

MARSHALL MANUFACTURING COMPANY  
(1979) (PROPRIETARY) LIMITED

Appellant  
(Defendant a quo)

and

MARSHALL ENTERPRISES (PROPRIETARY)  
LIMITED

Respondent  
(Plaintiff a quo)

IN THE SUPREME COURT OF SOUTH AFRICA  
(APPELLATE DIVISION)

In the matter between:

MARSHALL MANUFACTURING COMPANY  
(1979) (PROPRIETARY) LIMITED

Appellant  
(Defendant a quo)

and

MARSHALL ENTERPRISES (PROPRIETARY)  
LIMITED

Respondent  
(Plaintiff a quo)

CORAM: HOEXTER, GROSSKOPF, JJA et  
GALGUT, AJA

HEARD: 26 August 1986

DELIVERED: 30 September 1986

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J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA

In the Witwatersrand Local Division the respondent company (to which I shall refer as "the plaintiff") sued the appellant company (to which I shall refer as "the defendant") for payment of commission. The defendant resisted the action and filed a counterclaim for damages in respect of an alleged breach of contract. Beginning in June 1983, there followed before PREISS, J a protracted trial during an early stage of which the defendant withdrew its counterclaim and was ordered to pay the wasted costs occasioned thereby. The trial Court ruled that the plaintiff was entitled to the commission claimed by it and gave judgment for the plaintiff in the sum of R39,300, together with interest on that amount on an agreed sliding scale, and costs. With leave of this Court the defendant appeals against the whole of the order so made by the trial Court.

The .....

The plaintiff's claim arose in the following way. For the purpose of joining abutting rails on its railroad system the South African Railways ("the SAR") has for many years used reinforcing slabs made of a rigid material. Such slabs are called fishplates. The commission claimed by the plaintiff related to a sub-contract for the machining in Johannesburg of fibreglass insulating fishplates. During 1980 the Stores Department of the SAR invited tenders for the supply and delivery of insulating fishplates. The successful tenderer was a Johannesburg company called J J Langen & Co South Africa (Pty) Ltd ("the Langen company"). The plaintiff and the defendant also carry on business in Johannesburg. In its successful tender the Langen company had nominated the defendant as its sub-contractor to machine raw fibreglass blocks which were to be imported by the Langen company. The sole issue in the case was whether or not the defendant had been awarded the sub-contract through the instrumentality of the plaintiff.

The .....

The trial Court found that the plaintiff had discharged the onus of proving that its efforts were the effective cause of the appointment of the defendant as the sub-contractor. On appeal the defendant challenges the correctness of that finding.

The managing director of the plaintiff is a Mr Samuel who, at the time of the trial, was aged seventy-five. Despite his years he enjoyed good health and he was able to engage energetically in certain business ventures involving engineering skills and experience. In 1952 Samuel established in Johannesburg a manufacturing company. Later Samuel also formed the plaintiff company which became the holding company of the former. The plaintiff traded as "Marshall Manufacturing Company" and included in its business was to supply wooden fishplates to the SAR. During 1977 the plaintiff sold its business as a going concern to one Strydom in order to enable the latter in turn to sell the business .....

business to a new company. The new company thereafter registered was the defendant. Pursuant to the terms of the deed of sale between the plaintiff and Strydom the defendant incorporated the word "Marshall" as part of its name and it traded under the style of "Marshall Manufacturing Company." Paragraph 8 of the deed of sale between the plaintiff and Strydom contained, inter alia, the following provisions -

"8. RAILWAY BUSINESS:

Inasmuch as the Seller has been the successful tenderer to the South African Railways ('S.A.R.') for the supply of certain materials for the manufacture of fish plates and obtains orders from the S.A.R. for machining, it is agreed:

8.1 .....

8.2. The Seller binds itself that it will not accept orders for machining, will not undertake any machining but will pass on to the Purchaser and the new Company any enquiries for machining and will assist the Purchaser and the new Company in tendering therefor."

The .....

The sole shareholders of the defendant were two men respectively called Duek and Castiglioni. The defendant manufactured some metal products but its chief commodities were woodware such as garden furniture, trelliswork and picket fencing. After the aforementioned sale to Strydom the plaintiff continued to carry on business in its own right but no longer engaged in manufacturing.

During 1978 one Husemeyer, an engineer with long service in the SAR, was appointed in the Johannesburg offices of the SAR as its Assistant Chief Engineer (Signals and Telecommunications). He held this senior position until his retirement from the SAR at the beginning of 1981. At the time of the trial Husemeyer was the General Manager of Malawian Railways. In the SAR a large part of Husemeyers's work was concerned with insulating fishplates, and since 1958/1960 Samuel had been well-known to him as a manufacturer of wooden fishplates. The fishplates used by the .....

the SAR are subjected to great stresses. Together with the Civil Engineering Department of the SAR Husemeyer was constantly searching for an improved version of the fishplates used by the SAR, both with regard to the material of the fishplates and the design according to which they were shaped. Until about 1977 fishplates had been fashioned from laminated wood. In that year Husemeyer came across fibreglass fishplates manufactured by the American 3M company. These 3M fibreglass fishplates had a profile differing from that of the fishplates used in South Africa and they were unsuitable for local use. Husemeyer had a high regard for Samuel's skills and knowledge in regard to fishplates and he explained to Samuel that they should try to find fibreglass fishplates suitable for local use. The Langen company is the local agent of various foreign engineering companies, one such being Röchling, which has a factory at Haren in West Germany. In 1979 Mr Langen, who is the managing director of the Langen company, paid a visit .....

visit to the offices of Husemeyer and tried to interest Husemeyer in the purchase of laminated wood. Husemeyer told Langen that he was no longer interested in wood as a material for fishplates and he showed Langen fibreglass samples from the SAR workshops. One of Röchling's products is fibreglass. As a result of this meeting Langen communicated with Röchling in Germany and in due course Langen brought Husemeyer some samples of Röchling fibreglass.

