JAMAICA

Judgment Book

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 67/91

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN JAMAICA TELEPHONE COMPANY LTD. DEFENDANT/APPELLANT

A N D CYNTHIA RATTRAY PLAINTIFF/RESPONDENT

John Vassell and John Givans instructed by
Dunn, Cox and Orrett for Appellant

Maurice Frankson, instructed by
Gaynair and Fraser for respondent

June 29, 30, 1992; February 23, 1993

ROWE P.:

Cynthia Rattray owned premises in Harbour View, St. Andrew, which were described as "17 Stars Way, Kingston 20" in the statement of claim and as "17 Stony Way, Kingston 20", by Merrick Alexander, the only witness called on behalf of the plaintiff/respondent. At all material times the respondent lived outside Jamaica but visited sometimes annually and other times semi-annually. In 1972 through the agency of her brother Merrick Alexander the respondent applied to the appellant to have a telephone installed at her premises. This was done and all went well until about 1984. The appellant company provided telephone services and the respondent honoured her obligations to the company.

Then in 1984 the respondent applied for and received a new telephone service in substitution for that installed in 1972. No longer were these premises supplied with a shared line bearing number 925-1141; now it had an unlisted straight line numbered 925-1174.

Due to inefficient accounting in the appellant's office, it continued to render bills in respect of telephone number 925-1141 which number was inoperative and rendered no bills in respect of the new number until July 1985. The respondent paid all bills promptly. Through her brother she brought to the attention of the appellant the defect in its accounting system and sought rectification. Nevertheless on or about September 26, 1985 the appellant disconnected the respondent's telephone service which she received through telephone number 925-1174.

The appellant admitted disconnecting the respondent's telephone on September 26, 1985 but claimed that it had authority so to do as the respondent had failed to pay the sum of $182.83 as per bill dated August 8, 1985 within the time stipulated. At trial, however, counsel for the appellant admitted that the September disconnection was unauthorised as due to an accounting error, the appellant was unaware that the respondent's account was not only up to date but was in credit then. The telephone was re-connected on December 5, 1985.

Other difficulties arose between the respondent and the appellant which resulted in the further disconnection of the respondent's telephone service on January 23, 1986 which continued for some five years. Clarke J. in his written judgment found that the respondent was entitled to damages for both the September 26, 1985 and January 23, 1986 disconnections and awarded a sum of $20,000.00. He granted an injunction to restrain the appellant from continuing to disconnect the respondent's telephone and a declaration that the respondent was entitled to the uninterrupted use of her telephone upon the payment of rental and toll charges within a reasonable time after the tender of the customer's bill to her.

Against these two coercive orders there has been no appeal. The complaint on appeal was grounded on three bases, viz. : (1) that the damages awarded were excessive and inordinate and out of all proportion to the loss suffered by the respondent; (2) that the assessment was based upon the loss of a third-party who occupied the house and with whom the appellant had no contractual relationship; and (3) that no award should be made in respect of the January 23, 1986 disconnection as the respondent did not sue in respect thereof.

As I said earlier, the respondent was not a witness at the trial and did not otherwise give evidence. Merrick Alexander, her brother, who acted throughout as her agent said that he used the telephone as his primary means of communicating with his family overseas and in his job as Operations Steward to the Jamaica Racing Commission. The learned trial judge found that the respondent or her agent suffered loss of benefit and physical inconvenience caused by the appellant's wrongful disconnection of the telephone service. He found too, that the "parties", presumably the appellant and the respondent, must have had in their contemplation that if the appellant breached the contract to provide telephone service the respondent or her agent would be disappointed, annoyed or even frustrated by the appellant's breach. He based himself upon the decision of the Court of Appeal in Jarvis v. Swans Tours Ltd. [1973] 1 All E.R. 71.

That was a failed holiday case. An English solicitor was enticed by a glowing advertisement to make reservations for a winter holiday in Switzerland. He was gravely disappointed at the treatment he received, at the facilities provided and with the lack of company with whom to interact. At times he was alone in the house with a non-English-speaking host. He sued for breach of contract and obtained judgment for £31.72. Being dissatisfied with the quantum he appealed. In his judgment on appeal, Lord Denning M.R. said:

> "His damages are not limited to the mere cost of the ticket. He is entitled to general damages for the disappointment he has suffered and the loss of the entertainment which he should have had."

