the licensee was "unable to be in the vicinity." Exhibit P3 is a request by Ms Kim for the Director's approval that the plaintiff "take control of my fishing operation" (underlining mine) from 1 March to 30 December 1994, her "reason for absence" being "study". Exhibit P3 bears the following official notation:-

"The approved person assumes full responsibility for complying with Fisheries legislation in relation to the licence."

On the face of it, in Exhibit P3 Ms Kim was informing the Department that she wanted approval for the plaintiff to take control of her fishing operation, without disclosing the prior existence of the current lease of 24 January to the defendant Exhibit D1. Taken at face value Exhibit P3 may militate against the contentions sought to be advanced by the defendant, and the father and sister, particularly in the absence of the production of any Departmental approval under s13(2) in relation to the defendant. However, nothing was sought to be made of this in final addresses, and I discard it from consideration.

Ms Kim said she had never seen Exhibit P2 before she came to Court; that would be consistent with her account that its provisions played no part in her calculations of the amount due to the plaintiff of \$2699.65.

As regards her relationship with the defendant she said "we are not agreeable with each other." She said that she had bought crabs from the plaintiff only four times in 1994 - "end of May, beginning of June, but I have recorded on some document." She paid him by cheque, in June, at her home; she said that her

brother the defendant was not present at the time. Her father was present, but took no part. Her evidence as to the calculation of the amount of the cheque, \$2699.65, at transcript p123 was:-

"[MR NORMAN:] - - - how did you arrive at that figure - - - \$2699.65? How did you calculate that amount?--- Because each time that the crabs arrive, my father has written on a little piece of paper how many kilos of crabs and from which person, and he put it in the crabs container of that employee. And from those little bits of paper then I record back in my notebook, and I only write the records of all of the employees of mine. And if we talk about the example of Phuoc, I don't work with him. I only bought from him one or 2, or 3 or 4 times. I took the record of the amount of kilos of crabs in one piece of paper for declaration of tax."

She is here explaining that she only recorded in her notebook details of the catches of her employees, and the plaintiff was not one of them, so his catches would not appear in her notebook, but separately. She did not produce her notebook. Her evidence continued:-

"[MR NORMAN:] Did you make an allowance for the sum of \$15,000?

---I don't understand your question.

- - -

MR NORMAN: When you were working out how much you should pay Phuoc, you made allowance for expenses and that sort of thing?---No.

Yes, did Phuoc say that he had to pay \$15,000 for his lease to your brother?---That's my brother's business.

I have nothing to do with his business.

And do you know how much your brother was leasing to Phuoc, how much - - -?---No, I don't know."

She said that she had not lodged the Fisheries Returns for the plaintiff's catches of crabs for March, April and May 1994, saying that that was the plaintiff's responsibility. She

also denied providing the information to enable those forms to be filled in. As noted earlier, I do not accept her evidence on that aspect. The plaintiff is quite illiterate in English. I consider that the Department was seriously misinformed as to the weight of crabs caught by the plaintiff in those months and she was responsible for misinforming the Department. There is information on those forms as to the destination of the crabs interstate which I am satisfied could only have emanated from Ms Kim.

She identified a document (Exhibit P15) which she said had been prepared by her secretary - her sister - which detailed how she claimed the payment of \$2699.65 to the plaintiff on 14 June 1994 was made up, viz:-

"Pay to Phuoc Van Tran

Date	Weight	Price	Total
24/5/94	112.5kg	\$8	\$900
30/5	143.5kg		1148
4/6	107		856
9/6	94.5		<u>756</u>
			\$3660

Pay to Phuoc chq No.135 \$2,699.65
14/6

Buy fuel for Phuoc Van Tran

23/5/94	Chq No.120	Fuel	295.56
28/5	128		70.60
29/5	130		<u>148.38</u>
			514.54

3/6		Fuel	295.81
8/6			150

	Chq No.140	8/7	445.81
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	Total Fuel cost		960.35"
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It can be seen that the cheque for \$2699.65 is here said to represent the total value of crabs bought from the plaintiff on 4 occasions (\$3660) less the total fuel costs she had paid for him on 5 occasions (\$445.81) between 23 May and 8 June 1994. Exhibit P8 contains, inter alia, the corresponding receipts for those payments from the fuel suppliers; see receipts nos. 21-25 inclusive. They all bear the plaintiff's name "Phuoc" handwritten on the back; Ms Kim said she did not recognise that handwriting. She recalled giving invoices for expenses to the plaintiff, and agreed that she gave invoices nos. 21-25 to him. Her cross-examination at transcript pp129-30 continued:-

"MR WYVILL: - - - When did you give them to him?
---Straight after when I purchase for the fuel, when my driver drove to Roper River and - - - immediately when I paid for this expense my father took this receipt to Phuoc and gave to Phuoc at the sea.

So your father gave those to Phuoc after he had taken the fuel?---Yes.

Have a look at the balance of these invoices [in Exhibit p8].

- - -

- - - I will just explain to you, Miss Bui, that - - - with one exception, those invoices all have the numbers prior to 21, 22, 23, 24 and 25. If you turn them over you will see my client's name on the back of them, on many of them. Would you agree with me that that writing on the back of some of those receipts is the same writing that was on the back of the other receipts you said were given to him?---No, doesn't resemble."

