14 of 1977

No. 10 , of 1976.

In the Privy Council

ON APPEAL

FROM THE FULL COURT OF HONG KONG

BETWEEN

TAI HING COTTON MILL LIMITED ... ... *Appellant*

and

KAMSING KNITTING FACTORY ... ... *Respondent*
(a firm)

RECORD OF PROCEEDINGS

ELLIS, WOOD, BICKERSTETH & HAGEL,
38, ST. ANDREW'S HILL,
LONDON, EC2V 5DL.

Agents for:-

C. Y. KWAN & CO.

Solicitors for the Appellant

HUGHES, WATTON & CO.
235/241, REGENT STREET, LONDON, W.1.
AGENTS FOR:-

C. P. LIN & CO.

Solicitors for the Respondent

Printed by The Standard Press, Ltd., Hong Kong.

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C. P. LIN & CO.
Solicitors for the Respondent

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RECORD OF PROCEEDINGS

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DOCUMENTS NOT PRINTED

Description of Documents	*Date*
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List of Exhibits	—
Contract No. 2857/70	17th June 1970
Contract No. 2858/70	17th June 1970
Contract No. 3065/70	17th December 1970
Contract No. 3077/70	30th December 1970
Schedule of actual deliveries under Contracts Nos. 2857/70, 2858/70, 3065/70 & 3077/70	—
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Letter from C. P. Lin & Co. to C. Y. Kwan & Co.	27th November 1974
Letter from C. P. Lin & Co. to C. Y. Kwan & Co.	16th January 1975

In the Supreme Court of Hong Kong

Original Jurisdiction

O. J. Action No. 3627/1975

No. 10 , of 1976.

In the Privy Council

ON APPEAL

FROM THE FULL COURT OF HONG KONG

BETWEEN

TAI HING COTTON MILL LIMITED ... ... *Appellant*

and

KAMSING KNITTING FACTORY ... ... *Respondent*
(a firm)

10

RECORD OF PROCEEDINGS

Amended as in red this 31st day of Jan., 1975 pursuant to Order of Hon. Chief Justice Briggs dated the 24th Jan., 1975.

(*Sd.*) C. G. DOYLE
Asst. Registrar.

1975, No. 3627 *In the Supreme Court of Hong Kong Original Jurisdiction*

IN THE SUPREME COURT OF HONG KONG

ORIGINAL JURISDICTION

No. 1
Amended Writ of Summons
28th November 1973

BETWEEN KAMSING KNITTING FACTORY *Plaintiff*
(a firm)

and

TAI HING COTTON MILL LIMITED *Defendant*

ELIZABETH THE SECOND, by the Grace of God, of the United Kingdom of Great Britain and Northern Ireland and of Our other realms and
20 territories Queen, Head of the Commonwealth, Defender of the Faith:

To: Tai Hing Cotton Mill Limited whose registered office is at No. 1417-20 Prince's Building, Chater Road, Victoria in the Colony of Hong Kong.

We command you that within 8 days after the service of this Writ on you, inclusive of the day of service, you do cause an appearance to be entered for you in an action at the suit of Kamsing Knitting Factory whose address is

at D. D. 445, Lot 693, Castle Peak Road, Tsuen Wan, New Territories in the said Colony of Hong Kong and take notice that in default of your so doing the Plaintiff may proceed therein, and judgment may be given in your absence.

WITNESS The Honourable Mr. Justice Geoffrey Gould Briggs Chief Justice of Our said Court, the 28th day of November 1973.

J. R. OLIVER
Registrar.

L. S.

Note: — This writ may not be served more than 12 calendar months after the above date unless renewed by order of the Court.

DIRECTIONS FOR ENTERING APPEARANCE

The defendant may enter an appearance in person or by a solicitor either (1) by handing in the appropriate forms, duly completed, at the Registry of the Supreme Court in Victoria, Hong Kong, or (2) by sending them to the Registry by post.

Note: — If the defendant enters an appearance, then, unless a summons for judgment is served on him in the meantime, he must also serve a defence on the solicitor for the plaintiff within 14 days after the last day of the time limited for entering an appearance, otherwise judgment may be entered against him without notice.

(*Sd.*) C. P. LIN & CO.

STATEMENT OF CLAIM

1. The Plaintiff is a firm and carries on the business of a knitting factory at D. D. 445, Lot 693, Castle Peak Road, Tsuen Wan, New Territories in the Colony of Hong Kong.

2. The Defendant is a limited company incorporated in Hong Kong with its registered office at 1417-20 Prince's Building, Chater Road, Victoria in the Colony of Hong Kong. It carries on the business of a cotton mill.

3. By a document headed Sales Contract No. 3118/71 (hereinafter called the contract) dated 23rd March, 1971 signed by the Defendant as seller and the Plaintiff as buyer, the Defendant agreed to sell to the Plaintiff 1,500 bales of cotton yarn totalling 600,000 lbs. at a price of Hong Kong $1,335.00 per bale of 400 lbs. Delivery under the contract was April 1971 to December 1971.

4. Before the making of this contract, the Plaintiff and Defendant had entered into four other contracts for the sale of cotton yarn, Nos. 2857/70, 2858/70, 3065/70 and 3077/70, with deliveries commencing from June 1970 and continuing to July 1971.

5. The Plaintiff had entered into business with the Defendant as a result of oral approaches made by the Defendant through its manager Yim Cheung Tat, sales representative Chow Hok Kuen, and engineer Chong Wan Fui. In about April or May 1970 these representatives of the Defendant saw Mui Chok Chue, managing partner of the Plaintiff, and Mui Nuen Tin, manager of the Plaintiff. In soliciting business for the Defendant, these representatives promised the Plaintiff's representatives that there would be no objection to the Plaintiff varying its intake of the Defendant's yarn, so that its monthly intake need not be constant, and also that the Defendant would continue to supply yarn at the agreed price notwithstanding any subsequent increase in price. Further, the aforesaid Mui Nuen Tin said to the Defendant's representatives that, because of the fluctuating requirements of the Plaintiff's customers, the Plaintiff could not be bound to take delivery of the Defendant's yarn within any specified period; with which the Defendant's representatives concurred.

6. On the basis of the Defendant's aforesaid promises, the Plaintiff commenced to do business with the Defendant, and entered into the four contracts set out in paragraph 4 above as well as the present contract No. 3118/71. Further, prior to the making of the said contract, the Defendant's manager Yim Cheung Tat, in or about February or March 1971, again reassured the Plaintiff that the Defendant would supply the yarn at the agreed price notwithstanding any subsequent increase.

7. There had been no prior discussion or agreement as to the delivery period (April 1971 - December 1971) inserted in the contract, and neither side intended that this period was one which the Plaintiff was bound to observe; nor was the Plaintiff even aware of this provision until the dispute in this case had arisen. The course of dealing established between the Plaintiff and Defendant both under the earlier contracts and under the contract in question was for the Plaintiff to telephone its requirements to the Defendant from time to time, and for the Defendant to supply the yarn so requested upon or soon after such telephone request. Periodically the Defendant's engineer Chong Wan Fui would call at the Plaintiff's factory to enquire in advance the estimated quantity which the Plaintiff would require for the following month.

8. Pursuant to this course of dealing the Plaintiff had asked for and the Defendant had supplied the following quantities of cotton yarn up to the end of December 1971.

Month	Bales
July 1971	33.375
August 1971	91
September 1971	77
October 1971	97.875
November 1971	119
December 1971	102
Total :	520.250

9. Notwithstanding the end of the period set out in the contract for delivery, the Plaintiff and Defendant continued their course of dealing under the said contract with neither side adverting to the period so set out. The Defendant continued supplying cotton yarn under the contract to the Plaintiff throughout the whole of 1972, and for the first five months of 1973, as particularised hereunder:—

Month	Bales
January 1972	71
February 1972	10
March 1972	1.5
April 1972	23.875
May 1972	19
June 1972	16.625
July 1972	7
August 1972	38.25
September 1972	89
October 1972	62
November 1972	71.8
December 1972	58
January 1973	52.5
February 1973	19
March 1973	10
April 1973	3
May 1973	3
Total :	555.550

10. The Plaintiff's intake fell during the period from February to June, 1972 as it was then installing additional machines at its factory, as the Defendant well knew, to the extent that the Defendant sent mechanics to help install these machines.

11. From about July 1972, the Plaintiff's Potential had been substantially increased, but the Defendant then fell behind in its deliveries. As a result, the Plaintiff's manager Mui Nuen Tin telephoned the Defendant's manager Yim Cheung Tat and engineer Chong Wan Fui at frequent intervals, and they promised that delivery would be accelerated.

12. Subsequently, in about September or October 1972, the Defendant's said manager and engineer called at the Plaintiff's factory and said that the Defendant would re-equip its own factory and be able to supply the Plaintiff's full requirements as from the end of 1972 or the beginning of 1973.

13. Notwithstanding these promises, the Defendant's supply fell sharply from February 1973, and the Plaintiff again sought and obtained the Defendant's assurance of continued delivery. The price of yarn had increased sharply from about the beginning of 1973, but the Defendant assured the Plaintiff it would honour its commitments. In particular, in April 1973 the

Defendant promised at least 15 bales a month would be delivered commencing from May 1973, and in May 1973 made a similar promise for delivery from June 1973.

14. Notwithstanding these promises, the Defendant made no deliveries whatever to the Plaintiff in June 1973.

15. The Plaintiff continued its verbal reminders and finally wrote to the Defendant by letter dated 21st July, 1973 calling for the resumption of deliveries. However, by letter dated 31st July, 1973, the Defendant alleged that the Plaintiff had failed to take delivery of the balance of goods after December 1971, and stated that the Defendant was treating the contract as cancelled because of the Plaintiff's failure to take the yarn within the specified time.

16. It is not, however, open to the Defendant to treat the contract as cancelled. The Plaintiff will rely on the matters pleaded above and say that there has been an implied agreement between the Plaintiff and Defendant for the Defendant to continue supplying the Plaintiff with the yarn under the contract notwithstanding the expiration of the delivery period set out in the contract; such delivery is to continue for as long as the Plaintiff calls for deliveries, alternatively until the expiration of a reasonable period after notice given by the Defendant to the Plaintiff that the Plaintiff must take up the balance of the goods: no such notice has been given.

17. The Plaintiff will say that, in addition to the matters pleaded above, the implied agreement is evidenced by the following:—

(*a*) On each occasion that the Defendant has made delivery of yarn, the Defendant has forwarded to the Plaintiff a delivery receipt referring to the contract No. 3118/71, and this receipt, after signed and chopped by the Plaintiff, has been returned to the Defendant, with a copy retained by the Plaintiff. Subsequent to delivery the Defendant has sent to the Plaintiff its invoice quoting the contract No. 3118/71 as well as the delivery receipt, and in addition has issued its receipt for payment, and this receipt refers to the invoice as well as the contract No. 3118/71 and the prior delivery receipt. Each such invoice and receipt for payment is signed by or for the Defendant.

(*b*) There has been acceptance by the Plaintiff of the goods so sold, or a part thereof, as particularised in paragraphs 8 and 9 above, and actual receipt by the Plaintiff of the same.

(*c*) The Plaintiff has made part payment of the goods under the contract namely payment of the goods accepted and received by the Plaintiff as particularised in paragraphs 8 and 9 above.

(*d*) There has also been part performance by the Plaintiff in that the Plaintiff has accepted, received and paid for the goods particularised in paragraphs 8 and 9 above.

18. In the alternative, by reason of the matters pleaded above, the Defendant has waived the right to cancel, alternatively is estopped from

setting up the Plaintiff's alleged breach in order to cancel: had the Defendant not given its repeated assurance that the yarn would be supplied (particularly in September/October 1972) the Plaintiff would have made alternative arrangements for the supply of yarn at a time when the price of such yarn was still relatively stable. As stated above, the price of yarn rose sharply from about the beginning of 1973. The Plaintiff has acted to its detriment in reliance upon the Defendant's aforesaid assurances.

19. For all the reasons given above, the Defendant's aforesaid repudiation by its letter dated 31st July, 1973 is wrongful, and the Plaintiff has suffered damage. As stated above, the price of this cotton yarn rose sharply from about the beginning of 1973. At the date of the Defendant's aforesaid repudiation, the market price of such yarn stood at an average of $3,325.00 per bale of 400 lbs. (*i.e.* an increase of $1,990.00 over the contract price). The quantity undelivered under the contract stands at 424.20 bales totalling 169,680 lbs., wherefore the Plaintiff's damages amount to $844,158.00.

And the Plaintiff claims:—

(*a*) Damages in the sum of $844,158.00.

(*b*) Interest thereon at such rate and for such period as the Court may allow.

(*c*) Further and other relief.

(*d*) Costs.

~~Dated the 28th day of November 1973~~.

Dated the 31st day of January 1975.

~~(*Sd.*) JOHN J. SWAINE~~
~~*Solicitors for the Plaintiff*~~.

(*Sd.*) C. P. LIN & CO.
Solicitors for the Plaintiff.

This Writ was issued by Messrs. C. P. Lin & Co., of 1301-2, Hang Seng Bank Building, 77, Des Voeux Road, Central, Victoria, Hong Kong, Solicitors for the said Plaintiff, whose address is at D. D. 445, Lot 693, Castle Peak Road, Tsuen Wan, New Territories in the said Colony of Hong Kong.

(*Sd.*) C. P. LIN & CO.

1973, No. 3627 *In the Supreme Court of Hong Kong Original Jurisdiction*

IN THE SUPREME COURT OF HONG KONG

ORIGINAL JURISDICTION

No. 2
Re-amended
Defence
5th January 1974

BETWEEN KAMSING KNITTING FACTORY (a firm) *Plaintiff*

and

TAI HING COTTON MILL, LIMITED *Defendant*

RE-AMENDED DEFENCE

1. Paragraphs 1 and 2 of the Statement of Claim are admitted.

2. Paragraph 3 of the Statement of Claim is also admitted. But the Defendant further says that under the contract therein referred to (hereinafter called "the said contract"), it was an express term or condition thereof or one implied by the law merchant that the Plaintiff would take delivery of all the goods covered by the said contract within the time stipulated therein, namely, between April and December, 1971, alternatively within a reasonable time thereafter failing which the Defendant as seller might (*inter alia*) forthwith cancel the said contract. The Defendant will at the trial refer to the said contract for its full terms and effect.

3. Save that deliveries under the 4 contracts referred to in paragraph 4 of the Statement of Claim took place between June 1970 and October 1971, the said paragraph 4 is admitted.

4. As to paragraph 5 of the Statement of Claim, the Defendant admits that prior to the making of the said 4 contracts referred to in paragraph 4 of the Statement of Claim and the said contract, there had been negotiation between the Plaintiff and the Defendant through their respective representatives. Save as aforesaid, the said paragraph 5 is denied. The Defendant particularly denies that it had promised the Plaintiff's representatives that the Plaintiff could vary its intake of the Defendant's yarn or that the Defendant would continue to supply yarn at the agreed price (after the time for acceptance of delivery had expired) notwithstanding any subsequent increase in price, as alleged or at all; or that the Plaintiff would not be bound to take delivery of the Defendant's yarn within any specified periods. The Defendant further relies on Clause 2 of the Conditions of Sale set out at the back of the said contract and paragraph 2 hereof.

5. Save that the Defendant admits having reassured the Plaintiff that the Defendant would supply the said goods at the rate set out in the said contract

during the period stipulated therein, paragraph 6 of the Statement of Claim is denied.

6. As to paragraph 7 of the Statement of Claim, the Defendant says as follows:—

(*a*) The said period of April to December 1971 was inserted into the said contract after discussions between the parties hereto.

(*b*) The said period of supply of yarn is a material term and condition of the said contract.

(*c*) It was clearly recited in the said contract that the said goods were sold by the Defendant to the Plaintiff "on the undermentioned terms and is also made, in other respects, upon the condition specified on the back hereof".

(*d*) The Plaintiff is estopped from pleading ignorance of, or otherwise varying, the terms and conditions of the said contract after the same had been signed by its manager on its behalf.

(*e*) Save as aforesaid, the said paragraph 7 is not admitted.

7. Save that it is admitted that the deliveries of yarn are correctly set out in paragraphs 8 and 9 of the Statement of Claim, the said paragraphs are denied.

8. In further reply to the said paragraph 9, the Defendant says as follows:—

(*a*) In or about January and February, 1972, Mr. Yen (spelt 'Yim' in the Statement of Claim) of the Defendant repeatedly orally told Mr. Mui the managing partner of the Plaintiff and Miss Mui its manager both personally and by telephone, that unless the Plaintiff were to take delivery of the balance of the said goods as soon as possible, the Defendant would not make further deliveries at the contract price but would only sell so much of the goods to the Plaintiff and for such price as the Defendant should see fit.

(*b*) The goods sold by the Defendant to the Plaintiff in 1972 and 1973 at the said contract price were entirely as a result of indulgence on the part of the Defendant despite the Plaintiff's said failure to take delivery of the said goods at the end of December 1971, or alternatively within a reasonable time after the said communications between the said Mr. Yen and Mr. Mui and Miss Mui; or alternatively, each of the deliveries in 1972 and 1973 formed in law on the facts pleaded herein subject matters of separate sales.

(*c*) In or about August, 1972, the Defendant through its said representatives Mr. Yen repeatedly made it known to the Plaintiff's representatives, the said Mr. and Miss Mui personally and also by telephone, that the Defendant would only sell the said yarn to the Plaintiff at the contract price if and only if the Defendant had yarn left after satisfying the orders of its other customers and would not deliver to the Plaintiff the full

amount requested. The Plaintiff accepted or otherwise did not demur from this arrangement which, in itself, was a concession by the Defendant.

(*d*) All the yarn thereafter sold by the Defendant to the Plaintiff was in pursuance of the above understanding between the parties hereto.

(*e*) On or before the 11th day of May, 1973, when or just before the Defendant delivered the last 2 bales of yarn to the Plaintiff, the said Mr. Yen informed the Plaintiff's representatives the said Mr. or Miss Mui by telephone that the said 2 bales would be the last lot that the Defendant would sell at the contract price since the period of the contract had long expired and the price of yarn had gone up substantially since 1971.

(*f*) The Plaintiff agreed to take delivery of the said 2 bales of yarn on the conditions laid down by the said Mr. Yen without demur, and is therefore estopped from demanding or has thereby waived its rights (if any, which is denied) to demand further deliveries at the said contract price.

9. As to paragraph 10 of the Statement of Claim, the Defendant admits sending a mechanic, at the Plaintiff's request, to help the Plaintiff install one new soft winder machine for cone dyeing purposes ~~overcome a minor fault in one of the new machines installed~~ in the Plaintiff's factory, but denies that the installation of the said new ~~additional~~ machine~~s~~ or the installation of additional machines as alleged by the Plaintiff should ~~had~~ in any way affect~~ed~~ the intake of yarn by the Plaintiff or in any way affected the said contract in fact or in law.

10. Save that it is admitted and affirmed that the price of yarn had increased sharply from about the beginning of 1973 each and every allegation of fact in paragraphs 11, 12 and 13 of the Statement of Claim is denied. The Defendant further repeats paragraph 8 hereof.

11. Save that it is admitted that there was no delivery of yarn in June 1973 and thereafter, paragraph 14 of the Statement of Claim is denied.

12. The two letters referred to in paragraph 15 of the Statement of Claim are admitted. Save as aforesaid, the said paragraph 15 is denied.

13. (*a*) Paragraph 16 of the Statement of Claim is denied. The Defendant says that by reason of the foregoing it is indeed open to it to treat the said contract as cancelled.

(*b*) The Defendant further denies that there was any implied agreement between the parties hereto as alleged or at all subject to the matters set out in paragraph 8 hereof~~, at all~~.

(*c*) Further and in the alternative, if (which is denied) there was such an implied agreement as alleged or at all, there was no note or memorandum in writing of the said alleged implied agreement made or signed by the Defendant or its servant or agent. The Defendant will if necessary rely on the provisions of section 6 of the Sale of Goods Ordinance, Cap. 26.

In the Supreme Court of Hong Kong Original Jurisdiction

No. 2
Re-amended Defence
5th January 1974
(continued)

14. (*a*) As to paragraph 17 of the Statement of Claim, the Defendant admits that all the delivery receipts, invoices and receipts for payment relating to the yarn sold to the Plaintiff bore a reference to contract No. 3118/71 but says that the said reference was put on the said documents for accounting purposes so as to show that ~~only since~~ the goods supplied thereunder were sold at the said contract price as a matter of indulgence only; but cannot in any way bind the Defendant to give delivery to the Plaintiff ~~at the date of the writ herein (28th November 1973)~~ under the said contract and after the expiration of the said period in December 1971. Save as aforesaid the said paragraph 17 is denied.

(*b*) Further, the documents set out in paragraph 17 (*a*) of the Statement of Claim do not unequivocally refer to the said alleged implied agreement and do not in law amount to a note or memorandum in writing of the said alleged implied agreement.

(*c*) Likewise the acceptance alleged in paragraph 17 (*b*) of the Statement of Claim, the part payment alleged in paragraph 17 (*c*) thereof, and the part performance alleged in paragraph 17 (*d*) thereof, do not unequivocally refer to the alleged implied agreement and cannot made the alleged implied agreement enforceable by action herein.

15. Paragraphs 18 and 19 of the Statement of Claim are denied.

16. In the premises, the Defendant denies that the Plaintiff is entitled to any relief as claimed or at all.

17. Save as is hereinbefore expressly admitted, the Defendant denies each and every allegation of fact contained in the Statement of Claim as if the same were set forth herein and specifically traversed.

~~MARTIN LEE~~
~~*Counsel for the Defendant.*~~

~~Dated the 5th day of January, 1974.~~

~~MARTIN LEE~~
~~*Counsel for the Defendant.*~~

~~Dated the 10th day of November, 1974.~~

MARTIN LEE
Counsel for the Defendant.

Dated the day of , 1975.

IN THE SUPREME COURT OF HONG KONG

ORIGINAL JURISDICTION

ACTION NO. 3627 OF 1973

BETWEEN

KAMSING KNITTING FACTORY (a firm) *Plaintiff*

and

TAI HING COTTON MILL LIMITED *Defendant*

Date: 24th January 1975 at 2.35 p.m.

Coram: Sir Geoffrey Briggs, C.J.

Present: John J. Swaine (C. P. Lin & Co.) for Plaintiff.
Brook Bernacchi, Q.C. and Martin Lee (C. Y. Kwan & Co.) for Defendant.

Transcript of the shorthand notes taken by the Court Reporters of the evidence in the above Action.

MR. SWAINE: I call my first witness, Miss Mui.

P.W.1 — MUI Nuen-tin. Affirmed in Punti.

XN. BY MR. SWAINE:

COURT: Please sit down, Miss Mui.

Q. Miss Mui, you are the Manager of the Plaintiff firm.

A. Yes.

Q. And this is a family business with your father being the Managing Partner.

A. Yes.

Q. And your father's name is MUI Chok-chue.

A. Yes.

Q. And you also have a brother Robert MUI who has also been concerned in the running of the business.

A. Yes.

Q. Would you identify your father Mr. Mui and your brother Robert? I will now request them to leave the Court. (Two gentlemen leave Court.) Now, Miss Mui, there is no dispute that your firm, Kamsing Knitting Factory, has done business with the defendant company, Tai Hing Cotton Mill Ltd.

A. Yes.

Q. And I will tender for your easy reference the agreed bundle in this case, which contains the five contracts which Kamsing has made with Tai Hing.

A. Yes. **10**

MR. BERNACCHI: Could the witness speak up in Chinese?

Q. Would you please look at Contract 1. The signature for buyer is, I believe, your signature.

A. Yes.

Q. So also Contract 2.

A. Yes.

Q. So also Contract 3.

A. Yes.

Q. And 4.

A. Yes. **20**

Q. But 5 does not bear your signature.

A. That is correct.

Q. And the person signing 5 for Kamsing is, I believe, your uncle, Mr. CHEUNG Sau-san.

A. Yes.

Q. Now we will come to these contracts again, but meantime would you please tell the Court when you first met representatives of the defendant Tai Hing, bearing in mind that the first two contracts were made on the 17th June 1970.

A. In May or June 1970. **30**

Q. And where did you see them?

A. In the Kamsing Knitting Factory.

Q. And who of the defendant did you see?

A. I saw one Mr. Yim, one Mr. Chong and one Mr. Chow.

Q. Perhaps just to get their names right, Mr. Yim is Mr. YIM Cheung-tat.

A. Yes.

Q. He is the gentleman seated at Counsel's table at the corner.

A. Yes.

Q. And he also spells his name Mr. Yen.

A. Yes.

Q. We know him to be the Manager of the defendant. Mr. Chow's full name?

A. Mr. CHOW Hok-kuen.

Q. And who is he of the defendant?

A. He sells cotton yarn.

Q. He is their sales representative.

A. Correct.

Q. And Mr. Chong, his full name is CHONG Wan-sui and he is their engineer.

A. Yes.

Q. Now on Kamsing's side who were present? Yourself, and was there anyone else?

A. My father also.

Q. Now was this the first time that these gentlemen had come to Kamsing or had they come before, or if you don't remember or don't know, of course, say so?

A. That was the first time that they came to Kamsing.

Q. All right. And what did they say to your father and yourself?

A. They said that they very much wanted to have business dealings with us.

Q. Now in what language was the conversation carried on?

A. In Cantonese.

Q. Mr. Yim, we are told, is Shanghainese. How did he converse?

A. In Cantonese.

COURT: He spoke in Cantonese too, Mr. Yim?

A. Yes, my Lord, yes, he spoke Cantonese.

Q. Of the three — Were they all Shanghainese or — judging from their accents?

A. Yes.

Q. And they all spoke Cantonese.

A. Yes.

Q. Now to go back to the answer before this, they said they wanted very much to have business dealings with Kamsing. Could you continue that part of the evidence?

A. They also said that they could facilitate Kamsing in many respects in business dealings.

Q. All right. Please continue. Did you yourself say anything to them?

A. Yes, I did. I told them that the amount of yarn demanded by our customers varied from time to time, and sometimes they wanted yarn of 32 counts and sometimes yarn of 30 counts. I said that sometimes the amount of yarn required by us varied from time to time.

Q. So there were two things; type of yarn varied from count to count, and the amount of yarn would also vary.

A. Correct.

Q. And were your customers local or overseas or both?

A. Both.

Q. So having said that there would be this fluctuation in type and quantity, did they say anything?

A. They said that there would be no problem. They said that they only hope to have dealings with us, Kamsing, but it is immaterial to them as to the amount we used and they would not mind if we changed the number of counts.

Q. Is that what they said?

A. Correct.

Q. And did Mr. Yim do anything in particular just then?

A. Yes, he did.

Q. What did he do?

A. He used a pencil and wrote the following — he used a pen or pencil and wrote the following words on a piece of paper, he only wanted to have business dealings with Kamsing and that the amount of yarn used was immaterial.

Q. What happened to this piece of paper?

A. Well I did not retain this piece of paper because it was just an ordinary piece of paper.

Q. So you don't have it now?

A. No.

Q. All right. And was any mention made of your customers being here or being abroad? Any such discussion?

A. We mentioned this.

Q. Yes. Who said it?

A. Well I told them that most of our customers are in America and that they would change the specifications regarding the amount and yarn count at any time.

Q. And did you say anything more?

A. I then said that that being the case we would only be prepared to do business with them on a large scale only if they would make things easy for us.

Q. Did you mention how they could make things easy for you?

A. Yes, I did.

Q. What did you say?

A. I said that our customers are apt to change the specifications of the order at any time and that we would be prepared to have dealings with them only if they could make things easy for us.

COURT: What did they suggest?

A. They said that there was no problem.

Q. Now was any mention made of payment at this meeting?

A. Yes.

Q. What was said?

A. We told them that we would make payment 50 days after the delivery of the goods.

Q. And what did they say?

A. They said that there was no problem.

Q. And was any mention made of delivery periods?

A. They said that if we needed the goods they would deliver them to us if we telephoned.

Q. Now the two contracts dated the 17th June 1970, the first you will see is for 20 count yarn, and the second is for 32 count yarn.

A. Yes.

Q. The first is at the price of $1,000 per 400 lb. and the second $1,280 per 400 lb.

A. Yes.

Q. Now were these points agreed at that meeting or subsequently?

A. Subsequently.

Q. And what happended subsequently?

A. Subsequently they came to our factory and re-confirmed their promise to make things easy for us, and it was in those circumstances that these two contracts were signed.

Q. When you signed these two contracts did you notice that in each case there was a delivery period specified? Please speak up, Miss Mui.

A. I don't know.

Q. No, no. Did you notice when you signed these two contracts that there was a delivery period specified at that time?

A. I did not notice. The reason was that we had been told by them that we could have delivery of the yarn at any time convenient to us.

Q. I see, so you did not notice. And did you notice that there was provision in each contract for cash payment against delivery?

A. It was agreed between us that payment would be made 50 days after delivery. I believe that they would abide by their words and therefore I did not notice that particular provision.

Q. In fact how good is your English, Miss Mui?

A. I don't know English very well.

Q. If you had noticed the words "cash payment against delivery" do you think you would have understood what they meant?

A. No.

Q. Now we have heard that your father is the Managing Partner of Kamsing. Has he been taking an active part in Kamsing over the last few years?

A. Yes.

Q. When you say "yes", will you explain that? What does he do in Kamsing? Is he concerned with the day to day running or the overall management, or both?

A. He was concerned with the overall management.

Q. Yes. And how old is he?

A. 64.

Q. And has he a health condition?

A. He is suffering from slight high blood pressure and also diabetes.

Q. When you agreed the price and the quantity of the yarn under these two contracts with the defendant did you consult your father or did you approve on your own?

A. I informed my father about it.

Q. And did you wait for his approval or did you go ahead just the same?

A. I informed him of the amount of yarn purchased and the price.

Q. The question is did you wait for his approval or did you do it first and tell him afterwards?

A. I did it first and then informed him.

Q. Now have you ever met Mr. Y. C. Chen, the Managing Director of Tai Hing?

A. No.

Q. Have you ever spoken to him?

A. No.

Q. So you had signed the first two contracts of the 17th June 1970 and would you just formally identify the various documents supplied with the goods under these two contracts?

MR. SWAINE: These are agreed documents and they comprise part of item 6, my Lord.

Q. These are the documents accompanying the goods delivered by Tai Hing and also the invoices for payment and receipts for payment.

A. Yes.

Q. Now for easy reference, Miss Mui, I would like you to look at this schedule of deliveries under the first four contracts. P1 (6), my Lord. And have you checked these figures yourself against the two bundles of documents before you?

A. Yes.

Q. All right. And you would confirm the deliveries under contracts 1 and 2 as shown in that schedule?

A. Yes.

Q. Now we know that the contract 1 and contract 2 in each case called for delivery during June to September 1970. That is what appears on the contract. Now under the first contract, according to the schedule, by September 1970 only a portion of the goods were actually delivered.

A. Yes.

Q. And deliveries continued through October, November, December, January 1971 and February 1971.

A. Yes.

Q. Did anyone in Kamsing advert to the fact that deliveries were running late? **10**

A. No.

Q. Did anyone from the defendant Tai Hing advert to the fact that deliveries were running late?

A. No.

Q. And was the position the same under the second contract, no-one adverted to deliveries running late?

A. Correct.

Q. Now you have said that in the first discussions the mode of delivery discussed was your people would telephone your requirements to Tai Hing. **20**

A. Yes.

Q. In fact how were the deliveries arranged?

A. We telephoned them and informed them what amount we required, and they would accordingly deliver the goods.

Q. And who telephoned from Kamsing?

A. I telephoned.

Q. And to whom of Tai Hing did you phone?

A. Sometimes Mr. Yim, sometimes Mr. Chong, sometimes we would just inform an employee in the factory. **30**

Q. Yes. Anyone in particular?

A. Sometimes the factory manager, Mr. Wong.

Q. He was the factory manager, Mr. Wong?

A. Yes.

Q. And on an average how many times would you be telephoning?

A. Sometimes I telephoned them every day.

Q. All right. And in addition to your regular phone calls did they make any contact with you for delivery?

A. Yes. Sometimes they telephoned us and Mr. Chong used to come to our factory once a week.

Q. And what did he come for?

A. He came to examine the quality of the goods supplied and also to find out how much yarn we needed.

Q. Yes. So that we — yes, all right. And did this method of doing business proceed satisfactorily?

10 A. Yes.

Q. Now as for the mechanics of delivery, there is no dispute, Miss Mui, as to the goods being delivered to your factory with delivery notes issued by the defendant.

A. Yes.

Q. Your people at the factory would chop two copies of the delivery note and return these to the defendant's representative.

A. Yes.

Q. Later they would send an invoice, one chopped copy of the delivery note and a receipt for payment to your office.

20 A. Yes.

Q. They made out an invoice and your office would check the particulars on the invoice and make sure the goods had been received by relation to the chopped delivery note.

A. Yes.

Q. Now it is not in dispute that payment was always made by Kamsing by post-dated cheque.

A. Yes.

Q. And upon production of the post-dated cheque then Tai Hing's representative would make a note on the receipt of the particulars
30 of the cheque.

A. Yes.

Q. So at the end of the day at the factory you would have one of the defendant's delivery notes.

A. Yes.

Q. At the office you would have one delivery note chopped by yourselves.

A. Yes.

Q. You would have one invoice issued by the defendant for payment.

A. Yes.

Q. And you would have a receipt issued by the defendant for payment of your post-dated cheque.

A. Correct.

Q. Now I would like you to look at contracts 3 and 4. Contract 3 is for 32 count cotton.

A. Yes.

Q. And contract 4 is for 20 count yarn.

A. Yes.

Q. These were both in December 1970.

A. Yes.

Q. By which time you had already taken the bulk of the deliveries under the first two contracts.

A. Correct.

Q. Now in making the third and fourth contracts did you approach Tai Hing or did they approach you?

A. When we had used part of the yarn we purchased under the first two contracts they informed us that we had almost used up all the yarn and asked if we wanted to place an order for some more.

Q. Yes. By "they" whom do you mean, Miss Mui?

A. Tai Hing.

Q. Who of Tai Hing?

A. Mr. Chow and Mr. Yim.

Q. And who did they speak to?

A. They spoke to me.

Q. And they asked whether you wanted to place a further order. What did you say?

A. I promised them to place a further order.

Q. And did you agree the amount?

A. I agreed to the amount as shown in the contracts.

Q. And the price?

A. And the price as well.

Q. Again on this occasion before the making of contracts 3 and 4 was there any question of delivery periods?

A. We were to follow the practice in respect of the goods under the first two contracts.

Q. Yes, but was any mention made of delivery periods?

A. No.

Q. And when you signed contracts 3 and 4 did you notice that there was a delivery period specified in each case?

A. No.

Q. And did you notice the provision for cash against delivery?

A. No, because prior to contracts Nos. 3 and 4 we paid 50 days after the delivery of the goods.

Q. And that was still your understanding?

A. I believe, I was under the belief that we would adopt the practice that we had originally agreed upon.

Q. And in fact payments were under the third and fourth contracts made by post-dated cheques by 50 days.

A. Correct.

Q. Now if you look at the schedule, would you confirm under the contract that there was no delivery at all within the specified period January and February 1971?

A. Yes.

Q. And delivery did not begin until March 1971.

A. Yes.

Q. And as far as the delivery of the 32 count yarn was concerned, under the second contract that delivery finished in March and under the third contract it began in March.

A. Yes.

Q. Would you confirm under the fourth contract there was no delivery at all during the contract period, which was January 1971?

A. Yes, I can.

Q. And delivery only began in February and did not end until October, did not end until the latter part of 1971.

A. Yes.

Q. Right. Now, as to the amount of yarn under the fifth contract, that is 1,500 bales, and the price of 1,335 per 400 lbs, with whom were those agreed?

A. With Mr. Chow.

Q. And do you remember if it was on the occasion of that visit to Tai Hing or subsequently?

A. Subsequently.

Q. And, again, was any mention made of delivery period?

A. No.

Q. Now, again, in this contract there is provision for cash against delivery but it is not disputed that payment was always made by post-dated cheques?

A. Correct.

Q. And did you notice . . . I am sorry, did you see this contract '5' before it was signed?

A. No.

Q. It was signed by your uncle Cheung Sau-san, is that right?

A. Yes.

Q. And did he have anything to do with the negotiation of this contract?

A. No.

Q. How did he come to sign that contract for Kamsing?

A. Because I was interested in leaving Hong Kong in going abroad by the time of the delivery of the goods to this contract; I was already in the process of applying for the necessary documents; that being so, I asked Mr. Chong to sign the contract.

Q. Right; and I think you said so that the man who signed would be in Hong Kong during the deliveries?

A. Correct.

Q. All right. Now, did you speak to your uncle about the terms that you had agreed with Mr. Chow?

A. He knew the amount and the price.

Q. How did he know?

A. I told him.

Q. I see, you told him. Did you tell him anything else about the terms of the contract?

A. No.

Q. Now, would you look at the schedules of actual deliveries under the fifth contract, P.1 (7) . . . this one . . . the big one, my Lord, P.1 (7); and would you confirm that deliveries under the fifth contract only began in July, 1971? *Exhibit PI(7)*

A. Yes.

Q. And this was for 32 count cotton yarn?

COURT: Beginning in July?

Q. Beginning in July under the fifth . . .

A. . . . yes.

Q. But sometimes you have got 42 counts . . . a variation that you have agreed with Mr. Chow and Mr. Yen?

A. Correct.

Q. By and large it was 32 counts that you were getting under the fifth contract?

A. Yes.

Q. And following the same course of dealing under the first four contracts, the delivery of 32 count yarn under the third contract, that is P.1 (6) schedule, ended in July, 1971, and, under the fifth contract, began in July, 1971?

A. Yes.

Q. All right. So both in regard to the 20 count and the 32 count there was no break in delivery, it just went on from month to month?

A. Correct.

Q. And would you — and was the method of placing a telephone order from time to time and Mr. Chong coming week to week the same under the fifth as under the first four?

A. Yes.

Q. And was the documentation the same as for the first four contracts, i.e. delivery notes, invoices, receipts for payment?

A. Correct.

Q. Now, did you in fact leave Hong Kong at about that time in 1971?

A. I did.

Q. And obviously you came back?

A. Yes.

Q. And did you ever notice in contract '5' the provision for delivery April 1971 to December 1971?

A. No.

Q. When did you first become aware of this provision?

A. Now.

Q. By "now" do you mean today or when this case started?

A. When this case started.

Q. All right; and did you notice the provision for cash payment against delivery? **10**

A. No.

Q. Not again — not until this case started?

A. Correct.

Q. All right. Now, at the end of 1971 did anyone advert — anyone in Kamsing advert to the fact that deliveries were running late?

A. No.

Q. Did anyone in Tai Hing advert to deliveries running late at the end of 1971?

A. No. **20**

Q. Now, you mentioned a little earlier that the reason you placed this large order for 1,500 bales was Kamsing was intending to expand.

A. Yes.

Q. Did Kamsing expand?

A. Yes.

Q. About when?

A. End of 1971 and beginning of 1972.

Q. And what did the expansion consist of?

A. We increased the number of machines.

Q. Anything else? **30**

A. We installed additional machines to the worth of about $1 million.

Q. Yes, and it is not disputed that in fact Tai Hing sent — gave some assistance?

A. Yes.

Q. What did they do?

A. They sent someone to our factory to help us instal the machines.

Q. It doesn't matter very much but was it one person or more than one, do you remember?

A. More than one.

Q. More than one. Now, as a result of this expansion . . . Now, did this expansion affect your intake of yarn from Tai Hing?

A. Yes, it did.

Q. Yes, and did it result in your taking less or more or what?

A. At first, we used less.

Q. And later?

A. Later we used more.

Q. And did Tai Hing make any complaint of your taking less?

A. Well, they knew that we were installing additional machines and would therefore be using less yarn but at the same time they were also aware that by August following the completion of the installation of the machines we would be using more. For that reason they even sent people over to us to give us a hand.

Q. So did they complain?

A. No.

Q. All right; and you say that July/August the work was finished?

A. Yes.

Q. And from Tai Hing's point of view . . . I am sorry, may I rephrase the question: were you after this expansion getting all the yarn you wanted from Tai Hing . . . I am sorry, I may not have put this clearly: after this expansion were you able to get physically all the yarn you wanted from Tai Hing? I am sorry, this is not an easy question . . . Was the delivery from Tai Hing satisfactory after your expansion?

A. After the expansion we informed Tai Hing that we would be needing large quantities of yarn and Tai Hing also — the people from Tai Hing rather also came over to see our factory and they knew that we required more yarn.

Q. Who came from Tai Hing?

A. Mr. Chong and Mr. Yen came.

Q. Right, and they came. They saw the new machines. Did they say anything?

A. They knew that we had increased the number of our machines; they told us that they were increasing their machines and that in the circumstances they wanted to be able to supply us much more than what they were supplying.

Q. So . . . yes, and did they say when they would finish their expansion? **10**

A. They said that after November . . . after December and at the beginning of January they would supply us as much as we demanded.

Q. This would be December, 1972, January, 1973, so really by the end of 1973 . . . I am sorry, by the end of 1972, beginning of 1973, they would be able to supply all you wanted?

A. Correct.

Q. All right; and this discussion occurred about when — when they came to your factory?

A. This was after August, sometime in September.

Q. And was there any suggestion made by Mr. Yen or Mr. Chong that **20** the delivery period under the fifth contract had already expired and you were not entitled to any more yarn under the fifth contract?

A. No.

Q. All right. In any case Tai Hing did continue to supply yarn in August, September, October, November and December, 1972?

A. Correct.

Q. But not as much as you wanted?

A. Correct.

Q. Now, if at this time in September, 1972, Mr. Yen or Mr. Chong had said you were not entitled to any more contract — any more **30** yarn under the fifth contract, would you have been able to get yarn from other sources?

A. If they had informed us then I would have been able to buy yarn from mainland China.

Q. And it is agreed that from about the beginning of 1973 the price of yarn started to rise very sharply?

A. Yes.

Q. Now, in September, 1972, was the price of yarn relatively stable?

A. Yes.

Q. It didn't really rise until the beginning of 1973?

A. Yes.

Q. Now, you mentioned you could have got your yarn from mainland China; why do you mention mainland China in particular?

A. Because we had been invited to mainland China to purchase their yarn.

Q. I see, this was Kamsing being invited?

A. Yes.

Q. And did Kamsing go?

A. Yes, we did.

Q. About when was this?

A. September.

Q. So you could have got more if you had known that Tai Hing was taking this stand?

A. Correct. I bore in mind their promise that they would be supplying us in large amounts by Chinese — after Chinese New Year and for that reason I did not purchase yarn from any other source.

Q. All right. Now, in 1972 did you have dinner with Tai Hing at the Golden Crown Restaurant?

A. Yes.

Q. Now . . .

COURT: . . . December, 1972?

MR. SWAINE: I am coming to the month, my Lord.

Q. About what month was this?

A. Sometime in October.

Q. What was the occasion — the occasion?

A. We — the occasion was for us to introduce an important American customer to Tai Hing and thereby to let Tai Hing know that we would be requiring very large amounts of yarn in the firm.

Q. Yes, this was your customer from America?

A. Correct.

Q. The name of the customer?

A. C.P.S.

Q. Yes, a corporation, I believe?

A. Yes.

Q. And who of Tai Hing attended the dinner?

A. Mr. Chong, Mr. Chow, Mr. Yen and the factory manager Mr. Wong.

Q. Yes, and they were introduced to your American customer as your yarn supplier?

A. Yes.

Q. All right, that was in October, 1972, and you were promised all you wanted by early 1973; did you get it? **10**

A. No.

Q. And what did you do about it?

A. We kept on asking them and in reply they said, "All right, all right, whenever we have the goods we will supply you."

Q. Now, you said "we", who of Kamsing?

A. I myself.

Q. And of Tai Hing who?

A. Mr. Yen and Mr. Chong.

Q. And was this by telephone, in person or how? **20**

A. By telephone.

Q. How often in the early part of 1973?

A. Well, I communicated with them almost every day by telephone.

Q. And did they ever say on these occasions that you were no longer entitled to yarn because the contract had expired?

A. No.

Q. You said that "we kept on asking; they said we would get it if they had supply"?

A. Yes.

Q. Now, did they say they did not have supply? **30**

A. No.

Q. Did they say why they were not supplying?

A. They told me that they did not have enough yarn to supply and they would supply us as soon as they had the yarn.

Q. And in fact there were supplies during January, February and March but these were relatively small?

A. Yes.

Q. And we know that this was when the price of yarn was rising very sharply?

COURT: January and February?

MR. SWAINE: There were small deliveries during January, February and March 1973, my Lord, and in fact also April and May, but these were very small quantities.

Q. Your father would be able to tell us but do you know whether he also tried to contact Tai Hing?

A. Yes, he did.

Q. And were you present when he was on the phone with Tai Hing?

A. Sometimes I was and sometimes I was not.

Q. And your almost daily phone calls, Miss Mui, how long did that go on for: a few weeks, a few days or a few months?

A. Well, I continued to telephone.

Q. Are you able to say whether you were doing this over a period of days or weeks or months? If you cannot remember it is all right.

A. I cannot remember.

Q. But you do remember daily phone calls?

A. Yes.

Q. All right. Now, I would like you, please, to look at document '8' in the agreed bundle. This is a letter from Kamsing to Tai Hing of the 21st July, 1973, and the second paragraph in the last four lines refers to a further discussion with your Mr. Richard Chow between the 22nd to 27th May, 1973, at the Golden Crown Restaurant, third floor; were you present at that Golden Crown meeting?

A. No.

Q. The letter is, I believe, signed by your father Mr. Mui Chok-chue?

A. Yes.

Q. He would be able to tell us about the contents of this letter?

A. Yes.

Q. Now, you have said that this reply which you were getting from Mr. Yen and Mr. Chow was "We will supply you when we have the yarn"; did they at any time mention how much per month they might be able to supply you?

A. No.

Q. We know that in April 1973 there were three bales delivered and in May 1973 three bales.

A. Yes.

Q. And after this there were no more deliveries?

A. Correct.

Q. Do you remember whether there was still any telephone communication with Tai Hing during April and May 1973? If you are not sure or you don't remember, say so.

A. Cannot remember.

Q. All right. Now, I want you to look at the reply from Tai Hing to your father's letter and their reply is document '9' and the second paragraph reads:

> " According to the delivery time stipulated on the contract, that was for April to December 1971, in which duration, after taking part of the quantity contracted, you consequently failed to take delivery of the balance. In consideration of your failure within that specified timing in consuming the yarn produced, we now treated the contract for cancellation."

Now, before this letter, was there ever any indication from Tai Hing that you had not taken the quantity within the period April to December 1971?

A. No.

Q. Now, I must ask you to formally deal with the allegations in the Defence . . . at page 2, Mr. Gray. Now, this is what the defendant says is their case, and at paragraph 8a, they say:

> " In or about January and February, 1972, Mr. Yen (spelt 'Yim' in the Statement of Claim) of the Defendant repeatedly orally told Mr. Mui the managing partner of the Plaintiff and Miss Mui its manager both personally and by telephone, that unless the Plaintiff were to take delivery of the balance of the said goods as soon as possible, the Defendant would not make further deliveries at the contract price but would only sell so much of the goods to the Plaintiff and for such price as the Defendant should see fit."