By early 1980 Husemeyer's office had obtained four slabs of fibreglass whereof two (each being almost one metre long) came from the 3M company and the remaining two (each being almost half a metre long) came from Röchling. Husemeyer wished small test pieces for tensile and compression tests to be made from the slabs of each company; and in addition he wished to have twelve pairs of fishplates to be fashioned from the 3M slabs. Husemeyer arranged with Samuel that the latter should cut the necessary test pieces and fishplates from the aforesaid slabs. A letter written

by .....

by Husemeyer to the plaintiff on 7 March 1980 reflects that Samuel undertook this work in anticipation of a petty contract formally to be concluded between the SAR and the plaintiff at a future date. In fact the petty contract was finally concluded and signed only on 25 July 1980. However, with a view to the manufacture of the test-pieces and fishplates so undertaken by the plaintiff, Samuel promptly made arrangements, during March 1980, to have the necessary work done at the defendant's factory. As to the manner in which these arrangements were concluded between the plaintiff and the defendant and as to the further question how much of the work in terms of the petty contract was done by Samuel himself, the evidence at the trial produced strongly conflicting versions which will be examined later in this judgment. Suffice it here to mention that pursuant to the anticipated petty contract Samuel on 6 May 1980 delivered to the SAR the required test-pieces cut from both the 3M and the Röchling fibreglass; and that during or about the .....

the latter half of July 1980 Samuel further delivered to the SAR the sample fishplates cut from the 3M slabs of fibreglass.

While the petty contract was being performed at the defendant's factory the Chief Mechanical Engineer of the SAR had been conducting his own tests on test-pieces from a slab of fibreglass available to him. In the light of these tests the SAR decided to go to tender - this being the tender to which the plaintiff's claim for commission relates - before it received the sample fishplates from Samuel. Already in June 1980, and with a view to the said tender, the SAR published a detailed set of specifications known as "Specification CSE 87/6".

Before the year 1980 Samuel and Langen had never met. They were introduced to each other over the telephone in the following circumstances. On a date during the first half .....

half of 1980 Samuel was present in the office of Husemeyer while the latter was having a telephone conversation with Langen. Husemeyer interrupted his conversation with Langen to hand the telephone receiver to Samuel, whereafter a telephone conversation took place between Samuel and Langen. I shall refer to this introduction of Samuel to Langen by Husemeyer as "the telephone introduction." To what end Husemeyer effected the telephone introduction, and what was said in the course of the ensuing telephone conversation between Samuel and Langen, are both matters important to an assessment of the probabilities in the case and will be explored later in due course.

At or about the end of May or the beginning of June 1980 Langen paid a visit to the defendant's factory. On 25 July 1980, and at the defendant's factory, Duek on behalf of the defendant signed a letter ("the commission letter") addressed to the plaintiff and containing the following:-

"Dear .....

"Dear Sir

Should your efforts be successful and result in orders for the Machining of Glass Fibre Insulating Fishplates, then we herewith confirm, that we will pay you a commission of 10% (ten per centum) on our charges for all orders received. This is in respect of S.A.R. Tender, which will be published shortly and will be for the total orders placed, tentatively 30,000 pairs..

Yours faithfully

(Signed)

J.M. DUEK

DIRECTOR."

On 28 July 1980, and at the defendant's factory, the terms of the commission letter were varied in a manuscript document bearing that date and signed by both Duek and Samuel. To this document, wherein reference to the plaintiff company is made by the initials "M.E.", I shall refer as "the increased commission note." Its effect was to increase the amount of the commission payable to the plaintiff (assuming the success of its efforts in terms of the commission letter) by the defendant. The increased commission notice reflected the following details:-

"Order .....

"OrderInsulating Fishplates Fibreglass

You can charge per pair	R9,50
Your quote	<u>8,60</u>
	,90

We agreed to 50 : 50

This means R8,60

10%	,86
-----	-----

plus 50% of ,90	<u>,45</u>
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R1,31

per pair

commission for M.E.

This applies only to the first  
tender for ± 30 000 pairs."

At the beginning of August 1980 Samuel, travelled to Europe and he returned to this country only at the beginning of October of that year. His journey took him to West Germany and during his stay in that country he paid a visit to the Röchling factory at Haren. There Samuel had discussions with the managing director, the sales director and the factory manager of Röchling.

At the end of August 1980 the SAR issued tender forms in respect of Tender No 1080 75207 for the supply and

delivery .....

delivery of insulating fishplates in conformity with Specification CSE 87/6. On 15 September 1980 Duek, on behalf of the defendant, addressed to the Langen company a letter the opening portion whereof was in the following terms:-

" RE : Quotation 1080 75207  
S.A.R. Stores Department

We have been advised that the samples submitted to S.A.R., made by us with your material, have been approved.

We hereby submit our quote for the machining, stamping, lacquering and packing for

Item 1 No 28119 30,000 pairs Fibre Fish Plates  
 Alternatively

Item 2 No 28119 20,000 pairs Fibre Fish Plates

Insulating fish plates complete in accordance with specification C.S.E. 87/6, Drawing E3331. Our price is R9,60 per pair excluding G.S.T. Plus 3% of value of tender submitted by you to S.A.R. ...."

