No. 226.

IN THE SUPREME COURT OF THE )
) CORAM: MANN, C.J.
TERRITORY OF PAPUA AND NEW GUINEA)

W. RUSKIN

- v -

BROWN RIVER TIMBER COMPANY LIMITED

J U D G M E N T

This is a question of evidence which has arisen during the course of the trial. The Plaintiff gave evidence of his version of a conversation which is material and which constitutes an issue arising on the pleadings. The Plaintiff was not cross-examined as to this conversation and no further evidence on this point was given by the Plaintiff's witnesses.

During the course of his evidence-in-chief, the Defendant Company's principal witness is now asked by Counsel for the Defendant to give his version of the same conversation. Objection has been taken by Counsel for the Plaintiff on the ground that the defence is precluded now from treating the conversation in question as comprising an issue between the parties because Counsel for the Defence has, by failing to cross-examine on the point, accepted the Plaintiff's version of the conversation.

Since I had not encountered such a proposition in the course of my own experience, I adjourned for a few moments to give the point some consideration, and I have had the benefit of argument from Counsel.

As a starting point, I should say that there is no doubt that Counsel ought to cross-examine the witnesses for the other side on every subject matter which is the subject of an issue before the Court. If he does not do so, he may be taken as conceding the opposing party's version of the facts, at least, on the matters in question. Counsel, however, clearly has a discretion as to the course which he will take in cross-examination, and should any inference arise from his conduct of the case, the result may be that he is exercising that discretion at the cost of his client in relation to the Court's finding on some particular issue. Where no cross-examination takes place, then at the end of the trial in the ordinary course the Court will draw the inference that the evidence

is not challenged, and the case of The King v. Walter Berkley Hart, reported in 1932, Vol. 23 Cr. Ap. R. at p. 202 is a very good example of this.

Where there has been some cross-examination on some matters but not on others, a similar result may follow in relation to the matters which were not made subject to cross-examination, but Counsel cross-examining a witness may indicate by general cross-examination as to credit or otherwise that the whole of the witness' evidence is refuted by his client. In cases of this kind the question really is as to what inference a Court should draw at the end of the trial in arriving at its conclusion as to the facts. The rule of practice indicated does not necessarily have any bearing on what the opposing side may do in relation to calling of evidence to contradict the Plaintiff's case. There are instances cited in some of the cases to which I have been referred where a witness has not been allowed to contradict a former witness on the ground that the former witness was not cross-examined on the point and did not have his mind specifically directed to the subject matter to be dealt with by the later witness.

From the rather incomplete reports and annotations available here it seems to me that these cases are not cases where the earlier witness is being contradicted in the sense merely that the later witness is being asked to give a different version of some material fact. It seems to me that these are cases where the earlier witness is being contradicted in the sense that the later witness is being called for the purpose of proving that he has made some prior inconsistent statement, this being a matter arising under the evidence and the statutory condition that the witness must first have his mind directed to the prior inconsistent statement must be complied with.

It seems to me that it is not possible for the Plaintiff to rely on an estoppel arising out of the mere fact that Counsel for the Defence has not cross-examined his witnesses on some relevant issue. It is rather to the advantage of the Plaintiff than to his detriment that Counsel for the Defence omitted to cross-examine on the point because it puts the Plaintiff in the position of being able to contend that this evidence is or was unchallenged. If, however, later in the trial the Defence proposes to call witnesses to support a contrary version of the facts on some issue arising under the pleadings, I think that the correct course is for the Plaintiff's Counsel if, in fact, he is taken by surprise, to apply for leave to call additional witnesses. Such an application may be granted under the Court's general power to exercise its discretion in the control of proceedings to ensure, so far as

possible, that the Court will have the best opportunity ultimately of arriving at the truth.

A striking example of the Court's discretion being exercised in this way is in Bigsby v. Dickinson, reported in Vol. 4 Ch. Div. at p. 24.

It has been put that the Plaintiff's witnesses have not had an opportunity to give all the evidence which they may have been able to give if the Plaintiff himself had been cross-examined. This is probably a fair appreciation of the position, but no objection can arise that Counsel for the Plaintiff did not have an opportunity to re-examine by reason of the omission to cross- examine on this point, because Counsel examining a witness-in-chief must elect to terminate his examination at whatever point he thinks most appropriate and on the understanding that he may not have an opportunity to expand the evidence on some particular point in re-examination. If Counsel for the Plaintiff has refrained from calling additional witnesses, relying on Defendant's conduct of the case in this matter, he is now taken by surprise, and I would think that he would have substantial grounds for an application for leave to recall the additional witnesses. Even if this were to be regarded as presenting a rebutting case, it is clear that an application to do this, even to the extent of calling evidence merely to confirm the Plaintiff's original case, may be granted where Counsel is taken by surprise.

To test the matter further, a curious question would arise if Counsel for the Defence were now to apply for leave to cross-examine the Plaintiff on this very point on the ground that he had inadvertently omitted to do so before. I am not for a moment suggesting that he should take any such course, but if the question were to arise, I think that there is no doubt that the Court could, if it saw fit, grant such an application in the interestsof justice and might in consequence entertain similar applications from Counsel for the Plaintiff.

I do not think that the references in the 8th Edition of Mr. Phipson's text book deal with the precise point which I have to consider, although the rather generalised statement on page 471 citing the case in Brown v. Dunn seems widely enough expressed to be applicable. Reading the whole paragraph, however, it seems to me that the author is really dealing with the other type of case to which I have referred, where it is sought to call a witness for the purpose of proving a previous contradictory statement allegedly made by the first witness.

I say nothing at this stage as to comment which may be made or inferences which may be drawn as a result of Counsel's failure to put any question to a witness in cross-examination, because I am not here concerned with that. I say nothing at the moment as to the credibility of any witness, for it seems to me that the credit of the principal witnesses on both sides will be very much in issue. So far as the present point is concerned, I hold that there is no rule to the effect that by failing to cross-examine on some particular point which is relevant, Counsel loses his right to tender a part of an opposing case evidence to contradict the witness whose evidence was not subjected to cross-examination on the point. I therefore hold that Mr.White's questions are in order, and as I have indicated, if Mr. O'Regan has any application to make to meet the situation, he having been taken by surprise, I will entertain such an application.

8th March, 1962.