Stephenson L.J. was more emphatic. He said:

> "The learned judge in assessing the loss underestimated the inconvenience to the plaintiff, perhaps because he followed the distinction drawn by Mellor J. in Hobb's case ([1875] LR 10 QB 111 at 122) and disallowed any inconvenience or discomfort that was not physical, insofar as that can be defined. I agree that, as suggested in McGregor on Damages (13th Edn. [1972] p. 45, para. 68) there may be contracts in which the parties contemplate inconvenience on breach which may be described as mental: frustration, annoyance, disappointment; and, as counsel for the defendants concedes that this is such a contract, the damages for breach of it should take such wider inconvenience or discomfort into account."

The general rule of law was that no damages could be recovered in contract for injury to one's feelings. McGregor on Damages in the 15th Ed. at paragraphs 96 and 97 comments upon this general rule and introduces some tentative exceptions thus:

> "The reason for the general rule is that contracts normally concern commercial matters and that mental suffering on breach is not in the contemplation of the parties as part of the business risk of the transaction. If however the contract is not primarily a commercial one, in the sense that it affects not the plaintiff's business interests but his personal, social and family interests, the door should not be closed to awarding damages for mental suffering if the court thinks that in the particular circumstances the parties to the contract had such damage in their contemplation."

Another holiday-maker who suffered the most bitter disappointment was a married man who with his wife and two young children journeyed to Ceylon for a four-week holiday under a contract with a travel agency to provide him with luxurious accommodation. What was provided was sub-standard and downright disgraceful. After two

weeks of total discomfort the holiday-maker moved with his family to another and somewhat more commodious hotel. He sued the travel agency and recovered damages of £1,100 although the charge for the four weeks holiday including airfares was only £1,200. On appeal alleging that the quantum of damages was excessive, it was argued that the holiday-maker could only recover for loss which he personally suffered and not for the loss suffered by his wife and children. Lord Denning M.R. discussed the legal situation when one person makes a contract for the benefit of a third party and that contract is broken. He said:

> "At present the law says that the only one who can sue is the one who made the contract. None of the rest of the party can sue, even though the contract was made for their benefit. But when that one does sue, what damages can he recover? Is he limited to his own loss? Or can he recover for the others? ... None of them individually can sue ... He can, of course, recover his own damages. But can he not recover for the others? I think he can. The case comes within the principle stated by Lush L.J. in Lloyd's v. Harper [1880] 16 Ch. D. 290 at 321:
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> > '... I consider it to be an established rule of law that where a contract is made with A. for the benefit of B., A. can sue on the contract for the benefit of B., and recover all that B. could have recovered if the contract had been made with B. himself.'
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> It has been suggested that Lush L.J. was thinking of a contact in which A was trustee for B. But I do not think so. He was a common lawyer speaking of the common law. His words were quoted with considerable approval by Lord Pearce in Beswick v. Beswick [1967] 2 All ER 1197 at 1212). I have myself often quoted them. I think they should be accepted as correct."

In applying that principle to the holiday-maker in the case before the Court, it was held that that was an appropriate case in which to include the damages suffered by the husband, wife and children - Jackson v. Horizon Holidays Ltd. [1975] 3 All E.R. 92.

There has been some development in the law since the decision of Jackson v. Horizon Holidays Ltd. (supra) in 1975 in the course of which the hotel cases "have been put on one side" as exceptions to the general rule as to the basis for assessing damages for breach of contract. The Court of Appeal did not regard a breach of a surveyor's contract as falling within the special class of cases in which the subject-matter was to provide peace of mind or freedom from distress.

In Watts v. Morrow [1991] 4 All E.R. 937, Ralph Gibson L.J. said at p. 955:

> "As to the law, it is in my judgment, clear that the plaintiffs were not entitled to recover general damages for mental distress caused by physical discomfort or inconvenience resulting from the breach of contract."

