

## Walter Trading v Cable & Wireless plc

Supreme Court  
Case No. 34/1989

19 October 1989

*Contract - public utility - application of terms as to credit*

*Tort - Unlawful interference with contract - principles not applicable as between parties to a contract*

*Public utility - abuse of monopoly or dominant position*

Cable and Wireless refused to allow Walter Trading credit for some weeks, but then restored it. Walter Trading brought proceedings claiming damages from Cable and Wireless on the basis of breach of contract and the tort of unlawful interference with contract.

HELD:

Dismissing the claim.

- (i) there had been no breach of the terms of the contract for telephone services, but a public utility should not take advantage of its monopoly or dominant position;
- (ii) if there had been a breach of the terms of the contract, the damage suffered by the plaintiff was not serious;
- (iii) the tort of unlawful interference with contract did not apply as between the parties to a contract.

Webster J

**Judgment:**

The Plaintiff bases its case largely on the contract which it says exists with the Defendant for telephone services. But I am satisfied that no such contract does exist and that the contract which the Plaintiff may have for telephone services - it was not proved in Court - is with the Tonga Telecommunications Commission, who were not a party in this action.

I see reason why this Court should not follow the judgment of Martin CJ in Cable and Wireless v Mataele (Case No.134/88) which decided that in providing international calls Cable and Wireless were acting as agents for and on behalf of the Commission.

However I do find that when Cable and Wireless accepted the Plaintiff's "Application for Credit Account" there was a limited contract - to provide credit for certain international telephone services - between the Plaintiff and the Defendant. The terms of that contract were those set out on the Application as Conditions A to E immediately above the signature of Mr Uata as Managing Director of the Plaintiff.

There was no proof that the Defendant had broken these conditions, and it was accepted by the Plaintiff that they had broken them by failing to pay an account totalling \$131.70 by the due date in October 1988. They were therefore in breach of Condition C, which stated -

"C. C & W's credit terms are 21 days. Any account not paid within 21 days of delivery may be closed and the number blacklisted."

C & W accordingly closed the account and blacklisted the relevant numbers, as they were intended to do. Their requests for further deposits were within Condition D-

"D. C & W may request a deposit to open a new account or to re-open a blacklisted account. The deposit will be a minimum of T\$100 but may be more, depending on circumstances. The amount of deposit is at the discretion of C & W."

Following payment of a further deposit of \$100 one line still remained unopened for international calls and there was clearly confusion about the amount of deposit required, at least in the minds of the Plaintiff's officers.

On 15th November 1988 Mr Uata then made a telephone call to the Financial Controller of the Defendant, Ms Ruth Larner, which I am satisfied on the evidence was abusive and threatening. On this I accepted Ms Larner's evidence. Mr Uata was obviously upset and excited at the time and may not have recollected exactly all that he actually said. The Defendant then applied Condition A -

"A. Cable and Wireless (C&W) reserves the right to refuse credit."

and completely suspended the Plaintiff's credit for some weeks. This was done not as an arbitrary or spiteful reaction but as part of a cogent and reasonable policy to do so in order to safe guard staff and combat the prevalence of such calls. Subsequently after consideration of whether to cancel credit completely the credit facility was restored to the Plaintiff by the Defendant. Therefore I find that there was no breach of contract by the Defendant and there can be no damages under that head.

However I have reservations over the strictness of the credit terms and their application in this incident. Unless Mr Uata is a bad credit risk, I have some sympathy with his exasperation over the situation and I can understand what led him to say what he did to Ms Larner, though that does not for one minute excuse it.

I regret that I am not convinced that the original stop on credit was reasonable in all the circumstances or that the position was fully explained to the Plaintiff company. Their

only history of bad debt was \$9 outstanding for 2 months and \$18 outstanding for 3 months, which was hardly a big liability likely to embarrass Cable & Wireless. If a bad credit record is \$27 outstanding for a month or so then I hope I never find myself in that position due to human failings or being overseas etc. It is also important that the actual late payment of \$131.70 was in fact always covered by the Plaintiff's initial deposit of \$200, so that in reality the Defendant always owed money to the Plaintiff and not the other way round. However whether or not the Defendant's decisions were reasonable, they were within the terms of the contract.

