CASE NOTE
TONOLEI DEVELOPMENT CORPORATION LTD. v. LUCAS WAKA*

BY
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I. THE FACTS

The facts of this case are simple. The plaintiff was an incorporated company. Mr. Aoae, a Minister in the previous government, on July 26, 1982 made an offer for the grant of a timber permit to the company in the following terms: "I ... wish to advise you that your application has been approved pending your acceptance of the conditions". The document containing this offer was collected from the Minister's office and delivered to the company at Kieta on July 30, 1982. One Mr. Bolger on behalf of the company deposited its acceptance on the table of the Minister's personal Secretary in Port Moresby at about 10.00 a.m. on August 2, 1982.

On August 6, 1982, Mr. Lucas Waka was appointed as Minister for Forests to succeed Mr. Aoae. The new Minister decided to withdraw the offer of July 26 made by Mr. Aoae. He telexed his revocation on August 11, 1982. The telex was also followed up by a letter sent on the same day.

Mr. Lucas Waka had at no stage read the company's acceptance prior to his telexed withdrawal or follow up letter. It was also not clear whether Mr. Aoae had read the company's acceptance before August 11, 1982.

It was contended by the defence that the company's acceptance was never communicated to the offeror.

II. THE DECISION

Pratt, J. however held that there was a proper communication of the acceptance and that therefore a binding contract existed between the parties. His Honour observed that "a personal presentation of the acceptance to the Minister . . . . . would certainly be one in the contemplation of the parties, but it is not the only one", and held that "delivery of a written acceptance onto the table, if not even to the actual hands, of the personal secretary would be adequate delivery to the Minister himself". His Honour justified his conclusion by stating that "as the document (containing the offer) was to be collected by an agent

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of the plaintiff it appears an obvious inference to me that the Minister should expect the same system in return. I cannot imagine he or any other Minister suggesting that personal service was required on him". His Honour agreed that the plaintiff should not be penalised for the failure of the Minister to read his mail.

In determining whether the acceptance was effective when it was deposited on the table of the Minister's Secretary, Pratt J. looked into the principles underlying acceptance by post and adumbrated:

> What Mr. Coady is really asking me to do is to draw an analogy between the postal case decisions which lay down that once the acceptance is posted communication thereof is presumed to have occurred when the acceptance would be delivered to the addressee in the ordinary course of post, and the present set of circumstances when the courier is not the postal authorities but an agent of the plaintiff company. The common law of England is of course part of our underlying law and must be applied so far as it is applicable to the circumstances of the country. One circumstance which I must take into account is that we have no postmen to deliver letters in Papua New Guinea. The mail stops at the post office until it is collected by the addressee or someone on his behalf. In short, assuming the postal cases do apply to this country then the plaintiff would be in a worse position because a responsible agent of the plaintiff has delivered the acceptance to the Minister's doorstep whereas in the ordinary course of post some very junior departmental officer would be the person uplifting the mail on behalf of a Minister or a Government Department.

III. THE ISSUES RAISED

This case does not break any new ground but raises three important issues: (1) by what method can an offer be accepted? (2) When does a postal acceptance take effect? (3) What if the Supreme Court or the National Court wrongly stated an English common law rule and then applied it?

(a) Mode of Acceptance

Acceptance must be made in the mode prescribed by the offeror for he is master of his offer. Where no exclusive method of acceptance is indicated, the offer should be accepted in a reasonable manner and by an equally or more expeditious method. As a general rule an acceptance has no effect unless it is brought to the notice of the offeror. There are several exceptions to this rule. The offeror may authorise his agent or a third party to receive the acceptance. He may altogether dispense with communication of acceptance, expressly or tacitly or he may be estopped from denying that he did not receive the acceptance.

In this case the offeror did not prescribe any method of acceptance. Therefore it could have been accepted by any mode deemed appropriate in the peculiar circumstances in which the contract was made. Pratt J. also considered alternative methods of acceptance as being appropriate. It might however be added that the circumstances were such that it could be inferred that it was within the contemplation of the parties that the post could be used as a means of communicating acceptance. It has been held that where the circumstances are such that according to the ordinary usage of mankind, the post might be used as a means of communicating the acceptance, then the acceptance is complete as soon as it is posted.(1) Surely, it would be better to send the acceptance by post than to leave it on the table of the minister's Secretary.

(b) **Acceptance by Post**

With the greatest respect it is submitted that Pratt J.'s view that according to the English common law "once the acceptance is posted communication thereof is presumed to have occurred when the acceptance would be delivered to the addressee in the ordinary course of post", is incorrect and without any foundation.

As said above an acceptance has no effect until it actually reaches the offeror. One of the exceptions to this rule is found in the doctrine of postal acceptance. In this case the acceptance is deemed to be complete when the properly stamped and addressed letter of acceptance is posted and not when it is delivered to the offeror's address or received by him or when it is brought to his notice or read by him. The question as to when a postal acceptance takes effect was judicially considered for the first time in **Adams v. Lindsell (2)** in 1818 where it was held that acceptance takes effect the moment the letter of acceptance is put in the post. This rule, though criticised on a few grounds, has been followed in a number of English decisions **(3)** and represents the law of England on postal acceptance.

