

AUSTRALIAN AND NEW ZEALAND BANKING GROUP LTD ~V~ CHARLES ASHLEY
 (trading as A & A Legal Service, a Firm) and **JAMES APANIAI AND JOHN HAURAE** (trading as A & H Lawyers, a Firm)

High Court of Solomon Islands
 (Muria, CJ)

Civil Case No. 287 of 2001

Date of Hearing: 12th September 2002

Date of Judgment: 6th November 2002

Mr A Radcliffe for the Applicant

Mr C Ashley for the First Defendant

Mr J Apaniai for the Second Defendant

MURIA CJ: By a writ of summons filed in this Court on 30th October 2001, the plaintiff claims against the two defendant firms of Solicitors contribution in the sum of \$76,232.17 as joint tortfeasors. In the alternative the plaintiff claims the said sum of money being monies had and received by the defendants to the use of the plaintiff. The plaintiff's claim is based on the *Law Reform (Married Women and Tortfeasors) Act 1935* of the United Kingdom.¹ Both defendants denied the claim.

Brief Facts

Following an order from the High Court made on 2nd February 2001 in *Ado Corporation Solomons Limited -v- Lagwaeano Sawmilling and Logging Company and Others*,² the proceeds of log sales in the sum of \$484,000.00 was injunctioned. One of the defendants in that case was Oceania Trading Company ("OTC"). *Ado Corporation* was then represented by Mr Haurae, a partner in the A & H Lawyers firm of Solicitors (the second defendant in the present case) and Mr Ashley of A & A Legal Service (the first defendant in the present case) represented OTC. The copy of the Court Order was served on the plaintiff bank, although there is dispute as to the date of service of the Order on the bank. The defendants disputed that the order was served on the bank on 5th February 2002, rather they said that it was served on the bank on 2nd February 2002. For the purpose of the present case, such a dispute matters very little. What is not disputed, however, is the fact that OTC's account was debited with the total sum of \$76,232.17 (\$27,414.36 and \$48,817.81, on 5th and 6th February 2001, respectively) and paid the amount into a cheque account opened in the joint names of Mr. Ashley and Mr. Haurae. Thereafter the plaintiff bank dealt with the money upon instructions from the defendants whereby \$38,182.39 was transferred from the defendant's joint cheque account to a joint IBD Account while \$19,000 was transferred from defendant's joint cheque account to the second defendant's trust account and a further \$19,000 was transferred from joint cheque account to the first Defendant's trust account. Having discovered that its account had been debited in the sum of \$76,232.17 OTC complained to the plaintiff that the sum debited to their account was not part of the proceeds from log sales. The plaintiff, upon legal advice, refunded OTC and now the plaintiff claims contributions from the defendants.

Issue

The issue basically is whether the sum of \$76,232.17 was part of the proceeds of the log sales. If it was not, then the plaintiff rightly reimbursed that amount to OTC and now entitled to claim contributions

¹ This Act applies in Solomon Islands by virtue of Schedule 3 to the Constitution.

² *Ado Corporation Solomons Limited v Lagwaeano Sawmilling and Logging Company and Others* (2 February 2001) High Court, Civil Case No 103/2000.

from the defendants. If the said amount was part of the log sales, then the plaintiff bank was entitled to deal with it in the way it did, namely transferred it to the defendants' joint interest bearing account to be kept there until further order from the Court. Connected to the basic issue already mentioned, it may also be asked: if OTC had sued the plaintiff would it succeed?

The Plaintiff's Case

The case as put for the plaintiff is that the sum of \$76,232.17 was not part of the proceeds of log sales restrained by the Court Order of 2nd February 2001, but that it belong to OTC. As such when the defendants gave instructions to the plaintiff to transfer the amount to their joint cheque account and subsequently to their joint IBD Account, they were not entitled to do so. Consequently, the plaintiff also wrongfully transferred the money to the defendants. Having taken legal advice that its action amount in law to conversion, the plaintiff reimbursed OTC the full amount of \$76,232.17, and now claimed contribution from the defendants.