I interpose to note that the name of the plaintiff is written on the back of 19 of the 25 receipts, sometimes spelled "Fuoc", sometimes "Phuoc". Mr Wyvill continued:-

"What I put to you, Miss Bui, is that all of those invoices were numbered in accordance with the system used by your business?---No.

- - -

I put it to you that what you said before about Mr Phuoc only being charged and given invoices 21 to 25 by your business is false; that you in fact gave him all the invoices numbered 1 to 25?---I don't know anything about these here [the other invoices], which has nothing related to my business."

Mr Wyvill then took Ms Kim to the discrepancy between the amount of \$148.07 shown in receipt no.22 of 29 May 1994 - one of the 5 receipts which she admitted had been handed by her father to the plaintiff - and the sum of \$148.38 shown in Exhibit P15 as the payment said to have been paid on 29 May. Her evidence on this aspect was at transcript pp130-131:-

"[MR WYVILL] Do you see - - - the invoice [no.22] is in fact 148.07, but your secretary has in fact written [in Exhibit P15] \$148.38?---That's why I said that these - this one is not mine."

I interpose to note that is clearly inaccurate; Ms Kim had shortly before acknowledged (see p38) that invoice No.22 was one of the 5 invoices her father had given the plaintiff. The evidence continued:

"[MR WYVILL] But it's got my client's name on the back, hasn't it? Would you have a look at the back?---Yes, it bears the name of your client.

That was an amount of money paid by your business?
---No, I don't know this because it doesn't resemble what I have written here.

- - - let me put to you why there was a change in the cents there. See, if you didn't change that figure [to 148.38], then the end result wouldn't have been 2699.65 and - - - therefore that figure [148.07] was - - - deliberately mis-translated in order to give the false impression that this was how that cheque was calculated?---No, no I don't - I can't say, I don't know."

This was quite a devastating piece of cross-examination. I am satisfied that the amount of \$148.07 in receipt no.22 is genuine. The substitution of \$148.38 for \$148.07 raises a strong suspicion that this was deliberately done by Ms Kim to arrive at a final amount of \$2699.65, with a concomitant suspicion that the whole document Exhibit P15 is a later fabrication, using a selection of genuine figures, except the \$148.38, to arrive at the \$2699.65 which was paid by cheque on 14 June 1994. That is, it involved a "cooking of the books".

Ms Kim denied that she worked together with her father and the defendant in 1994.

She said she had not kept her father's original record of the 4 catches of crabs he had purchased from the plaintiff - "how can I keep - - - the wet pieces of paper?". Mr Wyvill's cross-examination continued at pp132-3:-

"- - - You've said you copied off those wet pieces of paper that come with the crabs, where do you copy to? Where do you write that information"---To my book.

Where's that book?---With Phuoc, I don't have any book because I don't do the business with him, I just bought from him 4 time and record in the piece of paper that I give you [Exhibit P15].

- - -

MR WYVILL: - - - That document was written by your secretary on the day she worked out how much Mr Phuoc was owed?---No, on the day we receive the crab from - the day - I record from the little bits of paper from my father on the day that he bought it.

The little bits of paper from your father. So what you're telling the court is that this document wasn't prepared once, just all at once, it was prepared between 24 May and 14 June?---Each time I bought, then I record that.

HIS HONOUR: Where did you record it?---At home.

At home?---Yes.

Yes, you recorded it at home. What did you write it on?---On this piece of paper.

On that particular piece of paper?---Yes.

MR WYVILL: That's not your writing, it's your secretary's writing, isn't it?---Yes.

So it was your secretary you're saying who did this?---She did this in front of me.

In front of you?---Yes.

So it wasn't you who did it, it was your secretary?---Yes.

This document is a fabrication which you created long after the time you gave that cheque to Mr Phuoc?---Each time I bought then I take - put a record on this paper.

What I put to you again is this, that not only is this document a fabrication created after the event, but so are the documents in exhibit D1, the leasing agreements and the receipts?

Perhaps, Your Honour, before she answers that question she should see exhibit D1.

HIS HONOUR: Yes.

THE INTERPRETER: She would like to answer one part of your question.

MR WYVILL: Yes.

THE INTERPRETER: She would like to say that what you ask her is not true, she has recorded like 24/5/94, she recorded that amount here on this piece of paper, and the next time, 30 May she recorded it, and that these pieces - what was recorded on here was not done in one go."

I observe that in his notebook (Exhibit P4) the plaintiff recorded, inter alia, the following catches of crabs:-

24-5-94	143.5 x 7.50
4-6-94	147 x 7.50
10-6-94	28.5 x 7.50

By way of contrast the corresponding weights and prices for those dates as shown in Exhibit P15 (p37) may be noted. She was cross-examined on this topic at p134:-

"MR WYVILL: What I put to you is this, Ms Bui, that again you have deliberately changed the weights and the prices in order to calculate a figure that will - - - lead you to the \$2,695.65 (sic). Again, that's what's happened?---I don't know anything about this book [Exhibit p4]. I don't know. I have never seen this and he can write it in his own book anything he likes. I only know exactly what - how much I bought from Phuoc then I would put it on my record, which is that particular piece of paper [Exhibit P15]."

