

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NUMBER SLUHCV1996/1096

BETWEEN:

OLIVER SAMPSON

Plaintiff

AND

WATER AND SEWERAGE COMPANY INCORPORATED

Defendant

Appearances:

Mr. Dexter Theodore for Claimant

Mr. Hilford Deterville Q.C. and Ms. Charlotte Mangal for Defendant

.....

January 20: 2005

.....

JUDGMENT

Factual background

1. **SHANKS J:** The Claimant was on the Board of WASA from 1982 until July 1996. At the end of November 1995 he also voluntarily assumed the role of "Executive Director". His duties and remuneration in that role were not established or recorded although it seems not to be in dispute that his activities grew when the General

Manager John Calixte went on an extended leave in May 1996. From at least June 1996 there were efforts to have his position regularized by the Board.

2. In July 1996 Daniel Girard was appointed Chairman of the Board. The Board considered the Claimant's position on 26 July 1996 and Mr. Girard wrote to him on 30 July stating that before a decision could be taken in relation to his salary his status needed to be clarified and that he should advise the Board of the duties he performed before and after the General Manager's departure "so that a fair and equitable determination of [his] remuneration" could be made (C/35).
3. Between 19 April and 13 September 1996 the Claimant took a number of advances totalling \$12,500.00 (see breakdown on at A/2). On 18 September 1996 the Claimant requested approval of a "salary advance" of \$10,000.00 from Mr Girard (C/56). On the same day Mr Girard wrote to him in the following terms:

"While the Board of Directors of the Water & Sewerage Authority has indicated its willingness to remunerate you for work done at WASA, I would have preferred the quantum and conditions of your tenure at WASA to be established before any payments were made.

Accordingly, I wish to draw your attention to my letter of June 30 instant, in which the Board is seeking to determine the scope of your responsibilities at WASA so that the matter of your remuneration by the Authority may be settled. A copy of my letter is attached.

I am approving this request on the understanding that you will respond to the Board's request for information pertaining to your duties, so as to obviate the need for salary advances in the future. My approval in this instance also assumes that there would be no further requests of this nature until your remuneration and conditions of service have been determined by the Board".

The \$10,000 advance was duly made.

4. The Claimant wrote to Mr Girard on 25 September 1996 setting out his activities and achievements as "CEO" at length. The letter concluded by saying " I am now in charge of WASA and attend to all matters of Operating, Engineering,

Finance and Establishment". This prompted a reply dated 2 October 1996 in these terms:

Re: Salary of CEO. At its 103rd meeting held on Wednesday September 26, 1996 the Board of Directors agreed to the following remuneration to you for services rendered to the Authority as indicated by your letter of September 25 instant.

- 1. You will be paid an honorarium of \$18,000.00 for the period of your engagement at the Authority before the General Manager commenced his vacation leave. For the period subsequent to that, you will be paid at a flat rate of \$8,040.00 per month. Therefore the gross amount to September 30, 1996 is \$54,180.00.*
- 2. Since your engagement with the Authority was intended to be temporary, as evidenced by the absence of any documentation indicating otherwise, the Board further agreed that this arrangement would terminate by December 31, 1996. By this time it is expected that the position of Managing Director of the Authority would have been determined*
- 3. The stipend of \$175.00 paid to you as Out-districts meetings of the Board is to cease immediately. Any payments made from May 1996 is to be refunded as it would be anomalous to pay the Chief Executive Officer for attending meetings of the Board when he is already in the employ of the Authority. In addition any other advances received from the Authority is to be deducted also.*

Please submit statement of the amount due to you based on the foregoing so that formal instructions may be issued for the payment of the balance due, based on the agreed remuneration"

It was unfortunate that there were two copies of this letter in almost identical terms, the earlier one dated 26 September 1996; I am satisfied that the Claimant only received the one dated 2 October 1996.

5. The Claimant accepted that he did not submit the statement referred to at the end of the letter of 2 October 1996 but he did arrange for payments to be made to himself through Mr. Inglis, the Senior Accountant and acting Financial Controller, totalling

about \$46,175.00 between 23 September and 2 December 1996 (see breakdown at A/2-3), which resulted in a total amount received by him over the year of \$78,300.00. This was equivalent to the gross amount to which he was entitled up to 31 December 1996 under the terms set out in the letter of 2 October so that (subject to tax and NIS) the Claimant did not receive any more money than he was ultimately to be entitled to under the terms of the letter. The Claimant accepted in evidence that the later payments were obtained by him by showing Mr. Inglis paragraph 1 of the letter of 2 October 1996 but that he did not show him the remainder of the letter, in particular the final paragraph, in spite of Mr. Inglis's request to see it.

6. When the Board learnt of these payments a decision was made to dismiss the Claimant and the Board composed a letter signed by Mr Girard and dated 6 December 1996 in these terms:

I am directed by the Board of Directors of WASA to inform you that your services with the Authority are hereby terminated with immediate effect.

