

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO HCV 4635 OF 2011

BETWEEN	LISA GORDON	CLAIMANT
AND	JAMAICA PUBLIC SERVICE	DEFENDANT
	COMPANY LIMITED	

IN CHAMBERS

**Rose Bennett Cooper and Sidia Smith instructed by Bennett and Beecher-Bravo
for the claimant**

Katherine P.C. Francis and David Fleming for the defendant

**INTERLOCUTORY INJUNCTION – STATUTORY INTERPRETATION – WHETHER
SERIOUS ISSUE TO BE TRIED – WHETHER STATUTE PREVENTS DEFENDANT
FROM RECOVERING ARREARS – RESTITUTION – CHANGE OF POSITION**

August 15, 16 and September 16, 2011

SYKES J

[1] Mrs. Lisa Gordon, the claimant, has been sent what has been described as an adjusted statement of account in the sum of JA\$1,845,814.40, by the Jamaica Public Service Company Limited ('JPS') who is the defendant. JPS is a

monopolist and currently has an exclusive licence granted under the Electric Lighting Act ('the Jamaican Act') to provide electricity to all persons in Jamaica who wish to receive this vital service. Indeed, the civilization in Jamaica is premised on the availability of this commodity. The sum stated is said to be the amount owed by her because she had at her house an improperly functioning meter which underbilled her. She has resisted paying the bill. She has sought to resolve the matter through the dispute mechanism set up by the Office of Utilities Regulation ('OUR'), the body established by law to regulate the providers of public utilities. The JPS says to her, 'You have used the electricity. You must pay.' The OUR tells her the same thing. She is outraged and now comes to court seeking, in this application, an injunction restraining JPS from disconnecting her electricity supply pending the full hearing of her application for a declaration that JPS is barred from collecting any arrears owed by her. The injunction was granted and these are the reasons.

The background

[2] This matter first came before this court on Monday, August 15, 2011 and was set down for hearing for Tuesday, August 16, 2011. What the court has set out comes from the affidavits filed by Mrs. Gordon and JPS. The basic facts are not in dispute.

[3] Mrs. Gordon and her husband, Mr. Cary Gordon, purchased property at 11 Hopefield Close, Lot 6, Kingston 8, in the parish of St. Andrew in 2000. She applied for and received metered electricity service from JPS for the property.

Since that time she has received and paid all bills sent to her by the JPS. To the best of her knowledge, the meter had not been changed or tampered with since she became the registered proprietor.

[4] On March 10, 2010, JPS went to the property. It noticed a number of irregularities with the meter that led to the meter being removed (see the affidavit of Mr. Vaden Williams sworn to August 15, 2011). The technical team left with Mrs. Gordon a document called notice of irregularity in service.

[5] JPS took the meter to the Meter Testing and Calibration Centre at 113 Washington Boulevard, Kingston 20 - a facility operated by the JPS. At this facility meters are examined to determine whether they should be replaced. From the evidence, it does not appear that the OUR has any facility to test any meter in the event of a dispute, about the meter, between the customer and the JPS. On the face of it, any decision arrived at by the JPS has to be accepted unless the customer can produce an expert to challenge the JPS's conclusion. It is said that the facility has met the standards set by the International Organisation Standards (see the affidavit of Mr. Donovan Carson sworn on August 15, 2011). The implication being, that if JPS says that the meter is malfunctioning then it is malfunctioning. The Bureau of Standards is the local assessment body which guarantees the JPS's facility is compliant with the international standards.

[6] The meter in question was examined and according to the JPS's Meter Testing and Calibration Centre (there being no independent confirmation at this stage), the meter was recording only fifty percent of the energy which passed through it.

On further examination, it was found that the mal-adjustment identified in this specific meter occurred because some person deliberately altered the meter so that it would record a lower supply of electricity than what was actual supplied. The result of this, it is said, was that Mrs. Gordon was paying only fifty percent of what was actually supplied to her.

[7] JPS, relying on its assessment of the meter, sent a bill going back from March 6, 2010 to April 2, 2004. It is observed that JPS assumes that this fifty percent reduction of recorded provision of electricity is constant going back six years. The evidence produced to date does not make this conclusion inevitable.