Mr Wyvill then questioned her about the 2 receipts dated 24 January 1994 and 15 July 1994, each for \$6500, annexed to her lease agreement of 24 January with the defendant, Exhibit D1. Her evidence is at transcript pp135-6:-

"MR WYVILL: Attached to D1 are two receipts?
---Yes.

Six and a half thousand dollars is a large amount of money, isn't it, Ms Bui?---Yes.

And to keep proper accounting records that is the amount of money you should deposit in the bank, so you have a record of it, shouldn't you?---I don't have to - I can't (sic, can) keep it to use for my own or whatever I want. That's my money.

You see, you accept, don't you, that your bank statements around that time - this is in January '94 and July '94 - show no amounts equivalent to a deposit of six and a half thousand dollars?---No, I have never put this amount of money in the bank so therefore there can't be any evidence of me putting that amount of money in the bank.

And I take it, because you're studying accountancy, that you keep a cash book?---This is my business and I work it with my own system. It doesn't mean that I have to apply literally what I have studied in accountancy into my business.

What you're telling me is, that you don't keep a cash book, isn't it?---No.

And what you're telling me also is that there is no way for His Honour or myself or anybody to try and find a document - or find a document that confirms, that can prove, the payment of that money by your brother to you?---I have declared with tax.

How many other people did you lease licences to in that period, 1994?---I lease out two of my licence that I own to two people and then I re-lease the third licence to another person.

Ms Bui, - - - if you kept complete accounting records you would be able to bring them to the court and show us that you had not received any crabs from Mr Phuoc prior to May?---I have declared with my accountant - - - these four times that I bought from Phuoc. But I did not feel that I needed to say precisely which - - - precise amount that I bought - - - personally from Phuoc himself, to - - - my accountant. But this amount of money which I pay out to Phuoc [\$2699.65], it did figure on the sheet of paper that my accountant has to report.

- - -

Are you able to bring to court - - - next time we sit your records from your business, - - - so you can show to us that Mr Phuoc didn't give you anything prior to 24 May as you say?---I am not pretty sure that it showed in my accounting work, but if you want - - - the paper I will bring the paper.

We would like you to bring those papers, if you could, and could you also bring the book in which you noted down all the crab purchases. You know the book you talked about?---Of whom?

Your book, the book of your business for the purchase of crabs by your business, for the first half of 1994.

Can you bring that for us next time?

---I just have the book for my employees, not - not Phuoc.

I just asked you, are you able to bring it next time, please?---Is that the one you want, because I - - -

Yes, please. I want that one and the other documents that relate to your business?---Yes."

When Ms Kim next appeared in Court, after an adjournment of several weeks, she had brought only "the expenses book", on the

basis that the details of expenses supplied was "everything that you need". Her evidence at transcript p144 was:-

"- - - you don't produce any documents to show what crabs you purchased from your fishermen in 1994? Do you understand the question?---Would you repeat?

I will put it again for you. You haven't given to us any documents that keep a record of the crabs you purchased from your fishermen in 1994?---No.

That includes one-claw and two-claw crabs?---Mm mm.

Is that 'yes'?---Yes."

It is clear to my mind that she was concerned to conceal from the Court as far as possible the records of crabs she had purchased from her "workers".

She was shown Exhibit D2, the defendant's record of dates of his attendances at Roper Bar and crabs that he had purchased there; at p145 her evidence was:-

"That diary shows when crabs are given to your brother he writes the date that the crabs were given and from that we can see when your brother was at Roper Bar. Do you understand what I'm saying?---Yes.

Okay. Is there such a record that you have, which will show when your father was at Roper Bar to collect crabs? Do you have such a record, a document?---Yes.

You do have a document like that?---Yes.

And you haven't produced that to court?---No."

Again, the reluctance to produce a record clearly relevant, may be noted.

She denied that the cheque for \$2699.65 had been calculated in the manner contended for by the plaintiff. Mr Wyvill then took her through Exhibit P15. She agreed that she had not identified the amount of \$148.38 separately in her "expenses book". She explained that cheque no.130 shown on

Exhibit P15 was in the sum of \$591.41, because "with the cheque I pay for all my fishermen, including Phuoc" - that is, the sum of \$591.41 included the sum of \$148.38 for the plaintiff. The witness continued at pp147-9:-

"Because this one [cheque no.130] I pay for three fishermen and I got three receipt, including ones of Phuoc, that's the amount of 148.38, that's Phuoc, and two other. - - - I gave the receipt to my fishermen - - - for them to do the tax for themselves. And in my fishermen record book I did record the expense of this cheque for them.

MR WYVILL: And you haven't produced that fishermen's record book?---No.

You see, the problem is, Miss Bui, that the receipt from your records for Mr Phuoc is in fact \$148.07, not \$148.38. Is there any explanation for that?---I don't know about the Phuoc's, the one you just said of Phuoc. The one actual I got - actually bought for him is this one, the one I record [\$148.38]

Okay?---Because, I would like to tell you, that with the receipt you can come to the [fuel] station, to ask them for another one if you lost one. So you can get any - sorry, do you know what I mean?

What you are saying is that this invoice [No.22], you believe, was created or wasn't the correct invoice?--- I'm not saying so, but I mean that, if you lost you can come to the station to ask for another one, they'll give you.

- - -

[MR WYVILL:] This is an invoice from Ampol Karama. Just have a look at that, please.

