IN THE HIGH COURT
OF THE WESTERN PACIFIC) 1969 No. 7

(CIVIL JURISDICTION)

BETWEEN: BARRY JOHN EDDY SCOTT

Plaintiff

AND: JAMES KOH-SING WANG
R.C. SYMES PTY LIMITED

Defendants

JUDGMENT

This is an action for damages for breach of a contract of service entered into between the Plaintiff of the one part and the 1st Defendant or the 2nd Defendant of the other part.

The facts as disclosed by the evidence and the various admissions of the parties I find to be as follows -

The Plaintiff came to the Protectorate as a visitor some time prior to the 20th May, 1968, and was anxious to obtain employment in order that he might remain in the Protectorate and not be required by the Immigration Authorities to leave at the expiration of his visitor's permit. In these circumstances he came into contact with the 1st Defendant who was at all material times also the Governing Director of the 2nd Defendant, a corporate body, namely R.C. Symes Pty. Ltd. After discussion between the Plaintiff and the 1st Defendant it was decided that a construction company should be promoted and the Plaintiff was to apply to be the manager. That he did and the terms of the contract of service were drawn up by the 1st Defendant in draft. The 1st Defendant gave the draft to the Plaintiff who took it away to consider. After a few amendments, the agreement was finalised and signed on the 20th May,1968, by the Plaintiff on the one part and the 1st Defendant, signing in his capacity as Governing Director of the 2nd Defendant, on the other part. That agreement is admitted and is Exhibit A in this action. The agreement is written on paper headed "R.C. SYMES PTY. LTD" and is in the form of a letter addressed to the Plaintiff and commences as follows -

" Dear Sir - This is to confirm our acceptance of your application as manager of United Construction Company which is to be formed as a limited company, with the following terms: -".

There then followed eight clauses of agreement which I shall consider later in this judgment. The letter ends as follows -

" Kindly signify your agreement of this contract by signing the duplicate of this letter hereof:-

Agreed by ..".

The Plaintiff and the 1st Defendant signed that letter in the manner I have described.

On the 1st June, 1968, work was started on the various contract building and other related projects. Certainly during the first months of work the United Construction Company made use of the letter heading of R.C. Symes Pty. Ltd and also used order forms and invoices so headed. Later on invoices and order forms in the name of the United Construction Co. were obtained and used. Finally on the 14th September, 1968, the 1st Defendant made application in his own name, and not in his capacity as Governing Director of the 2nd Defendant, for registration under the Business Names Registration Ordinance, (Cap. 88) of the name United Construction Company as a "building contractor, brick supplier and building material dealer". The application declared that work would commence on the 15th September, 1968. However that declaration may be, the parties agree that work was in fact started on the 1st June, 1968. The Plaintiff carried out the supervision of the project work but appears on the evidence to have had little to do with the supervision of the accounting and monetary side of the concern, and he has complained that he was not able to act properly as manager because the accounting was all in fact being done by the accounts staff of R.C. Symes Pty. Ltd, the 2nd Defendant. The work progressed and in October 1968 the 1st Defendant left the Protectorate for a visit to the United Kingdom and Hong Kong and did not return till early January 1969. When he returned he was disappointed to find that certain building work being carried out on contract for the Public Works Department of the Protectorate Government which ought to have been completed by the end of December was far from completed and the Public Works Department was pressing. He also was worried, in spite of the Plaintiff's assurance to the contrary, that the concern appeared to be making a heavy loss. However that may be, in February, when the Public Works contract was still not completed, the 1st Defendant seriously considered closing down the business. This was discussed from time to time between the Plaintiff and the 1st Defendant and finally towards the end of March the 1st Defendant decided that he at least was pulling out of the business. The final discussion, relevant to the facts of this case, between the Plaintiff and the 2nd Defendant took place on the 28th March, 1969. What was actually said at that meeting is far from clear. The Plaintiff says that the discussion again turned upon whether the business was making a profit or a loss and that when he, the Plaintiff, asserted that it was making a profit, the 1st Defendant called him a liar whereupon the Plaintiff walked out of the office. On the other hand the 1st Defendant says that he had already made up his mind to close the business down and that at that meeting he gave the Plaintiff verbal notice that the business would be closed on the 30th April, 1969, and instructed him to give notice to the labourers and that thereafter the discussion turned upon ways and means by which the Plaintiff might himself carry it on independently. That meeting was in private and unfortunately therefore there is no other evidence than that of the parties themselves as to what really did take place. However, as soon as that meeting was over, the 1st Defendant wrote the letter Exhibit B which reads as follows -

