

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. 266 of 1972

BETWEEN ALBERT LEE PLAINTIFF

A N D TROPICAL GAS COMPANY INC. DEFENDANT

COR: WILLKIE J.

J U D G M E N T

22/15/75
The plaintiff's case, shortly put, is that by an agreement dated 11th October, 1962, made between plaintiff and the defendant, the plaintiff agreed inter alia to transport and deliver to defendant's customers in Kingston and Saint Andrew, cylinders filled with liquified petroleum gas to each of defendant's customers.

That this agreement was renewed several times until in 1969 when the agreement was again renewed for a period of five years and expiring in the year 1974.

That although there was expressed provision in the agreement for the termination of the agreement by either side by Notice, the defendant in breach of the agreement summarily terminated the agreement, and that by reason of this he had suffered loss and claimed damages.

The defendant denied that they breached the agreement and held that the agreement was terminated due to the breaches by plaintiff as set out in a series of letters.

The pleadings:

There seem to have been no proper discovery and inspection of documents which have affected the settlement of the pleadings. There was a distinct absence of preciseness, as the breaches alleged in the defence were cited in letters. The contents of some of these letters were couched in generalities; another difficulty arose as it was only during the course of the trial other letters were found and paragraph 6 of defence was amended to include these letters.

The resultant effect was that the evidence adduced by both plaintiff and the defendant had to be enlarged in order for the court to understand and appreciate what the issues were on the pleadings.

This entire exercise, again illustrate the by-passing of proper interlocutory proceedings before the pleadings are closed with the resultant delays and lengthening of the trial.

In reviewing the evidence, which to a large extent clarified the pleadings, the issues between the parties have been made somewhat clearer,

if at times imprecise.

The Issues:

I shall summarize these in their broadest sense.

- (a) Plaintiff is saying that he performed the contract in a reasonable and efficient manner.
- (b) Defendant, on the other hand, alleges that plaintiff breached the contract in the following regards:
 - (1) complaints from customers of the conduct of plaintiff's employees. That it is an implied term of the agreement that plaintiff's servants and/or agents would conduct themselves in such a manner while carrying out the agreement, so as to prevent the likelihood of loss or damage to defendant's business, goodwill and/or reputation;
 - (2) plaintiff's drivers not properly completing invoices;
 - (3) not properly operating the emergency truck;
 - (4) improper delivery without authority;
 - (5) non-delivery of gas in that:
 - (a) lack of supervision by plaintiff and his absence when needed;
 - (b) non-delivery generally culminatingⁱⁿ the Xmas episode when a large number of cylinders were left undelivered.

In plaintiff's reply to these broad allegations:

- (a) plaintiff denied that there was an implied term of the agreement that plaintiff's servants and/or agents would conduct themselves in such a manner while **carrying** out the terms of the agreement so as to prevent the likelihood of loss or damage to the plaintiff's business, goodwill and/or reputation.

Mr. Small, for plaintiff, however, later conceded that there was such a term implied in the agreement.

- (b) The reply, however, denied that plaintiff or his servants or agents were in breach of any of the express or implied terms of the agreement;
- (c) that the matters complained of do not constitute breach of any of the express or implied terms of the agreement and plaintiff makes no admission as to the matters complained of;

- (d) that further or in the alternative, defendant did not at the time when any of the matters allegedly complained of occurred, treat same or relied upon the said allegations as constituting a breach of the agreement;
- (e) that defendant did not at the time the alleged complaints were made inform plaintiff thereof or complain to plaintiff about same, but did so sometime after;
- (f) further that if any of the matters referred to constituted a breach, the defendant waived any such breach and elected to have the agreement continue in existence between the parties;
- (g) that defendant by its conduct is estopped from relying on any of the matters complained of in the letters as constituting a breach of contract giving the defendant the right to summarily terminate the agreement between the parties.

I shall review the evidence under these broad headings above, as I am of the view that this will comprehensively cover all the areas of dispute between the parties.

Before reviewing the evidence, it would be convenient to outline the system of the taking of orders from the customers and the delivery of these orders.

System:

Customers usually phoned in orders for gas to Tropical Gas Head Office at Half Way Tree Road. On the receipt of these orders an invoice is made up in respect of each order and these invoices are collected by plaintiff or his agent at 4:00 p.m. each day. If later than 4:00 p.m., the invoices are placed in a special receptacle from which plaintiff would take them when the office is closed.

The system provides that orders taken on one day should be all delivered the next day in the normal course.

If, however, a customer is completely out of gas, that customer's order would be treated as an emergency delivery and may be delivered the same day when the order is made.

