COPY

IN THE SUPREME COURT)
OF THE TERRITORY OF )
PAPUA AND NEW GUINEA)

CORAM : OLLERENSHAW J.

Tuesday,
25th June 1968.

BETWEEN ISLAND PRODUCTS LIMITED
Plaintiff

AND MARIO LIBERATORE
Defendant

JUDGMENT

1968
Jun 20,21,
24,25.
PT MORESBY.

The plaintiff claims to recover from the defendant the sum of $1700.15 as the balance owing by the defendant to the plaintiff for the price of goods sold on credit and delivered by the plaintiff to the defendant and interest thereon claimed in pursuance of an agreement between the plaintiff and the defendant.

There is no dispute as to the amount claimed for the price of the goods or the amount included for interest.

The sole defence is that the goods were sold and delivered not to the defendant but to a proprietary company named M. Liberatore Pty Limited and that this company and not the defendant, Mario Liberatore, is the plaintiff's debtor for the amount claimed.

The plaintiff carries on and at all material times carried on business as a general merchant in Port Moresby and it now has its hardware division at Boroko and at all material times had its hardware division at Konedobu or at Boroko.

In 1964 the defendant carried on business as a building contractor and on the 1st of August in that year he made application in writing to the plaintiff, upon the plaintiff's usual form, to open a credit account with the plaintiff. This application is Exhibit A in this action and it contains particulars such as one would expect to find in such an application including particulars of business references, applicant's bank, nature of applicant's business, and so on and there is a space provided for the applicant to state whether the applicant is a "Public or Private Company, Partnership, Sole Trader". In his application the defendant filled in this space with the words "Sole Trader". It also contains the defendant's agreement to pay interest at the rate therein provided on overdue portions of his account.

The defendant used this account extensively in 1964 and 1965 and it is the plaintiff's case that he continued to do so during 1966 and during and up to August 1967.

../2

The defendant says and it is not disputed that on the 25th March, 1966, he caused to be incorporated a company named M. Liberatore Pty. Limited. He says further that thereafter this company and not he himself carried on the building contracting business and that, for instance, all tenders for contracts and all contracts to build were in this company's name.

He and his wife were and are the sole shareholders in this proprietary company.

Although the defendant says that at about the time of its incorporation he told the plaintiff's manager of his formation of the proprietary company to which information the manager responded with the words: "Good on you Mario", no application was made by the company or by the defendant on behalf of the company to open a credit account with the plaintiff.

I am not satisfied that a conversation between the defendant and the plaintiff's manager about a credit account for the proprietary company ever took place. All the probabilities are most strongly against it and I prefer the denial of the manager of the plaintiff company to the evidence about it that was given by the defendant, given not in chief but in cross examination.

There is evidence given on behalf of the plaintiff that where a private company requires to open a credit account with the plaintiff not only is a formal application required as in the case of an individual but also that it is the practice of the company to require the execution of a form of guarantee from the principals, that is as the evidence goes, from the "major owners or shareholders" of the company. It may well be that no such application was made on behalf of the proprietary company for the reason that before granting credit facilities to the proprietary company the plaintiff would have required the defendant's guarantee and the position would have remained unaltered as far as his personal responsibility for the price of the goods supplied for the business by the plaintiff was concerned.

Be that as it may the company continued to debit to the defendant's account the price of all goods sold and delivered for the purpose of the business as it had done previously to the formation of the company.

The plaintiff continued to send to the defendant and he received monthly statements in his name showing clearly to my mind that it regarded him as the purchaser and the debtor responsible for payment.

To this course he made no objections and never at any stage complained or suggested that the plaintiff was in error in debiting him

and that it was the proprietary company that was the plaintiff's debtor.

The goods the subject of the present action were sold and delivered over the period May to August inclusive in 1967 and it is relevant to observe that the course of business between the parties to which I have referred was continued without any alteration, the plaintiff continuing to debit the price of the goods to the defendant and sent to him monthly statements in his own name as always in the past. He continued to receive these statements and to make no objection.

To go back a little, it appears from the evidence that in March, 1967, the period of credit allowed by the plaintiff to the defendant was exceeded beyond the limits the plaintiff was prepared to allow and the plaintiff stopped the defendant's credit. Thereupon in that month the account was reduced by cash payments made by cheques of the proprietary company amounting to $3971.73. The right to use his credit account was restored to the defendant until July 1967 when it was found that his account was again three months overdue. Thereupon the plaintiff's manager wrote a letter to the defendant dated the 18th July 1967, which letter was received by him. A copy of this letter is Exhibit "C". It is addressed simply to the defendant, refers to the attached statement of his account as showing overdue amounts and regrets that "we must keep your account closed until such time as the total amount outstanding has been paid in full". There is no word in this letter about any liability on the part of the proprietary company and again the defendant made no objection to the plaintiff regarding him as its debtor and looking to him for payment of the account which was still in his name and the statements of which were still issued in his name. Likewise the defendant made no reply to a letter of demand written to him personally by the plaintiff's Solicitor in September 1967 requiring payment by him of the monies claimed in this action.

Carbon copies of the relevant statements are in Exhibit "B" and there is evidence or admission that they were received by the defendant and there is evidence that he made no objection to these statements. Indeed there is this evidence given by the plaintiff's manager in re-examination in this trial: "Q. Until yesterday had you heard anyone on behalf of Mr. Liberatore deny that he was personally liable for the amounts appearing in his monthly statements. A. No".