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1. Henthorn v Fraser (1892) 2 Ch.27.

2. (1818) 1 B.& A, 681

3. For example, see Household Fire Insurance Co. v. Grant (1879) 4 Ex. D. 216; Holwell Securities v. Hughes 1(1974) 1 WLR 155

It must also be stated that since the postal rule is that an acceptance sent by post is complete and effective on its posting, it is artificial to talk about the absence of postmen in Papua New Guinea to deliver letters. It is possible that Pratt J. had at the back of his mind section 5 of the Interpretation Act, Chapter 2, namely,

"(1) Where a statutory provision authorizes or requires a document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used), then unless the contrary intention appears the service shall be deemed to be effected by properly addressing, pre-paying (except where under a law the document may be sent by post free of charge) and posting the document as a letter.

(2) Subject to Subsection (3) and (4), where a document is served as provided for by Subsection (1), service shall, unless the contrary is proved be deemed to have been effected at the time when the letter would be delivered in the ordinary course of post.

(3) Where the person on whom the document is to be served ordinarily collects his mail, or has his mail collected, at a post office or other place at which mail is held by or on behalf of the Department responsible for posts for collection, service in accordance with Subsection (1) shall be deemed to have been effected when the document would, in the ordinary course of events, have been collected.

(4) Where the person on whom the document is to be served has given, generally or in a particular case, a post office or other place as his postal address, service in accordance with Subsection (1) shall be deemed to have been effected when the document would, in the ordinary course of events, have been available for collection.

However the case under discussion was not one where a statutory provision required a document to be served by post.

(c) **The Problem of Misunderstanding an English Common Law Rule by the Courts in Papua New Guinea.**

The observations of Pratt J. on postal acceptance are **obiter dicta** and hence they are not binding precedents for the lower courts. Nevertheless it raises a very important issue, namely, what if the Supreme Court or National Court wrongly states an English common law principle and then adopts it - would that be of binding authority?

The **Constitution** subject to some specific conditions has adopted the principles and rules of common law and equity. Section 20 provides that an Act of Parliament shall declare

the underlying law of Papua New Guinea and until such time as an Act of Parliament provides otherwise, the underlying law and the manner of its development shall be prescribed by schedule 2. As yet no such Act has been passed by Parliament. Schedule 2.2, inter alia, provides:

> "Subject to this Part, the principles and rules that formed, immediately before Independence Day, the principles and rules of common law and equity in England are adopted, and shall be applied and enforced, as part of the underlying law, except if, and to the extent that -
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> (a) they are inconsistent with a Constitutional Law or a statute; or
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> (b) they are inapplicable or inappropriate to they circumstances of the country from time to time; or
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> (c) in their application to any particular matter they are inconsistent with custom as adopted by Part 1."

Sch. 2.3 states that if in any particular matter before a court there appears to be no rule of law that is applicable and appropriate to the circumstances of the country, it is the duty of the National Judicial System, and in particular of the Supreme Court and the National Court, to formulate an appropriate rule as part of the underlying law.

It is evident from the constitutional provisions quoted above that the courts in Papua New Guinea may refuse to apply an English common law rule in certain circumstances and they (particularly the Supreme Court and the National Court) may, where there is no rule of law appropriate and applicable to the circumstances of the country, formulate an apposite rule as part of the underlying law. Now coming to the English common law rule on postal acceptance, it can be safely asserted that it does not conflict with a constitutional law or a statute nor is it inconsistent with custom as adopted. Whether it is appropriate to the circumstances of the country was not really examined by the court, for it enquired into a postal rule of acceptance which was not based on the English decisions. Further, the innovative principle laid down by Pratt J. cannot be regarded as a rule of underlying law declared by the National Court.

Assuming that the principle of acceptance by post as declared by Pratt J. would have been a part of the ratio **decidendi** of the case - would it then be binding on courts subordinate to the National Court? Under schedule 2.9, all declarations of law by the National Court are binding on all courts but not on itself and the Supreme Court. A court inferior to the National Court may therefore consider itself

bound to follow a decision of law made by the National Court. On the other hand, an aggressive judge may ignore such a decision on the ground that it was made by mistake. Perhaps the fathers of the **Constitution** were aware of this problem: schedule 2.10 **inter alia** provides that where it appears to a court other than the Supreme Court and the National Court that a decision of law that is otherwise binding is seriously inconsistent with the trend of the adaptation and development of the law in other respects, then "the court may, and shall if so requested by a party to the matter, state a case to the court that made the decision or decisions or the equivalent court or if there is no such court to the National Court...." However schedule 2.9 does not enable the National Court to refer a matter to the Supreme Court. Thus where the Supreme Court has misunderstood and wrongly applied a rule of English common law, then the National Court has no option, as "all decisions of law by the Supreme Court are binding on all other courts" including the National Court.(4).

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4. Schedule 2.9.