This is the invoice, which is numbered in the top right-hand corner number 22, from exhibit P8.

- - -

Just look at the back of that document, if you could, please. That has got Phuoc written on the back of it, like many of the other invoices; yes?---Mm mm. Yes.

And that is the writing of your secretary, your sister?---I don't know.

You don't know?---No.

You don't recognise your secretary's writing?---No.

Can you turn over the page. That is the invoice that we are all discussing here, isn't it? That is the invoice for \$148.07 which you paid on behalf of Mr Phuoc, isn't it?---I said that I don't know this invoice because what I paid I record here. The amount is 148.38.

You have got no document that you can produce that can verify that figure of \$148.38, is there?---Would you repeat, please.

There is no document that you can produce for us that can confirm that the expense was \$148.38 not \$148.07?--
-I got two other book that record the rest of the amount.

And you haven't produced those books?---No."

This was again devastating cross-examination; see pp39-40. Ms Kim had earlier acknowledged the genuineness of invoice no.22 as one which she had paid and passed to the plaintiff; now, confronted with the discrepancy between the amount of that invoice, \$148.07, and the amount she had recorded in Exhibit P15, \$148.38, she sought to deal with it (p45) by seeking to cast doubt on the genuineness of receipt no.22. I did not find Ms Kim a reliable witness; I am satisfied that it is probable that she concocted the document Exhibit P15 to provide a fictitious basis for the calculation of the sum of \$2699.65, a sum which she could not dispute since she had paid it by cheque to the plaintiff on 14 June.

(d) I referred earlier to the evidence of the defendant's older brother Cang Van Bui. He also testified as to the bad relationship between the father and the son. He said

that as a result they were never at Roper Bar at the same time.

He said at p155:-

"- - - they are never both of them at the same place. I always gave the crabs to my father very early and (inaudible) I know that might be my brother is coming I will tell my father to hurry away because each time that they met each other they quarrel. It might end up into a fight.

What you have just told us is what you have been told to tell us by your brother, isn't it?---No, he didn't tell me to say these things. I only say what I saw with my own eyes.

See, you have seen your father and your brother at Roper Bar at the same time, haven't you?---No.

That is completely false, isn't it, Mr Bui?---Each time that they might meet each other then they will fight and they quarrel."

I accept that part of his evidence. I note that Mr Stevens, who lent some money to the defendant in July 1994, said at transcript p142 that the defendant and his wife "never got on too well [with the father] at all, at any time."

Mr Cang also said that he had worked in April 1994 for the defendant and then from May onwards for the sister. He said that in April 1994 in the camp at Roper Bar "I did see him [the plaintiff] taking his crab in". He did not see him give the crabs "to anybody", but only saw him "taking the crab onto the bank."

At p158 his evidence as to the procedure when selling the crabs was:-

"- - - I record on a piece of paper my name, the amount of crabs and I put the piece of paper in the container of crabs so my father can take it home for my sister.

Did your father also keep a record or was that the only record kept of the crabs caught?---Yes, he keeps his own record.

And that record has the date and the amount of crabs?---Yes, and it figures - all the amounts and the record figures are - the notebook of my father.

And it was a book, a notebook that he kept these in?---Yes, it was a notebook, a copy book that he use as record.

- - -

MR WYVILL: Mr Bui, was it a book like this [Exhibit P4]? Not that exact book but a similar book?---No, not - it's a little bigger."

This was one of the books that the father and sister did not produce.

(e) The defendant's wife's evidence

Thi Phi Phung Nguyen has been married to the defendant for some 13 years. She is his partner in their crabbing enterprise. At transcript p160 her evidence was:-

"Do your brother (sic, husband) and your father-in-law work together?---No.

How does your husband get on with his father and his sister, Kim?---They are not very close. They're fighting all the time."

She said that she held the defendant's copies of the lease Exhibit D1 and the subsequent hire agreement with the plaintiff Exhibit P2, soon after they were executed.

She said that the plaintiff had not sold the defendant any crabs.

She said that she paid the \$6500 to Ms Kim in January 1994, in cash, explaining its derivation as follows at transcript p162:-

"- - - I borrow from the bank \$13,000 so it's the end of the year [1993]. Then I withdraw cash from \$6000 to

\$6800 on that day or the day after. That is to be on guard in case I have to pay out immediately to different people that need the cash money.

Do you say that you used that cash money to pay the \$6500 to your husband's sister?---Yes, to my sister-in-law.

- - -

So what you're telling us, Ms Nguyen, that rather than giving your sister a cheque for \$6500 on 24 January 1994, you took \$6800 cash out of the bank some 3½ weeks before that, kept it at home and then gave it to your sister on 24 January?---Yes, that's true.

Why didn't you just give her a cheque?---Because she required to have cash."

She gave a hearsay account of the performance of the contract, at pp164-5:-

"He [her husband] complain with all the time about Phuoc because 'he not sell any crab to me', but we put the 13,000 for lease, the licence, already. So we lost the money.

So when did he say that to you?---Because the first trip he taking there nothing happen, but another trip no crab come in from him, until - - - I think, few month more and after my husband complain. He say because him [the plaintiff] break the contract already. But we don't know we sell whom, whom we (sic, he) sell it, because we must know where he sell it, see if we can cancel and get back the licence, but we don't know who he sell it [to].- - - he [her husband] try to find out where he sell it. So one day he tell me all he know already, he know Phuoc sell to Miss Kim few trips, we know that from - I think his sister tell him, and go we cancel the licence and take back the licence.