Now, speaking for yourself, did anyone from Tai Hing ever say any such thing to you?

A. No.

Q. 8 (c), Tai Hing says:

> " In or about August, 1972, the Defendant through its said representative Mr. Yen repeatedly made it known to the Plaintiff's representatives, the said Mr. and Miss Mui personally and also by telephone, that the Defendant would only sell the said yarn to the Plaintiff at the contract price if and only if the Defendant had yarn left after satisfying the orders of its other customers and would not deliver to the Plaintiff the full amount requested."

Now, speaking for yourself, did the defendant ever say any such thing to you?

A. No.

Q. In fact, on your evidence, in September of 1972 Yen and Chow had gone to your factory and had promised that after their own expansion had been finished at the end of 1972, beginning of 1973, they would supply all you wanted?

COURT: After January, 1973?

MR. SWAINE: After end of 1972, beginning of 1973, they would supply all that the plaintiff wanted.

A. Correct; and they further said that they hoped for more cooperation with us the following year.

Q. All right. Sub-paragraph (e) raises something which was allegedly said to your father so I will put it to your father and not to you.

Q. There is one letter I want to take further with you; would you look at document 10.

COURT: Is this a new matter?

MR. SWAINE: Yes, my Lord.

COURT: Well, we will adjourn now to next Monday.

MR. BERNACCHI: Before your lordship rises, I have been informed, and I will inform your lordship and my learned friend, that as a result of what my learned friend has said my client Mr. Yen cannot be certain whether it was Mr. or Miss Mui, so I would have to amend the Defence . . . and perhaps my learned friend will put it to both of them.

COURT: Yes, we will deal with that on Monday.

4:25 p.m. Court adjourns. 24th January, 1975.

27th January, 1975 @ 10 a.m. Court resumes. Appearances as before.

P.W.1 MUI Nuen-tin o.f.a.

XN. BY MR. SWAINE continues:

MR. SWAINE: For easy reference, I have now done a similar schedule for the fifth contract. Your Lordship will remember that we put in P1 (7), the numerous schedules of deliveries under the fifth contract, and this is P1 (7), my Lord, and I have referred you to the Statement of Claim for the actual deliveries under the fifth contract which were admitted in the Defence, but for easy reference I have got a similar schedule to summarise P1 (7). May I hand this in please? Could your Lordship perhaps mark this P1 (7A). Perhaps just to explain the handwriting on P1 (7A), I have drawn a line at December, 1971, to give the quantities delivered within the contract period which comes to 520.250 and then the total, of course, 1,075.800, the total for the entire delivery, and I then put in the shortfall which is 424.20.

Exhibit P1(7)

Exhibit P1(7A)

MR. BERNACCHI: My Lord, I have been reminded that I would apply for a small amendment to paragraph 8 (e), the third line, page 3 — (e), the fourth line: 'Mr. or Miss'. 8 (e), 'Mr.' and then the amendment 'or Miss.'

Q. Now, Miss MUI, on the defendant's case, there is one other allegation that I must put to you for your comment and that relates to para. 8 (e) of the Defence, which reads:

> " (e) On or before the 11th day of May, 1973, when or just before the Defendant delivered the last 2 bales of yarn to the Plaintiff, the said Mr. Yen informed the Plaintiff's representative(s)" — I suppose — "the said Mr. or Miss MUI by telephone that the said 2 bales would be the last lot that the Defendant would sell at the contract price since the period of the contract had long expired and the price of yarn had gone up substantially since 1971."

Yes, now, what do you say to that?

A. He did not say that.

Q. All right.

COURT: To you?

A. To me.

Q. But your father will be giving evidence as to whether he said to him. Now, I was about to refer you on Friday to the agreed bundle, document 11, and this is a letter from Tai Hing dated 25th October, 1973 to the Hong Kong Chinese Textile Mills Association. This is the last paragraph, Miss MUI, and in the translation Tai Hing says this:

"The said factory" — namely, yourselves, Kamsing — "and our factory had entered contract for supply of cotton yarn in March 1971. Unfortunately, the said factory did not within the period take delivery of the goods but in addition during the interval ceased to take delivery of goods despite repeated requests. . . ."

Now, it is not in dispute that the full amount of yarn was not delivered within the contract period. As to why, that is a matter for the Court on the evidence. It has now been established and it has also been admitted rightly by Tai Hing that there was in fact delivery of cotton yarn after December, 1971. Whether that delivery was under the contract or was by special arrangement is again a matter for the Court on the evidence. What I want you to say is whether or not Tai Hing made repeated requests to yourselves to take delivery after December, 1971.

A. No.

Q. Now, Miss MUI, in the case for Kamsing, there is a claim against Tai Hing for damages on the basis that the market price for this cotton yarn at the end of July, 1973 was $3,325.00 a bale.

COURT: Paragraph?

MR. SWAINE: This will be 19, my Lord, page 6 of the Statement of Claim.

Q. And did you, after the 31st of July, 1973, buy cotton yarn of 32 count from other sources?

A. Yes.

Q. Who was your supplier at that time?

A. Kin Nan Hong.

MR. SWAINE: My Lord, they call this in English 'Kian Nan Trading Company Limited."

Q. Now, I am going to hand you, Miss MUI, a bundle of original documents between Kian Nan as seller and Kamsing as buyer and I want you to identify these first and then we will go into the details.

MR. SWAINE: My Lord, this is under the unagreed bundle and I am asking the witness to look at items 1 and 2.

COURT: These will have to be put in one by one.

MR. SWAINE: I think so. I think we will have to detach from the plaintiff's bundle, but I am particularly anxious that we should detach these because one of the documents in the unagreed bundle is the defendant's. I wouldn't like the whole lot to go in simply because I prove my documents.

Q. Meanwhile, the first document, Miss MUI, is a sales contract of the 30th of May, 1973 between Kian Nan as seller and Kamsing as buyer of 32 count cotton yarn, Chinese origin.

Exhibit P2 COURT: P2, that would be.

Q. And the price at the 30th of May, 1973, according to this contract, was $2,400 per bale of 400 pounds.

A. Yes.

MR. SWAINE: My Lord, we have not got these in the best order. We would skip over the next 6 invoices and come to the seventh invoice which is No. 33066.

Q. Now, Miss MUI, that invoice is followed by the words "Date Concluded 30/5." Can you see it? This is an invoice under P2.

A. Yes, 'C'.

Exhibit P2 Q. And it gives the contract number "C-483/73", which is our P2.

MR. SWAINE: It is part of the P2 bundle, my Lord.

COURT: Oh, I see. You are putting all your documents in as P2?

MR. SWAINE: Yes, I was thinking, my Lord, if we could have as P2 the 30th of May contract and the invoices under that contract, then the other invoices might be P3, P4, as the case may be.

COURT: Yes.

Exhibit P2A Q. I think the first invoice P2A — this will be under P2 — and the date of that invoice P2A is the 25th of June, 1973.

A. Yes.

Q. Then the next following invoice 33149 is likewise under the 30th of May contract and the invoice date is the 4th of July, 1973.

COURT: This is still under P2, isn't it?

Exhibit P2B MR. SWAINE: P2B, my Lord.

COURT: Same date?

MR. SWAINE: And the same price, of course, but the delivery dates differ.

Q. Then the one following 33215, also under the 30th of May contract, and the invoice date is the 10th of July, 1973.

A. Yes.

MR. SWAINE: P2C. *Exhibit P2C*

Q. Now, this was the price prior to the end of July, 1973?

A. Yes.

Q. The next invoice 33543, now the date concluded there is 10th August.

COURT: Under the same contract?

MR. SWAINE: No, my Lord, this would be spot order.

A. Yes.

Q. And the invoice date is also 10th August, 1973?

A. Yes.

Q. Now, was there in this case a formal written contract?

A. It was a cash purchase based on the market price and the transaction was done orally through the telephone.

Q. On the 10th of August?

A. Correct.

Q. And you say, then, that the price of $825 a carton was the market price on the 10th of August?

A. Yes.

Q. And on the left-hand side, under the article description, it is 32 count cotton yarn at 100 pounds per carton.

A. Yes.

Q. So 400 lbs. will be 825 times 4?

COURT: Per bale?

MR. SWAINE: Per bale, my Lord.

COURT: How much is that?

MR. SWAINE: 3,300.

A. Yes.

MR. SWAINE: My Lord, this might be P3. *Exhibit P3*

Q. And the next following is similar?

A. Yes.

Exhibit P3A COURT: Let's call that P3A.

Q. The next following again is similar?

A. Yes.

CLERK: May I have the number?

MR. SWAINE: We have just got P3A which is invoice 33543, that is similar to P3.

Exhibit P3

COURT: 33610 is 3A?

MR. SWAINE: Oh, I'm so sorry, my Lord. What has happened is that we have got a certified translation and I have been looking at this. I'm sorry, my Lord. Yes, it is my fault. I have been reading two documents as one, Yes, we have got 33543. The next should be 33610. I'm very much obliged.

COURT: Yes. P3A. All these spot orders that we have are P3s.

Q. The difference there, Miss MUI, is that, invoice 33610, the concluded date is 10th of August, but the invoice date is 15th of August.

A. Yes.

Q. And was that order placed, in the same way as the preceding one, on the telephone?

A. Yes.

Q. And at the same price?

A. Yes.

Q. All right. And the one following, 33657, concluded date 18th of August, invoice date 18th of August, 1973.

Exhibit P3B COURT: P3B.

Q. And was that done in the same way as the preceding ones?

A. Yes.

Q. At the same price?

A. Yes.

Q. Then the one following 33715, concluded date 23rd of August, invoice date 24th of August.

A. Yes.

Exhibit P3C

Q. P3C, done the same way?

A. Yes.

Q. Same price?

A. Yes.

Q. All right. The one following 33837, that is P3D, concluded date 23rd of August, invoice date 3rd of September. *Exhibit P3D*

A. Yes.

Q. Done the same way?

A. Yes.

Q. And the same price?

A. Yes.

Q. All right. The one following 33912, that would be P3E, concluded date 23rd of August, invoice date 8th of September. *Exhibit P3E*

A. Yes.

Q. Done the same way?

A. Yes.

Q. The same price?

A. Yes.

Q. The one following 34052, P3F, concluded date 23rd of August, invoice date 22nd of September. *Exhibit P3F*

A. Yes.

Q. Done the same way and same price?

A. Yes.

Q. 34153, that is P3G, 23rd of August and 29th of September. *Exhibit P3G*

A. Yes.

Q. Done the same way?

A. Yes.

Q. At the same price?

A. Yes.

Q. The next one 34297, P3H, 23rd of August concluded, invoice 13th of October. *Exhibit P3H*

A. Yes.

Q. Done the same way?

A. Yes.

Q. And the same price?

A. Yes.

Exhibit P3I

Q. 34324, P3I, concluded 23rd of August, invoice 16th of October.

A. Yes.

Q. Done the same way?

A. Yes.

Q. At the same price?

A. Yes.

Q. And from your own knowledge and experience in the business, Miss MUI, was the price of 3,300 per bale the market price for Mainland yarn of 32 count in August, 1973?

A. Yes.

Q. And from your knowledge and experience, was Mainland yarn cheaper or more expensive than Hong Kong yarn?

A. Mainland yarn is a little cheaper.

COURT: And all these represent sales that were made by you?

A. Yes, my Lord.

MR. SWAINE: My Lord, these are the only invoices I think relevant to the claim for damages. There are others. These are not in the agreed bundle. What I mean is that none of these has been agreed. I don't intend to do more than what I have already done. Perhaps, my Lord, we can extract these from your Lordship's bundle and have them put in the right order. I have no further questions of this witness.

MR. BERNACCHI: My learned junior will be cross-examining this witness.

XXN. BY MR. MARTIN LEE:

Q. Madam, since when have you been left in charge of the plaintiff's business by your father?

A. Ten years ago.

Q. So long before you met any representative from the defendant company, you already had plenty of experience in these sales contracts or purchase contracts?

A. Yes.

Q. In other words, you had signed contracts for the purchase of yarn on behalf of the plaintiff company long before these transactions with the defendant.

A. I had signed contracts.

Q. Many of them?

A. I had signed contracts.

Q. No. Had you signed many of them before you signed these with the defendant?

A. I had signed contracts for the purchase of yarn.

Q. But how many of them — more than a hundred or less than a hundred or what?

A. I had signed several such contracts.

Q. I see. So although your father had left the management of the plaintiff firm to you for some ten years, you had only signed a few contracts for the purchase of yarn before the plaintiff company commenced dealings with the defendant company?

A. Yes.

Q. Now, these contracts — the four contracts that you signed on behalf of the plaintiff company were all in English, is that right?

A. Yes.

Q. Had you consulted anybody who knew English as to the terms and conditions of these contracts before you signed them?

A. No.

Q. I want you to look at these contracts, in Exh. P1 —

MR. LEE: My Lord, the agreed bundle, P1 to 4, these are the four contracts the witness has signed, your Lordship may recall. *Exhibit P1-4*

Q. Mr. Gray, would you refer her to P1A first, the contract dated the 17th of June, 1970. *Exhibit P1(1)*

A. Yes.

Q. Now, is it your case, madam, that you signed — you appended your signature at the left bottom corner of this document without consulting anybody as to the terms?

A. Correct.

Q. Well, when you signed this contract, what did you think the contract was all about?

COURT: Is it the right way of going about it, Mr. LEE, because you are not saying the contracts did not exist, are you?

MR. LEE: No, my Lord.

COURT: What is the point of this cross-examination?

MR. LEE: Yes, my Lord, the relevance of that question, my Lord, is that she saw fit to sign them without knowing the terms of them. That goes to her credibility, my Lord. The plaintiff's case is, my Lord, that the plaintiff is not bound by these terms as to the delivery dates and so forth.

COURT: Yes.

MR. LEE: So I must be entitled, in my respectful submission —

COURT: I am not stopping you. I only want the correct explanation.

MR. LEE: Yes, the explanation —

COURT: Go on, go on! Don't let's waste time.

A. Correct, I only knew the price and the quantity.

Q. You mean you can understand these figures yourself?

A. Yes, and I only knew the amount and the quantity.

Q. The amount and —

A. — the quantity.

Q. The price?

A. And the price and the quantity.

Q. Apart from that, you know nothing more about this contract?

A. Because prior to the signing, we had all agreed upon the price and the quantity.

Q. Were you aware that there were printed words at the back of the document?

A. I did not see these words.

Q. I see.

A. I did not know what they were.

Q. But perhaps you can tell my Lord this: all these four contracts were sent by the defendant to the plaintiff already bearing the defendant's signature at the right bottom corner, is that right?

A. Yes.

Q. And these contracts already contained a lot of matters filled up by typing apart from the printing words, is that right?

A. Yes.

Q. And these contracts were just brought to you since you were the manager and you just signed them?

A. Yes.

Q. Madam, I put it to you that all these terms had already been agreed between you and Mr. CHOW, the defendant's representative, before they were reduced into writing.

A. According to what?

Q. Well, I'll put it in another way: Mr. CHOW had already discussed with you all these terms, including the period of delivery, and you agreed to them before they were reduced into writing.

A. No such a thing.

Q. Now, madam, I put it to you that the agreement as to the payment was that you would be given 45 days credit to pay.

A. According to what we had agreed, we were given credit for about 50 days after taking delivery of the goods.

Q. The agreement was that you would pay by post-dated cheques, is that right?

A. Correct.

Q. Now, you know that there is a price difference between cotton yarn of 20 count and cotton yarn of 32 count?

A. Yes.

Q. But there is also a difference in price between 32 count and 40 count?

A. Correct.

Q. Now, are you sure that when, according to you, you were discussing business dealings with the defendant's representatives, that the defendant's representatives had told you that you could vary the number of counts of yarn if you had wanted to?

A. I could vary the number of counts only in respect of 32 and 40 counts yarn. When I said that they would make things easy for us, that was what I meant.

Q. Did you agree to pay extra if you had wanted 40 count yarn?

A. Yes, the difference being only $100.

COURT: Per bale?

A. Per 400 lbs., my Lord.

MR. LEE: That is per bale, my Lord.

Q. Now, madam, you told my Lord that prior to the signing of any contract between the plaintiff and the defendant, there were these discussions and promises.

A. Yes.

Q. Madam, I put it to you that when the pre-contract discussions took place, Mr. YIM was not there at all.

COURT: Mr.?

MR. LEE: YIM or YEN.

A. On the first two occasions, he was present because he came to our factory.

Q. I put it to you that only Mr. CHOW was there to discuss possible contracts with your father.

A. No.

Q. I further put it to you that you were then subsequently introduced by your father to Mr. CHOW.

A. That was a second occasion when he came to our factory.

COURT: Mr. CHOW came?

A. When Mr. CHOW came on the first occasion, I was not in, but my father was. On the second occasion, Mr. CHOW, Mr. CHONG and Mr. YIM, all came and I was there.

MR. LEE: My Lord, I don't want to waste your Lordship's time. I have put my case already.

MR. SWAINE: I think there is a conflict between the case as put and para. 4 of the Amended Defence.

MR. LEE: I take my learned friend's comment. I'm sorry, could I have your Lordship's indulgence?

Q. I put it to you that Mr. CHOW only mentioned three things to you: he promised good quality, reasonable price and good service.

A. He promised us that he would make things as easy as possible for us, namely, Kamsing, and he also promised that the quality would be up to standard — that is, good quality — and also there would be no change in price, and he also promised that we could change from 32 to 40 count in the use of our yarn.

Q. Yes, provided you pay $100 each time per bale.

A. Yes, and that he would not mind regarding the amount of yarn we used per month — whether we used a small amount or a large amount — and he also promised that he would not fail to deliver the goods to us just because prices had gone up.

Q. But I suggest, madam, the two last things you mentioned to my Lord were not promised you at all.

A. It was only after these promises of making things easy for us had been made that we would have business dealings with him.

Q. You see, madam, do you agree that there were in fact numerous discussions before the first two contracts were signed?

A. He had been to our factory twice — the three came together. On the first occasion I was not in, but on the second occasion I was.

Q. And you have already told us what happened on the second occasion, according to you.

A. Yes.

Q. And is it your case, madam, that after the second visit, the next thing that happened was that two contracts were sent by the defendant to you for signature?

A. Yes.

Q. And you have told my Lord all that was discussed on that second occasion.

A. Yes.

Q. Now, I want you to look at Exh. P1 again. The price appearing in the middle part, it says: "Description: 20's/1" — I think it is 20 count — "A Cotton Yarn, 'MAPLE' Brand, 25% C.P.C." Now, what is "C.P.C."? Is it Commonwealth Preference Certificate? *Exhibit P1(1)*

A. I don't know.

Q. So that term was never discussed before?

A. Correct.

Q. The next item is "Packing: On paper Cones." was not discussed before?

A. No.

Q. Now, and then you already said there was nothing discussed about delivery?

COURT: Is it common to pack on paper cone?

Exhibit P1(3) MR. LEE: P1 (3) is wooden cone.

A. No, it is not a common practice.

COURT: You use wood usually?

A. Sometimes wood and sometimes paper.

Q. Does it make any difference?

A. No specially big difference.

Q. There is some difference to the dyeing process, is there?

A. No.

Q. Then what is the difference?

A. No special difference, except that the angles are different.

COURT: The angles?

A. The angles.

Q. There was another term "Rebate ½%"

A. Yes.

Q. Never discussed before?

A. Never.

Q. So do you understand what that means: "Rebate of ½%"?

A. At that time I did not pay attention to this matter.

Q. But you now understand what that means, don't you?

A. Yes, I do.

COURT: What is that little Chinese writing at the bottom underneath there, $2?

MR. LEE: I see, sacks.

Q. So if they are selling sacks, in sacks, it is $2?

COURT: $2 each?

MR. LEE: Perhaps I would ask the witness.

COURT: Yes, if you would.

Q. There are three Chinese characters, "ma bau fai" and then @2.00, what is it?

A. After the purchase of the goods, they paid me $2 for the sacks. This was paid to me by Mr. CHONG.

Q. Now, I want you to turn to P2 now, madam, or P1 (2), my Lord. *Exhibit P1(2)*

COURT: The second contract.

MR. LEE: But also made on the same date as the first one, as your Lordship will remember.

Q. Now, at the bottom of that page, you have "Other Terms":

"If 40's/1 A Cotton Yarn on paper Cones shall be required, the unit price will be HK$1,380.- . . ."

and then "32's/1 AA Cotton Yarn . . ." — again the same price, which represents $100 more than the unit price above.

A. Yes.

Q. That was discussed before?

A. Yes.

Q. And you say on the second occasion —

COURT: Which term is it?

MR. LEE: "Other Terms."

COURT: On the bottom.

A. Correct. May I say something?

COURT: Yes.

A. I was not aware at the outset of the payment of $2 for the sacks. Later on Mr. CHONG came and handed me $2 informing me that it was for the sacks. At first I had refused to accept it into the amount because I did not know what he was paying me for. Later on, he told me that the money was for the sacks and for that reason I told him that if I purchased yarn from him again on any future occasion, I would not accept such amount. Therefore, these characters no longer appeared in subsequent contracts. The company belongs to us and I told him that it was not necessary for him to pay us any extra amount.

Q. But you see, madam, do you realize that when the plaintiff company made payment under these two contracts, the first two, they already took into account the rebate of half of one per cent and they have reduced that in their payment, do you realize that?

COURT: The plaintiff when they paid?

MR. LEE: When they paid.

A. I know nothing about this. It was our accounts department which paid the cheque to the defendants.

COURT: What is the difference between 32's/1 A and 32's/1 AA?

MR. LEE: I think AA is a superior quality.

COURT: I want to know.

A. There is a difference in price of $100 between these two types.

COURT: But why? Is it a better quality or what?

A. Yes, my Lord, the quality is better.

Q. Yes, madam, I put it to you that all those terms were typed onto these contracts because of a prior agreement, except this item "Cash payment against delivery."

A. I don't agree.

Q. In particular, madam, I put it to you that the delivery periods were put down on the first four contracts because Mr. CHOW had asked you when you required the yarn and you told him so, so he wrote down the delivery periods there.

A. No.

Q. Madam, I think there was a price difference between the first and fourth contracts and second and third contracts, is that right?

A. Correct.

MR. LEE: My Lord, there are $60 difference between the first and fourth and $10 difference between second and third.

A. Yes.

COURT: It is per bale?

MR. LEE: Per bale.

A. Per bale.

Q. Madam, as to the usual practice of the delivery, I will put it to you as follows: at the end of each month, the defendant would telephone you and ask the amount you required for the coming month and then you would name the specific number of bales.

A. Before delivering the goods, they would frequently telephone us to enquire from us how much we wanted; sometimes we telephoned them.

Q. Now, madam, do you agree that the plaintiff did not — I think the plaintiff only took about one-third of the total quantity under the fifth contract, my Lord, at the end of December, 1971. Do you agree with that?

A. Yes.

Q. Now, you are not saying that it was the defendant's fault, are you? Do you mean that although the plaintiff wanted more goods, more yarn, during that period, from April to December, 1971, the defendant was unable to deliver them?

A. Either we telephoned and informed them of the amount we wanted or they telephoned us and informed us of the quantity they could supply.

Q. But I mean, so if you wanted certain yarn in certain situations, you would ring and the defendant would then deliver — now, that is one situation, is that right?

A. Correct.

Q. Do you mean that there is another situation where the defendant had yarn made ready for delivery and then ring you and ask you to take delivery?

A. The defendants did not tell us that they had a large quantity of ready-made yarn with them.

Q. Now, I think there is obviously some misunderstanding, madam. I am asking you about April and December 1971 only. Now, we know at the end of December, 1971, the plaintiff only bought about one-third of the total quantities under that fifth contract from the defendant.

A. Correct.

Q. Now, had the defendant during that period supplied to the plaintiff all the yarn that the plaintiff required during that period?

A. Yes.

Q. So, the fact that the plaintiff only bought about one-third of the total during that period was only because the plaintiff did not want the balance for that period, is that right, am I right?

A. No.

Q. Would you explain that for a minute?

A. It was either we telephoned the defendants to inform them of the amount we wanted or the defendants telephoned us to inform us of how much goods they had and this was true for the period now under discussion.

Q. Yes, was there any occasion that you wanted, say, 20 bales, say, 20 bales, say, in three days' time, and the defendant did not deliver 20 bales during that period in 1971?

A. Yes.

Q. So you now say that if the defendant had manufactured the yarn more quickly than they did, the plaintiff would have bought more than about one-third of the total quantity during that period?

A. Correct.

Q. Now, how many more bales do you say the defendant should have delivered during that period in 1971? **10**

A. Sometimes we gave them short notice for the supply of 10 to 20 bales or 5 to 6 bales. This practice also applied in respect of all the other preceding contracts and they had given promise that it would not matter if we used more or if we used less.

MR. LEE: I don't think she answers the question.

COURT: Do you say that they sent short notice?

MR. LEE: They said there would be short supply and so my question was: about how many more bales should they have delivered.

COURT: Yes, ask her that.

A. I cannot remember. **20**

Q. You cannot remember, was it a large quantity, do you think?

A. Yes.

Q. I see. So in December of 1971, did you ring the defendant's representatives and said, "Well, please give us more goods, give us more yarn"?

A. No.

Q. What about the early part of 1972?

A. I merely telephoned them to inform them of the amount of yarn we wanted and asked them to deliver it.

Q. Yes. Please answer my question. In the early part of 1972, did you ring the defendant's representatives and asked them to deliver more yarn than they were actually delivering? **30**

A. I cannot remember.

Q. You cannot remember. Now, perhaps I will refresh your memory a little, Madam, obviously you wanted the yarn in order to turn them into piece-goods.

A. Yes.

Q. And you needed the piece-goods because you had orders from your customers.

A. Yes.

Q. And in your customers' orders with you, there would be a stipulation as to time of delivery for the piece-goods.

A. We do not sell piece-goods, we sell garments.

Q. Finished garments, I see. So — I will take one more step — so, your customers' orders were that you should supply to them so many dozens of finished garments, is that right?

A. Yes.

Q. And was there usually a stipulation as to the delivery period in those orders from your customers?

A. Our customers had to write to alter the delivery date any time they wanted.

Q. So you, first of all, agree with me that there was a date for delivery in those orders.

A. Yes.

Q. But you added that your customers could vary the date.

A. Yes.

Q. By postponing it or also by bringing it forward.

A. Either by bringing it forward or by postponing it.

Q. I see. So obviously you rang, by telephone, the defendant for certain bales of yarn, because you needed the yarn to turn them into piece-goods, from which you would produce your garments.

A. Yes.

Q. And the defendant was late with that delivery even in 1971.

A. Yes.

Q. And you do not even remember whether you had telephoned to them and told them to supply more, you don't even remember that, in 1971 and also early 1972.

A. If my customers wanted a large order of finished garments, then I would ask Tai Hing to supply me with the necessary amount of yarn. My customers could always change or vary the time of delivery and the quantity at any time they wanted.

Q. Yes, but did you have the right also to postpone delivery to your customers?

A. Yes.

Q. So even though the defendant was not supplying the yarn as you would have liked them to, you could have postponed your finished garments to your customers, is that what you are saying?

A. We only could do this at times.

Q. At times, precisely. At other times, your customers would hold you to your contract date of delivery.

A. Sometimes, but very seldom.

Q. Madam, in respect of the fifth contract, that is the contract in question, I put it to you that it was Mr. YIM, or Mr. YEN, who negotiated the terms with you.

A. No, Mr. CHOW negotiated the terms with me.

Q. You are sure about that?

A. Yes.

Q. I put it to you that it was on this occasion, that is relating to the fifth contract, my Lord, that Mr. YIM, or YEN, wrote on a piece of paper in Chinese that he would guarantee quality, good service, and he would honour his word.

COURT: That was YIM?

MR. LEE: YIM or YEN, my Lord, gentleman to my left.

A. No, that is not true. On the first occasion, I remember, when he came to our factory, he wrote down on a piece of paper that he would only deal with Kamsing not because — not for the amount involved.

Q. Well, from your recollection, Madam, how many times had Mr. YIM, or YEN, written anything down on a piece of paper?

A. One occasion.

Q. I see. Now, Madam, you said that the defendant was not delivering as much yarn as you had wanted in the latter part of 1971, you remember saying that?

A. Yes.

Q. Now, did the plaintiff buy from other suppliers of yarn to offset this short delivery from the defendant?

A. Yes.

Q. Large quantities?

A. No.

Q. About how many bales in 1971, second part of it?

A. I cannot remember.

Q. More than one hundred bales?

A. Cannot remember.

Q. But, of course, in 1971, latter part of it, the price of the cotton yarn had not increased to any substantial extent, is that right?

A. Correct.

Q. Now, let us go to the next period, that is the early part, the first half, say, of 1972. Now, during that first half of 1972, did the defendant continue to supply you less yarn than you had wanted?

A. I cannot remember.

Q. You cannot remember.

A. Cannot.

Q. What about the second part of 1972?

A. We started buying from Tai Hing from August, 1972, large quantities of yarn because we were installing new machines to expand our factory between February and July, 1972, and in spite of the large orders, we discovered that they could not supply us with what we wanted.

Q. That was starting from August, 1972.

A. Correct.

Q. Now, but what about from January to . . .

COURT: Did she mention February?

MR. LEE: From February — that is when they began to install machines, my Lord.

COURT: February until July.

MR. LEE: I think August, or the end of July, perhaps.

MR. SWAINE: I think, in fact, I might just . . .

COURT: 1972.

MR. SWAINE: I think what she said in Cantonese was, between February and July, they were installing the machines, from August, they started ordering large amounts.

Q. Now, Madam, from February to July, the plaintiff, that is your factory, continued to produce piece-goods and garments, is that right?

A. Yes.

Q. You installed new machines, you did not change the old machines, or did you?

A. We did.

Q. But production, nevertheless, continued.

A. On a very small scale.

Q. Well, you still took delivery from the defendant for this period.

A. Correct.

Q. You expected, didn't you, that from August, 1972 onwards, you would require large quantities of yarn.

A. Yes, because by then, our machines had already been installed.

Q. Did you — did it occur to you that you should take delivery of yarn from February to July, store them, so that there would be plenty of yarn for use starting from August?

A. There was no place for us to store the yarn during that period because of the construction work going on which involved digging, and also the removal of machines.

Q. You see, Madam, in effect, you wanted the defendant to accommodate your factory by only manufacturing very little yarn for the period between February and July, but to produce a lot of yarn thereafter.

A. We had informed, and they knew, that during that period, we had to install machines in our factory.

Q. Now, starting from August, the defendant was not supplying you as much yarn as you would have desired.

A. Correct.

Q. Now, but the defendant was unable to do that since August, 1972, is that right? Since August, 1972, until May, 1973, the defendant always supplied you less than you ordered.

A. Correct.

Q. So your production schedule was upset, or was it not upset?

A. Yes.

Q. Did you buy yarn from other sources from August, 1972?

A. No.

Q. Why not?

A. Because when we asked them for yarn, it was not that they failed to supply us with any yarn at all; moreover, in September, they came over to see our factory to ascertain if we really needed large quantity of yarn.

Q. But in spite of that, they continued to default, according to you.

A. Correct.

Q. So, all the way down from August, 1972, you did not buy yarn elsewhere.

A. Correct.

Q. Until May, 1973, that is the date of the contract with Kian Nan — 30th of May, my Lord, P.2. *Exhibit P2*

A. During that period in question, we did purchase yarn from other sources, but yarn other than thirty and forty count . . .

MR. LEE: Thirty-two and forty.

A. Thirty-two and forty. For example, we purchased from other suppliers twenty count yarn.

Q. Madam, I don't think you appreciated my question. The other count of yarn we are not worried, we are only concerned with the yarn that you say the defendant was obliged to supply to you; so, forget about the other yarn, will you? Is it true that from August, 1972 down to May, 1973, every month, the defendant was short delivering?

A. Correct.

Q. And yet you only entered into an agreement with Kian Nan Trading Co. Ltd. — P.2, my Lord — on the 30th of May, 1973. *Exhibit P2*

A. Correct.

Q. Did you buy thirty-two count yarn from any other source before that agreement with Kian Nan Trading Co. Ltd.?

A. I cannot remember.

Q. You did, didn't you?

A. I cannot remember.

Q. Perhaps your memory could be refreshed — I do ask for your indulgence, my Lord, my papers are everywhere — yes, these are the other invoices from Kian Nan, originally contained in the unagreed bundle that my learned friend said he would not bother to produce, your Lordship will remember this.

COURT: 8th of January, is that the one?

MR. LEE: The earliest would be 31184, that is the earliest.

COURT: Document 2, unagreed bundle.

MR. LEE: Yes, this is the document I am looking at. Perhaps I can have the copy back, I need my copy.

Q. Yes, now, you see that your factory purchased from Kian Nan twelve cartons of thirty-two count. The date concluded was the 8th of January, which is the same as the date of the invoice, 8th of January, 1973, is that right?

A. Yes.

Q. So your company did buy from other sources even before May, 1973.

A. Very small quantities.

MR. LEE: The other invoices, my Lord.

COURT: 32275.

MR. LEE: Yes, my Lord, and following . . .

Exhibit P4A to P4F

COURT: We will call it A, B, C, D and E, and F.

MR. LEE: My Lord, I wonder if you could do it by the numbers because I seem to have only five. 31184 would be 4A; and 32275 would be 4B; and the next one is 32362, 4C; next one 32640, this is 4D; and then 32706, 4E. Now, my Lord, that's all I have. Should there be more?

COURT: One more, yes, one more, 32640.

MR. LEE: 32640 I have, I marked it 4D.

MR. SWAINE: 32438.

MR. LEE: 32438, I haven't got it. I am sorry, my Lord, that is not in our bundle, that is why it is missing. Perhaps we would make a note of that.

COURT: What number is 32438?

MR. LEE: 32438, that is the one I do not have, my Lord, I think it should be 4D.

COURT: 28th of April.

MR. LEE: I think it should be 4D, I don't have that. I will sort it out later on. So, there would be 4F, all right, down to the end.

Q. So, you see, Madam, you agree that your factory did buy this yarn, or these quantities of yarn from Kian Nan even before May, 1973.

A. Yes.

Q. What about before that, Madam, what about the period in late 1972?

A. I cannot remember.

Q. Well, Madam, this is important to the defendant's case. Could you make an effort to find out when you have time?

MR. SWAINE: I am not sure that the witness should be asked to go back and search, my Lord. If this was relevant, there could have been request for further interrogatories; these invoices were put in to show the market price for 1973, that was why we thought they were relevant.

MR. LEE: My Lord, we were not led into knowing that there were or were not such invoices prior to the first one that we have been supplied with, which is dated the 8th of January, 1973. We don't know, we simply don't know, and the witness says she can't remember.

COURT: This point surely must have been in your mind, that there were other suppliers; you could have surely asked for further documents.

MR. LEE: My Lord, if it is hardship on this present witness to go back and make a search for them, perhaps it is not so much hardship for her father to do it, or somebody else to do it, for her father, before he is called, some other — some last witness on behalf of the plaintiff.

COURT: We will leave it at that.

MR. LEE: Yes, I am obliged, my Lord. Now, Madam . . .

COURT: I have forgotten, how many cartons — four cartons make up a bale, don't they?

MR. LEE: I think so, four cartons will make up one of our present bales.

Q. Now, Madam, about that visit, you told my Lord about, to Tai Hing's mill, a few weeks before the signing of the fifth contract, now, I put it to you that nobody said to you that the price of yarn would go up in future.

COURT: This is the meeting when the three of them . . .

MR. LEE: Yes, in the Tai Hing — in Tai Hing's mill. She and her father and a few other colleagues went, and practically the whole lot were there, except the big boss, Mr. CHAN, whom she never met.

A. Can you repeat this question?

Q. I put it to you, Madam, that during the visit, nobody from Tai Hing ever said to you, or your group, that the price of yarn would go up in future.

A. They did.

Q. But wouldn't you agree, Madam, that if they knew, or they expected the price of yarn to go up, they would be very stupid in entering into this contract?

A. They told me frequently that I would not be buying expensive goods if I bought from Tai Hing, and they also said that — they quoted an example by saying each time when a contract was signed between me and Tai Hing, the price of yarn went up; for that reason, they told me to buy large quantities from them — therefore, they asked me to buy larger quantities from them, they said that they would keep their promise and would not fail to deliver the goods just because prices had gone up. They quoted examples of previous rise in price and their delivery of the goods despite the rise in price to support their confidence.

Q. Now, Madam, you said that you discussed about this, or the terms of the — discussed about the fifth contract with Mr. CHOW alone — only the fifth, I am only interested in the fifth.

A. It was in the course of a telephone conversation with him that I decided to buy 1,500 bales.

Q. The price, when was it discussed — first discussed, where?

A. When we visited his factory, he mentioned that to us.

Q. Who mentioned it?

A. Mr. YIM and Mr. CHOW. Then there was a telephone between Mr. MUI and Mr. CHOW. I also took part in that telephone conversation. This conversation took place in the evening in my father's room.

Q. Now, let me get this clear, the first time — the first time the quantity, namely, a thousand and five hundred bales — now, when was the first time that that was discussed?

A. This was first brought up after our visit to Tai Hing.

Q. May I have your Lordship's indulgence? Right, the discussion — the first discussion about 1,500 bales took place in your factory, in your father's room.

A. No.

COURT: Where was the first — when was it that you first decided to purchase 1,500 bales?

MR. LEE: I am obliged, my Lord.

A. There was a conversation between me one evening and the other party, a telephone conversation in the bedroom of my father, and it was then decided to purchase 1,500 bales.

Q. Now, was the price also agreed on the same telephone call?

A. Yes.

Q. Who was on the other side of the line?

A. Mr. CHOW.

Q. I put it to you, Madam, that the decision to purchase this lot of goods took place in your factory, and Mr. YEN was there.

A. In the factory, we mentioned 700 bales with Mr. YEN, no decision was made until the telephone conversation.

Q. According to you, Madam, when you agreed to buy 700 bales, was Mr. CHONG also there? Simple question, just — Mr. CHONG, was he there or not?

A. Yes.

Q. Madam, I put it to you that on that occasion, you agreed to buy 1,5000 bales.

A. No.

Q. Now, Madam, according to you, which is denied by the defence, this final agreement was reached over the phone while you were using the phone in your father's bedroom.

A. Yes.

Q. Now, what were the terms agreed on?

A. We agreed on the amount and the price.

Q. That's all?

A. That's all.

Q. You are quite sure of it.

A. Yes.

Q. So, you say, you could take delivery any time thereafter, no time limit, you say.

A. No.

Q. Likewise, the defendant could take all the time to supply you with the goods. Yes or No please.

A. That had always been the practice in previous transactions.

Q. So you agree with me that you could require delivery any time thereafter, and the defendant could give you delivery any time thereafter, no time limit at all. Not "because", Madam, not "because", it is either "Yes" or "No", not "because". (To Interpreter) Put it to her, it can't be answered with a "because", just "Yes" or "No".

A. They would deliver to me as much as I required.

Q. And they would deliver at the time that they see fit.

A. No, the time was decided by us.

Q. I see. So only you could decide when the goods should be delivered. "Yes" or "no" please.

A. Yes.

Q. You could decide to have delivery in 1980.

A. I never said that.

Q. But you could, if you wanted, you could.

A. I never said that.

Q. Now, how many things did you tell your uncle, Mr. CHEUNG, about this fifth contract?

A. I only told him about the quantity purchased from Tai Hing, and the price.

Q. That's all?

COURT: Who is Mr. CHEUNG, what part does he play?

MR. LEE: Her uncle.

MR. SWAINE: He signed the fifth . . .

COURT: I am asking a question, what position does Mr. CHEUNG hold in your firm, the factory?

MR. LEE: I am sorry, my Lord.

A. He was in charge of the Accounting Department.

Q. The Accounting Department, so, normally, it would be — it would not be for him to sign contracts.

A. Sometimes he did.

Q. I see. Now, you told my Lord that you were expecting to be away from Hong Kong, we know that you actually went away, is that right, is that what you said?

A. Correct.

Q. From when to when were you away?

A. I left Hong Kong many times.

Q. When the contract was signed, were you in Hong Kong — the fifth contract?

A. I was.

Q. Shortly thereafter, you left Hong Kong.

A. Correct.

Q. How much later after the fifth contract did you leave Hong Kong?

A. May I look at the fifth contract?

Q. Yes, the date is 23rd of March, 1971.

A. Cannot remember, I must look at the passport.

Q. Fair enough, if you don't remember, it is all right, we will just leave it there. Now, your company, your factory, the Kamsing Knitting Factory, had been allotted certain quota in respect of cotton goods, is that right?

A. Yes.

Q. Did you sell any quota in the second part of 1971, and the whole year of 1972? Yes or no?

A. I was not looking after quotas.

Q. You mean you don't know whether any quota was sold.

A. I don't know.

Q. You see, Madam, I put it to you that you told Mr. YIM, this gentleman, that your father was annoyed with you because you had sold the plaintiff's quota too soon, and if you had waited longer, you would have fetched a higher price for the quota.

COURT: That was Mr. YIM?

MR. LEE: Yes, she said it to Mr. YIM.

A. No, did not.

Q. I further put it to you that you told Mr. YEN, or YIM, because of your father's annoyance with you, you would take a long holiday.

A. No.

Q. Who would know anything about the sale of quota by the plaintiff?

A. My father.

Q. I see. Now, about the sending of mechanics by the defendant to your factory, Madam, I put it to you that only one person was sent.

COURT: To the defendant?

MR. LEE: By the defendant to the plaintiff to help the plaintiff install a new machine, I think.

A. I don't agree.

Q. His name is, my Lord, YIM Yau-chuen — not this gentleman, — YIM, same surname, Yau-chuen.

A. No.

Q. Now, perhaps you can tell my Lord this, am I right that you told Mr. CHONG about your problem of not knowing how to install the new dyeing machine, or the new winder, soft winder machine.

A. Yes.

Q. You told Mr. CHONG.

A. Told him what?

Q. That you, your factory, did not have anybody who knew how to install this soft winder machine, a new machine that you bought.

A. Yes, I did.

Q. And he then said, "Well, we can send you somebody to help."

A. Yes.

Q. And when was this new soft winder machine installed?

A. Between February and July, 1972.

Q. You mean you are not certain of the actual period, or do you mean the whole period, it took five months to install the machine?

A. All the additional machinery worth about one million dollars was installed from — during the period February to July.

Q. Yes, Madam, I am only concerned with one machine, namely, the soft winder machine. Do you know what machine it is?

A. Yes.

Q. Perhaps I can give you . . .

COURT: Can you remember when it was installed?

Q. This is the one I am talking about.

A. Some time in May or June.

Q. This is the soft winder machine.

A. May or June.

Q. My Lord, perhaps it is necessary to romanize it, the three characters we gave her — Lok Tung machine. Madam, I put it to you that nobody ever said to you that Tai Hing would increase the number of their machines.

A. I remember Mr. YIM and the engineer, Mr. CHONG, coming to me and telling me that they were not in a position to supply large quantities to us because production was held up by the installation of machines in their factory.

Q. I put it to you that was never said.

A. They said that.

Q. Now, Madam, you had been to the Tai Hing Mill, am I right that they had about 100 spinning machines?

A. I don't know how many they had.

Q. Well, weren't you invited to have a tour of the mill?

A. Yes, I only know that their factory was a very large one.

Q. The factory was very large with lots of spinning machines.

A. Yes.

Q. You see, Madam, only ten of those spinning machines would be sufficient to produce all the yarn that you wanted under this contract, do you know?

A. I don't.

Q. Yes, about the Golden Crown Restaurant, now, did you ever tell your guests from Tai Hing the purpose of that dinner?

A. Yes.

Q. I put it to you that you didn't tell them, and they just went and had dinner.

A. I did.

Q. I think your father also invited Mr. YEN and his other colleagues to dinner at your father's home.

A. Yes.

Q. Mr. YEN, I think, was invited every time, but he declined your invitation on a number of occasions, is that right?

COURT: What do you mean "every time", "every time", what do you mean by "every time", you only mentioned two occasions.

MR. LEE: "Several", I am sorry, my Lord.

COURT: Several occasions, yes.

Q. On several occasions, they were invited home, and so on.

A. That is true only of the last occasion.

Q. Now, Madam, I am coming to the early part of 1973. You told my Lord last Friday that your father tried to contact Tai Hing.

A. Yes.

Q. And you told my Lord that sometimes you were present, and sometimes you were not present on these occasions.

A. Correct.

Q. Now, I can only ask you about the occasions that you were present, what did you father say to the other side?

A. He asked the other side if there was going to be any delivery of yarn.

Q. And what did the other side say?

A. They were in a telephone conversation.

Q. I see, so you happened to hear what your father said on his end of the line.

A. Yes.

Q. Could you understand what they were talking about?

A. My father told me about what happened after the conversation.

Q. Very well, in that case, I will ask your father. Now, the plaintiff wrote a letter to the defendant on the 21st of July, 1973 — document P.1 (8), my Lord.

Exhibit P1(8)

A. Yes.

Q. Did you know about that letter before it was signed, P.1 (8), the agreed bundle?

A. Yes.

Q. So your father had discussed with you before that letter was actually typed.

A. He told me about writing a letter to Tai Hing.

Q. I see, did he say, "I already sent a letter to Tai Hing", or did he say, "I am going to write a letter to Tai Hing"? Madam, that was a short question, did your father tell you, "I am going to write a letter to Tai Hing", or did he say, "I have already sent a letter to Tai Hing", which one?

A. I cannot remember.

Q. I see.

A. But I knew about such a letter.

Q. Did you discuss with your father as to what should be put into this letter?

A. No.

Q. Now, there was a reply from Tai Hing, P.1 (9), my Lord, dated the 31st of July, 1973. Now, did your father discuss with you about that letter? Just "yes" or "no" please.

A. He mentioned this matter to me.

Q. I see, can you tell whether Kamsing wrote back in reply to this letter?

A. No.

Q. They did not reply.

A. They did not reply.

Q. Did Kamsing write to the Hong Kong Chinese Textile Mills Association?

A. Yes.

Q. You know about that letter? No, not this one, it is not inside the bundle.

COURT: The defendant wrote?

MR. LEE: No, the plaintiff wrote complaining about the defendant's conduct.

Q. Do you understand the question?

A. Yes, I do.

Q. Do you know — so there was a complaint made by the plaintiff to the Hong Kong Chinese Textile Mills Association.

A. Yes.

Q. Did you write that letter?

A. No.

Q. Had you read that letter?

A. No.

Q. Your father wrote it?

A. You have to ask my father for an answer.

Exhibit P2

Q. I see, yes. Now, Madam, about the documents you identified this morning, firstly, Exhibit P.2, the contract, my Lord, — has she got it before her?

