*Privy Council Appeal No. 22 of 1983*

Tiong Ing Chiong — *Appellant*

*v.*

Giovanni Vinetti — *Respondent*

*(and Cross-Appeal)*

FROM

# THE COURT OF APPEAL OF BRUNEI

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## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JULY 1984

*Present at the Hearing:*

LORD KEITH OF KINKEL
LORD ELWYN-JONES
LORD BRIDGE OF HARWICH
LORD PRANDON OF OAKBROOK
SIR ROBIN COOKE

*[Delivered by **Lord Brandon of Oakbrook**]*

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On 6th October 1977 a collision took place in a road named Jalan Bunga Raya, Kuala Belait, in the State of Brunei, between a motor-cycle driven by Giovanni Vinetti and a motor car driven by Tiong Ing Chiong, as a result of which the former was badly injured.

On 27th August 1980 Giovanni Vinetti (hereinafter called "the plaintiff") brought an action against Tiong Ing Chiong (hereinafter called "the defendant") in the High Court of the State of Brunei, in which he claimed damages for negligent driving. The action was tried on 7th December 1981 by Penlington J., before whom both liability and damages were in issue, save for a small part of the plaintiff's special damages relating to matters other than past loss of earnings. On 9th December 1981 Penlington J. delivered a judgment in which he found for the plaintiff on liability and awarded him total damages of B$1,300,792 with interest.

The defendant appealed against the order giving effect to that judgment to the Court of Appeal of the State of Brunei on both liability and damages and the plaintiff cross-appealed on damages. By an order of 18th December 1982 the Court of Appeal (Sir Geoffrey Briggs P., Sir Alan Huggins and Bewley J. sitting as Commissioners) dismissed both the defendant's appeal
[35] on liability and the the plaintiff's cross-appeal on

damages, but allowed in part the defendant's appeal on damages by reducing substantially the sum awarded for past loss of earnings.

The defendant appealed and the plaintiff cross-appealed from the order of the Court of Appeal to this Board, as the amount involved in the action entitled them to do. Both appeal and cross-appeal were, however, limited to two issues only, first the amount of damages awarded for past loss of earnings, and secondly, that awarded for future loss of earnings, the defendant contending that both sums were too high and the plaintiff that they were too low.

Most of the difficulties with regard to the amount of damages which have arisen in this case have done so by reason of the want of care, thoroughness and foresight with which the parties' legal advisers first prepared for, and later conducted, the trial at first instance.

In the statement of claim it was pleaded that the plaintiff had suffered loss of earnings totalling B$244,650.00 and continuing. It was further pleaded that the plaintiff would also at the trial claim damages for loss of future earnings.

Some particulars of the claim for past loss of earnings were given but they were wholly inadequate and in part misleading, in that they implied that in his employment, which was that of a deep sea diver, he was paid in Brunei dollars, whereas in fact, as an Italian working for an Italian company, he was paid largely in Italian lire. The pleading further implied that, in his new business as a seller of solar energy panels, his profits were likewise made in Brunei dollars, although, since he had returned to Italy in order to engage in this new business, it should have been obvious that this could not be so. No particulars of the plaintiff's claim for future loss of earnings were given at all.

The question of the currency in which the plaintiff was paid or made profits before the trial, and the currency in which he would make profits in the future, was one of great potential importance, because the rate of exchange between the Brunei dollar and the Italian lire was at all material times changing rapidly in favour of the Brunei dollar.

The statement of claim, being in this form, clearly cried out for a request, and if necessary an order, for extensive further and better particulars of the claims for past and future loss of earnings. The advocates for the defendant, however, failed to ask for any such particulars. The claims also clearly cried out for a request, and if necessary an order, for full discovery of all the relevant documents in the possession or power of the plaintiff. The

advocates for the defendant, however, failed to make a request, or seek an order, for such discovery.

The only effort made by the advocates for the defendant to obtain documents from the plaintiff was a Notice to Produce dated 26th November 1981, asking for production at the trial of all relevant documents, including in particular (a) all records in writing showing past earnings and (b) all previous and present income tax returns filed and receipts for income tax paid in Italy or elsewhere. No consideration appears to have been given to the likelihood that many of the relevant documents would be written in Italian, so that, if they were to be put in evidence or otherwise used at the trial, translations into English would be required. In any case a Notice to Produce at the trial was no substitute for pre-trial discovery.

