

COPY

1952 No. W.S.7

GUY PRITCHARD

v.

REGINALD WALTER EGINTON

Kelly J. The Plaintiff, Guy Pritchard, claims against the Defendant, Reginald Walter Eginton, for accounts, moneys owing and alternatively 1952. for damages arising out of their business associations in connection Sep. 18 with Eginton's salvage rights from Commonwealth Disposals Commission.

The parties were in business association from March 1951 until March 1952.

Pritchard claims on six distinct and separate footings of claim - all based on alleged oral contracts.

Eginton admits four contracts with reservations. Of the remaining two, one is denied absolutely. The other is denied, but alleging a different contract as alleged by Pritchard - the Oro Bay contract, which constitutes the greatest amount in dispute between the parties.

Pritchard kept one book of account, from which he has produced details of his financial affairs from time to time.

Eginton has not kept books of account. He has depended upon his bank records, shipping documents and accounts sales. That system has proved weak to the extent that he has not been able to adduce evidence of details of his financial affairs from time to time.

Dealing now with the six separate claims:-

(1) Ward's Dump Contract. In this Pritchard asks for accounts, or alternatively damages.

Pritchard claims that on an oral agreement made in April 1951 he worked, and won from Eginton's salvage area at what is known as the Seven-Mile, Port Moresby, salvage metals on a 50% basis of net profits. He has produced in evidence a statement, Exhibit "A", showing different metals recovered from the area in a total amount of 11 tons 4 cwt 15 lbs. That statement does not bear date, but according to Pritchard's evidence, it was handed to Eginton in early January 1952.

That statement includes an item -

			Tons.	Cwts.	Lbs.
"Shell cases (SC)	9 Drums	Av. 5 cwt.	2	5	36 "

Eginton admits the contract but he denies the quantity of metals recovered and in particular the nine drums of shell cases. His attitude on this claim, as also on the other three admitted with reservations, is, and quite rightly so on the weakness of his bookkeeping system, - "Prove your claim. If you can do so I will admit it."

In his evidence in chief Pritchard stated that the metals recovered from Ward's Dump were "in the main junk but there were some copper cables airplane and radio batteries." And on cross-examination -

"Q. You told the Court that from Ward's Dump you recovered copper cables, airplane and car radiators and batteries.

A. Yes.

Q. Nothing else.

A. Some cartridge cases.

- Q. Why didn't you tell us cartridge cases.
- A. The number of cartridge cases I got out from there was very very small indeed. I have no answer as to why I didn't mention it.
- Q. In fact all you got was copper cables, radios and batteries.
- A. I can't agree with that.
- Q. What quantity of shell cases did you recover.
- A. Five or six drums.
- Q. What weight.
- A. Somewhere between six and nine drums. "

As mentioned above the total weight of metal as shown in the statement Exhibit "A" is 11 tons 4 cwt. 15 lbs. The weight of the shell cases in dispute is 2 tons 5 cwt 36 lbs. By comparison this latter weight does not constitute a very very small proportion of the total weight. There is therefore a dispute between the parties as to Pritchard's share of proceeds of the metals recovered from Ward's Dump of sufficient gravity to warrant an order for inquiries and accounts on the issue. And there will be an order accordingly.

(2) Drumming Contract. In this Pritchard claims £1,153.10.0 for work and labour done less £624.10.0 received on account, or alternatively damages.

He claims the amount for services supplied arising out of an oral contract made towards the end of November, 1951, when the Ward's Dump operations were drawing to a close. Under that contract he and one Ray Stuart, together with native labour supplied by Pritchard, cleaned and drummed ready for shipment non-ferrous shell cases at Eginton's depot at the Four-Mile, Port Moresby. This depot is part of the yard of the premises occupied by Roy Field.

Pritchard states that he and Stuart were to be paid each £4 per day, that Pritchard was to pay the natives' wages, with a surcharge of 15% on all wages including his own and Stuart's.

Particulars are embodied in part of Exhibit "B" and in Exhibits "D" and "E".

Eginton admits the contract with two reservations -

- (a) he denies the surcharge of 15%, and
- (b) he claims that Pritchard so negligently cleaned one shipment of 102 tons 17 cwt. 2 qrs. 16 lbs. that Eginton was forced to accept a price at £30 per ton less than the price contracted by him with his buyers Eagles Metals Limited of London.

