

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

BRITISH VIRGIN ISLANDS
CIVIL SUIT NO BVIHCV2001/0103

BETWEEN:

WATERFRONT TAXI STAND (1994) LIMITED

Claimant

and

CABLE AND WIRELESS (WI) LIMITED
WILBURN CONNOR

Defendants

Appearances:

Kerry Anderson for the Claimant
Dion Boland for the 1st Defendant
Tana'ania Small for the 2nd Defendant

2004: February 16, 17, 18

JUDGMENT

[1] **MITCHELL, J:** When Wilburn Connor was the president of an association of taxi drivers in Tortola, he applied in his name for a telephone number to be used for the business of the association. The day came when he ceased to be president. Cable & Wireless, contrary to its policy, without his consent, transferred the number out of his name into the name of the association. Mr Connor applied to Cable & Wireless to transfer the phone to him at his new location. Cable & Wireless transferred it as he requested. The association was not consulted. It has sued Cable & Wireless and Mr Connor. The question is, did the number belong to the association so that he no longer has the right to it?

[2] Mr Connor has been a taxi driver since the early 1970s. In the early days, he and a group of associates, working on their own account under the name "BVI Taxi Stand" used the telephone number of another taxi driver as a communal telephone for receiving bookings

for taxi jobs. In the year 1976, there was a dispute and that number was disconnected. Mr Connor applied to Cable & Wireless for a new telephone service. He filled out the application form and thereby entered into a written contract for the provision of that service. We shall come back to the terms of that contract. He was allocated the number 3456.

[3] Mr Connor and his colleagues continued doing business under the name "BVI Taxi Stand" They operated from a location at the Road Town waterfront. They all used 3456 for receiving calls in relation to their taxi operations. They were not supposed to make calls, but some did. There were phone bills to be paid. Mr Connor says that for about two years he bore all the costs of the telephone by himself. That is highly unlikely, given that this was the accustomed way for the members of the taxi stand to receive calls for taxi jobs. I find that from the beginning he collect monies from the other members of the taxi stand on a monthly basis to reimburse himself for the costs of the telephone service. It was a very informal arrangement, under Mr Connor's control as president of the taxi stand.

[4] From the above, I conclude that from at least the year 1976, Mr Connor and his taxi colleagues had been operating as an unincorporated association. In time, they built a communal booth. The booth was supplied with electricity and Cable TV, in addition to the telephone service. This was all done in the name of Mr Connor, but the costs were shared by members of the Association.

[5] In the year 1990, the members of the association decided to apply for a second telephone line. Mr Connor as the president and customer of record made the application at Cable and Wireless. He did so in the name that he and his associates operated under, viz, "BVI Taxi Stand." Cable & Wireless allocated the number 6456. So far as Cable & Wireless was concerned, Mr Connor was their customer. The bills came addressed to him. He paid Cable & Wireless monthly. He was, as with the first telephone, reimbursed by the members of the association on a monthly basis. Mr Connor does not claim any right to this number. He considers that he made the agreement with Cable & Wireless on behalf of the association. Until he and the association, or someone acceptable to Cable & Wireless,

complete a new application form, he remains the only customer of record of Cable & Wireless in relation to 6456.

[6] In the year 1996, the members of the association appear to have had a problem with some drivers abusing the phone service and using it to make personal calls. They decided to bar telephone calls from 3456 and 6456. Mr Connor, as the only customer recognised by Cable & Wireless, applied to Cable & Wireless for controlled barring of calls. Shortly after that, the need to have a phone from which personal calls could be made by members of the association became apparent. The decision was taken to acquire a pay phone. Mr Connor, as the only customer recognised by Cable & Wireless, duly filled out the application form for a pay phone. On it, he indicated by putting its name in front of his own that he made the application on behalf of the association. By this time, as we shall see below, the members of the association had incorporated themselves under the name Waterfront Taxi Stand, the claimant in this action. Mr Connor did not make the application in the correct name of the company. No doubt, this was because he did not produce a copy of the certificate of incorporation for Waterfront Taxi Stand. Instead, he sloppily used the old name, "BVI Taxi Stand." Cable & Wireless allocated the number 7519 to him on behalf of the association. It made him sign a personal guarantee to pay the bills if the association did not. It treated the application as one being made by an established customer. The pay phone was in due course installed at the taxi stand on the waterfront, and members wishing to make a call could do so on payment of the charges demanded by Cable & Wireless. So far as these three telephones were concerned, the only customer recognised by Cable & Wireless, the only person against whom it could have enforced the contract for services, was Mr Connor. So far as their records were concerned, the name "BVI Taxi Stand" was no more than Mr Connor's trade name.