A. Yes.

Q. Now, who signed on behalf of Kamsing, P.2?

A. I did.

Q. So you know about this contract.

A. I only knew about the price and the amount.

Q. Again, the other conditions you know nothing about.

A. Correct.

Q. Surely, Madam, at least you knew that it was going to be grey cotton yarn that you were buying. Well, did you know that?

A. But the cotton yarn was not grey in colour.

Q. Yes, that's why I am surprised, because if you look at the invoices, it would appear that they were supplying to you thirty-two count grey cotton yarn. They are all grey. You mean this is a surprise to you now that I mention it?

A. The cotton yarn was beige in colour.

Q. Beige, yes, but in this contract, it is stipulated that the yarn, cotton yarn, should be grey. Are you hearing it for the first time now?

A. Yes.

Q. I see, do you know, Madam, that for dyed cotton yarn, it would cost you more money?

A. Yes.

Q. Do you know how much per bale — that is the difference of the dyed . . .

A. I don't know.

COURT: Do you remember the deliveries under this contract, do you remember seeing some of the yarn that came from Kian Nan Trading Co.?

A. Yes, my Lord.

COURT: What colour was it?

A. Beige colour. Beige, yellowish.

Q. Beige colour?

COURT: There may be a simple explanation, the translation?

MR. LEE: I don't think it is a translation, the contract itself is the original.

COURT: Yes, but somebody might have said to somebody else, "Put it down in English, use a certain word", you know, this happens in every single one of these cases, I have had lots of them.

Q. Well, Madam, P.2A, invoice 33066, now the date concluded, 30th of May, that is, in fact, the date of the contract, is that right? *Exhibit P2A*

A. Yes.

Q. Now, I want you to look at P.3A — P.3A, my Lord — invoice number 33610, the date concluded was the 10th of Angust, but the date of the invoice was only 15th of August, that is five days later. *Exhibit P3A*

A. Yes.

Q. Does that mean that you had an oral agreement to buy on the 10th of August, but the goods were only delivered on the 15th?

A. On the 10th of August, we informed Kian Nan by telephone that we wanted twenty bales. Ten bales were delivered on that same day as evidenced by the preceding contract, 33543; and on the 15th, the remaining ten bales were delivered.

Q. Yes, I see what you mean. But starting from P.3C, P.3C onwards, P.3C, D, E, F, G, H, I, in all of these invoices, the date concluded was put down as the 23rd of August. *Exhibit P3C to P3I*

A. Yes.

Q. Was there any written contract made on the 23rd of August?

A. No.

Q. You just placed an order.

A. Yes, orally.

Q. Orally, and you just said, "I want thirty-two count, so many bales of it."

A. Yes.

Q. "At whatever price per bale."

A. The price is specified here.

Q. Yes, you specified the amount, number of bales you wanted, and also the price.

A. Yes.

Q. You did not specify the colour of the yarn.

A. But this type of yarn which we purchase is always beige in colour.

Q. So did you mention specifically the colour of the yarn?

A. No.

Q. So you presumed it would be an ordinary yarn, which is beige in colour.

A. Yes.

COURT: On the bottom of P.2, there is another mysterious message in Chinese, it has 38.99 in the middle of it, what does that mean, translate it, Mr. Grey. P.2, Mr. Grey.

Exhibit P2

MR. LEE: Oh, I think it is the "Jen Man Pai", the rate of exchange.

COURT: Oh, I see, the rate of exchange between here and China. It has something to do with money, Mr. Grey?

INTERPRETER: Yes, 38.99 Jen Man Pai for $100.00 Hong Kong on the date of the signing of the contract.

MR. LEE: Those two being the strongest currencies these days, my Lord.

COURT: Yes. I would like to adjourn now, Mr. LEE. 2.30.

MR. LEE: Yes. I won't take too long thereafter, my Lord.

12.40 p.m. Court adjourns.

2.31 p.m. Court resumes

Appearances as before.

XXN. BY MR. MARTIN LEE (CONT.):

Q. Madam, do you agree with me that the price of yarn in Hong Kong began to fall round about September 1973?

A. September 1973?

Q. Yes.

A. A little only.

Q. It began to fall all the way down until now. It keeps on dropping.

A. Correct.

10 Q. Do you agree . . .

COURT: What is the price now a bale?

A. In some cases, $1,800 per bale, approximately.

Q. Some even lower?

A. Perhaps.

Q. For the rest of my cross-examination I shall put the defendant's case to you and it will be necessary only for you to agree or disagree. I put it to you, madam, that when the 5th contract was being discussed, it was done by Mr. Yen and Mr. Chong on behalf of the defendant.

20 A. I don't agree, no.

Q. And you agreed to buy 1,500 bales of yarn, 32 count yarn.

A. Yes.

Q. The price was $1,335 — the 5th.

A. Yes, $1,335.

Q. I put it to you that Mr. Yen asked you when the plaintiff would like to have the yarn. Did he ask you that?

A. At what stage?

Q. Before the 5th contract was entered into — when it was being discussed. Did Mr. Yen ask you then?

30 A. Asked me what?

Q. Asked you when you would like to have delivery of the yarn.

A. No.

Q. I further put it to you that you answered him and said the plaintiff would like to have delivery of the yarn between April and December of 1971.

A. No.

Q. Now, I further put it to you that about January or February of 1972 Mr. Yen had the following conversation with you: Mr. Yen told you that unless the plaintiff were to take delivery of the balance of the yarn as soon as possible, the defendant would not make further delivery of the yarn at the contract price but would only sell so much yarn to the plaintiff and at such price as the defendant should then see fit.

A. No.

Q. I further put it to you that you then replied to Mr. Yen saying, "All right, all right, we will work it out".

A. No.

Q. You further asked Mr. Yen to help. Do you agree or disagree?

A. Help me what?

Q. You asked Mr. Yen to help the plaintiff by delivering more yarn at the same price.

A. No.

Q. And Mr. Yen then said, "I can't help if prices were to go up then".

A. No.

Q. I further put it to you that on many occasions between January and July of 1972 the said Mr. Yen repeatedly spoke to you and your father over the phone urging the plaintiff to take delivery of the balance of the yarn as soon as possible.

A. I don't know.

Q. Mr. Yen asked you to take delivery as soon as possible because the contract period had expired.

A. He never asked that.

Q. I put it to you that Mr. Yen further told you and your father repeatedly that if the price of yarn should go up in future and if the defendant should have a tight schedule to meet in respect of its other commitments, then the defendant could not guarantee the goods would be delivered at the contract price.

A. I did not hear this.

Q. You then replied that on these occasions that you would make your best endeavour to take delivery of the balance as soon as possible.

A. No.

Q. I put it to you that it was after about August 1972 that you began to press for more delivery.

A. Correct.

Q. Mr. Yen then told you that what he had warned you earlier in the year about had then materialized, namely, that the defendant could not supply the balance or any more yarn at the contract price.

A. No.

Q. Mr. Yen said that if the defendant company had any surplus yarn left after satisfying its other commitments, then, but only then, would the defendant deliver more yarn at the same price.

A. No.

Q. Do you agree that it was around the 11th of May, 1973 that the defendant delivered its last two bales of yarn to the plaintiff?

A. In May 1973.

Q. Now, just before the two last bales were delivered, Mr. Yen returned your call by telephone and he told you that these two bales would be the last lot of goods to be supplied at the contract price.

A. No.

COURT: Wasn't it three?

MR. LEE: One and then two. There were three bales. I was instructed there was, in fact, one and then two.

Q. I further put it to you that Mr. Yen said, I can't help any further because the contract period had long expired.

A. No.

Q. And Mr. Yen further told you, "Please don't ring me any further because I just cannot help".

A. No.

Q. Madam, I put it to you that it was because of what Mr. Yen said to you that you then signed exhibit P-2 — the contract with Kian Nan at the end of May 1973.

A. They were not supplying us with enough yarn and for that reason I had to get some from other source to tide me over.

Q. You see, madam, according to you, the defendant had been in continual default since August 1972.

A. No. They supplied us with the goods and they said furthermore that they could supply us more after the New Year and therefore we reserved some of our purchases for the defendants.

MR. LEE: May I have your Lordship's indulgence? (A pause) That's all, thank you, madam.

COURT: Would you look at P-2. It said cash against delivery order. How, in fact, did you pay for the purchases under that contract?

A. After the delivery of the goods a post-dated cheque would be issued.

COURT: This is to Kian Nan?

A. Yes, my Lord.

COURT: How many days?

A. About fifty days.

COURT: Thank you.

MR. SWAINE: No re-examination.

COURT: Thank you.

MR. SWAINE: I call Mr. MUI Chok-chue, my Lord.

P.W. 2 — MUI Chok-chue Affirmed in Punti

XN. BY MR. SWAINE

Q. Mr. Mui, you are the father of the last witness, Miss Mui Nuen-tin.

A. Yes.

Q. And you are the managing partner of Kamsing Knitting Factory?

A Yes.

Q. How old are you?

A. 64.

Q. And how is your health?

A. I have diabetes. I have also been suffering from high blood pressure and sometimes insomnia.

Q. For the sake of Mr. Yen's hearing, could you speak up a little when you answer my questions.

A. Yes.

Q. We know that Kamsing made five contracts with Tai Hing for the supply of cotton yarn.

A. Correct.

Q. And before Kamsing did business with Tai Hing, was there any meeting of the representatives of Kamsing and Tai Hing?

A. Yes.

Q. And where did the meeting take place?

A. They came to my factory.

Q. I see. And when you say they, who do you mean?

A. The manager, Mr. Yen.

Q. The gentleman in court?

A. Yes. There was also Mr. Chong, and also a person surnamed Chow.

Q. All right. And were you present?

A. Yes, I was.

Q. What did you talk about?

A. We talked about the yarn which we had to use in our business.

Q. Yes?

A. We would patronize them by purchasing yarn from them.

Q. You would patronize them. Was it a case of your going to them for business or they coming to you for business?

A. It was a case of their coming to us for business.

Q. All right. And what else did they say?

A. On the first occasion no conclusion was reached because my daughter was absent. So they came a second time.

Q. And were you present the second time?

A. Yes.

Q. Your daughter was present?

A. Yes.

Q. And were these the same three people from Tai Hing or different?

A. The same three persons.

Q. And what did they talk about?

A. We talked about the method of doing business and also the price.

Q. Yes?

A. We discussed about post-dated cheques.

Q. Yes, anything else?

A. And we also talked about the price.

Q. The method of business?

A. And also the quantity.

Q. And the quantity. Method of business — what did you talk about?

A. Regarding the method of doing business we discussed about the price and the quantity.

Q. Anything else?

A. And they could type down any date for delivery. It was only a matter of formality. They said that the date was immaterial and was put there as a matter of formality.

Q. This is the occasion when Miss Mui was present and yourself and these three representatives from Tai Hing.

A. Yes.

Q. Anything else take place?

A. That was all. They also said that if the yarn was not of good quality they would work on it until the quality was satisfactory.

Q. All right. And as regards the actual making of the contracts, did you leave that to your daughter or did you take part also?

A. In most cases I left this to my daughter or to my fokis.

Q. All right.

COURT: You left what?

MR. SWAINE: The making of the contract, my Lord.

Q. I want you to take your mind back to the 5th contract — the contract that we are concerned with in court. That is the contract of 1,500 bales.

A. Yes.

Q. Now, before that contract was made, was there any discussion between representatives of Kamsing and representatives of Tai Hing?

A. Yes.

Q. And was there a meeting? Did you meet personally?

A. Yes.

Q. Where?

A. In the factory.

Q. Yes. Which factory?

A. Kamsing.

Q. All right. Now, have you ever visited the mill of Tai Hing?

A. Yes, I have. I was even invited to a meal in the Castle Peak Hotel.

Q. That is after your inspection?

A. Yes.

Q. And was this before or after the making of the contract for 1,500 bales?

A. I cannot remember.

Q. And you said you were invited to lunch afterwards. Why did you go to the mill of Tai Hing?

A. Because I was invited to go there.

Q. You remember by whom?

A. Mr. Chow, Mr Chong and Mr. Yen invited me. We fixed a time.

Q. And was Miss Mui there?

A. Yes, she was there.

Q. Did you talk business during the inspection?

A. I admired their yarn and their machines.

Q. Did they say anything?

A. They were also talking about the machines and asked us to place more orders with them, and they said that they would supply us with sufficient amounts.

Q. Yes. After that, did you place an order?

A. Yes, for 1,500 bales.

Q. Now, we know that in the early part of 1972 your factory installed additional machines costing about $1,000,000.

A. Yes.

Q. Before that installation, was the delivery from Tai Hing of the 1,500 bales satisfactory or not satisfactory?

A. Not very satisfactory. In the month of August we asked them to supply us with a certain amount, but they failed to do so.

Q. In the month of August — would that be before or after the new machines were installed?

A. Before the installation of the new machines we asked them to speed up in the delivery of more yarn, but they couldn't do so.

Q. And did you yourself speak to anyone from Tai Hing?

A. Yes. I spoke to everyone of them. They kept on making promises but eventually they did not deliver as promised.

Q. When you say everyone, who do you mean?

A. Mr. Yen, Mr. Chow and Mr. Chong.

Q. And was this by telephone or person to person or how?

A. By telephone.

Q. By telephone. Then after the machines were installed at Kamsing, did anyone from Tai Hing come to your factory?

A. Yes. **10**

Q. Who were they?

A. Those three again.

Q. And did you see them?

A. Yes, I did see them.

Q. What did you talk about?

A. I pressed them again for the delivery of the yarn.

Q. Yes. What did they say?

A. They kept on promising that they would deliver, but it just turned out that they couldn't deliver.

Q. And did you speak to them after this visit to your factory? **20**

A. After that occasion I spoke to them again by telephone, but it was very difficult to get hold of Mr. Yen.

Q. I see. With whom would you normally speak?

A. Subsequently when our schedule became tighter and tighter and when we could not get hold of them because they would not answer phone calls, we could only contact Mr. CHOW Hok-kuen.

Q. Who could you not get because he was not answering the phone?

A. Every time when I tried to get in touch with Mr. Yen I was told that he was not in the office and when I contacted the factory he was not in the factory. **30**

Q. So, you spoke to Chow?

A. So, in the evening I had to telephone Mr. Chow to ask Mr. Chow to convey my message to Mr. Yen.

Q. And how many times do you think you made these telephone calls trying to get Mr. Yen?

A. I tried about thirty or forty times, I believe.

Q. All right. And you know the Golden Crown Restaurant in Kowloon?

A. Yes.

Q. Did you have any meeting there with any representative from Tai Hing?

A. I had a meeting there with CHOW Hok-kuen. We were together for tea and for discussing the matter.

Q. Yes. And tell my Lord what was said.

A. He told me that the yarn would be delivered and they were not bothered by the rise in price of yarn because they had plenty of money.

MR. SWAINE: They were not . . .

INTERPRETER: They were not bothered.

Q. This was said by Mr. Chow at the Golden Crown Restaurant.

A. Yes, Golden Crown.

Q. And was anything else said?

A. He said that the yarn would definitely be delivered and they won't mind losing a few hundred thousand dollars because of the rise in price as they had plenty of money.

Q. Anything else?

A. The last meeting we had was in May during which he said that he was informing me of what Mr. Yen said, mainly that they would be able to deliver 15 bales in one month.

MR. SWAINE: At least.

INTERPRETER: At least 15 bales.

Q. Was this still the Golden Crown meeting?

A. Yes, and I said "there was no reason for you to deliver so small a quantity of 15 bales only. You should deliver everything".

Q. One moment please. This was Mr. Chow telling you what Mr. Yen had said?

MR. BERNACCHI: I am sorry, surely is Mr. Chow telling the witness what Mr. Yen had said to him?

COURT: Yes, that is the effect.

MR. SWAINE: I must clarify that. When he said "he", he meant Mr. Chow.

A. Yes.

Q. You weren't happy with 15 bales?

A. Of course I was not satisfied. How could I be. 15 bales a month, that would amount to only a hundred odd bales in a year.

Q. At any time — on all these occasions, did either Mr. Chow or Mr. Yen or Mr. Chong say that the delivery period have expired a long time ago? **10**

A. No, nothing at all of this was said.

COURT: Nothing at all of what?

INTERPRETER: Nothing at all of the kind was said — that the delivery period had long expired.

Exhibit P-1(8)

Q. I want you to identify your signature on a letter in English from Kamsing to Tai Hing, P-1 (8).

A. Yes, this is my signature.

Q. Do you read or write English, Mr. Mui? **20**

A. No. My son wrote this letter.

Q. Your son — which son?

A. He is waiting outside.

Q. His name please.

A. MUI Ying-chun.

Q. Does he have a Christian name in English?

A. Robert MUI.

Q. Was Robert present at the meeting with Mr. Chow at the Golden Crown?

A. Yes, he was. **30**

Exhibit P-1(9)

Q. Now, I want you to look at the reply P-1 (9) of the 31st July, 1973.

A. Yes.

Q. And in paragraph 2, Mr. Y. C. Chen, the managing director of Tai Hing, says,

> " According to the delivery time stipulated on the contract, that was for April to December 1971, in which duration, after taking part of the quantity contracted, you consequently failed to take delivery of the balance. In consideration of your failure within that specified timing in consuming the yarn produced, we now treated the contract for cancellation".

A. Yes.

Q. Before this letter from Tai Hing was there any suggestion from anyone in Tai Hing that Kamsing had not taken the yarn within the contract period?

A. The contract was valid because in spite of what happened in 1971 they kept on supplying us with yarn in 1972 and also 1973.

Q. Answer the question please, Mr. Mui.

A. No, no. It was their fault that the goods were not supplied. We did not reject the goods.

Q. All right. Now, there is also in the bundle a letter in Chinese from the Hong Kong Chinese Textile Mills Association to Tai Hing.

MR. SWAINE: P-1 (10), my Lord, dated 18th September, 1973. *Exhibit P-1(10)*

A. Yes.

Q. And it refers to a complaint lodged by Kamsing with the Association against Tai Hing?

A. Yes.

Q. Who in Kamsing lodged the complaint?

A. I. I am also — I was also a director of the Textile Mills Association and I lodged this complaint during a meeting of that Association.

Q. During a meeting of the Association. There is one point that I've got to go back to. Now, you said that you had a last — your last meeting with Mr. Chow was in May at the Golden Crown Restaurant?

A. Yes.

Q. And you wrote to Tai Hing on the 21st of July, 1973 in English according to your son's draft?

A. Yes.

Q. Now, after the Golden Crown meeting and before this letter, were you in touch with anyone from Tai Hing?

COURT: P-1 (10)?

MR. SWAINE: P-1 (8), my Lord.

A. I telephoned CHOW Hok-kuen.

Q. Yes?

A. And he told me to approach Mr. Yen direct.

Q. Yes?

A. That was in June. I had to . . .

COURT: That was in June . . .

INTERPRETER: "To approach Mr. Yen direct".

Q. And did you approach Mr. Yen direct?

A. I telephoned Mr. Yen but he told me over the phone that there were four persons playing mahjong, but he had to leave and his place taken by someone else as he had to answer the phone.

Q. I think you are trying to tell us something, Mr. Mui. You've got in such a hurry it doesn't come up quite right. Slowly. What did Mr. Yen say to you? Step by step. Supposing . . .

A. There were four persons playing mahjong, and as he had left, then he needed someone to fill his seat to continue the game.

Q. In Chinese you said "ngor". That "ngor" meant yourself or Mr. Yen?

A. I was referring to myself. I was playing mahjong and I had to make a phone call and ask someone to take my place.

Q. Mr. Mui, take your time. You are telling the court what Mr. Yen said to you. Take it step by step.

A. Mr. Yen talked about four persons playing mahjong and that since I had left my seat I had to get someone to fill my place.

Q. Who had to get someone to fill your place? What did you understand by that?

A. He did not specify which person. He merely said someone had to replace him.

Q. Replace the person leaving the table?

A. Yes.

Q. What did you understand by that?

A. By that I understood that since I no longer wanted the yarn, he would get someone else to accept it.

Q. Ah, yes.

COURT: Yes.

Q. And after that, did you have any more contacts with Mr. Yen?

A. No. I wrote to him and told him that there was no reason why he should fail to supply us with yarn.

Q. When you say you wrote, do you mean this letter or something else? 21st July.

A. Yes, this letter.

Q. Now, Tai Hing — that is the defence — has made certain allegations which I must put to you and ask whether you agree or disagree. They say that in or about January and February 1972 . . .

MR. SWAINE: 8 (A) of the Defence, my Lord, page 2.

Q. . . . Mr. Yen had told you that if Kamsing — that unless Kamsing were to take delivery of the balance of the 1,500 bales as soon as possible Tai Hing would not make further deliveries at the contract price.

A. This was not said.

Q. This was not said?

A. Even in August and September I pressed them for more deliveries, but they just did not deliver.

Q. Was this before or after the new machines were installed at Kamsing?

A. Before. I told them to rush with the delivery.

Q. They also say this . . .

MR. SWAINE: 8 (C), my Lord.

Q. . . . that in about August 1972 Mr. Yen again told you that Tai Hing would only sell the yarn at the contract price if Tai Hing had yarn left after satisfying orders of its other customers?

A. Of course this is what they have to say now.

COURT: Did they say that?

A. No, they did not say that, my Lord.

Q. They did not. They also say that just before they delivered the last two bales of yarn in May 1973, Mr. Yen said to you that this would be the last lot that Tai Hing would sell at the contract price.

A. No. If they did not want to make the deliveries, they should have informed us earlier and our loss would not have been so great.

MR. SWAINE: All right. Thank you, Mr. Mui, no further questions.

XXN. BY MR. BERNACCHI:

Q. Mr. MUI, you said earlier on in your evidence "They" — which means one or more of the three YIM, CHOW and CHONG — "They said in effect we can put down any date for delivery. It is only a matter of formality."

A. Yes.

Q. And that was before even the first of these five contracts were signed?

A. Yes.

Q. Now, just to refresh your mind in case you know it already, the first two which were signed on the same day, the dates for delivery are four months: June to September, 1970.

A. Yes.

Q. The third is two months: January and February, 1971.

A. Yes.

Q. The fourth is one month: during January, 1971.

A. Yes.

Q. And the fifth in nine months: April 1971 to December 1971.

A. Yes.

Q. Now, why, if it was only a matter of formality and any dates would be all right, was the actual dates different: four months, four months, two months, one month, nine months?

A. If they did not deliver the goods, then they would deliver it at a later date.

Q. I'm sorry. You are not at present answering the question. Why were the dates a different number of months: four months, four months, two months, one month, nine months, if the actual time of delivery was immaterial?

A. They were businessmen and if they could not deliver the goods at an early date they would do so at a later date; if they could not sell it to one customer they would sell to another.

Q. Well, that is a different matter, but I am questioning your remark that they — meaning the defendants' senior employees — said that the dates for delivery did not matter and they said it was only a matter of formality, any dates were sufficient.

A. Yes.

Q. You see, if that is a true version of the conversation, I would have thought that they would have put all four months, or all two months, all nine months, but not different dates.

A. But they were the ones who typed them.

Q. You have no explanation of why they typed one, one month, another one nine months?

A. What explanation do you want me to give?

Q. You see, I am suggesting to you that the dates for delivery were discussed.

10 A. But they said that the goods could be delivered in time. If one company did not want the goods they could always sell it to another one.

Q. I can quite understand — whether they said it or not — I can quite understand they are saying, "Well, it is all right. If you take delivery after the stated time", but you go further than that, much further: you say that dates for delivery were never discussed.

A. The dates of delivery were just typed on the contract. As far as we are concerned, we did not impose any restrictions on them.

Q. And you really mean to tell the Court that the nine months in the
20 one contract, the one month in another contract — they are never the subject of any discussion whatsoever?

A. Dates of delivery were of no importance in respect of any contract, they could deliver it on any date.

Q. Were they discussed or were they not discussed?

A. I only informed them by telephone as to the amount I need by a certain date.

Q. By a certain date?

A. Yes.

Q. When you say 'by a certain date', do you mean the dates from when
30 to when or do you mean only from when?

A. Sometimes they telephoned us and sometimes we telephoned them in connection with how much yarn we need the following month.

COURT: That wasn't what you were asked. Was there any discussion about the dates of the commencement of the contracts?

A. No.

Q. Well now, I will come to the contract in issue in this case, contract No. 5. Now, the main part of the contract, of course, is on the front. The back has printed conditions of sale. The front would have been different for every contract.

A. Yes.

Q. Now, "Description". Could you interpret what it says, "Description:", P1 (5)? *Exhibit P1(5)*

A. Yes.

Q. Now, was that discussed?

A. Yes.

Q. Now, "Packing: On Cone.", was that discussed or not?

A. No, this was not discussed because they always came in the same package.

Q. They always came on a cone?

A. Yes.

Q. "Quantity:" and then it gives the quantity.

A. Yes.

Q. Was that discussed?

A. Yes, it was.

Q. "Delivery:", you say was not discussed?

COURT: "Unit Price", you missed out "Price".

MR. BERNACCHI: I'm sorry, I missed out "Price".

Q. "Unit Price", was that discussed?

A. Yes, it was.

Q. Now, I will jump from "Unit Price" to the end of the contract, "Rebate ½%", was that discussed?

A. No, it was not.

Q. Was it discussed in the first contract and then for the subsequent contracts, they said "other terms as per the first contract"?

A. It was not I who signed these contracts, so I only had a general idea of the contracts.

Q. Do you mean that the one that signed the contract would know what was discussed?

A. I did not pay attention to such unimportant items as rebate and so forth. I was mainly concerned with the price.

Q. Well, when you are dealing with 600,000 lbs., a rebate of half per cent is not an inconsiderable amount of money. And do you know — they are in evidence already, but do you know that your receipts were for money paid but it takes into account the half per cent — your cheques?

COURT: Was that in respect of the 1st and 2nd? There was no mention of rebate on the third and fourth contract.

MR. BERNACCHI: Where there is no mention of rebate, I am assured by my learned junior that the cheques did not take into account.

Q. Were you aware of that? They were issued from your firm, you are the managing director.

A. This is a matter for the accounts department, not for me. I don't have to bother myself with that. That is for the accounts department.

Q. So the accounts department of your firm took advantage of the term "rebate ½%", but you say that you do not know whether that term was discussed or not?

A. This question was raised at that time.

Q. It was raised?

A. Yes, it was raised.

Q. And it was discussed then?

A. Yes, it was, yes.

Q. And it was negotiated as at a half per cent?

A. Yes.

Q. Then going back to delivery, you say that that was not discussed?

A. Correct.

Q. Now, "Margin: Nil", was that discussed?

A. Anyway, one month's notice had to be given —

COURT: What does that mean?

MR. BERNACCHI: A deposit in fact.

A. — in any event, if goods were required for delivery.

Q. Do you mean to say that it was only agreed that one month's notice had to be given and not April 1971 to December 1971? Is that your meaning or what?

A. I have to give one month's notice for whatever amount or quantity I required and not as stated in the contract from April to December, 1971.

Q. And was that discussed at the same time as all the rest was discussed like "Description" "Quantity" "Unit Price"?

A. No, no, there was no discussion about price, etc. It was understood that if I need a certain amount the following month, all I had to do was just to give a phone call to the other party.

Q. When was this understood?

A. But they did not keep their promise. I asked for a certain amount and they failed to give me that certain amount in spite of the notice I gave.

Q. You say "it was understood". Do you mean that at some time or other, there had been a discussion, or just that it was understood in the trade, or what other words do you mean by "it was understood"?

A. In our trade, it is customary to give one month's notice for goods to be supplied.

Q. I see, it is customary in your trade.

A. That was the usual practice, the customary practice between us and Tai Hing in that either we gave one month's notice by phone or they gave us one month's notice by phone.

Q. I'm sorry. You said two things that may not coincide. You said first 'it was the custom of our trade' and then you said 'it was the custom between ourselves and Tai Hing.'

A. That was our custom in dealing with Tai Hing.

Q. All right. Now, was that at any time discussed or did that in effect just grow up as the custom?

A. This method became customary in time.

Q. All right, but was it ever discussed or just did it become customary because that was what you did and Tai Hing didn't object?

A. Anyway, that was the custom. Sometimes they telephoned us and asked us "How much yarn do you need the next month" and then we would give them a reply. Sometimes we telephoned them and informed them of the amount we wanted for the next month.

Q. Answer the question, please. Was it because of an original agreement to do it that way, or was it that you did it that way and Tai Hing never objected and therefor it became customary?

A. Sometimes they telephoned and asked if we wanted any yarn the next month. We would give them a reply.

Q. Do I understand from your answers that it was never the subject of any specific discussion, but it just grew up. Either you telephoned them and gave them one month's notice or they telephoned you and asked for your orders for the next month.

A. This was not discussed. If they had supply of yarn, they would inform us by telephone.

Q. Yes, it was not discussed.

A. It was not discussed.

Q. Now, so that nothing was actually discussed as to delivery?

A. Correct.

Q. Now, "Margin" — that means in this contract "Deposit" — "Nil".

A. Correct.

Q. Was that discussed?

A. No, no, no.

Q. Are you sure?

A. Sure.

Q. All right. Now, I come to "Payment". Now, did — please, I don't want you to answer before I ask the question. Did anyone inform you or mention to you that Tai Hing always made the payment "Cash against delivery" on their solicitors' advice? Did anyone ever inform you of that, or not perhaps always, but very often?

A. No.

Q. Could you just turn to printed condition No. 2, please? It is in typical small writing — printing, but I will read to you the passage which I want:

> " The Buyers shall take delivery of the goods contracted within the time stipulated and shall, unless otherwise arranged with and agreed to by the Sellers, make payment in full on or before delivery. . . ."

Now, I put it to you that you were well aware that although the payment term was "Cash against delivery", it was an agreement within Clause 2 of the printed conditions that they would accept a post-dated cheque, post-dated for 45 days, do you agree?

A. 50 days.

COURT: That was agreed, was it?

A. Yes, my Lord.

Q. Now, "Other Terms:" Could you, Mr. Interpreter, read to him the "Other Terms" above the word "Rebate"?

A. Yes, that means $100 more.

Q. Was that discussed?

A. Yes, it was. Yes, this involved the payment of $100 more. By that, if we needed 30 count yarn and had previously ordered 40 count yarn, then we could ask for 30 count yarn instead.

Q. So it was discussed? **10**

A. Yes, it was discussed.

Q. So now, to sum up, other terms were all discussed?

A. Yes.

Q. There was a special arrangement which covered the payment in margin, unit price was discussed, quantity was discussed.

A. There was no mention of payment of deposit.

Q. Well no, because he said it was not discussed. No, no. Don't you agree with me that the arrangement for them to accept 50 — you say 50, I say 45 — day post-dated cheques covered deposit and payment? **20**

A. No, only payment, no deposit.

Q. All right. "Unit Price" was discussed?

A. Yes.

Q. "Quality" was discussed?

A. Yes, there was no change in quality.

Q. "Packing" was not discussed because you say they always delivered on a cone.

A. Yes, standardized packing.

Q. "Description" was discussed?

A. But yarn 30 count and 40 count were interchanged by the payment of $100 extra. **30**

Q. Because "Other Terms" made that clear?

A. Yes, yes.

Q. But having discussed all that, not a mention was made of the terms as to delivery?

A. Yes, correct.

Q. Now, you said you left the signing of contract to your daughter or other fokis?

A. Yes.

Q. Now, your daughter signed all the other four contracts?

A. Yes.

Q. This was signed by Mr. CHEUNG?

A. Yes.

Q. You said Mr. CHEUNG was a mere foki.

A. He had the right to sign cheques.

Q. He had the right to sign cheques, he was the chief accountant of your firm?

A. Yes.

Q. I think he was related to you?

A. We are brothers-in-law.

Q. Brothers-in-law. Now, you made particular stress that when you visited the defendants' factory, they — and you explained who 'they' were — invited you to lunch at the Castle Peak Hotel.

A. Yes.

Q. And you also invited them to lunch with you several times, didn't you?

A. Yes.

Q. And I think also to dinner at home?

A. Yes.

Q. So there is nothing very significant, is there, that on one occasion they invited you to take lunch with them?

A. Correct.

Q. Now, when you visited the factory, at one time you said that you could not remember whether it was before or after the fifth and final contract was signed.

A. I cannot remember.

Q. No. At another time, you did say the 1,500 bales order was discussed.

A. Yes.

Q. Combining those two answers, I take it to mean that you had a discussion about this last contract, but whether before or after it was signed you cannot remember.

MR. SWAINE: I think the — I'm sorry. I think my learned friend has got the sequence of the evidence wrong. The witness did say he could not remember whether this inspection was before or after the fifth contract, but later when he told of the details of the inspection, he said they were trying to get him to place a big order. I said, "Did you?" He said, "The 1,500". That is the evidence.

MR. BERNACCHI: Well, I think I am wrong, but to frame my question in another way:

Q. As you do not remember whether the visit to the factory was before or after the contract was signed, presumably any discussion of the 1,500 bales order you don't remember whether it was about an unsigned contract or about the completion of a signed contract?

A. I cannot remember.

Q. Yes, all right. Now, you said 'in August we asked them for some delivery,' but you were dealing with the delivery under the fifth contract.

A. Yes.

Q. I presume that in August means in August, 1972?

A. August, 1971, before the installation of the machines. We could not have taken delivery of so much yarn when the machines were being installed.

Q. August of 1971 on your own document, in evidence already, the defendants delivered 91 bales.

COURT: 1972 — it must be 1972.

MR. BERNACCHI: August 1972, 38 bales, so it is in August, 1971 the defendant delivered 91 bales; whereas in August, 1972, they only delivered just over 38 bales.

A. There was nothing I could do. I pressed them for delivery and they just gave no heed to me.

Q. Yes, but I am just suggesting to you that when you said 'in August we asked them to deliver' and then you said about their refusing to do so, you meant August, 1972, not 1971 — in other words, after you had installed the new machines.

A. Before the installation of the machines, the price of yarn kept on rising and therefore we had to press them for delivery of more yarn, but there was nothing we could do when they refused to deliver.

Q. I think you are just out one whole year. The price of yarn, on my instructions, at least was more or less constant throughout 1971 but it rose the latter part of 1972.

A. I asked them for delivery in 1971, but they did not do so.

Q. The contract was signed by Mr. CHEUNG, your chief accountant, in I think it is March of 1971.

A. Yes.

Q. And it was — you say you don't know — it was in fact for delivery from April to December, 1971.

A. Yes, this has been mentioned many times.

Q. And you are saying that in 1971, the defendants refused to deliver yarn.

A. The end of 1971, they refused to deliver us yarn.

Q. Well, it is the expression 'in August', you mentioned that 'in August', I didn't. "In August, we asked them for delivery. They refused to do so" — that is the contents of your statement.

A. No, we asked in August, they failed, and in subsequent months, namely, September, October, November and December, we pressed them but yet they couldn't deliver.

Q. Couldn't deliver at all or only delivered a small quantity?

A. Sometimes the amount delivered was insufficient, sometimes too much. In any event, the amount delivered was not fixed.

Q. Well, I put it to you that either by mistake or deliberate — I don't know — but the evidence of their refusal to deliver started from about August, 1972, not August, 1971.

A. I disagree. There is no reason for them to deliver even such a small quantity even in 1972.

Q. Well, before I explain to you my case, I want you to tell us what you meant by the word "they refused". You said the word "they refused to deliver."

A. When I said they refused, I meant that they weren't able to deliver. They said that most of their products were for exports.

Q. Didn't they say that "we must deliver to other customers first and we can only deliver to you what is left."?

A. No, they said that they must first deliver the goods to their customers abroad, not to those in Hong Kong.

Q. I see. So you only disagree when I say 'other customers'. You say no, they said they must first deliver to their customers abroad and then meet your order.

A. That was the answer given to me by Mr. YIM, but I did not know what actually happened.

Q. Oh yes, of course, and that answer given to you by Mr. YIM was not just once: it started in August and it went on and on through the rest of the year.

A. Correct, they said they could deliver, they had a tight schedule.

Q. Now, did he explain to you that the reason for his remark was that the price of yarn had risen considerably?

A. No, he said the price was not material, he would not be bothered by the loss of a few hundred dollars.

Q. That is your evidence, but I am dealing with his conversation, not with anything else. You attributed that remark not to Mr. YIM but to Mr. CHOW, you will remember, in your evidence-in-chief.

A. Mr. YIM also made that remark.

Q. Oh, I see, all right. Now, I am not dealing with that remark though. I am dealing with the reason. Didn't he say why was the reason? The reason was that the price of yarn had increased?

A. No, he didn't say that.

Q. Well, why did you think very clearly that the price of yarn had gone up by August, 1971 — I hope you'd say later that it is August, 1972, but that is immaterial for my question — why did you think that the price of yarn had gone up considerably by August, 1971?

A. Well, the price of yarn had always been going up but not sharply. Back in June and July, prices were going up.

Q. Surely, it was because of something that Mr. YIM had told you, you yourself volunteered the statement that the price of yarn had gone up by August, 1971.

A. Mr. YIM did not tell me anything. The price of yarn did go up. He said that what mattered most to him was business confidence.

Q. Why, when I was asking you about what happened in August, 1970 — well, in August, you say 1971, all right — in August, you said by August, the price of yarn had risen and then you made reference to this conversation — this telephone conversation with Mr. YIM?

A. Why can't I mention both?

Q. By all means, mention both, but I suggest that in your mind, there was a connection and therefore you mention both almost at the same time.

A. What is the significance of this, if I mention both?

Q. All right. And I put it to you that a full conversation ran something like that, this: "I have told you already. I have been pressing you earlier on to take delivery. Now the price has gone up as I foretold and I can only supply you what is left after supplying other customers."

A. No, no, he did not say that.

COURT: How many bales of yarn can your factory deal with per day?

A. About 15 bales.

COURT: We will adjourn.

4.35 p.m. Court adjourns.

27th January, 1975.

28th January, 1975.

9.55 a.m. Court resumes.

Appearances as before.

P.W. 2 — MUI Chok-chue o.f.a.

XXN. BY MR. BERNACCHI: (continues)

Q. Mr. MUI, before the court rose last evening, the judge asked you what your daily capacity was, and you said fifteen bales.

A. Yes.

Q. You also, earlier on, said about installing new machinery, I think, elsewhere — new dyeing machinery, weren't they?

A. Yes.

Q. So, presumably, your capacity was the same before the new machinery was installed, as after, or was it different?

A. No, production increased after the installation of new machinery.

Q. Before the new machinery, what was your capacity?

A. Before the installation of new machinery, we used about ten bales.

Q. I see. You have agreed with me that new machinery consisted of dyeing machinery.

A. Yes.

Q. I think you changed from hank dyeing to cone dyeing, I am sorry, I don't know what that means.

A. Yes.

Q. I am sorry, I am not in your trade at all, why, because you changed the dyeing process did your production increase?

A. We had also other machines installed.

Q. Oh, I see, you had also other machines installed.

A. Yes.

COURT: About a million dollars, he is talking about, it is about a million dollars worth of machines.

Q. Yes, now, whilst I am dealing with machinery, I think, at your request, the defendant sent over a man to install a new — well, to help with the installation of one of the machines dealing with the dyeing process.

A. Yes.

Q. I think it was a soft winder machine which is necessary for cone dyeing.

A. Yes.

Q. Now, you changed from hank dyeing to cone dyeing all at one time, didn't you?

A. We used both types of dyeing processes, hank dyeing and cone dyeing.

Q. I think that is an answer to my question, but I don't know for sure; do you mean that you changed gradually, still producing by the hank dyeing, or do you mean that you virtually stopped production to change from hank dyeing to cone dyeing?

A. No, we originally used the process of hank dyeing, but we increased the machines, so that we could also use cone dyeing.

Q. But when you were changing from — well, when you were installing the cone dyeing, did your — did not your production drop off very considerably?

A. It dropped off a little.

Q. Well, I am suggesting to you, you can deny it or accept it, but I am suggesting to you that it dropped off very considerably.

A. Correct.

Q. It did not have to, did it? In other words, you could have changed over very much slower, machine by machine, which would not have affected your rate of production very much at all.

A. Because in order to have dyeing machines installed, we must build additional pipes for water to flow into these machines, and that caused production to drop.

Q. So your evidence is that you could not have changed over slowly so as not to make any marked difference to your production, you had to do it the way you did it.

A. That is correct, because for dyeing processes, pipes were required, the installation of pipes caused delays and slowed down production.

Q. You see, I don't want you to be under any misapprehension, I shall produce evidence that you could have changed over so that it wouldn't have had much effect on your production, but you deliberately changed it quickly, or quicker, and caused your production to diminish considerably.

A. No, the installation of pipes was essential because even if the piece-goods were made, they had to be dyed, and without water for the dyeing process, there would be no production.

Q. You know what a quota is, don't you?

A. Yes.

Q. And in effect, you are restricted to so much finished goods per, I think it is three months, to export to America and other countries.

A. Yes.

Q. Did your quota become used up at all?

A. Yes, it was all used up.

Q. Did it become used up because you yourself made finished goods, or did you sell out of your quota to other firms?

A. Used up because we exported all our own finished goods.

Q. I see. Now, was the change-over in the former dyeing put through at a time when your quota had all been used up?

A. What?

Q. Your change-over from hank dyeing to cone dyeing — or your introduction of new cone dyeing machines, anyhow, was in the early months of 1972.

A. Yes.

Q. At that time, was your quota already used up?

A. We could use our quota up to the 31st of September.

COURT: Did you?

A. I cannot remember.

Q. I see. Do you remember mentioning the quota in the early part of 1972 to Mr. YIM?

A. No.

Q. Do you remember mentioning that you had sold your quota — whether you meant sold physically, or whether you meant used up, of course, Mr. YIM isn't — I mean, he cannot say, but the actual words were you had sold your quota.

A. We have never sold our quota.

Q. All right, used up your quota, then, remember telling him that you had used up your quota?

A. No, definitely not.

Q. Do you — is your main business — I am sorry — is your main business exporting to overseas customers that are in the quota area?

A. America.

Q. Yes, so the answer is "Yes, America."

A. We use the quota principally for export to America.

Q. That is not my question, I said, do you — are your main customers customers in the quota area?

A. Yes.

Q. Yes, all right, and you always, you say, used up your quota.

A. Yes, correct.

Q. And . . .

A. If we do not use up our quota, it would be cancelled.

Q. Not sold?

A. There was no reason for me to sell the quota since I could use them myself.

Q. Well, did you, did you?

A. No, I did not.

Q. No, did you use them yourself?

A. Yes.

Q. I see, always?

A. Yes.

Q. Do you remember one occasion when you told Mr. YIM that you were not very happy that your daughter had sold your quota?

A. No, she only sold nylon quota, nor cotton quota.

Q. I see, she only sold nylon quota, and you remember saying to Mr. YIM that you were not very happy that your daughter had sold these nylon quotas?

A. No, I did not say that, these quotas had nothing to do with cotton.

Q. I see, but anyhow, you had no conversation with Mr. YIM about your daughter selling your quotas.

A. No.

Q. You didn't indicate to him that if she hung on to your quota, she would have got a very much higher price.

A. I cannot remember so much.

Q. I see, do you remember, perhaps, casually remarking to Mr. YIM that your daughter wanted to play the stock market?

A. I did not say that, I did not know about her.

Q. You didn't give Mr. YIM the impression that, perhaps, that was the reason why your daughter had sold the quotas?

A. No, no such thing.

Q. I see, and he — do you remember him telling you that you should not be annoyed with your daughter, that she had managed to make — that she clearly made a profit on selling your quota, and you should be content with that?

A. No, no, no.

Q. I see, now, I would like — turn please, to P.1 (8), which is a letter — it was a letter signed by yourself and written, you say, by your son. *Exhibit P1(8)*

A. Yes.

Q. Now, presumably, your son knew about the subject he was writing about.

A. I told him the subject.

Q. And presumably, he translated it back to you before you signed.

A. Yes, he explained the letter to me in Chinese.

Q. And then you signed it.

A. Yes.

Q. Now, I would like to ask you a few questions on this letter; your evidence in-chief has been that Mr. YIM promised you to deliver at least fifteen bales, commencing from May, 197 . . . no, I think it was commencing from June, 1973 — I am sorry, I might be mistaken.

COURT: It was CHOW, I think.

MR. SWAINE: CHOW told him YIM promised.

Q. I am sorry, I withdraw that question. Now, do you see the line in the middle of the second paragraph, referring to a conversation with Mr. CHOW which you allege, "confirmed that your manager, Mr. YIM, had promised to deliver us at least fifteen bales i.e. 6,000 lbs. per month commencing from May, 1973. However, you have not kept your promise to deliver such an amount in May . . .", and then, you repeat at the end of that paragraph, "Subsequently your Mr. Richard CHOW reassured that you will maintain a delivery of not less than fifteen bales per month from June, 1973 and onwards."

A. Yes.

Q. Now, in that letter, it gives the impression, would you agree, that if the plaintiff did deliver fifteen bales a month — I am sorry, if the defendant did deliver fifteen bales per month, that would have been all right?

A. This is what the letter says, but I had already maintained that there was no reason for them to deliver such a small quantity.

Q. Well, that, perhaps, is your present position, but at the time that your son wrote the letter, in effect, almost at your dictation, you would have been content if they had delivered . . .

COURT: Does it read like that? It doesn't to me.

MR. SWAINE: The third paragraph from the bottom shouldn't be omitted.

MR. BERNACCHI: I am not omitting it, I assure you.

COURT: It certainly doesn't mean that to me.

MR. BERNACCHI: But I won't pursue this if . . .

COURT: If you ask him, "Would you have been content . . . ", that is your question, isn't it, "Would you have been content if they had continued to deliver fifteen bales per month?"

Q. At that time, I don't want your attitude now.

COURT: In July, yes, at that time.

A. Of course, I would not have been content, how could I work with fifteen bales?

Q. Well, look at the words, also in the middle of the paragraph, "However, you have not kept your promise to deliver such an amount in May and we are extremely disappointed in receiving instead only a very small portion of your delivery of cotton yarn to us."

A. Yes.

Q. That means that instead of delivering fifteen bales, as you were allegedly promised, you only received three bales.

A. Yes.

Q. Surely, at that time, you were well aware that the defendant would not deliver to your firm very considerable amounts of cotton under this contract.

A. I don't know.

Q. And you were alleging — well, at least, they promised fifteen bales and didn't keep their promise.

A. They promised fifteen bales, I asked for more, but they could not supply us; fifteen bales were of no use to me.

Q. Oh, I am sorry, if they had supplied fifteen bales per month — May, June, July, August, September, would you have accepted and continued with this contract, or would you have said, as you now say, "Fifteen bales are no use to me, I would terminate the contract"?

A. Well then, the only thing I could do would be to chase after him.

Q. So you would have accepted, grudgingly, in effect?

A. I would have accepted it grudgingly, because there were over 100 workers, and there were only about 200 lbs. of cotton yarn to work on.

Exhibit P1(10)

Q. I see. And just pausing for a moment, I haven't finished with this letter, but going on to P.1 (10), that is a report that you made to this Association of which you are one of the directors, you said, on the 18th of September — this letter was written on the 18th of September.

A. Yes.

Q. "You are earnestly requested to write to the other party", that means you, this is in quotation marks, so, this is your report, "You are earnestly requested to write to the other party to fulfil the contract and to deliver the yarn that is owing."