In respect of Tender No 1080 75207 the Langen company during October 1980 submitted to the SAR a tender for a total value in excess of R2m. In its said tender the Langen company

nominated .....

nominated the defendant as its sub-contractor in respect of the machining, drilling, stamping, lacquering and packing of the fibreglass blanks involved. By letter dated 5 December 1980 the Chief Stores Superintendent of the SAR informed the Langen company that its tender had been accepted.

On 10 December 1980 Langen, on behalf of the Langen company, wrote to the defendant as follows:-

" re: S.A.R. CONTRACT 4/3187. 75207. 010  
for 30.000 Pairs of Insulating Fishplates

Based on your quotation of 15.9.1980 we have pleasure in herewith awarding you our sub-contract for:

30.000 Pairs of Insulating Fishplates to be supplied from overseas in raw blocks as per your drawing and to be machined, stamped, lacquered, printed on and packed by you, including delivery to S.A.R. Stores, Langlaagte.

Price: At R9,60 per Pair plus R 2,12 being 3% of our total quote to the S.A.R. of R 70,69 per Pair.

....."

On .....

On 3 February 1981 Duek delivered by hand to Samuel a letter addressed to "Mr Samuel, Marshall Enterprises" which Duek had written on behalf of the defendant. The first two paragraphs of this letter read as follows:-

"When you discussed the machining by us of insulating fibre fish-plates for the South African Railways last year and when we agreed to effect certain payments to you if we obtained the order through you, you left us under the very clear impression that if we obtained the order it would have been as a result of your efforts. It was on that basis that we agreed to pay certain commission to you.

In fact it has now become very clear that the sub-contract awarded to us was not the result of any efforts on your part. We regret that in the circumstances you must realise that we are unable to pay any commission to you in respect of this order since it was not obtained through your efforts."

The above letter was followed by an exchange of correspondence between the attorneys respectively acting for the plaintiff and the defendant and in June 1981 the plaintiff instituted its action. Copies of the commission letter and the

increased .....

increased commission note were annexed to the particulars of claim wherein it was averred that the plaintiff "had fulfilled its undertakings" entitling it to payment of commission. The defendant sought further particulars to the plaintiff's claim. The defendant wished to know, for example, whether the plaintiff alleged that the sub-contract had been awarded to the defendant "solely as a result of the efforts of the plaintiff". The plaintiff's answer was that its efforts had been "the effective cause" of the award of the sub-contract. The defendant required the plaintiff to detail the efforts which at the time of the agreement in July 1980 "had been made and were to be made" by the plaintiff in fulfilment of its undertakings. This question elicited the following response from the plaintiff:-

" The efforts made by Mr Samuel acting for and on behalf of the plaintiff included the following:-

(i) he negotiated with officials of the S.A.R. in connection with the S.A.R. acquiring and using fibreglass fishplates instead of the wooden fishplates which the S.A.R. had used and were using up to that stage;

(ii) he .....

- (ii) he designed the form of the fibreglass fishplates and did the necessary experiments in connection therewith;
- (iii) he did experiments to determine a satisfactory and economical technique for cutting and machining the fibreglass fishplates;
- (iv) he secured an order from the S.A.R. for the making of eleven pairs of fishplates as samples to be used by the S.A.R. for testing purposes, and thereafter duly made and supplied the said 11 pairs to the S.A.R.;
- (v) he recommended to the S.A.R. that the sub-contract for machining be awarded to the defendant;
- (vi) he introduced and recommended the defendant to J.J. Langen and the 3M company who were suppliers of the material involved and who, it was contemplated, would submit tenders for the main contracts;
- (vii) he made a special trip to the factory of Rochling in Germany in connection therewith."

In its plea the defendant denied that the efforts described in sub-paragraphs (i), (ii), (iii), (vi) and (vii) quoted above had been made by Samuel; and it pleaded that it had no knowledge of the efforts described in sub-paragraphs (iv) and (v). Accordingly the defendant put the plaintiff to

the .....

the proof of all the allegations set forth in sub-paragraphs (i) to (vii). The defendant further denied that the plaintiff or the plaintiff's alleged efforts had been the effective cause of the award of the sub-contract to the defendant.

Against the above summary of the main undisputed facts of the matter and the essential issues as reflected in the pleadings it is necessary now to look more closely at the evidence adduced at the trial. The witnesses for the plaintiff were Husemeyer and Samuel while for the defendant there testified Duek, Castiglioni and Langen.

From the tender forms issued by the SAR it appears that in regard to the manufacture of goods required by the SAR the policy of the Administration is to encourage local manufacture thereof by industrial and commercial undertakings established in the Republic of South Africa. When Langen came back to him with samples of Röchling

fibreglass .....

fibreglass Husemeyer explained to Langen the SAR's policy favouring local manufacture. In his evidence Husemeyer said that while it would have been quite impermissible for him to have selected a sub-contractor for a supplier, it was nevertheless open to him to make recommendations in this regard to a supplier. He testified that he told Langen that Samuel had been involved in the manufacture of fishplates in this country for many years; and that he recommended Samuel to Langen with a view to the local machining of fishplates. According to Husemeyer there were at that time locally only two parties capable of making fibreglass fishplates, the one being the workshops of the SAR's Chief Mechanical Engineer and the other being Samuel.

In the course of his evidence it transpired that early in 1980 (and, indeed, until the date of the trial itself) Husemeyer had been under the impression that Samuel was still directly involved in the manufacture of fishplates

by .....

by "Marshall Manufacturing". This fact prompted a suggestion in the cross-examination of Husemeyer that if any testing of fibreglass had to be done the logical person to be approached - outside of the SAR - would be the defendant company. Husemeyer repudiated this suggestion and replied:-

"I would go to the only non-railway expert,  
Mr Samuel."