At the trial before Penlington J. three witnesses gave oral evidence for the plaintiff with regard to his past earnings and what his future earnings would probably have been but for his injuries. These were the plaintiff himself; Vittorio Majoni, the Operations Manager of the company by which the plaintiff had been employed; and Colin Wilson, a Project Manager employed by another company active in the off-shore oil industry. The plaintiff further gave evidence about the profits of his business of selling solar energy panels.

During his cross-examination the plaintiff produced for the first time a bundle of statements relating to his past earnings as a diver, which was put in evidence as exhibit P 4. These statements were written in Italian and contained somewhat complex figures, so that translation into English and a close study of such figures would have been necessary to enable them to be properly understood. The advocate for the defendant might reasonably have asked for an adjournment for these purposes. He chose, however, not to do so, and put no questions to the plaintiff about the statements. In particular he never put to the plaintiff that, by reason of the changing rate of exchange between the Brunei dollar and the Italian lire, or for any other reason, there were any inconsistencies between his evidence-in-chief in which he had referred to his earnings in terms of Brunei dollars only, and the figures in Italian lire shown in the statements produced. Penlington J. said in his judgment that both the plaintiff and Vittorio Majoni were good witnesses on whose evidence he could rely. Later, dealing with the question of loss of earnings he said:-

> "... there was an unfortunate lack of documentary evidence on this head which should have been easy to calculate."

As will be apparent from what has already been said, their Lordships can only regard this observation as a charitable understatement.

Relying wholly or mainly on the evidence of the plaintiff and Vittorio Majoni, Penlington J. made the following findings of fact with regard to the plaintiff's past earnings:-

(1) That at the time of the accident the plaintiff was employed by an Italian company called Sub Sea as a third class diver earning about B$8,000 a month, which included a basic salary paid in Italy and various bonuses and extra payments.

(2) That, following the accident, the plaintiff's income was reduced to about B$1,000 a month paid by the Italian Government.

(3) That this continued till August 1978, when he got medical clearance to act as a shallow-water diver: he then worked in Libya for a short period at a salary of B$4,000 a month.

(4) That in January 1979 he returned to Brunei, where he was paid B$4,000 to B$4,500 a month.

(5) That in June 1979 he went back to Italy for further medical treatment.

(6) That he afterwards returned to Brunei, where he again earned B$4,000 to B$4,500 a month.

(7) That he resigned from his work as a diver for Sub Sea in January 1980.

(8) That, but for his injuries in the accident, he would have been promoted to second class diver on 1st January 1978 at an increased salary of B$9,500 a month.

(9) That, after giving up diving, he was unemployed from January until August 1980, during which period he again received B$1,000 a month from the Italian Government.

(10) That in August 1980 he began work on his own account selling solar energy panels. He invested B$30,000 in that business, and his father did the same. With regard to the plaintiff's earnings in that business Penlington J. said:-

> "He (the plaintiff) said that the profit from the business varies according to the seasons but the turnover is about B$4,000 a month. He has to spend quite a lot on advertising and there are other overheads. I will, however, assume that he made a profit of B$4,000 per month during that period."

Their Lordships would pause to observe that Penlington J.'s finding that the profit from the plaintiff's business, as distinct from the turnover, was B$4,000 a month was surprisingly adverse to him. His pleaded case was that his profit was B$1,800 a month, and his oral evidence, though admittedly somewhat confused, certainly did not, if taken at its face value, support any higher figure.

On the basis of these findings of fact Penlington J. calculated the plaintiff's loss of earnings separately over five periods, and arrived at a total loss of B$327,000. It is to be observed that he approached his task throughout on the basis that the currency in which the plaintiff's salary was paid, and the profits of his business made, was Brunei dollars.

Turning to future loss of earnings, Penlington J. made the following further findings with regard to the probable future of the plaintiff if he had not been injured in the accident:-

(1) That he would in due course have become a first class diver and then a superintendent.

(2) That his earnings from the date of trial, when he was aged 27, until his probable retirement at the age of 60 would have been B$12,000 a month.

(3) That, allowing for profits of B$6,000 a month from his new business, his future loss of earnings was B$6,000 a month or B$72,000 a year. Their Lordships would pause again here to observe that it is not apparent what was the evidential basis for the figure of B$6,000 a month deducted by Penlington J. from the plaintiff's hypothetical earnings of B$12,000 a month. Indeed, having regard to the absence of any real evidence on the matter, Penlington J. could do no more then make a reasonable estimate of the right figure, and their Lordships must assume that this is what he did.