In the case of normal deliveries, when plaintiff collects the invoices, he would take them to the plant at Brighton, Rockfort, where the filling of cylinders take place. There he would collect the number of cylinders as per the invoices and see to the loading of the trucks

with these cylinders. The trucks are loaded according to prescribed routes. The driver of each truck is the person responsible for the deliveries on his route.

When delivering to a customer, if the customer has an account with Tropical Gas, the person receiving the cylinder should sign the invoice.

In theory for each delivery of a full cylinder, the driver should get back from the customer an empty cylinder. However, this is not always the case as more often than not, the customer has not used the cylinder fully.

In the case where the customer has not an account with Tropical Gas, upon delivery the customer should sign the invoice and the driver should collect in cash the cost of the cylinder of gas.

After completing his route, and on return to the plant, the driver completes a driver's report, which he submits to the plant superintendent together with copy invoices and cash collected. All these documents should be correctly written up by the driver before handing in to the plant superintendent. That in simplistic terms is the system that was in existence.

Of course, there are variants dictated by different circumstances which I shall deal with in connection with complaints from customers. Similarly in the case of emergencies and the use of an emergency truck.

The Evidence:

(1) Complaints from Customers

(a) Complaint by Mrs. Thelma Tibbetts - Exhibit 8

Plaintiff stated that he received letter, exhibit 8 and investigated the matter and discussed with Mr. Henry the outcome of his investigations. He stated that Henry was satisfied with the explanation given by him for Burke's action.

Burke in his evidence stated that he does not recall this incident. He cannot recall Mr. Lee discussing this particular complaint with him.

Mr. Henry in his evidence stated that plaintiff never wrote to him about this complaint. That plaintiff spoke to him about it saying that he had discussed the matter with Burke, who had denied it or gave a different story to the customer's and that he (Lee) had suggested to Burke that when they held the drivers' meeting they could go further into Burke's behaviour. This drivers' meeting was suggested by Mr. Henry in his letter, exhibit 8, outlining the complaint. This meeting was

never held. The matter seemed to have ended on that note, although Mr. Henry seemed convinced that Mrs. Tibbetts' version was the correct one. In cross-examination to Mr. Small, Mr. Henry stated:

That plaintiff reported to him that Burke had a different version from Mrs. Tibbetts as to what had happened. That he Henry had a way of knowing which of the two versions was the truth through the personnel manager, who investigated the matter and he concluded that Burke had committed the act. He admitted that he had not spoken to Mrs. Tibbetts or Burke himself, but he decided that Burke was in error based on his investigations and he communicated this to plaintiff. He stated he does not know what work Mrs. Tibbetts did or how old she was. That he would not know her if she passed along the corridor by him.

Finding of Fact:

On the evidence before me, I cannot find as a fact that Burke did the acts complained of. Mr. Henry's investigations seem based on hearsay and the personnel manager who investigated the matter was not called to give evidence. One cannot say what form his investigations took. One, however, must sympathise with Mr. Henry. His company is providing a service and the maxim that the 'customer is always right' must be his guiding consideration. Complaints by customers real and/or imagined would be endemic to this type of business, and although it may be politic to extend profuse apologies to the complaining customer, one would expect the most meticulous investigations to be made if the object is to penalize the person about whose conduct the complaint was made. In this case, Burke must be judged by cogent and credible evidence and none was adduced.

(b) Complaint of Mr. C. Pennant - Exhibit 10

Plaintiff in his evidence stated that he did receive exhibit 10 and spoke to Burke about it. That Burke did not agree with the allegations made against him. That Burke admitted that he was unable to leave the correct change of \$1.05 but only after he had promised to return with the correct change the following day. Plaintiff stated he made a report of his investigations to Mr. Jones.

Burke in his evidence states that he does not remember anything like that (i.e. the contents of the complaint). He stated that the deliveryman and customer have minor arguments about deliveries most of the time. He stated customers argue about **the cylinder is light (i.e. not full)** that

some say it is not full and all that sort of thing. He stated that most customers are abusive with you even when you take it easy with them. He stated that nothing like this complaint was brought to his attention. Of course, Mr. Lee stated he did speak to Burke about it. Burke further stated that this did not happen either. Burke stated that on one occasion he got a message to go to Mr. Henry's office. He went and saw him and had a talk with him. That it might have been a complaint he does not remember. Burke stated that some of the customers are abusive and he is making this statement from his experience of delivering gas to them. He agreed he has been involved in a number of incidents with customers. He disagreed he was the driver involved in most complaints by customers.

