

10 **Niu v Cable & Wireless Ltd**

Supreme Court, Nuku'alofa
 Martin CJ
 Civil Appeal No.6/1990

28 March, 1991

Restitution - unfair advantage

20 *Telephone Regulations - application to overseas calls*
Costs - reliance on previous judgment - per incuriam

The appellant appealed from a decision of the Magistrates Court rejecting his claim for refund of \$200 deposit for future overseas telephone calls.

Held on appeal

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1. The provisions of the Telephone Regulations applied to go over only the provision of domestic telephone services and not to the Respondents business which was governed by the terms of its contract with the Kingdom and by common law.
 2. A previous decision of this Court to the contrary was per incuriam and should not be followed.
 3. There was a binding contract created between Appellant and Respondent for the provision of overseas calls.
 4. The Respondent had not taken unfair advantage of the Appellant's need in order to extort an unreasonable payment.
 - 40 5. The decision of the appeal was dismissed but without any order for costs.

Cases considered: Cable & Wireless v Mataele C.134/88
 Walter Trading v Cable & Wireless C.34/89

Statute considered: Telephone Act (cap.108)

Regulations considered: Telephone Regulations

50 Counsel for appellant : Mr 'Etika
 Counsel for respondent : Mr Hogan

Judgment

This appeal concerns a claim in restitution.

Mr Niu is a practising barrister and solicitor. He uses his home and office telephones to make overseas calls. International telephone calls are provided by Cable & Wireless ("the Company") under a contract with the Government of Tonga which empowers the company to receive payment from the public for this service.

In 1989 Mr Niu completed an application form requesting a credit account with the Company. This form set out the conditions upon which credit would be given including:

"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.

"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 the deposit is in the discretion of C&W."

In November 1988 Mr Niu's account for overseas calls made from his office telephone was \$278.35. The bill was not paid in time. On 25th January 1989 he wanted to make another overseas call from that number but was refused because the bill was unpaid. He paid the amount due but the company demanded a further \$200 deposit before he could have further credit facilities. He paid the further \$200 under protest, and then brought proceedings to reclaim it.

He argued in the Magistrates' Court

1. that he had no alternative but to sign the application form, and that the Company took an unfair advantage of his need to demand payment of a unreasonable sum; and that in any event
2. The requirement of a deposit was unlawful because Regulation 7 of the Telephone Regulations had not been complied with.

The relevant part of Regulation 7 (as amended) states:

"7. The General Manager may, with the consent of Privy Council . . . demand security . . . for the payment of any telephone charges . . ."

It is agreed that the consent of Privy Council was not obtained.

The claim was dismissed in the Magistrates' Court. The material findings of the learned magistrate were:

1. the Telephone Regulations do not apply to the Company; and
2. completion and acceptance of the application form for a credit account did not create a contract between Mr Niu and the Company, but " . . . the customer must observe it before calls are made on credit." By that he appears to imply that as soon as a call is made a contract on these terms comes into existence.

Mr Niu appeals on the grounds that the learned magistrate was wrong to hold that the Telephone Regulations 1977 do not apply to the Company; but says that he was correct to hold that there was no contract between them. He relies on passages in *Cable & Wireless v Siosaia K Mataele* (C.134/88), which applied the Telephone Regulations to the Company's business and in particular states:

" . . . the obligation to pay is imposed by statute, not by the contract itself . . ."

The contract referred to was that between the customer and Tonga

Telecommunications Commission.

When that case was heard there was no contract between the company and its credit customers. That position has now been rectified and every credit customer has to apply in writing, accept the conditions set out on the application form, and be accepted by the company. In *Walter Trading v Cable & Wireless (C.34/89)* (decided after this case was heard in the Magistrates' Court) Webster, J. ruled that in these circumstances a contract was created between the parties which incorporated the conditions set out on the application form. I respectfully agree with that conclusion.

110 The magistrate's conclusion that there was no contract between Mr Niu and the Company was therefore wrong. The Company was therefore wrong. The Company agreed to provide international telephone calls; Mr Niu agreed to observe the conditions set out on the form he had signed. Those conditions are binding on him unless his arguments that the terms were unlawful can be sustained.

Unfair advantage

A court will order restitution if a defendant has taken unfair advantage of a plaintiff's need in order to extort an unreasonable payment.

120 Under the terms of its agreement with the government, the Company is obliged to provide international telephone calls. But there is no obligation to provide them on unsecured credit. The Company incurs expense as soon as a call is made, and bears that cost until the account is paid. Evidence was given in the Magistrates' Court that unsecured credit was allowed for many years, with the result that by 1987 unpaid bills totalled over \$500,000.00.

130 Not surprisingly, the Company tightened up its credit control. One step was to demand a deposit from credit customers in arrears, the size of which was related to the sum unpaid. It is not unreasonable, where a credit customer has not paid his account on time, to refuse him further credit unless a reasonable sum is paid as security against any further default. And it is not unreasonable to require a deposit of \$200.00 where the unpaid account was nearly \$300.

On the facts of this case, the Company did not take an unfair advantage of Mr Niu and the amount demanded was reasonable.

Statutory restriction

140 *Cable & Wireless v Mataele* was decided in the absence of the Defendant and was not fully argued. On reconsideration it is evident that a crucial point was overlooked. The old Telephones Act (Cap. 108) and its successor the Tonga Telecommunications Commission Act govern only the provision of domestic telephone services. Therefore any regulations made under those Acts apply only to domestic telephone services. The decision in *Cable & Wireless v Mataele* can be supported on other grounds, but in so far as it decided that the Telephone Regulations apply to international telephone calls it was decided per incuriam and should not be followed.

The Telephone Regulations do not apply to the Company. Its business in Tonga is governed by the terms of its contract with the government and by common law.

The decision of the learned magistrate was correct. The appeal is dismissed.

Costs

150 Mr Hogan came to Tonga specially for this appeal and seeks his costs, which are substantial. Mr Niu's appeal was based mainly on the decision in *Cable & Wireless v Mataele* which he was entitled to assume correctly stated the law, and which supported

his contentions. In these circumstances it would not be right to penalise him and I make no order for costs.