Furthermore there is the evidence of what took place between the plaintiff's manager and the defendant in May of this year when, as I find, the defendant offered to sell to the plaintiff land of his at Hohola upon which he had commenced to build buildings, for the completion of which he found himself without sufficient moneys. The relevant parts of what the defendant said to the manager are, as I find he did say notwith-

standing his denials in evidence in this action: "I offer it to you first as I owe your company $1800.00". This was a reference by the defendant to the debt claimed in this action. Towards the end of the interview the defendant again referred to the debt in these words: "I would like to sell the property so that I can pay my debts to your company and other companies." On this occasion the defendant left with the plaintiff's manager a set of plans on which the name of the defendant appeared as building owner. I mention in passing that there is his evidence that he owns the land and that two of his four companies are involved in the erection of buildings upon it.

Mr. White for the defendant has relied upon the fact that since the incorporation of the proprietary company the building contracting business for which the goods supplied by the plaintiff were required has been carried on in the name of the proprietary company, which has done the tendering and contracting to build. Furthermore, I assume that the subject goods were used in this business. He argues that these matters were or must have been known not only to the plaintiff's salesmen at its Boroko hardware store but also to the plaintiff's executive officers in Port Moresby. He also points to the admitted fact that, e.g., in March, 1967, payments were made to the credit of the account by cheques drawn by the proprietary company.

The strongest point made by Mr. White or rather the matter he has emphasized to the greatest extent is that sometimes in the period from May to August, 1967, as indeed also in the period from March, 1966, (the month of the incorporation of the company) to May, 1967, invoices were issued by the salesmen at the time of sale in the name not of the defendant but of the proprietary company: M. Liberatore Pty. Limited. It appears clearly from the evidence that sometimes goods were ordered on a printed form taken from an order book in the common form supplied by stationers and that sometimes the name of the company was stamped by a rubber stamp on this form in such a place as to show that the order was from the company. This may explain why goods were sometimes invoiced to the company.

I note that during the period of the supply of the goods the subject of this action twenty invoices were issued in the name of the defendant, that is to "M. Liberatore" or "Mario Liberatore" and five were issued in the name of the proprietary company, that is to "M. Liberatore Pty. Limited". These invoices include all the goods the subject of this action. It is not suggested that there were two businesses one carried on by the defendant and the other by the company so that is not the significance of the fact that some invoices were issued in the name of the

defendant and some in the name of the company and one might enquire in passing why, if the fact that five invoices were issued in the name of the company is evidence in favour of the defendant, why is not the fact that twenty were issued in the name of the defendant, evidence in favour of the plaintiff?

However, quite apart from such an argument, in the circumstances of this claim I cannot attach any real weight to the fact that these invoices were issued in the name of the proprietary company. The invoices were issued for goods sold on credit; the proprietary company had never been given the right to purchase goods on credit and the plaintiff's salesmen had no authority to sell goods to it on credit. It would be quite wrong in the circumstances to suggest that the action of these salesmen in writing occasional invoices in the name of the proprietary company could bind the plaintiff. The plaintiff did not consider this to be so because it continued to debit the defendant and it included the goods the subject of such invoices in the statements it issued in the name of the defendant and sent to him. Likewise he does not appear to have considered that such invoices bound the plaintiff in the way it is now suggested that they do. He made no objection to the price of the goods, the subject of such invoices being debited to him personally or to the statements, including the debits evidenced by such invoices, being rendered in his name. The debt which he referred to in the interview of May this year as his debt included the amounts evidenced by these invoices. To say that it is the fact of the invoices issued by the salesmen, occasionally in the name of the proprietary company, and not the account always kept by the plaintiff in the name of the defendant and the statements always rendered by it to him that point to where the liability rests for the debt presently claimed is to my mind to say that it is the tail that wags the dog and not the dog that wags the tail.

I have considered all the matters raised and pressed by counsel for the defendant but from the whole of the evidence I conclude that after the formation of the company the plaintiff continued to contract with the defendant as it had done prior thereto. There was no change in the course of what I consider to be the significant things that happened in the business between them. No arrangement was made for credit to be extended to the company and all the evidence shows to my mind that it was to the defendant that the plaintiff continued to sell goods on credit and it was to him that it continued to look for payment.

I have no doubt upon the evidence that the defendant knew of and accepted this position and, indeed, not only relied upon it himself but also allowed the plaintiff to rely upon it.

In conclusion I would cite, although I do not find it necessary to rely upon, this passage from Phipsom on Evidence, Tenth Edition, at page 322 paragraph 769.

../6

"The mere failure to answer a letter or object to an account, however, will not necessarily imply an admission of its contents. "What is said to a man, before his face, he is in some degree called on to contradict, if he does not acquiesce in it; but ..... it is too much to say, that a man by omitting to answer a letter ..... admits the truth of the statements that letter contains", or "that every paper which a man might hold purporting to charge him with a debt or liability, was evidence against him." But it is otherwise if the letter is sent under circumstances which entitle the writer to an answer: or where it is the ordinary practice of people to reply. So, in the case of merchants' accounts, an inference of correctness will generally arise unless objection be made within a reasonable time;" (The underlining of that part of the passage commencing: "But it is otherwise ....." is mine).

The inference mentioned in the last sentence of this passage is usually relied upon for the correctness of the items and the amount claimed. However, I consider that it could equally be relied upon, if need be, for the correctness of the person charged. In any event, I find that the facts established by the evidence in this action entirely support such an inference.

I find a verdict for the plaintiff for the sum of $1700.15 and pronounce and direct that judgment be entered for the plaintiff accordingly with costs.

I order that the Exhibits remain in Court until further order or until a consent to their being handed out of Court signed by the plaintiff and the defendant or their respective solicitors is filed to the Registry.