Reference has already been made to the SAR's letter of 7 March 1980 as a result of which Samuel, in anticipation of the petty contract, began making test-pieces and sample fishplates from fibreglass supplied by the SAR. That letter was signed by Husemeyer and addressed to the plaintiff. Husemeyer explained that the purpose of the petty contract was to enable Samuel to experiment with fibreglass fishplates. According to Husemeyer Samuel had earlier during their association conceived the idea of a new profile for wooden fishplates. His innovation involved the elimination from the fishplates of certain .....

certain concave surfaces for which plane surfaces were substituted. Samuel had contended that this would mean speedier and more economical manufacture of fishplates. Husemeyer testified that Samuel's idea was accepted by the SAR and incorporated in drawings of fishplates produced by the Chief Civil Engineer's Department.

In regard to the possibility that Röchling fibreglass might be used as the future material for the SAR's fishplates Husemeyer said that he had "continuous contact" with Langen; and that the latter's attitude towards the matter of local machining was -

"...that he couldn't determine where else to go and he would accept our recommendation."

While Samuel was busy making the test-pieces and sample fishplates in execution of the petty contract, so testified Husemeyer, Samuel kept him informed of the progress of the work. He had regarded Samuel as an expert in the

manufacture .....

manufacture of fishplates and insofar as fibreglass was concerned he considered that Samuel knew better than anyone else how to handle this material; and how to cut and drill it.

In regard to the telephone introduction of Langen to Samuel while the latter was in his office Husemeyer testified that he had effected the introduction with a view to a possible tender; and he gave as the gist of his words to Langen over the telephone:-

"If Mr Langen were to be successful in a bulk tender for fishplates, I would recommend Mr Samuel. Mr Samuel is in my office if you wish to speak to him.

Did he speak to him? -----Yes."

Samuel told the trial Court that from 1977 to 1978, and at the office of Husemeyer, he often discussed with the latter the possibility of using fibreglass in the manufacture of fishplates and also the technical problems

which .....

which machining of the new material was likely to present. Samuel corroborated the evidence of Husemeyer that he (Samuel) had devised the expedient of eliminating curved surfaces on the fishplates and had made the proposal for the new design which was in fact adopted by the SAR. Even before he had collected the 3M and Röchling fibreglass slabs from the SAR pursuant to the anticipated petty contract, so testified Samuel, he went to the defendant's factory and he there proposed to Duek and Castiglioni that the defendant should embark upon the manufacture of fibreglass fishplates. The defendant worked mainly in wood, however, and since Samuel mentioned the difficulties which working the new material might present, the reaction of Duek to his proposal was "negative". Duek and Castiglioni nevertheless agreed that Samuel should be allowed to use the defendant's factory in order to make the fibreglass test-pieces and sample fishplates for the SAR. After Samuel had collected these slabs he began working on them at the defendant's factory. ....

factory. According to Samuel he worked there "for quite a few weeks ..... nearly every day". Initially he worked on his own; later he worked together with Castiglioni who was responsible for the technical side of operations at the defendant's factory. Samuel said that he alone cut the test-pieces and did the drilling of the sample fishplates; but that he co-operated with Castiglioni in the cutting of the fishplates. Working on the fibreglass necessitated certain modifications of the defendant's machinery for which certain new parts and accessories had to be purchased. These purchases were paid for by Samuel. When the sample fishplates had been produced Samuel agreed with Duek and Castiglioni that the defendant should be compensated for the time spent by Castiglioni in working with Samuel on the petty contract; and a by mutual agreement a figure of R50 per fishplate was fixed. Samuel therefore paid the defendant R550. The remuneration paid to Samuel by the SAR in respect of the petty contract was R1236,71.

In .....

In his evidence Samuel was unable to fix the date of the telephone introduction more precisely than to say that it took place at some time during the period April to June 1980; but the witness was able to give a fairly detailed account of what had been said by Husemeyer to Langen and the content of the ensuing conversation between Samuel and Langen. I quote from Samuel's examination-in-chief:

"I was in Mr Husemeyer's office and there was a telephone conversation between Mr Langen and Mr Husemeyer and Mr Husemeyer introduced me to Mr Langen over the telephone as the man who would eventually make these fibre glass fish plates.

Did you then speak to Mr Langen? -----

Mr Husemeyer gave me the phone. I spoke to Mr Langen and Mr Langen said to me over the phone: 'I believe we have <sup>to</sup> co-operate in the manufacture of fibre glass fish plates.'

What did you reply? ----- .....My reply was that I was still connected with the manufacture, but that I had sold the manufacturing company and that Mr Langen would have to negotiate with the people who bought the company, my successors, Messrs. Duek and Castiglioni, over the actual contract."

Samuel .....

Samuel testified that when the success of his experiments at the defendant's factory demonstrated the feasibility of mass production of fibreglass fishplates, he had discussions with Duek and Castiglioni which culminated, on 25 July 1980, in the agreement reflected in the commission letter:

"We mutually agreed that I was entitled to a commission for the efforts which I had until that time made in order to bring this whole thing so far as to convince Mr Duek that this could be done."

According to Samuel he told Duek and Castiglioni that a tender would be forthcoming and he (Samuel) dictated the terms of the commission letter which Duek signed. In regard to the figures mentioned in the increased commission note Samuel said that the sum of R8.60 therein described as the defendant's "quote" had been worked out together by the parties on 25 July; but that thereafter he "had heard that

a .....

a price of R9.50 would be acceptable". He passed on this information to Duek and Castiglioni and this led to the drawing up of the increased commission note. After the signature of these two documents, so Samuel told the trial Court, he offered to be of assistance in negotiations between the defendant and the suppliers of fibreglass, but Duek told him very pointedly that he did not want Samuel to discuss the terms of any sub-contract with possible suppliers.