A. Yes.

Q. So, even by the middle of September, you, yourself, hadn't abandoned this contract, you hadn't even accepted their rejection of this contract.

MR. SWAINE: May it please you, my Lord, does this go to any of the issues?

MR. BERNACCHI: Yes, it does, it goes to the issue of damages.

MR. SWAINE: . . . as we know nothing about it.

COURT: He has never abandoned it, as far as I see, that is why you are sitting here.

A. We wanted the other party to deliver the yarn, the cotton yarn.

Q. Even by that letter of September?

A. Yes.

Q. Now, I come to the next paragraph, the fourth — no, the third paragraph.

COURT: 8 again?

Exhibit P1(8)

Q. Of 8, I am sorry, P.1 (8). The second sentence, "We have been . . . ", I stress those words, "have been", "compelled to have to purchase cotton yarns from the market at a very high price for knitting our products for our customers." I am sorry, I think, perhaps, Mr. Grey, you have slightly mis-interpreted — "We have been compelled to have to purchase cotton yarns from the market at a very high price for knitting our products for our customers" in the plaintiff, Kamsing's letter to the defendant, the plaintiff's letter to the defendant.

A. Since they did not supply us with enough cotton yarn, our workers were forced to stop work, and we could not meet the orders of our customers.

Q. Not — that is not what this sentence says, "We have been compelled to purchase cotton yarns from the market at a very high price."

A. That's true, if we did not buy the cotton yarn from the market, there would be no work for our workers.

Q. So, did you or not?

A. Yes, in Hong Kong.

Q. Now, you said yesterday, in cross-examination, that even in August, 1971, when you were supplied with 91 bales, that was insufficient, and you had requested more than they delivered.

A. Yes.

Q. So, presumably, this purchase from the market commenced even in 1971.

A. Whenever I was not supplied with enough cotton yarn, I purchased from other sources.

Q. I see, so you purchased — 91 were not sufficient, so you purchased in August, and you were only supplied with 77 in September, so you must have purchased August, September and October from the market.

A. Well, I don't know, I must refer to my books of accounts.

Q. Well, is this probable?

A. I don't know; but, anyway, if Tai Hing did not supply us with enough, we had to purchase from other sources.

Q. Then throughout 1972, the average monthly supply was about — oh, not more than about 30 or 40 bales.

A. Correct.

Q. So, you, presumably, bought from the open market throughout 1972.

A. Not necessarily, sometimes we just could not buy any, in that case, we would just not accept orders from customers.

Q. I see, but when you could buy, and they, the defendant, supplied insufficiently, you did buy to make up the difference.

A. Of course, but sometimes, we could not even buy from other sources.

Q. You see, the plaintiff's version of this incident is different.

COURT: Defendant's.

Q. I am sorry, the defendant's, I am always mixed up. They say that throughout the early part of 1972, they were constantly urging you to take more, is that right?

A. You should ask my daughter, she will know.

Q. I see, now, tell me, wasn't there plenty of yarn throughout 1972? You could have purchased if you wanted — you could have purchased in any month in 1972 as much yarn as you liked.

A. I don't remember.

Q. I see, all right, now, you said just now in answer to another question of mine that, "When we couldn't purchase yarn, we didn't accept orders", you said just now.

A. Purchased yarn?

Q. "When we could not purchase yarn", you said in relation to the shortfall of the defendant's supply of yarn, you said, "When we couldn't purchase yarn elsewhere, we didn't accept orders."

A. Yes.

Q. Do I gather from that answer that you made sure that you had enough yarn in stock before you accepted an order for finished products?

A. All I had to know was how much yarn Tai Hing was able to supply, and then I could accept the orders accordingly because I only obtained yarn from Tai Hing.

Q. And purchased from the open market when Tai Hing supplied less yarn than they were supposed to, on your version.

A. Yes, yes.

Q. And on your version of facts, Tai Hing had supplied less — very much less than they should have supplied throughout the year 1972, and then less again in 1973.

A. Yes.

Q. So that, presumably, you purchased from the market; if you couldn't purchase from the market, then you didn't accept the order from your customers.

A. Correct.

Exhibit P1(10)

Q. Would you turn to P.10, it is, you see, the report that you obviously made at the directors' meeting, it's given in inverted commas.

A. Yes.

Q. "Unfortunately . . . ", it is the fourth line of the English copy, "Unfortunately recently the other party broke its promise and did not in accordance with the contract deliver the full quantity of cotton yarn resulting in discontinuation of our production affecting our business. Thereafter we have been complained of by overseas customers who demanded for compensation." That is obviously an exaggeration because you didn't accept orders unless you were certain that you had the yarn.

A. The failure of Tai Hing to deliver the yarn upset our schedule.

Q. I see, would you agree with me that the report that you obviously made to — as a director of this Association was an exaggerated report?

A. Well, I did have complaints from my customers who demanded compensation from me for not delivering the finished goods in time.

Q. I see, now, I am coming on to this meeting with Mr. CHOW at the Golden Crown Restaurant — if I can find the page — now, are you clear about the date — Mr. CHOW agrees with you that it was some time in the early part of 1973 — can you be a bit more certain than that, or do you agree with Mr. CHOW that it was some time in early 1973?

A. Which month of 1973, early part of 1973.

Q. Well, Mr. CHOW doesn't remember, and I am suggesting that you don't remember either — some time in the beginning of 1973.

A. I don't remember the date, but I do remember having tea with him twice. On one occasion, I was with my son.

Q. All right, well, but you also don't remember the date except that it was some time in the beginning of 1973.

A. In 1973; on the second occasion, I went with my son and that was around the 20th of May.

Q. I see, now, you say that there were two occasions, one you met Mr. CHOW alone, the other you met him with your son.

A. Yes.

Q. Now, the following questions refer to either of these occasions. First of all, do you remember that you talked about this problem that Tai Hing could only deliver a few bales?

A. Not on the first occasion.

Q. Either occasion, please.

A. On the second occasion, Mr. YIM promised to deliver at least fifteen bales.

Q. The conversation was about delivering a few bales of yarn under this contract, is that right?

MR. SWAINE: My Lord, I object to my learned friend putting words into the witness's mouth.

COURT: Yes, you are trying to do so, Mr. Bernacchi.

Q. I will go on then. This occasion, when he and you were alone, did you discuss the Tai Hing contract?

A. No. In fact, I had not even seen that contract.

Q. No, no, no, no, look, did you discuss delivery of bales by the defendant on both of these occasions, or only on one? **10**

A. There was no discussion.

Q. There was no discussion, on the first occasion, do you mean?

A. Discussion with whom?

Q. With Mr. CHOW.

A. You mean Mr. CHOW Hok-kuen?

Q. Yes.

A. On the first occasion, I discussed with Mr. CHOW, he told me that for the time being, he could not have the yarn delivered, but he would deliver at a future date. He also said that in spite of the rise in price, he would not mind losing a few hundred thousand **20** dollars.

Q. So both times, delivery of bales was discussed.

A. Yes.

Q. Now, did you not say to Mr. CHOW — you, yourself — that Tai Hing should deliver at least ten to fifteen bales per month?

A. On the last occasion, it was Mr. CHOW who promised that there would be at least fifteen bales delivered. I definitely would have requested for more delivery than just fifteen.

Exhibit P-1(8)

Q. Would you turn, please, to your letter, P.1 (8). You speak of a telephone conversation with Mr. CHOW in April, when he confirmed **30** that "Mr. YIM had promised to deliver us at least 15 bales."

A. Yes.

Q. Then you say, "We made a further discussion with your Mr. Richard CHOW between 22nd and 27th of May at the Golden Crown Restaurant."

A. Yes.

Q. That would have been the second meeting.

A. Yes.

Q. And you say, "Subsequently your Mr. Richard CHOW reassured that you will maintain a delivery of not less than 15 bales", now, that . . .

A. But I disagree.

Q. Well, that is your letter, Mr. MUI. That means, in English — and your son apparently writes English all right, and your son was present at the meeting in the Golden Crown — "subsequently" means after the meeting; some time after the meeting, "your Mr. Richard CHOW reassured that you will maintain a delivery", the defendant maintain this delivery.

A. Yes.

Q. Which gives the impression in English — and your son understands English, and his written English is quite good — that this was not mentioned at the meeting, but mentioned subsequent to the meeting.

A. It was mentioned during the meeting and also subsequent to the meeting.

Q. I see, you forgot to put it in that it was mentioned during the meeting too.

COURT: He says there was a discussion.

Q. Now, I suggest to you that at that meeting, it was you that raised a point that Tai Hing should deliver at least ten to fifteen bales per month.

A. No such a thing, I had no right to raise this.

Q. And he told you that Mr. YIM, or YEN, had already told you that the contract was at an end, he could only convey your suggestion to Mr. YIM.

A. He did not say anything about conveying a message to Mr. YIM, he was quoting Mr. YIM himself.

Q. The date of the meeting, according to the letter, was in the last part of May.

A. Yes.

Q. Would you turn to P.2 please, P.2 is another bundle, I think. *Exhibit P2*

COURT: Contract with Kian Nan.

Q. That is — I think that contract with Kian Nan was signed by your daughter on the 30th of May.

A. Yes.

Q. I suggest to you that it was because you realised at the meeting that the defendants were not likely to deliver you any more goods, or any more yarn, that this contract was signed three or four days later.

A. I asked for cotton yarn, none was supplied. On the other hand, I had my workers, so I must obtain the yarn from other source.

Q. I suggest to you that at that meeting with Mr. CHOW at the Golden Crown Restaurant, you realised that it was hopeless, or almost hopeless, thinking that you could obtain any more yarn from the defendants.

A. I don't know. **10**

Q. You don't know.

A. I was informed during that meeting that they had orders from customers abroad, and that they had exported their yarn abroad.

Q. That was, I suggest, in connection with an offer made by you that Mr. CHOW was not able to accept, wasn't that right?

A. No.

Q. You offered that if Tai Hing was to continue to make deliveries under the old contract, you would place new contracts at the new price.

A. I suggested that half of the goods supplied would be purchased under a new price, and the other half under the old price, but they said that they had no cotton yarn to supply us. **20**

Q. I think Mr. CHOW said that the defendants' schedule was too tight, to accept your proposition, but that he would convey your proposition to Mr. YIM.

A. Mr. CHOW said that he would convey my message to Mr. YIM, but he added that price had nothing to do with the failure to supply.

Q. I see, now, you remember at one time, you said that your best — or, the majority of your finished products was exported to America?

A. Yes. **30**

Q. Now, you remember that America, at one time, would not have products that originated in any way from China?

A. Correct.

Q. And then they removed this restriction.

A. Yes.

Q. And directly they removed this restriction, it was cheaper for you to obtain sources of supply from China than from Hong Kong.

A. A little cheaper.

Q. Now, could it be that throughout 1972, you were obtaining Chinese yarn and just called upon the defendants to supply the difference between the Chinese yarn ordered, and the orders of the American customers — the difference — made up the difference.

COURT: Couldn't we have it clearer, "Did you use Chinese yarn in 1972", "Did you buy . . . "? When was the restriction removed?

MR. BERNACCHI: I think it was about 1971 actually, or early 1972.

COURT: There is no "about" about it, this is an important point, you should find out.

A. I cannot remember, I must look at the accounts.

COURT: Do you know when this restriction was removed?

A. I can't even remember that, my Lord.

Q. It was about two years ago.

A. About, about that, yes.

Q. Yes, and could it have been that because it was slightly cheaper to obtain Chinese yarn, you ordered yarn from China, and relied upon the defendants to just make up the difference?

A. No, no, no such thing.

Q. My Lord, I apologise, I should have looked up the date, but I think it was early 1972, and I will look up the date and give it to you. Do you remember telephone calls from Mr. YIM in the early part of 1972?

A. Yes.

Q. And why did Mr. YIM telephone you?

A. Which year?

Q. In the early part of 1972, you say "Yes, I do remember telephone calls from Mr. YIM."

A. I cannot remember.

Q. Wasn't it each time to ask you — to press you to take delivery of the balance of the yarn as soon as possible?

A. There was no telephone call from him.

Q. Didn't he also say that the contract period had already expired?

A. He never said that.

Q. Didn't he also say that if the price of the yarn rose or if the defendants had a tight schedule of making deliveries, then the defendant company could not guarantee that the balance would be delivered at the contract price.

A. No.

Q. Did you in any way ask the defendants for assistance for help to give you time to take delivery?

A. No. I was pressing them for delivery.

Q. Throughout the latter part of 1971 and throughout 1972, your case is, you were pressing them to make deliveries and they weren't coming up to the scratch.

COURT: I have heard it about ten times. Don't bother. He has answered over and over again.

MR. BERNACCHI: Yes, my Lord.

COURT: Any re-examination?

MR. SWAINE: Just one question, my Lord.

RE-XN. BY MR. SWAINE

Q. About fifteen minutes ago, Mr. Mui, it was put to you that it was you who raised the point with Mr. Chow at the Golden Crown that Tai Hing should deliver 10 to 15 bales per month.

A. No, no. I never raised such a point. I never made a request for such a small amount.

Q. What you said was, "No such a thing", and then, "I had no right to raise this". What did you mean by you had no right to raise this?

A. I meant I had no reason to ask for such a small quantity.

MR. SWAINE: I see. No further questions, my Lord.

MR. BERNACCHI: Before the witness leaves the box, I have now instructions that there was only one meeting when Mr. Mui's son was present. If my learned friend wants me to formally put that to him . . .

COURT: He said to you there were two meetings. "I met him alone, the first one. My son was at the second one". Do you wish to ask him anything?

MR. BERNACCHI: Mr. Chow will say there was only one meeting in which his son . . .

COURT: So be it. Do you wish to ask this man any more questions?

MR. BERNACCHI: I just — to put the case.

FURTHER XXN. BY MR. BERNACCHI

Q. I do formally put to you that you only met Mr. Chow once at the Golden Crown Restaurant and that was when your son was present.

A. I cannot remember if it was once or twice.

MR. BERNACCHI: Thank you.

COURT: Yes, thank you.

MR. SWAINE: My Lord, I shall be calling next Mr. Robert MUI.

COURT: This is the son.

MR. SWAINE: Yes, the son.

2.30 p.m. 28th January, 1975 Court resumes. Appearances as before.

D.W.1 YEN Chang-tat Affirmed in Shanghainese:

XN. BY MR. BERNACCHI:

Q. I think, Mr. YEN, that you are the business manager of the defendant company?

A. Yes.

Q. I am handing you a copy of the exhibits classified as P1 in these proceedings. *Exhibit P1*

A. Yes.

Q. Will you turn to P1 (5)? Now, that is the contract about which this action has been taken against your company? *Exhibit P1(5)*

A. Yes.

Q. Now, what do you know of the negotiations which resulted in P1 (5) being entered?

A. Yes.

Q. Say what you know. What did you do — start from the beginning — as regards document No. 5?

A. At first the parties concerned contacted each other by telephone.

Q. I'm sorry, but don't say the parties concerned, say who contacted who, or if you don't remember, whether who it was on behalf of the defendants or — I would say one or the other — who did the contact of your firm?

A. Miss MUI and myself had contacts.

Q. By telephone?

A. At first by telephone.

Q. As as a result of the telephone conversation, did you do anything?

A. Over the telephone she told me that she wanted to buy some cotton yarn. As a result I went to her factory.

Q. The contract is dated the 23rd of March, you see.

A. Yes.

Q. With that date in mind, when would you have gone over to her factory?

A. About two or three days before that date; I can't remember exactly which date.

Q. Did you go alone or did you go with anybody else from your company?

A. I went with the engineer of our factory, Mr. CHONG.

Q. What type of engineer is — is he given a title of engineer or is he just general engineer?

A. Engineer in charge of quality control.

Q. Now, did you go to the office or did you go to the factory of the plaintiffs?

A. Factory.

Q. And did you see anybody there of the plaintiff company?

A. Miss MUI; I can't remember if Mr. MUI was there.

Q. You do remember that Miss MUI was there?

A. Yes, definitely, she was there because I spoke to her.

Q. Now, could you tell us of the conversation?

A. I asked her what type of yarn, that is, how many count yarn she wanted, and I also asked her how many bales she wanted; I also asked her the period during which she required the yarn.

Q. Yes, presumably, she replied to your questions?

A. Yes.

Q. Well, I see that the order is for "Description: 32's/1 A Cotton Yarn". Was that what she said was the quality?

A. Yes.

Q. And I see that it is for 1,500 bales. Did she say 1,500 bales?

A. She told me 1,500 bales.

Q. Now, you have also said that you asked her for the period.

A. Correct.

Q. Now, what did she say?

A. She told me that she would be needing the yarn from about April until the end of the year.

Q. Now, who quoted the price?

A. I quoted the price first.

Q. Now, was there any discussion over the price or did you quote the price and she accepted it?

A. I quoted the price and there was some bargaining, and eventually it was settled at $1,335.

Q. I see, you quoted a higher price first, there was some bargaining and then eventually it was agreed at that price?

A. Yes.

Q. Could you look down at "Other Terms"? First of all, there are two clauses under "Other Terms". I want to ask you about the first clause first. Why was that inserted: "If 32's/1 AA and 40 . . . " etc., etc., etc., and etc.? Why was that inserted?

A. Because Miss MUI told me that sometimes her customers would ask for a change in the number of yarn count. I said that I would be agreeable provided that she paid $100 more in accordance with the practice of our factory.

Q. Can you now — if you can't, say you can't — but can you now remember her exact words? She said that sometimes her customers wanted a change. Can you remember her exact words or not?

A. The words she said were that sometimes her customers wanted 32 count, but sometimes 40 count, so that I had to make things easy for her.

Q. All right. Tell me, in what language did you speak?

A. I spoke to her in Cantonese, but I could not speak Cantonese well.

Q. You speak it with a very strong accent, I take it?

A. Yes.

Q. Now, I'll ask you about the second term: "Rebate ½%".

A. Yes.

Q. Was there any discussion on that?

A. This question was raised by Miss MUI when we were discussing the price.

Q. And you agreed to a rebate of ½%?

A. Yes.

Q. Now, I see that the payment is "Cash payment against delivery." **10**

A. Yes.

Q. Now, the evidence is that you in fact accepted post-dated cheques. I have not asked the question yet, please. Wait until I ask the question. First of all, do you know why these words "Cash payment against delivery" were inserted into the written contract, do you know?

A. Yes, I do.

Q. Why?

A. Because our legal adviser advised our proprietor that in the case of payment, the contract must specify cash payment against delivery. **20**

Q. Now, was the method of payment in fact discussed at this meeting?

A. Yes.

Q. Did she bring it up? Did you bring it up? Who brought it up?

A. Miss MUI brought it up and asked for 45 days.

Q. And you agreed?

A. I agreed.

Q. Now, there is two things that I have not asked you about on the sale contract: one is "Packing". Now, "On Cone" — was that brought up or not specifically?

A. It was brought up. **30**

Q. I mean, what did you say or what did she say?

A. Normally, the yarn was packed in wooden tubes.

Q. Is tube and cone the same word or not?

INTERPRETER: No.

COURT: In wooden tubes, inside.

MR. BERNACCHI: I see.

COURT: (to witness) Do you understand English, Mr. YEN?

A. My English is no good.

Q. Yes. In fact, you specified packing on cone?

A. Yes.

Q. Did you specify that? Did she specify that?

A. Normally, the packing is always on cone and therefore there was no need to make any change.

Q. Well now, look, you have just said a minute ago that you normally packed in wooden tubes.

A. Yes.

Q. Well, is there any difference between wooden tubes and on cone?

A. There is.

Q. I'm sorry, Mr. YEN, but at present you have given two contradictory answers: you have said "Normally we pack in wooden tubes" "Normally we pack on cone."

A. No, these tubes are in the shape of cones.

Q. Is there any difference or not?

A. The difference lies in this: that in one case the yarn is stuffed inside paper container; the other, wooden container.

Q. Well, packing on cone could mean either wooden or paper.

A. There is some difference.

Q. I know there is, I understand that, but in that particular contract, you do not specify wooden or paper.

A. Normally, in a contract where paper is not specified, it is understood that is packing in a wooden container.

Q. Is there any difference between packing in a wooden tube and packing in a wooden cone?

A. It would be easier for us to wind the yarn around a wooden tube than around a paper tube.

Q. Do listen to my question: is there any difference between packing on a wooden cone and packing in a wooden tube? Do they mean the same thing or do they mean different things?

A. The quality of the cotton yarn would not be affected, but it would be easier for the weaving factory to have — it would be more convenient for the weaving factory to have the yarn wound around a paper tube.

Q. Please! I have not mentioned paper. Please listen to my question.

A. In that case, there is no difference.

Q. Thank you.

COURT: No difference between what?

MR. BERNACCHI: No difference between on a wooden cone and in a wooden tube. He said there was, and then he mentioned paper. I think he was getting mixed up between paper and wooden.

Q. Now, this packing — was there any discussion by anyone as to the packing?

A. Yes.

Q. Miss MUI said what she would like packing in or you said what you would deliver it in — which way round?

A. I told Miss MUI that we normally packed on a wooden tube and hence the contract.

Q. I see, you said "We normally pack in a wooden —

A. — wooden cone.

Q. Tube, cone — you said there is no difference?

A. No difference.

Q. And she just agreed?

A. Correct.

Q. Now, the other stipulation on the face of the contract that you haven't mentioned is "Margin: Nil."

A. Correct.

Q. Now, was there any discussion or not about this "Margin: Nil."?

A. Miss MUI raised this point and I agreed.

Q. Now, if you turn over the page, at the back there are numerous printed conditions of sale.

A. Yes.

Q. Now, did you in any way mention these printed conditions or did you in fact make up the contract with the printed conditions there?

A. The printed conditions were already there.

Q. They were not specifically mentioned.

A. Correct.

Q. Now, these terms were all agreed a few days before the 23rd of March between you and Miss MUI at the plaintiff's factory?

A. Yes.

Q. What did you do then?

A. I went back to the office and told our business manager Mr. CHOW to write out the document that the transaction had been completed and then I had the document handed to our general manager.

Q. Well now, just when you say that the transaction had been completed, no contract was signed at present, are you referring to another document or are you referring to this document P1 (5)?

Exhibit P1(5)

A. Orally an agreement had been reached.

Q. Then the document that you told Mr. CHOW to make out — was it P1 (5) or was it another document?

A. Another one.

COURT: Is this in your list of documents?

MR. SWAINE: I think it is one of the unagreed, my Lord. I think it is No. 5.

MR. BERNACCHI: This is one of the original copies, I think.

Q. Is this the document you have been referring to?

A. Yes.

CLERK: D1.

Exhibit D1

Q. Now, you went on to say that you instructed him to hand over the sales memo to somebody.

A. He prepared this memo, I signed on it, and then I gave it to the manager for his signature.

Q. And when he had approved it, what happened to the document?

A. When he approved it, he instructed the accounts department to prepare a contract.

Q. That is P1 (5)?

A. Correct.

Q. And I think when the contract was prepared, your managing director signed it?

A. Correct.

COURT: You see, it refers to the yarn being 'grey'.

MR. BERNACCHI: I was just about to ask that question.

Q. In that sales memo, you referred to the yarn as being 'grey'. I noticed that point just as you, my Lord, had noticed it.

Exhibit D1

COURT: Look at D1, look at that. It has got 'grey' on it. Look at the first line.

MR. BERNACCHI: It has that written on it.

A. It is not grey, my Lord.

COURT: We all know it is not grey. We are saying it is called 'grey' here.

A. I must ask the accounts department about this because I did not prepare the contract.

Q. Anyhow, the undyed yarn is in fact a browny colour.

A. The undyed yarn had the colour of cotton.

Q. The colour of cotton does not mean anything to me.

A. The colour of cotton.

Q. I know. What is the colour of cotton?

A. It is light beige.

Q. Now, when your managing director had signed the contract, what happened to it?

A. The contract was handed back to the accounts department which would then either send it by post or by messenger or by hand, that is.

Q. It was dispatched to the plaintiffs but you didn't physically take it to the plaintiffs?

A. Correct.

Q. But eventually you received one copy back signed by the plaintiffs?

A. Yes, it was sent back to me by post.

Q. Now, it is common ground that this contract was not the first contract signed between yourself and the plaintiffs.

A. Correct.

Q. There were altogether four earlier contracts, two of them signed on the — the first two signed on one day.

A. Correct.

Q. Now, prior to the first contract, did you go over at all to the plaintiffs' factory?

A. No.

Q. Did you play any part in the negotiations for the first two contracts? I'm sorry, but would you hand him — look at P1 (1) and P1 (2).

COURT: Both the same day.

MR. BERNACCHI: Yes, both the 17th of June, 1970.

A. I took no part in the negotiations for the first two contracts.

Q. And was it before or after the 17th of June, 1970 that you first went over to the plaintiffs' factory?

A. After.

Q. Now, Miss MUI and Mr. MUI say that you promised certain things before ever the first contract was signed. You promised, according to them, that there would be no objection to the plaintiff varying its intake, you promised that the intake need not be constant, you promised that the dates for delivery were only a formality.

A. I had not even met them at that time.

Q. So you did not promise. Did you ever promise?

A. Never.

Q. Turning over to P1 (3), that is the contract of the 17th of December 1970. Did you have anything to do with the negotiations that resulted in this contract being made? *Exhibit P1(3)*

A. No.

Q. P1 (4), the contract of the 30th of December, 1970, did you have anything to do with the negotiations that led to this contract being signed? *Exhibit P1(4)*

A. No.

Q. So that, to summarise your evidence, the first time that you yourself negotiated the contract was the contract P1 (5)? *Exhibit P1(5)*

A. Yes, the fifth contract.

Q. For instance, again the two contracts P1 (1) and P1 (2), when, if ever, did you come into the picture on those contracts? Did you come into the picture, for instance, on deliveries or anything like that? *Exhibit P1(1)* *Exhibit P1(2)*

A. I did not come into the picture at all.

Q. I am speaking of after the contract was signed when they used to telephone the defendants company to specify how many bales they wanted.

A. No.

Q. They never telephoned you?

A. Correct.

Exhibit P1(3)

Q. P1 (3), did they telephone you about deliveries on P1 (3) or not?

A. They did telephone me.

Q. P1 (4), did they telephone you about deliveries on that contract?

A. Yes, they did, but only on a few occasions.

Exhibit P1(6)

Q. Now, P1 (6) is a document termed "Schedule of actual deliveries."

COURT: It is separate, it is not in that bundle.

Q. And it shows deliveries after the contract date for final delivery.

A. Yes.

Q. Now, was there any special arrangement made with the plaintiffs or does your particular company let their customers have deliveries fairly frequently after the date of final delivery under the contract?

MR. SWAINE: It is very leading.

Q. Was there anything special as regards the plaintiffs or not?

A. No.

Q. From that answer, I take it that your company provides this indulgence to other customers as well?

MR. SWAINE: I don't think it should be put in this leading fashion.

COURT: Yes, I agree. How do you explain the fact that some deliveries were made — I think he is only concerned, is he not, with the third and fourth, not the first and second, because he says he had nothing to do with that.

MR. BERNACCHI: He did not have anything to do with the first and second.

COURT: Well, just look at the contract number 3065 and 3077. You can take it from me that those deliveries were after the final date in these contracts for delivery. Can you explain that? How did that come about?

A. This came about because prices had not gone up considerably and besides, not too much time had elapsed after the final date of delivery.

Q. Now, was that peculiar to — well, that has been answered I think — you have already answered that that was not peculiar to the plaintiffs.

A. Correct.

Q. If prices did not go up considerably, it is the custom of your particular company to allow deliveries after the date specified in the contract?

A. Correct.

Q. But you did add, I think, that these deliveries shown in this document were only a few months after the date of the contract?

A. Of course, we could not allow this to take place if there was a considerable rise in price, or that there had been a very long lapse of time after the last date of delivery.

Q. No, thank you. After the last date of delivery on the ground, or after the last date of delivery in the contract — which do you mean?

INTERPRETER: On the ground.

Q. Last date of delivery in fact or last date of delivery as it should have been under the contract?

A. Last date of delivery as specified in the contract.

Q. As specified by the contract, I see. Now, it was also inferred, or in fact, perhaps said by Mr. and Miss MUI that you consented to not be bound to take delivery within any specified period because of the fluctuating requirements of the plaintiffs' customers. Now, did you make that promise at any time?

A. Within the delivery period, yes, but not outside the delivery period.

Q. The question was, did you ever promise the plaintiffs to take delivery within — I am sorry, did you ever promise the plaintiffs not to be bound by the date of delivery on the contract?

A. No, no, no.

Q. P.1 (17) please. (To Interpreter) Would you read to the witness the whole of paragraph 1 please? Well, no, the whole of paragraph 1 starting from the second sentence. *Exhibit P1(17)*

A. It is not true.

Q. Now, before your solicitors translated this letter to you, had you ever heard of this allegation before?

A. No.

COURT: It would have been all right if that had been qualified with the words, "within the delivery period", in the contract.

A. I mean, before the expiry of the contract, yes, but not after.

COURT: That is what I said.

Q. Now, you say that you were concerned with this contract before entering into this contract, did you promise the plaintiff company that your company would supply the yarn at the agreed price?

COURT: This is number five?

MR. BERNACCHI: Yes.

A. Yes.

Q. Did you specify during what period, or what?

A. Yes, of course.

Q. What did you specify?

A. I specified the period April to December.

Q. I see, and did you specify that during that period, there would not be any increase in price?

A. Yes.

Q. Now, it is an admitted fact that the plaintiffs did not start taking delivery under this contract until July, 1971.

A. Yes.

Q. Now, was that because of anything to do with you, or because they didn't request delivery until July?

A. They did not ask for delivery until July.

Q. And in July, just over 33 bales were delivered — 33.375.

A. Yes.

Q. Was that to meet their request, or did they request a larger amount and you only supplied a smaller?

A. We had the goods, but they only asked for that quantity?

Q. I see. In August, you supplied 91 bales, was that — did they request 91 bales, or did they request more than 91 bales, and you only supplied 91 bales?

A. They asked for 91 bales.

Q. And did that go for the rest of the months in 1971?

A. Correct.

Q. Now, I come to the year 19 . . . I am sorry, whilst I am dealing with 1971, I believe that the American Government did, at one time, restrict the entry of any made-up goods of which the raw material had been — had come from China.

A. Yes, correct.

Q. Do you remember when that restriction was lifted, what year?

A. I have to make enquiries, I am afraid, I can go to the American Consulate.

Q. No, no, no, no, not necessary, if you do not know, just say you don't know. All right, now, I come to the year 1972. The plaintiffs — you can take it from me, it is on P.1 (7A) — the plaintiffs had only taken delivery of 520.25 bales by the end of December, 1971. *Exhibit P1(7A)*

A. Yes.

Q. Now, did you — were you distressed at all by that comparatively low figure at the end of the contract time?

A. I was very distressed.

Q. Did you do anything about it?

A. Yes, I did, I telephoned Miss MUI and sometimes, Mr. MUI, and asked them to take delivery of the goods as quickly as possible.

Q. That would be in the year 1972.

A. The first half of 1972.

Q. You telephoned Miss MUI and sometimes Mr. MUI.

A. Yes.

Q. You said that you asked them to take delivery as soon as possible.

A. Yes.

Q. Did you say anything more?

A. I told them that the contract had expired, and that there was still time to take delivery, and that if too long a time had elapsed, and prices had gone up, then I won't be able to help them even if I wanted to.

Q. Did you say anything more or not?

A. No.

Q. Do you remember in particular what Miss MUI said?

A. She seemed to be delaying things, she told me that she would do her best, and on the other hand, asked me to do my best to help her.

Q. I see. Did you say anything in reply to her request to help her?

A. I told here not to delay, I said if we should have a tight schedule, then there was nothing I could do to help her.

Q. And did this, or similar conversations, take place both to Miss MUI and Mr. MUI?

A. Yes.

Q. Apart from telephone conversations, did you ever go over to the plaintiffs' office?

A. Yes, I did, yes.

Q. What about?

A. I told her the same thing as I said to them over the telephone, but they gave me the same reply.

Q. In fact, you continued to supply yarn to the plaintiffs.

A. Yes.

Exhibit P1(7A)

Q. I am going over — has he got P.1 (7A) before him — I am going over — you see, "January, quantity in bales, 71; February, 10; March, 1.5" etc., down to "July".

A. Yes.

Q. Now, was that all the same as 1971, they requested and you supplied?

MR. SWAINE: That is very leading, isn't it?

Q. All right, I agree, did — when in January, 1972, you supplied 71 bales, what did they request for January?

A. They asked for 71 bales, so I supplied them 71 bales.

Q. Does that apply — I am going deliberately down to July — they asked and you supplied.

A. Correct.

Q. Was there any time between January and July when they asked for more than you supplied?

A. No, no, no, no, in fact, they always asked for a small amount, what we wanted was to supply a large amount so as to fulful the contract.

Q. Now, I come to August, 1972. Did anything happen in August that affected this contract?

A. Yes.

COURT: When is this, July?

MR. BERNACCHI: No, August, August, 1972.

A. Beginning in August, the price of cotton yarn started to rise, and I had a very tight schedule because the number of purchases suddenly increased, so that I was not in a position to supply all they wanted.

Q. Well, now, did you tell them that?

A. I told them about it, and I reminded them of the warning which I gave them during the first half of 1972.

Q. Do you remember whether it was Miss MUI or Mr. MUI that you spoke to?

A. Most of the time was Miss MUI, but also Mr. MUI at times.

Q. And do you remember with whom you actually used — reminded them of a warning that you had given earlier on in this year, 1972?

A. Miss MUI.

Q. Miss MUI.

A. Yes, Miss MUI. Yes, I also spoke to Mr. MUI and reminded him of my warning.

Q. I see, do I take it then that you reminded the plaintiff company not once, but more than once, of your previous warning?

A. Correct.

Q. Now, from August onwards, did you tell them what the defendant company was willing to do?

A. Well, I told them that the warning I had given had been fulfilled, I said that the price of yarn was going up, as well as wages, I said that in the circumstances, I could only supply my other customers first, and then sell them whatever that was left over.

Q. Did they accept that?

A. Like before, they kept on saying, "Mr. YIM, please help us, please help us."

Q. I see, and they took certain quantity of bales from August onwards that you have had said were the bales left over after supplying other customers.

MR. SWAINE: That is not just leading, it is putting words in his mouth.

COURT: Yes, that is indeed.

Q. Having had this conversation, you did, in fact, supply the plaintiffs with 38.25 bales in August, 89 in September, etc.

A. Yes.

Q. Now, from your point of view first, what did this quantity represent?

A. I had no one to turn to, they kept on pressing me, and spoke about past friendship, and so forth; I was very embarrassed.

Q. You had said over the telephone to them — to both of them — at different times, "I can only supply you with bales when I have supplied the other customers first."

A. Yes.

Q. Now, did you, in fact, carry out that statement?

A. Yes.

Q. From August, when you made it, or later?

A. From August.

Q. So these figures, from August onwards, represent the amount of bales you had left over.

MR. SWAINE: It is leading, my Lord.

COURT: It is leading, yes.

Q. Did they know that the bales they were getting were limited to the bales left over after you had supplied the other customers? **10**

MR. SWAINE: A double leading question.

COURT: I don't know, he has already said that he carried out his warning, which was they would only get the left-overs, "Did they know that was being done", that is quite all right.

MR. SWAINE: Yes, my Lord.

Q. Did they know that the bales you were supplying were, in fact, the bales left over from after supplying the other customers?

A. They knew.

Q. And they accepted?

A. They kept on saying, "I know, I know, I will do my best, I will find a way out, I will work it out." **20**

Q. I know, but the answer is "yes" or "no"? Did they accept these bales?

A. They accepted, yes.

Q. Now, when did this arrangement last — how long did this arrangement last; give me the month that something happened to supersede it.

MR. SWAINE: It wasn't superseded.

MR. BERNACCHI: Of course it was, nothing has been, in fact, supplied since that date, it is common ground. **30**

COURT: How long did this arrangement last?

A. This arrangement lasted until the early part of 1973.

Q. Well, now, the final delivery was two bales, you delivered three bales in all in May, but the final delivery was two bales.

A. Correct.

Q. Now, did you have a telephone conversation at all with someone in the defendant company before — I am sorry, the plaintiff company, before giving this delivery?

COURT: This final one.

Q. Yes.

A. Yes.

Q. With whom?

A. With Miss MUI.

Q. Now, was it an original telephone call, or did you return a telephone call of Miss MUI?

A. She telephoned me first, I was afraid of her by then.

Q. All right, well, she telephoned first, and you returned her telephone call.

A. Yes.

Q. What was it you said, please?

A. I told Miss MUI over the phone that after these two bales, I would no longer be able to supply her with any more bales, and I asked her never to telephone me again because they would only make us embarrassed.

Q. After that telephone call, did she, in fact, accept the two bales?

A. Yes, she did.

Q. Now, I will go back to 1972, the first part, between February and July, there were very small deliveries of yarn.

A. Correct.

Q. You have already said that you delivered yarn at their request, and to the amount they requested, and you pressed them to take delivery of more — you have already said that.

A. Correct.

Q. Now, did they, at any time, explain the reason for this very small amount of yarn between February and July?

A. They did not give any reason.

Q. Did you know anything about their installing new machines?

A. Yes, I did.

Q. From whom did you know that?

A. From Miss MUI.

Q. From Miss MUI. Did she explain what purpose the new machines were to be used for?

A. The new machines, according to her, were used for dyeing piece-goods.

Q. I see, I don't know — do you know what . . .

COURT: Garments, do you mean, or do you mean piece-goods? Do you mean garments or piecegoods? **10**

A. I don't know, my Lord, I don't know much about the factory, but they might use it either for the dyeing of yarn, or polyester, nylon.

Q. I see, but you knew that it was new machines for dyeing.

A. Yes, that is correct.

Q. Do you know, originally, what dyeing process the plaintiff factory used?

A. I am a layman in this field, but I believe that originally, they already had the machines for dyeing, but they installed additional machines just to expand their business, I don't know. **20**

Q. Perhaps an engineer could explain, you don't know?

A. I don't know.

Q. Do you know whether the installation of new dyeing machines should have affected the intake of yarn by the plaintiffs?

A. That is not possible.

Q. Well, is it — if, of course, they installed the dyeing machines all at one time, presumably, they won't have been able to dye, which would have affected the intake.

A. To my knowledge, before the installation of the machines, the plaintiff used to ask other factories to do the dyeing work for them. **30**

Q. I see, now, I want to ask you about quota.

A. Yes.

Q. Did anybody in the plaintiff company mention quota to you?

A. Both Miss MUI and Mr. MUI mentioned this many times.

Q. I see, separately or together?

A. Both separately and together.

Q. I see, well, what was their mention, I mean, what was the general context of what they said?

A. Mr. MUI, the old gentleman, said that selling quota could be more lucrative than selling garments, but the quotas were sold too early, and not enough profit had been made.

Q. So he told you that the quota had been sold, but he said, too early?

A. Correct.

Q. Did he, or Miss MUI, say by whom it had been sold?

A. I cannot remember now by whom it was said the quotas were sold, but anyway, I remember that they were sold.

Q. You remember being told by Mr. MUI or Miss MUI that the quota had been sold.

A. Yes.

Q. Did either of them specify what quota, cotton quota, or nylon?

A. They did not specify.

Q. Do you remember what you said?

A. I told Mr. MUI not to blame Miss MUI for playing with the stock-market, and neglecting the factory, I said that in any event, although the quotas had been sold at a lower price, he had made money from the sale of the quotas, and besides, he got it for nothing.

Q. Did anybody mention Miss MUI had played with the stockmarket?

A. Mr. MUI said.

Q. Did anybody mention where she got the money from?

A. No.

Q. I mean, why did you say, "Don't blame Miss MUI for playing with the stockmarket, you've sold the quota . . . " etc., any connection, or not?

A. I was trying to console Mr. MUI because I believed that there must have been some connection between the stockmarket and the sale.

Q. You just believed, nothing was actually said.

A. I was just trying to console Mr. MUI; as a businessman, I had to be courteous.

Q. And you say that these discussions on quota took place on more than one occasion.

A. These discussions took place many times.

Q. All right, tell me, did you know whether Miss MUI took a holiday?

A. Yes, I do.

Q. Do you know why?

A. No, Miss MUI told me that her father was very angry with her, and very annoyed, and she might just as well go on holiday for a long period of time to be away from her father.

Q. I see, tell me, I don't know whether you remember when, approximately, were these discussions about the quota.

A. I don't remember exactly when, but some time in the first half of 1972.

Q. Thank you, thank you, Mr. YIM.

COURT: I think we will adjourn now. 10 o'clock tomorrow morning.

4.20 p.m. Court adjourns.

29th January, 1975

10.00 a.m. Court resumes

Appearances as before.

D.W. 1 — YEN Chang-tat O.F.A.

XXN. BY MR. SWAINE

Q. Mr. Yen, you have said that you only negotiated the 5th contract with the plaintiff, not the four earlier contracts?

A. Correct.

Q. And when do you say you first met the representatives of Kamsing? When did you first meet Kamsing representatives?

A. After the signing of the 1st and 2nd contracts I had contact, I believe, with the plaintiffs, but I do not remember whether the contacts were in the form of telephone calls or personal meeting.

Q. So, you did not meet them, you say, sorry — you did not have contact with them until after June 1970?

A. I cannot remember when, but, anyway, I first had contact with them after the signing of the 1st and the 2nd contracts.

Q. And before the signing of the 3rd and 4th contracts?

A. I had contacts with them.

Q. All right. If you would accept that the first two contracts were signed in June and the 3rd and 4th in December, then you met them some time between, say, July and December 1970. I am sorry. You first had contact with them between July and December?

A. Yes.

Q. You cannot remember whether that first contact was person to person or on the telephone?

A. I cannot remember.

Q. But do you remember having met Kamsing representatives within that period, say, July to December 1970?

A. I cannot remember because I had too many customers.

Q. So, you cannot remember at all whether you had met Mr. Mui or Miss Mui during that period July to December 1970?

A. I don't say that I did not meet them. I say that I seldom had contact with them and these contacts were either on the phone or meeting person to person.

Q. I see. Are you saying you might have met them during that period July to December 1970?

A. I believe I did meet them, but not on many occasions. I only met them on a few occasions during that period.

Q. During that period. I see. You see, the plaintiffs, in their Statement of Claim . . .

MR. SWAINE: This is paragraph 5, my Lord.

Q. . . . have said that in about April or May 1970, before the signing of the first two contracts, you, Mr. Chow, and Mr. Chong had gone to see them and you had seen Mr. Mui first and later Mr. Mui and Miss Mui, before the signing of the first two contracts.

A. No.

Q. So, what they say here is wrong as far as you are concerned?

A. Correct.

Q. In the Defence put in by Tai Hing . . .

MR. SWAINE: At paragraph 4, my Lord.

Q. . . . Tai Hing's counsel has agreed that prior to the making of these four contracts, there had been negotiation between Kamsing and Tai Hing through their representatives. Now, I read this as agreeing that you had met Mr. Mui and Miss Mui before the first two contracts.

MR. BERNACCHI: Is that a fair question?

COURT: That is a comment.

MR. BERNACCHI: Yes, that is a comment.

COURT: It is for comment all right.

Q. That would be wrong if that were the suggestion, Mr. Yen, that you had met Mr. Mui and Miss Mui before the first two contracts?

A. I did not meet them.

Q. And that suggestion would be wrong?

A. I don't know.

Q. Do you recall ever writing on a piece of paper before Mr. Mui and Miss Mui words in Chinese, "It is not so much the quantity, but we want to do business with Kamsing, or words to that effect.

A. I wrote down something during the signing — in connection with the signing of the 5th contract, not the words that you have just mentioned.

Q. All right. What did you write?

A. Because there was this language barrier between us, I wrote down on a piece of paper that in Tai Hing we could guarantee good quality and good service and that they won't be let down by the price.

Q. In other words, your price would be a fair one?

A. Our price would be a fair one.

Q. You wrote down nothing about quantity?

A. No.

Q. Such as "The quantity doesn't matter".

A. No.

Q. And you say you wrote this in connection with the 5th contract?

A. Correct.

Q. In the presence of Miss Mui?

A. Yes.

Q. In the presence of Mr. Mui?

A. I cannot remember whether I wrote it in the presence of Miss Mui or Mr. Mui.

Q. I see. It might have been Miss Mui, it might have been Mr. Mui.

A. Correct, but I cannot remember.

Q. And where did you write this? At their factory or elsewhere?

A. At their factory.

Q. And was this the occasion you went with Mr. Chong?

A. Correct.

Q. This was after you say Miss Mui telephoned you saying she wanted to buy cotton yarn?

A. Correct.

Q. You see, in evidence-in-chief you said you went to the factory, you saw Miss Mui. You could not remember if Mr. Mui was there. You spoke to Miss Mui.

A. I spoke to Miss Mui because Mr. Mui's Cantonese is very difficult to understand.

Q. What you said is, "I cannot remember if Mr Mui was there". Is that not the case?

A. I can't quite remember if Mr. Mui was there, but Miss Mui was definitely there.

Q. If Miss Mui was definitely there, you can't remember if Mr. Mui was there, you must be certain that the piece of paper that you wrote was written in the presence of Miss Mui?

A. Yes.

Q. So, the position is that you do remember you wrote it before Miss Mui and not that you don't remember whether it was before Miss Mui or Mr Mui?

A. I cannot remember that.

Q. In fact, what you wrote on the piece of paper you wrote before the making of the first two contracts — I am putting it to you.

A. Definitely I do not agree.

Q. And you wrote it in the presence of Mr. Mui and Miss Mui?

A. Before the signing of the contract when we were still discussing it, I wrote it down.

Q. That is not answer to my question, Mr. Yen. All right. You said that you wrote on a piece of paper that your quality was bound to be good and your price was reasonable?

A. Yes.

Q. Had there been any doubt before this that Tai Hing's quality was unsatisfactory or its price unreasonable?

A. The reason I wrote it was, firstly, because there was this failure of communication between us and, secondly, because I wanted to assure them about doing business with Tai Hing. Very often when I could not express myself or when I could not make them understand what I said, I would write it on a piece of paper.

Q. According to your evidence, Miss Mui telephoned you saying she wanted to buy yarn?

A. Yes.

Q. And they had four previous contracts with Tai Hing?

A. Yes.

Q. Yet you wrote on a piece of paper before the 5th contract, "Price reasonable, quality good". So, I ask again, was there any doubt before this that Tai Hing's price was unreasonable and its quality unsatisfactory?

A. No.

Q. So, what you wrote on a piece of paper was purely gratuitous?

A. In connection with the first four contracts I took no part in the negotiations and since that was the first time that I ever negotiated with them, that was why I wrote it down on a piece of paper.

Q. You say you were not concerned at all with the first two contracts, but you have said that as regards delivery under the 3rd and 4th you were from time to time in touch with Mr. Mui and Miss Mui.

A. I was seldom in touch with them. They were mainly in touch with our Mr. Chow.

Q. But there were at least some contacts between yourself and Mr. Mui and Miss Mui regarding deliveries under the 3rd and 4th contracts.