Now, that is the story you have been told to tell this court by your husband, isn't it?---My husband tell me like that and I know because he with me and husband and wife.

Did your husband ever say to you that he complained to Mr Phuoc about the fact that he wasn't selling crabs to him. Did your husband ever say that to you?---Yeah, he say he have talk with him but what he, Phuoc, say, because something happen, like the engine not go or something, no crab, nothing, so he don't deliver crab to my husband - - - .

So what you are telling us is that your husband told you about one occasion only in which Mr Phuoc said he couldn't catch crabs because his motor wasn't working?--I don't know how many time what he say he speak to him and he tell about the crab already, and I know - - - he called telephone to him before he cancel the licence, he want talk with Phuoc, he warning Phuoc if not crab coming, not crab to sell, my husband, he will cancel licence. But he don't answer, four time, I think, because in that time I am stay home and my husband call telephone from my house to Phuoc house; and he called Phuoc but he doesn't want to answer, and, because my husband before he take back the boat and cancel licence he warning him because not crab to sell must cancel, and he don't want to answer and he say, 'Okay, go ahead'. So my husband cancel the licence because he not sell crab to us. If he sell crab to us we never cancel the licence because we get the money; how can we cancel the licence?

- - -

This is the story you have been told to tell this court by your husband, isn't it, the story you have just told me?---This one, this one I know because this one my business too. We work together so we know. Even he not told I still know already.

Your father-in-law has a reputation for being untrustworthy; is that correct?---That's one I don't know, but I know one thing exactly, because my husband and me get together my father doesn't like, so in (inaudible) his honour fighting with my husband because he doesn't like me from Vietnam to here, and that the reason. We not close together.

It was your responsibility under the contract with Mr Phuoc to pay expenses, wasn't it, his expenses in respect of the boat?---Yes. This agreement means if we receive the crabs, if he sells the crab to us, then it's our responsibility to look after what he has leased from us. But he has not sold us any crab so how can we pay for him his fuel and pay for the other repairs?

You knew that your father-in-law and your sister-in-law were paying the expenses for Mr Phuoc's boat, didn't you?---We have never been close to each other, my in-laws and my nuclear family, so I don't know exactly if my sister-in-law has pay to Phuoc anything, because I and my husband do not like my in-laws.

- - -

You knew, didn't you, Ms Nguyen, that Mr Phuoc was selling his crabs to your father-in-law and your sister-in-law right the way through the first part of 1994, didn't you?---No, I didn't know.

Have you had lots of meetings with your family about this case?---I never go to my father's house even one time, I never get in his house."

(f) I dealt earlier with the evidence of Mr Matos. I note that at pp176-7 his evidence was that he had seen in April and May that the plaintiff had always given his crabs to the father. His evidence continued at p177:-

"[MR WYVILL:] He [defendant, his employer] never said to you, 'Look, Mr Phuoc is giving the crabs to the wrong person. Can you make sure he gives them to me'? He never said things like that to you?
---No.

Did he ever say to you that he was concerned that Mr Phuoc was giving the crabs to the wrong person?
---No.

Did he ever tell you anything that led you to believe that Mr Phuoc was giving his crabs to the wrong person?---No."

The submissions

(a) The defendant's submissions

The submission by Mr Norman of counsel for the defendant were as follows:

- (i) The issues which arose concerned questions of fact, not law: "it is a question of credibility". I accept that questions of credibility lie at the heart of the case.

His argument proceeded as follows.

- (ii) The uncontradicted evidence was that the defendant entered into the contract Exhibit P2 with the plaintiff and that "the relevant terms of the contract were that - - - the plaintiff would supply all the crabs he caught to the defendant." The plaintiff did not do this: the defendant denied ever having received any crabs, pursuant to the contract. I accept this.
- (iii) The plaintiff conceded in effect that "all the crabs I caught, I sold to the defendant's father". I accept that that is established.
- (iv) The plaintiff asserted that the defendant, his father, and his sister Ms Kim were working in collaboration with each other; the evidence clearly established that this was not in fact the case. I accept that submission, in the sense that the defendant conducted a business separate from that of the father and the sister.
- (v) Consequently, the plaintiff was in breach of the contract Exhibit P2, by failing to deliver the crabs to the defendant; the defendant was therefore entitled to repudiate the contract, as he had done, unequivocally, by seizing the boat.
- I consider that this submission and (iv) above do not address the question of the legal significance of the behaviour of the defendant

in never raising with the plaintiff the subject of non-delivery of the crabs to him, and in particular whether an estoppel arises against the defendant from that conduct.

Mr Norman made the following 6 submissions in support of his contention that the defendant was not "working in collaboration" with his father and sister Ms Kim.

(1) The sister Ms Kim (the owner of the boat and equipment and the licensee of the crab licence) and the defendant had entered into an agreement on 24 January 1994, Exhibit D1, whereby she leased the licence, boat, nets and crab pots to him for the calendar year 1994 for \$13,000.00. Mr Norman submitted that the evidence that such a lease had been entered into was supported by the evidence that the defendant's wife had obtained a loan of \$13,000 on 31 December 1993; this was the specific amount to be paid under the agreement of 24 January 1994, Exhibit D1. The fact that the defendant had had to take out a loan for the purposes of that agreement was also "cogent evidence that the defendant and his sister were not working in conjunction with each other"; in fact it went to support that there was "bad blood between the [defendant], his father and his sister."