[8] An important concession was made by the JPS. Mr. David Fleming, an attorney at law and legal officer of JPS, makes this statement at paragraph 18 of his affidavit dated August 12, 2011:

It is not the defendant's contention that the claimant carried out this unauthorised third party (human) intervention of the meter resulting in the meter under-registering. However the claimant benefitted from the under-registration of the meter as the defendant provided electricity to the claimant which was consumed, however the defendant was not able to properly bill the claimant for the total electricity being provided and consumed. The claimant has thus deprived the defendant of revenue which it is entitled to.

[9] Mrs. Gordon is not being accused of personal dishonesty. If Mrs. Gordon is not being accused of tampering with the meter, it is not entirely clear why it is being

said that Mrs. Gordon deprived the JPS of revenue to which it was entitled. Perhaps what was meant was that Mrs. Gordon did not pay the full amount for the electricity actually consumed.

[10] The dialogue between OUR and Mrs. Gordon is interesting. The OUR, like JPS, makes the assumption that the fifty percent reduction in recorded supply of electricity applies for the entire period. It has to be an assumption because the OUR did not carry out its own examination of the meter and formed its own independent conclusion. It simply adopted JPS's position. In a letter dated July 11, 2011 to Mrs. Gordon's lawyer, the OUR writes:

In addition, you noted in your letter that your client inherited the meter that was at her premises when she purchased the property some time ago. While we understand your statement, the fact is that the meter was tampered with by a third party as evidenced by the increased consumption being registered on the meter after the meter changed. In addition your client would have benefitted from the tampered meter since she purchased the property as her total consumption was not registered.

[11] For good measure, the OUR added:

Also, you quoted the JPS' Standard Terms and Conditions which you believe should be the basis for adjusting your client's account. However the OUR approved Back Billing Policies & Procedures states,

'In all cases of fraud, deliberate acts of dishonesty or willful interference with JPS equipment or device, JPS shall be entitled to recover the correct charges due and owing subject to any statutory limitation.'

[12] It is important to observe that the OUR is talking about fraud and deliberate acts of dishonesty in a context where the JPS has not accused Mrs. Gordon of any such activity. Presumably the OUR must be saying that it does not matter whose committed the fraud or even whether Mrs. Gordon was aware of the fraud. Once there is fraud, Mrs. Gordon must pay even if she is not responsible or had any knowledge of the fraud. Mrs. Gordon asked the OUR to review its position. This position as confirmed in clear and unambiguous terms by the OUR in a letter dated August 8, 2011:

The focus is therefore not on who may have interfered with the JPS equipment, but rather that due to such interference the customer would have consumed electricity for which JPS is entitled to recover payment.

[13] The electricity provider, JPS, and the public utility regulator, OUR, in unison, told Mrs. Gordon, that it does not matter who tampered with the meter. It does not matter that you did not do it. It does not matter when it was done. The fact that the back billing went back six years must necessarily be based on the proposition that the mal-adjusted meter began under recording at least six years ago. It does not matter whether the tampering was not discoverable by you on an examination. It does not matter whether a dishonest person, unknown to the

property owner, tampered with the meter. Once it was tampered with and the customer used the electricity he or she must pay.

[14] A hold was placed on Mrs. Gordon's account by JPS. What this means is that the supply would not be disconnected until the matter was resolved between the parties. However, there is an email from OUR which indicates that the hold expires on August 15, 2011 which in practical terms means that there would be nothing to prevent JPS disconnecting the electricity supply. It is this position which precipitated this application for the injunction.

