LENGA -v- SOLOMON TAIYO LTD, BANA AND LOTE

High Court of Solomon Islands
(Ward C.J.)
Civil Case No. 87 of 1990
Hearing: 9, 10 and 16th September 1991
Judgment: 17 September 1991

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

WARD CJ: The plaintiff claims damages for negligence against the first defendant, Solomon Taiyo Limited (STL) and for fraudulent misrepresentation against the third defendant, Joses Lote.

The case concerns the royalties arising from baitfishing by STL in Rakata Bay in North West Ysabel. In 1981, STL entered into an agreement with the plaintiff as representative of the Eti Eti clan to pay the royalties to his clan. At the time the agreement was signed on 24th June 1981, the baitfish ground was referred to as Rakata Bay but, in 1982, the Fisheries division allocated the number 118 to that area. There is a dispute as to what was meant by Rakata Bay and the extent of area 118 to which I shall return later.

From 1981 to mid 1985, STL paid all royalties for this area to the Eti Eti clan but, by then, a number of other tribes had claimed to be entitled to a share of the royalties and some also disputed the right of the Eti Eti to the royalties at all. One of the disputing tribes is the Bulau and the third defendant is their representative.

In mid 1985, as a result of these disputes, STL suspended payments of the royalties but continued fishing the ground with the consent of the disputants. In June 1985 there was a meeting at which it was agreed that, whilst the past royalties should remain frozen, a sum of $747 in recent royalties would be divided equally between the three contending claimants at that time, Eti Eti, Bulau and Mamara. It has been suggested by the first defendant that the agreement to split the money equally was a new permanent agreement but the plaintiff states it was an agreement to settle only that one payment. If it is necessary to settle that point, I am satisfied on the evidence that

agreement for third shares was for that one payment only and was not intended to bind the parties further. Immediately after that payment, the royalty payments were suspended again.

By 1987, the suspended royalties amounted to $31,166.78 and STL were being pressed by the various claimants to pay out. It is STL policy not to become involved in such custom disputes and to leave it to the parties to sort out themselves. In July or August of that year, STL received, at approximately the same time, a letter, dated 28th July, apparently signed David S. Lena and sent by the plaintiff in which he tells STL to release all the suspended money to three clans, Bulau, Etini and Mamara, and a letter from Lote, dated 31st August saying that the Paramount Chief was not doing anything about the dispute and asking STL to pay the royalties to the Mamara, Etini and Bulau groups and disputing the plaintiff's right to any of the royalties. This letter was not the first from Lote. He told the court he had written in 1983 and had certainly written in 1985. In 1985 and 1987, he had adopted the unfortunate technique of using his position in the police to stress his claim. I shall return to these letters later when dealing with the claim against Lote.

It is not disputed that the letter of 28 July 1987 was a forgery by Lote's brother in law, Casper Bana, the second defendant against whom the plaintiff has already obtained judgment.

Lote's letter finished with the statement that "*groups representatives including myself wish to call in your office on 2 September 1987 so that our Baitfish Royalty payments can be sorted out.*" On that day he arrived with Bana and a lady. Bana is, in fact, a member of the Etini tribe but the officer of STL, Augustine Manakako, was not aware of this or why he was there. Thus, as far as STL was concerned, the only person representing any of the disputing parties was Lote for the Bulau. Despite that and with no other attempt to verify the letter or to seek the views of the other tribes they accepted Lote's advice that the money should be split 46.5% to Bulau, 46.5% to Etini and 7% to Mamara and paid it in that way.

That is the basis of the plaintiff's claim of negligence by the first defendant.

The first defendant denies this and counterclaims that the plaintiff misrepresented his title to the Rakata Bay ground and his right to represent the owners and as a result STL entered into an agreement with him that resulted in them wrongly paying him a total of $15,902.21. They further claim that in April 1990 the plaintiff falsely warranted that he was the representative of the Eti Eti clan and, as a result of that, STL paid a further total of $13,383.30. Also that on 1st March 1990 the plaintiff agreed to try and settle the dispute and received $1500 in consideration of this.

The last point is admitted by the plaintiff but no evidence has been adduced by the first defendant to demonstrate why this payment should not have been made. Similarly, the total payment of $13,383.30 has not been described in evidence. It does not seem to be disputed that the plaintiff is entitled to represent the Eti Eti clan but the basis on which it is argued he misrepresented their right to Rakata Bay baitfishing ground depends on the definition of that Bay.

The plaintiff claims that, when he first negotiated the agreement in 1981 the area was described as Rakata Bay but he explained he meant by that only to claim from the north of the Pukuhoghelera River in the west to the mouth of the Rakata River in the east. The first defendant denies the plaintiff so limited his claim. In support they point to the area given the number 118 by Fisheries the next year. That, they say, was the same area and runs from Pukuhoghelera Bay to Suananao point. They produced a map to show the area but unfortunately the map only shows the undisputed western boundary. No map or written evidence has been adduced to support their claim that the eastern boundary is Suananao Point.