I consider that in light of the defendant's wife's evidence, the connection between the loan of \$13,000 and the lease is not as strong as the amount might otherwise indicate; in any event I accept that the lease Exhibit D1 was entered into.

(2) The evidence showed that -

"the defendant and his father and his sister [Ms Kim] and his wife Thi Phung Nguyen say there was

bad blood between them; they did not work together; they ran separate businesses. This was supported by the evidence that the defendant would make sure that he went down [to Roper Bar] at a later time [of the day] than the father, to pick up the crabs from the fishermen."

I accept that there was "bad blood" between the father and the son; and, from April, they had always arrived separately at Roper Bar.

(3) The evidence established that when the defendant's truck (which he used to freight the crabs from Roper Bar) was out of service after an accident in April 1994, he hired a replacement vehicle from a hire company. This was inconsistent with the father and defendant having worked together, as otherwise the defendant could have simply said to his father: "Look, my truck's out of action, we will use your truck the next time [to collect the crabs]."

I accept that the father and the son were not working together, at least from some time in April 1994, having had a "falling out".

(4) To accept the plaintiff's account that the defendant was 'working in collaboration' with his father and sister Ms Kim the Court would have to find that the defendant, his father, his sister, his brother Cang Van Bui and Matos Mac had all "fabricated [their] evidence."

I observe that while I do not consider that the father and son were working "in collaboration", I am satisfied that considerable parts of the evidence of these witnesses were in fact fabricated, and in other respects they sought to conceal the emergence of the truth.

(5) The evidence of Mr Matos, that the plaintiff had offered "to pay him \$1000 to testify that the plaintiff gave his crabs to the defendant" was "crucial". His evidence was that the plaintiff had not given his crabs to the defendant; rather, he gave them to the defendant's father. He was vigorously cross-examined and had not resiled from his evidence. I have already indicated that I do not accept the evidence of this witness as to the bribe offer of \$1000, but I accept his evidence that the plaintiff sold his crabs to the father.

(6) The evidence established that upon the defendant learning that the plaintiff was selling crabs to the sister Ms Kim, via the father, he treated this as constituting proof of a breach of contract by the plaintiff necessary to enable him to terminate the contract; and this he did, by seizing the boat at Roper Bar. I do not accept that the defendant did not find out about the delivery of crabs to the father until 'late in the day'. I am satisfied that he was well aware of it from early times, but due to forces arising from family restraints, felt unable to do something about it until the question of the plaintiff having "paid off" his \$15,000 licence fee arose.

Mr Norman submitted that the plaintiff's breach of contract by delivering crabs to the father resulted in the defendant being out-of-pocket for the \$13,000 he had outlaid in leasing the boat and licence from his sister Ms Kim, and the loss of several months profit from the crabbing activity of the boat. He submitted (transcript, p209):

"- - - if the Court accepts that [there] are two different companies [the defendant's and the sister's,

the latter having bought the crabs from the plaintiff, via the father]; and because of family reasons, the sister and the [defendant] don't get on together - - - then we say the defendant has succeeded, not only in his defence but in his counterclaim that he should be repaid the money - - - mentioned as the consideration for the leasing of the boat."

This submission does not take account of an estoppel against the defendant, for whom it is impossible not to have sympathy. By his account he has paid out \$13,000 for the lease of Exhibit D1, with no return. Why he paid the second tranche of \$6500 in July 1994, if he paid it, is a puzzle. On the evidence as it has appeared before me, he is clearly entitled to recover from the father and sister any sums that the plaintiff recovers from him. However, he did not seek to have them joined in this action as third parties

(b) The plaintiff's submissions

Mr Wyvill of counsel for the plaintiff submitted that the defendant's case rested on "a fundamental misunderstanding of the law", in that "internal arrangements - - - struck between the defendant and his family" could not bind the plaintiff. He submitted that the question to be addressed was:-

"whether the conduct of the plaintiff [in selling catches of crabs to the father] amounted to repudiation of the contract [by the plaintiff], sufficient for the defendant to terminate it."

I accept that this is the major question to be addressed. He submitted that the contract had not been repudiated by the plaintiff by delivering the crabs to the father because:-

- (1) The defendant had expressly directed the plaintiff as to the manner in which he was to

perform the contract, by directing that he deliver the catches of crabs to the father.

I do not accept the plaintiff's evidence that such an express direction was given.

- (2) Alternatively, the manner in which the plaintiff had performed the contract - by selling his crabs to the father - had been accepted by the defendant. This acceptance was either express, or implicit in the defendant's conduct in that he was aware of the plaintiff's deliveries of crabs to the father but did nothing to put the plaintiff on notice that he was not thereby carrying out the contract Exhibit P2.

I do not accept this proposition; however I consider that the defendant has estopped himself by his conduct from asserting that the delivery of the crabs to the father was not sufficient performance by the plaintiff of the contract Exhibit P2 in that, being aware from the commencement of those deliveries, he stood silently by and did nothing to put the plaintiff on notice that deliveries to the father was not sufficient performance of the contract. See the discussion in *JWH Turner & Co v O'Riordan* (1924) 24 SR (NSW) 421, at pp59-60.