The submissions

[15] The main thrust of Mrs. Rose Bennett-Cooper's submissions is that when one looks at the Jamaican Act and other documents relating to the supply of electricity to customers by the JPS one sees the following:

- a. all equipment including the meter supplied by JPS is and remains the property of JPS;
- b. JPS has right of access to any property on which its equipment is located for the purpose of 'installing, inspecting, repairing, replacing and removing all transformers, meters, wires and other equipment of the company, and of inspecting and examining any electrical wiring, appliances and equipment of the consumer connected thereto and for any other lawful purpose' (see sheet no 211 of the JPS Standard Terms and Conditions);

- c. there is an affirmative duty on JPS to inspect regularly its meters installed on property. This is found in the following clause: 'The meter will be the property of the company and will be tested at regular intervals' (see sheet no. 212 of the JPS Standard Terms and Conditions);
- d. the fact that JPS is now claiming six years of arrears on the basis of a malfunctioning meter means that the company failed to inspect this particular meter regularly over the six year period. There is no assertion from JPS, at this point, that it did inspect the meter;
- e. on a proper interpretation of the Jamaican Act, the JPS is barred from recovering the arrears.

[16] Miss Francis had concerns about these submissions. Learned counsel queried whether on the premise that Mrs. Gordon is correct in her interpretation of the Act. If Mrs. Gordon's position is correct, then it would mean that the principle of restitution would be turned on its head. As will be seen below, this issue has been addressed by the Canadian Supreme Court. Miss Francis questioned whether there was a serious issue to be tried (see ***American Cyanamid v Ethicon*** [1975] A.C. 396). She also appeared to take the view that damages would be an adequate remedy for Mrs. Gordon. Miss Francis' concerns, in the view of this court, are not sufficient to prevent an injunction being granted.

Resolution

[17] It appears to the court that there are serious issues to be tried, particularly the proper interpretation of the Jamaican Act which governs JPS's supply of electricity to customers under its exclusive monopoly. JPS is relying on restitution law to recover the money. It is saying that Mrs. Gordon received a benefit which she was not entitled to and therefore has to pay for the service regardless of how honest she is.

[18] From the authorities cited by Mrs. Rose Bennett – Cooper, there is this principle: in dealing with cases involving a supplier of electricity who does this pursuant to statutory power, the starting point, in resolving a dispute over electricity which has been supplied but not paid for by the customer, has to be the proper interpretation of the statute.

[19] The cases also suggest that if, on a proper interpretation of the statute, there is a statutory duty to collect all moneys due and a statutory duty on the customer to pay for all electricity supplied, then the customer cannot rely on estoppel to resist payment. On the other hand, the cases say that if, on a proper interpretation of the relevant statute, there is no duty imposed on the electricity service provider to collect for electricity supplied and the provisions of the statute do not preclude a reliance on estoppel principles then the customer can indeed resist the demand from electricity service provider to pay any arrears that may be found to be owed. The authorities also strongly suggest (as an underlying theme although none of the cases to which this court will refer actually decided the

point) that if the customer is guilty of fraud or dishonesty and that fraud enables him to use the electricity without paying for it at the time it was used, then even if the statute permits reliance on estoppel, such a customer must pay the full sum for any electricity supplied. These principles emerge from the following cases, ***Maritime Electric Company v General Dairies Ltd*** [1937] A.C. 610; ***Kenora (Town) Hydro Electric Commission v Vacationland Dairy Co-operative Ltd*** 110 D.L.R. (4th) 449; ***Taranaki Electric-Power Board v Proprietors of Puketapu 3A Block In*** [1958] N.Z.L.R. 297.

[20] The court will now take a closer look at the cases cited above. In ***Maritime Electric***, the customers were underbilled for electricity supplied. When the error was discovered, the electricity supplier sought to recover the arrears which ought to have been paid. The customer relied on estoppel arguing that the supplier was estopped from collecting the arrears because by sending bills with stated amounts it was indicating to the customer that the amounts stated were owed. There was no allegation of fraud against the customer. The statute in question had the following provisions. Section 16 read:

No public utility shall charge, demand, collect or receive a greater or less compensation for any service than is prescribed in such schedules as are at the time established, or demand, collect, or receive any rates, tolls or charges not specified in such schedules.

Section 18 (1) stated:

(1) Every public utility which, directly or indirectly by any device

whatsoever, charges, demands, collects or receives from any person, firm or corporation, a greater or less compensation for any service rendered or to be rendered by it, than that prescribed as provided herein, or than it charges, demands, collects or receives from any other person, firm or corporation for a like and contemporaneous service, is guilty of unjust discrimination, which is hereby prohibited and liable to a penalty of not less than fifty dollars nor more than five hundred dollars, which may be imposed by the board; and if the same is not paid within fifteen days after the imposition thereof, the non-payment of the same shall be ground (after public notice thereof in The Royal Gazette) for proceedings to be taken by the Attorney-General to dissolve the public utility so in default.