Mr. Jones, marketing manager, stated he wrote exhibit 10 to plaintiff. That he did not receive a written reply from plaintiff and he was surprised. He stated, however, he did not invite a reply from Mr. Lee. That he told him to take any disciplinary action without delay. That he was new and felt it was a matter to be left to Mr. Lee's discretion. That this would involve hearing the other side of the story. He stated that he did not ask Lee to reply, he felt Lee should exercise his discretion in the circumstances. That he did not assume Burke was guilty of what was alleged in the letter. That he did not receive a written reply from Lee and that plaintiff never explained to him orally what had happened.

It is apparent that no provision is made in the system for the supply of cash (i.e. change) to the deliverymen.

If the customer has no account with the company, the cylinder of gas cannot be left with the customer on credit, as the deliveryman is obliged to account for every cylinder or its cash equivalent if a cash delivery is made. What then is the position if the customer tenders cash in excess of the cost of the cylinder as in this case? It seems it depends entirely on the discretion and good sense of the deliveryman:

- (a) If he has no change, he can refuse to deliver the cylinder and return it to the plant.

It is obvious this would not be in the best interest of the company. The company would lose the sale, and in any event the customer would be most annoyed with the company and may well take gas from the company's competitor, either way, the company would suffer.

(b) The deliveryman may leave the gas and promise to return with the change at a later date. A customer may not be happy about this arrangement. One must bear in mind that apparently it is usually after the new cylinder is delivered and connected up that payment is requested. or

(c) The deliveryman may leave the gas and hope to collect the cash at a later date. This method, however, is prohibited under the system.

The ideal situation is that the customer ought to have the exact sum to pay for the cylinder, but alas, most customers never do,

This illustrates the multiplicity of ways disputes can arise between the customers and the company through the deliverymen.

Finding of fact:

In this instance no proper investigation was made of the incident. Did it occur in the manner described in Exhibit 10? Mr. Lee stated he brought it to Burke's attention and Burke admitted he was unable to leave the correct change. Burke denies this. He also denies that the incident occurred. I do not believe him but I cannot find as a fact that the incident did occur as set out in Exhibit 10 without some concrete evidence before me.

One cannot judge conduct on the basis of generalities. The evidence must be cogent and here it is not.

(c) Complaint by Mr. Anthony Wong - Exhibit 13

Plaintiff gave evidence and stated he received letter exhibit 13. That he investigated the allegations and made a report to Mr. Jones. He stated that Burke agreed he had thrown a spanner at Mr. Wong's dog, that Burke stated he was actually told to enter the premises and he was assured that the dog was properly leashed. When he was attacked by the dog he used the spanner to defend himself. That Burke did admit uttering some bad language.

Burke in his evidence stated that on making deliveries most time they encounter bad dogs in the homes; that they generally knock before entering and ask the customer to lock up the dog or chain him. He stated that if attacked by bad dog in the yard he would have to defend himself.

He stated that he never saw the letter exhibit 13 but that he recalled the incident with the dog, and that the incident took place with the

"helper" i.e. the truck sideman, and not with him personally. He said it is the helper who connects the cylinder. He stated that Mr. Lee spoke to him about the dog and he explained to him and that the dog jumped over the fence and ran away i.e. a little low fence.

Mr. Jones in his evidence stated that he wrote exhibit 13 but did not get the reply he had requested. In cross-examination he stated that he knows Burke. That on the question of dogs coming after deliverymen this is something to expect and he expects the deliverymen to defend themselves, as best they can. That in the context of Jamaica if a dog comes after you he does not necessarily expect indecent language. He stated that it is his responsibility to bring this to the attention of Mr. Lee as he feels it is unfavourable to customer relationship. He agreed that without the words being quoted (i.e. the actual words used) it is difficult to understand what was indecent language to the neighbour. That what is considered indecent one place may not be considered so elsewhere.

Finding of fact:

I accept Mr. Burke's evidence in this regard and find the complaint not justified. Mr. Burke said it was the helper who struck the dog, I accept this and found the helper's conduct in defending his person from the dog to be reasonable. Although the 'customer is always right' customers also have obligations towards persons making deliveries on their premises; and if they act unreasonably in seeing that their premises are safe for the deliveryman who acts reasonable to repel attack by dogs on those premises, then it cannot be said that the deliveryman's conduct was unreasonable in trying to defend himself.

On the question of indecent language, I have no doubt that words were used but not knowing what words were used, I cannot say if those particular words were unreasonable in the circumstances, or not. I find this complaint to be unjustified.