The reasons for the above are:

1. *that in blatant violation of the Board's directive you caused salary advances to be made to yourself. This directive and the circumstances which made it necessary are well documented in correspondence dated July 30th, September 18 (in particular) and September 26, 1996.*
2. *that such salary advances in excess of \$78,000.00 were obtained from the Senior Accountant without full disclosure of the complete text of the Chairman's correspondence dated September 18th and no copy was provided to the disbursing Functionary when so requested. Clearly the reason for the partial disclosure is obvious and the practise of approval of payment to oneself in such circumstances is highly questionable.*

Your action certainly constitutes wilful disobedience to the order of the Board for which reason summary dismissal is the natural consequences".

Issues

7. Having received that letter the Claimant sued for damages for wrongful dismissal and libel. In relation to the libel claim the only publication relied on is that to the secretary who typed the letter and Mr. Girard who signed it. It is accepted that the Defendant is entitled to rely on the defence of qualified privilege so that the Claimant must prove malice if he is to succeed.
8. The issues I must resolve are these:
 - a. what (if any) were the terms of the contract between the Claimant and WASA and in particular whether he was an employee;
 - b. whether (whatever his status) WASA was entitled to terminate his services forthwith on 6 December 1996;
 - c. if not, whether he is entitled to recover damages in respect thereof;
 - d. whether (assuming he was an employee) he was entitled to any holiday pay;
 - e. what the letter of 6 December 1996 means and whether it was defamatory;
 - f. if so, whether WASA was malicious in publishing it;
 - g. if so, what libel damages the claimant is entitled to;
 - h. whether the defendant company has succeeded to WASA's liabilities under the Water and Sewerage Act 1999.

(a) Terms of contract between WASA and Claimant

9. I do not think that the Claimant had any enforceable contract with WASA before the letter of 2 October 1996: he was working either voluntarily or on the basis of vague assurances that he would be paid something in due course when a decision had been made and it would have been open to either party to bring an end to the arrangement at any time.
10. The position is different however after 2 October. The Chairman of WASA wrote to him a letter headed "Salary of CEO" in which he stated that he would be paid at the rate of \$8,040.00 per month and that his "engagement" and the arrangement between the

parties would terminate "by December 31, 1996". By his actions in continuing to work and arranging payments to himself (including monthly payments relating to the period after 2 October) the Claimant clearly accepted those terms. The effect of that in my view is that the Claimant was contractually engaged as CEO at a salary of \$8,040.00 for a fixed term ending 31 December 1996. I also accept Mr. Theodore's submission made in his helpful written submission supplied after trial that the contract, once made, was intended to be retroactive to 1 December 1995

11. It also seems to me that he must have been an "employee" in the strict legal sense by virtue of this contract. There was, as I have found, mutuality of obligation: the Claimant was to work and the Defendant was to pay him. He was clearly working under the control of the Board. And there is nothing else in the arrangement inconsistent with his being an employee (save that he in fact took payments for himself without giving credit for tax and NI as the Defendants themselves complain he ought to have done if he was an employee). I do not think that the fact that his duties were not well defined means that he was not an employee: people are frequently employed without their duties being specified simply on the basis of a job title. It must have been clear to the parties in general terms what a CEO was to do, particularly in the light of the claimant's letter dated 25 September 1996 which set out his achievements as such up till then.

(b) Was WASA entitled to terminate him on 6 December 1996?

12. Whether or not he was an employee in the strict legal sense WASA would have been entitled to terminate the engagement on 6 December if he committed a repudiatory breach of contract. I do not think that the actions amounting to a repudiatory breach are any different in this context whether the contract is classified as a contract of employment or something else. If the Claimant committed an act of "gross misconduct" or "wilful disobedience" WASA could terminate him.
13. There is no doubt that the claimant made arrangements to have himself paid in full up to the end of December 1996 without having submitted a statement of the amount due and without formal instructions having been issued as stated in the letter of 2 October 1996 and it seems likely that he took the payment in respect of December before it was

due as salary. Further, he took the money without giving credit for tax and NI which he must have known was inconsistent with his status (on his own case) as an employee. Those are serious matters in themselves but given that it was not suggested that the Claimant was acting dishonestly they may not have been sufficiently serious to warrant instant dismissal.

14. But the Defendant also says that by arranging to pay himself the Claimant was acting in contravention of the instructions of the chairman in the letters of 18 September and 2 October 1996 (wrongly referred to as 26 September in the dismissal letter but this is irrelevant in considering whether the Defendant was entitled to dismiss). I fully accept Mr. Theodore's point that neither of those letters is crystal clear but, reading them again in context, it seems to me that they are sufficiently clear to bring home to the Claimant that he was not to arrange further payments to himself: rather there was to be a formal accounting in respect of any arrears and instructions to pay issued by the Board, and thereafter he was to receive his salary in the normal way. By taking the payments he did between 2 October and 2 December 1996 he was therefore acting contrary to the instructions of Mr. Girard. It is significant in this context that he chose not to show Mr. Inglis the whole of the letter of 2 October as he admitted in the witness box: this confirms that he must have known that he was acting contrary to the terms of that letter. In those circumstances WASA was entitled in my view to terminate his services forthwith.