Section 19 (1) provided:

No person, firm or corporation shall knowingly solicit, accept or receive any rebate, concession or discrimination in respect to any service in, or affecting or relating to, any public utility whereby any such service is by any device whatsoever, or otherwise, rendered free or at a less rate than that named in the schedules on force, as provided herein, or whereby any service or advantage is received other than is herein specified.

[21] Lord Maugham held

The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a section of the public, that is, on grounds of public policy in a general sense. In such a case (and their Lordships do not propose to express any opinion as to statutes which are not within this category) whereas here the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it.

[22] The customer was barred from relying on estoppel and had to pay the arrears never mind that it was not guilty of any dishonest conduct.

[23] Interestingly, **Maritime Electric** was an appeal from the Supreme Court of Canada. The Supreme Court was reversed. The **Kenora Hydro Electric** case is also from the Supreme Court of Canada in which **Maritime Electric** was distinguished. In this case a clerical error (using the incorrect multiplier) resulted in the customer being underbilled for electricity supplied. The customer resisted. The company resorted to the courts. By the narrowest of margins (5:4) the customer squeaked past the finish line ahead of the electricity supplier on the basis that the statute did not preclude a reliance on estoppel. There was no allegation of dishonesty on the part of the customer. The relevant statutes in the **Kenora Hydro Electric** case were section 27 of the Public Utilities Act and sections 95, 98 and 99 of the Power Corporation Act. The relevant portions of section 27 read:

(2) *In fixing the rents, rates or prices to be paid for the supply of a*

public utility the corporation [Ontario Hydro] may use its discretion as to the rents, rates or prices to be charged to the various classes of consumers and also as to the rents, rates or prices at which a public utility shall be supplied for the different purposes for which it may be supplied or required.

(3) In default of payment, the corporation may shut off the supply but the rents or rates in default are, nevertheless, recoverable.

...

(6) The amount payable to a municipal corporation [e.g., The Town of Kenora] or to a public utility or hydro-electric commission of a municipality [e.g., Kenora Hydro] or to Ontario Hydro is a debt and may be recovered by action in a court of competent jurisdiction.

[24] Sections 95, 98 and 99 of the Power Corporation Act are as follows:

95 (1) The rates and charges for supplying power, and the rents and charges to meet the cost of any work or service done or furnished for the purposes of a supply of power, chargeable by any municipal corporation generating or receiving and distributing power are subject at all times to the approval and control of the Corporation, and the rates, and such rents and charges, charged by any company or individual receiving power from the Corporation for the supply of power are subject at all times to such approval and control.

(2) Notwithstanding this Act, the Corporation may from time to time,

when in its opinion it is in the interests of the municipal corporations under contract with the Corporation so to do, make orders fixing the rates to be charged by the corporation or commission of any municipality ... for power supplied by the Corporation.

98. Where it appears to the Corporation upon examination of the accounts of a municipal corporation or municipal commission receiving power from the Corporation under a contract between the municipal corporation and the Corporation under this Act that there are arrears due and owing for electrical power supplied by the municipal corporation or municipal commission, or for rents, rates, costs and charges in connection with the service or supply of such power or for the installation of any works for such service or supply, and that the municipal corporation or municipal commission has not taken the necessary proceedings for the collection of such arrears, the Corporation may give, in writing, such directions as it considers proper, signed by the chairman or secretary, for the collection of the arrears by any method by which they may be collected, and it is the duty of the municipal corporation or municipal commission forthwith after receiving such directions to take all proceedings necessary to carry them into effect.

