

Cable & Wireless plc v Mataele

Supreme Court
Civil Case No.134/1988

10 29 March, 1989

Contract - agent - principal may sue
Contract - Contract Act - not applicable where liability imposed by statute
Quantum meruit - applicable where person has accepted services which he knew were not free of charge
Contract - Contract Act - not applicable if person claiming its protection does not prove he is a Tongan

20 Cable and Wireless sued the defendant for the cost of international telephone calls made to or from the defendant's telephone number. There was no contract between the defendant and the plaintiff, but only between the defendant and the Tonga Telecommunications Commission.

HELD:

Upholding the plaintiff's claim.

- 30 (i) The contract made by the defendant with the Tongan Telecommunications Commission contemplated that international calls would be made by Cable and Wireless, and with regard to such calls the defendant was liable to Cable and Wireless;
- (ii) The Contract Act did not apply because the obligation to pay was imposed by statute not by contract, and because the defendant had not proved that he was a Tongan;
- (iii) In any event Cable and Wireless was entitled to recover a reasonable charge on the basis of quantum meruit.

Statutes considered

40 Contract Act

Cases considered:

New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd [1974] 1 All ER 1015
Craven Ellis v Canons Ltd [1936] 2 All ER 1066

Counsel for plaintiff : Mr Macdonald
No appearance of defendant

50 Martin CJ

Judgment

The Plaintiff claims payment for a series of international calls made from the Defendant's telephone between October 1985 and May 1986 which were charged at a total of \$2,892.20.

The Defendant has made no payment at all. He put in a defence (i) that he did not authorise most of the calls (which is no defence at all) and (ii) relying on s.5 of the Contract Act (Cap 113). There is no merit in the defence - it is simply a question of whether the Defendant can avail himself of a technical defence under the Contract Act.

60 Although he was aware of the trial date he did not appear. An application by his counsel for an adjournment was refused as no reason whatever was given for his absence. His Counsel, being without instructions, was released and the trial proceeded in the absence of the Defendant.

The facts can be shortly stated. On 18th September, 1984 the Defendant completed a written application form requesting the Telegraph and Telephone Department to provide a telephone service at his home. In that form he agreed "to pay all authorised charges, and to submit to all regulations in force respecting the hire or use of Government telephones." He was connected in August 1985. From 1st October 1985 until 17th May 70 1986 international calls were made from his number, or collect calls accepted at his number, to a total value of \$2,892.20. Accounts were delivered to the Defendant at monthly intervals. No complaint was ever made by him that the accounts were wrong in any way. Nothing was paid, and the service was eventually disconnected on 17th October 1986.

The Tonga Telecommunication Commission Act 1983 shows that on 1st July 1984 the functions of the Telegraph and Telephone Department had been taken over by Tonga Telecommunications Commission. The Defendant's contract was therefore with that body. The Commission itself did not provide the facilities for international calls. This was done by Cable and Wireless under a franchise agreement, which I have not seen. 80 Cable and Wireless accepted the calls, connected them, timed them and in due course billed the Defendant direct. There was no written contract between Cable and Wireless and the Defendant.

Section 16 of the 1983 Act empowered the Commission to make Regulations with the consent of Cabinet, and preserved the validity of Regulations made under the old Telephones Act (Cap 108). Regulation 25 of the Telephone Regulations (as amended) states: "The subscriber is in all cases responsible for charges of whatever nature incurred by the use of his telephone service". The Defendant was clearly "the subscriber" as defined by the regulations. He is therefore liable for the cost of calls. But two questions 90 remain:

- (1) to whom is he liable? Is he liable to Cable and Wireless or only to the Commission with whom he made the original contract?
- (2) can he escape enforcement of that liability because there was no written contract registered under the Contract Act?

(1) To whom is he liable?

When a subscriber wishes to make an international call he rings a certain number which connects him with the Cable and Wireless operator. The operator accepts the request, makes the call to the desired number, and connects this with the local subscriber.

100 For many years no request was ever refused, but Cable and Wireless clearly reserve the

right to do so because their practice now (which has not been challenged) is to refuse international calls to subscribers who have not paid their bills.

Mr Macdonald for the Plaintiff argued that in this situation there is a fresh contract, made direct between Cable and Wireless and the subscriber, on each occasion when an international call is requested. On each occasion, he says, there is a request for service, with an implied promise to pay Cable and Wireless for it. I do not think that can be right. The subscriber already has a contract with the Commission to provide this service, and Cable and Wireless are performing that contract as agents for, and on behalf of, the Commission.

110 The basic rule is that a contract between two parties cannot be sued on by a third party, even though the contract might be expressed to be for his benefit. But the situation is different when one party contracts as agent for that third party. Lord Reid in Scruttons Ltd v Midland Silicones Ltd [1962] 1 All ER 1 set out certain circumstances in which a third party might be entitled to the benefit of a contract. The Privy Council in New Zealand Shipping Co Ltd v A.M. Satterthwaite & Co Ltd [1974] 1 All ER 1015 put those principles into effect. In that case a contract of carriage by sea contemplated that part of the contract would be carried out by a third party firm of stevedores. Lord Wilberforce described this as "a bargain initially unilateral, but capable of becoming mutual ..." which became so
120 when the services were performed by the third party. The stevedores, having performed those services, were held to be entitled to the benefit of the contract.

I apply the same reasoning to this case. The Commission does not and cannot provide facilities for international calls. It can only do so through the agency of Cable and Wireless. Every contract which it makes with a subscriber clearly contemplates that international calls will be provided by Cable and Wireless. When a subscriber avails himself of that service he makes himself liable to Cable and Wireless for the proper cost of the call.

(2) Can be escape enforcement?

130 Section 5 of the Contract Act states:

"No action shall be maintainable upon any contract for ... services to be rendered where the consideration moving from either party exceeds \$500.00 in value unless there is produced to the Court at the hearing a written agreement executed in duplicate and registered in accordance with the requirements of this Act."

No such agreement was produced.

In my view the Contract Act does not protect the Defendant, for three reasons:

(i) the obligation to pay is imposed by statute, not by the contract itself.

140 Section 17 of the old Telephones Act empowered the Privy Council to make regulations for inter alia,

"(c) the installation of telephones in private houses ... and the use of telephones so installed and the charges and fees to be paid in respect of them."

The Act clearly intends that payment must be made for telephone services. The power to decide the amount to be paid is delegated, but the liability to pay is imposed by the statute itself. Regulations make the subscriber responsible for all charges, but that adds nothing to the liability already imposed by the Act. The 1983 Act preserves the validity of existing Regulations and gives the Commission similar powers.

150 (ii) Regardless of the strictly contractual position. Cable and Wireless are entitled

to recover on a quantum meruit. A quasi-contractual or restitutionary obligation arises where one party has obtained an incontrovertible benefit. As Greer L.J. put it in Craven Ellis v Canons Ltd [1936] 2 All ER 1066 (approved in Societe Franco Tunisienned' Armement v Sidemar S.P.A. [1960] 2 All ER 529 (at p.548):

"... obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact arising from the acceptance of services ..." That principle also applies where there is a binding contract which cannot be enforced for some purely procedural reason.

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Here the Defendant has accepted the benefit of the Plaintiff's services (which they had the right to refuse) knowing that the services were not intended to be free of charge. The Contract Act does not protect a person in that situation. The Defendant must pay a proper price for those services.

(iii) On a purely procedural point, the Defendant did not give evidence and therefore did not prove that he is a Tongan, and therefore entitled to the protection of the Contract Act.

Judgment will be entered for the Plaintiff with costs which I assess at \$200.00.