" Dear Barry, March 28th, 1969.

This is to confirm our conversation regarding our decision to terminate the operation of the United Construction Company by giving you the required notice up to the end of April.

Yours sincerely,

James Wang. "

The 1st Defendant says that he intended to give that letter to the Plaintiff the following morning, which was a Saturday, upon which day they usually had an informal meeting to discuss the week's work, but that the Plaintiff did not turn up. He says that he therefore delivered the letter on Monday the 31st March when the Plaintiff came to work. The Plaintiff admits that he did not go to the Saturday meeting. He says instead that he went to see the Bishop of Melanesia to make arrangements for his impending wedding. That is confirmed by his fiancee whom he called as a witness. He also denies that he was given the letter Exhibit B on the 31st March but says that he was given it on the morning of the 2nd April. On this evidence I must decide whether verbal notice was in fact given on the 28th March and if not was the letter containing written notice given on the 31st March or on the 2nd April. The onus is on the Plaintiff to show that he did not receive notice till the 2nd April in order to establish the breach of contract upon which he bases his claim. On a balance of probabilities I find in favour of the Plaintiff. The Plaintiff admits that he was not surprised when he received the letter Exhibit B because as a result of the meeting on the 28th March, 1969, he was aware that the 1st Defendant had made up his mind to close the business down but had not specified how or when that would be done. Furthermore, and this evidence I accept without hesitation, the Plaintiff showed the letter Exhibit B to his fiancee at lunch time on the 2nd April. The Plaintiff has said that if he were dismissed from work he would be required to leave the Protectorate by the Immigration Authorities and it seems to me unlikely that had the Plaintiff understood that he had been given notice on the 28th March he would have proceeded with arrangements for his wedding the following day, and also if he had received such notice or the letter Exhibit B before 2nd April he would not at once have told his fiancee; and I am quite satisfied that she was not told, or shown Exhibit B, before lunchtime on the 2nd April. What happened was that the 1st Defendant no doubt intended to give the Plaintiff verbal notice at the meeting on the 28th March expiring 30th April, and he no doubt thought that he had done so, but that this was not clear to the Plaintiff who left that meeting only under the impression that the concern would shortly be closed and he would have to expect to receive notice in due time. Then a chapter of accidents intervened which prevented the confirmatory letter Exhibit B being delivered to the Plaintiff before 2nd April.

I have to make one more finding of fact, namely the date upon which work by the United Construction Company actually ceased. I find that it ceased operations on the 30th April, 1969. The Plaintiff called a witness to say that he had been re-employed by the United Construction Company after that date but that witness said that he thought he was working for R.C. Symes though from evidence of the 1st Defendant it would appear that he was working for a contractor called Sefanai, whom the witness admits paid him his wages for May and June months. That contractor had taken over the unfinished work of the business on his own behalf. I have no doubt on the evidence at all but that the United Construction Company ceased all operations on the 30th April, 1969.