A. To my recollection we very seldom had contacts.

Q. There were at least some contacts, Mr. Yen.

A. Yes.

Q. Did they complain to you at all about Tai Hing's quality or price under the 3rd and 4th contracts?

A. I cannot remember the details, but complaints of this kind were bound to be made because after all the yarn was man-made.

Q. Are you saying that there were complaints then under the 3rd and 4th contracts?

A. Yes, but there were only a few complaints.

Q. Earlier on you said there were no complaints.

A. When I said there were no complaints I don't mean — I meant there were no complaints regarding insufficient amount delivered and so forth.

Q. There were complaints as to the quality of the yarn, were there, under the 3rd and 4th contracts?

A. Yes, but such complaints were only very seldom.

Q. And was it because of these complaints that you sought to put Kamsing's mind at rest when you wrote on this piece of paper before the 5th contract?

A. Yes, and, besides, that was the first time that I myself negotiated with them.

Q. It was in your mind, was it, that there were complaints under the 3rd and 4th contracts, but you had not negotiated these. So, you were now going to assure Kamsing that this being your contract there would be no cause for complaint as to the quality.

A. Regarding those contracts, before the signing of the 5th one, it was Mr. Chow who negotiated with them. I was not present, but since that was the first time that I ever negotiated with them I had to give them an assurance of the way I do business.

Q. Not the way that business might have been done under the 3rd and 4th contracts?

A. The way would be the same. Even when Mr. Chow negotiated with them he also had to give such an assurance to them regarding price and quality.

Q. I see. So Mr. Chow had given an assurance which apparently had not been kept and now you were giving your assurance.

A. No. In the course of every negotiation such assurance had to be given.

Q. I see. Now, you said that it was because of a difficulty in communication and this being your first negotiation with them that you wrote on this piece of paper.

A. Yes.

Q. And you would now like to add also bearing in mind that there had been complaints under the 3rd and 4th contracts.

A. When I said complaints I cannot remember the details. I only wanted to say that not one hundred per cent of the goods delivered were all of satisfactory quality.

Q. All right. I shan't press you. You also wrote on a piece of paper the price was reasonable.

A. The price was reasonable.

Q. I ask you, was the price under the first four contracts not reasonable?

A. The price under the first four contracts was also reasonable, but since that was the first time that I ever had to negotiate with them, it was necessary for me to give them another assurance.

Q. You say that Miss Mui actually telephoned you and spoke to you personally. She ought you out to make this contract with.

A. I don't know — I can't say that she specially sorted me out. That was a matter for her, but anyway, she telephoned me. **10**

Q. Not Mr. Chow?

A. Correct.

Q. Even though the first four contracts had been negotiated with Chow and not you?

A. Because by then I already knew her quite well.

Q. Yes, and despite having made the first four contracts with Mr. Chow, she went to you to make this contract?

A. Yes.

Q. All right. Now you said that the price under the first four contracts was reasonable. **20**

A. Yes.

Q. Now, you also have said that you had nothing to do with the negotiations of the first four contracts. How did you know the price was reasonable?

A. I was the business manager and I had to be informed of any transaction done by Mr. Chow. If I noted that the price was not reasonable I would not have allowed the transaction to be carried out. Otherwise I would be in trouble with my proprietor.

Q. I see. Are you saying that Mr. Chow consulted you before agreeing the first four contracts? **30**

A. Well, in Tai Hing we had a price list. If Mr. Chow conducts a transaction and there is only very slight variation in price, he can make up his own mind without consulting me. If there is a big variation in price, then he would have to ask me for permission and if there is a very big variation in price from that stated in the price list, then we all had to go to the proprietor.

Q. Did he in fact consult you on any of these four first contracts?

A. There was no substantial variation in between — in price from our price list for the first four contracts and I was only informed after the contracts were signed.

Q. So, it was not a case that Mr. Chow consulted you first and obtained your approval before agreeing the price under the first four contracts?

A. No.

Q. But after the price had been agreed then he told you about it?

A. Yes, after the price was agreed he would produce a sales memo.

10 Q. I see. Is it the sort of sales memo that we already had in court and you identified as D-1? Is that the sort of sales memo?

A. Yes.

Q. And that is submitted through you to Mr. Y. C. Chen in the same way as the sales memo under the 5th contract?

A. Yes. In the case of the 5th contract I instructed Mr. Chow to prepare the sales memo. I then signed it and submitted it to Y. C. Chen.

Q. That is the 5th contract, and the first four, was it done in the same way — prepared by Mr. Chow, submitted through you to Mr. Y. C. Chen?

20 A. Well, it would not matter who prepared the sales memo. Sometimes Mr. Chow would ask the Accounts Department to prepare it.

Q. But it was prepared in all those four cases and in fact submitted to Mr. Y. C. Chen through you?

A. That is correct, and sometimes if Mr. Y. C. Chen was away, I would put the document on his desk.

Q. All right. And if you would look at D-1, just to refresh you as to how it looks you see that at the bottom there are the words on the right, "Prepared by", and then the words, "Sales Manager" and then "Approved by". *Exhibit D-1*

30 A. Yes.

Q. And it was the same sort of sales memo in the first four cases?

A. Yes.

Q. Is it not the position that Mr. Chow submitted the terms through you to Mr. Y. C. Chen for approval?

A. Yes.

Q. A few minutes ago you say you were not consulted beforehand about these terms.

A. But an outdoor salesman must have some authority. If the price was reasonable and also the period of delivery was reasonable, there was no need for me to go through everything and give my approval.

Q. Was the sales memo in the first four cases submitted through you to Mr. Y. C. Chen before the contracts were signed — signed by Tai Hing?

A. Yes, for his approval.

Q. For his approval.

A. Yes.

Q. So, you were consulted about the price before the contract was signed by Tai Hing?

A. As long as there is no irregularity concerning the price and the time limit for delivery, the outdoor salesman could make the decision on the spot without having to consult me. If he had to consult me in everything he did, then we couldn't go on with our business at all.

Q. Nevertheless, the sales memo was submitted through you to Mr. Y. C. Chen for approval before the four contracts were signed by Tai Hing?

A. That is correct.

Q. All right. Is the truth of the matter not this, Mr. Yen, that in fact you had a lot more to do with these four contracts than you now say in your evidence.

A. I don't understand.

Q. In other words, you actually negotiated the price and the quantity with Kamsing.

A. Definitely not, not the first four.

Q. Not the first four?

COURT: Would Mr. Chow get a commission on that contract?

A. No, my Lord. He was drawing a fixed salary from Tai Hing as an employee.

Q. Does the same apply to yourself, Mr. Yen, that you draw a salary and not commission?

A. Correct, correct.

Q. Now, the 5th contract is dated the 23rd of March, 1971 and prior to that date, did a team of Kamsing representatives come to look at the Tai Hing mill?

A. I cannot remember. I don't think this happened.

Q. I see. Was there ever an occasion to your knowledge that Mr. Mui and Miss Mui came to look at the Tai Hing mill?

A. Yes.

Q. And are you saying you don't remember whether this was before or after the 5th contract?

A. I cannot remember. No.

Q. It might have been before March 1971. It might have been after.

A. I cannot remember the exact date because I had too many customers.

Q. All right. But in any case on the occasion of that visit do you remember whether you said to Mr. Mui and Miss Mui that you wanted the good business relations between Tai Hing and Kamsing to continue?

A. I can't remember, but they were guests and, as a matter of courtesy, I was bound to say something pleasing to them.

Q. Something like that anyway.

A. As a businessman I must have said something similar, but I can't remember exactly what I said. I said this to every customer.

Q. I suppose being the sales manager it is your business really to go out and get customers, to say pleasing things to your customers?

A. Well, this is done as a matter of courtesy. I cannot say I do not welcome my customers when they visit the factory.

Q. As a rule, it is your practice as a sales manager to go looking for business and say nice things to your customers?

A. Nice things — by nice things I meant polite things, say, for example, "Please excuse us. This place is not very tidy", or words of that kind.

Q. But surely also words like, "I hope that we can continue our good business relations" — more germane words than whether your place is tidy or untidy.

A. Yes.

Q. All right. And at that time do you recall whether you were already doing business with Kamsing?

A. Yes, of course.

Q. And do you recall whether after that business — after that visit there was new business with Kamsing?

A. I cannot say there was new business because I have forgotten the date of their visit.

Q. Never mind the date of their visit. Do you remember whether after that visit there was new business with Kamsing?

A. I cannot answer this question because I have forgotten the date of their visit.

Q. Surely, Mr. Yen, you must remember irrespective of dates whether after that visit there was new business with Kamsing.

A. I cannot just say anything. I can't remember the date of their visit.

Q. So, there might have been new business after that. There might not. You just don't remember.

A. I cannot say. I cannot remember the date. **10**

Q. All right. Do you remember saying other nice things to Mr. Mui and Miss Mui when they came to the mill, such as, "The orders you placed before, the prices have since gone up, and you have done better. You have placed a big order at that on those previous occasions".

MR. BERNACCHI: I don't think there was any evidence about "you would have done better".

COURT: It is an obvious inference.

MR. SWAINE: There was evidence.

MR. BERNACCHI: Oh, yes, it is an obvious inference. **20**

MR. SWAINE: It was said by this witness.

COURT: Let's get on.

Q. Do you remember saying something nice, such as, "Since your placing of the previous orders prices have gone up".

A. No.

COURT: You didn't say.

A. I did not.

Q. On that you are quite sure?

A. I am quite sure.

Q. Is it not the case, Mr. Yen, that the negotiations for the 5th contract were actually conducted during the visit by Kamsing representatives to the mill but not finalized until some time later. **30**

A. I really cannot remember when representatives of Kamsing came.

Q. Are you saying you cannot even remember whether there were negotiations for a contract during that visit?

A. There was no negotiation. They only came for a visit.

Q. I think you said it was by Tai Hing's invitation.

A. They said that our factory was a large one and they would like to see it and we said that we would welcome them any time.

Q. You can remember all that, Mr. Yen, but you can't remember whether this preceded the 5th contract.

A. No. It is not the case that they said they were going to visit us and the visit took place on the same day as they requested. There was some pre-arrangement and then they came.

Q. I see. You remember all that?

A. Many days before the visit took place they said they would like to see our factory and we said you are most welcome and then there was this visit.

Q. I see. You remember all that. All right. Now, you said that when you went to see Miss Mui at the factory to discuss the 5th contract there was bargaining over the price.

A. Yes.

Q. And it was eventually settled, you said, at 1,335 per bale?

A. Correct.

Q. Do you remember whether it was before, during, or after the bargaining you wrote on a piece of paper, "Our prices are reasonable"?

A. On the day I went to negotiate the contract.

Q. Yes. Do you remember whether it was before, during, or after the bargaining over the price?

A. In the course of the negotiation.

Q. In the course of the negotiation. So, you started off at the price higher than that which was eventually settled?

A. A little higher. It was only a little higher. We couldn't be irresponsible and quote any price we wanted.

Q. Yes, yes, yes. You wrote on a piece of paper, "Our prices are reasonable" and there was further bargaining and you brought it down?

A. In the course of the negotiation such words are bound to be said, namely, "You can rest assured the price will be reasonable" and so forth.

Q. After you wrote it down then the price was agreed at 1,335?

A. No, no. You always have the opening words in a negotiation, in any negotiation.

Q. And those are the opening words, are they?

A. And, moreover, when we couldn't understand each other, then I had to put what I said in writing.

Q. You wrote it down as part of the opening words?

A. Normally in any negotiation one would start off by saying, "Don't worry, the price would be reasonable", but these words could be repeated subsequently in the course of the negotiation. We don't know.

Q. Is it not the position, Mr. Yen, that you never wrote the words, "Price reasonable" on your piece of paper. What you did write was, "It is not so much the quantity that matters. It is the doing of business".

A. No.

Q. You have also said that she — Miss Mui — had told you she would be needing the yarn from April until the end of the year?

A. I asked Miss Mui and that was her reply.

COURT: What was her reply?

MR. SWAINE: That she would need yarn from April until the end of the year.

Q. And you accepted her dates without further negotiation?

A. Yes.

Q. So, the position is, you negotiated the price. You said there was a bargaining, but as for the delivery period what she said you agreed.

A. Yes, because we — our factory was able to meet her demands.

Q. And as regards the delivery period, was that one term which your factory would have been able to oblige Kamsing if they wanted a longer delivery or a shorter delivery period?

A. We would oblige them if they asked for slight variations within the delivery period. We would not, say, supply them with all 1,000 bales in a month's time.

Q. That is not quite my question, Mr. Yen. It was Miss Mui who asked for April to the end of the year?

A. Yes.

Q. If she had asked for a shorter or longer period, would you have minded?

A. That depends. If the period is too long, then I would have to consider.

Q. In this case, it happened to be about right. So you said all right.

A. Correct.

Q. Now, you say that you specifically discussed with Miss Mui on this occasion the provision for changing the yarn count at an additional price of $100 per bale?

A. Yes. Miss Mui brought up the question of changing the yarn count first and then I told her we had fixed price for that. I told her the price and she agreed to it.

Q. And were you aware at that time when you were talking to Miss Mui that under the second and third contracts there was already a similar provision?

A. Yes, I was already aware of that.

Q. I see. And in each case, the variation in price was also $100 per bale?

A. That was the fixed price of Tai Hing.

Q. And how did you know in the 2nd and 3rd contracts there was such a provision?

A. Because I signed on the sales memo.

Q. Yes. Did you bring out the sales memo before you went to see Miss Mui to refresh your mind as to their contents?

A. I had to prepare my mind. Before I went I had to think first what type of cotton yarn they might require.

Q. And does that mean that you looked at these sales memo before you went to see her?

A. No. Because I had — I came across such memos everyday and I could remember them by heart.

Q. You could remember these variations by heart?

A. We had more than one customer. We had, in fact, thirty to forty odd customers. I knew how much one had to pay for variations from one count to another.

Q. Yes, and you were able to remember that under the 2nd and 3rd contracts the yarn was 32 count yarn?

A. Not all 32 counts. Some, I believe, were 20 count yarn.

Q. For the 1st and 4th the yarn was 20 count?

A. Yes.

Q. 2nd and 3rd was 32 count?

A. Since this was signed a long time ago, may I see the agreements?

(Witness reads relevant documents)

Yes.

Q. You agree. I suggest to you, Mr. Yen, that you did not carry in your head the memory of the count variations under the 2nd and 3rd contracts simply because you had seen the sales memo previously. You carried this memory in you head because you had negotiated the four contracts with Kamsing.

A. No. I merely signed my name on the cash memos.

MR. SWAINE: May I see the original bundle please?

COURT: How many contracts do you sign — not contracts, the sales memos, do you sign in a month?

A. Very difficult to say. On an average of ten to twenty at that time. Nowadays not even one because of bad business conditions.

Q. I would like you to look at the 3rd contract, Mr. Yen. Is that your signature here at the bottom right above the chop Tai Hing? It is not very clear. There appears to be the signature "Yen".

A. Yes.

Q. I see.

COURT: That is in the original, not on mine. (A pause) I see.

MR. SWAINE: It is very blurred, my Lord, in some of these copies. It is better on the agreed bundle.

Q. Can you explain why your signature should be there although you had nothing to do with the negotiations for this contract?

A. Whent a contract is to be signed, it is the custom to send two copies to the customer for signing. The customer retains one copy and sends back a copy to us after it has been signed. Then just to indicate that the — that we have received a copy of the agreement, the business manager must sign on the contract. That is the system. The main purpose is to show that the factory is — that we have received the contract.

Q. And it was just by chance that you happened to countersign this one?

A. In most cases I signed, but sometimes Mr. Chow also signed in my absence. The main purpose is to show that our factory has received the contract. It is only for internal use.

Q. The next thing that you say you discussed with Miss Mui was the ½ per cent rebate.

A. That was at the request of Miss Mui.

Q. That is what you also said, "It was raised by Miss Mui that we discussed the price".

A. Yes, it was requested by Miss Mui.

Q. And if you would look at the first two contracts, you will see likewise provision for rebate of ½ per cent under the provision for other terms.

A. Sometimes there was a rebate but sometimes there was none. Everything depended on what was said during the negotiations.

Q. All right. You confirm, anyway, that it was there on the 1st and 2nd contracts.

A. Yes.

Q. And were you aware of that before you went to see Miss Mui?

A. I knew that there had been rebates before I went, and I also knew that sometimes there were no rebates and I could not anticipate if there was going to be any rebate for the 5th contract.

Q. You did know before going to see Miss Mui that there had been rebates in some cases and no rebates in other cases involving Kamsing?

A. Yes.

Q. How did you know that?

A. Because I had signed sales memos as business manager.

Q. Yes, and the sales memo was signed in June, 1970 — I'm sorry, the contracts in June 1970 and December 1970, so the sales memo would be at about the same time.

A. Yes.

Q. And the two contracts with rebates were in fact the June 1970 contracts. I'm sorry to interrupt — the two contracts with rebates were the June 1970 contracts.

A. Yes.

Q. And are you saying that you carried in your mind when you went to see Miss MUI the recollection of the sales memo which you had seen in June and December 1970.

A. I only remember that in the case of this particular customer sometimes rebates were granted and sometimes not.

Q. And you remembered these purely from your having seen the sales memo.

A. Yes, I had to know the contents of the sales memo in my capacity as a business manager.

Q. Which you had seen in June and December, 1970, but did not see again before going to see Miss MUI.

A. As the business manager I had to know something about rebates when I negotiated a contract with a customer.

Q. Undoubtedly. Did you look at the sales memo again to refresh your memory before you went to see Miss MUI? **10**

A. There was no need; I had a rough idea about what the sales memo said.

Q. All right. I suggest to you, Mr. YEN, that the reason you did remember that there was provision in some cases for rebate and no provision in the contracts involving Kamsing was because you had negotiated those four first contracts.

A. No.

Q. The next thing you discussed with her was payment by post-dated cheques?

A. Yes. **20**

Q. You said that Miss MUI brought it up and she asked for 45 days and you agreed?

A. Yes.

Q. You are quite clear she asked for 45 days?

A. Yes, she asked for it and I agreed.

Q. Are you aware, Mr. YEN, that the practice under the four earlier contracts was for Kamsing to pay by post-dated cheques?

A. Yes.

Q. Are you aware that those post-dated cheques were for at least 50 days credit? **30**

A. I did not know the details because it was the accounts department that collected the cheques from the customers.

Q. Well, are you surprised now to hear that the post-dated cheques were for at least 50 days credit under the first four contracts?

A. No, I am not surprised.

Q. And notwithstanding that Kamsing was paying under the first four contracts by 50 days post-dated cheques at the least, you say Miss MUI asked for 45 days?

A. Yes.

Q. Now, on the contract itself, the payment term, contract 5, is "Cash payment against delivery." *Exhibit P1(5)*

A. Yes.

Q. But you say that the oral agreement between you and Miss Mui was for post-dated cheques.

A. Yes.

Q. So that the written term on contract 5 "Cash payment against delivery" does not truly reflect the agreement between you and Miss MUI?

A. That had also been the case in connection with the four previous agreements.

Q. So all five agreements which state "Cash payment against delivery" do not reflect the true agreement which was for post-dated cheques?

A. That was by mutual agreement.

Q. Sorry, what was by mutual agreement?

A. The payment for the goods by post-dated cheques.

Q. Yes, and the written term did not truly reflect the agreement, the oral agreement.

A. Well, this is true of all the agreements we signed with our customers because our legal advisers had told us that we could not put down payment by post-dated cheques in our contracts.

Q. I see, so it is not an isolated case involving only Kamsing: with all your other customers you agreed post-dated cheques but you write down cash payment?

A. But in the cash memos we can put down payment by post-dated cheques.

Q. What cash memos?

A. Sales memo.

Q. I'm sorry; this is the internal thing that goes from the salesman up to the managing director?

A. Yes, and this also applies to other customers.

Q. But as regards the actual written contract, solemnly signed by your managing director, the written term "Cash payment against delivery" isn't worth the paper it is written on.

A. Yes, but I can't comment on it. It was our legal adviser who told us to put that down.

Q. Now, when you had got the approval of Mr. Y. C. CHEN to the sales memo for the fifth contract and the contract was duly prepared "Cash payment against delivery" and signed by Mr. CHEN, sent to Kamsing for signature and it came back, signed by Kamsing, were you surprised that they have not queried the written term "Cash payment against delivery"? It is a long question.

A. No, we were not surprised because this had been agreed to beforehand.

Q. I want to make quite clear what you mean by "this had been agreed to beforehand." What do you mean?

A. During the negotiations.

Q. The only agreement as to price you have told us about so far is post-dated cheques.

A. Yes.

Q. Are you saying that it was also agreed that Tai Hing should put down "Cash payment against delivery" in the contract but both sides would disregard it, are you saying that?

(Mr. Interpreter asks counsel to repeat the question)

Q. Are you also saying that the two sides agreed that Tai Hing should put down in the written contract "Cash payment against delivery" but agreed that this would be disregarded?

A. Not that we could disregard it. We agreed to put this provision down, but on the other hand we came to an agreement for payment by post-dated cheques, for 45 days post-dated cheques and we did the same with other customers as well.

Q. So, are you then saying that when you spoke to Miss MUI at the factory before the fifth contract you had told her, "Look, we are going to write down 'Cash payment against delivery' but in fact you pay by post-dated cheques."?

A. Regarding the fifth contract, there was no need to discuss about the matter of payment because there was precedence connected with the four previous contracts as to how payment was made.

Q. I see, so you did not tell Miss MUI, "We will write down cash but in fact we agree post-dated cheques."?

A. That was not a matter in issue.

Q. It was not said, was that right?

A. There was no need to say.

Q. Was it said?

A. The same applies for her not having to pay any deposit.

Q. Was it said, Mr. YEN?

A. No.

Q. No, and you were not surprised when the fifth contract came back signed by Kamsing agreeing to the written term "Cash payment against delivery."?

A. No, I was not surprised because this has been done before.

Q. And how did you know it had been done before, Mr. YEN?

A. Because I knew about the four previous contracts.

Q. How?

A. Because I had signed the sales memos in respect of the four contracts and there were no complaints from the accounts department.

Q. I see. So you knew from the sales memo that the actual agreement was post-dated cheques.

A. Yes.

Q. And how did you know that the contract said "Cash payment against delivery" in all four cases?

A. I knew because I had been in this business for so many years.

Q. That is no answer, Mr. YEN. Are you saying that you knew — you thought the four contracts must have had a provision for cash payment because that was the invariable practice of your firm?

A. Yes.

Q. And you are saying that there being no complaints by Kamsing under the first four contracts, so you assumed it was all right in this case?

A. Yes, I only had to negotiate on four points: quantity, price, delivery and rebate. In fact, rebate was included in the price.

Q. You did not have to negotiate method of payment?

A. There was no need to discuss. For example, it was understood that we never had to pay down payment, a deposit.

Q. So there was no need for Miss MUI on this occasion to ask for 45 days credit, it was understood?

A. Correct.

Q. I suggest to you, Mr. YEN, that in the same way as your company put on the contract 'cash' when the true agreement was credit, so in each of these five cases, your company put down the delivery period although there was no agreement for it.

A. I do not agree with you.

Q. Now, as to the margin, you say that was understood, is that right?

A. Yes.

Q. And it was understood because Miss MUI was asking for 45 days credit?

A. She did not mention 45 days credit when negotiating the fifth contract with me because there was no need for her to do so, this was understood.

Q. So she did not bring it up and ask for 45 days credit?

A. No, she did not bring it up because that was the practice.

Q. I don't want to waste time on this. You said in chief that she did and you repeated in cross-examination that she did.

A. She might have touched upon it, I don't remember, but to my recollection, there was no need to bring up the question of post-dated cheques.

Q. Is your evidence now that you don't remember whether she did or did not bring up the question of post-dated cheques?

A. I only remember that this was the established practice and there was no need for me to give attention to this particular point.

Q. Do you remember whether during your discussions with Miss MUI she brought up the question of post-dated cheques?

A. No, just touched upon it, simply by saying, "I believe payment as usual, no deposit" or words to that effect, I can't remember now. She just casually touched upon it. Nobody took that point seriously.

Q. And if she did bring it up, it was to say "as usual", is that right?

A. Even if she had brought it up, it was brought up very casually.

Q. Are you saying you don't remember whether she even brought it up?

A. I cannot remember because that was a question of no importance.

Q. All right. Is your final word "you don't remember"?

A. Well, in my recollection this was a matter — a point to which neither party paid any attention.

Q. As regards the margin, did she bring it up?

A. The question of margin was just as unimportant as that of the matter of payment, so it was just a matter of course that it was not brought up.

Q. It is a matter of course that it was not brought up?

A. Right.

Q. So are you saying it was not brought up?

A. I can't say with certainty that it was not brought up at all, but anyway, neither party paid attention to this point and I can't remember.

Q. You can't remember. In view of your present uncertainty, I would remind you of your evidence in chief when you were asked, "Was there any discussion as to the margin being nil?" You said, "Miss MUI raised this question and I agreed." Are you now saying you would like to modify that by saying you don't remember?

A. No, I am not changing my evidence: because nobody emphasized on these two points and I only had reason to — had cause to remember such things as price, delivery period and so forth.

Q. I would suggest to you, Mr. YEN, that the reason these things have made no impact on you in regard to the fifth contract was because you had negotiated them on prior occasions with Kamsing in respect of the four earlier contracts, you had done it all before, there was no need to do it all over again.

A. No, no, that is not true. I knew about the unimportance of these points because I had signed sales memos before.

Q. I would put it to you that you did hold preliminary discussions with Miss MUI and Mr. MUI at the factory of Kamsing before the first contract in April or May 1970.

A. No.

Q. I would further put it to you that during these preliminary discussions you had assured Miss MUI that the intake was not important, it was the business that counted.

A. No, I did not even know them during that time. It was our Mr. CHOW who did the work.

Q. Now, you said in chief that it was after June 1970 that you went to the plaintiffs' factory.

A. I want to say that I had no contracts at all with the plaintiffs over the signing of the first two contracts because Mr. CHOW was the person who negotiated with them. I can only say that I had contacts on a few occasions only with them after the signing of the second contract — the first and second contracts.

Q. And when was it, do you remember, that you first went to their factory?

A. I only remember having contact with them. I don't remember how I contacted them and therefore I don't even know if I had ever been to their factory.

Q. You don't even know whether you had ever been to their factory?

A. I can't remember because I have got too many customers.

Q. So, in the witness-box today, Mr. YEN, you are saying that you don't even remember whether you have ever been to their factory at all? 10

A. Let me put it this way: before the signing of the first and second agreements and during the negotiations for these agreements, I did not even know them. Now, after the signing of the two agreements, I had contacts with them, but only on a few occasions and I do not remember in what way I had contacts with them.

Q. And you don't remember whether you ever went to their factory at all?

A. After the signing of the second contract, we had talks, but I don't remember if I had been to their factory in the course of these contacts. 20

Q. Are you saying you don't remember whether you had been to their factory at all?

A. Of course, before the signing of the fifth agreement, as I had to negotiate with them I did go to their factory, but I don't remember if I went to their factory after the signing of the first two agreements.

Q. As far as you are concerned, the time that you went to the factory to negotiate the fifth contract might have been the very first time?

A. I can't say for sure, I can't say for sure, I don't know.

Q. Now, you said that you had not come into the picture at all as regards the first two contracts. 30

A. Correct.

Q. On deliveries or any —

A. I came into the picture only as regards the signing of the sales memos.

Q. Yes, I was about to add on deliveries or anything like that, you had not come into the picture at all on deliveries or anything like that under the first two contracts?

A. Mr. CHOW negotiated with them and I approved of what Mr. CHOW did.

COURT: What about deliveries?

A. I approved of what was stated in the contract regarding deliveries.

Q. Did Mr. MUI or Miss MUI phone you at all about deliveries under the first two contracts?

A. No.

Q. You are quite sure of that?

A. I didn't even know them.

Q. Are you saying that you had got to know them before the making of the third and fourth contracts?

A. I definitely can say that I did not know them at all when the first and second contracts were signed, but after the signing of the two contracts, I might have had contact with them, but in what way I do not remember at all.

Q. So you might have had contact with them before the making of the third and fourth contracts?

A. I had contact with them because by then they had already become our customers.

Q. So you definitely remember having contacts with them before the third and fourth contracts?

A. Yes, but in what way I contacted them I don't know, I can't remember.

Q. Now, would you look at P1 (6), the schedule of deliveries under the four earlier contracts. Now, you remember Mr. Bernacchi having questioned you about this schedule? *Exhibit P1(6)*

A. Yes.

Q. We know that the third and fourth contracts were made in December 1970.

A. Yes.

Q. And you have said that you did have contact with Kamsing before the third and fourth contracts.

A. Yes.

Q. We also know from this schedule that the deliveries under the first and second contracts continued after December 1970 when the third and fourth contracts were made.

A. Yes.

Q. And we know from the schedule that under the first contract there were deliveries in January and February, 1971.

A. Yes.

Q. Under the second contract deliveries in January, February and March 1971.

A. Yes.

Q. All after the making of the third and fourth contracts?

A. Yes.

Q. All after you had begun contacts with Kamsing?

A. Yes.

Q. Are you still sure you never had any contacts with Kamsing concerning deliveries under the first and second contracts?

A. Before the signing of the agreements, of course I did not even know them at all, but even after the signing of the first two agreements I did not know them and I came to know them only gradually in the course of transactions between the two firms.

Q. Come, come! Mr. YEN, you had contacts with them and you were sure about this before December, 1970. Are you still sure you did not have contacts with them concerning deliveries under the first and second contracts after December, 1970?

A. Before the signing of the first two contracts, I did not know Mr. MUI and Miss MUI and I did not even know of the existence of Kamsing.

Q. Would you please answer the question? Are you still sure you had no contacts with them concerning deliveries under the first and second contracts?

A. I'm sorry, I can't remember.

Q. You can't remember. So when in chief, you said 'they never telephoned to me at all about deliveries under the first and second contracts,' that is no longer correct?

A. They did not telephone with me at all regarding the transaction.

Q. Mr. YEN, Mr. YEN — all right. Now, you are quite sure they did telephone you for deliveries under the third and fourth contracts?

A. Yes, because by that time I had come to know them quite well.

Q. By that time, you had come to know them quite well. Now, the first delivery under the third contract was in March, 1971, if you look at the schedule.

A. Yes.

Q. The first delivery under the fourth contract was in February, 1971.

A. Yes.

Q. Now, coming to the first contract, there were deliveries also in February, 1971, and under the second contract there were deliveries in February and March, 1971.

A. Yes.

Q. So that deliveries under the first two contracts were overlapping the deliveries under the third and fourth.

A. Correct.

Q. Now, if there was contact between Kamsing and yourself concerning deliveries under the third and fourth because you had already come to know them well, surely there must also have been contacts towards the end of the deliveries under the first and second contracts?

A. Yes.

Q. So on reflection, do you now say that Kamsing might have telephoned you concerning deliveries under the first and second contracts?

A. I cannot remember.

Q. Now, you were asked to look at that schedule by your counsel and you were asked whether there was anything special about the deliveries in these four cases.

MR. BERNACCHI: My Lord, I'm obliged if my learned friend quotes me right, if he quotes at all. I was then dealing with a point that the defendants had given a few months over the time to their customers.

MR. SWAINE: I was going to come to this because it is a long question. I don't want to point too much to the man at one time.

Q. I will give the actual question and answer, Mr. YEN. The question was: "P1 (6) is the schedule of actual deliveries?" *Exhibit P1(6)*

A. Yes.

Q. "It shows the delivery after the contract date for delivery."

A. Yes.

Q. And you said "yes", and the question was: "Was there anything special about the plaintiff?" The answer was "no."

A. Correct.

Q. Now, I would just like to clarify this, Mr. YEN: under the first contract, the contract delivery period was June to September, 1970.

A. Yes.

Q. Up to September, 1970, the plaintiff had accepted a total of 33.25 bales.

A. Yes.

Q. Out of the contract total of 200 bales, which means they had accepted less than one-sixth at the end of the contract period.

A. Yes.

Q. Was that of any concern to Tai Hing?

A. Tai Hing's attitude was based on two considerations: one that they would allow this, they would put up with this provided that the price of yarn would not rise sharply; and secondly, provided that we did have the goods to supply them; and third, that the date I was taking delivery would not be too far off from the expiry date of the contract.

Q. I see, there were three provisos.

A. Yes.

Q. Was the first proviso in operation by September, 1970, namely, then had the price gone up sharply?

A. No.

Q. The second proviso, did Tai Hing have enough goods to supply?

A. Yes.

Q. And the third proviso, that the date was not too long beyond the contract date, was that satisfied?

A. Not too long.

Q. So is it your evidence that in the case of the deliveries under the first contract, Tai Hing was not concerned — was not anxious?

A. Not that we were not concerned, but we knew that there were those three conditions which I have just mentioned and we would not suffer any loss and therefore we continued to supply them under the contract.

Q. So to quote the language used by you in regard to the fifth contract, "Tai Hing was not distressed at the deliveries under the first contract."

A. Yes, not that we were unconcerned, we were able at that time to oblige our customers.

Q. I will put it to you in another way, Mr. YEN: you were asked in regard to the fifth contract where the intake by Kamsing up to the end of the contract period was 520 odd bales, about one-third of the total.

A. Yes.

Q. And the question was: "Were you distressed by this comparatively low intake?" Your answer was: "I was very distressed — very distressed."

A. Yes, I did say that.

Q. You remember your evidence. Now, I will ask you in regard to the first contract where at the end of the contract period only one-sixth had been absorbed by Kamsing, was Tai Hing distressed.

A. As I have said, not that we were unconcerned, but there was no violation of the three conditions I have mentioned; there was no fluctuation in price and, moreover, there was only a small quantity involved.

Q. Would you answer the question in the form in which you answered it in chief in regard to the fifth contract? In regard to the first, was Tai Hing distressed?

A. Yes.

Q. They were distressed?

A. Yes.

Q. All right.

COURT: You just said the exact opposite.

A. My Lord, the reason is regarding the first contract the total quantity is only about 200 bales.

COURT: You have also said that you were anxious and you were not anxious. How can both be right?

A. Regarding which contract?

COURT: The first contract.

A. Regarding the first contract, I knew what was going on, but I wasn't worried because the amount involved is small.

Q. Now, the question is: were you distressed? I am using the very same word used by your counsel to which you seemed to have no answer in reply in regard to the fifth contract.

A. Yes, I was distressed — I was distressed regarding the fifth contract because it was a much larger quantity and the price had gone up sharply.

Q. Were you distressed over the first contract?

COURT: Yes or no?

A. I was not distressed.

Q. Let's look at these conditions, these provisos, Mr. YEN. In September, Tai Hing knew that Kamsing had only absorbed one-sixth. How could Tai Hing have known in September that the third proviso would be fulfilled, i.e., that Kamsing would take the rest before too long after the contract date?

A. Regarding the first contract, there was no reason why I should be so impolite to a customer, so discourteous because price was not rising, we had enough supply for them and there was only a small amount involved.

Q. Ah, but what about your third proviso, Mr. YEN? Did you know in September, 1970 that they would absorb the rest fairly quickly? **10**

A. No, I did not know.

Q. You did not know. Therefore, the third proviso was not satisfied in September, 1970?

A. Supposing a contract expires today, but they kept on taking delivery in the next few months, then that condition is still fulfilled although a long time has elapsed, as long as they keep on taking delivery.

Q. So you don't know until towards the end of the actual delivery whether the third condition will be fulfilled?

A. No, no, suppose I give them, say, three to five months to take delivery and they took no delivery at all, then I could tell them that the contract had long expired and they could no longer take delivery. **20**

Q. Well, Mr. YEN —

A. Only time would tell.

Q. Yes, would you please answer the question? It is not until towards the end of the actual delivery that you will know whether the third condition is fulfilled?

COURT: That is a comment, I think, in respect of this — I mean, it stands to reason.

MR. SWAINE: Yes. **30**

Q. After September 1970, did Tai Hing approach Kamsing to accelerate its intake under the first contract?

A. No.

12.26 p.m. Court adjourns.

2.30 p.m. Court resumes.

Appearances as before.

XXN. BY MR. SWAINE: (continues)

Q. Mr. YIM, in regard to the old deliveries, I will remind you of your evidence-in-chief when you said, "In regard to the third and fourth contracts, prices had not gone up considerably, and not too much time had elapsed after the delivery period", and that was in answer to my Lord.

A. Yes.

Q. In answer to your counsel, you went on to say, "Of course, we could not allow this to take place if there was a considerable rise, or lapse after the last date of delivery as specified by the contract."

A. Correct.

Q. So, I am reminding you that in your evidence-in-chief, you referred to two conditions: one — whether or not the price had gone up considerably, and two — whether much time had elapsed after the delivery period.

A. There is also a third condition.

Q. Yes, the third was added by you this morning, in cross-examination, when you said it also depended on the supply of Tai Hing.

A. Yes.

Q. And you have now added a fourth, have you not, because you have also said, in the course of this late morning's evidence, that it depended on how much yarn was outstanding.

A. No, I did not say it depended on how much yarn was outstanding, I said it depended upon the quantity of the yarn under the contract.

Q. Oh, I see, so in any case, you do say there is a fourth condition, it depended also on how much yarn fell within the contract.

A. Yes, it depended upon whether there was a lot of yarn, or only a small quantity of yarn covered by the contract.

Q. And what about the amount of yarn outstanding at the end of the contract period, did you take that into account?

A. I also took that into account, but that would be of secondary importance; what was most important was the price.

Q. You see, this morning, when I questioned you about the first contract and pointed out that in September — by September, only one-sixth had been absorbed by Kamsing, you said the amount not absorbed was not very large.

A. No, I did not say that.

Q. Perhaps I misunderstood you.

COURT: You made the point that there was only a small amount of yarn involved, same thing as Mr. Swaine said.

MR. SWAINE: Yes, I am obliged, my Lord.

A. Yes, I said the amount of yarn purchased under that contract was small, not the amount outstanding.

Q. I see.

COURT: What you said was, "The amount of bales involved", you only mean the amount outstanding under the contract in that context.

A. Yes, my Lord, yes.

Q. All right, now, under the second contract — and I would like you to look at P.1 (6) again — the amount quoted there was 500 bales, which was more than twice the amount under the first contract.

A. Yes.

Q. And by September, which was the end of the contract period, Kamsing had absorbed 239 bales.

A. Yes.

Q. Which was less than half of the total contract amount.

A. Yes.

Q. Was Tai Hing, in September, distressed at the late delivery under the second contract?

A. During that period, prices did not fluctuate very much, and we would not be seriously affected. As I said, the most important point was the price.

Q. The most important point was the price; the answer is, you were not distressed.

A. We were not seriously distressed.

Q. Was Kamsing told to accelerate its intake under the second contract?

A. No.

Q. And under the third contract, deliveries did not begin until after the contract period.

A. Yes.

Q. So, also, under the fourth contract.

A. Yes.

Q. Was Tai Hing distressed at this late intake by Kamsing?

A. We were concerned, but not distressed, in that the price was relatively stable, and we were not seriously affected.

Q. And was Kamsing told to accelerate its intake under the third and fourth contracts?

A. No.

Q. Now, under the fourth contract, they should have taken it all in January, 1971.

A. Correct.

Q. But they didn't take it all until October, 1971.

A. Yes.

Q. That is, they were nine months late in fulfilling the contract.

A. Yes.

Q. And is it your evidence that between January and October, 1971, there was no real rise in price?

A. Yes, correct. As regards the yarn delivered in October, we at first thought that we had delivered all the yarn under the contract; we later discovered that we had failed to deliver the 2.3 bales, and therefore this amount was delivered in October.

Q. Yes, and in September, there were three bales, was that an omission on Tai Hing's part too?

A. No, I am only talking about the 2.3 bales.

Q. All right, and in September, was Tai Hing distressed that Kamsing had not yet absorbed the full amount?

A. No.

Q. Is it your evidence that between January and September, 1971, there was no real rise in price?

A. There was not very much fluctuation in price, first of all; and secondly, the quantity under the contract was a small one.

Q. So both factors were taken into account.

A. Yes.

Q. Now, I would suggest to you, Mr. YIM, that the real reason Tai Hing was not distressed that deliveries were running beyond the contract period in all four contracts was because no delivery period had actually been agreed with Kamsing.

A. I don't agree.

Q. Now, you said in your evidence-in-chief that within the delivery period, it was all right for Kamsing's intake to fluctuate, but not outside the delivery period.

A. May I have your question again?

Q. Yes, I will put it to you in the form that it was asked, the question was, "It was also said by Mr. and Miss MUI that you consented to not be bound to take delivery within any specified period because of the fluctuating requirements of the plaintiffs' customers", and your answer . . .

A. That was stated in the contract — the period of delivery.

Q. Mr. YIM, this is the question as put to you by your counsel, your answer was, "Within the delivery period, yes, but not outside the delivery period", now, do you remember that?

A. Yes, I do.

Q. Was this something you discussed with Kamsing, or was this just your statement of your general understanding?

A. When I signed the agreement, I never thought of what might happen after the contract had expired; what I had in mind was everything happening during the period of the contract.

Q. Well, take this step by step — did you discuss with Kamsing that it would be all right for them to fluctuate their requirements during the delivery period?

A. I told them there could be fluctuations, but not too much, and that we could always discuss the matter.

Q. I see, and when did you tell them that?

A. When we were negotiating for the contract, namely, the fifth contract.

Q. I see, was that something you said to Miss MUI at the plaintiffs' factory?

A. Yes, yes.

Q. And did you make mention of fluctuations outside the delivery period?

A. No.

Q. No, although, of course, by March, 1971, you knew that under the first four contracts, there had been considerable fluctuations outside the contract period, under the first four contracts.

A. Yes, I knew about it, but I did not speak to them because the price was stable, and the amounts involved were small.

Q. Now, you said that you were very distressed at the end of 1971 when Kamsing had only absorbed 520 bales under the fifth contract.

A. Yes.

Q. And had the price gone up by the end of 1971, compared to March, 1971?

A. The price had not gone up considerably, it was going up gradually, but the amount under the fifth contract was very large.

Q. So, are you saying that this was one case in which it wasn't price that was all important, it was the amount involved that was all important?

A. I was rather anxious because price was going up, and at the same time, the amount was very large.

Q. But the price rise at the end of 1971 was a small factor, was it not?

A. Look at it this way, if there were 1,000 bales, and prices had gone up by $100, there would be a difference of $100,000 in price, so the amount was important.

Q. I see, you mean, in this case, the amount of money involved rather than the price was all important.

A. The total amount of money, yes.

Q. And as a result of your great distress, you say you telephoned Miss MUI and you asked her to take delivery as quickly as possible.

A. Yes.

Q. And you say you also sometimes telephoned Mr. MUI to tell him the same thing.

A. Yes.

Q. And all this would be at about the beginning of 1972.

A. The first half of 1972.

Q. Before there was any substantial rise in price.

A. Price had already started to rise.

Q. Isn't it a fact, Mr. YIM, that the price of the cotton yarn had always been on the rise, from the time that Tai Hing first did business with Kamsing, it has been a matter of degree. If you look —

A. I did not pay too much attention to the rise in price during the time of the first four contracts because the quantity involved was small, but I became anxious, and I paid attention to the price after the fifth contract.

Q. Would you look at contract one, June 1970, for twenty count yarn, the unit price there is $1,000.

A. Yes.

Q. And would you then look at contract four, in December 1970, where the unit price is $1,060.

COURT: Twenty count.

Q. Twenty count.

A. Yes.

Q. Then would you look at contract two, in June 1970, for thirty-two count, where the unit price is $1,280.

A. Yes.

Q. Contract three, in December, 1970, also for thirty-two count, where the unit price is $1,290.

A. Yes.

Q. And then contract five, for thirty-two count, in March 1971, where the unit price is $1,335.

A. Yes.

Q. So the price of yarn has always shown this tendency to rise, it has been a matter of degree.

A. But you must know that the first contract is only for twenty count yarn, whereas the fifth one is for thirty-two count yarn.

Q. Mr. YIM, I made a special effort to separate these two counts. As regards the second contract, thirty-two count, in June 1970, the unit price was $1,280.

A. Yes.

Q. And under the fifth contract, thirty-two count, the unit price in March 1971 was $1,335.

A. Yes.

Q. Would you agree that the yarn has tended to rise, it has always been a matter of degree.

A. It only rose a little.

Q. And was the early 1972 price, likewise, a little more than the March 1971 price for thirty-two count cotton?

A. Well, I cannot be sure, but at the time, when I telephoned them, I believe the price per bale had gone up by less than $100.

COURT: In 1972.

A. In 1972.

Q. As compared to 1971.

A. As compared with the price in the fifth contract, but I don't know exactly how much.

Q. According to your evidence-in-chief, you had "told them that the contract had expired, there was still time to take delivery, and that if too long a time had elapsed, and the prices had gone up, I won't be able to help them even if I wanted to."

A. Yes.

Q. So, was your position in early 1972 that it was still all right for them to take delivery, but if they waited too long, then you might not be able to help them?

A. Yes, because price was on the rise, but only gradually; I was afraid that there might be a very sharp rise resulting in our suffering a loss of over $80,000 to $100,000, in that case, there might be a dispute between us. To avoid that, I told them to take delivery as soon as possible.

Q. Mr. YIM, you mean you anticipated all this in the early part of 1972?

A. But this was something which I had to tell them.

Q. Did you . . .

A. I did not anticipate.

Q. But it was in your mind, was it?

A. Price was rising up, and should price rise up drastically, then what?

Q. That was in your mind in early 1972.

A. I was thinking of an eventuality.

Q. Was that in your mind in the early part of 1972, or are you saying that now in retrospect?

A. Well, at that time, price was going up, I was hoping that it would stop going up, but I was also afraid that should it go up sharply, then what was going to happen?

Q. Yes, and you were thinking those thoughts in the early part of 1972.

A. I am not saying that I had the foresight, but as the business manager, I had the duty to tell my customers.

Q. So you did think about it.

A. I was thinking that if there was no big fluctuation in price, then everything would go on smoothly, but what if prices went up sharply, then what would happen?

Q. Was that a question you put to yourself in the early part of 1972? "Yes" or "no", Mr. YIM?

A. I could not foresee what the price would be, but as business manager, I had the duty to tell this to my customer.

Q. Was it in your mind in the early part of 1972 that it was possible prices might rise very sharply thereafter? **10**

A. No, I am not saying that, I was not sure that price was bound to go up sharply, but at that time, prices were already going up, and I was afraid of an eventuality should it go up sharply.

Q. So you had the eventuality in mind — whether or not it might happen was something else.

A. I had the duty to tell them, at that time, prices were already going up, what if it should eventually go up very sharply, what would happen? I had to tell them.

MR. SWAINE: My Lord, this is a fair question, I think the witness ought to be directed to answer. **20**

COURT: Yes, will you put it again?