(c) Is he entitled to any damages?

15. Since I have found that WASA were entitled to terminate the contract the question of damages does not strictly arise. However, in my view, even if the Claimant had been successful on the termination issue, I do not see how he could be entitled to any damages. As I have found, he was employed on a fixed term contract which was to end on 31 December 1996 in any event. There is no dispute that he has received payment for the whole of that period (indeed he may well have received more than was his entitlement given the failure to give credit for tax and NI): thus, even if he was wrongfully terminated, his loss is nil and he would not be entitled to any damages.

16. Mr. Theodore in his written submission refers to the possibility of an extension of a contract enabling an employee to obtain further damages and says that the Claimant stood a good chance of being re-employed as Managing Director after 31 December, 1999. I am quite sure that the principle he refers to only applies where there is a provision for an extension within the contract which has been terminated and does not apply to the loss of some extraneous chance to get another job.

(d) Holiday pay

17. Mr. Theodore says that having been employed for 12 months the Claimant was entitled to 14 days paid annual holiday for which he is entitled to claim \$3,513.46. It seems to me that there are two difficulties in the way of this claim. First, although at paragraph 2.5 of his statement the Claimant indicates he worked long hours, nowhere in the evidence does he say he did not take a holiday during the period 1 December 1995 to 1 December 1996 and I believe the onus was on him to show that this was so. Second, he was in any event paid for the period 6 December to 31 December 1996, during which period he did not work.

(e) Letter of 6 December 1996

18. Again the dismissal letter is by no means crystal clear in its meaning. The Claimant says (paragraph 14 statement of claim) that it is accusing him of dishonestly taking salary advances to which he knew he was not entitled. The Defendant says that the letter is only accusing him of taking salary advances contrary to instructions and without disclosing the full text of a letter and not that he has knowingly taken money to which he is not entitled.
19. Defendant's position is not assisted by the fact that the wrong letter is referred to in relation to the failure to disclose the full text and by the rather cryptic remark that the "reason for the partial disclosure is obvious" but, again reading it in context, it is clear I think that it is only accusing him of disobeying the Board's directive and of "highly questionable" conduct in not disclosing the whole contents of the letter to Mr. Inglis and that it does not go so far as to say he has dishonestly taken money to which he is not

entitled. Nevertheless the letter is clearly defamatory and I must address the question of malice.

(f) Was WASA malicious?

20. The Claimant's case on malice is set out at paragraph 9 of the Reply (A/15). It states that WASA cannot honestly have believed that the Claimant's conduct was highly questionable when it knew that he had only approved salary advances to himself which were in arrears. In the light of my findings in paragraphs 13 and 14 above in relation to the Claimant's conduct I think WASA was entitled to reach the view that his conduct was highly questionable (which does not necessarily connote "dishonest") notwithstanding that they knew that he had (arguably) taken no more money than he was entitled to. I am certainly not satisfied having seen Mr. Girard in the witness box that he or any of his fellow directors were malicious in the sense of knowing that what was being said was not true (or indeed in any other sense) when they composed the dismissal letter.

(g) Libel damages

21. In the light of my finding on malice this also does not arise but in case the matter goes further I should indicate that, given the very limited nature of the publication (to the secretary; I do not see how the signatory of a letter (Mr Girard in this case) can be said to have published it to himself), the level of damages would be nominal. If I had found for the Claimant on libel I would have awarded him only \$500.00 damages.

(h) Has the defendant company succeeded to WASA's liabilities?

22. In view of my other conclusions it is not strictly necessary to consider this point which was rather surprisingly raised in Mr Deterville's written submissions. Section 7 of the Water and Sewerage Act 1999 (which in effect set up the Defendant company) deals with the transfer of assets and liabilities to it. The section is, I am afraid, not very clearly worded and on a literal reading it does not appear to transfer liabilities like those we are concerned with from WASA to the Defendant: section 7(1)(b) only refers to

Government liabilities and then only to liabilities relating to matters referred to in paragraph (a), namely lands and property relating to “works”. However, I find it most unlikely that the legislature intended to abolish WASA and transfer its functions to a new company but to leave existing liabilities outstanding; such liabilities are normally catered for in one way or another on such a re-organization (see for example section 31(2) of the Water and Sewerage Act 1984 which would appear to cover existing liabilities like those in question). Since it is not necessary I will not express any final view on the matter: the parties can invite the Court of Appeal to resolve it if the Claimant sees fit to complain about the other findings in this judgment. In the meantime it may be that the legislature will consider clarifying the section by amendment.

Result

- 23, The claim is dismissed. Subject to any submissions to the contrary I will order the Claimant to pay costs to the defendant at the prescribed rate in respect of a claim for \$20,000, which is the sum I will stipulate for the purpose of CPR 65.5(2)(b)(ii).

MURRAY SHANKS
High Court Judge (Acting)