Ralph Gibson L.J. was there responding to a submission by the plaintiff's attorneys that damages for mental distress can be recovered against a negligent surveyor in the ordinary case as such a contract was in the same category as contracts for the provision of a holiday as in Jackson v. Horizon Holidays case (supra). These plaintiffs had suffered misery, and discomfort of a high degree. But Ralph Gibson L.J. continued:

> "No doubt house buyers hope to enjoy peace of mind and freedom from distress as a consequence of the proper performance by a surveyor of his contractual obligation to provide a careful report, but there was no express promise for the provision of peace of mind or freedom from distress and no such implied promise was alleged. In my view, in the case of the ordinary surveyor's contract, damages are only recoverable for distress caused by physical consequences of the breach of contract."

In a pithy judgment, Bingham L.J. said at p. 959:

> "A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reaction are not foreseeable, which they surely are or may be, but on considerations of policy.
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> But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category."

In the instant case the respondent alleged in paragraph 16 of the Statement of Claim that by reason of the appellant's breach of contract the respondent had been denied the use and convenience of her telephone and had suffered loss and damage. No special damages were claimed. Is this the kind of case in which the very object of the contract was to provide pleasure, relaxation, peace of mind and freedom from molestation as in Jackson v. Horizon Holidays Ltd. (supra)? I think not. A telephone when installed is not intended for a temporary or singular purpose like unto a holiday, but as the pleadings show, the contract was intended to remain in force indefinitely provided the respondent honoured her obligations. However because the appellant was in a monoploy situation, it must have appreciated that any arbitrary disconnection of the respondent's telephone would result in the dislocation of her method of communication locally and overseas. This disconnection exposed the respondent to unnecessary risks should an emergency arise especially as it was a telephone for residential purposes. Although in my view this case does not fall neatly within the "ruptured holiday" cases, the measure of general damages for breach of contract although regarded as nominal in the absence of proof of actual damages should not be derisory.

Clarke J. found that the inconvenience to the respondent's agent was recoverable in this suit although he was not a party to the contract between the appellant and the respondent. The observations of the Law Lords in Woodar Investment Development Ltd. v. Wimpey Construction U.K. Ltd. [1980] 1 All E.R. 571 would seem to make this finding quite untenable. Lord Wilberforce disagreed with the ambit of the ratio by which Lord Denning M.R. decided Jackson v. Horizon Holidays Ltd. (supra). At p. 576 he said:

> " I cannot agree with the basis on which Denning M.R. put his decision in that case. The extract on which he relied from the judgment of Lush L.J. in Lloyd's v. Harper was part of a passage in which Lush L.J. was stating as an 'established rule of law' that an agent (sc an insurance broker) may sue on a contract made by him on behalf of the principal (sc the assured) if the contract gives him such a right, and is no authority for the proposition required in Jackson's case, still less for the proposition, required here, that if Woodar made a contract for a sum of money to be paid to Transworld, Woodar can, without showing that it has itself suffered loss or that Woodar was agent or trustee for Transworld, sue for damages for non-payment of that sum."

It was never alleged that the respondent was trustee or agent for her brother Merrick Alexander and certainly could not sue to recover damages suffered exclusively by such person. Insofar then as there was evidence that Mr. Alexander could not use the telephone in the performance of the duties of his office, the respondent could not recover in these proceedings for such third-party loss.

The final point in the case is whether the respondent could recover damages for the disconnection which took place on January 23, 1986. There was no claim for such damages in the writ filed on December 2, 1985.

Paragraph 14 of the Statement of Claim pleaded:

> "On or about the 26th day of September, 1985, in breach of its contract, the Defendant arbitrarily and without just cause disconnected the Plaintiff's telephone number 92-51174 and has refused and neglected to restore the said service on demand."

This pleading remained unamended at the end of the case. In my view it was impermissible for Clarke J. on that state of the pleadings to award damages for a period of approximately five years of disconnection.

I find that the arbitrary disconnection of the respondent's telephone service which was due to a faulty accounting system adopted by the appellant, a monopoly entity, was a serious breach of contract which although existing for only ten weeks should be compensated in damages which I assessed at five thousand dollars. I would therefore allow the appeal as to damages and substitute five thousand dollars for the award in the Court below.

I would not make any order as to costs in this Court. In the Court below the appellant persisted until the end of the respondent's case in the assertion that it had a right to disconnect the respondent's telephone for non-payment, a claim which it was then forced to retract. The appellant should have its house in order and should not inflict inconvenience and distress upon its captive customers without adequate checks. It should be deprived of its costs on appeal.

DOWNER J.A.:

I agree.

MORGAN J.A.:

I agree.