Mr Wyvill submitted that four propositions of law were relevant, viz:-

- (a) Whether or not the defendant had contracted as agent for his father and sister Ms Kim as individual principals was not to the point, because plainly the defendant was in any event

liable as a principal on the contract Exhibit P2. In any event, whilst performing the contract, the defendant had told the plaintiff "I'm doing this on my father's behalf", and this inextricably linked the defendant and his father to the contract.

In support Mr Wyvill relied on *Australian Trade Commission v Goodman Fielder Industries Ltd* (1992) 36 FCR 517. In that case the question was whether the respondent had sold certain wheat as a principal, or as an agent. The Full Court referred to some settled propositions of the law of principal and agent, and said at p222:-

"The effect of the authorities was summed up by Mr F M B Reynolds in *Chitty on Contracts* (25th ed, 1983), Vol 2, Ch 1. Mr Reynolds wrote (par2274):

"The fact that a person is an agent and is known to be so does not, however, of itself necessarily prevent him incurring personal liability. Similarly he may be entitled to sue. Whether this is so is to be determined by the construction of the contract, if written, and by its nature and the surrounding circumstances. When the agent does contract personally the scope of the contract which he makes requires careful analysis. He may undertake sole liability to the exclusion of his principal: conversely he may undertake joint liability on the main contract together with his principal. He may act as surety for his principal, or enter into a collateral contract with its own terms. The possibilities shade into one another, and there is no general rule."

I do not consider that the defendant contracted in Exhibit P2 as agent for the father and the sister; I consider he contracted as a principal, and is liable as such on that contract. I do not accept that the defendant told the plaintiff that he was "doing this on my father's behalf".

(b) As to what constituted sufficient delivery of crabs by the plaintiff for the purposes of the contract Exhibit P2, Mr Wyvill relied on *J.W.H. Turner & Co v O'Riordan* (supra). In that case the plaintiff informed the defendants that Bank A was its agent to receive goods it had bought from the defendants; it directed Bank A to receive the goods from Bank B which had been announced by the defendants, erroneously, as its agent. The delivery documents for the goods were in fact tendered to Bank A by the defendant's (true) agent Bank C, but without any intimation that Bank C was doing so on behalf of the defendants or that delivery was being tendered to Bank A in its capacity as agent for the plaintiff. Bank A only accepted the goods as agent for Bank C. The trial judge ruled that there had been a delivery to the plaintiff. On appeal it was held that it was for the jury to decide whether the conditions of the contract had been complied with by the delivery of the

goods to Bank A, whether such delivery had been accepted by the plaintiff as compliance with the contract, or whether the conditions of the contract or any of them had been waived by the plaintiff. At p434 the Court (per Ferguson J) observed:

"The clear intention was not merely that [Bank A] should get the goods, but that they should be put at the plaintiffs' disposal, in other words that the Bank should receive them for the plaintiffs. To take an illustration suggested during the hearing, if goods are bought by A from B subject to the condition that they are to be delivered to the hall porter at A's club, that condition is not necessarily complied with by the mere handing over the goods to the porter. They must be given to him for A. If they are in a parcel bearing no address and no instructions are given to him as to their disposal, he might rightly refuse to deliver them to A, or A may never learn that he has them. That is not the position contemplated by the contract. The case is still stronger if the porter expressly tells the person from whom he receives the parcel, that without instructions from that person he will not hand it to anybody else. On the other hand, even in the absence of such instructions, if A becomes aware that the goods have been handed to the porter, he may accept that as a delivery or tender under the contract, or act so as to estop himself from saying that it was not such a delivery or tender." (emphasis mine)

Mr Wyvill submitted that in terms of the words emphasized above the defendant knew that the plaintiff was delivering the catches of crabs to his father, and did nothing about it, and therefore the deliveries to the father was sufficient to constitute a delivery of the crabs in terms of the contract Exhibit P2.

I do not consider that the defendant accepted that deliveries of the crabs to the father was delivery under the contract; but he so acted that in the circumstances he is estopped from "saying that it was not such a delivery - - -".

(c) The onus of proof was on the defendant to show that the plaintiff's conduct in delivering crabs to the defendant's father was a sufficient breach of the contract to justify his terminating it late in June 1994; see *J.W. Carter 'Breach of Contract' (1984), par732*. There the learned author says:-

"Where it is alleged that a repudiation or anticipatory breach [here the failure to deliver crabs] has taken place the onus is on the promisee [here the defendant]. Almost invariably the issue of repudiation or anticipatory breach will arise when the promisee seeks to justify a termination of performance. The onus of proof in cases of repudiation and anticipatory breach is then a particular application of the general rule that a promisee who terminates the performance of a contract must justify his termination."

See, for example, *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701, a case involving the removal from office of a managing director in repudiation of his service agreement, by amending the company's Articles so as to enable a third party to determine it. On onus, Lord Wright said at p729:-

"[The company] has to justify the determination of the contract, or the case will be one of breach or repudiation [by it]".