With regard to the multiplier to be applied to the annual loss of B$72,000 Penlington J. said:-

> "The plaintiff is now 27 years of age and would normally have retired at 60. He was, however, engaged in a hazardous occupation, and that is a factor which must be considered. The Chief Justice in *McGuinness* (another case in the High Court of the State of Brunei) applied a multiplier of 12 for a man of 34 who was a driller, also a hazardous occupation, who would retire at 55. I think I should apply a multiplier of 13 here. That gives a figure for loss of earnings of B$72,000 x 13 = B$936,000."

In the result the damages awarded to the plaintiff by Penlington J. were as follows;-

| | |
|---|---|
| (1) Agreed special damages in respect of matters other than past loss of earnings | 10,292 |
| (2) Past loss of earnings | 327,000 |
| (3) Pain, suffering and loss of amenities | 27,500 |
| (4) Future loss of earnings | 936,000 |
| Total | B$1,300,792 |

He further awarded interest on these sums.

The judgment of the Court of Appeal was delivered on 18th October 1982 by Sir Alan Huggins. That court, as indicated earlier, dismissed the defendant's appeal on liability and the plaintiff's cross-appeal on damages; but allowed in part the defendant's appeal on damages by reducing substantially the amount awarded for past loss of earnings. The reduction so made was from B$327,000 to B$233,688.58, with consequential variations in the amount of interest awarded in respect of that item.

The difficulties facing the Court of Appeal on the question of damages for both past and future loss of earnings were stated succinctly by Sir Alan Huggins:-

> "In relation to the earnings one must first inquire what the plaintiff was earning at the date of the accident, and at once we run into difficulty because the whole case was tried on the false basis that the plaintiff was being paid in Brunei dollars, whereas the fact is that his basic salary and deep sea diving bonus was paid in lire in Italy."

Shortly afterwards he said:-

> "Another difficulty which has bedevilled us, as it must the trial judge, is the unsatisfactory nature of the rest of the evidence as to damages."

Later again he said:-

> "The evidence as to the earnings of his (the plaintiff's) business is woefully inadequate ...."

Sir Alan Huggins reviewed the whole of the evidence, and, using the exchange rate of B$1 = L280 prevailing at the date of the accident, made a revised analysis of the plaintiff's past loss of earnings, which he expressed in the form of a table as follows:-

| Period | Lire | B$ |
|---|---|---|
| 1.10.77 to 31.12.77 | 785,806.44 | - |
| 1. 1.78 to 31. 7.78 | 1,960,000.00 | - |
| 1. 8.78 to 31. 8.78 | - | 4,000.00 |
| 1. 9.78 to 31.12.78 | 4,480,000.00 | - |
| 1. 1.79 to 30. 6.79 | 1,680,000.00 | 21,000.00 |
| 1. 7.79 to 31. 7.79 | 280,000.00 | 3,500.00 |
| 1. 8.79 to 30. 9.79 | - | 8,000.00 |
| 1.10.79 to 31. 1.80 | 4,480,000.00 | - |
| 1. 2.80 to 31. 7.80 | 1,680,000.00 | - |
| 1. 8.80 to 6.12.81 | 18,136,774.09 | - |
| Totals | 33,482,580.53 | 36,500.00 |

In arriving at the plaintiff's income after he began his own business as a seller of solar energy panels, Sir Alan Huggins, while reasonably doubting the profit figure of B$4,000 a month on the grounds to which their Lordships referred earlier, concluded that, having regard to the unsatisfactory nature of the plaintiff's evidence on the subject, the trial judge was entitled to use it as a basis for his calculations.

Turning to the question what the plaintiff would have earned but for the accident, Sir Alan Huggins accepted broadly the findings of Penlington J. as to the future course which the plaintiff's career would have taken, and made a revised analysis of his hypothetical earnings expressed in the form of a second table as follows:-

| Year | Lire | B$ |
|---|---|---|
| 1977 | 3,929,032.20 | 8,419.35 |
| 1978 | 21,840,000.00 | 72,000.00 |
| 1979 | 21,840,000.00 | 72,000.00 |
| 1980 | 21,840,000.00 | - |
| 1981 (to 6th Dec) | 25,273,548.19 | - |
| Totals | 94,722,580.39 | 152,419.35 |

Sir Alan Huggins then subtracted the totals in the first table from those in the second table, thereby arriving at total losses of L61,239,999.86 and B$115,919.35 respectively. Then, applying the rate of exchange prevailing at the trial, as given in evidence, namely, B$1 = L520, he calculated the sum of the two losses as B$233,688.58, which was less by B$93,311.42 than Penlington J. had awarded under this head.