As to the surcharge. Eginton was under the belief that Pritchard was paying his native labourers at approximately 10/- per day. I think it will be admitted on both sides that Eginton was ill, if not seriously ill, throughout practically the whole period of this contract which ceased on 22nd February, 1952. However that can hardly be deemed an excuse for his omission to check the particulars in the accounts rendered. These accounts show native workers at 8/- per day with boss-boys varying to £1 per day. When this was pointed out to him in the witness box he more or less agreed that the surcharge on native labour would be reasonable - because the rates shown are the same as he paid his native labourers and he would not expect Mr. Pritchard to supply native labour at actual wages cost.

Further, the whole account in Exhibit "B", including that portion for cleaning and drumming, was duly met on a final payment of £218.14.0 by Eginton on, as would appear from a note in ink on the account, 30th December 1951. Irrespective of the actual date of the payment Eginton admits having made the payment. Thereby he acknowledged the surcharge in respect of that portion of the contract. The question is "Having acknowledged the surcharge in respect of the first portion of the contract could he justly deny the surcharge in respect of those portions shown in the two remaining accounts?"

I do not think so; and Mr. Cromie, Counsel for Eginton, did not pursue this particular issue in his closing address.

Pritchard succeeds in respect of that surcharge.

As to the negligent packing - In evidence in chief Pritchard gave his version of the contract as follows: "On Friday 24th November Mr. Eginton approached me and said 'Jimmy has sacked himself'. I knew that 'Jimmy' referred to Jimmy Maxfield who had been doing the work for him at the Four-Mile. He said 'I have to get a shipment away in about two to three weeks for the 'Nellore' and I would like you to take the work over for me'. I said 'All right Reg. I'll undertake the work on the basis of £4 for each day for Ray and myself plus the cost of labour and plus 15% on the whole of that amount'. He said 'That's O.K., that's acceptable to me,' or words to that effect signifying his agreement. 'When can you start?' "

On cross-examination -

" Q. Tell us in general terms what work had to be done on them (shells) to make them ready for shipment.

A. The ferrous clips had to be removed away from the shells.

Q. Anything else.

A. Any foreign matter, slag, and a certain amount of soil in the cases had to be removed and the shells packed in drums and marked for shipment. "

In evidence in chief Eginton brought in what he alleged to be a condition of his contract with Eagles Metals Limited on a discussion with the Company's representative, one Magnus. "He (Magnus) said 'They have to be clean otherwise the contract will be no good. It has got to be free of all ferrous metal - clean. That's why I am paying you £270 a ton sterling.' " Eginton previously explained that Eagles Metals Limited were buying the shell cases for delivery to the Admiralty in England for re-manufacture.

Eginton went on to explain that the £270 per ton sterling was a much better quote than he had received from any other buyer. However I cannot find anything in Eginton's evidence which would amount to a definite statement by him to Pritchard conveying to Pritchard a knowledge of that alleged condition with Eagles Metals Limited.

However, dealing with Pritchard's negligence:- Eginton admitted in cross-examination that on 2nd December he received a radiogram from Magnus reading, inter alia, "Market Inclines weakening." He also admitted on cross-examination that Pritchard, with the aid of his native labourers had cleaned and drummed one shipment prior to the disputed shipment and other shipments subsequent to the disputed shipment, that the work was done right throughout in the same manner, and that no complaints were made on the prior and subsequent shipments.

Eginton was at Oro Bay when Magnus arrived from Australia to inspect the disputed shipment of 102 tons 17 cwt. 2 qrs. 16 lbs. Pritchard gave particulars of the inspection. Two drums taken at random were opened and inspected by Magnus. One drum proved to be clean. The other showed a ferrous content of .0124%. On this ferrous content Magnus indicated that he would condemn the whole shipment. Pritchard compiled a written report of the inspection and handed that to Eginton a day or so later on his return from Oro Bay. That report was tendered, Exhibit "G".

In fact Magnus did not hold to his severe condition of declaring the shipment "no good". On the contrary, in my opinion, he used that ferrous content as a bargaining weapon to reduce his price from £270 sterling to £240 sterling per ton. The difference, £30, was stated by Pritchard and not denied by Eginton; as the exact amount of the drop in the market at that time.

