DAVID LENGA -v- SOLOMON TAIYO LTD, BANA AND LOTE

High Court of Solomon Islands
(Ward C.J.)
Civil Case No. 87 of 1990
Hearing: 17 January 1991
Judgment: 24 January 1991

A. Radclyffe for the Plaintiff
J. Corrin for the First Defendant
Mrs. M.B. Samuel for the Third Defendant

CASES CONSIDERED:

Kendale v. Hamilton (1879) 4 App. Cases 504
Scarfe v. Jardine (1882) 7 App. Cases 345
Morel v. Westmorland (1903) 1 KB 64
Morel v. Westmorland (1904) AC 11
Re Hodgson (1886) 31 Ch. D 177
Robinson v. Geisel (1894) 2 QB 685
Goldrei, Foucard v. Sinclair & Anor (1918) 1 KB 180
Moore v. Flanagan (1920) 1 KB 919

WARD CJ: In this case, judgment was entered on 28th September 1990 for the sum of $28,050.00 and costs against the Second Defendant in default of appearance. By a further defence, filed on 2nd Novemer 1990, the First Defendant pleads that the plaintiff is barred from proceeding against the First Defendant by virtue of that entry of judgment.

The Court has been asked to consider that point of law as a preliminary matter under Order 27 rule 2.

The point made by the First Defendant is shortly stated. Once the plaintiff pursued the Second Defendant to judgment he had effectively elected one of his alternative courses. Miss Corrin for the First Defendant cites **Morel Brothers v. Westmorland** in support. It was held both in the Court of Appeal and the House of Lords that the procedure in Order 14 rule 5 does not apply to cases of alternative liability. I accept that is correct and states the position in Solomon Islands. **Morel's** case was a clear case of alternative liability.

Mr Radclyffe, for the Plaintiff, suggests this case is not covered by Order 14 rule 5 but by Order 13 rule 4 where the power to enter final judgment against one or more of several defendants and still proceed against the remainder is clear.

Morel's case was one of principal and agent. In the Court of Appeal (1903) 1 KB 64, Collins M.R. considered the question of joint or several liability and @ 76 stated:

> "I have dealt with the question of joint liability; but upon the plaintiff's contention that for this purpose the action is to be treated as one against the defendants severally or in the alternative, we must deal with the claim against the Countess as made against her severally as being herself a principal in respect of the contract for the goods supplied. The plaintiffs, having obtained judgment against the Countess on the footing that she was severally liable as the principal, cannot now turn round and say that she was an agent for the purpose of imposing liability upon her husband as the principal. In this point of view the liability of the husband and wife is not joint, but the liability of one is inconsistent with the liability of the other. In such a case, if it is sought to render the agent liable, it must be by treating the agent as a principal, to the exclusion of the liability of the real principal. If it is sought to render the real principal liable, then the agent must be treated as such and not as principal. The plaintiffs cannot recover against both. If they choose to take judgment against the wife, they cannot consistently with that have judgment for the same amount against the husband."

The reasoning of the learned Master of the Rolls in that case was supported by the House of Lords and I feel that case is clearly distinguishable from the present case. It was

based on a consideration of the question of joint or several liability for the same debt under the same contract or agreement. The court was bound by the limitation in **King v. Hoare** that there cannot be more than one judgment on one contract. Where there is judgment against one of a number of joint tortfeasors the whole of the action merges in that judgment.

In this case, although the plaintiff prefaces his claim against the Second Defendant with the words, "Further or in the alternative.....", I do not feel they are alternative claims in the sense described in **Morel's** case. The claim against the First Defendant is for negligence and against the Second Defendant for fraudulent representation. These are separate causes of action. They rely on the same evidence and are rightly joined but they are separate. The one can succeed without any evidence of fraud the other must prove fraud to succeed. These cannot be alternatives in the sense of **Morel's** case.

I would also suggest that the wording of both Order 13 rule 4 and Order 29 rule 3 is intended to remove and does remove actions against several joint contractors from the limitation of **King v. Hoare.** However, as I have stated, I feel this is a case of separate causes of action and I have decided it on that basis.

(F.G.R. Ward)
CHIEF JUSTICE