(d) Complaint by Mr. Henry, divisional manager - exhibit 19

Plaintiff stated he received letter exhibit 19 and spoke to Burke telling him of the request of the company that Burke contacted Mr. Henry and Burke was given the O.K. to continue. Plaintiff stated that he was present with Burke at the plant when he spoke to Mr. Henry who gave the O.K. that Burke could continue working. Burke was, however, told that they would be watching him closely. That Burke continued working with

him (Lee) up to the termination of the contract and thereafter he was employed by Mr. Henry at Tropical Gas.

Burke stated that he can recall one time he spoke to Mr. Henry about complaints.

Mr. Henry gave evidence and confirmed that Burke contacted him and he saw Burke at his office and spoke to him. That Burke asked to be given a chance. That prior to that Lee had also asked that Burke be given a chance. That Lee explained the seriousness of the situation to Burke who said he was sorry. He stated that this situation came up so often with Burke that he can't remember if this was the time on which Burke was given a chance but he does recall telling Burke that he would allow him to continue. Henry stated that he himself made no independent investigation of the allegations referred to in the letter, exhibit 19. That Mr. Jones did and that after the investigation was carried out he believed the customer. That he never spoke to the customer.

Mr. Jones gave no evidence in connection with exhibit 19.

Mrs. Wilson's evidence is that she knew about exhibit 19 and brought it to Mr. Henry's attention.

Exhibit 19 illustrates one of those imprecise areas of the pleadings. The letter refers to customers' complaints. No specific instances are given. Exhibit 19 paragraph 2 also refers to a customer but no particulars are given. Consequently, I assign no weight to this letter.

Exhibit 28 - Complaint from Mr. Howard Hamilton

Mr. Lee in evidence said he had never received or seen exhibit 28. There is a notation on exhibit 28 directed to Mr. Jones. Mr. Henry, however, states that exhibit 19 relates to exhibit 28. That he received exhibit 28 and referred it to Mr. Jones. Mr. Jones, however, gave no evidence in relation to exhibit 28, or to exhibit 19. Mr. Lee said he received the letter, exhibit 19, but not exhibit 28. There is no evidence from Mr. Jones that he passed exhibit 28 on to Mr. Lee. Lee has said he never saw it and I accept his evidence in this regard. I, therefore, assign no weight to letter, exhibit 28.

Having dealt with the complaints in regard to specific customers I am satisfied on the evidence that these complaints have not been substantiated by evidence. I, therefore, find and I so hold that the company would not be justified in terminating the agreement on those grounds.

Plaintiff's Drivers not completing Invoices and Invoices Mislaid

Plaintiff stated that he received letter dated 17th November, 1970 (exhibit 4), from Mr. Henry and as a result they had a discussion. Following this discussion, he received exhibit 5 which listed out the areas agreed on in the carrying out of the agreement. (Paragraphs 7 and 8 of exhibit 5 refer) He also received letter exhibit 7, complaining that drivers are not putting their signatures or invoice numbers after delivery on invoices with the resultant difficulty to the company of tracing any transaction. That he received exhibits 21 and 21a complaining that invoice No. 88758 dated 24th April, 1969, bore no signature on the form to indicate that the customer ever received the gas. On the other hand, plaintiff stated he received letter exhibit 30 pointing out that a customer, Mrs. Lopez, had ordered two cylinders of gas and they were not delivered, yet the invoice is signed by one 'Charles' as having received it. This no doubt illustrate a difficulty that can arise where honest delivery is made.

There is no question that an important part of the system was the proper completion of the invoices. It is only in this way the company can practise proper accounting procedures and maintain proper control of its products. The non-completion or mislaying of invoices were referred to in general terms (see exhibit 4, exhibit 7). Specific reference was made to invoice No. 88758, (exhibit 21a) which had no signature to indicate the customer had received the gas.

In relation to the non-specified instances no weight can be given to Mr. Henry's evidence and in relation to the specific incident. I hold that although it would create inconvenience for the company it is not a matter that would constitute a breach of the contract. It does not go to the root of the contract.

Late, Wrong and Non-delivery of Cylinders

General Remarks:

System:

Generally, the orders placed by customers for gas on say a Monday, must be collected by plaintiff not later than 4:00 p.m. that day. These orders would be presented at the plant. The cylinders in respect of these orders would be filled and loaded on the trucks according to routes and delivery made to the customers on the next day, i.e. the Tuesday.

If for any good reason the deliveries of gas are not made on the

Tuesday then those cylinders would be returned to the plant that Tuesday evening and would be first loaded on the Wednesday morning and delivered not later than that Wednesday. Of course, if deliveries are made on the route say twice per week delivery would be made on the next trip by the truck on that particular route.