Q. In the early part of 1972, was it in you mind that prices might rise sharply?

A. No.

Exhibit P1(8)
Exhibit P1(9)

Q. No, all right, do you agree, Mr. YIM, that it was not until the plaintiff, who wrote a letter of complaint to Tai Hing in July, 1973, that there was ever anything in writing from Tai Hing to Kamsing about the contract period? This is P.1 (8), my Lord, the plaintiffs' letter, and Tai Hing's reply, P.1 (9).

A. This was the first letter ever written by Kamsing, but before that, **30** everything was conducted orally.

Q. And Tai Hing's letter in answer was the first indication in writing from Tai Hing that Kamsing was in the fault because the contract period had passed.

A. Yes.

Q. All right, going back to the conversations in early 1972, you also said in-chief, "I told her not to delay, if we should have a tight schedule, then there was nothing I could do to help her."

A. Correct.

Q. And was the position that when you made that call, Tai Hing did not, as yet, have a tight schedule?

A. Tai Hing did not, as yet, have a tight schedule.

Q. So, when you made these phone calls in the early part of 1972, the price was not yet a real factor, Tai Hing's schedule was not a real factor, but you felt that because of the size of the contract, you owed a duty to your customer to let them know.

A. Yes.

Q. I see, and in your evidence-in-chief, you also said that between January and July, 1972, you wanted them to order more so you could fulfil the contract.

COURT: "You wanted them to order . . . "?

MR. SWAINE: Yes, he wanted them to take more so that they could fulfil the contract.

COURT: Yes.

Q. And would I be correct in saying that this trend of higher price continued through the first half of 1972?

A. Yes, the trend was towards higher prices.

Q. Now, by July of 1972, roughly, how much had the price gone higher than the price in March, 1971? You said it was less than $100 more at the end of 1971, what was the increase by July, 1972?

A. Well, I don't remember by how much, but there was a rise in price.

Q. Would it have been over $100 by July, 1972?

A. I am afraid I don't remember.

Q. You are afraid you don't remember. But you do remember you said, "In August, the price of yarn started to rise."

A. Yes, by August, price had gone up, and besides, we did not have enough yarn to deliver to our customers.

Q. In August, which you have pinpointed, how much more was the market price compared to the contract price?

A. Well, I am afraid again I don't know, I must look up the files.

Q. Was it a sharp rise from one month to the other, from July to August?

A. Not a very sharp rise, but we had a very tight schedule, and we could not supply enough yarn to all our customers.

Q. So when you said, "In August, the price of yarn started to rise", what you really meant it continued on its upward trend.

A. Yes, price did not come down, first of all, it continued to go up, and besides, we were not producing enough to meet the demands of our customers.

Q. Up to July, 1972, you could have supplied Kamsing all they wanted.

A. Yes, they did not want it, so I pressed them.

Q. Had the price — I am sorry — at the time when the market price was already in excess of the contract price, you don't remember by how much.

A. Yes, price had gone up by, I believe, less than $100.

Q. And you were prepared still to supply at the old price up to July, 1972.

A. Yes.

Q. So Kamsing could have taken your entire output under the contract, and made a profit on resale if it was so wanted.

A. I don't know about that.

Q. You said that in August, you had a tight schedule, and you told Kamsing about it.

A. Yes.

Q. And you say you reminded them of the warning you had given during the first half of 1972.

A. Before August, I pressed them to take delivery of the goods, after August, they pressed me to deliver them the goods. Then I told them that what I had told them earlier on had come to pass.

Q. I see, and what was it had come to pass?

A. I had forewarned them about the rise in price, and I told them also that they should not blame me if I could not supply them — if they should come when I could not supply them with the goods.

Q. And was that something you said round about August, 1972?

A. Yes, every time they telephoned me to ask for the goods, that was the answer I gave them.

Q. But I thought that in August, we saw simply a continuation of the trend, and there was no sharp rise in August.

A. But they were pressing us for delivery, and we did not have enough goods to deliver to our customers.

Q. I would remind you of your defence — paragraph ten, my Lord — where Tai Hing admits and affirms that the price of yarn increased sharply from about the beginning of 1973.

A. Yes.

Q. And do you agree that it is correct that the price of yarn increased sharply from about the beginning of 1973?

A. Yes, yes.

Q. Do you agree that it did not show any sharp rise in August, 1973?

A. I agree.

Q. Nevertheless, you say that you reminded them that the warning you had given in the early part of 1972 about the price going up had come to pass.

A. Yes, I said, "I told you of this possible eventuality, and this eventuality had at last happened."

Q. It didn't really happen until early 1973, Mr. YIM.

A. Price went up drastically in 1973, but it started going up in August, 1972.

Q. Was it not on the way up throughout 1971 and 1972?

A. No, the rise in price was gradual in 1971, and there were signs of a more sharper rise in 1972. By 1973, prices went up uncontrolled.

Q. Yes, but by July, 1972, in your evidence, it had gone up by not more than $100 compared to March, 1971.

A. Yes, approximately less than $100.

Q. All right, in July, 1972, only seven bales were taken by Kamsing, and you were asked whether you requested them to take more, and you said "yes".

A. Not only that I asked them, I pressed them.

Q. So you got this abrupt change from July, 1972 when you were pressing them to August, 1972 when they were pressing you.

A. Yes.

Q. I see. You were asked whether in July, 1972, they explained why they were taking this very small amount.

MR. BERNACCHI: I think — I cannot be sure — but I think my question had to do with the early part of 1972, i.e. up to July, not just in July.

Q. I accept that. You were asked whether they gave any reason for taking — I think it must have been July, 1972 because the reference

was to seven bales; the next question was, explain the reason for this very small amount — all right, in any event, you say they gave no reason for taking these small amounts.

A. They kept on telling us that they would soon take delivery of all the goods, they told us to be patient for a while, and that they appreciated our good intentions and so forth, without meaning what they said.

Q. Without giving any specific reasons.

A. No.

Q. But you knew that at this time, in the early part of 1972, they were expanding their factory.

A. Yes.

Q. And Tai Hing actually sent one, or more, mechanics to help install the — at least one of the machines.

A. Yes, he spent three days there.

Q. Yes, and yet, you maintain that you got no explanation from Kamsing as to why their intake in the first half of 1972 was small.

A. They gave no explanation, and an increase in machinery had nothing to do with the original schedule of production.

Q. How do you know that?

A. Because I know that they did not increase the number of their weaving machines.

Q. How did you come to know that?

A. They told me that they were merely increasing their machines for dyeing piece-goods.

Q. And you deduced from that that that should not have affected their intake of yarn.

A. Nor did they tell me.

Q. Sorry?

A. Nor did they tell me about this.

Q. Now, do you recall in 1972, going to the mill — sorry — going to the factory of Kamsing in the company of Mr. CHONG?

A. Yes.

Q. In 1972?

A. Anyway, I had been there, but I don't know if it was 1972.

Q. You remember if this was just after the plaintiffs had installed their new machines?

A. Yes, their dyeing machines which I want to see.

Q. You did see the new machines?

A. Yes, new dyeing machines.

Q. And we have the evidence of Mr. Mui and Miss Mui that the installation of new machines was completed about July 1972.

A. I don't know.

Q. Would you accept that you went to look at this new machine just after the middle of 1972?

A. I am sorry, I cannot remember the date.

Q. Why did you go and look at the new machine?

A. I really cannot give a special reason. I was not interested in those machines because I am a layman. It is just because they are customers and we must maintain some form of communication with them.

Q. Wasn't the reason this, Mr. Yen, that you went to look at the new installations in order to satisfy yourself that Kamsing did really require more yarn in the latter half of 1972?

A. No.

Q. And did you not promise Miss Mui that after the end of the year Tai Hing would be able to supply Kamsing all its requirements?

A. No.

Q. Do you remember in about October 1972 going to a dinner at the Golden Crown Restaurant on Kamsing's invitation?

A. I cannot remember the date but I have been there for dinner.

Q. More specifically they invited you to meet their customers in the U.S.A. — the C.B.S. Corporation.

A. They told us that they would be inviting their customers — foreign customers. They gave us the date and said they would welcome personnel from Tai Hing to attend, but during the party we sat at different tables. We did not sit with their customers.

Q. Were you introduced to the foreign customers?

A. Yes, we were.

Q. You were introduced as Kamsing's supplier of yarn?

A. No.

Q. Of that you have no doubt. You are quite sure?

A. I do not know English and there was one person who was interpreting to me what was being said in English. He didn't tell me that we were being introduced as their supplier of yarn.

Q. I am going back to August 1972 which appears to be the vital month in this case. You said that from August 1972 what you were, in fact, supplying to Kamsing was what you had left over after supplying your other customers?

A. That was the answer I gave them when they kept on pressing me for delivery.

Q. Is that answer true?

A. Yes, the answer is true.

Q. And what you were supplying Kamsing from August was what was left over after supplying your other customers?

A. Yes.

Exhibit P-1(7a)

Q. If you look at the schedule P-1 (7a) — now, you have said that from August your schedule became very tight. We will come to the schedule in a moment, but you have said that from August your schedule was very tight?

A. Yes.

Q. And did that situation get progressively worse? Did it get tighter by the month?

A. The schedule became more and more tight.

Q. Became tighter with every month that passed?

A. Yes.

Exhibit P-1(7a)

Q. I would like you please to look at P-1 (7a). You will see that in August you supplied them 38.25?

A. Yes.

Q. Your schedule was tight that month?

A. Yes.

Q. In September you supplied them 89?

A. Our schedule was also tight.

Q. But not so tight as August since Kamsing got more?

A. That was I was so confused. She kept on bothering me all the time — Miss Mui — I couldn't stand her any more.

Q. So you gave her more than your left-overs.

A. There was nothing else I could do.

Q. Is that the answer, Mr. Yen, you were giving her more than your left-overs?

A. That is correct. She bothered me with three to four telephones a day.

Q. October you gave her 62 bales — less than September but more than August. In November you gave her 71.8 — more than October, less than September, more than August?

10 A. Yes.

Q. Are you saying that your schedule was becoming progressively tighter month by month but you gave in to Miss Mui's importuning and you were, in fact, giving her more than your left-overs?

A. Yes, I supplied to her what I should have given to other customers.

Q. I see. A few minutes ago when I reminded you of your examination-in-chief and you agreed that, in fact, from August they were only getting the left-overs, that evidence is not true?

A. Yes, that was my intention to sell her only what was left over. But, if I may say, she forced me to a dead end. There is nowhere I could
20 turn to. She kept on bothering me without end.

Q. You agree that the evidence-in-chief you gave earlier was not true?

A. I knew I was wrong in supplying her what was not left over, but I couldn't stand her any more.

Q. Were you also getting calls from Mr. Mui?

A. Yes, at the same time Mr. Mui was pressing.

Q. And were there many occasions when you refused to answer the calls of Mr. Mui and Miss Mui?

A. Yes, I was afraid.

Q. I see. When Mr. Mui says that in 1973 he tried many times to get
30 you but was told you were not in or out of the office — as far as that is concerned — he is telling the truth?

A. I don't know what he meant. I lived in the factory. My home is in the factory.

Q. What he meant basically was you were avoiding his calls. Is that true?

A. I was not avoiding all his calls. Some of his calls only. Suppose he telephoned twice, I might answer his call once on a day.

Q. So, Mr. Mui and Miss Mui were constantly telephoning during the latter part of 1972 and early part of 1973?

A. Yes.

Q. You found it very embarrassing to the point where you were avoiding at least some of his calls?

A. She kept on telephoning me. Sometimes I had the misfortune of answering the call, but eventually in May 1973 when I delivered the last bales to her I decided never to answer their phones again.

Q. The importuning kept up right to May 1973?

A. Yes. **10**

Q. And as far as you were concerned they had no right to importune because you had already warned them in the early part of 1972 that they'd better hurry up and you have told them in August 1972 that your warning had come to pass, is that correct?

A. I used the words — when I spoke to them I used the words speaking from my conscience.

Q. All right. And despite what you thought to be your rights, despite this constant importuning, your embarrassment, you never once wrote them a letter and it was not until Kamsing complained in July 1973 that there was anything in writing from Tai Hing? **20**

A. Correct.

Q. Now, as regards the last two bales in May, you said that you spoke to Miss Mui?

A. Yes.

Q. She telephoned you first, you said in-chief.

A. Yes.

Q. You returned her call?

A. She telephoned me. I told her that the two bales to be delivered on that day would be the last two bales. I asked her not to telephone again and then to make sure she won't telephone again I rang her **30** up and told her, "Please don't telephone me again".

Q. There were three phone calls — herself to you, you to her, and then again you to her. (To interpreter) She to him, he to her, and then he to her again.

A. Two telephone calls — she to me and I told her that those were the last two bales, and then I telephoned her just to remind her that apart from those two bales there would be no more and I asked her not to telephone me again.

Q. She phoned you and that is when you said these would be the last two, but after the two were delivered you phoned again and said, "That is it".

A. Yes. I told her that it would be unnecessary for her to telephone me again.

Q. You have very distinct recollection of this event. Yes or no, Mr. Yen?

A. I feel very annoyed about those repeated phone calls because I believe that Tai Hing had done its best for them and yet they kept on bothering me.

Q. Yes. All this made a big impression on you and you had a very distinct recollection of this particular event. Just yes or no, Mr. Yen?

A. Further they were being ungrateful. I had been treating them so well.

Q. You had a very distinct recollection of these phone calls?

A. Yes.

Q. All right. Would you explain how it is that in the Defence of Tai Hing at paragraph 8 (E) it was originally said that you spoke to Mr. Mui, not Miss Mui, about the two bales being the last?

MR. SWAINE: Your Lordship will remember the application for amendment made after I have begun calling evidence.

A. No. I said that it was either Miss Mui or Mr. Mui with whom I spoke over the phone concerning those last two bales. I could not be sure which one because there had just been too many phone calls from those two persons.

Q. Are you saying that that is the evidence you have been giving up to this time? You have said in evidence you weren't sure whether it was Mr. Mui or Miss Mui.

A. In connection with those two bales of yarn, I spoke to Miss Mui over the phone but I don't know about the other.

Q. I am not asking you about the others. You are sure you spoke to Miss Mui about these last two bales and I ask you if you can explain why in Tai Hing's Defence the original statement was that you spoke to Mr. Mui.

MR. BERNACCHI: Surely that is a comment rather than a question to the witness.

COURT: Yes. You say now it is Miss Mui you spoke to.

A. The last telephone was with Miss Mui. The last telephone conversation I had was with Miss Mui in connection with those two bales. I cannot remember the other conversations because both Mr. Mui and Miss Mui telephoned me too many times.

Exhibit P1(9)

Q. All right. I would like you please to look at the letter signed by your managing director, P-1 (9). Now, it is in English. I ask that the second paragraph be interpreted to you.

A. Yes.

Q. And from where did Mr. Y. C. Chen obtain this information for the second paragraph of this letter?

A. The accounts department.

Q. You did not supply this material to Mr. Y. C. Chen?

A. Of course I had to put Mr. Y. C. Chen in the picture as to what happened. I couldn't bother him with details about the daily telephone calls that I was receiving.

Exhibit P-1(8)

Q. Yes. If you look at the preceding letter, P-1 (8), that was Kamsing to Tai Hing, 21st July, 1973. No doubt Mr. Chen spoke to you about this letter.

A. Yes.

Q. You were the sales manager and you had yourself, you say, negotiated this particular contract?

A. Yes.

Q. He must have asked you what is this all about?

A. Yes.

Q. You must have told him what this was all about?

A. Yes.

Q. All right. Now, in paragraph 2 of Mr. Chen's letter where he says, "According to the delivery time stipulated on the contract, that was for April to December 1971, in which duration, after taking part of the quantity contracted, you consequently failed to take delivery of the balance". Is that statement true or untrue?

A. True.

Q. It is true. But we know for a fact that after the stipulated period April to December 1971, Kamsing did take cotton yarn from Tai Hing.

A. Yes.

Q. And the amount they took after the contract period was 555 bales odd?

A. Yes.

Q. Right. I will ask you next to look at a letter in Chinese from Tai Hing to the Hong Kong Chinese Textile Mills Association.

MR. SWAINE: P-1 (11), my Lord. *Exhibit P-1(11)*

A. Yes.

Q. And that was in answer to a letter from the Association dated 18th September, 1973?

A. Yes.

Q. Was Tai Hing's reply drafted by you or by Mr. Chen or someone else?

A. Drafted by . . .

COURT: Who signed this letter?

A. Signed by our secretary.

Q. Is it signed by Mr. Y. C. Chen?

A. Yes.

Q. And by this time, of course, in October 1973 this contract and the relations with Kamsing must have been discussed quite a lot between you and Mr. Chen?

A. No, we did not discuss because we did not anticipate legal proceedings.

Q. I see, all right. Read the last paragraph which of course is in Chinese. All right. Are the contents of that paragraph true?

A. True.

Q. And where the letter says, "Unfortunately, the said factory did not within the period take delivery of the goods but in addition during the interval ceased to take delivery of goods despite repeated requests". Is that true?

A. It is true.

Q. Is it not your evidence, Mr. Yen, that you had reminded them in the early part of 1972 to take delivery and they did take delivery but not enough?

A. I still remember clearly that one of the months in 1972 they took delivery of either one bale or two bales only.

Q. That is March. You've got a good memory there, but let me remind you of my question. Is it not your evidence that during the early part of 1972, up to July and including July of that year, you were asking Kamsing to take more. They did not take enough but they took the quantities set out in that schedule.

A. Yes, in one of the months they took only one or two bales. That was almost nothing.

Q. They took in the first half of 1972 about 150 bales.

A. During one of the months they took only one or two.

Q. Do you still say it is true the statement in this letter — "During the interval Kamsing ceased to take delivery despite repeated requests". **10**

A. Yes.

Q. It is true?

A. Yes.

Q. Your evidence is also true?

A. Yes, and I distinctly remember one month in early 1972 when they only took delivery, I believe, of one or two bales only. That amounted to nothing.

Q. I want to ask you this. Did you in 1973 authorize Mr. Chow to tell Kamsing that Tai Hing would delivery at least 15 bales from May 1973? **20**

A. No.

Q. One last question to put to you, Mr. Yen, and that is to say there is no truth in your evidence that you ever discussed the question of quotas with Mr. Mui or Miss Mui.

A. We did discuss on more than one occasion.

MR. SWAINE: No further questions.

RE-XN. BY MR. BERNACCHI

Q. You said that earlier on in your cross-examination that if ever there was a failing of comprehension "I wrote on a piece of paper". **30**

A. Yes.

Q. So, you, presumably from that you wrote more than once on a piece of paper?

A. I wrote many times.

Q. I think you can understand Cantonese but you can't make yourself understood very well without occasionally writing on pieces of paper?

A. If I could not understand then again we had to rely on writing on pieces of paper.

Q. Whenever either you couldn't understand or you couldn't make yourself understood, you resorted to writing Chinese characters on to pieces of paper?

A. Yes.

Q. Now, you were asked many questions about this visit that Miss Mui and Mr. Mui paid to your own factory.

A. Yes.

Q. In fact, they — you did say that they asked to visit your factory. Just one moment please. Now, was that an exceptional thing for a customer to do to visit your factory or is it done fairly frequently?

A. It is very usual for our customers to visit our factories.

Q. Now, you also said that in one answer that you had 30 or 40 customers?

A. Yes.

Q. Do you mean over a number of years 30 or 40 customers or do you mean at any one time 30 or 40 customers?

A. I mean 30 to 40 customers doing business with me at the same time.

COURT: Doing business with your company?

A. Yes, my Lord.

COURT: That was during these years, of course?

A. Yes, my Lord, during those years.

COURT: Yes.

Q. Now, you were cross-examined and asked many many questions on the words in this contract — contract no. 5 — "cash payment against delivery".

A. Yes.

Q. And you pointed out that in the sales memo it had cash — payment, I mean, payment by post-dated — you said 45 days cheque, or . . .

A. Yes.

COURT: He said . . . ?

MR. BERNACCHI: 45 days after delivery.

A. Yes.

Q. Now, you also said that it wasn't only this customer that you put on the main body of the contract cash payment against delivery. It was many customers on the advice of your solicitor?

MR. SWAINE: All customers.

COURT: All customers.

A. Yes, correct.

Q. Then you were asked did the plaintiffs query it and you said no. **10**

A. Correct.

Q. Now, I would ask you, do other customers or any other customers query it sometimes?

A. No.

Q. I see. It is generally accepted that that is your practice?

MR. SWAINE: Sorry, my Lord, I think this is leading in re-examination.

MR. BERNACCHI: All right.

COURT: Adjourn until to-morrow.

(4.17 p.m. Court adjourns)

IN THE SUPREME COURT OF HONG KONG
ORIGINAL JURISDICTION
Action No. 3627 of 1973

In the Supreme Court of Hong Kong Original Jurisdiction

No. 4
Judgment of the Hon. Chief Justice Sir Geoffrey Briggs
19th February 1975

BETWEEN:

KAMSING KNITTING FACTORY (a firm) — *Plaintiff*

and

TAI HING COTTON MILL LIMITED — *Defendant*

Coram: Briggs, C.J.

Date: 19th February, 1975.

JUDGMENT

The plaintiff carries on the business of a knitting factory. The defendant carries on the business of a cotton mill. The plaintiff seeks to recover damages from the defendant in the sum of $844,158, being the amount that the plaintiff has lost as a result of the the repudiation by the defendant of a contract made between the parties.

By this contract which is dated March 23rd, 1971 the plaintiff agreed to buy 1,500 bales of cotton yarn — described as '20's/1A' — from the defendant. The price was $1,335 per bale. I will call the contract 'the fifth contract'.

The contract is in the English language and contains the following laconic terms (among others):—

" Packing: On Cone
Delivery: April 1971 - Dec. 1971
Margin: Nil
Payment: Cash payment against delivery.
Rebate: ½% "

The contract is a printed form for the sale of yarn to the customers of the defendant and on the back of it bears twenty-two "Conditions of Sale". It is not really in dispute that both parties to the contract ignored these, though the amended defence does make a reference thereto. It is further agreed that neither party to the contract relies on the term referring to payment for the goods. Though it forms part of the contract it was never the intention of either party that payment should be cash payment upon

delivery of the goods. It was always agreed that the plaintiff should have a period of time after each delivery in which to pay. The plaintiff says that it was agreed that 50 days would be allowed. The defendant says 45 days. The sales memorandum of the sale which was exhibited by the defendant and which is a document for internal use within the defendant company states the period to be 45 days. However, in practice the plaintiff paid for each delivery with cheques which were post-dated 49-56 days. On one occasion the period was 72 days but for the most part the period was 50-53 days. There is no record that the defendant objected to this method of payment.

I was told that the words "cash payment against delivery" were inserted in the contract upon the advice of the defendant's lawyers: that such words were always inserted into the defendant's contract for the sale of yarn, while the invariable practice was to give the purchaser credit. I cannot believe that any lawyer would advise that a client should insert a term in a written contract being fully aware that it does not represent the intentions of the parties who are to be bound by that contract.

The plaintiff's case is that the parties treated the term in the written contract as to delivery in a similar manner: that is that it was never intended to bind the parties. The term reads: "Delivery: April 1971 - December 1971". It was not, according to the plaintiff, the intention of the parties that the whole 1,500 bales should be delivered before December 1971, or before the end of the year if the months are to be read inclusively.

Both parties are agreed that the plaintiff did not require a fixed number of bales to be delivered each month. The method of business was either the plaintiff phoned their requirements to the defendant or the defendant would ask the plaintiff how many bales they wanted to be delivered during the ensuing month. On some occasions the defendant would telephone the plaintiff and state that they had so many bales ready if the plaintiff wished to take delivery. But the point is that it was the plaintiff who settled the amount of bales. At no time did the defendant deliver without being requested to do so by the plaintiff. Though the contract is dated March 23rd, 1971 the first delivery was not made until July 1971. Though the written contract gives December 1971 as the date for the completion of delivery, deliveries actually continued until May 1973. That is to say, seventeen months after the last date given in the contract.

It is quite obvious to me that the parties never intended to be bound by the delivery clause as stated in the written contract. The evidence clearly shows that this was so.

A considerable portion of that evidence was devoted to four previous contracts of a similar nature made between the same parties. In each case the contract contained a clause stating that delivery was to be within a certain period. In each case that period was not adhered to. The first and fourth contracts were contracts for the delivery of 20 count cotton yarn; the second and third were for 32 count cotton yarn as was the fifth contract, which is the subject matter of this action.

The delivery period under the first contract was expressed to be June - September 1970: deliveries under the contract continued up to and including February 1971. The delivery period under the fourth contract was expressed to be the month of January 1971. No deliveries were made in that month, but deliveries started in February 1971 and continued until October of that year.

The delivery period under the second contract was expressed to be June to September 1970: deliveries, however, continued until March 1971. The delivery period under the third contract was the months of January - February 1971. No deliveries were made during that period. Deliveries started in March 1971 and continued until July 1971.

As I have already said the deliveries under the fifth contract continued for 17 months after the end of the delivery period stated in the contract, that is for a period nearly double the length of the delivery period stated in the contract.

The evidence also shows that new contracts were entered into when deliveries under the previous contract were still outstanding. The first and fourth contracts were contracts for the sale of 20 count yarn. The fourth contract was made in December 1970 for delivery of 50 bales in January 1971. But in December 1970 there were still 30 bales under the first contract undelivered.

The second and third contracts were contracts for 32 count yarn. When the third contract was made there still remained some 65 bales undelivered under the second contract. And it is clear that no deliveries were made in January and February under the third contract at all. That is to say, no deliveries were made under that contract during the entire delivery period as stated. However, during that period deliveries were made under the second contract.

The position is similar as regards the third and fifth contracts, again, contracts for 32 count yarn. The fifth contract is dated March 23rd, 1971, and delivery was stated to begin in April. But at that date only three bales out of two hundred under the third contract had been supplied. Deliveries under the fifth contract did not commence until July 1971. It would be odd indeed if the plaintiff had stipulated for further quantities to be delivered during a time when so much was still available to them under the third contract.

When each delivery reached the factory of the plaintiff it was accompanied by delivery notes made out by the defendant. And a receipt was made out by the defendant in advance. These documents have been exhibited. They clearly show that for the whole period during which deliveries were made under the fifth contract whether these deliveries were made within the delivery period or not, the defendant acted as if they were acting within the contract. For each of the defendant's documents bears the number 3118/71 which is the number of that contract.

The evidence for the defendant was that the delivery period stated in each contract was a binding term of that contract. However, if I understand him aright, Mr. Yen, who was the business manager of the defendant company said that the defendant company was willing to allow the contracts to overrun the stated period provided that it was not for too long, that there was not a large amount of yarn still undelivered under the contract and provided that the price had not substantially increased. I took this to mean that the defendant would continue to make deliveries under the contract when it was convenient for them to do so.

Be that as it may, I find as a fact that the period of delivery stated in contract 3118 of March 23rd, 1971 was never intended by the parties to be binding on them. The true agreement which can be implied from the conduct of the parties was that the defendant would supply 1,500 bales of yarn at a fixed price for an indefinite period — the plaintiff having the right to call for deliveries. The implication was that if the plaintiff refused to accept or did not call for deliveries within a reasonable time then, of course, it would be open to the defendant to treat the contract as having been broken by the plaintiff provided that the plaintiff had been given an opportunity to accept delivery of the balance of the yarn outstanding within a reasonable time.

Deliveries continued for a long time under the contract. The amounts requested by the plaintiff varied from month to month at their convenience. It is common ground that the defendant did not supply the plaintiff with the quantities they requested as from the latter half of 1972 onwards.

Mr. Yen, who is a witness whose evidence I regard with great suspicion, said that he had told the plaintiff that the contract was at an end in the middle of 1972. I do not understand how on the evidence the contract can be said to have been cancelled for deliveries continued under it. I do not believe that Mr. Yen 'cancelled' the contract. Mr. Yen said that he told the plaintiff that the defendant would only supply such bales of yarn as were not required by their other customers. These were referred to as 'left-overs'. This is not borne out by the facts. For I was also told that the rate of production of yarn by the defendant was a fixed amount, that they had difficulty as from late 1972 in fulfilling the requirements of the other customers so there would be less left-overs for the plaintiff. The figures show that the amounts delivered to the plaintiff between September 1972 and January 1973, both months being inclusive, far exceeded the amounts delivered in the first part of 1972. I do not accept Mr. Yen's evidence on this point. I accept the evidence of Miss Mui. She said that the defendant promised that though he was unable to supply as much yarn as she wanted at that particular time, namely in the last half of 1972 he, the defendant, would be able to supply the plaintiff all they wanted after Chinese New Year 1973. There was, she said, no suggestion that the defendant considered the contract of March 23rd, 1971 had been cancelled, was at an end or had lapsed. She said that, starting in August 1972 the plaintiff pressed for delivery of further supplies of yarn under the contract and that the defendant did not deliver as much as was required by the plaintiff.

The defendant did not treat the contract as having come to an end and they never wrote to the plaintiff cancelling the contract. They continued to supply the plaintiff but as from February 1973, with very small amounts. I am quite sure why this was so. The price of yarn had been increasing since 1970 at a fairly steady rate. And this is reflected in the prices for yarn in the various contracts. However, the price rose very sharply early in 1973. Both Miss Mui and Mr. Yen gave evidence of this most important fact. From that time, of course, the contract was very onerous on the defendant and very advantageous to the plaintiff. The defendant naturally tried to free themselves from the contract and the plaintiff pressed for further deliveries.

As I have said, deliveries continued during February to May 1973 but in very small amounts. The plaintiff continually pressed for further deliveries. Their requests were not met. The last delivery was in May 1973. The plaintiff continued to demand delivery and it would seem, became most importunate.

There was a meeting between Mr. Mui Chok Chue of the plaintiff and Mr. Chow of the defendant at the Golden Crown Restaurant in late May 1973.

What transpired at this meeting is in dispute between the parties. Mr. Mui Chok Chue was emphatic that the expiry of the contract was never referred to. He said Mr. Chow said that the defendant could guarantee delivery of 15 bales per month and mentioned that he had obtained this information from Mr. Yen. Mr. Mui said that was insufficient. Mr. Mui also said he tried to bargain with Mr. Chow. He sought agreement to a new arrangement whereby the defendant would continue deliveries half of which would be paid for at the old contract price and half at the then reigning price of yarn. Mr. Chow did not agree to this. Mr. Mui said the offer of 15 bales was repeated after the meeting in a telephone conversation.

Mr. Chow's evidence agreed with that of Mr. Mui but with two significant differences. He denied that he had made any promise that the defendant would deliver at least 15 bales per month. He said that Mr. Yen had told him (Mr. Chow) that the contract was at an end. He passed on this information to Mr. Mui. He added that the defendant was in difficulties and could not satisfy their other customers. The evidence of this witness was very much slanted in favour of the defendant. He struck me as being a creature of Mr. Yen who would say whatever was necessary to bolster up the case for the defendant. Not only did I not believe his evidence as to the manner in which the fifth contract was negotiated, I do not believe his evidence of eavesdropping on the conversations between the plaintiff and Mr. Yen and his feat of memory in detailing to the court of what those conversations consisted.

I do not believe that Mr. Mui was told that the contract was at an end until he received a letter stating this on July 31st, 1973.

I accept the evidence of Mr. Mui when it conflicts with that of Mr. Chow on this issue. In particular, I do not think that the expiration of the contract was ever referred to at the meeting at the Golden Crown Restaurant.

No more yarn was forthcoming from the defendant so the plaintiff placed orders elsewhere. In particular, on May 30th, 1973 the plaintiff purchased one hundred bales of yarn from another company for $2,400 per bale. This company obtains its yarn from mainland China and it was not disputed that yarn bought from China costs a little less than yarn purchased in Hong Kong. It will be remembered that the purchase price for yarn to be supplied under the contract was $1,335 per bale.

On July 21st, 1973, the plaintiff wrote to the defendant stating that they were in breach of contract. They did not repudiate the contract but said that they required at least four bales per day from the defendant; they referred to the promise of 15 bales per month given by or passed on to them by Mr. Chow and mentioned that they had had to buy and to buy expensively elsewhere.

On 31st July, 1973, the defendant replied that the delivery time under the contract had expired and that since the plaintiff had not taken delivery of all the yarn stipulated for delivery under the contract within the time specified the defendant "treated the contract for cancellation." They then referred to one of the printed conditions on the back of the contract which, as I have already said, were not regarded as being part of the intention of the parties when the contract was entered into.

In view of what had occurred since December 1971, the final date given in the contract, this letter can only be described as jejune. It does not suggest that the defendant could supply the balance of the bales due under the contract nor did it require the plaintiff to accept delivery thereof. Indeed, it has been the case of the defendant that they could not or would not supply the plaintiff. The plaintiff complained to the Hong Kong Chinese Textile Mills Association. This action was begun shortly afterwards.

The defendant's letter of July 31st, 1973 to the plaintiff clearly states that the defendants no longer considered themselves bound by the contract. I have found as a fact that this was the first time the defendant showed an intention not to be further bound by the terms of that contract. The letter is unequivocal. It does not give a reasonable time to the plaintiff to make arrangements for supplies from elsewhere. It must be admitted that the evidence shows that the defendant was increasingly reluctant to make deliveries under the contract during the period February - May 1973, so the plaintiff could not be said to have been taken by surprise by the action of the defendant in July. Indeed, on May 30th, as we have seen, the plaintiff arranged for a supply of yarn from another company.

Be that as it may, at the date of the cancellation of the contract by the defendant the plaintiff was entitled to the delivery of 424.20 bales of yarn at the price of $1,335 per bale.

The defendant relied on section 6 (1) of the Sale of Goods Ordinance. This reads as follows:—

> "6. (1) A contract for the sale of any goods of the value of one hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract is made and signed by the party to be charged or his agent in that behalf."

The defendant's case is that, given that there was an implied contract to extend the period of delivery which was stated in the contract there was no note of memorandum in writing of that implied contract.

I do not think that the defendant can rely on section 6. There was acceptance of, and payment for, part of the goods under the contract. And in addition the delivery receipts, invoices and receipts for payment, for the various deliveries all contain the names of the parties, the sale contract number and the unit price referred to in the contract. In addition, the invoices and receipts are validated by the Chief Accountant to the defendant.

These facts are in my view, enough to satisfy the section. It is not necessary that the memorandum should refer to the implied agreement in all its terms. It need not, for example, take the form of a letter from the defendant stating that the date of delivery mentioned in the contract is hereby extended. It is enough if the matter relied upon by the plaintiff clearly point to the existence of an implied contract, as is the case here. That this is settled law was decided in Hartley v. Hymans[1]. In the present case all the essentials of the implied contract are on paper.

The claim of the plaintiff is for the difference between the price of the yarn under the contract and the price of yarn in the open market at the date of the cancellation of the contract by the defendant on July 31st, 1973. This was the basis adopted by McCardie, J. in Hartley v. Hymans[1]. The plaintiff chose this figure because they relied on the promises given to them that they would be supplied with further deliveries of yarn under the contract.

There was evidence, however, that for a considerable period before the date of cancellation the demands of the plaintiff were not being met. It is noticeable that the plaintiff did make one large purchase of yarn from another company on May 30th, 1973, namely at a time when the defendant, though they had not formally cancelled the contract, and shown their intention of supplying no more yarn to the plaintiff. And there is no doubt that by that time they knew that they would almost certainly not receive any more yarn from the defendant under the contract.

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(1) (1920) 3 K.B. — 475.

The plaintiff purchased the yarn from the Kian Nan Trading Company on May 30th, 1973 at $2,400 per bale. But the plaintiff claims that the price of yarn on July 31st, the date of the cancellation of the contract was $3,325 per bale. It is admitted that the yarn from Kian Nan came from China and was slightly cheaper than Hong Kong produced yarn but I was not supplied with any figures.

Mr. Bernacchi, for the plaintiff, urged that the measure of damages accepted by the court in Hartley v. Hymans[1] was not appropriate to this case. The evidence was that the defendant had failed to meet various demands made by the plaintiff for deliveries of yarn during the last half of 1972, and early in 1973. At that time the price of yarn was lower than it was on July 31st, 1973. It was $2,400 per bale whereas in July it was $3,325 per bale. It is the duty of a plaintiff to mitigate the damages caused to him by the conduct of the defendant. Unfortunately, I have not been told of the dates of the failures of the defendant to deliver nor of the amounts involved: nor indeed of the price of yarn at that particular time.

I view the purchase by the plaintiff of 40,000 lbs. of yarn on May 30th, 1973 as being a purchase to replace yarn which they were entitled to receive from the defendant under their contract with the defendant.

The price was $2,400 per bale. It is the difference between that figure and $1,335 which is the price stated in the contract of 23rd March, 1971 which should be awarded to the plaintiff as damages. This comes to $451,773.

There will be judgment for the plaintiff for that amount with costs.

(GEOFFREY BRIGGS)
Chief Justice.

John Swaine (C. P. Lin & Co.) for Plaintiff.

Bernacchi Q.C. & M. Lee (C. Y. Kwan & Co.) for Defendant.

(1) (1920) 3 K.B. — 475.

1973, No. 3627 *In the Supreme Court of Hong Kong Original Jurisdiction*

No. 5
Judgment
19th February 1975

IN THE SUPREME COURT OF HONG KONG

ORIGINAL JURISDICTION

BETWEEN KAMSING KNITTING FACTORY (a firm) *Plaintiff*

and

TAI HING COTTON MILL LIMITED *Defendant*

BEFORE THE HONOURABLE SIR GEOFFREY BRIGGS CHIEF JUSTICE, IN COURT

10 **JUDGMENT**

Dated and entered the 19th day of February 1975.

This action having been tried before the Honourable Mr. Justice Briggs Chief Justice without a jury in the Supreme Court of Justice, Hong Kong, and the said Chief Justice Briggs having on the 19th day of February 1975 ordered that Judgment as hereinafter provided be entered for the Plaintiff.

It is adjudged that the Defendant do pay the Plaintiff the sum of $451,773.00 together with interest thereon at the rate of 8% per annum from the 28th day of November 1973 to the date hereof and costs of this action be taxed.

20 It is further ordered that there be a stay of execution for thirty days.

(*Sd.*) C. G. DOYLE
Acting Assistant Registrar.

L. S.

In the Supreme Court of Hong Kong

Appellate Jurisdiction

Civil Appeal No. 16 of 1975

(on Appeal from O.J. Action No. 3627 of 1973)

In the Supreme Court of Hong Kong Appellate Jurisdiction

No. 1
Notice of motion of Appeal as amended in Red 24th March 1975

IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

Civil Appeal No. 16 of 1975

(On Appeal from O.J. Action No. 3627 of 1973)

BETWEEN TAI HING COTTON MILL LIMITED *Appellant (Defendant)*

and

KAMSING KNITTING FACTORY (a firm) *Respondent (Plaintiff)*

NOTICE OF APPEAL

TAKE NOTICE that the Full Court will be moved so soon as Counsel can be heard on behalf of the above-named Defendant on appeal from the judgment herein of the Honourable Chief Justice Sir Geoffrey Briggs given on the trial of this action on the 19th day of February 1975, whereby it was adjudged, *inter alia,* that the Defendant do pay to the Plaintiff the sum of $451,773.00 as damages for breach of contract together with interest thereon at the rate of 8% per annum from the 28th day of November 1973 to the 19th February 1975 and costs of the action, for an order that the said judgment may be set aside and that judgment may be entered in the above-mentioned action for the Defendant and costs of the said action, to be taxed, or in the alternative that a new trial may be ordered, or in the further alternative, that the case be remitted to the learned trial judge for damages to be re-assessed.

AND FURTHER TAKE NOTICE that the Grounds of this appeal are:—

1. That the learned trial Judge was wrong in holding that the Plaintiff had suffered damage by reason of the Defendant's alleged breach of contract in that he should have found that the contract being for delivery by instalments and the Plaintiff having taken steps to mitigate its damage as early as the latter part of 1971, had failed to prove that it had suffered any damage by reason of such measures taken. And insofar as the learned judge held that the failure of the Defendant to deliver to the Plaintiff the quantities of yarn required by the Plaintiff first commenced in the latter part of 1972 such finding is against the weight of the evidence that the learned judge himself accepted.

Dated the 2nd day of July, 1975.

2. That the learned trial Judge was wrong in excluding documents which were relevant to the issues before the Court but were not disclosed by the Plaintiff in its list of documents, in that when the 1st witness for the Plaintiff, Miss Mui Nuen Tin, in cross-examination by counsel for the Defendant was asked to produce receipts and other documents which would show the extent of and prices for the Plaintiff's purchases from other suppliers in anticipation or by reason, of the Defendant's breaches of contract in short-delivering quantities of yarn then required by the Plaintiff, when, on counsel for the Plaintiff objecting to such production, the learned trial Judge held that the Defendant was not entitled to require such documents brought to Court without having asked for specific discovery of the same.

3. Further, the production of such documents would show either that the Plaintiff had purchased yarn from other suppliers to replace the quantities of yarn short-delivered by the Defendant (at the same or approximately the same price as under the contract) which would in turn show that the Plaintiff has suffered no damage at all, alternatively much less damage than the actual sum awarded to it by the learned trial Judge or would have shown both Miss Mui and her father not to have been credible witnesses.

AND FURTHER TAKE NOTICE that the above-named Defendant proposes to apply to set down this appeal in the Appeal List.

Dated the 24th day of March, 1975.

(*Sd.*) C. Y. KWAN & CO.
Solicitors for the Appellant (Defendant)

To Messrs. C. P. LIN & Co.,
Solicitors for the above-named
Respondent (Plaintiff)

IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

Civil Appeal No. 16 of 1975

(On Appeal from O.J. Action No. 3627 of 1973)

In the Supreme Court of Hong Kong Appellate Jurisdiction

No. 2
Respondent's notice
8th April 1975

BETWEEN

TAI HING COTTON MILL LIMITED — *Appellant (Defendant)*

and

KAMSING KNITTING FACTORY (a firm) — *Respondent (Plaintiff)*

RESPONDENT'S NOTICE

TAKE NOTICE that the Respondent intends upon the hearing of the Appeal under the Appellant's Notice of Appeal dated 24th March, 1975 from the judgment of the Honourable the Chief Justice Sir Geoffrey Briggs given on the trial of this Action on 19th February, 1975 to contend that the said judgment should be varied by increasing the amount of damages awarded to the Respondent as follows:—

(*a*) The correct quantum of damages should be $833,553 being the difference between the market price of $3,300 per bale at the date of the Appellant's repudiation on 31st July, 1973 and the contract price of $1,335 per bale in respect of the undelivered quantity of 424.20 bales.

(*b*) Alternatively, the correct quantum is the sum of $743,553 arrived at as follows:—

(i) As to 40,000 lbs. (100 bales) the difference between the market price of $2,400 per bale on 30th May, 1973 and the contract price of $1,335 per bale, namely the sum of $106,500.

(ii) As to the balance of 324.20 bales the difference between the aforesaid market price of $3,200 per bale on 31st July, 1973 and the contract price of $1,335 per bale, namely the sum of $637,053.

AND FURTHER TAKE NOTICE that the grounds of this Appeal are:—

(*a*) As the learned trial Judge had found that the Defendant's letter of 31st July, 1973 was the first time the Defendant showed an intention

not to be further bound by the terms of the contract, there was no repudiation by the Defendant until that date.

(*b*) Accordingly there was no duty on the Plaintiff to mitigate before such date.

(*c*) Therefore it was wrong for the damages to be assessed on the basis of the price paid by the Plaintiff for yarn from other suppliers on 30th May, 1973.

(*d*) The Plaintiff was entitled to have its damages assessed on the basis of the market price at the date of the Defendant's repudiation, which on the unchallenged evidence of the Plaintiff was $3,300 per bale.

(*e*) Further, the learned trial Judge having found that at the date of the cancellation of the contract by the Defendant (on 31st July, 1973) the Plaintiff was entitled to the delivery of 424.20 bales of yarn at the price of $1,335 per bale, he should have found as a necessary corollary that the Plaintiff's damages should have been assessed on the basis of the market price at such date.

(*f*) Alternatively, if it was correct in law to view the Plaintiff's purchase of 40,000 lbs. of yarn on 30th May, 1973 as being a purchase to replace yarn which the Plaintiff was entitled to receive from the Defendant, and further correct to use this purchase as a yardstick of the Plaintiff's damage, such assessment should have been confined to the 40,000 lbs. of yarn in question.

(*g*) Accordingly, as to the balance of yarn totalling 324.20 bales, the correct yardstick should have been the market price of yarn on the date of the Defendant's repudiation namely 31st July, 1973.

AND FURTHER TAKE NOTICE that the Respondent will apply to the Full Court that the Appellant pay to the Respondent the costs occasioned by this Notice to be taxed.

Dated the 8th day of April, 1975.

(*Sd.*) C. P. LIN & Co.
Solicitors for the Respondent

To the abovenamed Appellant and its solicitors
Messrs. C. Y. Kwan & Co.

PROPOSED AMENDMENT TO THE RE-AMENDED DEFENCE

16A. Further and in the alternative, if (which is denied) the Defendant had been guilty of a breach of the said contract, the Defendant says that the breach was not committed on or about 31st of July 1973 as alleged, but was committed (if at all) by the Defendant in failing to supply to the Plaintiff with quantities of yarn as required by the Plaintiff through out the latter part of 1971, the whole of 1972 and early 1973, and the Plaintiff is only entitled to damages at the respective dates of such short-deliveries.

In the Supreme Court of Hong Kong Appellate Jurisdiction

No. 4
Judgment of the Hon. Mr. Justice Huggins
19th September 1975

IN THE SUPREME COURT OF HONG KONG

(APPELLATE JURISDICTION)

Civil Appeal No. 16 of 1975

(On appeal from O.J. 3627 of 1973)

BETWEEN

TAI HING COTTON MILL LIMITED — *Appellant (Defendant)*

and

KAMSING KNITTING FACTORY (a firm) — *Respondent (Plaintiff)*

Coram: Huggins, McMullin & Cons. JJ.

JUDGMENT

Huggins, J.:

But for the authorities I would not have entertained the slightest doubts about this case. Having had the advantage of reading the judgment just delivered by McMullin, J. I have found it some consolation that he, too, thinks the substantial intention of the Legislature is really beyond doubt. The statute appears to me as clear as any statute could hope to be. The general principle for assessing damages for breach by the seller is stated in s.53(2):

> "The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract".

The provisions which follow must have been intended to be read in the light of that principle. Section 53 (3) applies the general principle to particular circumstances:

> "Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed for delivery, then at the time of the neglect or refusal to deliver".