Eginton's evidence - "When I arrived back Magnus came to see me. He said 'I cannot take that at the contract price we have. I advise you to open all the drums and reclean them.' That would have been a colossal task and my shipping time under the contract was fast expiring. He said 'I want to be fair. The best thing we can do is to come down and see your bank manager.' We went to my bank, the Bank of New South Wales. There the question of price arose. After considerable discussion he said 'As you cannot clean it I will take it and deduct £30 a ton.' I said 'That seems a terrible lot to deduct.' He said 'In my estimation it will cost you at least £5 a drum to have them opened and properly cleaned. I'll pay you now 70% and I'll clean them in London and I'll send your bank the final figures.' I agreed to that. I had to ship it."

That probably was the position - Eginton had to accept the reduced price not because of the actual ferrous content disclosed in one drum but because Magnus found himself in the better bargaining position. As a jury I find that Pritchard's work in cleaning the shell cases was not negligent. It is unfortunate for Eginton that he had to accept a reduced figure. But I do not intend asking Pritchard to share that misfortune. Pritchard succeeds in respect of this second issue, and there will be judgment for him on the contract for the amount claimed, but subject to any adjustment on moneys paid by Eginton, to which moneys I will refer later.

(3) £70 a ton contract. This was another contract made toward the close of work on Ward's Dump. Pritchard's evidence on the formation of this contract - "It arose out of a discussion regarding the Ward Dump area; that we had got the best out of that and that we (referring to Mr. Stuart and myself) would like to collect non-ferrous metals for you and to receive the same treatment as other collectors operating for you in the Port Moresby area. I knew from previous discussions with Mr. Eginton what this basis was. We had previously discussed the other collectors. He said 'Guy, I am only too happy that you should. I am paying the others £70 per ton.' The question of cartage was never raised but at the same time I did know and I have received further evidence since that he was paying others £70 per ton delivered at the Four-Mile yard. He never asked me to deliver at the wharf at Port Moresby. I had no facilities for carting material of that nature to the wharf. All I had was a jeep and a trailer. The practice at the yard on carting to the wharf was that it was carted only when a ship was at the wharf. It was carted to the ships slings. Some loads may have been left on the wharf but only to suit the convenience of the ships slings loading gangs."

Particulars of quantities of metals supplied 49 tons odd and the amount claimed £3,482 are embodied in an account dated 23rd February 1952, Exhibit "F", and particulars of amount claimed £690.1.8., but no quantities, in an account dated 4th March 1952, Exhibit "C".

Pritchard states that Eginton did not question these two accounts

Eginton admits the contract with the reservation that the metals were to have been delivered at the Port Moresby wharf and not at his depot at the Four-Mile.

His evidence in chief - "Mr. Pritchard said to me in November 1951 'As there is nothing else at Ward's Dump I suggest if you are agreeable that Ray Stuart and I go and work the Four-Mile for you. Auld is buying metal for you and you are paying £70 a ton. What about me having the same arrangement.' I said 'O.K. you will be buying for me also.' " And later - "It was Mr. Pritchard's duty to take them to the wharf. Every other person who had a contract with me delivered to the wharf or I carted to the wharf at their expense and I deducted the cost of cartage from the amount owing. I mentioned the matter specifically to Mr. Pritchard. He took over the contract the same as anybody else; I informed him at the time it was £70 a ton cleaned and drummed delivered on wharf Port Moresby. That is when we first discussed the matter."

On cross-examination -

" Q. Mr. Pritchard knew he had to cart the metal to the wharf not because you told him but because he knew everybody else did it.

A. Yes.

Q. You did not tell him.

A. No I did not.

Q. Referring to your evidence in chief 'I informed him at the time it was £70 a ton cleaned and drummed delivered on wharf at Port Moresby. That was when we first discussed the matter.' Which is it.

A. I did not tell him myself but my son told him. "

It will be noted that both sides have "slipped in" a little hearsay evidence to support their respective contentions. That is not the way to adduce evidence. I would have had a much easier task on this small issue, the cost of cartage from Eginton's depot to the wharf, had one party or the other brought forward some of Eginton's other contractors. Their evidence would not have been conclusive on the issue but it would have been helpful.