80 I would not normally think it right to mention this, but Cable and Wireless are in a special position providing a public service by virtue of their Franchise Agreement and have an effective monopoly over international operation controlled calls, especially those made by telephones in the subscribers' own premises. Making international calls from the Cable and Wireless Office at Ma'ufanga is not in any way a comparable alternative for a businessman. It is difficult to imagine how a telephone service can be used effectively without some form of credit.

100 This monopoly was given to the Defendant by the Legislative Assembly and the Government and must be exercised and operated in the public interest. Under section 9 of the Tonga Telecommunications Commission Act 1983 (20 of 1983) the functions of the commission are to be carried out in an efficient and profitable manner to the best advantage and interest of the Kingdom. The Telephone Regulations show in Regulation 7 that security for the payment of telephone charges may be required; in Regulation 8 that an application for a service may be refused; and in Regulation 18 that the connection may be discontinued for non-payment of charges, so the imposition of the Conditions by Cable and Wireless as agents of the Commission was legally permitted, but must still be dealt with in the public interest.

110 Mr Hogan submitted that there was no specific mention in the Franchise Agreement of the provision of credit, but it is inferred in clause 14(i), which refers to direct relations with the public "including the rendering of accounts and collection of moneys from customers for services rendered" and clause 14(iv) about sharing bad debts. There is however no mention in the Agreement of the 24 hour public service which the Defendant believes meets its obligations under the Agreement. An international telephone service would be virtually useless without a connection into the local service with telephones in subscribers' own premises.

120 In terms of fair trading anybody providing a public utility service such as this ought to do so without taking advantage of their monopoly or dominant position by over rigid terms of business, that is there is a history of bad debts in Tonga. Just seems credible that this action arose from late payment of an account of just \$131.

Trade and business would come to a halt without credit and are unlikely to develop in Tonga if communication with the outside world is made unduly difficult. In addition, it seems to be in the interests of Cable and Wireless itself to encourage international telephone traffic by making it easier and not more difficult to make calls. Perhaps they need to take a fresh look at other systems of credit.

130 If I am wrong on the contractual position, I do not accept that the Plaintiff suffered any serious business damages. Mr Uata agreed that most of the Plaintiff's overseas calls were made by direct dialling (ISD, paid through the Commission) rather than through the operator (paid to the Defendant). For breach of contract, the damages are what were

reasonably foreseeable at the time of the contract, but there was no real evidence of how the Plaintiff's business was damaged. The damages in respect of calls from Tonga would be minimal as there would only be the extra time and inconvenience to the Plaintiff having to go to the Cable and Wireless Office to make them, say \$100. Damages in respect of the unavailability of collect calls from overseas might be greater as they could reflect on the business standing of the Plaintiff and might amount to \$500.

The Plaintiff also claims damages in tort for unlawful interference with a contract, but this is not a recognised tort between the 2 parties to a contract themselves, as explained in Clerk and Lindsell on Torts para 15-20 page 759 -

140

"In the two party situation, however, this would involve transforming every intentional breach of contract into a tort, a mutation which, although it has been to some extent adopted in some other jurisdictions and advocated by some English commentators is unsupported by any authority so far in English Law."

In any event there was no adequate evidence to satisfy me that the Defendant unlawfully interfered with its contract with the Plaintiff to provide credit. There were neither any pleadings nor proof to support an allegation that the Defendant unlawfully interfered with any contract the Plaintiff may have had with the Commission.

150

Therefore I find that the Defendant is not liable to the Plaintiff in tort either and so the Plaintiff's case is dismissed.

210

220

230