Before turning to the construction of the contract it remains to determine with whom the Plaintiff contracted, namely the 1st Defendant in his private capacity or the 2nd Defendant, R.C. Symes Pty. Ltd, or may he look to both of them. The 1st Defendant admits that he intended to contract in his personal capacity and says that R.C. Symes Pty. Ltd, the 2nd Defendant, was not involved. The Plaintiff on the other hand is looking to R.C. Symes. Certain it is that the contract is signed by the 1st Defendant in his capacity as Governing Director of R.C. Symes and on the very face of it the Plaintiff would appear to have contracted with R.C. Symes. There is no mention to the contrary anywhere in the contract. However,

the 1st Defendant has explained that he was only doing this to help the Plaintiff because the Immigration Authorities would not have accepted the Plaintiff's employment as bona fide if it had been in the name of the United Construction Company which was still at that time a non existant concern. Therefore he says he signed in the name of R.C. Symes Pty. Ltd. In the absence of the clearest evidence to the effect that the whole thing was just a ruse to deceive the Immigration Authorities and that the Plaintiff was at all times a party to it I cannot accept that. Whatever may have been in the mind of the 1st Defendant, he caused the 2nd Defendant, qua company, to hold itself out as being the contractor and for all practical purposes thereafter for some considerable time the Plaintiff would appear to have been no more than a building supervisor employed by R.C. Symes. I hold therefore that both the 1st Defendant and the 2nd Defendant are jointly and severally liable for the consequences which may flow from any breach of the contract Exhibit A.

I now turn to the construction of the contract of service Exhibit A.

The primary rule of law governing the construction of documents is that the document to be construed must be looked at as a whole and therefrom must be extracted the intentions of the parties. The learned author of Chitty on Contracts 23rd Edition (General Principles) at paragraph 609 puts it this way-

> " The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say, the meaning of the document or of a particular part of it is to be sought in the document itself; "One must consider the meaning of the words used, not what one may guess to be the intentions of the parties."

The learned author derives that proposition from two leading cases, namely, Smith v Lucas (1881 18 Ch.D, 531 - not available in this library) and British Movietonews Ltd v London and District Cinemas Ltd (1951 2 AER 617). Those cases merely confirm what has always been the rule for construction of contracts. If the words themselves are ambiguous or do not reflect the intention of the parties in themselves or are so framed as to lead to absurdity the surrounding circumstances may be regarded with a view to extracting from the wording of the contract what must have been the true intention of the parties.

Bearing that cardinal principle of construction in mind I shall now look at the contract Exhibit A. The Plaintiff has argued that it is a contract for a fixed period of two years and that there is no provision for terminating it before the expiration of that period by either party. He says in other words that clause 2 must be read in isolation. That clause reads -

> " The period of contract is two years with option of renewal."

But bearing in mind that the document must be looked at as a whole I find clause 8 which reads-

> "8. Minimum of thirty days notice to be given by either party for termination of the contract."

And then there is also clause 7 which reads-

> " 7. Outward passage to New Zealand will be provided by the company after two years service. In case you wish to terminate this contract earlier the fare will be paid pro rata".

Now there we see that not only by clause 8 is provision made for the termination of the contract but by clause 7 it is specifically stated that the contract may be terminated before two years are up, in which case if it was the Plaintiff who wished to terminate it he would forfeit a proportion of his passage entitlement. If, presumably, it was terminated by the Defendant then the Plaintiff would be entitled to his full passage out to New Zealand because the shortened term of service would not be at his instigation. Reading, therefore, the three clauses which are relevant to the question of termination of the contract as a whole, which they must be to arrive at the true intentions of the parties, I find without hesitation that the intention was that the duration of the contract was to be for two years but that if either party wished to terminate it before the expiration of that period it could be achieved by the one party giving to the other notice of not less than thirty days. I cannot accept the Plaintiff's contention as to this issue, nor indeed do I think that he had much faith in it when he argued it. That disposes of the major issue. I have found on the facts that the Plaintiff was not given the minimum of thirty days notice and therefore the 1st and 2nd Defendants are in breach of contract to the extent that the proper notice required by the contract was not given. Liability for damage which flows from that, and which I shall consider later in this judgment, falls upon both of them.