It is clear that, geographically, Rakata Bay extends past the Rakata River to Suananao Point in the east but I am far from satisfied that was the area of the agreement when it was signed in 1981. The Eti Eti clan do not claim ownership the land bordering the sea to the east of the Rakata River and I am satisfied that, on balance, the plaintiff was not claiming any more than the area he described. I do not believe there was any deliberate or reckless misrepresentation by him to STL and the counterclaim is rejected.

I have decided that matter on the evidence. Had it been necessary to determine the actual landownership issues here, I could not have done so without referring the matter to the Local Court.

The question left for determination in relation to the first defendant is whether or not they were negligent in paying out the money in 1987.

They had accepted the validity of the agreement with the plaintiff alone in 1981 and had paid royalties to him for some years. By 1985 the disputes were sufficiently strong to necessitate suspension of payments. As a result, they held that money until they could ascertain from the various disputants who was entitled to the money. They were clearly aware of the various claims and, in particular, they knew the Bulau clan were disputing the right of Eti Eti to the money at all.

When they received the forged letter, they had a copy of an agreement with Lenga's signature on it. Even the most casual comparison would have been sufficient to put them on guard. It has been pointed out that up to 1981, Lenga worked for STL and Paul Belande would have known his signature. I do not feel that, after 6 years, he can be expected to remember it that well but that, in itself, makes it all the more necessary to check.

It was also clear that the name was spelled differently. Again I accept the defendant's contention that customary names may be spelled in more than one way but, again, it was a matter that should have put them on guard. Clearly neither fact led them to check.

Believing , as a result, the letter was genuine, they were then willing to accept the third defendant's advice on the entitlement of the three clans to the money. They took no steps to check whether the representatives of these tribes agreed or to ask the basis of that advice.

Two years before, they had been asked to share a payment equally between Bulau, Mamara and Eti Eti and Lote's letter in 1985 had only referred to the claims of the Bulau and Mamara clans yet, when Lote as representative of Bulau, suggested his line should receive 46.5% as against Mamara's 7%, they took no steps to check the views of the Mamara or to query, the sudden appearance of the Etini. Neither did they, as I have already said, take any step to check the position of the only person with whom they had any written agreement, the plaintiff.

To complete the farce, they then executed a written agreement between Lote and STL about the payment to other parties and acknowledging in the last sentence that future payment had to be suspended again as the ownership was still in dispute.

Alderson B defined negligence as -

> *"the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do"*

Blyth -v-Birmingham Waterworks Co. (1856) LR 11 Ex 781 @ 784.

It was defined in *Thomas -v-Quartermaine* (1887) 18 QBD 685 as -

> *"simply neglect of some care which we are bound to exercise towards somebody."*

The existence of a duty must be established. In *Donoghue -v- Stevenson* (1932) AC 562 @ 580, Lord Atkin defined a neighbour to whom was owed a duty not to cause injury as -

> *"persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."*

I am satisfied that, in withholding the payments from the person to whom they had been paying them for 4 years, STL had a clear duty of care to ensure they did not pay them out to the wrong person. Of course, they did not pay them out, despite many requests, until they received a letter they believed to be from the other party to the agreement but, thereafter, they showed little or no care when they failed to check the position.

The degree of care which the law requires is that which is reasonable in the circumstances of the particular case. The standard is the foresight and caution of the ordinary or average prudent man (*Hall -v- Brooklands Auto-Racing Club* (1933) 1 KB 205). I have no doubt at all that the ordinary or average prudent man would consider the manner in which STL paid out this money was clearly unreasonable.

It is necessary for the plaintiff to prove a duty owed to him by the defendant, a breach of that duty by the defendant and consequent damage. Since *The Wagon Mound* (1961) 1 All E.R. 404, it has been accepted that the damage must not only be a consequence of the negligence but also reasonably foreseeable if there is to be liability.

I am satisfied the plaintiff has proved all these ingredients of negligence by the first defendant and I find in his favour.

The plaintiff's claim is for damages of $31,166.78 or alternatively he pleads that, by an agreement made between the Eti Eti and Mamara clans, he accepts the Mamara are entitled to 10% of all royalty payments and therefore claims only 90% or $28,050.10. Whether there is such an agreement or not, it does not bind STL. If STL is liable to pay the sum, they are liable to pay the full sum.

Having said that, it is necessary to consider what is the actual damage the plaintiff has suffered. At the time of the payment by STL, the $31,166.79 was being held by STL with the agreement, inter alia, of the plaintiff. He gave that consent because he acknowledged there may be others with some claim to the money and, indeed, has accepted at least a 10% right to the Mamara clan.

At the highest, the actual damage suffered by plaintiff is that the money is no longer held by STL for his possible further benefit. I am only inclined to make an order to that extent.