[7] By the year 1994, there were other taxi associations operating in the BVI in competition with the members of the BVI Taxi Stand. One of them, the "BVI Taxi Association," had a similar name that was causing confusion in the minds of customers. Mr Connor and his colleagues became concerned that they were losing business. They decided to change their name to "Waterfront Taxi Stand." At the same time, they took the decision to

incorporate the association. Mr Connor says that this was done without his knowledge or approval. He is an old man now, and a bit confused. He and thirteen other taxi drivers signed the memorandum of association. It provides for a share capital of US\$10,000.00 divided into 10,000 shares of \$1.00 each. Each subscriber took one share. This memorandum of association is typical for a trading company. It is not clear why they or, more likely, their lawyer, decided to incorporate the association in this form.

[8] The articles of association of the company Waterfront Taxi Stand do not provide for a sale or transfer of the shares, as it should have if it was really to be the articles of a company limited by shares. Rather, it provides that new members may be admitted on payment of dues. The articles do not provide for a board of directors, but for an executive committee. The articles do not appear to have been drafted for a company limited by shares. They might seem to be more appropriate for a company limited by guarantee. In several respects that are not relevant to this case, if this the association was intended to be incorporated as a company limited by guarantee, then the bulk of the articles do not follow any recognisable precedent for that purpose. Other than a few preliminaries appropriate for a public company limited by shares, the remainder of the articles are really in the form of the constitution of an unincorporated association. It appears, however, that the intention was that they should serve as the articles of a company limited by guarantee. It is not for me to decide at this time whether this intention was successfully carried into action. Under these articles, Mr Connor was from time to time, very informally, elected as president of the association. There are no minutes of meetings from his time in office in evidence.

[9] From the evidence, it is apparent that the company never traded. It had no business. It had no income. It had no profits. It had no assets. It had no expenses. The members continued to work on their own account. Such expenses as the company accepted were met by the members continuing their previous practice of making a monthly payment of dues. From the early days, those of them that were cooperative paid their dues to Mr Connor who used them to defray the bills that came addressed to him from the TV company, the electricity company, and Cable & Wireless. Some taxi drivers used the facility and were uncooperative. They did not all pay their share of the expenses. It was

all very informal. There were no accounts published or agreed. Mr Connor may have made a profit from the dues paid to him, or he may have made a loss as he now alleges. At some stage after the incorporation of the company, the executive committee opened a bank account for it. A treasurer was elected and he began to collect the dues from those who were accepted to be members, and to issue cheques to refund such expenses as Mr Connor claimed he had incurred on behalf of the association. These included the charges for telephone rental and billing for 3456.

[10] Caribbean Publishing Company is the publisher of the telephone directory for the BVI. It is a separate company from Cable & Wireless. It receives from Cable & Wireless data on each of its subscribers. Caribbean Publishing publishes that data in the "white pages" and, in the case of businesses, also in the "yellow pages." It makes its profit from selling advertising space in both the white pages and the yellow pages. Advertising in the white pages involves listing the customer's name in bold, or in a separate window. In the yellow pages full page adds and other forms of advertising are possible. Caribbean Publishing is not supposed in the publication to change the name of the customer given to it by Cable & Wireless. For some reason known only to Caribbean Publishing, in the directories for the years 1994 and 1995 the two telephone numbers used by the Waterfront Taxi Stand for receiving calls were joined by two other telephone numbers. These other two numbers did not belong to Waterfront Taxi Stand, but to the competitor taxi association, the BVI Taxi Association. The several numbers were all incorrectly listed in the yellow pages under the name "BVI Taxi Association Taxi Stand." This appears to be a strange amalgam of the two names, "BVI Taxi Stand" and "BVI Taxi Association," created by Caribbean Publishing. This was the beginning of a catalogue of errors.