The first thing to notice about that provision is the words *"prima facie"*. They were intended to show that in these particular types of case the general principle was not abrogated: where to apply sub-s. (3) would result in obvious conflict with the general principle, the sub-section will not be applied. Next there are two things to be said about the phrase "was fixed". First, it is clear that the words "by the contract" are to be implied. A date of delivery "to be fixed" is not a date which "was fixed" even though it "has been fixed" by the date action is brought. In this s.53(3) is to be compared with s.31(2), where the draftsman referred to a fixing of the time for "sending" the goods "under" the contract. Secondly, it must be observed that the draftsman was careful not to use the word "certain" but chose instead the word "fixed". Because of the desire of the courts in the past to save from invalidity leases of land which might otherwise not have been for terms certain, they came to apply the rule which is commonly expressed in the Latin *"id certum est quod certum redde potest"*. No comparable rule applies to the word "fixed". The date may be fixed although it is not expressed by the reference to the calendar, *e.g.* seven days after the arrival of a vessel in port. The date may not be immediately ascertainable and may depend upon the happening of a future event, but it must not depend upon the intervention of another will at some future time. Thus "such date as may be named by the purchaser" is clearly not a "fixed" date, while "the date which has been fixed by X" undoubtedly is. Then it should be noted that s.53(3) of our Ordinance contains two words which do not appear in s.51(3) of the English Sale of Goods Act 1893, namely "neglect or". The significance of this is that, whatever may be the correct position in England, in Hong Kong it would seem that the draftsman used the word "neglect" to show a failure to deliver and the word "refusal" to show an indication of an intention not to deliver, the date for delivery not yet having arrived. The second part of the sub-section is, of course, concerned with cases where no date "has been fixed", and if that had been intended to mean where no date is "certain" the word "neglect" would make nonsense, for until the seller knows, or ought to know, when to deliver he cannot "neglect" to deliver, although he may "refuse" to deliver. Our statute was passed some time after the enactment of the English legislation and we must assume that the draftsman inserted the additional words deliberately and endeavour to give them some meaning. It is only here that I part company with McMullin, J. He takes the view that the words "neglect or" are surplusage. I am reluctant so to hold if I can find an alternative interpretation of the sub-section which gives them some effect. Of course, if "fixed" means "certain" then a case where, on my interpretation, the date was unfixed but certain would fall within the first part of the sub-section and not within the second, so that the two words added in the second part would indeed be surplusage. But that is one of the reasons, why I am forced to the conclusion that "fixed" does not mean "certain". Once that conclusion is accepted then, if the words "neglect or" are omitted, the case where the date is unfixed but certain is not covered by either part of the sub-section: not by the first because, there being "no time . . . fixed for delivery", it

is implicitly excluded from that part and yet not by the second because that would then include only a "refusal" to deliver. I believe it was because the draftsman of our Ordinance thought that without the additional words there would be this casus omissus that he inserted them. I confess that use of the word "refusal" seems to me of itself necessarily to indicate an anticipatory breach and I do not see how any other meaning can fairly be given to the English sub-section. Be that as it may, not only is there nothing in our statute to suggest an intention that the latter part of sub-s. (3) should never apply to a case of anticipatory breach, but there is positive evidence that it was intended to apply — provided that the result was not an obvious conflict with the general principle laid down in sub-s. (2). There are two classes of case to be considered. The first is where, although the time for delivery was not "fixed" within the meaning of the statute, that time has been ascertained at the date of the refusal to deliver: the second is where not only was the time for delivery not "fixed" but also the time has not been ascertained at the date of the refusal to deliver, as in a case where delivery was to be "on demand" and no demand has been made or, perhaps, where delivery was to be "within a reasonable time" and the purchaser has not already sued for non-delivery. In the former case there is likely to be a conflict with the general principle, because unless there is no fluctuation in the market price between the date of the refusal and the time when the goods ought to have been delivered the buyer would be bound to get less or more than his actual loss if the damages were ascertained by reference to the difference between the contract and market prices at those two dates. However, in the second of the two cases under consideration I see no reason why the damages should not be assessed by reference to the market price at the date of the refusal to deliver. I believe the Legislature was endeavouring to introduce a degree of certainty into the assessment of damages. If the date for delivery could, by reason of the refusal to deliver, never become precisely ascertained (and that includes a case where delivery was to be "within a reasonable time") it would be reasonable in seeking to achieve certainty to have regard to the market price on the date of the refusal.

Applying these principles to the present case we find that the contract was one which did not "fix" the time for delivery, for delivery was to be made, as the judge found, over an indefinite period, the Plaintiff company (the buyers) having a right to call for delivery as and when the goods were needed. It necessarily followed that the damages fell to be assessed under the second part of s.53(3) unless that would produce manifest injustice. In so far as the buyers did make demands which were not met they could have treated the case as partly falling within the class of case where the dates for delivery are unfixed but certain, but they chose to continue as though there had been no breach and on the pleadings it is not open to the sellers to contend that any of the goods should have been delivered before 31st July 1973. They never suggested, until they sought leave to amend in this Court, that they had broken the contract before that day by their failures to deliver goods which had been demanded by the Plaintiffs. Therefore this is a case

where damages must be based on the assumption that the date or dates for delivery of all the goods were unascertained. That would leave us with no alternative but to apply the rule in the sub-section and to assess the damages by reference to the difference between the contract price and the market or current price of the goods at the time of the refusal to deliver *i.e.* 31st July 1973. For my part I cannot see that that would produce injustice. On the other hand it is common ground that in the present case the method of assessment adopted in the court below was wrong and it is clear on figures which have been mentioned to us that it produced a figure far less than the amount of any estimate of the loss sustained which might be made in the alternative ways suggested.

The trial judge took the difference between the contract price and the market price on 30th May 1973. He appears to have done that with two things in mind. First he had regard to the evidence (which presumably he believed) that the sellers failed to meet various demands for deliveries made by the Plaintiff during the latter half of 1972 and early in 1973. As he pointed out, he was not told of the dates of those failures, but that was because on the pleadings they were irrelevant. The second matter which he appears to have had in mind was the duty of the Plaintiff to mitigate his damage, but, once again, on the pleadings there was no question of a breach of contract until 31st July 1975 and no plaintiff can be required to take steps to mitigate his damage from a breach of contract which has not yet occurred.

Unfortunately it now becomes necessary for me to consider the authorities, which raise considerable difficulties. The report of Tyers v. Rosedale & Ferryhill Iron Co., Ltd. (1875) 10 Exch. 195 is not concerned directly with the assessment of damages but it is material to the present discussion because it was relied upon by McCardie, J. in a later case. The contract was for delivery of 2,000 tons of iron in equal monthly quantities over 1871 "or sooner if required". The defendants made short delivery in January. In February and in several later months they again made short deliveries — but at the request of the plaintiffs. In December the plaintiffs demanded delivery of the whole outstanding balance in that month. The defendants thereupon refused to deliver any more iron. All that was decided by the Exchequer Chamber was that the plaintiffs' request to the defendants not to deliver in accordance with the contract did not put an end to the contract: the defendants remained liable to fulfil their obligation to supply 2,000 tons. The court left open the question whether the damages ought to be assessed as at December (on the basis that the defendants' obligation was to deliver the whole balance when demanded in that month) or by reference to the dates of the instalments by which that balance ought to have been delivered. The judge of first instance had assessed damages on the former basis but he gave leave to the defendants to apply to vary the assessment and it had in fact been varied by the Divisional Court, the final order being that the damages ought to be calculated at the monthly prices of each month's deficiencies. As it would have favoured the defendants rather than the plaintiff appellants to take the price in December, the court found it unnecessary to decide the point.

The case in which McCardie, J. relied upon Tyers' Case was Hartley v. Hymans 1920 3 K.B. 475. Those cases were dissimilar in that in Hartley v. Hymans the plaintiff was the seller and not the buyer, but the judge suggested that they were similar in that in each of them the defendant absolutely refused further to perform the contract at any time so that, whatever the position might have been had there been a refusal to take or to make further deliveries (as the case might be) unless they were made within some reasonable time which was designated, the damages ought to be assessed as at the date of the repudiation. I am not sure that McCardie, J. did think Tyers' Case in the Court of Appeal was direct authority on the question of damages — and clearly it was not. As I read his judgment he was saying only that the cases were similar to the extent I have indicated and that in his view the proper measure of damages in such cases would have reference to the date of repudiation even though there might have been an agreement to be performed on various dates thereafter. He made no mention of s.51 of the Sale of Goods Act 1893, but it may well be the case was fought solely on the issue as to the right of the defendants to cancel the contract on the date of repudiation and everyone may have assumed that if there was no such right the section required that the damages be assessed in accordance with what I have suggested was the manifest intention of the Legislature.

We then come to Millett v. Van Heek 1921 2 K.B. 369. In passing it may be observed that the Court of Appeal in that case expressly reserved the question whether Bray, J. and Sankey, J. in the Divisional Court had been right to follow the decision of Bailhache, J. in Melachrino v. Nickoll 1920 1 K.B. 696 to the effect that a contract for delivery within a reasonable time was not one where the time for delivery was "fixed". Atkin, L.J., seeking to suggest a way of avoiding the possibility that a consequence of holding that a contract for delivery at times which could be determined by a jury was not a contract for delivery at fixed times would be to make nonsense of the second part of sub-s. (3), said that the words of that part might be read as referring to "a contract such as to deliver goods on demand or to deliver goods as required by the purchaser". That, of course, is the very case we have here. However, what the Lords Justices decided was that the latter part of sub-s. (3) of s.51 did not apply to a case where the breach of contract was an anticipatory breach. I think our case may be distinguished on the ground that the wording of our sub-section is different and, as I have said, makes a clear differentiation between (to use the words of Bankes, L.J. at 1921 2 K.B. 375) "a case of what is strictly speaking non-performance of a contract" (*i.e.* "neglect") and "anticipatory breach arising from repudiation of a contract" (*i.e.* "refusal").

Even if our statute were indistinguishable from the English Act I would, with all respect and diffidence, have questioned the conclusion of the Court of Appeal in Millett v. Van Heek although I might have felt that I ought to follow it for reasons of certainty and comity, particularly as it has stood without serious attack for nearly a quarter of a century. Atkin, L.J. appears to have appreciated that the language used was at least capable of the

interpretation which I would wish to adopt, but thought "that . . . would introduce an anomaly entirely without any kind of principle to justify it". He therefore concluded

> "That the code never intended to make that distinction, or to vary what was the rule of law at the time when it was passed, a rule which has been recorded in countless decisions since the doctrine of repudiation of contract has received its development in Frost v. Knight (1872) L.R. 7 Exch. 111 — namely, that the damages are to be fixed in reference to the time for performance of the contract subject to questions of mitigation."

None of the other judges, either in the Court of Appeal or in the Divisional Court, gave any reason why "this rule cannot apply to this case". For my part I do not see why it should be assumed that the Legislature did not mean what it said simply because that would result in a change of the law. The principle which would have justified a change in the law was the desirability of introducing a degree of certainty where certainty was formerly lacking. There is good reason for not applying the *prima facie* rule apparently laid down by the sub-section where the date for delivery, though unfixed, is certain: no difficulty arises in calculating the damages by reference to the difference between the contract price and the market or current price on a certain date, or certain dates, and there might be an obvious injustice if the rule were to be applied in such a case. In cases where the date for delivery is uncertain it might, without this rule, be necessary (as is probably implicit in the judgment of Atkin, L.J. at 1921 2 K.B. 378) in every case to go to a court to ascertain how the damages ought to be assessed in order to arrive at "the loss directly and naturally resulting, in the ordinary course of events". That, I believe, was the very thing which the Legislature sought to avoid and which, at least in Hong Kong, in my view it has successfully avoided. If the court seeks to assess the loss by reference to some notional date of delivery in a case where, ex hypothesi, the date of delivery is unfixed and uncertain (*e.g.* where delivery is to be "on demand") it can only be in the nature of guess work. Moreover, as Cons, J. has pointed out, by suggesting that the second part of sub-s. (3) might apply to a case where delivery was to be on demand Atkin, L.J. implicitly conceded that it might apply to a case of anticipatory breach. Although Melachrino v. Nickoll was referred to by the Court of Appeal in relation to the question whether the time for delivery was "fixed", no mention was made of it in relation to the application of s.51(3) to cases of anticipatory breach, although Bailhache, J. had held that the first part of the sub-section did apply to such cases. Nevertheless Atkin, L.J. accepted that where the time for delivery was fixed and repudiation of the contract was accepted damages would have to be assessed with reference to the fixed time — which is what the first part of the sub-section says. For my part I do not see why if the first part of the sub-section applies to an anticipatory breach the second part should not likewise apply.

The only other matter argued was whether the fact that the Plaintiffs purchased goods elsewhere when the defendants failed to deliver all the goods

demanded prior to 31st July 1973 ought to be taken into account in mitigation of damages. Mr. Bernacchi suggested that in some way these purchases "discharged the contract in part". He relied upon R. Pagnan & Fratelli v. Corbisa Industrial Agropacuaria Limitada 1971 1 W.L.R. 1306 as laying down a general principle that the court will always look into other contracts made by the innocent party, whether made before or after the breach of contract in respect of which damages are to be assessed. I do not think the case is authority for any proposition. The contract which was there taken into account was entered into by the parties, after the breach of contract had occurred, for the sale and purchase of the contract goods at a price which was intended to take into account the previous dealings between the parties. I do not think it can fairly be said in the present case that the plaintiff buyers mitigated their loss by making purchases before the breach of contract occurred in respect of which they claimed.

For these reasons I would allow the cross-appeal and enter judgment for the Plaintiffs in the sum of $833,553. However, I agree that if the view of s.53(3) which has found favour with Cons, J. is right the proper order would be one dismissing the appeal and directing that the assessment of the trial judge stand, even though the Respondents concede that that assessment was wrong.

19th September 1975.

IN THE SUPREME COURT OF HONG KONG

(APPELLATE JURISDICTION)

Civil Appeal No. 16 of 1975

(On appeal from O.J. 3627 of 1973)

In the Supreme Court of Hong Kong Appellate Jurisdiction

No. 5
Judgment of the Hon. Mr. Justice McMullin
19th September 1975

BETWEEN

TAI HING COTTON MILL LIMITED — *Appellant (Defendant)*

and

KAMSING KNITTING FACTORY (a firm) — *Respondent (Plaintiff)*

Coram: Full Court (Huggins, McMullin & Cons. JJ.)

Date: 19th September, 1975.

JUDGMENT

McMullin, J.:

This is an appeal upon damages. There was written contract between the plaintiff and the defendant whereby the defendant was to supply to the plaintiff 1,500 bales of cotton yarn, the period of delivery being stated as April 1971 to December 1971. It is common ground upon the hearing of the appeal that in most material particulars this written document had become a dead letter save insofar as the nature of the merchandise, its quantity and price were concerned. The learned trial judge found that there had been substituted, for the original terms relating to quantities and deliveries, an agreement to supply the yarn at the contract price over an indefinite period the plaintiff company having a right to call for delivery as and when needed.

There has been no quarrel with this part of the judge's findings nor with his finding that the deliveries under the new implied contractual terms continued for a long time under the contract, the amounts requested by the plaintiff varying considerably from month to month. He also held, and it is not now disputed, that the defendant did not supply the plaintiff with the full quantities requested on these occasions over a considerable period commencing from the latter half of 1972 onward. It was in fact an important part in Mr. Bernacchi's argument on behalf of the defendant company that the failure to supply the stipulated amounts had commenced even in 1971. There had been correspondence between the parties, concerning the defendant company's

performance, which culminated with a letter dated 31st of July 1973 from the defendant company to the plaintiff company in which the defendant company announced its intention not to supply any further yarn whatsoever giving as its ground for doing so the fact that the plaintiff company had failed to take up the full quantity of the yarn within the original period stated in the written contract. By the same letter the plaintiff company was informed that the defendant company considered the contract between them to be cancelled. There was at that date an outstanding balance of 424.20 bales still undelivered.

The plaintiff claimed $844,158 by way of damages basing its claim upon the difference in the market price of cotton yarn at the date of the formal repudiation of contract by the defendant and the price for the same yarn stated in the contract. The defendant denied that it was in breach of contract and on the contrary alleged that the plaintiff had been in breach and it further denied that the plaintiff was entitled to any damages whatsoever. The learned trial judge awarded the plaintiff damages in the sum of $451,773. This figure was calculated on the difference between the contract and the market price in May of 1973. He did so on the basis that by May 1973 the plaintiff company, although not yet formally notified of the repudiation by the defendant company, was aware that it was unlikely that the defendant company was going to fulfil its bargain and he gave as his reason for that finding the plaintiff company's duty to mitigate its loss.

Both parties now appeal against this award but the plaintiff's appeal stands in sorry plight following upon our refusal to permit Mr. Bernacchi to amend the defence for the purpose of introducing, at this late hour, an issue which had never been pleaded at all and which had arisen only incidentally at the hearing and was then dealt with somewhat obliquely in the course of argument. What he had sought to do in effect was to turn his own pleadings upon their head and to claim that if the learned trial judge was right in finding his client in breach of its contractual obligations at all he should have done so on the basis that it had been in breach at a much earlier date than the 31st of July and had in fact been in breach upon every occasion from the commencement of the contract upon which, in delivering goods pursuant to a request by the plaintiff company, it had delivered less than the stipulated quantity requested. The point of that argument was that since the plaintiff company had, as it was alleged, on each such occasion fulfilled its requirements by going into the market and buying outside the contract the contract was, as to quantum of goods, discharged *pro tanto* by the amount so purchased on each occasion leaving only to the plaintiff company a right to claim the difference between the market and the contract price at the date of each such short delivery. Although we have not the benefit of the actual figures involved in each replenishment there is no doubt that something of the sort did occur and it would have made a very considerable difference to the actual quantity of goods outstanding and undelivered under the contract at the 31st of July 1973. Notwithstanding the refusal of permission to amend however Mr. Bernacchi struggled valiantly to persuade us that we should nevertheless look to these earlier replenishments in the light of what he deemed to be the more modern approach to the assessment of damages in such a situation as this. For this approach he relied upon the decision in the

case of R. Pagnan & Fratelli v. Corbisa Industrial Agropacuaria Limitada[1]. That case does not assist him for it concerns a quite different and very special set of circumstances. The sellers in that case were in breach of a fundemental term of a contract to deliver a quantity of maize having failed to deliver it within the stipulated time. Instead of rejecting the cargo the buyers, by an oral arrangement with the sellers, agreed that the contract should remain alive but that the buyers were to be at liberty upon the arrival in port of the cargo to reject the maize if they were not satisfied with its condition. On the 19th of October 1955 they did reject the cargo, as they were entitled to do, but they then negotiated with the sellers to purchase the whole cargo at a reduced price and this new contract, which they entered into on November the 13th, was among the matters considered when the whole situation was subsequently submitted to arbitration. The tribunal found, *inter alia*, that the buyers' profit over the whole course of these proceedings had extinguished their alleged loss from the original breach of contract. The Court of Appeal upheld the findings of the tribunal and ruled that the buyers having suffered no loss were not entitled to any damages.

As I understand him Mr. Bernacchi seeks to apply this decision in a rather loose and analogical way pursuant to what he regards as the modern tendency, in the assessment of damages, to disregard technical rules and to fix upon the actual as distinct from the theoretical reality of the situation. He sought in this way to overcome the difficulty that he had been debarred from presenting the issue of earlier breaches. For my own part I do not think that he can do so for that would be to admit by the back door those very clements of mitigation from which the ruling of the court shut him out in denying him the right to urge the existence of any earlier breach. Accordingly I can only repeat what was said to Mr. Swaine when, at the opening of his address, he asked whether the effect of the court's ruling was to reject the appeal and to say, as we then said, that that is so and that no reason has been shown for diminishing the award of damages to the appellant at least upon the ground that there had been breaches of contract before the 31st of July.

More difficult considerations arise upon the respondent's appeal. The respondent argues that the proper damages should have been the figure originally claimed *i.e.* $833,553 being the difference between the market price of $3,300 per bale upon the 31st July 1973 *i.e.* the date of the plaintiff's repudiation of the contract and the contract price of $1,335 per bale in respect of the undelivered quantity of 424.20 bales. The learned trial judge's award was calculated upon a figure of $2,400 per bale which was the market price of the cotton on the 30th of May 1973. The reason he gave was the necessity for the plaintiff to mitigate its damages. I think it may be said that it was common ground between counsel upon the hearing of the appeal that this in any event was incorrect. The true issue upon the cross-appeal is whether the 31st of July was in truth the proper date for the purpose of estimating damages. As to that Mr. Bernacchi says that if that also was not the proper date then, irrespective of what the proper date should have been, the cross-appeal must fail.

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(1) (1971) Weekly Law Reports 1306.

Mr. Swaine for the respondent relies upon the decision in Hartley v. Hymans[2], a case which is upon its facts undoubtedly very similar to the case at bar save that the repudiating party was the buyer not the seller. In that case the plaintiff agreed to sell to the defendant cotton yarn worth £11,000 delivery to begin in September 1918 and to be at the rate of £1,100 worth of yarn per week. Deliveries were in fact late and irregular and for lesser amounts than those mentioned in the contract. The defendant complained but did not seek to treat the contract as at an end. On March the 13th in the following year, some three months after the whole quantity of the yarn should have been delivered, the defendant, without previous notice requiring delivery within a reasonable time, wrote to the plaintiff cancelling the order and refused thereafter to take any further deliveries of yarn. A great part of the judgment of McCardie J. is concerned with the question of breach and he had to deal with a variety of arguments bearing upon points of waiver, extension of time, new agreement etc. He found that the defendant had been at fault in not giving notice to the plaintiff requiring delivery within a reasonable period after the end of the original contract period had come. He found an implied agreement extending the contract, the defendant having continued up to March 1919 to call upon the plaintiff for further deliveries, and he found that the defendant was in breach of contract in writing upon the 13th of March to inform the plaintiff that he regarded the contract as at an end without then giving him a reasonable time to deliver the balance of the goods. Turning finally to the question of damages he said (page 496):

> " The defendant here gave no such notice. He cancelled with peremptory abruptness. But for the fact that the defendant's repudiation was absolute as to all undelivered goods a difficult question would have arisen as to the proper period of periods for delivery which could have been fixed by the defendant in March, 1919. But inasmuch as he absolutely refused on that date to take any further goods, at any time, the point is covered by the decision of the Exchequer Chamber in Tyers v. Rosedale & Ferryhill Iron Co. Hence it is right to assess the damages as at March 1919."

It is here that the complications in the present case arise. Unfortunately it is far from clear that the decision in Tyers' case[3] does decide the point but there is this much cover for the opinion of McCardie J., quoted above, that in Tyers v. Rosedale & Ferryhill Iron Co.[3], upon the hearing of a rule nisi granted by the judge of first instance, Martin, B., in a dissenting judgment upon facts of a character closely similar to those with which we are here concerned, and to those which concerned McCardie J., found that the trial judge had computed damages upon the correct principle *i.e.* upon the market price of the iron, which was the subject matter of the contract, at the date of the refusal to deliver any more. The question does not appear to have been canvassed whether, deliveries of the iron having been delayed on several occasions at the request of the buyer, and the instalment amounts, which were

(2) (1920) 3 K.B. 475.

(3) (1875) L.R. 10 Ex. 195.

also fixed by the contract, having been reduced likewise at his request, he was under an obligation, when the date for completion stated in the contract had arrived, to give to the seller an opportunity of fulfilling the contract by making delivery by subsequent instalments, either as provided within the contract or comparable with those already received, rather than demand, as he did, delivery, in one consignment, of the full quantity outstanding within the original contract period. The case having gone upon appeal to the Exchequer Chamber Cockburn, C.J. took the view that the plaintiff had no right to call upon the defendant to deliver all the remaining iron at one time but was only entitled to call upon him to deliver in such quantities per month as had originally been provided for. He took the view that were it not for the fact that the market price at the date of the defendant's refusal favoured the defendant it would have been necessary to determine the market rate at the date of each monthly instalment throughout the period during which the defendant ought to have delivered the balance of the iron still outstanding at the date of repudiation.

Blackburn, J. the only other judge to deliver a considered judgment left open the question whether the relevant date for estimation of the damages was the market rate at the date of repudiation or at the several subsequent dates upon which instalments ought to have been delivered.

Brett, J. said:

> ". . . I desire to reserve my opinion as to the measure of damages, and as to whether, for that is really what it comes to, the case of Roper v. Johnson decides the point."

The latter case was decided in 1873 some two years before Tyers v. Rosedale & Ferryhill Iron Co.[3]. The plaintiff in Roper v. Johnson[4] had a contract for 3,000 tons of coal at a certain price to be taken during the months of May, June, July and August. No coal was delivered in the month of May and the defendant wrote on the 31st of May desiring the plaintiff to regard the contract as cancelled. The plaintiff did not assent to that and on the 11th of June the defendant definitively refused to deliver any coal. On the 3rd of July, *i.e.* before the date for completion of the original contract had arrived, the defendant brought an action for this repudiation of contract and the case was concluded in the middle of August a date still prior to the original date for completion of the contract. It was held that the true measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery notwithstanding that the last period had not elapsed when the action was brought or when the case was tried.

Thus far the preponderance of authority would certainly seem to favour the view that in the case of a contract for delivery of goods by fixed instalments the primary rule as to computation of damages is the difference between the

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(3) (1875) L.R. 10 Ex. 195.

(4) (1873) L.R. 8 C.P. 167.

contract price and the market price at the several dates at which deliveries would have taken place had the contract been performed notwithstanding acceptance of repudiation within the stated contract period. As Cockburn, C.J. said in Frost v. Knight[5] (at page 114):

> "the promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived."

He was there approving the principles stated in Hochster v. Da La Tour[6] a case also relied upon by the several judges in Roper v. Johnson[4]. These were all decisions concerning contracts in which, either within the express terms of the contract itself or else within those terms as extended by necessary implication, as interpreted by the courts, goods were to be delivered by fixed instalments. In the present case there were no fixed dates for delivery but goods were to be delivered as and when requested by the buyer. Mr. Swaine, therefore, pointing out that Tyers v. Rosedale & Ferryhill Iron Co.[3] was decided before the passing of the Sale of Goods Act 1893 asked us to infer from the very language used by Martin, B. in the Court of Exchequer in that case that the latter part of Subsection 3 of Section 51 of the Act seems expressly designed to cover just such cases. Subsection 3 is in the following terms:

> " (3) where is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

The present case, he says is a case in which no time was fixed for delivery and the difference between the market price and the contract price must therefore be fixed in relation to the date of refusal to deliver *i.e.* the 31st of July 1973. Section 51 of the English act corresponds exactly with Section 53 of the Sale of Goods Ordinance with one difference to which I will later refer. I confess when I look at the language of Subsection 3 that contention seems so obviously correct that were it not for the other authorities to which I must now refer I would have had little hesitation in accepting his proposition. One might well think that McCardie J. had something of the same sort in mind when he gave his decision in Hartley v. Hymans[2]. But it is an undoubted and perhaps somewhat curious fact that although he expressly relied upon Tyers v. Rosedale & Ferryhill Iron Co.[3] and although in the course of his judgment he deals with Section 4 of the Sale of Goods Act he makes no express reference to Section 51 whatsoever.

(2) (1920) 3 K.B. 475.

(3) (1875) L.R. 10 Ex. 195.

(4) (1873) L.R. 8 C.P. 167.

(5) 7 Exchequer Cases 111.

(6) (22 L.J.) Q.B. 455.

By contrast the several judges of the Court of Appeal in Millett v. Van Heek & Co[7], a case decided at first instance in the month following the decision in Hartley v. Hymans[2] but dealt with by the Appellate Court early in the following year, all made explicit reference to Section 51 (3) in upholding the decision of the court of first instance. The decision in Hartley v. Hymans[2] is not referred to in Millett's case[7]. In that case an English firm entered into six contracts between the 10th of January and the 23rd of August 1916 with a firm in Holland for the sale and delivery to Holland of a quantity of cotton waste. It was implicit in the arrangements between the parties that the merchandise could not be delivered all at once and that there would therefore be deliveries from time to time under the several contracts. When a certain quantity of cotton had been delivered under the contracts the British Government, in January 1917, imposed an embargo upon the export of such cotton waste. A correspondence ensued between the parties which was later interpreted by the court as meaning that the parties had thereafter entered into a new and binding agreement that the deliveries on the six contracts should be suspended until the removal of the embargo. On the 8th of January 1919 the plaintiff took proceedings for a declaration that the contracts insofar as they were still unperformed had been dissolved by reason of the embargo. A week later the embargo was removed but the action proceeded. In the action the declaration sought was refused but the Dutch firm was given a declaration to the effect that they were entitled to recover damages for the plaintiff's repudiation of his contract. The official referee, to whom the case was referred for the estimation of damages on the basis that a reasonable time for delivery following upon the removal of the embargo must be allowed for, held that the proper way to assess damages was to take the market price of the goods from March 1919 onwards and to ascertain from time to time what was the difference between the contract price and the market price at the time when the goods would in the ordinary course of business have been delivered. On appeal to the Divisional Court it was held by Bray and Sankey JJ. that when a contract provided for delivery within a reasonable time, or within a reasonable time after a future date, it was not a contract for delivery at a fixed time within the meaning of Section 51 subsection 3 of the Sale of Goods Act 1893. They also held that the rule, in subsection 3, that if no time for the delivery was fixed, the measure of damages was to be ascertained by the difference between the contract price and the market or current price of the goods at the time of the refusal to deliver, did not apply to a case where the breach was an anticipatory breach. The latter part of the principle enunciated by the judges of the Divisional Court was approved unanimously by the judges in the Court of Appeal all of whom however reserved the question whether a contract to deliver goods within a reasonable time is, for the purposes of section 51, subsection 3, of the Sale of Goods Act a contract to deliver goods at a fixed time. That is a high authority and there is no suggestion of hesitancy in the conclusion to which the Court of Appeal came on the question of section 51 (3) and

(2) (1920) 3 K.B. 475.

(7) (1921) 2 K.B. 369.

anticipatory breach. Counsel for the respondent was not even called upon to reply to the argument that the final words of the subsection must apply in a case in which no fixed date of delivery had been established by the contract.

I confess that I do not find that decision easy to understand and I venture to suggest that it may be the source of what appears to me to be a shadow of uncertainty hanging above this area of the law of contract which may be found reflected in some of the latest commentaries where the topic of non-delivery is being discussed in relation to anticipatory breach. Thus the latest editions of Chitty on the Law of Contracts and of Mayne and McGregor on Damages cited Millett v. Van Heek & Co.[7] as the sufficient (and indeed the sole) authority for the proposition that the subsection does not apply to cases of anticipatory breach. The authors of the current edition of Chalmers on the Sale of Goods quoting the same authority are content with the observation:

> " the anticipatory breach of a contract to deliver within a reasonable time comes under Subsection (2), and not under Subsection (3)."

We are at that point referred to a footnote which cites the case against the comment:

> " quaere whether the final words of Subsection (3) ever apply to such a contract."

It may not be too much to suggest that the root of the confusion can be discerned in the words just quoted. The question posed is whether a contract which the court has interpreted as being a contract for delivery within a reasonable time can ever have applied to it the rule for estimating damages which is stated in the concluding words of subsection 3. The phrase itself seem to derive from the decision at first instance in Millett v. Van Heek & Co.[7] where Bray J. expressing the opinion of the court added that in such cases the principle set forth in Section 51(2) would apply. This is scarcely helpful since subsection 2 states only the most general and familiar principle and the learned judge moreover adds that it is to be read with the light thrown upon it by subsection 3. No reason is given for this opinion nor is it said what principle, revealed by the light of subsection 3, excludes such cases from the final words of the subsection. The trouble is that if the final words of subsection 3 do not apply to such cases it is difficult to see to what cases they can apply. On the face of it there seems to be no better reason why only the earlier words in the subsection should govern cases of anticipatory breach, as clearly they do. A seller of goods which, upon the understanding of both parties, are to be delivered within a reasonable time may be found as guilty of what one might term pre-emptive non-delivery as may a seller who prior to fixed delivery dates announces his intention not to deliver. The case before the judges in Millett v. Van Heek & Co.[7] was one involving anticipatory breach

(7) (1921) 2 K.B. 369.

and had Bray J. and Sankey J. found that the contract was one within the description of those earlier words no difficulty would have arisen and the decision of Bailhache J. in Melachrino v. Nickoll[8] would have been directly in point. In that case, also involving anticipatory breach, the judge held the contract to be one with a fixed date for delivery calculable by reference to the happening of a certain event and, expressly relying upon the provisions of subsection 3 of section 51 of the Sale of Goods Act 1893 he found the measure of damages in the difference between the contract price and the market or current price at the time when the goods ought to have been delivered. That is to say, the earlier and not the final words of the subsection applied to it. But all the courts involved in Millet's case[7] found that the contract there was not such a contract and although the language of subsection 3 seems patently designed to exhaust the whole field of contract by dividing it into contracts with fixed dates for delivery and those without, the judges at first instance appear, if I may put it so, to have evaded the logic of their own conclusion by making a further sub-division of the latter category of contracts into those which fall within and those which do not fall within the final words. One must say, with respect, that this wears a distinctly arbitrary air. Nevertheless of the three judges of appeal only Atkin L.J. sought to put the matter any further. Bankes L.J. and Warrington L.J. adopted, without reservation, the view of the judges in the court below on the point now under consideration. Atkin L.J. thought that the Act could not have been intended to introduce a new principle in relation to contracts where no fixed time of delivery had been included in the express terms of the contract itself. He doubted whether the judges in the court below had been right to regard the contract as other than one with a fixed time for delivery and he suggested, but without deciding the point, that any contract in respect of which the date for delivery could be established by the findings of a jury might reasonably be regarded as a contract with a fixed time for delivery. Both he and Bankes L.J. noted with respect the opinion of Bailhache J. who, in Melachrino v. Nickoll[8] (page 696) that a contract to be performed within a reasonable time was a contract for which no time was fixed for delivery within the meaning of the subsection but both of those eminent judges were evidently reluctant to follow that opinion. Since they were upholding the decision of the court below it may have seemed desirable in order to avoid emptying the final words of subsection 3 of all content, to suggest an area for their operation. At page 378 Lord Atkin said this:

> " It is difficult to see why it should be said that a contract for delivery at times which can be determined by a jury is not a contract for delivery at fixed times. It seems to be that a meaning could be given to the words 'if no time was fixed', by reading them as referring to a contract such as to deliver goods on demand or to deliver goods as required by the purchaser. It might well be argued that that would give a meaning to the words in question."

(7) (1921) 2 K.B. 369.

(8) (1920) 1 K.B. 693.

The point is a teasing one and out of deference to the opinion of a very eminent judge I wish I could say with confidence that it had been resolved. With all respect, however, I cannot see that this answer does more than to raise the same difficulty in a different dress. For a contract to supply goods on demand is as much a contract with executory obligations as is one with a fixed date for delivery, at least until the demand is made. But when the demand has been made then it must be a demand either for delivery now or for delivery at some future date. If for delivery now, and this is answered by a refusal, there is no question of anticipatory breach save in a wholly nominal sense — the date of refusal and the date for delivery being for practical purposes one. If for delivery at a future date or dates, the contract then becomes one with a fixed date or dates for delivery and it falls subject to the possibility of anticipatory breach. Where the final words of subsection 3 refer to contracts where "no time was fixed for delivery" I understand that to mean "fixed by or in accordance with the terms of the contract". A contract for goods to be delivered on demand seems to me to fall within the latter description. As such it is governed not by the final words of subsection 3 but the preceding words of that subsection. In either case *i.e.* whether the demand be "deliver now" or "deliver at a future date" the final words are not applicable and we are still to seek a set of circumstances which would give them use. If the words of Atkin L.J. in the passage quoted above are construed as meaning that the final clause of subsection 3 might apply to a contract which provided for delivery on demand or as required by the buyer in a case where the refusal to deliver was announced before the demand for delivery has been made then the principle that the final words do not cover cases of anticipatory breach must be abandoned for that is clearly a case of anticipatory breach. I do not think it has ever been said that there can be no anticipatory breach unless a date for delivery has been ascertained prior to the date of the refusal and certainly none of the judges in Millett v. Van Heek & Co.[7] said anything of the kind. If the appellate judges in Millett's case[7] were prepared to entertain the possibility that a contract to be performed within a reasonable time might nevertheless be considered to be one with a fixed date upon the ground that such a date could be assigned by a jury long after the refusal to deliver one would think that a contract which actually had acquired a delivery date by agreement of the parties prior to the refusal must, a fortiori, be looked on as one with a fixed date yet it is the latter kind and not the former which are suggested to be the possible object of the final words of the subsection. Lord Atkin did not favour the suggestion that the Act had intended to introduce a novelty. He regarded the law on the matter as settled at least since the decision of Cockburn C.J. in Frost v. Knight[5] and he held that damages, even where no date or dates of delivery were fixed by the contract, must be calculated by reference to the time for performance of the contract subject to questions of mitigation.

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(5) 7 Exchequer Cases 111.

(7) (1921) 2 K.B. 369.

Perhaps it is not too much to suggest that the Legislature did intend to introduce a novelty. Clearly, at any rate, the Act was intended to codify and to clarify the situation generally, and there is some reason to doubt that the attitude of the courts whether to cases of anticipatory breach or to cases of unaccepted anticipatory repudiation has been unvaryingly consistent prior to the passing of the Act or even thereafter. Thus is Roper v. Johnson[4], a case of anticipatory breach of a contract with fixed dates of delivery, it was held that the true measure of damages was the sum of the differences between the contract price and the market price at the several periods for delivery notwithstanding that the last period had not elapsed when the action was brought or when the cause was tried. Yet in the same year, in Tyres v. Rosedale & Ferryhill Iron Co.[3], we have the dissenting judgment of Martin, B. to which reference has been made already. Upon the granting of a rule nisi by the Court of Exchequer that case went upon appeal to the Exchequer Chamber. The judges of appeal (who appear to have included the judge of first instance Blackburn J.) upheld the opinion of Baron Martin on the question of the breach but reserved the question of the proper date for estimation of damages finding it unnecessary to decide whether the date of refusal was the correct date for estimating the market price because that price was in any event advantageous to the defendant and not to the plaintiff.

In Brown v. Muller[9] which was even not a case of anticipatory breach because, although the sellers, who had undertaken to deliver a quantity of iron in equal proportions over three months, gave notice prior to the date for the first of those deliveries that they did not intend to deliver, the plaintiffs did not accept the repudiation and did not bring an action until the date had passed upon which deliveries should have been made, Baron Martin nevertheless expressed some doubt about the true rule. The other members of the Court of Appeal were satisfied that in such circumstances the damages should be based on an estimation of the market prices at the several dates of delivery notwithstanding the attempted repudiation by the sellers. Martin B. said (page 323):

> " In deference to authority I come to the same conclusion. But for my own part I should have been disposed to think that the damages ought to have been estimated once for all when a complete breach of the contract had been committed. But the cases of Boorman v. Nash (9 B. & C. 145) and Josling v. Irvine (6 H. & N. 512) decide the matter."

Those cases were also cases in which there were fixed dates for delivery not involving anticipatory breach. In Philpotts v. Evans[10] a case tried long before the passing of the Sale of Goods Act and before the notion of anticipatory

(3) (1875) L.R. 10 Ex. 195.

(4) (1873) L.R. 8 C.P. 167.

(9) Law Reports 7 Exchequer Cases 319.

(10) 5 Meeson's & Welsby's Reports 475.

breach had developed Baron Parke, dealing with a contract which may be regarded as having been one for the delivery of wheat within a reasonable time and in which the buyer, after the despatch of the goods but before delivery, announced that he would not accept them, upheld the trial judge in finding that the damages should be computed on the condition of the market on the last day when the contract could have been performed *i.e.* the date upon which the wheat was tendered for acceptance. Having considered the contrary argument which had been put forward for the defendant he said (page 477):

> "I think the damages have been calculated on a proper principle. If Mr. Richards could have established that the plaintiff, after the notice given to him, could have maintained the action without waiting for the time when the wheat was to be delivered, then perhaps the proper measure of damages would be according to the price at the time of the notice."

On the other hand in Tredegar Iron & Coal Co. Ltd v. Hawthorn Brothers & Co.[11] which was decided about 10 years after the passing of the Sale of Goods Act the buyers of a shipment of coal, to be delivered within a specified month, while the goods were in transit informed the sellers that they would not accept them upon delivery. The sellers held them to their contract and refused to sell the cargo prior to the due delivery date, which they could have done at a better price than that contained in the contract, but instead sold, after the delivery date had passed, at a price lower than the contract price and claimed the difference by way of damages. The judge at first instance awarded them only nominal damages. Allowing the appeal the Master of the Rolls said:

> "The plaintiffs could not maintain an action for damages except upon the footing that the contract had been broken. It was clear law that the repudiation was a nullity unless it was accepted by the other party to the contract. If the other party chose to treat the repudiation as a breach, then matters proceeded on the footing that there had been a breach and the damages must be assessed as for a breach on that date . . ."

And Lord Justice Mathew in a concurring judgment said:

> "The law was perfectly clear. Repudiation was of no effect unless it was acted upon by the other party. If acted upon by the other party there was what was called the anticipatory breach of contract, and the damages were to be calculated as on the date of the acceptance of the repudiation — as if the contract had then run out."

This does not seem to accord well with the rule of Roper v. Johnson[4] viz.: that even in the case of accepted repudiation damages are still calculated at the time fixed by the contract for delivery. The passages just quoted from

(4) (1873) L.R. 8 C.P. 167.

(11) 18 Times Law Reports 716.

Tredegar's case[11] are indeed made the subject of a critical footnote at page 386 of Mayne and McGregor on Damages (the 12th edition) where a similar criticism is made of the decision in Sudan Import Co. v. Societe Generale de Compensation[12].

Thus before and since the passing of the Act three distinct views have been expressed by courts in relation to the assessment of damages (following upon peremptory refusal to perform) and the relevant date for inspecting the condition of the market. This has been said or suggested to be: (*a*) the actual date of purported repudiation; (*b*), the date of acceptance of that repudiation; (*c*), the date or dates for delivery under the terms of the contract. The latter is no doubt the true primary rule as it has evolved and I only mention the other dicta to suggest that for over a century the true rule does not seem to have been invariably discerned or observed. We come back thus to a consideration of Section 51 itself where, if anywhere, one might expect to find the resolution of these perplexities insofar as they bear upon the present case. It appears to me that the section makes two distinctions which are of the first importance but that it then proceeds to deal with them in a way which is not wholly easy to understand. The first subsection touches two situations between which there is a world of difference. The first of these situations is where the seller merely neglects to deliver the goods and the second is where he positively refuses to deliver them. In either case an action may be maintained for non-delivery. One might well think that the distinction to which I have alluded in subsection 1 was one specifically designed to clear up all doubts concerning anticipatory breach because the distinction made in Subsection 3 between the two modes of measuring damages would seem to correspond naturally with the two forms of non-delivery mentioned in Subsection 1. Thus where non-delivery results in an action for non-performance after through mere failure to deliver the appropriate rule would seem to be the primary rule whereby the contract rate and the market rate are compared at the date of non-performance; whereas, if a novelty was to be introduced by the legislation one would expect it to be, along the lines indicated by Baron Parke in Philpotts v. Evans[10], by conferring upon the disappointed buyer a more peremptory right in relation to the assessment of his damages in cases of wilful refusal as distinct from failure to perform through want of competence. The symmetry of that proposition is, however, somewhat impaired by the fact that this novelty, if it be such, is specifically restricted to the case of contracts with no fixed time for delivery. Yet the plain fact is that anticipatory breach may as readily occur in cases of fixed date contracts as of those to be performed within a reasonable time. There may be some difficulty in the way of

(10) 5 Meeson's & Welsby's Reports 475.

(11) 18 Times Law Reports 716.

(12) (1957) 2 Lloyd's Reports 528.

explaining why an accepted repudiation in the first case should leave the buyer in any different position from that of a buyer who has accepted repudiation in a case of the second sort. The reason for applying the primary rule is clear enough in contracts when the fixed delivery dates are all elapsed by the time of action, for then the end of "restitutio in integrum" may be easily achieved, but where, as might happen in instalment cases, the appointed dates leave the court to feel its way as best it can towards market values which may lie subsantially ahead, that rule obviously becomes less attractive. What remains clear however is the distinction drawn by the subsection between the two relevant dates of computation. There can be no question of the words "time of the refusal to deliver" being merely synonymous with the words "time or times when they ought to have been delivered". The former words cannot be merely redundant. In the end, therefore, I can only say that notwithstanding the decision of the Court of Appeal in Millett v. Van Heek & Co.[7] I am unable to find any good reason for supposing that the final words of Subsection 3 do not apply in cases of anticipatory breach. Although McCardie J. in Hartley v. Hymans[2] arrived at his conclusion with expressed misgivings I would prefer to follow that opinion as being clearly in accord with the language of the subsection.

It may be that there is a good reason for making a distinction, in this matter of anticipatory breach, between cases where the parties themselves have fixed a definite term and interim periods of delivery and cases where all questions as to delivery and term are left at large or at the will of the buyer in expressing his requirements from time to time. In contracts of the first kind, even where, at the trial, the fixed dates lie in the future, the parties have looked ahead and have established the precise intervals at which ascertained quantities of the whole bulk of the goods the subject of the contract are to be delivered. In such cases it is perhaps reasonable to expect that the disappointed buyer upon repudiation by the seller should, even though accepting the repudiation, be held, in measuring his claim against the seller, to the market prices prevailing at precisely those dates to which from the outset he was looking to the seller for the satisfaction of his needs in those precise amounts whether those dates favour him or not. Where on the other hand the contract is at large in respect of such detail and only the price and the whole quantity of the goods is ascertained it does not seem unreasonable that the buyer, upon repudiation, should be at liberty to demand at once the whole balance of the undelivered goods, at all events where, as in the present case, previous instalments had been of very unequal amounts and at unequal intervals. Also, it could well be, in part, the intention of the Legislature that in such cases the courts are to be relieved of at least the more extreme anxieties of prophetic utterance where future damages are concerned and that the parties are to be bound to one specific date for the accrual of rights

(2) (1920) 3 K.B. 475.

(7) (1921) 2 K.B. 369.

and obligations following upon the decisive act of one of them acceded to by the other. To my mind the final words of Section 51 (3) of the Act are clear and ought to be followed and I cannot say otherwise of the provisions of S.53(3) of the Ordinance. *Prima facie* a contract with a fixed date of delivery must be either one which states the date or dates of delivery in the contract itself or else one which, as in Melachrino's case[8], has an ascertainable date for delivery fixed by reference to the happening of a given event. But where the contract itself provides for delivery on demand then, although it is not on the face of it one with a fixed delivery date I do not see why it should not be regarded as a contract for which a "time was fixed for delivery" upon the buyer exercising his right to appoint a date and the seller agreeing to the date so appointed. Where no such certitude exists and where, at the date of the request, the date or dates of delivery are wholly indefinite and are, ascertainable only by having regard to the whole nature of the relations of the parties and the previous course of their conduct, then I think the contract must be regarded as one to be performed within a reasonable time. As such I would say that it cannot be described as having a fixed or certain time for performance. I find support for this view in the language of section 31 (2) of the Act which, almost in terms, equates a contract with no certain date to one to be performed within a reasonable time. To all such contracts I believe the final words of subsection 3 must always apply.