I must make a finding. Eginton did not challenge either of the two accounts rendered. And on all the probabilities, as I see them as a jury, I find on this issue in favour of Pritchard for the whole amount claimed, £4,172. 1.8, less any adjustment on moneys subsequently paid to be mentioned hereafter.

(4) Weighing Contract. Pritchard claims that this contract was made at the Four-Mile Depot. His evidence on the point - "Early December or it may have been late November Mr. Eginton came out to the yards at the Four-Mile. We were seeing each other practically every day. He said 'I am sending some boys out with non-ferrous materials I want you to check and weigh this material into the yard. I will pay you £10 a ton for the stuff you weigh and check.' We later discussed the mechanics of this arrangement and it was decided that I should issue receipts to the natives setting out the quantities of non-ferrous metals received plus the amount of money for which they were due. These signed receipts the natives then took back to Mr. Eginton's house and received payment for it later."

Eginton absolutely denies any such contract - "I deny that there was any weighing agreement. I never had any discussion with him about weighing."

Particulars of Pritchard's claim are embodied in the account dated 4th March 1952, Exhibit "C". "Fee for weighing non-ferrous metals into 4-Mile yard from your collectors 23 tons 4 cwts 80 lbs @ £10 per ton £232/7/-."

No native labour is included in the claim; from which it can be concluded that Pritchard is claiming £10 per ton for his personal services, and has charged native labour wages in the other accounts rendered.

Weighing slips were in Court, but by mutual consent they were not tendered.

The picture of activities at the depot during this period as I see it was - Ward's Dump had finished. Pritchard was on the £70 a ton collecting contract. He was also on the drumming contract. Eginton's dealings with his previous contractors at Oro Bay were unsatisfactory and his salvage collecting time under his contract in respect of Oro Bay was fast running out. The main efforts were directed to Oro Bay with charter planes coming in to Jackson's Airstrip on some occasions not being met by transport and labour. Mrs. Field, the only other European at the depot, was not concerned with Eginton's affairs. She was concerned only in keeping her husband's trucks running; because her husband had the cartage contract with Eginton. Eginton and his wife performing some duties.

Pritchard to attend to the native vendors and not to worry him, Eginton, about the cost. And I think that is what Pritchard has done but he has fixed his own personal labour at £10 per ton. This may be a fair fee, again it may be excessive.

On this issue I find in favour of Pritchard, not on a contractual basis, but on the basis of quantum meruit, as Eginton received the benefit of the work involved. But as I am not sure that the fee of £10 per ton is a fair figure there will be an order for inquiries as to what is a fair figure, with judgment in favour of Pritchard on the amount ascertained.

(5) Oro Bay contract. As mentioned previously this constitutes the greatest financial amount in dispute between the parties.

Pritchard claims one-sixth share of the net proceeds of sales of non-ferrous metals recovered from Eginton's salvage area known as Oro Bay. These metals were shell cases, cleaned and drummed under the drumming contract and sold to Eagles Metals Limited.

Pritchard's version of the contract - "The discussions which we had on this matter went back as far as February last year but I'll bring it more up to date than that. Very early in November last year I saw Mr. Eginton at the Port Moresby Hotel. He said 'Guy, I am far from satisfied at the way things are going at Oro Bay. Broinowski will not stay on the job and the Sales Advice Note expires at the end of the year. As soon as I can get rid of him I want you to go over there to get the balance of the shell cases out for me. I will put you on the same basis as Broinowski was on, that is a third of the net proceeds of sale.' I knew this was the basis that Broinowski was on and also McCallum before him. I said 'That's all right Reg I will be only too happy to go over on that basis.' The only job which I had on hand was at the Seven-Mile Dump, Ward's Dump and we had had the best out of that. That was the end of our discussion for the moment."