With regard to future loss of earnings Sir Alan Huggins examined a number of criticisms made by both sides of both the multiplicand and the multiplier used by Penlington J. but rejected them all on the ground that there was evidence to support the figure of B$72,000 as the multiplicand, and that the multiplier of 13, although on the low side, was not in all the circumstances of the case so low that the Court of Appeal would be justified in increasing it.

Their Lordships now come to the appeal and cross-appeal which is before them. With regard to these, three preliminary points need to be made. The first point is that all the issues raised on both sides are issues of fact involving no question or principle of law at all. The second point is that the issues of fact raised on both sides are issues relating to the assessment of damages for past and future losses of earnings, in respect of which a court cannot, even if it has the benefit of perfect pleadings, all essen-

tial discovery, and evidence both oral and written as complete and satisfactory as it is possible to have, arrive at precise answers, because of the many hypothetical facts necessarily involved in any such assessment. The third point is that, as their Lordships indicated earlier, the want of care, thoroughness and foresight with which the advocates prepared their respective cases for, and conducted them at, the trial at first instance had the result that the trial judge had before him inadequate pleadings and only a small part of the total evidential material, especially documentary evidence, which he needed in order to make a satisfactory assessment of the two items of damages with which this Board is now concerned.

Their Lordships consider first the amount awarded for past loss of earnings. For the defendant (appellant and respondent to the cross-appeal) three main submissions were made. The first submission was that the rate of exchange of B$1 = L520, on the basis of which Sir Alan Huggins had converted back the plaintiff's loss in lire into Brunei dollars, was erroneous, and that fresh evidence, which counsel for the defendant applied for leave to adduce, would show that the correct figure was L580. The second submission was that the evidence called by the plaintiff in respect of his actual past earnings as a diver, and the earnings which he would have earned but for the accident, was incomplete and unsatisfactory; there should have been written evidence on these matters from the plaintiff's employers; and, since the burden of proof in respect of both matters lay on the plaintiff, the losses found by the Court of Appeal were not justified. The third submission was that the evidence about the profit made by the plaintiff in his new business of selling solar energy panels was wholly inadequate, and that a higher profit than B$4,000 a month should have been attributed to him in respect of it.

For the plaintiff (respondent to the appeal and cross-appellant) two main submissions were made. The first submission was that Sir Alan Huggins, in converting back the plaintiff's past earnings from Italian lire into Brunei dollars, had throughout used the rate of exchange of B$1 = L280, which was the rate in force at the date of the accident, and that he should instead have applied to the various periods considered the progressively changing rate of exchange which culminated in the rate of B$1 = L520 by the date of the trial. The second submission was that both Penlington J. and the Court of Appeal were wrong to attribute to the plaintiff, as the profit made by him in his new business of selling solar energy panels, a sum as high as B$4,000 a month. On the plaintiff's evidence this was the figure for turnover and not for profit; there were deductions to be made for the cost of materials and advertising;

and a much lower figure for profit should therefore have been found.

Their Lordships consider first the three submissions made for the defendant. With regard to the first submission, it depended on the grant of leave to adduce fresh evidence with regard to the rate of exchange between Brunei dollars and Italian lire prevailing at the date of the trial. Their Lordships refused such leave on the ground that the fresh evidence could, by the exercise of due diligence on the part of the defendant's advocates, have been adduced at the trial. It is also pertinent to observe, firstly, that the evidence that L520 was the correct figure was given by the plaintiff's witness, Vittorio Majoni, at the trial, and he was not cross-examined with regard to it; and, secondly, that the defendant made no application to the Court of Appeal for leave to adduce the fresh evidence concerned.

With regard to the second submission, their Lordships have already commented on the unsatisfactory manner in which both sides prepared for and conducted the trial at first instance. If the advocates for the defendant had insisted on further and better particulars of the relevant averments in the statement of claim, and on proper discovery of the plaintiff's documents, they might well have put themselves in a position to mount an effective attack on the figures given by the plaintiff, Vittorio Majoni and Colin Wilson. Having failed, however, to do either of those things, they were not able to mount any such attack, and, as a result, the figures given by these three witnesses went largely unchallenged. The trial judge expressly stated that he regarded the plaintiff and Vittorio Majoni as good and reliable witnesses, and their Lordships cannot in these circumstances see anything wrong in either the trial judge or the Court of Appeal accepting and acting on the figures spoken to by these witnesses.