This is the normal system. If the customer is wholly without gas then this would be treated as an emergency and dealt with by the emergency truck.

At this point, I shall deal with normal deliveries. Emergency deliveries will be dealt with under a separate heading. I shall deal with the two aspects separately:

- (a) Late and wrong delivery;
- (b) Non-delivery;

Late and Wrong Delivery - Exhibits 25, 25a, and 25b

Plaintiff in his evidence stated he received exhibit 25 and exhibit 25a from Mr. Henry. That he made notations on exhibit 25a in respect of Andrew, Watson and Wong. He stated he did not investigate himself. That these were the notations made on the original invoices by the drivers. That notations on exhibit 25a are in his handwriting. That the notation beside 'Thaine' on exhibit 25a is not his. That in respect of the ^{other} customers where no notation is written it is possible that when the list was given to him that none of those invoices were in his possession.

Exhibit 25b invoice No. 35988 which shows 'Thaine' reveals that it was delivered on 1st November, 1971. The original order having been received by the company on 28th October, 1971. Delivery was effected within four days.

In cross-examination, Mr. Lee stated that exhibit 25a shows that orders taken on 28th and 29th had not been delivered and he agreed that the addresses shown were in the corporate area, which was a 24 hour delivery service.

The explanation given by Mr. Lee, i.e. the notation on exhibit 25a, in respect of three customers, he said he got this from the original invoices. However, exhibit 25b 1 - 8 (original invoices) show no such notations. Mr. Lee is not being truthful or his recollection is faulty. In respect of the others, however, he said he did not have the invoices so he could give no explanation and so he returned the list.

It is clear on the evidence that these deliveries were quite late.

I, however, believe the notation placed on exhibit 25a, in respect of three customers, by Mr. Lee, was as a result of information he received and accepted as true. I do not believe he manufactured it for the purpose of misleading the company, otherwise, why not all the customers instead of only three? Mr. Lee's investigation of the reason for the delay in the deliveries are incomplete and reflects a dereliction on his supervisory duties in the implementation of the agreement. I find, however, that Mr. Lee's conduct and the failure to deliver within a reasonable time, by itself would not be so fundamental as to amount to a breach which would warrant the summary termination of the contract.

Wrongful Delivery

(a) Delivery to 79 Deanery Road - Exhibits 18 and 18a

Mr. Lee stated he received exhibits 18 and 18a. He knows about it and although it was not authorised by him, the delivery was made to his ex-partner, Mr. Lue, who should really not have enjoyed the staff privilege price for the cylinders. He stated he cannot be sure if any adjustment was made. Notation on exhibit 18 'Del by Thyghter' is in his handwriting. Thyghter was his assistant at the plant.

In cross-examination he said Mr. Henry and himself had discussion about exhibit 18 and he indicated to Mr. Henry how this cylinder came to be delivered to Mr. Lue at staff price and his (Lee's) account was debited for the amount as it was felt that Mr. Lue did not enjoy staff privilege.

Findings:

I find that this isolated incident is not a matter that can be considered by itself a breach of the agreement on the part of the plaintiff.

(b) Delivery re Mrs. Lopez - Golden Spring - Kingston 9 - Exhibit 30

Plaintiff stated he received exhibit 30 and on investigations of this matter, if his memory served him right, this delivery was wrongfully made to another customer but was corrected when the mistake was pointed out.

Findings:

Again I find that this is not a matter that can be considered by itself a breach of the agreement on the part of the plaintiff.

Non-delivery on 28th and 29th May, 1971 (Exhibits 11, 12, 14, 20, refer)

Plaintiff in his evidence stated that he received exhibit 11. He

stated that these cylinders were not delivered because there was a power cut at the plant and he did not get his regular supply of cylinders in time. That he communicated this to Mr. Jones. That he received exhibits 12 and 14. That he did not reply as he had spoken to Mr. Jones about the other matters on the phone.

In cross-examination he reiterated that there was a power cut at the plant and he did not get the required cylinders and he spoke to Mr. Jones about it. He stated further that, if his memory served him right, he thinks Mrs. Wilson who was in charge of orders was notified first of the power cut by telephone on the day in question and then he had discussions with Mr. Jones on the matter after he had received exhibit 11. He can't remember the date he received exhibit 11 but it is his custom when he gets a note like exhibit 11 to go up and discuss the contents with the writer within a few days afterwards. That in this case, he thinks he did so on the same date he got exhibit 11.