"A few days after that I saw Mr. Eginton and he told me he had come to terms with Mr. White regarding Oro Bay. About 10th December Mr. Eginton came out to the Four-Mile yard where I was drumming shell cases from Oro Bay. I had commenced drumming on 26th November. He said 'Guy, I want you and Wallie (meaning his son) to go over to Oro Bay.' He used the nameplace Embi. That is the airstrip in the Oro Bay area. He continued 'I want you to get out the rest of the shell cases. We will need two jeeps and two trailers. I want you to take yours over. I will pay you a good rate of hire for it. I'm sending my own and getting a trailer from the Mission. Bill Matthews has had a look at the area and he estimates that there are between eighty and one hundred tons still remaining in the area. I am prepared to give away one third of the net proceeds of sale on the shell cases recovered and assuming that Bill Matthews' estimate is correct you and Wallie should get approximately £2,000 each. Anyway the more you get the more you make.' I said 'That is quite satisfactory Reg. I will be quite happy to proceed on that basis.' "

Eginton denies that alleged contract. He claims that he agreed to employ Pritchard at a flat sum of £2,000. His version of the contract - "I don't remember the date but it was early in December. Mr. Pritchard came to my house. My wife and I were sitting on the back verandah. After our usual chat and talk I said 'Guy, I think it would be a good idea if we had a spot.' Guy's reply was 'I think it is an excellent idea.' My wife and I and Guy duly had a spot. During the time we were having the drink I said 'Guy, how would you like to make £2,000 in six or seven weeks.' His reply was 'Yes. But how am I going to make it in that time.' I said 'Guy, young Wallie (meaning my son) has resigned from the Government and I am sending him to Oro Bay but I'm very worried over the business as my Sales Advice Note is running out and the people who have been in business with me in the Oro Bay venture have all let me down. I would want you to proceed to Oro Bay with Wallie. You will have to do all the arrangements about getting tools and stores together and I will make the arrangements about the aeroplanes.' He said 'That will do me.' "

I said 'Look Guy, there is one thing that has got to be kept going, that is the Four-Mile, the buying and collecting and sorting of metal. That has got to be kept going otherwise we are going to be short of money.' He then replied, 'Bless my soul, that can be easily arranged. Ray Stuart can stay behind at Moresby as he is working for me.' I replied 'Guy, that will be up to you. You do the job. It is going to be hard and has to be done quickly and you get £2,000.' That was the main conversation and we reverted to general topics."

Continuing his evidence - "I did discuss it with him some considerable time before. I don't remember the time but nothing came of the discussion. I can recall a conversation that Broinowski was on a third share but I could not have told Mr. Pritchard that I would put him in Broinowski's place on a third share because I could not get rid of Broinowski. He had a contract and I couldn't get rid of him. Eventually Broinowski terminated his contract himself. I did tell Mr. Pritchard that I had made arrangements with Mr. White. I could not then make arrangements with Mr. Pritchard because Mr. White had the contract. I made the arrangement with Mr. Pritchard early in December last, but before long he went into hospital. "

Eginton's contention was supported by his wife's evidence, and to some extent by part of the evidence of his son Walter Eric. When a litigant brings to his aid members of his family their evidence can become suspect, but not necessarily entirely unacceptable.

Mrs. Eginton gave a version somewhat similar to that by Eginton on the formation of the contract at their residence, with some elaborations regarding details of proposed arrangements. Mr. White, Counsel for Pritchard, submitted that her memory was "far too good". But she was not cross-examined at any great length.

Eginton Junior was interested in only the Oro Bay contract. He states that he was not on any definite agreement with his father as to what moneys he would receive from the venture and that the arrangement was that his father would "look after him".

He gave evidence regarding the general activities of the venture and regarding the terms of the contract on two points directed thereto:-

1. "I went up to the hospital to see Mr. Pritchard a few days before I left for Oro Bay. That would be about the 14th December. We discussed what equipment would be needed. He said to me 'Shovels and picks, hammers, nails and that sort of thing.' He also said to me 'I am going to get £2,000 for the job. I don't know what you are going to get because after all blood is thicker than water. I consider £2,000 good money for six weeks' work.' "

I do not propose quoting in detail Pritchard's evidence on cross-examination as to that alleged conversation about the £2,000. But on several questions he flatly denied that conversation, and he went further and claimed that on no occasion whatsoever did he discuss with Eginton Junior his financial interests in the venture.

2. "During those few days (at Embi airstrip) Mr. Stuart said "Under the present set-up I am to be left out of the final payment. Pritchard and you are to share a third between you but your Dad has sent over word with Guy (Pritchard) that it's all right with him if it's all right with you to split a third three ways which would cut me in on it.' After he said that I said 'That's news to me but it would suit me all right. I think you better have a word with Dad when he gets down here.' "

Again I do not intend quoting in detail from Stuart's evidence as to that conversation as it covers quite a number of questions on cross-examination. In every case he flatly denied that conversation.