With regard to the third submission, there is no doubt that the plaintiff's evidence about the profit made by him in his new business was, as Sir Alan Huggins said, woefully inadequate. It was, however, never put to the plaintiff in cross-examination that the profit exceeded B$4,000 a month, and, as their Lordships have already observed at an earlier stage, the findings that the profit was even as high as this was, on the plaintiff's evidence, surprisingly adverse to him. That being so, their Lordships can see no reason for holding that the profit made by the plaintiff should have been found to be even higher. Here again, if there had been proper discovery of the plaintiff's documents, the evidential situation might well have been different.

In the result their Lordships reject all the three main submissions made by the defendant, and turn to the two submissions made in a contrary sense for the plaintiff.

With regard to the first submission, there is logical force in the contention that, for each period of loss of earnings calculated, the amounts in Brunei dollars should have been converted to Italian lire at the contemporaneous rate of exchange, rather than all being calculated at the rate of exchange prevailing at the date of the accident. Because of the way in which the trial was prepared and conducted, however, the Court of Appeal had no evidence which would have enabled it to follow this theoretically more correct approach. This was as much the plaintiff's fault as the defendant's in not preparing and conducting the case adequately, and in these circumstances their Lordships do not consider that the plaintiff has any legitimate complaint against the Court of Appeal on this score.

With regard to the second submission, it will be apparent from what their Lordships have already said that they have some sympathy with the plaintiff on this issue. It was, however, for the plaintiff to satisfy the trial judge what was the profit made by him in his new business. Having regard to the woeful inadequacy of the evidence adduced by him on this topic, including the failure to produce any accounts or other relevant documents, their Lordships agree with the Court of Appeal that Penlington J. was justified in interpreting the plaintiff's evidence on this topic adversely to him.

In the result their Lordships reject each of the two main submissions made for the plaintiff.

It remains for their Lordships to examine the question of future loss of earnings. This involves a consideration, firstly, of the multiplicand, and, secondly, of the multiplier adopted by Penlington J. and accepted by the Court of Appeal. The multiplicand was attacked for the defendant as being too high, on the ground that a larger profit than B$6,000 a month should have been found as likely to be earned by the plaintiff in his new business as it developed in the future. The multiplier was attacked by both sides: by the plaintiff on the ground that it was too low; and by the respondent on the ground that it was too high, although counsel did not in the end press his argument to this effect.

So far as the multiplicand is concerned their Lordships have already observed at an earlier stage that the evidence before the trial judge was so inadequate that he had no alternative but to make what amounted to no more than a reasonable estimate. Like the Court of Appeal, their Lordships do not consider that

the estimate which he made was an unfair or unreasonable one for him to make. Here again the absence of discovery of the plaintiff's documents, and the failure to deal with the matter properly either in the plaintiff's evidence-in-chief or in his cross-examination, rendered the task of the trial judge, and that of the Court of Appeal, an extremely difficult one.

So far as the multiplier is concerned the main submission made for the defendant was that Penlington J. was wrong to calculate the multiplier by reference to an assumed rate of interest on the notional income from the lump sum awarded of as much as 6%: the rate which should have been taken was 4% to 5%, which would have produced a higher multiplier and resulted in a substantial increase in the sum awarded for future loss of earnings.

Their Lordships think it right to emphasise that, even when a court has the best possible evidence (which was far from being the case here), the selection of an appropriate multiplier can never be a matter of precision. A number of factors have to be taken into account, and their Lordships agree with the Court of Appeal that, although a multiplier of 13 was on the low side, it was not in all the circumstances of the case so low as to justify its being increased by an appellate tribunal.

In the result their Lordships are of the opinion that, despite the contentions advanced on either side, the figure of B$936,000 as damages for future loss of earnings has not been shown to be wrong and should stand.

There is a further point to be made with regard to this second issue relating to future loss of earnings. The question what is a proper amount to award is, as their Lordships said earlier, one of fact involving no question or principle of law. There are concurrent findings of fact on this issue by both the trial judge and the Court of Appeal, and it is not the practice of this Board, save in exceptional circumstances, to interfere with such findings. There are, in their Lordships' opinion, no such exceptional circumstances in the present case.

For the reasons given by their Lordships, they will humbly advise Her Majesty that both the appeal and the cross-appeal should be dismissed, with no order as to costs.