The present contract was one to be completed over an indefinite period by instalments upon demand. Had there been a point at which the plaintiff had demanded delivery of the balance of the goods according to a fixed schedule of dates and amounts and this had been accepted by the defendant then, upon the defendant's refusal to make any further deliveries, the plaintiff might have been bound to those dates in asking the court to determine the damages for then the delivery dates though appointed by the buyer would not have been "fixed" by the parties. But that is not what happened. Instead, after may demands and many deliveries at irregular intervals and of amounts which often varied from those stipulated, the defendant company suddenly announced that there would be no more deliveries at all although a substantial balance of goods remained at that date undelivered. The court found it at fault in so doing. In those circumstances I think that for the purpose of assessing damages the contract can only be regarded as one for delivery of goods in reasonable quantities at reasonable intervals *i.e.* a contract to be performed within a reasonable time. One might well think that there is little practical difference between a contract of that kind and a contract for delivery upon demand by the buyer which has been aborted by the seller's refusal before demand has been made, which would perhaps be an alternative way of describing the circumstances here. But if there is a valid distinction to be drawn, and this would seem to be implicit in what Atkin L.J. said in Millett v. Van Heek & Co.[7], then I would think that, in the alternative, the contract

(7) (1921) 2 K.B. 369.

(8) (1920) 1 K.B. 693.

in the present case might be regarded as one for delivery of goods upon demand or as required by the buyers which had been frustrated by the seller's refusal before any demand concerning the outstanding balance of undelivered goods had been made. Under that prescription the decision in Millett v. Van Heek & Co.[7] would, in the present circumstances, augment the authority of McCardie J. in Hartley v. Hymans[2] and once again the result is that the proper date for looking to the market for the purpose of estimating damages is the 31st of July 1973 the date of the positive and final refusal by the seller to deliver any more goods.

I have had the advantage of reading the judgment of my Lord the learned president and have considered the primary solution which he proposes to a problem which we both wish to answer one way. If I do not follow him in that opinion it is not only with diffidence but with regret, for there is an obvious attraction to an answer, founded on the special wording of the local legislation, which would make it unnecessary to depart from the authority of a decision of the English appellate court which, although it does not seem to have been expressly followed in any later case, has nevertheless not hitherto been questioned and has repeatedly been invoked by the academic writers. In these circumstances I think it is desirable to record as briefly as I can the reason why I am unable to find in the additional words "neglect or" which appear in our subsection the substantial determinant of the present case. I confess that the difference in the wording of the local statute was one which I had overlooked throughout the hearing of the appeal. It was not referred to by counsel and I rather suspect that Mr. Swaine, who was no doubt aware of it, must have assumed that the difference was immaterial. The additional words have been in the Ordinance from its first enactment and research has not yielded any extra-contextual clue to the draftsman's intention. In the end I have been unable to form any opinion save that these words are surplusage. I say this because I am regretfully unable to follow the learned president in the use which he makes of the distinction between contracts which have fixed delivery dates and contracts which have no such dates but which at the time of refusal have ascertained dates of delivery consequent upon the buyer's demand. This is I think the only point at which we are not in accord and I should say at once that I concede that a distinction can be made between an "ascertained" date of delivery and a "fixed" date of delivery where, upon the buyer appointing his date, the seller at once refuses to deliver for then there is no agreed date. But that, of course, does not help to show that there is a class of contracts providing for delivery of demand under which there could occur either a neglect or a refusal to deliver. For those alternatives to be open demand must initially have resulted in agreement as to the declared date. Where there is no such agreement and demand is met by refusal the term "neglect" in the final clause is of no relevance. I

(2) (1920) 3 K.B. 475.

(7) (1921) 2 K.B. 369.

appreciate that where such a demand is made and is not met by refusal the contract may suffer non-performance either through neglect or else through subsequent refusal and that, in that sense the word "neglect" has a function; it can, grammatically, be given a meaning in the final clause. For the reasons I have already given, however, I prefer to regard any contract in which the delivery date has been ascertained in the sense that it was agreed, prior to refusal, as a contract with a fixed date and therefore subject to the penultimate clause. That, however, does not mean that contracts without fixed dates are governed exclusively by the final words. The time of neglect (or failure) to deliver goods under a contract in which no time of delivery has been fixed can only mean the time when delivery ought to have been made in all the circumstances. That consideration will only arise when the parties are in disagreement as to when delivery ought to have been made; when disagreement does arise the date of that "ought" is something which only a court can ascertain and in doing so the court can only be guided by referring to what would be, or would have been, reasonable in all the circumstances.

When one is dealing with a contract having no fixed delivery dates there is a radical difference between the notion "time of neglect to deliver" and the notion "time of refusal to deliver". The latter has a fixed unalterable date consequent on the act of one of the parties long before action is commenced; the former is verbum equivocum, a term of no content, until the court has pronounced upon it. Therefore, as it seems to me, the English Legislature rightly omitted the words "neglect or" from the final clause of subsection three because they have no relevance there. Although the penultimate and the ultimate provisions of the subsection are set over against each other in the apparent mode of antithesis — the earlier covering fixed date contracts and the latter contracts without fixed dates — yet the words of the prior clause do no explicitly exclude the latter class and are clearly apt to cover not only the special case of refusal to deliver where there are fixed dates but also all cases of neglect or failure to deliver, irrespective of whether the contract itself provides a date for delivery or whether it does not. If the words "or refusal" be omitted from the final clause in subsection three of the Ordinance that clause would then amount to no more than a needless repetition of the earlier formula: "at the time or times when they ought to have been delivered". That is to say, the final clause would be otiose. I conclude therefore that in our legislation as in the English legislation the final words do express a different and additional intention from that expressed in the preceding clause and that that intention is centred precisely and exclusively in the word "refusal". It is here, if anywhere, that something new is added for if subsection three ended with the words " . . . ought to have been delivered", then, in any case of anticipatory breach the court would perhaps apply the rule discerned by Atkin L.J. in the cases commencing with Frost v. Knight[5] and fix damages by reference to the date or dates on which delivery ought to have been made. We

(5) 7 Exchequer Cases 111.

are, I think, agreed that the final words of the English section make it clear that such a rule does not apply where a date has not been fixed and there has been refusal to deliver. As I read it, the wording of the local legislation does not make that conclusion any more certain.

On one point both parties have agreed and that is that the date 31st of May 1973 chosen by the learned trial judge as the correct date for estimating the market could not in any event be the proper date. That was neither the date of refusal nor the date of breach. If, however, the proper date for looking to the market was the date of breach and not the date of the refusal it would appear on what is before us that that did not occur until action was brought by a writ issued in November of 1973. If the true date for assessment is not the 31st of July then I would agree with Mr. Bernacchi that since there was not before the court sufficient material to calculate an alternative figure, and since in any event the respondent does not suggest any such alternative, the cross-appeal would have to be dismissed. For the reasons given however I would allow the cross-appeal and substitute for the figure proposed by the learned trial judge the figure of $833,553 as set forth in paragraph (*a*) of the respondent's notice.

Bernacchi, Q.C. & Martin Lee (C. Y. Kwan) for Appellant/Defendant.

John Swaine, Q.C. (C. P. Lin & Co.) for Respondent/Plaintiff.

IN THE SUPREME COURT OF HONG KONG

(APPELLATE JURISDICTION)

Civil Appeal No. 16 of 1975

(On appeal from O.J. 3627 of 1973)

BETWEEN

TAI HING COTTON MILL LIMITED — *Appellant (Defendant)*

and

KAMSING KNITTING FACTORY (a firm) — *Respondent (Plaintiff)*

Coram: Huggins, McMullin and Cons, JJ.

Date: 19th September, 1975.

JUDGMENT

Cons, J.:

I have had the advantage of reading the drafts of the two judgments which now have been delivered. I am in entire agreement that the appeal should be dismissed. However, the cross appeal raises matter of much greater difficulty and I regret to say that in this respect I have come to a different conclusion.

Sub-section (3) of section 53 of the Sale of Goods Ordinance provides as follows:

> " Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed for delivery, then at the time of the neglect or refusal to deliver."

In the case of Millett v. Van Heek and Company[1] the English Court of Appeal ruled that the English equivalent of the second part of the sub-section did not apply where the time for performance of the contract had not yet

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(1) (1921) 2 K.B. 369.

arrived, *i.e.* it did not apply to anticipatory breach or breach by repudiation and acceptance thereof. Damages in such a case fell to be assessed according to the time or times at which the contract should have been performed. The facts of that case were as follows:

(*a*) Running contracts interrupted by a Government embargo upon the goods sold;

(*b*) a new agreement between the parties that deliveries would be resumed as and when the embargo was lifted;

(*c*) a repudiation by the seller before the embargo was lifted and an acceptance thereof by the buyer. **10**

It was held that the new agreement constituted a new contract to resume deliveries within a reasonable time after the lifting of the embargo and that the damages should be assessed as at that time.

The judges in that case did not decide, as they perhaps could have done, that in the circumstances the time at which the new contract was to be performed was in fact already fixed, although its actual ascertainment would depend upon the subsequent act of a third party. Bankes and Warrington, L.JJ., based their decisions upon a simple statement that the latter part of the sub-section did not apply to anticipatory breach as opposed to actual breach. Atkin, L.J., came to the same conclusion by extending the principle **20** which had already been established before the Sale of Goods Act was passed and upon which presumably the Act itself was based.

The three Lords Justices expressed themselves as deliberately leaving open as a separate issue the question whether a contract which is to be performed within a reasonable time is a contract with a fixed time for delivery. If this question is answered in the affirmative it is difficult to see the purpose of the second half of the sub-section, for by section 31 (2) contracts for which no time of delivery is expressed are to be performed within a reasonable time. Atkin, L.J., thought obiter that the words might refer to a contract to deliver goods on demand or as required by the purchaser. **30** This view has been accepted in McGregor on Damages, 13th Ed., para. 559. But with the greatest respect this only takes one back to the first premise, for if the demand had not yet been made nor the goods required the time for performance has not yet arrived and the breach is therefore anticipatory.

The case of Hartley v. Hymans[2] was decided at first instance shortly before Millett v. Van Heek. In that case a purchaser wrongfully refused to accept all the balance of the instalments outstanding. Damages were assessed as at the date of that refusal even though the refusal was not accepted until sometime later. McCardie, J., was apparently influenced by the fact that the correct date of delivery should have been fixed by the purchaser and **40** that by his absolute refusal he put it out of his power to fix such a date.

(2) (1920) 3 K.B. 475.

To my mind this decision is of doubtful authority because

(*a*) it is at variance with Millett v. Van Heek, in which it was apparently not mentioned;

(*b*) the authority upon which McCardie, J., relied does not appear to support him, *i.e.* Tyers and others v. The Rosedale and Ferryhill Iron Co., Ltd.[3]. In that case the judges deliberately left open the principle upon which damages should be assessed, although the comments of Cockburn, C.J., implied that they would depend upon the future time for performance;

(*c*) it was given shortly and at the end of a most difficult case in which the principal question was one of liability.

I do not think it possible to exclude the present breach from the basic principle enumerated in Millet v. Van Heek. Subject to one comment that I shall make later, the time for delivery of the balance sued for had not yet arrived when the seller repudiated or when the purchaser accepted that repudiation by issuing his writ. The breach can only be anticipatory and within the case.

Nor do I think it possible to distinguish that case by reference to the inclusion in our Ordinance of the words "neglect or" before the word "refusal". These words do not appear in the English statute. For my part I cannot see that in themselves they add anything. There can be no neglect to deliver until there is a duty to deliver and once there is a duty to deliver the matter is covered by the first part of the sub-section. The word "neglect" can only be given effect to if the meaning of "fixed" is restricted to "fixed in the contract itself" and at the same time allowance be made for the time of delivery to be ascertained in some other or subsequent way. I am not persuaded that the legislature intended to create such a dual concept which would result, on a *prima facie* basis at least, in the application of different principles where the time for delivery is agreed in the contract itself from where it is agreed perhaps only a few days later. I can find no hint of such restriction in the authorities. Indeed even in Hartley v. Hymans a comment by McCardie, J., at 496 shows that he considered it possible for the time of delivery to be "fixed" up to the last minute.

In the instant case I would think that damages should be assessed according to instalments reasonably demanded after the 31st July 1973. This was the date on which the purchaser was put on notice that the seller did not intend to complete. No decision was made as to what these would have been nor was evidence led as to the appropriate market prices. In the circumstances it is impossible for this Court to decide. But to my mind that is not necessary. It is sufficient to say that the true date for assessment is not the 31st July itself. And as it is upon that particular date that the two variations asked for in the cross appeal depend, I would dismiss the cross appeal.

(3) Vol. X L.R. Ex. 195.

Earlier I entered a caveat as to the nature of the breach in this case because it seems to me possible that the plaintiff had already fixed times for delivery of the balance outstanding. In his letter of the 21st July he asked

> "In order to complete caption contract you are earnestly requested to deliver us daily at least four bales, *i.e.* 1,600 lbs. starting from the 26th of this month.
>
> Your cooperation and prompt attention is absolutely essential."

It would be a matter of construction whether those polite words amounted to a definite demand for delivery or merely an offer to treat as to the amounts. However, this issue was not raised in any way at the trial and it would be improper to raise it at this stage.

I dissent from my brothers with the utmost diffidence, but I am not persuaded that either version of the latter part of the sub-section did effect a change in what were then well-established principles. With respect I do not read the earlier authorities as showing any inconsistency in those principles. Martin, B., was against the general run of authority but even he acknowledged that it existed: Brown v. Muller[4]. Such a change would have been a radical change and one would have expected it to have been introduced more definitely, as for example by the use of words "or if the time for delivery had not yet arrived". Moreover there would seem to be little advantage in the change. I can see the convenience to a seller who is minded to default of knowing in advance with certainty his liability for damages. But I can also see the detriment to a purchaser should the seller repudiate upon a rising market. It may be said that this is a particular circumstance which would override the *prima facie* nature of the whole sub-section. If so it may perhaps be equally said that all anticipatory breaches are particular circumstances which override the sub-section. As Bailhache, J., commented in Melachrino v. Nickoll and Knight[5] the section "does not in terms deal with an anticipatory breach." It is said that the change may have been made with a view to avoid litigation that would otherwise be necessary in each case where the time for delivery remained unascertained. I cannot help feeling that this view overlooks the good sense of the business community and those who advise them, although there may of course be cases of difficulty which would have to be taken to court. I must confess that I have some difficulty in understanding precisely what effect these troublesome latter halves do have. I would only say that to my mind they have not so clearly effected a change in the law that we would be warranted in rejecting a decision of the English Court of Appeal which has stood for over 50 years unquestioned, so far as I am aware, in any way whatsoever.

For these reasons I would dismiss the cross appeal as well as the appeal itself.

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(4) (1872) Vol. VII L.R. Ex. 319 at 323.

(5) (1920) 1 K.B. 693 at 696.

IN THE SUPREME COURT OF HONG KONG
(APPELLATE JURISDICTION)
Civil Appeal No. 16 of 1975
(On appeal from O.J. 3627 of 1973)

BETWEEN TAI HING COTTON MILL LIMITED *Appellant (Defendant)*

and

KAMSING KNITTING FACTORY (a firm) *Respondent (Plaintiff)*

BEFORE THE HONOURABLE MR. JUSTICE HUGGINS, THE HONOURABLE MR. JUSTICE McMULLIN and THE HONOURABLE MR. JUSTICE CONS, IN FULL COURT

ORDER

Upon reading the Notice of Motion dated the 24th day of March 1975 on behalf of the Defendant by way of appeal and upon reading the Respondent's Notice dated the 8th day of April 1975 on behalf of the Plaintiff by way of cross appeal from the Judgment of the Honourable Sir Geoffrey Briggs Chief Justice given at the trial of this action on the 19th day of February 1975, whereby it was adjudged that judgment be entered for the Plaintiff the sum of $451,773.00 together with interest thereon at the rate of 8% per annum from the 28th day of November 1973 to the date hereof and costs of this action be taxed.

And upon reading the said Judgment.

And upon hearing Mr. Brook Bernacchi and Mr. Martin Lee of Counsel on behalf of the Defendant and Mr. John J. Swaine of Counsel on behalf of the Plaintiff.

It is ordered that the said judgment of the Honourable Sir Geoffrey Briggs Chief Justice dated the 19th day of February 1975 be substituted for the figure of $833,553.00 and that the Appeal be dismissed and Cross Appeal be allowed.

And it is further ordered that the Appellant (Defendant) do pay to the Respondent and Cross Appellant (Plaintiff) interest on the said sum of $833,553.00 at the rate of 8% per annum from the 28th day of November 1973 to the date hereof and costs of this Appeal and Cross Appeal be paid by the Appellant (Defendant) to the Respondent and Cross Appellant (Plaintiff) or its Solicitors and such costs to be taxed by the Registrar.

Dated the 19th day of September 1975.

(*Sd.*) J. R. OLIVER (L.S.)
Registrar.

In the Supreme Court of Hong Kong Appellate Jurisdiction

No. 8
Judgment of the Full Court
19th September 1975

IN THE SUPREME COURT OF HONG KONG

(APPELLATE JURISDICTION)

Civil Appeal No. 16 of 1975

(On appeal from O.J. 3627 of 1973)

BETWEEN

TAI HING COTTON MILL LIMITED — *Appellant (Defendant)*

and

KAMSING KNITTING FACTORY (a firm) — *Respondent (Plaintiff)* 10

BEFORE THE HONOURABLE MR. JUSTICE HUGGINS,
THE HONOURABLE MR. JUSTICE McMULLIN and
THE HONOURABLE MR. JUSTICE CONS, IN FULL COURT

JUDGMENT

Dated and entered the 19th day of September, 1975.

Pursuant to the order of the Full Court dated the 19th day of September 1975 whereby it was ordered upon the Defendant's appeal and upon the Plaintiff's cross appeal from the judgment of the Honourable Sir Geoffrey Briggs Chief Justice dated the 19th day of February 1975, that the said judgment be substituted for the figure of $833,553.00 and that the appeal be 20 dismissed and cross appeal be allowed.

It is this day adjudged that the Appellant (Defendant) do pay to the Respondent and Cross Appellant (Plaintiff) the said sum of $833,553.00 together with interest thereon at the rate of 8% per annum from the 28th day of November 1973 to the 19th day of September 1975.

And it is further adjudged that the costs of this Appeal and Cross Appeal be paid by the Appellant (Defendant) to the Respondent and Cross Appellant (Plaintiff) or its Solicitors and such costs to be taxed by the Registrar.

(*Sd.*) J. R. OLIVER (L.S.)
Registrar. 30

IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

Civil Appeal No. 16 of 1975

(On appeal from O.J. 3627 of 1973)

BETWEEN

TAI HING COTTON MILL, LIMITED — *Appellant (Defendant)*

and

KAMSING KNITTING FACTORY (a firm) — *Respondent (Plaintiff)*

10

NOTICE OF MOTION

TAKE NOTICE that the Full Court will be moved on the 16th day of October 1975 at 10 o'clock in the fore-noon or so soon thereafter as Counsel on behalf of the abovenamed Appellant (Defendant) can be heard for an order giving leave to appeal against the decision of the Full Court herein both on the Appeal and Cross Appeal to the Judicial Committee of the Privy Council (including the refusal of the Full Court to allow the said Appellant to amend the Defence herein and/or to permit Counsel to argue the substance of the Appeal in the absence of a specific pleading as envisaged in the proposed
20 amendments) PURSUANT to the Order in Council regulating appeals from the Court of Appeal for Hong Kong to Her Majesty in Council AND for appropriate directions under Rule 5 thereof.

Dated the 29th day of September, 1975.

(*Sd.*) C. Y. KWAN & Co.
Solicitors for the Appellant (Defendant)

To: Messrs. C. P. Lin & Co.,
Solicitors for the Respondent (Plaintiff),
Hong Kong.

In the Supreme Court of Hong Kong Appellate Jurisdiction

No. 10
Order of the Full Court Granting Conditional Leave to Appeal to Privy Council 16th October 1975

IN THE SUPREME COURT OF HONG KONG

APPELLATE JURISDICTION

Civil Appeal No. 16 of 1975

(On appeal from O.J. 3627 of 1973)

BETWEEN	TAI HING COTTON MILL, LIMITED	*Appellant (Defendant)*
	and	
	KAMSING KNITTING FACTORY	*Respondent (Plaintiff)*

BEFORE THE HONOURABLE MR. JUSTICE HUGGINS AND THE HONOURABLE MR. JUSTICE McMULLIN IN FULL COURT

ORDER

UPON READING the Notice of Motion herein dated the 29th day of September 1975 on behalf of the abovenamed Appellant (Defendant) for leave to appeal against the decision of the Full Court both on the Appeal and Cross Appeal to the Judicial Committee of the Privy Council (including the refusal of the Full Court to allow the said Appellant to amend the Defence herein and/or to permit Counsel to argue the substance of the Appeal in the absence of a specific pleading as envisaged in the proposed amendments) pursuant to the Order in Council regulating appeals from the Court of Appeal for Hong Kong to Her Majesty in Council.

AND UPON HEARING Counsel for the Appellant (Defendant) and Counsel for the Respondent (Plaintiff) IT IS ORDERED that the Appellant (Defendant) be granted leave to appeal from the said decision of the Full Court to Her Majesty in Council on the following conditions:

1. The Appellant (Defendant) do within 6 weeks from the date hereof furnish security in the sum of $20,000.00 for the due prosecution of the appeal;
2. the record of proceedings to be despatched within 4 months;
3. the Respondent (Plaintiff) do give security in the amount of $400,000.00.

AND IT IS FURTHER ORDERED that the costs be costs in the cause of the Appeal to Her Majesty in Council.

Dated the 16th day of October, 1975.

(*Sd.*) J. R. OLIVER (L.S.)
Registrar.

EXHIBITS

Exhibit P1(5)
Contract
No. 3118/71
23rd March
1971

TAI HING COTTON MILL, LTD.

(INCORPORATED IN HONGKONG)
1417-20 PRINCE'S BUILDING,
No. 10, CHATER ROAD,
HONG KONG

大興紡織有限公司
香港遮打道十號太子大厦
十五樓一四一七–二〇室

CABLE ADDRESS:
"MAPLEMILL HONGKONG"

TELEPHONE NOS:
H-241161-5
H-226507

Please sign and return the original contract within one week from the date of issue. Otherwise, this contract will be void.
本合同所載日期起務希立返在七日內簽將正本簽回以便安排生產

CONFIRMATION OF SALE

SALES CONTRACT NO. ......3118/71............ Date.....23rd March, 1971...

THIS CONTRACT for the Sale and Purchase of the undermentioned goods is this day made between **TAI HING COTTON MILL, LTD.**, Hong Kong (hereinafter called the "Sellers"), and Messrs. Kamsing Knitting Fty., in D.D.445, Lot 693 Castle Peak Road, Ha-Kwai-Chung, Tsuen Wan, N.T., Kowloon. (hereinafter called the "Buyers"), on the undermentioned terms and is also made, in other respects, upon the conditions specified on the back hereof.

Description: 32's/1 A Cotton Yarn, "MAPLE" Brand, 25% C.P.C.

Packing: On Cone.

Quantity: One thousand five hundred (1,500) bales = 600,000 lbs.

Unit Price: HK$1,335.- (Hongkong Dollars One thousand three hundred thirty five only) per 400 lbs. nett Ex Mill Godown.

Delivery: Apr.1971 - Dec.1971.

Margin: Nil

Payment: Cash payment against delivery.

Other Terms: If 32's/1 AA and 40's/1 A Cotton Yarn on Wooden Cones shall be required, the unit price will be @HK$1,435.00 per 400 lbs. nett ex Mill Godown.

Rebate ½%

Accepted and Confirmed by Buyers:

KNITTING FACTORY
Manager

TAI HING COTTON MILL, LTD.
Managing Director.

Exhibit P1(5)
Contract
No. 3118/71
23rd March
1971
(continued)

CONDITIONS OF SALE

Description

1. All descriptions, dimensions, packing, quality, quantity, etc. are guaranteed approximately correct only and usual trade margins of the country of origin are allowed with regard to same.

Delivery

2. The Buyers shall take delivery of the goods contracted within the time stipulated and shall, unless otherwise arranged with and agreed to by the Sellers, make payment in full on or before delivery. In the event of the Buyers failing to take delivery of the goods within the time stipulated, in conformity with conditions stated in following sections on "DAILY AVERAGE" and "DELIVERY SCHEDULE", the Sellers may forthwith cancel this contract, forfeit the margin, and sell the goods either by private sale or public auction without prejudice to their right to claim damages for breach of contract.

Daily Average

3. In the absence of a prior special agreement concluded between the Buyers and Sellers regarding the quantities and exact dates of taking delivery within the period in question, the Sellers shall not be obliged to hold stock of such contracted goods in readiness for delivery upon call by the Buyers, except for an amount not exceeding a daily average as represented by the entire contracted quantity divided by the total number of days making up the period of delivery.

Delivery of any amount in excess of the average on any given day at the Buyers' request shall be subject to prior agreement on the part of the Sellers, notwithstanding previous postponement in taking deliveries having already caused a cumulative non-delivered arrear up to the date of delivery.

Delivery Schedule

4. At any time prior to the commencement of the delivery period, the Buyers shall be at liberty to propose in writing to the Sellers a delivery schedule other than the daily average basis above referred to, which schedule, if agreed by the Sellers in writing shall be as effective as if the same formed part of this agreement. If, however, agreement shall not be reached between the Buyers and the Sellers upon such schedule within seven days before commencement of the delivery period, deliveries shall be made on the basis of daily average, as herein provided.

(Any schedule proposed in pursuance of this clause shall specify delivery dates and quantities and with all necessary descriptive particulars, including, in the case of yarn on beams, the number of yarn ends in each batch of beams).

Part Delivery

5. In contracts providing for delivery or shipments of goods in separate lots during several specified time periods, any non-delivery, either in whole or in part, of the goods required to be delivered or shipped during one of these periods, and/or any dispute whatsoever arising from one delivery, shall not in any way affect the obligations and liabilities of the buyers with regard to the other deliveries covered by this contract.

Interest on Purchase Price

6. If the Buyers fail to effect full payment of the purchase price on or before delivery as stipulated in Clause 2 herein, they shall pay to the Sellers simple interest on the unpaid purchase price at the rate of 1% per month calculated from the date when the purchase price should have been to the date of actual payment.

Damage Arising out of Buyers' Default in Taking Delivery

7. The Buyers shall take delivery of the goods within 14 days from the date when the delivery warrant is delivered by mail to the Buyers. If the Buyers delay or fail to effect delivery within the time stipulated and as a result, the goods are damaged by moisture or dampness, infection by insects or rats or any other hazards beyond the control of the Sellers, the Sellers shall be exempted from liability and the Buyers shall not be entitled to claim against the Sellers for their losses.

Storage Charges

8. The Buyers shall pay storage charges to the Sellers in the event of their taking delivery of goods beyond the 14 days' period as stated in the preceding clause, such charges shall be at the monthly rate of H.K.$-.40 per bale.

Extension

9. Whenever actual deliveries fall behind either on the basis of daily average or on a mutually approved delivery schedule. It is Hereby Agreed that the following provisions shall become effective:—

I. If the default in delivery is due to the Buyers' failure or refusal then in such cases:—

(*a*) The Sellers may, within seven days from the date of such default or from the date of expiry of such extra time for such delivery as may be mutually agreed between the parties, give notice to the Buyers that the undelivered portion of the goods to be delivered under this agreement shall be reduced by such quantity, and the Buyers shall have no further claim to such delivery.

(*b*) If no such notice of cancellation is given by the Sellers to the Buyers within the stipulated period, then the Buyers shall remain liable to take delivery of such goods during an extended period of this contract equivalent to the number of days required to take delivery thereof on the daily average basis, as provided in the section on "DAILY AVERAGE" as if there has been no agreed schedule.

II. If the default in delivery is due to the Sellers' failure or refusal other than causes of Force Majeure, then in such case:—

(*a*) The Buyers may, within seven days from the date of such default or from the date of expiry of such extra time as aforesaid, give notice to the Sellers that the undelivered portion of the goods then due for delivery is cancelled and the total amount of the goods to be delivered under this agreement shall be reduced by such amount and the Sellers shall have no further right to compel the Buyers to take delivery thereof.

(*b*) If no such notice of cancellation is given by the Buyers to the Sellers within the stipulated period then the Sellers shall remain liable to deliver the undelivered quantity (subject to the Buyers furnishing all necesssary particulars in due time) and the Buyers to take delivery of such goods during an extended period calculated as aforesaid.

Provided always that nothing in this clause nor in the previous two clauses is intended nor shall operate to prevent an extention of the period in which delivery or part delivery is to be given by the Sellers or taken by the Buyers by mutual agreement in writing to some further date in which event such further date shall be the relevant delivery date for the purposes of this clause.

Force Majeure

10. The Sellers shall not be responsible for late shipment (or late delivery), non-shipment (or non-delivery) or any delays whatsoever, arising from Force Majeure such as strikes, breakdown of machinery, suspension of electric supply, riots, famines, war, robbery, civil commotions, hurricanes, disaster caused by fire and/or water, or from any cause or circumstances whatsoever beyond the control of the Sellers.

Separate Contracts

11. In case of there being more than one contract subsisting between the Buyers and the Sellers, any non-delivery, either in whole or in part, of the goods required to be delivered or shipped under one of these contracts, and/or any dispute whatsoever arising from any one of them, shall not affect the Buyers' obligations as regards any other outstanding contract.

More Than One Contract

12. In case of there being more than one contract for the purchase and sale of goods subsisting between the Buyers and the Sellers, late delivery or non-delivery of part of the goods covered by any one contracts, shall not affect obligations of the Buyers arising from other contracts, provided however that, in the event of the Buyers failing to perform any of the terms of any one contract, or in the event of showing indebtedness to the Sellers on a separate account, the Sellers shall reserve the right to refuse delivery to the Buyers of any part of the goods covered by any other contract until the Buyers shall have fulfilled their obligations and/or discharged such indebtedness.

Government Regulations

13. The Buyers shall be responsible for compliance with any government regulation where such compliance by the Buyers is required by the regulations concerned.

Government Charges

14. Any additional taxes, duties, fees or charges of any kind imposed on goods covered by this contract by the Government of any country on or after the date of this contract shall be for the account of Buyers.

Utilizing Margin

15. Margin doposit paid by the Buyers may only be utilised as pro rata payment of goods to the extent of that percentage at which the rate of margin was originally fixed in proportion to the agreed price of goods. Save as aforesaid, such margin deposit shall not be used in payment of goods, nor shall it be utilised to offset other accounts which may subsist between the Buyers and the Sellers.

Additional Margin

16. In the event that the market price of the contracted goods should decline to such an extent that the Sellers deem it necessary to demand margin or additional margin, the Sellers are entitled to do so by written notice.

Claim on Quality

17. No claim of any nature shall be entertained for inferior quality of the goods or for any deviation from any description or sample unless such claim is made within 14 days after delivery shall have been taken by the Buyers.

Exhibit P1(5)
Contract
No. 3118/71
23rd March
1971
(continued)

Bags and Cones

18. In the case of the contracted goods being yarn on beams or cones, packed in canvas bags, all such cones, bags and containers shall be on loan basis, and shall be returned to the Sellers in good condition. Failing such return the Buyers shall reimburse the Sellers the market price of such items on demand.

Devaluation of Currency

19. In the duration of this contract, should any change take place in the monetary system or should there occur any devaluation in the currency in which the contract price of the goods is expressed, the Sellers have the right to adjust the price according to the rate as may have been in force prior to such change or devaluation.

Serving of Notices

20. Any notice required hereby, or by any contract, to be served upon Sellers or Buyers shall be deemed to have been duly served if sent to the last known address of such Sellers or Buyers, and irrespective of the actual occupation of such address by such Sellers or Buyers at the time of delivery.

Arbitration

21. No disputes of any nature between Buyers and Sellers shall entitle the Buyers to defer and/or delay to take delivery of the goods within the time stipulated in this contract. Should any dispute arise between the Buyers and the Sellers in relation to this contract which they are unable themselves to settle, the same shall be referred to the Arbitration of two Arbitrators, one to be appointed by the Sellers and the other by the Buyers, and the provisions of the Hongkong Code of Civil Procedure as a reference to two Arbitrators shall apply.

English Version

22. If the terms of this contract are expressed both in the English and Chinese languages, and there shall be found any discrepancy, between the two versions, the text of the English version shall prevail over that of the Chinese version.

Exhibit P1(7A)
Schedule of actual deliveries under Contract No. 3118/71

IN THE SUPREME COURT OF HONG KONG

ORIGINAL JURISDICTION

Action No. 3627 of 1973

Exhibit No. P 1 (7A)

SCHEDULE OF ACTUAL DELIVERIES
(under fifth contract)

Contract No. 3118/71 dated 23.3.71 for 1,500 bales of 32 count cotton yarn delivery April to December, 1971.

	DATE	QUANTITY (bales)
	July, 1971	33.375
	August	91
	September	77
	October	97.875
	November	119
	December	102
	January, 1972	71
	February	10
	March	1.5
	April	23.875
	May	19
	June	16.625
	July	7
	August	38.25
	September	89
	October	62
	November	71.8
	December	58
	January, 1973	52.5
	February	19
	March	10
	April	3
	May	3
	Total	1,075.800

Exhibit P1(8)
Letter from Kamsing Knitting Factory to Tai Hing Cotton Mill Limited

21st July 1973

21st July, 1973

Letter from Kamsing Knitting Factory
to Tai Hing Cotton Mill, Ltd.,
1417-20 Prince's Building,
No. 10 Chater Road,
Hong Kong.

Dear Sirs,

Re: Your Sales Contract No. 3118/71

Our record shows that under contract No. 3118/71 you have only delivered to us 213,020-lbs., during 1971, 186,920-lbs. during 1972 and 35,000-lbs. during the period from January to May this year. There is still remaining a balance quantity of 165,060-lbs. against the above contract which you have not delivered any to us since the beginning of June 1973.

During the past months the undersigned and his fellow staff have frequently urged your mill by telephone to increase under any circumstance the cotton yarn quantity of your future deliveries. You will no doubt remember we have discussed many times with your Mr. Richard Chow, sales representative urging him to request your mill to fulfill your obligations. In a telephone conversation in April 1973 Mr. Richard Chow further confirmed that your Manager, Mr. Yim had promised to deliver us at least 15 bales *i.e.* 6,000-lbs. per month commencing from May 1973. However, you have not kept your promise to deliver such an amount in May and we are extremely disappointed in receiving instead only a very small portion of your delivery cotton yarn to us. We made a further discussion with your Mr. Richard Chow between 22nd-27th May 1973 at the Golden Crown Restaurant, 3rd floor. Subsequently your Mr. Richard Chow reassured that you will maintain a delivery of not less than 15 bales per month from June 1973 and onwards.

We are really at a loss to understand why our numerous requests and urgings and with your several confirmation and reassurance would end up in a total non-delivery during the month of June, 1973. We have been compelled to have to purchase cotton yarns from the market at a very high price for knitting our products for our customers. Our tremendous loss as a result of purchasing cotton yarns from the outside market is due entirely to the non-fulfillment of contract by your goodselves.

In order to complete the captioned contract you are earnestly requested to deliver us daily at least 4 bales *i.e.* 1,600-lbs. starting from the 26th of this month.

Your co-operation and prompt attention is absolutely essential.

We remain.

Sincerely yours

KAMSING KNITTING FACTORY
Manager.

Letter from Tai Hing Cotton Mill, Ltd.
to Kamsing Knitting Factory.

Exhibit P1(9)
Letter from Tai Hing Cotton Mill Limited to Kamsing Knitting Factory
31st July 1973

Ref. No. 39269/1032

31st July 1973.

Messrs. Kamsing Knitting Factory,
702, Hang Seng Bldg.,
677, Nathan Road,
Kowloon.

Dear Sirs,

Sales Contract No. 3118/71

With reference to your letter dated 21st July, 1973 concerning the captioned contract, we have read the contents.

According to the delivery time stipulated on the contract, that was for April to December 1971, in which duration, after taking part of the quantity contracted, you consequently failed to take delivery of the balance. In consideration of your failure within that specified timing in consuming the yarn produced, we now treated the contract for cancellation.

Your kind attention is drawn to clause No. 2 — Delivery, under the Conditions of Sale at reverse side of the signed Contract, that ". . . . In the event of the Buyers failing to take delivery of the goods within the time stipulated, the Sellers may forthwith cancel the contract, and forfeit the marginal deposit . . . ." Under the circumstances, we regret that at this stage, we are unable to do anything to help you.

Yours faithfully,
TAI HING COTTON MILL, LTD.,

Y. C. CHEN,
Managing Director.

YCC/SL/tc

Exhibit PI(10)
Certified translation of letter from Hong Kong Chinese Textile Mills Association to Tai Hing Cotton Mill Limited

18th September 1973

TRANSLATION

Hong Kong Chinese Textile Mills Association
38-40, Tai Po Rd. 11th Fl.
Kowloon H.K.

18th September, 1973.
34th No. 55

Dear Sir,

Recently according to complaint lodged by our members Hip Hing Knitting Factory (and) Kam Sing Knitting Factory "Our association and Tai Hing Cotton Mills Ltd. have traded in cotton yarn for years. Unfortunately recently the other party broke (its) promise (and) did not in accordance with the contract deliver the full quantity of cotton yarn resulting in discontinuation of (our) production affecting (our) business. Thereafter (we) have been complained of by overseas customers who demanded for compensation. (You are) earnestly requested to write to the other party to fulfil the contract (and) to deliver the yarn that is owing" and so on. This is to inform your esteemed company to inspect clearly (the contents of) the agreement (and) to deliver the balance quantity at an early date, to enable our members to export normally and to maintain good honour overseas. By so doing, within the business circle you will ever be highly esteemed. This is to Tai Hing Cotton Mills Ltd.

Mr. Manager,

H.K. Chinese Textile Mills Association
Chairman (sd.) Ho Chi Leung

I, Lo M. F., of the Judiciary, being a public officer appointed in writing by the Honourable the Chief Justice under Section 23F of the Evidence Ordinance (Cap. 8) hereby certify that the foregoing is a true translation of a Chinese document marked 2108.

Dated 10 May 1974.

Court Translator

Exhibit PI(11)
Certified translation of letter from Tai Hing Cotton Mill Limited to Hong Kong Chinese Textile Mills Association

25th October 1975

TRANSLATION

Cable Address:
"MAPLEMILL HONGKONG"

Telephone Nos:
5-241161-5
5-226507

TAI HING COTTON MILL, LTD.

(Incorporated in Hong Kong)
1417-22 Prince's Building,
No. 10 Chater Road,
Hong Kong.

Dear Sir,

Received (from) your esteemed Association letter of the 34th No. 55. Concerning the subject matter of contract for the order of cotton yarn and their deliveries between Hip Hing Knitting Factory, Kamsing Knitting Factory and our factory, we find that it is quite inconsistent with the truth of the matter. This is especially written as an announcement in order to bring out the truth and to give the correct impression.

Concerning Hip Hing Knitting Factory.

The said factory and our factory all along have close business dealings and so even during the times when supply of raw cotton and fabric were in extreme tense conditions overseas, our factory has maintained our trustworthiness first in priority as always use our best endeavour to make supply without stop each day. (We) list out hereunder the deliveries of cotton yarn within the recent three months:

July: two hundred pieces. August: two hundred and seven pieces. Ending 20th September 144.5975 pieces. Annexed hereto is a letter from Hip Hing Knitting Factory dated 1st October 1973 for your reference.

Concerning Kamsing Knitting Factory.

The said Factory and our factory had entered contract for supply of cotton yarn in March 1971. Unfortunately, the said factory did not within the period take delivery of the goods but in addition during the interval ceased to take delivery of goods despite repeated requests. For this reason, our factory can only treat and declare that the balance quantity under the said contract has lost effect and had on 31st July 1973 sent a letter notifying the same.

This is especially to reply. This is to Hong Kong Chinese Textile Mills Association.

Tai Hing Cotton Mills Limited.
(sd) CHEN YUEN KIN.
Chop of Tai Hing Cotton Mills Company Limited.
(Dated) 25th October 1973.

I, Lo M. F., of the Judiciary, being a public officer appointed in writing by the Honourable the Chief Justice under Section 23F of the Evidence Ordinance (Cap. 8) hereby certify that the foregoing is a true translation of a Chinese document marked 2108A.

Dated 10 May 1974.

Court Translator

Exhibit P1(12)
Certified translation of letter from Kamsing Knitting Factory to Hong Kong Chinese Textile Mills Association

31st October 1973

TRANSLATION

Kamsing Knitting Factory
Knitwears Manufacturer

Office: 702 Hang Seng Bank Building
677 Nathan Road, Kowloon
Hong Kong.

Cable Address:
"KAMSING" Hong Kong
Phone 3-923983

Factory:
In D. D. 445 Lot 693
S.B.S.S. 3 Castle
Peak Road.
Ha-Kwai-Chung, Tsuen Wan.
N.T., Kowloon.

Dear Sir,

(We) have received from Tai Hing Cotton Mills Factory a reply. From information contained in the copy letter furnished by your Association, in fact, our factory had urged him to deliver cotton yarn (but) he did not carry out (the promise). Now your esteemed Association is requested to write to Tai Hing Cotton Mills Factory again that they should within seven days continue to deliver cotton yarns. If this cannot be complied with (we will) resort to legal action for determination, etc.

This is to

Hong Kong Chinese Textile Mills Association.

The Chairman

(Dated) 31st October 1973.

Kamsing Knitting Factory.
(sd.) MUI CHOK CHUE.

I, Lo M. F., of the Judiciary, being a public officer appointed in writing by the Honourable the Chief Justice under Section 23F of the Evidence Ordinance (Cap. 8) hereby certify that the foregoing is a true translation of a Chinese document marked 2107.

Dated 7 May 1974.

Court Translator

Exhibit P2
Sales Contract between Kian Nan Trading Co., Ltd. and Kamsing Knitting Factory

30th May 1973

建南行有限公司
香港德輔道中聯邦大廈十六樓

KIAN NAN TRADING CO., LTD.

16TH FLOOR, REALTY BUILDING,
NO. 71, DES VOEUX ROAD, C.
HONG KONG

SALES CONTRACT
售貨合約

合約號碼
Contract No. C-483/73 Hongkong, 30th May, 1973 19

建南行有限公司（下稱賣方）今同意將下列商品，按照下開及列後之條款售與
KIAN NAN TRADING CO., LTD. (Sellers) have on this day agreed to sell and
Messrs. 金城織造廠 九龍彌敦道677號地下8樓702室
「下稱買方」經雙方協議成交簽訂合約如下：
(Buyers) have agreed to buy the undermentioned goods on the terms as stipulated hereunder and continued on back hereof.

SUPREME COURT OF HONG KONG
Original Jurisdiction
Action No. 7?? of 1973
Exhibit No P. 2
27 JAN 1975

貨名及規格 DESCRIPTION OF GOODS:	32/s GREY COTTON YARN. ON CONES. CHINESE ORIGIN.
商標 BRAND:	"BLUE PHOENIX" BRAND.
數量 QUANTITY:	Total: Forty Thousand (40,000) Pounds Only.
包裝 PACKING:	In Case or Carton.
單價 UNIT PRICE:	@HK$2,400.00 per 400 pounds.
合約總值 TOTAL CONTRACT VALUE:	HK$240,000.00 (HONGKONG DOLLARS TWO HUNDRED AND FORTY THOUSAND ONLY:-----------)
交貨期 ~~SHIPMENT~~/DELIVERY:	Ready Stock.
交貨條件 CLEARANCE:	Buyer should take delivery the contracted merchandise (to be delivered to your factory) before 15/7/1973, otherwise all extra charges are for account of Buyer.
定銀 MARGIN:	Nil.
付款 PAYMENT:	Cash against Delivery Order.
備註 REMARKS:	本合同所訂單價係依簽約日每100港幣等於人民幣 38.99 ……[illegible]
經紀 NAME OF BROKER:	偉昇

Buyers' Signature (買方簽蓋)
KAMSING KNITTING FACTORY
[signature]
Manager

Sellers' Signature (賣方簽蓋)
KIAN NAN TRADING CO., LTD.
[signature]

Exhibit P2
Sales Contract between Kian Nan Trading Co., Ltd. and Kamsing Knitting Factory

30th May 1973
(continued)

CONDITIONS OF SALE

1.—The whole or any part of this Contract is subject to Export and Import Licence being obtainable, Shipping facilities available, and any unforeseen events caused by war, strikes, lock-outs, fire, floods, droughts, earthquakes, delays, collisions, breakdowns, civil commotions, interruption of normal transport boycott, loss in transit, destruction, cancellation, Government orders and any other contingencies or causes beyond Seller's control, generally known as Force Majeure.

2.—If the Buyer makes default in payment or in taking delivery, the Company shall be at liberty to dispose of the goods contracted for and any loss in price suffered by the Company shall be made good forthwith by the Buyer to the Company.

3.—If goods are sold c.i.f.c., interest from date of draft until date of payment, storage and local insurance are for Buyer's account.

4.—If goods are sold c.i.f.c.i., no interest and storage will be charged for clearance within 10 days after arrival.

5.—If any or all of the goods do not arrive in consequence of Force Majeure and/or any other cause beyond Seller's and/or Manufacturers' control, Buyers shall not be entitled to claim delivery of such unarrived portion nor any compensation whatsoever and the Contract is to be considered null and void by both parties to the extent of any portion as cannot be delivered.

6.—If any or all of the goods arrive late due to Force Majeure and/or any cause beyond seller's control, Buyer shall be bound to accept such goods on the terms of this Contract without regard to the time stipulated for delivery, and Seller shall not be liable to Buyer for any loss arising from delay beyond Seller's control.

7.—Late or non-arrival of one part does not effect the validity of this Contract with regards to the others.

8.—In case, goods are deviated to any other than the original destination due to circumstance beyond Seller's control, Buyer agrees to pay all expenses arising out of such deviation, including interest as well as any loss which may result from re-sale or otherwise of goods at port of deviation.

9.—The Company shall not be liable for consequential damages.

10.—From the moment the goods shall have crossed the ship's rail at port of shipment, all risks thereon shall be for Buyer's account and the Company shall have no responsibility other than to make a delivery of the documents.

11.—Any duties, taxies, freight, insurance or other charges or expenses included in the price or prices stated in this contract are based on the tariffs and/or rates ruling on the date of this contract. Any increase in such duties, taxes, freight, insurance or other charges or expenses, and also any additional duties, taxes or other charges or expenses which may subsequently be imposed on the goods covered by this Contract are for buyer's account and shall be applicable to that portion of the contract on which the said additional and/or increased duties, taxes, freight, insurance or other charges incurred.

No. 10 , of 1976.

In the Privy Council

ON APPEAL

FROM THE FULL COURT OF HONG KONG

BETWEEN

TAI HING COTTON MILL LIMITED ... ... *Appellant*

and

KAMSING KNITTING FACTORY ... ... *Respondent*
(a firm)

RECORD OF PROCEEDINGS

ELLIS, WOOD, BICKERSTETH & HAZEL,
38, ST. ANDREWS HILL,
LONDON, EC2V 5DL.
Agents for :-

C. Y. KWAN & CO.

Solicitors for the Appellant

HUGHES WALTON & CO.
225/241, REGENT STREET, LONDON, W1.
AGENTS FOR:-

C. P. LIN & CO.

Solicitors for the Respondent