Mr. White, Counsel for Pritchard, submitted that the conversation may have taken place but forgotten by Stuart.

I will not spend unnecessary time and mental effort reasoning on the many possible approaches to that piece of evidence - and there are many - if it had been followed through by either Stuart or Pritchard. On the evidence before me it was not followed through by either, otherwise it would have been dangerous evidence against Eginton in favour of Pritchard. I suffice with this comment - "Whatever advantage may have been gained by Pritchard had it been followed through was promptly negated by the statement of Eginton Junior that it was news to him and his suggestion that it should be taken up with his father."

Activities at Oro Bay under this contract commenced about 18th December when Stuart and Eginton Junior went to Embi by plane with necessary gear and stores. Pritchard himself did not proceed to Embi, as he was in hospital for a few days, and after his discharge he, instead of Stuart, took over at the Four-Mile Depot. This change-over was approved by Eginton.

Stuart and Eginton Junior returned to Port Moresby on Christmas Eve then back to Embi on 28th December.

On Saturday 5th January last Pritchard went to Embi. Next day, Sunday, he, Stuart, Eginton Junior and one Bill Grey journeyed down towards the coast. There further quantities of shell cases were found at what was called, in this case, the Sudeste Dump. Whether that dump was discovered on information gained by Pritchard when he was previously employed in Commonwealth Disposals Commission, or whether it was discovered on the guidance of local natives is, in my opinion, not very material.

On the following day, Monday, Pritchard returned to Port Moresby. After a general discussion between him and Eginton additional native labour was sent to Oro Bay, and in addition to shell cases being flown out by chartered plane from Embi, those recovered from Sudeste Dump were shipped to Port Moresby by chartered coastal vessels.

Pritchard supplied to Oro Bay native labour recruited by him, in all fifty-two. At the Port Moresby end he furnished native labour for unloading planes at Jackson's Strip and for loading trucks at the Port Moresby wharf.

Pritchard admitted, as was claimed by Eginton, that Eginton bore all expenses in connection with the Oro Bay venture excepting Stuart's wages. On the evidence before me he did not volunteer at any time to bear his one-sixth share of the expenses. He was not asked by either Counsel why he did not so volunteer; but on his general evidence throughout I feel safe in assuming that had he been asked the question his reply would have been - "I was ready to bear my share of the expenses and would have done so had I been asked. And in any event Eginton could have deducted my share of the expenses on the final accounting." That is somewhat equivalent to Eginton's explanation as to why he did not pay the £2,000 to Pritchard, which in fact he has not - "My banker knew it was all right as I told him I would be paying a cheque to Pritchard when I knew the full amount owing. I sent word to Pritchard to call and see me and let me know what I owed him but he did not call to see me. I was sick and not worrying much about money matters. £2,000 is a fair amount and you like to have a man come along and pick up the cheque himself."

According to Pritchard's accounts rendered the Oro Bay activities, ceased on 22nd February 1952.

On 10th March 1952 Pritchard and Eginton found themselves at variance over the shell cases drummed and held at the Four-Mile depot ready for shipment. Eginton claims that Pritchard knew that Eginton could only receive from his bankers his advance under his contract with Eagles Metals Limited when the drums were on the wharf and duly consigned, but Pritchard refused to release the drums ready for shipment until Eginton paid him £3,000. Eginton did pay that amount to Pritchard.

On 12th March 1952 Mr. White, Counsel for Pritchard, then acting as his Solicitor, wrote the following letter to Eginton -

" I have been consulted by Mr. Guy Pritchard with reference to his half share of the proceeds of sale of salvage materials and metals . . .

from the 7-mile dump. This work has now been completed and my client desires a statement setting out the prices received by you and a cheque for his share of the proceeds. I shall hope to hear from you at the end of the week.