99. Where a municipal corporation or a municipal commission receiving electrical power from the Corporation under a contract made with the

Corporation under this Act,

(a) supplies electrical power to any person upon terms and at rates other than those that have been approved of by the Corporation;

(b) grants to any person to whom electrical power is supplied by the municipality or commission, special terms by way of bonus or otherwise as to the rates to be paid for electrical power or as to the terms at which they are to be supplied;

(c) neglects or refuses to carry out any direction of the Corporation given under section 98;

(d) by any means whatsoever, directly or indirectly reduces the cost of electrical power to any person so that it is supplied to such person at a lower rate or upon better terms than those approved of by the Corporation;

(e) fails to keep accounts in the manner prescribed by the Corporation or makes improper entries therein, or charges against any account items not properly chargeable thereto, such municipal corporation or municipal commission is guilty of an offence, and every member of the municipal council of such municipal corporation or every member of the municipal commission, as the case may be, is disqualified from sitting and voting in the council or from election thereto, or from acting as a member of the municipal commission or being appointed thereto, and from holding any other municipal office for a period of five years from the date of the judgment or order declaring his disqualification, and

proceedings may be taken against him in the same manner as in the case of a member of a municipal council who has become disqualified or has forfeited his seat under the Municipal Act, but no member of the municipal council or of the municipal commission, as the case may be, shall be found to be so disqualified who proves to the satisfaction of the court or judge before whom the application for a declaration of his disqualification is made, that he was not a party to the offence and that he did everything in his power to prevent the commission of the offence.

[25] The Supreme Court concluded that these provisions made this case distinguishable from the ***Maritime Electric*** case.

[26] In the New Zealand case of ***Taranaki Electric-Power Board***, North J, after examining the relevant statute and regulations concluded that there were no provisions prohibiting the customer from relying on estoppel. As in the previous the two cases, the customer was not being accused of fraud.

[27] Mrs. Bennett-Cooper submitted that the following provisions of the Jamaican Act lead to the same conclusion as the courts arrived at in the ***Kenora Hydro Electric*** and ***Tranaki*** cases. These are the provisions.

[28] Section 13 says:

Where a supply of electricity is provided in any part of an area for private purposes, then, except in so far as is otherwise provided by the terms of the licence, order or special State [in original], authorizing such supply, every company or person within that part of the area shall, on

application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled, under similar circumstances, to a corresponding supply.

Section 14 reads:

The undertakers shall not, in making any agreements for a supply of electricity, shown any undue preference to any Local Authority, company or person, but, save as aforesaid, they may make such charges for the supply of electricity as may be agreed upon, not exceeding the limits of price imposed by or in pursuance of the licence, order or special Statute, authorizing them to supply electricity.

Section 17 provides:

Any person who maliciously or fraudulently abstracts, causes to be wasted or diverted, consumes or uses, any electricity shall be guilty of simple larceny and punishable, and the Resident Magistrate's Court shall have jurisdiction in case of any such offence

[29] Sections 38 and 39 do not speak to rates for electricity. They deal with JPS's ability to enter to the customer's property. Mrs. Bennett-Cooper submitted that these provisions under the Jamaican Act, do not preclude a reliance on estoppel. They do not impose any duty on JPS to collect in full all sums, including arrears, from customers and neither do they impose any duty on the customer to pay for all electricity supplied. It was also submitted that there is no basis for saying that admitting the estoppel defence would undermine the statute.

[30] Mrs. Bennett-Cooper also said that the combined effect of the statute and JPS's Standard Terms and Conditions is that at all material times, the meter was the exclusive property of JPS which was under a duty to see that the meter was working properly and if JPS is claiming arrears for six years in respect of malfunctioning meter, then that in and of itself is prima facie evidence that JPS failed in its duty to keep the meters in proper working order. She strongly submitted that, under the terms of the statute and contract between the customer and JPS, the customer had no legal authority or duty to carry out any inspection of the meter on their own. Therefore, counsel submitted, JPS should bear the loss for its own inefficiency and omission to see that the meter in question was working properly. She relied on the *Taranaki Electric-Power Board* case.