[11] In the 1995, 1996, 1997, and 1998 telephone directories, the white pages show the subscriber to the two numbers 3456 and 6456 used by the association changed from "BVI Taxi Stand" to "Waterfront Taxi Stand." This change had been brought about by Arnold Smith, the elected secretary, who had issued the written instructions to Caribbean Publishing. Mr Connor claims now that these instructions were issued without his knowledge, authorization or consent. He says he could not have done that in relation to

3456 as this was his "dba" name. He says that when he applied for 3456 he had mentioned "BVI Taxi Stand" on the application form only because that was his personal business name. I have difficulty in believing that. By the year 1976 he was already working with a group of taxi drivers from the BVI Taxi Stand booth. His relationship with the other members up to the year 2000 was good. He was their president. He participated in the 1994 decision to change the name. The purpose of the change of name was to improve business. He would profit from an improvement in business. To improve business, the new name had to be publicised. Publishing it in the yellow pages is an acknowledged method of advertisement. He was part of the executive committee that approved the payment of the bill for the advertisement. He never came up with the "dba" concept until after he had fallen out with the executive and was trying to take back the number 3456. I am satisfied the 1995 change in the white pages was made by Caribbean Publishing with his full knowledge and complete approval. While he remained president, he treated the numbers 3456 and 6345 as communal numbers, for the use of the members of his association.

- [12] By 1999, relations between Mr Connor and his members were souring. The reasons are not before us, and are not relevant. In elections held in December 2000, Mr Connor was replaced as president of the association. After some time, he stopped associating with his old colleagues. There was bad blood between them. He determined to continue his taxi business on his own, operating from a new stand. He wanted to have his old number 3456 back. He considered that it was his own. It took him some time to get the necessary approvals from government to set up a new stall in the vicinity of "Crafts Alive" and to have a telephone line connected to it. He did not say anything about his plans to his previous colleagues who were operating from the old taxi stand using the three telephone lines he had arranged. He applied at Cable & Wireless to have 3456 transferred to his new booth at Crafts Alive. Being the only customer on record, his instructions were carried out, no doubt on payment of the appropriate charges. The members of the Waterfront Taxi Stand were affronted by what they considered the wrongful removal of their telephone number. All attempts at negotiation failed. They applied to the court for, and got, an interlocutory injunction causing Cable & Wireless to return the number 3456 to their use, pending the

outcome of these proceedings. They have brought this action for an order for the number to be declared to be their own by novation of the contract between Mr Connor and Cable & Wireless, and for damages. Mr Connor has counterclaimed for his number to be reinstated. He also claims damages, for the loss of use of his phone. Cable & Wireless has counterclaimed against the association as well, for damages apparently for having induced them wrongfully to remove the number from Mr Connor's name.

[13] To become a customer of Cable & Wireless, one has always had to complete an application form. That is the principal contract document. A contract with Cable & Wireless for the provision of a telephone service has never been made orally, not if Cable & Wireless wanted to be able to enforce it. The application form adopts Cable & Wireless' terms and conditions as altered from time to time. One of these conditions has always been that if one wants to transfer a telephone line to another person, that other person must sign a new application form. Another is that one is not permitted to apply for a telephone line on behalf of another person who is not signing the form. That must be so if Cable & Wireless is to have an enforceable contract with the customer. It has never been that a Cable & Wireless telephone line can be transferred unilaterally by a customer of Cable & Wireless to another person who becomes the new customer of Cable & Wireless. In 1975 and before, Cable & Wireless had always retained the right to refuse to have a particular person as its customer, or to accept a person as a customer only on special conditions. If Cable & Wireless will not be allowed by the court to enforce an oral contract with a customer, it is not likely that the court will allow a person claiming to be a customer of Cable & Wireless by virtue of an oral contract, or a contract by conduct, or by agency, or by novation, against Cable & Wireless, without Cable & Wireless' knowledge and consent in writing. There must be mutuality for there to be an enforceable contract.