Would you also let my client have a cheque for the amounts due to him in respect of the drumming of metal ex Oro Bay, collection of brass and copper salvage in Port Moresby area and weighing of metals, particulars of which accounts have already been rendered to you. "

That letter was tendered, Exhibit I. On the overall evidence on the six distinct footings of claim the only items omitted from that letter are the alleged sixth share in the Oro Bay venture, and the jeep contract. Pritchard did not touch on these omissions in his evidence in chief. But on cross-examination -

- "Q. Look at the last paragraph. Do you think there is any striking omission in it.
- A. No. At that stage that is all I could do because the Oro Bay stuff was not all packed and there was no way of determining the profit on the venture.
- Q. You have never made a demand on Mr. Eginton for a share in Oro Bay until you commenced the action .
- A. No.
- Q. Because you knew you were not entitled to it.
- A. That is quite incorrect.
- Q. Why didn't you instruct Mr. White to make a demand for a share in Oro Bay project in that letter Exhibit I.
- A. I cannot answer other than there was no way at that moment of ascertaining the profits from Oro Bay.
- Q. You issued a writ on 28th March. Had the position changed then.
- A. Yes. Some shell cases had been shipped - a pro rata payment of some sort.
- Q. You have never asked Mr. Eginton for an accounting on Oro Bay. Why should you have issued a writ sixteen days later.
- A. I couldn't ask for an accounting until the money was due. "

Later Pritchard explained that he issued the writ embodying all counts because he heard a rumour in Port Moresby that Eginton was leaving for Australia, thence on a trip to England. Eginton did leave for Australia on 1st April, according to him, on medical advice for treatment in Australia but without any intention of holidaying in England.

Another point which was not touched on by Pritchard in his evidence in chief was the matter of Pritchard affixing his mark to the drums of shell cases received from Oro Bay when duly packed and made ready for shipment by him. Under the other two contracts in which he claimed a financial interest, Ward's Dump contract and the £70 a ton contract, he marked the letter "G" over Eginton's marking on the drums - to indicate that he had a financial interest therein.

On his cross-examination regarding marking the drums of shell cases from Oro Bay -

- " Q. Why didn't you put a 'G' on the marking of the Oro Bay drums.
- A. Why should I.
- Q. You remember telling me earlier that Eginton's stuff was marked 'RWE' and everything in which you had an interest had a 'G' added.
- A. That referred to the Moresby stuff and the £70 a ton contract. To have marked the Oro Bay stuff with 'G' would have caused confusion by being mixed up with the £70 a ton stuff.

Q. And it would have caused confusion with the Ward's Dump stuff.

A. All the Ward's Dump stuff was drummed and shipped.

Q. Don't you think it would have been a very good idea, if you were interested in the Oro Bay cases, to have them marked with some identifying mark to protect your interest in them.

A. It would have been a very good idea looking back now, but at the time I had no reason to doubt Mr. Eginton's integrity. "

Elsewhere on cross-examination -

"Q. The Shell cases which were being drummed did not come from Oro Bay exclusively.

A. Not exclusively.

Q. How could one tell what was from Oro Bay and what from elsewhere.

A. All Oro Bay stuff was worked on one side of the yard and all local stuff including shell cases was worked on the other side of the yard. "

Dealing now with some aspects of the evidence on this contract -

1. In the earlier part of his evidence in chief Pritchard claimed a one-third share to himself exclusively, but later in evidence in chief, not in cross-examination, he moved to a new position admitting Eginton Junior into the one-third share and on which they would both have received at least £2,000 each. In cross-examination he held out firmly that he had the contract before Eginton Junior was ever mentioned. It is difficult to understand his attitude. Why hold out, in effect against himself, on a point on which he had already given way, and without any benefit by endeavouring to exclude Eginton Junior. This is not conclusive, but it is suspect.

2. Pritchard admitted that Eginton paid all expenses in connection with the venture excepting Stuart's wages. Pritchard did not at any time volunteer to bear his share of the expenses. I have already commented upon that. Pritchard rendered two accounts embodying particulars of labour costs in connection with the drumming. One account is Exhibit "D" covering the period 14th December 1951 to 25th January 1952. The other is Exhibit "E" covering the period 26th January, 1952 to the conclusion of operations 22nd February 1952.