He stated he received exhibit 12. The contents were put to plaintiff who agreed that up to the date of exhibit 12 i.e. 4th June, 1971, Mr. Jones was requesting an early reply. The contents of exhibit 14 were put to plaintiff who conceded that up to the date of exhibit 14 i.e. 11th June, 1971, Mr. Jones was still requesting a reply to exhibit 11. He admits that he received exhibit 20 but he stated in chief "three memoranda it refers to were in relation - not certain if it related to complaints re 28th and 29th May;" but in cross-examination he stated, when contents of exhibit 20 put to him, that he agrees that exhibit 20 dated 24th August, 1971, again indicates that up to that time the company had not had a reply to exhibit 11.

He agreed that exhibit 20 suggests that no reply was given in writing but he stated that he knew he had spoken by then to Mr. Jones, Mr. Hinds and Mrs. Wilson, regarding the matter, and that Mr. Henry, like on many occasions was misinformed about the matter.

Mr. Henry, for the defendant company, gave evidence and he stated that paragraph 3 of exhibit 20 is in reference to exhibits 11, 12, 14. That he got no written reply from plaintiff to exhibit 20. Exhibits 11, 12 and 14 had been brought to his attention. He does not recall discussing the contents of exhibit 20 with plaintiff. He stated it is incorrect plaintiff's reason for difficulty with deliveries was because of inadequacy at the plant as he stated every complaint brought by Mr. Lee

concerning the plant or transportation steps were taken to put them right. At the plant additional scales were installed, the platform was extended for loading, larger pumps were installed and plaintiff provided with an office or a room at the entrance of the plant with a telephone extension. He denies that there were power cuts that affected the filling of cylinders. He stated that there was a stand by plant in case of power cuts.

He stated that the last paragraph of exhibit 20 had to do with delivery of cylinders and the information requested by Mr. Jones which was not forthcoming and therefore they were not in a position to deal with the matter.

In cross-examination he stated that exhibit 20 was written and he enclosed three memoranda with it (i.e. exhibits 11, 12, 14). That they came to his attention shortly before he wrote exhibit 20. That exhibit 20 was the first letter he was writing Mr. Lee concerning delivery of cylinders in 1971.

He agreed there were power cuts in 1971. He cannot say how many or if it was the worst year. He can't recall power cuts in May, 1971. He stated that he would not say that the power cuts would have any adverse effects on Tropical Gas business. When there were power cuts during the day the cylinders were filled by the stand-by plant. He stated he was aware that on occasions this stand-by plant did not function. He stated that if there had been a power cut which affected the delivery system this would have been known by Tropical Gas personnel i.e. Mr. Edwards and Mrs. Wilson, and in those circumstances he would not have expected Mr. Jones to write Mr. Lee asking him about the breakdown in the delivery system. That unless matters were brought to Mr. Jones's or his attention, he would not normally know about complaints until they are brought to his attention.

Mr. Jones stated he wrote plaintiff exhibits 11, 12 and 14. That when he wrote exhibit 11 the state of deliveries were very poor. He had had an increasing number of complaints of non-delivery from customers. He received no reply from plaintiff. He denied that plaintiff had come in and spoke to him about it. He stated he kept Mr. Henry informed.

Findings:

It is clear from Mr. Lee's evidence that he admits the non-deliveries as set out in exhibit 11.

I reject Mr. Lee's evidence that he spoke to Mr. Jones about the contents of exhibit 11.

No rational person would be writing to Mr. Lee as per exhibit 12 dated 4th June, 1971, and exhibit 14 dated 11th June, 1971, if they had discussed the matter with Mr. Lee. Mr. Jones denied he did and I accept Mr. Jones's evidence in this regard.

I also reject Mr. Lee's evidence that the reason why the deliveries were not made it was because there were power cuts and this affected the filling of the cylinders.

If power cuts occurred to such an extent where it adversely affected the filling operations of the company then it seem improbable to me that both Mr. Jones and Mr. Henry would be unaware of it, and if they were so aware of it, how could they then be writing to Mr. Lee about non-deliveries, when the reasons for such non-deliveries would be the default of the company itself? I believe the correspondence exhibits 11, 12, 14 and paragraph 3 of exhibit 20, written when no litigation was contemplated, best illustrate the situation as existed at the time.

I, therefore, find and so hold that there were non-delivery of cylinders to customers on the 28th and 29th May, 1971, by plaintiff. That plaintiff offered no explanation to the company for these non-deliveries. Paragraph 1, exhibit 26, in my view, clearly shows Lee seeing Jones in connection with deliveries on the 28th and on the 29th and not before; and exhibit 27 confirms the discussion plaintiff had with Mr. Jones and Mr. Henry in connection with Mr. Jones's complaint of Mr. Lee's conduct.