That onus of proof had to be assessed in light of the serious nature and consequences of repudiating a contract; that is, the defendant's right to terminate the contract must not be lightly found or inferred. The plaintiff's conduct must be shown to have been a serious breach, one which amounted, as Mr Wyvill put it, to -

'"- - - an intimation to abandon and altogether to refuse performance of the contract."

In *The Mersey Steel and Iron Co Ltd v Naylor Benzon & Co* (1884) 9 App. Cas. 434 at p439, Lord Selborne L.C., stressed that the conduct impugned must be examined -

"- - - so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind and whether the other party may accept it as a reason for not performing his part - - -."

And see generally *Carter* (op cit) at pars 801 and 804, stressing that an allegation of repudiation by conduct must be "clearly proved", the repudiation requiring "a clear indication of the absence of readiness or willingness" to perform the contract, assessed objectively. Mr Wyvill submitted that -

"- - - whatever view of the evidence is taken in this case, even on the defendant's case at its highest - - - there was never a sufficient intimation in the circumstances of this case by the plaintiff that he refused to

honour [the contract by delivering] the crabs [to the defendant]."

Such a refusal had never been put to the plaintiff by the defendant. The plaintiff's conduct in delivering the crabs to the father was not "sufficiently clear and unequivocal, [amounting to] a serious refusal to perform [the contract Exhibit P2]"; that is, his behaviour amounted to no more than "a misunderstanding" of what performance required of him, and not to-

"- - - an intention to flagrantly - or knowingly - refuse to honour the term of the contract which was said [to be] 'you must give the crabs to the defendant'".

I accept submission (c). I am satisfied that the plaintiff, in delivering the crabs to the father, honestly believed in the circumstances that he was carrying out the terms of his contract with the defendant. He was misled into this belief by the family relationship between the father and the son, the initial delivery, and by the son's failure to raise the subject with him at any time over the weeks from 25 March to 10 June, at their various meetings during that time. I do not consider that in selling his crabs to the father in the circumstances which prevailed, the plaintiff had behaved in such a way as to indicate to a reasonable man in the defendant's position, that he did not intend to perform the obligations he had undertaken.

Conclusions

In the course of commenting on the evidence and on the submissions, I have sufficiently indicated the reasons why I

consider the plaintiff must succeed in his claim, and the defendant must fail in his counter-claim.

In the circumstances of the case the behaviour by the defendant, in standing silently by while the plaintiff continued to his knowledge to deliver his crabs to the father over the months in which the plaintiff and the defendant had contact, amounted to his refraining from correcting the plaintiff while knowing that he laboured under the mistake that he was thereby performing the contract Exhibit P2, and while he was thereby placing himself in a position of significant and increasing disadvantage. The defendant clearly must have known in the circumstances that the plaintiff would be induced by his behaviour in standing silent while the plaintiff delivered crabs to the father, to continue to deliver crabs to the father in the belief that he was performing the contract. The defendant's behaviour in this respect amounted to an implied representation to the plaintiff that the delivery of the crabs to the father was a sufficient delivery for the purposes of their contract.

In those circumstances, to permit the defendant to depart from the assumption which the plaintiff had reasonably adopted and on which he relied - that delivery of his crabs to the father was in performance of the contract Exhibit P2 - would be unconscientious and unjust; such a departure would in the circumstances operate to the plaintiff's detriment. That is to say, he would be materially disadvantaged by the defendant's conduct, such that if the defendant were now allowed to depart

from that assumption the consequences for the plaintiff would be unjust and oppressive.

This is a situation in which the rule of estoppel by conduct applies; see generally *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at pp444-6 per Deane J. As to the nature of the detriment required to be established see *Territory Insurance Office v Adlington* (1992) 84 NTR 7 at 17, per Mildren J. In the result, the defendant is estopped from complaining in this litigation that the delivery of crabs to the father was a non-performance by the plaintiff of the contract Exhibit P2; the defendant therefore can point to no lawful basis for his termination of the contract by seizing the boat in late June 1994.

The question then is the relief to which the plaintiff is prima facie entitled. He has carried out his part of the contract Exhibit P2. The defendant repudiated the contract by seizing the boat. I consider that the appropriate order is that the plaintiff recover compensatory damages.

The particulars of estimated damages handed up by Mr Wyvill on 24 March 1995 appear to be reasonable and calculated properly, viz:

- (1) Estimated average catch of 1000kgs of two-claw crabs per month, from 24 June to 31 December 1994 (6.2 months): 6200kgs.
- (2) Average price from July to December 1994: \$10.66 per kgs.
- (3) Gross return therefore is \$66,092.

- (4) Expenses estimated at \$500 per month for 6.2 months: \$3,100.
- (5) Nett income from two-claw crabs = (3)-(4) - 10%
(66,092 - 3,100) = \$56,693.
- (6) Income from one-claw crabs based on \$450 per month for 6.2 months: \$2,790.
- (7) Nett income from all crabs = (5)+(6) = \$59,483.
- (8) Income actually earned 24 June - 1 December 1994: \$21,748.
- (9) Damages due to plaintiff = (7)-(8) = \$37,735.
- (10) Interest thereon under s84 of the Supreme Court Act at 8% from the middle of the period in question (15/9/94) to date = \$2,961.

Orders

Judgment for the plaintiff in the sum of \$40,696. The defendant's cross-claim is dismissed. The plaintiff must have his costs.