I order that the first defendant pay $31,166.78 into a special account to be held by them pending settlement of the disputes in relation to those payments.

Costs to the plaintiff.

The claim against the third defendant is for fraudulent misrepresentation. That there was a fraudulent misrepresentation by the letter of 28 July 1987 forged by the second defendant is not disputed and neither is the fact it clearly caused STL to act to its own detriment and that of the plaintiff. The plaintiff's case against Lote is that he conspired with the second defendant to defraud the plaintiff by means of the misrepresentation to STL thereby inducing them to pay $31,166.78 into the accounts of the Bulau, Etini and Mamara clans.

The third defendant denies any knowledge of the letter until he was told of it by Paul Belande of STL. He did not conspire with Bana neither was he aware of any misrepresentation.

The plaintiff, if he is to succeed against Lote, must prove that Lote was involved knowingly in the misrepresentation.

The evidence shows that Lote had written previously about the dispute to STL. He was the brother-in-law of Bana and, at the time when he wrote to STL in August 1987, Bana was staying at his house. There had been no mention in previous letters of the Etini tribe. In Lote's letter of 1985 he claimed ownership only by the Bulau and Mamara clans. The first mention of Etini was in the forged letter and yet Lote, in his letter shortly afterwards, also claims for the first time for the Etini. The plaintiff suggest this is far more than a coincidence. Bana and his sister, Lote's wife, are Etini. That would, of course, account for Bana including the Etini in his fraudulent letter but why should Lote suddenly also include them and on what basis did Lote then advise STL that the Etini and his tribe should share equally 93% of the total money?

After all this time and despite the failure of a previous ultimation in his 1985 letter, Lote on 30th August confidently stated that he would come to the STL office with the groups representatives to sort it out. On his evidence, he did not know, when he wrote that letter, that there was a letter apparently from Lenga directing the money be given to his and other tribes. He did not turn up with any representative of the Mamara or Eti Eti tribes but he had with him a representative of the Etini tribe

although he never explained to anyone that Bana was such. The money for the Etini was paid into an account that Lote said had only been opened the month before and for which Bana and Lote's wife were the signatories.

Lote gave evidence and denied all knowledge, when he wrote his letter, of Bana's letter and, until the police were called in, all knowledge it was a forgery.

This is a serious allegation against a senior police officer and a prominent member of the community. I have considered the evidence and I am driven to the conclusion that the third defendant, Joses Lote, was a knowing party to the misrepresentation by Bana. That forged letter and Lote's letter were part of a plan between them to obtain the money. I am satisfied Lote knew of and was a party to the false representation and knew it was false. I am equally satisfied he intended the first defendant to act on it and the plaintiff was injured as a consequence. The result of the misrepresentation was that the first defendant paid the suspended payments to people other than the plaintiff.

In the common law tort of deceit, the representation must be to the plaintiff and cause him injury. I accept, on the authority of *Ratcliffe -v- Evans* (1892) 2 QB 524 that the tort of malicious falsehood does lie in a case such as this where the false statement is made to a third party with the intention of injuring the plaintiff and does injure him.

I also accept that the damages in such cases are normally intended only to restore the plaintiff to the position in which he was previously. I have already said that the damage to the plaintiff was the fact the money to which he had a claim was no longer in the hands of STL ready for payment. That has been remedied by my award against the first defendant and so, whilst I give judgment to the plaintiff to the extent that I find the malicious falsehood by the third defendant proved, I do not order any damages but do order the third defendant pay the plaintiff's costs.

The party that has really suffered by the action of the second defendant and third defendant is STL. They were induced by the deception to pay out money and are liable to replace it. Clearly the second and third defendants should be liable to pay that total sum to the first defendant but it is necessary to consider whether such an order can be made in this case. Miss Corrin for STL suggests that such an order should be made under the inherent power of the Court to avoid unnecessary litigation and Mrs Samuel, for Lote, does not dispute the Court has such a power. Miss Corrin further points out that, had the second and third defendants not been sued by the plaintiff, STL would have joined them as third parties.

I am afraid I do not agree the Court can make such an order. STL has not pleaded any claim or remedy as between themselves and the second and third defendants. Had they been joint tortfeasors liable in respect of the same damage, I could apportion the damage between them under the Law Reform (Married Women and Tortfeasors) Act 1955 but they are not. The first defendant is liable in negligence and the others in malicious falsehood. Thus it was necessary for a third party notice on a co-defendant to be served under O.18 r.11. There is a right to serve such a notice on a co-defendant without leave but, unless it is done, the Court cannot make an order as between the defendants. (*Re Burford* (1932) 2 Ch. 122).

I must finally deal with the second defendant. Judgment has been entered in default of appearance. As such, it included an order for $31,166.78 damages to be paid to the plaintiff. Such an order, should not stand. I do not know if he is represented but, if an application is made to set aside the order for damages, it will be considered.

(F.G.R. Ward)
CHIEF JUSTICE