During cross-examination there was explored with Samuel whether the plaintiff's "efforts" mentioned in the commission letter related to past or future efforts. Initially the witness was adamant that:-

"This agreement refers to past activities."

When his attention was called to the fact that the plaintiff's particulars of claim made mention of "efforts made and to be made" (my underlining) the reply of the witness was:-

"What .....

"What was contemplated is that I would assist in the setting up of the Marshall Manufacturing process."

Before leaving Samuel's evidence brief mention should be made of a number of suggestions put to him by the defendant's counsel, all of which Samuel firmly repudiated. These were:-

- (a) that Duek had not been opposed to Samuel's initial proposal that the defendant should machine fibreglass fishplates;
- (b) that in the manufacture of the test-pieces and the sample fishplates Samuel's own contribution had been minimal, involving an odd half-hour here and there over a period no longer than a week;
- (c) that all the sample fishplates had been cut by Castiglioni;
- (d) that, .....

- (d) that, far from having been the earlier inspiration of Samuel, the idea of using flat as opposed to concave surfaces on the fibreglass fishplates was in fact the brain-child of Castiglioni during March 1980;
- (e) that Castiglioni had not been present during the discussions preceding Duek's signature of the commission letter;
- (f) that initially Duek refused to sign the commission letter; and that his signature was ultimately procured only because Samuel duped him into believing that Samuel "was in charge of this project with the SAR" and that it was within Samuel's power whether or not a sub-contract would be awarded to the defendant;
- (g) that Samuel had not offered to be of assistance in negotiations between the defendant and suppliers.

Duek told the trial Court that he was the Managing Director of the defendant and that he was in charge of practically every facet of its business. He said that when in March 1980 Samuel approached the defendant he (Duek) was amenable to the idea that the defendant should make the test-pieces and the sample fishplates. In the course of his work Castiglioni hit upon the idea of flat instead of concave surfaces on the fibreglass fishplates. At the end of May or the beginning of June 1980 Langen came to see the defendant's factory. Langen intended to put in a tender for fibreglass fishplates if the SAR should call for such tenders and Langen further informed Duek "that Mr Husemeyer told him that we (i.e. the defendant) are going to do the machining." I mention in passing that this last-mentioned bit of evidence by Duek is of particular significance in weighing the probabilities. Duek then showed Langen over the factory. There were two or three meetings in all with Langen at the factory before the SAR issued its tender, and at such meetings Duek discussed with Langen the possibility of the machining of the fibreglass being undertaken by the defendant.

On .....

On 25 July 1980 Samuel came to the factory and told Duek that the SAR would shortly go out on tender for fibreglass fishplates; that the SAR had asked him (Samuel) to be in charge of the project; and that Samuel knew the people supplying the fibreglass material. From all this, so testified Duek, he concluded that Samuel would be the successful tenderer through one of Samuel's overseas principals. When Samuel presented the commission letter to Duek for signature, so Duek further contended, the defendant had recently lost its garden furniture business and he (Duek) felt that he had his back to the wall. In this situation, and without consulting Castiglioni, he signed the letter.

In cross-examination Duek said that in the execution of the petty contract the only work done by Samuel himself was the grinding of some test-pieces. Duek agreed with a suggestion by the plaintiff's counsel that in bringing the .....

the work under the petty contract to the defendant's factory Samuel had intended that the defendant and its employees should gain experience and technical skill in fashioning fishplates from fibreglass; but he denied that the underlying reason was to equip the defendant to handle a large machining sub-contract. Deviating from his evidence in chief Duek then proceeded to deny that when Langen visited the defendant's factory Langen had made any mention of the possibility of a tender.

Castiglioni is an Italian immigrant whose English is poor. After a brief and unsuccessful attempt to speak English in the witness-stand he gave his evidence through an interpreter. By his own admission Castiglioni was a nervous and confused witness with a very scanty recollection of the events in relation to which he tried to testify. His evidence may be dealt with very shortly. He said that the mechanical side of the defendant's operations was his

particular .....

particular responsibility and that Duek attended to all the administrative work and dealings with clients. When in March 1980 Samuel sought the defendant's assistance both he (Castiglioni) and Duek were interested in Samuel's proposals. He had not worked with fibreglass before, and later in his evidence he agreed that the machining of fibreglass presented many technical difficulties. Samuel came to the factory to look at the progress of the work from time to time but Samuel was not really involved in either the cutting or the machining of the sample fishplates. According to Castiglioni he himself realised that the elimination of concave surfaces on the fishplates would make for quicker and cheaper manufacture and during March 1980 he recommended to Samuel that the profile of the fishplates be modified accordingly. Armed with this idea Samuel went off to the SAR and returned with a drawing reflecting the amended design. The letter which the SAR addressed to the plaintiff on 7 March 1980 in connection with the petty contract made reference, by a number, to a particular .....

particular SAR drawing. At the time of preparation for trial the drawing was no longer in Samuel's possession and it was not discovered. A copy thereof was obtained by Samuel during the trial and, the objections of the defendant's counsel to the production thereof having been disallowed by the trial Court, Castiglioni's claim that he was the originator of the notion of plane surfaces was tested in cross-examination by reference to the drawing which reflected a fishplate design in which the concave surfaces had already been eliminated.