Plaintiff's explanation to the court that it was due to power cuts I reject. I do not accept plaintiff as a witness of truth in this particular regard.

What then is the position? Exhibit 11 refers to 'attached complaints'. Unfortunately, the 'attached complaints' are not part of the exhibit 11. The following questions may be asked:

- (I) How many cylinders were loaded on those dates?
- (II) How many delivered?
- (III) How many not delivered?

We do not know. We only know there were non-deliveries on these dates. To what degree - we have no evidence.

Non-delivery would be a breach of the agreement, but was it of such a degree, the effect of it was to by itself fundamentally destroy the foundations of the contract? I cannot say. There is no evidence before the Court. The evidential burden is on the defendant to establish this. This they have failed to do. I would, therefore, hold that, by itself, the breach was not of such a nature as to give defendant the right to terminate the contract.

(b) Exhibit 16a - Non-delivery During Period 31st May - 14th June, 1971

Mr. Jones for the defendant gave evidence and stated that exhibit 16a represented the number of orders handed to the plaintiff each day as well as the number of orders that came back in respect of ^{the} same day. He stated that these figures were as a result of a survey he undertook of the number of non-deliveries for a two week period, 31st May - 14th June, 1971, to get at first hand information as to the true position as to the state of deliveries. He stated that on exhibit 16a, the 6th and 13th June, are missing as these were Sundays. He stated that exhibit 16a showed over the period an average of 22% non-deliveries. He regarded it as unsatisfactory and brought it to plaintiff's attention.

In cross-examination he agreed that for the period May 28, there was a very bad period up until June 14. He stated he took this period because it was bad but the situation started before 28th May. He stated he had no statistics to support this, but it was because of this situation which led him to carry out the survey. He stated he never found out what caused that particular bad batch. He stated he cannot find the covering memorandum that enclosed exhibit 16a, and that covering letter and exhibit 16a should be at the office but a search was made and they have not been found. That he cannot offer any explanation for this.

Mr. Lee in his evidence stated he received exhibit 16a. He agreed that exhibit 16a reflected the situation as it existed between 31st May to 14th June, He, however, stated:

"I cannot rightly say the figures are correct as I have not got proof of the return orders but what I know is that it is not unusual to have say as many as 35 returned orders as there are many reasons why they could have been returned."

He stated:

"Agree from my point of view the percentage of returned cylinders was being brought to my attention by the company when I got exhibit 16a,"

He was asked:

He was asked:

- Q. Do you agree 22% of returned filled cylinders is high?
- A. If you remember my answer previously, it is not unusual to get back large numbers of returned orders i.e. these are filled cylinders taken out for delivery - not delivered and are brought back.
- Q. Would you say a percentage as high as 20% ^{would} be indicative of fact that something was wrong with the delivery system?
- A. Not necessarily, you may send out a number of orders to be delivered and you would have returns of non-deliveries for reasons of wrong address, no one at home, no money for C.O.D. orders.
- Q. Suggest that company was having considerable difficulty with deliveries which were being made by you and your employees almost continuously from around May 1971, to end of that year?
- A. I cannot agree with you in saying that. The company was having a series of setbacks in their deliveries but as I said previously with the sort of contract I operated there were always complaints from customers one way or the other, but nothing that I think was detrimental to the contract itself or the business of Tropical Gas,
- Q. Do you agree that as per exhibit 16a problem company was asking about is why filled cylinders were not delivered as they ought to have been?
- A. I think I answered a similar question before. Like I said before, it is not unusual for orders to be returned undelivered because of numerous reasons, like in this case, I could probably say because of late hour that the drivers left the plant they would probably have brought back a number of orders.
- Q. Suggest you are seeking to explain the non-delivery by reference to power failures now that I have pointed out to you the company was speaking of filled cylinders, are you now saying that the problem of non-delivery was due to late departure from the plant?
- Mr. Small objected to the question but was over ruled by the court.
- A. Cannot remember specifically what the reasons for non-delivery were.

Findings:

It is clear on the evidence that plaintiff can give no reasonable explanation for the non-deliveries as per exhibit 16a. He speculates as to possible reasons.

I find as a fact that exhibit 16a reflected the situation as existed over that period and I accept and so hold that the condition reflected a severe breakdown in the system of deliveries. Was this breakdown so fundamental as to amount to a breach of the agreement by plaintiff and would warrant the termination of the agreement at that time by defendant company? If it was an isolated incident it is my view that it would not. To have this effect the breakdown must be of a frequent and protracted nature. Plaintiff clearly does not know the reasons for the non-deliveries and only seeks in his evidence to advance excuses that he believes sound reasonable to explain his defaults.