[31] It seems to this court that these submissions are deserving of serious and mature consideration after a full enquiry into the facts and cannot be dismissed out of hand as Miss Francis appeared, at one stage, to be suggesting. There may well be other statutes and sections of the Act that are relevant to this issue. It may be that the terms of the licence granted to JPS by the relevant Minister under Act may assist JPS in its request to recover the money from Mrs. Gordon. However, all this is in the future. All this court needs to be satisfied about is that there are complex issues of statutory interpretation that cannot be resolved in a hearing of this nature. From the evidence presented, Mrs. Gordon seems to have an advantage and that is sufficient for this court to grant the injunction.

The restitution point

[32] The majority in ***Kenora Hydro Electric*** case also addressed the issue of restitution relied on by JPS in its initial opposition to the injunction. Major J, speaking for the majority, had this to say:

A statute can only affect the operations of the common law principles of restitution and bar the defence of estoppel or change of position where there exists a clear positive duty of the public utility which is incompatible with the operation of those principles. The application of the principles of restitution to the case at bar can be briefly summarized. A benefit in the form of electricity was conferred on the Co-op at the expense of Kenora. The law of restitution would normally force the Co-op to return the value of the benefit to Kenora unless that value was no longer in the Co-op's possession because of a change of position. In this case, the Co-op successfully proved that it acted to its detriment in reliance on the billing statements for its own billing and budgetary purposes and that therefore the value of the electricity no longer existed for the purposes of restitutionary relief. Kenora conceded that this was in fact the case in the Court of Appeal and confirmed it before this court. The defence of estoppel is thus an expression of what the common law has considered to be sufficient justification to release a defendant from liability in the pursuit of fairness, and, applying those principles to this case, the Co-op would no longer be liable to Kenora.

The Power Corporation Act does not express a policy of rate non-discrimination that excludes estoppel or change of position. Through the appellants' error in omitting the multiplier the Co-op has indirectly, but through no fault of its own, received power for a period of time at a 50 per cent discount. Allowing the respondent to raise estoppel in these circumstances does not relieve Kenora Hydro of its obligation. It does, however, relieve Co-op from bearing alone the burden of a loss resulting from change of position caused by the error of Kenora Hydro. In so doing, it underlines Hydro's obligation by placing the burden of non-compliance on Hydro and is a means of ensuring accountability. In the event such losses are allowed as a cost chargeable to consumers rather than the utility owners, they will be spread among all utility users thereby furthering true equality among them since clearly a utility consumer who is underbilled and acts to her/his detriment is not in the same position as one who is billed accurately from the start. Compelling payment to correct an error in these circumstances introduces costly uncertainty for power consumers and makes them individually bear the burden of the appellants' mistake. Such a harsh public policy should clearly appear in the statute, which is not the case in the Power Corporation Act.

[33] This whole business of restitution, as this passage shows, is a double-edged sword. Major J, in attributing the error to the electricity supplier and not the customer, took the view that the customer had acted to its detriment by relying on

the erroneous bills provided to it. It had organized its business and priced its product on the basis of the electricity rate supplied to it and so had changed its position in reliance on the electricity supplier's mistake and therefore the loss should fall on the electricity supplier. Surely, a similar argument can be made for a householder who would have budgeted on the basis of the bills supplied by JPS and allocated her resources accordingly.

[34] Initially, JPS, through its counsel, Miss Katherine Francis sought to say that damages would be an adequate remedy. This court does not agree. The dislocation that would be caused to a family with young school age children is difficult to quantify. On the other hand, JPS, if it succeeds in resisting Mrs. Gordon's case will be entitled to receive the arrears it claims provided that they are properly proved as owing. The risk of injustice is greater to Mrs. Gordon if the injunction is not granted than the risk of injustice to JPS if the injunction granted.

Conclusion

[35] In the final analysis, Miss Francis surrendered her position when it became clear to her that the court was minded to grant the injunction restraining JPS from disconnecting Mrs. Gordon's electricity supply pending resolution of the issue. The JPS, it is true has stayed its hand however as indicated above there is an email from the OUR stating that the stay that was in place barring the JPS from disconnecting the electricity supply from Mrs. Gordon's home expires on August 15, 2011. Mrs. Gordon, apparently, is not prepared to rely on the good

intentions of JPS. She wishes to have a court order. The injunction Mrs. Gordon sought is granted.