After an initial display of reluctance to make any concession in regard thereto Castiglioni was finally constrained to admit that the manufacture of the test-pieces and the sample fishplates had been undertaken with a view to a SAR tender for fishplates and in order to equip the defendant with experience and skill in the machining of fishplates.

So .....

So much for Castiglioni. Of rather greater importance in deciding the issues in the case is the evidence of Langen. Langen immigrated to this country as a fitter and turner and through the Langen company he carries on the business of a manufacturer's representative. It will be recalled that according to Husemeyer in his discussions with Langen he recommended Samuel with a view to the local machining of fishplates. Husemeyer's evidence to this effect was not challenged in cross-examination. Langen nevertheless told a rather different story. In this connection, so testified Langen, Husemeyer had recommended the defendant. Husemeyer recommended the defendant because it had experience in manufacturing fishplates and it had worked for the SAR before. Langen said that on the strength of this recommendation he went to the defendant's factory. He paid this visit to the factory because the Langen company was going to tender in the near future for a fishplate contract and it would .....

would need a local manufacturer.

During his evidence in chief Langen said that the factors which induced him to ask the defendant to give a quotation for the sub-contract were his "satisfaction as to their bona fides" and "the recommendation of the Railways." He gained the impression that the defendant was a company "that could indeed handle this machining contract". According to Langen, in the matter of nominating a sub-contractor for the machining of the fibreglass the Langen company was not subject to anybody's instructions; and his decision to nominate the defendant had not been influenced at all by the Röchling company.

The plaintiff's counsel explored at some length with Langen by what means the witness had been able to satisfy himself of the defendant's ability to perform the machining sub-contract. On this point Langen's evidence wavered somewhat. He said that he had "accepted" that they would .....

would be good enough to handle fibreglass, but in the same breath he added that he "took a chance on it". In a singularly unconvincing reply he then went on to say that Husemeyer himself had no proper appreciation of the difficulties involved in working with fibreglass.

Of particular significance, however, is the evidence of Langen in regard to the telephone introduction. Earlier in the trial Samuel had been cross-examined at great length, and after the defendant's counsel had consulted with Langen. It is noteworthy that in his cross-examination Samuel was nowhere challenged either as to the approximate date which he assigned to the telephone introduction or as to what had been said during the course thereof. In relation to the telephone introduction Langen's evidence was characterised by much vacillation and marked inconsistency. Although he finally conceded that it was not possible for him to fix the date of the telephone introduction, Langen

sought .....

sought to deny that his first visit to the defendant's factory took place after the telephone introduction. In order to determine the probable sequence of events it is important to consider with what object in mind Husemeyer effected the telephone introduction. In this respect the following passages in the cross-examination of Langen are revealing:-

"MR WISE: I put it to you it must have been quite clear to you that the purpose of that phone call by Mr Husemeyer to put you in direct contact with Mr Samuel is directly related to the forthcoming tender for fibreglass fishplates and with a view that there should be co-operation between you and Mr Samuel in that regard? ----- You are putting words in my mouth here.

Well, do you wish to comment on what the purpose of Mr Husemeyer telephoning you to introduce you to Mr Samuel might have been if it wasn't that?----- Well, I think only Mr Husemeyer can answer that.

COURT: No, Counsel is putting a certain proposition to you, you can either accept it or repudiate it or qualify it. Counsel has put to you the purpose of Mr Husemeyer's telephone call to you on this date that you were introduced to Mr Samuel was directly with the view that you and Samuel should co-operate, do you agree or not?-----I agree."

At .....

At this juncture it is convenient to notice what impressions the trial Court formed as to the credibility and reliability of each of the five witnesses whose testimony I have briefly summarised above. Although it found Samuel's evidence to be somewhat marred by his propensity towards stating unnecessary detail the trial Court considered both Samuel and Husemeyer to be truthful witnesses; and it found that their testimony accorded with the probabilities and was consistent with the documentary evidence produced. In the opinion of the Court below Samuel's evidence stood in sharp contrast to that of Duek and Castiglioni:-

".....who were clearly fabricating evidence in regard to what his (Samuel's) role in the machining of fibreglass blanks was."

The trial Court's impression of Duek was that he deliberately set out to paint a picture as unfavourable as possible to Samuel. The learned Judge found that Duek had been deliberately untruthful and evasive; that in his evidence

he .....

put forward a version which had not been properly canvassed in the cross-examination of the plaintiff's witnesses and which did not tally with the defendant's pleadings.

In the estimation of the trial Court Castiglioni was an evasive and uneasy witness whose technical knowledge was "extremely scanty" and whose version in evidence-in-chief was entirely demolished in the course of cross-examination. Differing in this respect from the witness Duek, so stated the learned Judge, there was in the case of Castiglioni:-

"....not so much of the deliberate intention of setting out to create a false impression in the mind of the Court but rather an inability to sustain evidence because he was testifying to matters of which he bore no real knowledge."

The cross-examination of Castiglioni with reference to the drawing mentioned in the SAR's letter dated 7 March 1980 indicated to the learned Judge:-

"...without .....

"...without possibility of doubt that it was Samuel who eliminated the concave surfaces on the wooden fishplate at a period long before the test pieces were to be manufactured and it serves to satisfy me that Mr Castiglioni's claim that he introduced this improvement during the machining of the test pieces as being a complete fabrication. And where Mr Duek attempts to support Castiglioni in this regard I regard it as no more than bluster and fabrication."

Hence the Court a quo concluded that it could pay no regard whatsoever to the evidence of Castiglioni where it was not confirmed by the evidence of some acceptable witness.

The trial Court's impression of Langen was that  
this witness -

"...although superior to Castiglioni and Duek was attempting to go out of his way to push his own efforts at the expense of Samuel's."