[14] The problem is that Cable & Wireless has itself muddied the waters. First, starting in the year 2000, Cable & Wireless, on the instructions of a member of the executive committee, not Mr Connor, began addressing the telephone bills, including that for the one in dispute, 3456, to the "BVI Taxi Stand," not to Mr Connor. Though the BVI Taxi Stand no longer existed, this change might be enough to persuade any reasonable observer that the

number 3456 belonged to the association, and not to Mr Connor. Then in 2001, acting on the instructions of a member of the executive committee, Cable & Wireless started sending the bills for the telephones, including the one in dispute, 3456, to "Waterfront Taxi Stand." Someone in Cable & Wireless did not follow procedure. He allowed an unauthorised person to alter the name of the customer on the bills. There should have been a written authorisation from Mr Connor if the address of the customer on the billing was to be changed. If the name of the customer was to be changed to a company, there should have been a consent signed by Mr Connor and a new application form signed by or on behalf of the company. As the new customer was to be a company, copies of the incorporation papers would have been required, along with a personal guarantee by one or more of the members of the executive committee. This change in the billing address encouraged the members of the association to believe that 3456 was their own, acquired by Mr Connor and held by him all those years, on their behalf. If Cable & Wireless had stuck to its own procedures, none of this problem would have arisen. Cable & Wireless has acknowledged that these alterations were unauthorised by their only customer, Mr Connor. It had been done by a new and inexperienced member of their staff, who did not follow regulations. Mr Connor only realised what had happened when in May 2001 the bills stopped coming addressed to him.

- [15] From the above narrative of the facts, it will be apparent that what I find is as follows. Mr Connor had never intended any of the numbers, including 3456, to be his personal number. He has wrongfully claimed that that was always his intention. He was unable to enter into a contract with Cable & Wireless on behalf of either of an unincorporated association or a company unless he completed the appropriate forms for doing so. He has never done so. He could have transferred the numbers to Waterfront Taxi Stand after it was incorporated. He never did this, as he should have. He wrongfully kept in his name all the telephone services intended for the use of the association. Mr Connor may well have owed the association a duty of loyalty and a duty of care to conduct the affairs of the association, including the management of the relationship with Cable & Wireless, in the best interests of the members of the association. He failed in this duty. There is no claim for damages against him on this footing. The telephone number 3456 is his by virtue of his

unchanged contract with Cable & Wireless. For the reasons I have set out, he was a principal cause of the confusion. He cannot now take advantage of the problem he has created and claim that the company has wronged him. He is not entitled to any damages. He is entitled to an order discharging the interlocutory injunction thus permitting the return to him of the use of the number 3456.

[16] Until the fiasco in 2000, Cable & Wireless had never recognised anyone other than Mr Connor in his personal capacity to be their customer. But, by the mistakes that they and the publishing company made in handling the various instructions that came in from the members of the association, they failed to follow their own procedures to ensure that the name and address of the customer were unaltered without the customer's consent. They took actions that could cause persons to believe that they accepted the association as their customer. They are not entitled to damages against anyone.

[17] The association has never at any time during the period in question been a customer of Cable & Wireless. Mr Connor was unable legally to transfer the benefit of his contract to them without the consent of Cable & Wireless, and without them or someone else on their behalf, signing up as Cable & Wireless' new customer. They acted wrongfully in giving instructions to Cable & Wireless and Caribbean Publishing without persuading Mr Connor to accompany them to give the appropriate instructions. They are not entitled to any damages against Mr Connor. The members of the association owed an obligation to themselves, Mr Connor, and Cable & Wireless to conduct their company's affairs in a competent and business-like manner. They did not do so. They are not entitled to any order against Cable & Wireless.

[18] For all the reasons above, the claim and the counterclaims are dismissed. Each party will bear his, its, or their own costs.

Don Mitchell, QC
High Court Judge