The Defendants Case

The case for both defendants can be put together. Their case is that the sum of \$76,232.17 was part of the proceeds of the log sales, and as such it was covered by the Court order of 2nd February 2001. They were therefore entitled to have the money transferred to their joint accounts as ordered by the Court. Consequently, they argued, their actions, and so were those of the plaintiff, were not tortious and therefore the plaintiff is not entitled to contribution.

The Position in Law

The legal position with regard to contributions by tortfeasors is contained in section 6 (1) of the *Law Reform (Married Women and Tortfeasors) Act 1935*. So far as material, section 6 (1) of the Act provides as follows:-

“(1) Where damage is suffered by any person as a result of a tort

(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise...”.

This provision was intended to secure the right of a tortfeasor who has been sued or against whom alone judgment has been obtained to recover contribution from the other tortfeasor. Thus the two classes of persons who are directed at by this provision are those who have been sued, as well as those who have not been sued but would, if sued, be held liable: *George Wimpey and Co. -v- BOAC*³. Like in that case, the issue that has to be resolved in the present case centers on the meaning of the words “liable”. In so far as the plaintiff is concerned, the submission on its behalf shows that “if OTC had sued the plaintiff and the defendants for conversion of the money, OTC would have been successful”, an admission of liability on the part of the plaintiff. The defendants are, of course, denying liability. But as to the meaning of the word “liable” under section 6 (1) (c) of the Act, the Court of Appeal in *Stott -v- West Yorkshire Car Co*⁴, after referring to *George Wimpey and Company -v- BOAC*⁵, held that the word “liable” meant “responsible in law”. Lord Denning MR stated:⁶

³ *George Wimpey and Co. -v- BOAC* [1954] 3 All ER 661, 664 (HL).

⁴ *Stott -v- West Yorkshire Car Co.* [1971] 3 WLR 282

⁵ *George Wimpey and Company -v- BOAC* [1954] 3 All ER 661 (HL)

⁶ *Stott v West Yorkshire Car Co.* [1971] 3 WLR 282, 286 per Lord Denning MR.

I am of opinion that the word "liable" does mean "responsible in law." It follows that a tortfeasor is entitled to recover contribution from another tortfeasor (i) when he has been held liable in judgment, (ii) when he has admitted liability; and (iii) when he has settled the action by agreeing to make payment to the injured person, even though, in making the settlement, he has not admitted liability. But, of course, when the tortfeasor settles an action, he cannot claim contribution from other tortfeasor unless he proves that he himself was "liable". He must prove, therefore, that, if the claim had been fought out, he would have been held responsible in law and liable to pay in whole or in part for the damage.

The plaintiff in the present case had settled OTC's claim on the clear acceptance of their responsibility in law on their part for what happened, that is, in paying out \$76,232.17 to the defendants, and now claims contribution from the defendants. I would respectfully adopt the three classes of persons set out by Lord Denning in cases of claims against joint tortfeasors in *Solomon Islands*.

Whether the \$76,232.17 a proceed from log sale

The defendants case is that the amount of \$76,232.17 was part of the proceeds of the log sales subjected to the restraining order of the Court in CC103/00 OTC maintained that it was not and that it was part of the \$150,000 lend to OTC by PPP. The evidence seems to suggest (see Exhibit 5) and I accept, that on 31st January 2001 the amount of \$333,936.65 was credited to OTC's Account No. 4057373 bringing a total credit balance of \$728,397.33 to that Account. That same day, a cheque withdrawal of \$350,000 and a debit transaction also of \$350,000 were made on that Account, leaving a credit balance of \$28,397.33. On 2nd February 2001, a PPP cheque of \$150,000 was deposited into OTC's Account bringing a credit balance to \$178,397.33. The sum of \$27,414.36 and \$48,817.81 (totaling \$76,232.17) were debited to OTC on 5th and 6th February 2001 respectively. When Mr Lieng Wong was asked in cross-examination that the \$150,000 was, in fact, a proceed from the log sales, he maintained that it was not and that it was money lend to OTC by PPP. The evidence, especially Exhibits 5 and 6, gave support to Mr Wong's evidence. I accept that the \$150,000 was money given by PPP to OTC and not proceeds from log sales. Was the amount of \$28,397.33 standing to the credit of OTC before PPP lend the \$150,000.00 a proceed or part of the proceeds of log sales? The onus of establishing that lies on the defendants. On the evidence produced in this case the defendants have obviously failed to establish that. What appears to the Court to be the position was that by the time the order of the Court dated 2nd February 2001 reached the plaintiff Bank on 5th February 2001, the only fund left in OTC's Account was the \$150,000 (paid in by PPP) and \$28,397.33 (balance remaining in OTC Account). In the circumstances the bank was infact transferring funds which were not log sales proceeds from OTC Account to the defendants joint Accounts. That was an action which the bank, in my judgment, correctly realized later as wrongful and upon taking legal advice, reimbursed OTC.