The particulars in those two exhibits follow the pattern of particulars of labour costs in connection with drumming embodied in an account rendered dated 18th December 1951 and covering the period 25th November 1951 to 14th December 1951. Remembering the evidence that Oro Bay contract between the parties was set into operation on 18th December 1951 when Stuart and Eginton Junior went to Embi by plane, it is clear that Pritchard could not claim any share under the Oro Bay contract in the shell cases referred to in this Exhibit "B".

On being questioned by Mr. Cromie why he charged Eginton with his, Pritchard's, and his native labourers' wages when he claimed a share in the venture, Pritchard replied that it had to be done by somebody as a cost to be brought in as a debit in arriving at the net proceeds on the venture. But the particulars rendered in the two exhibits "D" and "E" cover wages in respect of drumming materials from Eginton's Port Moresby salvage area as well as from Oro Bay. It is impossible to tell which is which. And on the face of those accounts it would be impossible for any accountant to compile the wages costs against the Oro Bay venture in arriving at the net profits of that venture.

Further, neither of those two accounts embodied in Exhibits "D" and "E" bear any notation that any of the labour costs are to be charged against the Oro Bay venture.

This indicates, in my opinion, that Pritchard had no intention of having any of those wages costs debited against the Oro Bay venture. If I am correct, then this is conclusive.

3. In both the Ward's Dump contract and the £70 a ton contract Pritchard marked his initial "G" on the drums to indicate his interests therein. But he did not mark the Oro Bay drums. In reply to Mr. Cromie's questions as to why he did not do so, Pritchard firstly questioned back "Why should I" and later that he was not obliged to do so, and later still, that it would have been a good idea but at the time he had no cause to doubt Eginton's integrity. He contended that marking of the Oro Bay drums would have brought about confusion with the £70 a ton drums.

I cannot accept his explanation. I cannot see the possibility of any confusion. On the contrary, I would have considered it a necessity to mark the Oro Bay drums to prevent confusion with the Port Moresby drums. He was not restricted to the letter "G"; he could have used some other indicator:

If I am correct, this is conclusive.

4. On 12th March 1952, Mr. White, Solicitor for Pritchard, wrote to Eginton regarding all matters in dispute excepting the Oro Bay venture and the jeep contract. I consider the jeep contract as a sub-contract within the Oro Bay contract. And it must be remembered this letter was written only two days after Pritchard had obtained payment of £3,000 from Eginton by refusing to allow the drums ready for shipment to be transported to the wharf.

On 28th March, 1952 the writ was issued, including the claim for a share in the Oro Bay venture.

Pritchard explained that the Oro Bay venture was omitted from Mr. White's letter because Pritchard, at that time, had no way of formulating his claim on Oro Bay. On the other hand he explained the inclusion of the claim in the writ because in the meantime a shipment had been made and some pro rata payment could be due. In addition he had heard the rumour that Eginton was leaving the Territory and, apparently, would be absent for some time.

His explanations are debatable. Although not conclusive, they are suspect.

On the foregoing, and on the evidence generally - which I do not intend traversing in detail - I accept Eginton's version that Pritchard was not in the venture on any share basis but on the fixed sum of £2,000. As this amount has not been paid there will be judgment for Pritchard in that amount accordingly.

6. Jeep Contract. I have already dealt with the formation of this contract in dealing with the Oro Bay contract. Pritchard claims hire on his jeep and trailer for nine weeks and four days at £20 per week, a total of £191. 8. 7.

Eginton admitted the contract but set up the contention that the vehicles were not available for service during the whole period. It transpired in evidence that the jeep was out of action for one week but during that time the trailer was available. Thereupon Eginton withdrew his contention.

By consent the parties fixed the rate of hire at £17.10.0 per week. There will therefore be judgment for Pritchard in the sum of £167.10.0.

A credit of £624.10.0 is shown in the statement of claim. It was announced by Mr. White that two further sums were paid by Eginton - £1,150 on 14th February 1952 and the £3,000 on 10th March 1952. These amounts will be credited against the aggregate sum found due on the inquiries and accounts, and the judgments above ordered.

Costs: Although Pritchard has failed in his claim for a share in the Oro Bay venture he has succeeded on that particular claim to the extent of £2,000. And he has succeeded on the five other separate claims. He is therefore entitled to his costs on a party and party basis to be taxed. There will be an order accordingly..

Liberty to both parties to apply, without prejudice to right of appeal. A. Kelly J.