Before considering the question of the quantum of damage there is the issue which was added at the request of the Plaintiff during the hearing, namely whether or not a clause should be read into the contract providing for holiday pay. There is no mention of it in the contract Exhibit A, but he says that provision for that is so much a custom in the Protectorate that it ought to be read into it. To that end the Plaintiff called the Commissioner of Labour to give evidence. He said in effect that it was a common practice but he also said (and I quote from his evidence) "I am unable to say that the custom is so strong as to override a written agreement". He then went on to say that whereas most firms do include specific provision for holiday pay in their service contracts it is subject to variations and sometimes a gratuity or bonus is given either as well as or in lieu of holiday pay or not at all. On that evidence it is quite clear that there can be no custom to that effect, for the essence of custom is that it must always be the same. Holiday pay is a matter for agreement in each case, and if the parties to a contract omit to make such an agreement this court cannot step into the breach and make one for them. The 1st Defendant in this connection draws attention to clause 4 of the contract Exhibit A which provides for a bonus of 10% of the net profits at the end of twelve months working and maintains that that bonus is in keeping with the variations in respect of holiday pay and in effect that if there is any custom in this respect at all that clause takes care of it. He further points out that the Plaintiff had time to think about the terms of the contract and indeed did so. If he was not content with the provision made in clause 4 and wanted holiday pay in addition or in lieu of that provision he should have raised the matter. As it was, neither party discussed the matter at all, and no agreement was made regarding it. As I have said before, this court cannot make an agreement now which the parties have omitted to make for themselves. The issue of holiday pay fails.

I come now to the question of damages.

The general rule as to damage is that the Plaintiff is entitled only to such damages as would compensate him for the loss suffered through the breach to the extent that such loss was reasonably foreseeable as liable to result. In the case of wrongful dismissal therefore the damages must be assessed only up to the earliest time at which the defendant could validly have terminated the contract. That rule is established law and was reaffirmed in a recent case before the Privy Council, namely British Guiana Credit Corporation v Da Silva (1965 I WLR 248) in which the issues were very similar to those in this case. The Plaintiff is entitled to thirty days salary (or say onemonth) in lieu of notice. He is entitled to the loss of benefit of accommodation for thirty days. He is entitled to 10% of the net profits of the business under clause 4 of the contract, and he would have been entitled to his outward passage to New Zealand except that he is not claiming it for it appears that that has already been provided for. The Plaintiff has asked for damages for loss in respect of the preparations for his wedding for which he says money has been wasted and also for loss of reputation and the loss of interest on money which he says he has had to draw from funds in Hong Kong to tide him over. None of those latter claims can be said to flow from the breach of this contract in the sense that any of them could be said to have been reasonably foreseeable as liable to result. Indeed, the item of loss of reputation was specifically dealt with in the case which I have cited above. Lord Donovan delivered the opinion of the court: the Plaintiff in that case in his statement of claim had claimed damages for "humiliation, embarrassment and loss of reputation " but the learned Law Lord said "Such general damages find no proper place in this claim. The Plaintiff is entitled only to such damages as will compensate him for the loss suffered through the breach to the extent that such loss was reasonably foreseeable as liable to result". In my judgment this applies to the claims for general damages claimed in this case. They are what is frequently called too remote.

The Plaintiff is entitled therefore to the following sums only -

Loss of salary at $200 per month (clause 3)	$200
10% of the net profits as found by the referee (clause 4)	64-28
Loss of benefit of accommodation for one month	25·00
	$ 289·28

In addition to that he is entitled to his passage back to New Zealand under clause 7.

The Plaintiff having succeeded in his claim to the extent that he has established the breach of contract which is the foundation of the action, but having failed to recover anywhere near the extent of the damages which he has claimed I consider it just that he should bear one half of the costs of the action and so I order.

In the result, therefore, Judgment will be entered for the Plaintiff in the sum of $289·28, plus one half of the costs of the action, against the 1st and 2nd Defendants jointly and severally.

Dated this 29th day of July 1969.

Sir Lovelyn Bodley

Chief Justice