Whether Defendants Are Joint Tortfeasors

The tort upon which OTC based its complaint against the plaintiff in this case was conversion, the ingredients of which consist of an intentional dealing with goods inconsistent with the possession or right to immediate possession of another person⁷ or as Palmer J noted in *Reuben Hulunga -v- Wilson Pwaulo*⁸

"Conversion is any act in relation to the goods of a person, which constitutes an unjustifiable denial of his title to them. There are two crucial elements in the tort of conversion to be established: (a) a dealing with the goods in a manner inconsistent with the

⁷ *Stephen Offei, Law of Torts in the South Pacific*, IJALSA, USP, Suva, 1997, 234

⁸ *Reuben Hulunga -v- Wilson Pwaulo* (28 August 2001) High Court, Civil Case No. 229/2000.

right of the person entitled to them, and (b) an intention in so doing to deny that person's right or to assent a right which is inconsistent with such right."

I respectfully agree with what His Lordship stated in that case. I only wish to add that in the case of a banker, as in the present case, transferring an amount from a person's account without lawful authority to the credit of another person is conversion. This is because the receiver, though may have been innocent, is a party to the denial of OTC's right to its money. The reception by the defendants of the property in the monetary transfer was conversion by receiving and they been sued, they would have been liable, just as the plaintiff in this case properly admitted its responsibility in law for its action in dealing with OTC's money. The defendants are joint tortfeasors.

Whether Plaintiff entitled to contribution

I have found that the defendants are joint tortfeasors in this case and as such, in law, they commit the same tort.⁹ Contribution is therefore recoverable, not only from a person who in an actual suit had been held liable by judgment, but it is also recoverable from one who, if sued, would have been held liable: *George Wimpey and Co. -v- BOAC*¹⁰.

Before leaving this matter, there is a point of concern which Mr Radclyffe had raised regarding the course of action taken by counsel for the parties in CC103 of 2000, and who are in effect, the defendants in this case, following the order of this Court of 2nd February 2001. By that order the sum of SBD484,000.00 was not to be released but to be paid into an interest bearing deposit "*to be held in the name of Solicitors until an inter partes hearing between the parties when the said order could be varied or new orders made by this Honourable Court.*" The evidence shows that Counsel for the parties in that case instead of adhering to the Order of the Court of 2nd February 2001, chose to disburse the funds injunctioned by the Court justifying it on the basis of a consent order made on 8th May 2000. No application had been made to the Court for variation of the Order of 2nd February 2001. It might very well be that the earlier consent order provided a good ground for variation of the Court Order of 2 February 2001, but the variation could only be done by the Court upon application made to it by a party, supported by the necessary evidence, allowing the defendants to draw money from an account subject to the injunction. Regrettably, the defendants felt that they should follow the consent order of 8 May 2000 which would enable them to disburse fund rather than adhering to the Court Order of 2 February 2001. The action of the defendants in this case could well have amounted to contempt of court order. Fortunately for the defendants, I have found that the amount transferred by the plaintiff into the defendants' accounts in this case was not part of the proceeds of the log sales.

The defendants in this case are joint tortfeasors and as such the plaintiff is entitled to receive contribution from them. That contribution would properly be apportioned between the defendants on a 50:50 basis.

Judgment for the plaintiff in the sum of \$76,232.17.

The question of costs is adjourned.

**Sir John Muria
CHIEF JUSTICE**

⁹ C. D. Baker, *Tort* (4 ed., Sweet and Maxwell, London, 1986) 142

¹⁰ *George Wimpey and Co. -v- BOAC* [1954] 3 All ER 661 664.