The learned Judge found Langen to be a highly intelligent and astute witness, but one who easily pleaded failure of memory when cornered. Of Langen the trial Court remarked:-

"Where .....

"Where his evidence conflicts with that of Samuel's and Husemeyer's I have no hesitation about accepting the latter's."

The overall conclusion to which the trial Court was impelled was stated by the learned Judge in the following way:-

".....I accept the evidence of the plaintiff's two witnesses and I reject the evidence of Catiglioni and Duek in toto and Langen in several material respects."

In argument before us it was urged by counsel for the appellant that the trial Judge had been rather too fulsome in his commendation of Samuel as a witness; and that in truth Samuel's evidence was not free from blemish. There are, I think, several (if rather minor) criticisms to be made of Samuel's evidence. For example, when he was pressed in cross-examination to say exactly how and from whom he had managed to discover between 25 July 1980 (the date of the commission letter) and 28 July (the date of the increased commission note) that R9.50 would be an acceptable

figure .....

figure for the defendant to quote, Samuel dithered not a little in his replies. Again, as has emerged earlier in this judgment, Samuel's evidence in relation to what future efforts (if any) on the part of the plaintiff were contemplated in the commission letter was inconsistent and unsatisfactory. It was said further that the trial Court had been unduly critical of Langen, more particularly in the following connection. The trial Court disbelieved Langen's evidence that he nominated the defendant as the sub-contractor in the tender by the Langen company without having recourse to its principal, the Röchling company in Germany. This was an issue not canvassed with Langen in his cross-examination and in my view there is merit in the argument of counsel for the appellant that there was no evidence on which to base the outright rejection of Langen's evidence on this score. This is an appeal, however, in which we have the benefit of a very comprehensive judgment by the learned trial Judge. His assessment of the witnesses was based on a thorough analysis of .....

of all the evidence and a careful appraisal of the probabilities. Having due regard to the minor criticisms which may properly be levelled at the evidence of Samuel the total potrait of him which emerges from the record is that of a trustworthy witness. The opposite is true of the defendant's three witnesses. And, although the trial Court may have erred in finding as a fact that Langen did communicate with Röchling before nominating the defendant as the Langen company's sub-contractor, an examination of the record shows that in regard to the crucial issue of the case, the causative potency of the telephone introduction, Langen was a slippery and thoroughly unsatisfactory witness. In my view there are no real grounds upon which the strong credibility findings of the learned Judge can be assailed. The appeal must accordingly be approached in the light of those findings.

The construction which the trial Court put upon the commission letter of 25 July 1980 was that it was:-

"...principally .....

"...principally a reward for Samuel's past efforts and Duek knew it. It contemplated some future conduct namely a visit to Germany."

In regard to the abovementioned "future effort" the trial Court found on the probabilities that Samuel's visit to the Röchling factory in Germany was one of the causes of the award of the sub-contract to the defendant; but he went on to say that even if he had wrongly so found this -

"...would not derogate from my conclusion in regard to efforts 1 to 6."

In the final result the trial Court came to the conclusion that the plaintiff had discharged the onus of establishing that the effective cause of the award on the sub-contract to the defendant was "all the efforts cumulatively assessed".

In order to see the line of reasoning on which the aforesaid conclusion was based it is convenient to quote here at some length from the judgment of the Court below. In this connection the learned Judge observed:-

"Apart .....

"Apart from other incidental causes, for example the quality of the Röchling fibreglass and the tender price, one must ask oneself how it came about that the sub-contract went to the Defendant. One must begin with events that preceded the tender by several years. Samples were requested, in this case from Three M and Röchling. At this stage there was no contact between the Railways on the one hand and Duek and Castiglioni on the other in this field. On the contrary it is Samuel and Samuel alone who was in regular contact with Husemeyer, keeping abreast of new technology and helping Husemeyer to overcome technical problems arising from working with an unfamiliar substance. The discussions had been fruitful, leading at least to the adoption by the Railways of a new and improved profile design ..... This petty contract gave Samuel the opportunity to promote the Defendant, to enable an entity outside the Railways to gain experience in the new technology and in working with hitherto unfamiliar material. Samuel went to the Defendant. Duek was unwilling at first but Samuel persuaded Duek and Castiglioni inter alia by offering to work with the material himself and by helping to solve problems to be encountered in machining. After the test pieces and sample fibre fishplates were completed and proved to be satisfactory for the Railways Samuel was in a position to put the Defendant's name forward, not in the form of a recommendation for the tender but as an assurance to Husemeyer that the Defendant in Samuel's opinion was capable of working adequately in this new field. This

carried .....

carried weight with Husemeyer and the latter's views in turn were likely to carry weight with the Tender Board of the Railways.

Consistent with this development was Husemeyer's introduction of Samuel to Langen. Langen agreed that the introduction was of such a nature that he felt and said that he and Samuel would have to co-operate in future. Samuel referred Langen in turn to the Defendant and Langen visited the factory several times to confirm that the Defendant could safely be named as a sub-contractor in a tender. Samuel not only referred Langen to the Defendant but advised him to negotiate with the Defendant directly."

The heads of argument for the defendant include a general submission that the trial Court erred in accepting the evidence of the plaintiff's witness and in rejecting that of the defendant's witnesses. For the reasons already mentioned in dealing with the credibility findings made by the Court a quo this submission is an untenable one.

Mr Nochumsohn, who argued the defendant's appeal, wisely did not persist with it. While advancing the broad argument that the plaintiff had failed to prove that any of the

efforts .....

efforts detailed in the further particulars, whether singly or collectively, represented the effective cause of the award of the sub-contract to the defendant, Mr Nochumson<sup>h</sup> vigorously attacked the trial Court's finding that Samuel's visit to the Röchling factory in Germany had been a contributory cause of the sub-contract. In this connection counsel called attention to the absence of evidence either by any representative of the Röchling company or of any communication affecting the sub-contract between the Röchling company and the Langen company. Counsel further stressed that this particular issue had not been explored with Langen in cross-examination. Although it seems to me to be a distinct probability that there was some or other communication between the Röchling company and the Langen company in regard to the sub-contract, I agree with Mr Nochumson<sup>h</sup> that the finding in question lacks any real factual foundation and that it cannot be sustained. It seems to me, however, that the jettisoning of effort (vii) - Samuel's visit to Röchling - does not conclude the inquiry. Here I should mention, perhaps, that an argument put up by the defendant in the Court below to the effect that, since

efforts .....

efforts both past and future had been alleged in the plaintiff's further particulars, proof of some future effort causally linked with the award of the sub-contract was an essential ingredient of the plaintiff's cause of action, was in this Court rightly abandoned. Effort no (vii) having been discarded the question remains whether any one or more of efforts nos (i) to (vi) represented the determining cause of the award of the sub-contract to the defendant.

On behalf of the defendant it was strenuously contended that inasmuch as, apart from the workshops of the SAR's Mechanical Engineer, the only factory with actual experience in the manufacture of fishplates (albeit wooden fishplates) was that of the defendant it was not improbable that, even if Samuel had not referred Langen to the defendant, ultimately Langen would in any event have gravitated to the defendant. I disagree with that argument which seems to

me .....

me entirely to overlook the causative efficacy of the plaintiff's action in persuading the defendant that the work required of the plaintiff under the petty contract should be executed in the defendant's factory. This arrangement, as Mr Wise for the plaintiff correctly pointed out, had two very significant consequences. First, it enabled the defendant to acquire skills and a proficiency in machining fishplates from fibreglass blanks - a technique of which it knew nothing. Second, and no less important, the experience and knowledge so gained by the defendant enabled the defendant, in consultation with the plaintiff, to give to a supplier of fibreglass blanks a quotation in respect of a sub-contract for machining which was (a) realistic and competitive and (b) at the same time ensured a suitable profit margin to the defendant. Time was moreover of the essence. The SAR tender was issued at the end of August 1980. The defendant was able to give the Langen company a quotation by 15 September 1980 - a quotation very close, be it noted,

to .....

to the figure foreshadowed in the increased commission note of 28 July 1980.

Then it was said on behalf of the defendant that at best for the plaintiff the evidence demonstrated no more than that the plaintiff had been the effective cause of the award of the sub-contract conjointly with Husemeyer; and that as this had not been pleaded the claim for commission should fail. I do not think that there is any merit in this submission. That Husemeyer's recommendation of Samuel to Langen operated powerfully on the mind of the latter is obvious; but it is no less clear that what prompted that recommendation was Husemeyer's recognition of Samuel's skill and his sustained efforts in the development and refinement of fishplates in the course of the long and fruitful collaboration between Husemeyer and Samuel.

To the inquiry into the matter of what had been

the .....

the effective cause of the award of the sub-contract the learned Judge brought what he described in his judgment as "a commonsense approach"; and it seems to me, with respect, that he was entirely right in so doing. In such a case, so I consider, the law is concerned not with any minute analysis based on the views of causation held by scientists or metaphysicians but rather with the ordinary man's notions of cause and effect. So viewing the matter it appears to me that the real substance of the voluminous evidence in the case may be condensed somewhat as follows:-

(A) Husemeyer thought highly of Samuel's skill in the field of fishplates and this induced Husemeyer to give the petty contract, involving experimentation with fibreglass as a suitable material for fishplates, to the plaintiff. The experiments were successful.

(B) Before .....

(B) Before March 1980 the defendant had had no experience in working with fibreglass, a process which presents considerable technical difficulties. The plaintiff, having arranged that the test-pieces and sample fishplates required by the petty contract should be produced at the defendant's factory, thereby achieved the result that the defendant's factory acquired experience of and proficiency in the machining of fibreglass fishplates. Thus equipped the defendant was by the end of July 1980 ready and able not only to execute a sub-contract for the machining of fibreglass blanks but also to give a suitable quotation for the work.

(C) Langen was interested in submitting to the SAR a bulk tender for fibreglass fishplates and he knew that the SAR favoured local machining. To that end Husemeyer recommended Samuel to Langen; and he in fact introduced Langen to Samuel whereupon Samuel explained to Langen that he would have to work through the defendant.

(D) Langen .....

(D) Langen did go to the defendant; he obtained an acceptable quotation for the sub-contract from the defendant; and in submitting its tender to the SAR Langen's company nominated the defendant as the sub-contractor.

(E) The SAR accepted the tender of the Langen company wherein the defendant had been nominated as sub-contractor.

It is unnecessary, I think, to make any further observations on the merits of this appeal, the consideration whereof has required a fairly detailed examination of the evidence.

At the end of a careful judgment PREISS, J arrived at the conclusion that at least efforts no (i) to (vi) led to the award of the sub-contract to the defendant.

I have earlier quoted the passages in his judgment which reflect the learned Judge's line of reasoning, and I am unable to find any valid ground for differing from that reasoning. So far from being persuaded that the

conclusion .....

conclusion to which the trial Court was impelled was wrong,

I am satisfied that it was entirely right.

The appeal is dismissed with costs.

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G G HOEXTER, JA

GROSSKOPF, JA     )  
 GALGUT,    AJA     ) Concur