But to continue the review of the evidence in regard to plaintiff's performance of the contract.

Standard of Performance by Plaintiff During 1971 & Christmas Episode

General:

In dealing with this aspect of the case, I shall review the evidence under the following headings for convenience sake:

- (1) Transportation;
- (2) Emergency Truck;
- (3) Allegations of breakdowns in delivery service;
 - (a) before and up to Christmas Eve;
 - (b) Christmas episode.

Transportation:

Under the terms of the agreement the trucks to be used in the delivery of cylinders are to be supplied by the company on a hireage basis.

The agreement paragraph 1(a) refers to a schedule of the vehicles but none is attached to the agreement. They will, therefore have to be ascertained from the evidence, particularly at the beginning of 1971.

Plaintiff in his evidence stated he took over a fleet of trucks owned by the company which he operated with his employees. He stated he took over three trucks which was increased after he made submissions to the company to four trucks about two months after. Plaintiff was responsible for maintenance of these trucks. In addition to the four trucks supplied by the company, plaintiff stated that he had two trucks of his own:

- (a) a large three ton truck; and
- (b) pick-up truck used for emergency service.

He used these trucks on the routes as he found it necessary to deal with the increased deliveries. That the company was aware of this. He stated he had requested additional trucks from the company but the response by the company was

that no money was available in the budget to purchase new vehicles.

At the termination of the contract he sold two trucks to the company one involved in deliveries and the other he had bought but had not put in service as yet.

Mr. Henry gave evidence. He stated that in exhibit 34 he sees six vehicles listed by licence numbers. He cannot say which, if any, of these vehicles belonged to the company. He knew a couple of vehicles belonged to plaintiff.

Exhibit 34 lists the trucks used in deliveries for period December, 1971, to January, 1972. They are as follows:

BY 267
BZ 574
BB 681
BX 556
BZ 646
T 4928.

He can't say which of these vehicles belonged to plaintiff. He became aware that plaintiff was providing transport in order to carry out his contract for Tropical Gas. He became aware when the transport manager, Mr. Hinds, advised him that a couple trucks provided by the company needed repairs which plaintiff was responsible for and that in place Mr. Lee was using vehicles belonging to him, that this was sometime in mid 1971. That he did not write Mr. Lee about it that he can recall. That he had no reason why he did not write. He denied that from the time he took over as manager he was aware that Lee was using his own trucks to carry out his obligations. He agreed that he knew Lee was dissatisfied with the working condition of the trucks supplied by Tropical Gas to carry out the operation but he said he did something about it. That he bought two trucks one at the end of 1970 and one at the beginning of 1971. Both selected by Lee. Lee denies this. He stated that in early 1971, he does not recall how many other trucks Lee had to use beside these two trucks. He stated that he does not recall that plaintiff had bought a truck for the Xmas season but could not get the body made so he could not put it into service. He remembered buying two trucks from Lee at the termination of the contract. He personally did not see the vehicles but he signed the cheques to pay for them. Mr. Hinds, the operation manager, inspected the vehicles.

Mr. Hinds, operation manager, gave evidence. Mr. Hinds identified the trucks as follows:

BY 267 - purchased by company after he joined company;
BZ 574 - purchased by company from plaintiff when he plaintiff had left
company;

BX 681 - purchased by company from plaintiff when he plaintiff had left company;

BX 556 - purchased by company after he joined company;

BZ 646 - purchased by company from plaintiff when he left company;

T.4928 - Mr. Henry stated this was a pick-up belonging to Mr. Lee.

The officers of the company seem greatly confused as to which vehicles the company owned and which vehicles plaintiff owned.

Exhibit 37 and exhibit 39 - 'Fixed asset Record' of the company shows the following as company's property:

Exhibit 37 - BV 681

BX 556

BY 267

Exhibit 39 - FG 234 - purchased from A. Lee, January, 1972.

BZ 574 - purchased from A. Lee, January, 1972.

On the evidence, I find as a fact that plaintiff had two vehicles of his own using to supplement the number of trucks supplied by the company. I do not accept Mr. Henry's contention that plaintiff used his vehicles in substitution for company's vehicles which needed repairs. I find as a fact that Mr. Lee's vehicles were used additional to the number of vehicles supplied by the company to carry out his deliveries. I further find that the transportation supplied by the company was inadequate to deliver the orders and had to be supplemented by Mr. Lee's vehicles. This, however, is a collateral issue as it was not pleaded by plaintiff and I shall deal with its effect anon.

Emergency Truck

System:

The emergency truck was intended for use in supplying customers who were completely out of gas. Normal orders would be supplied by trucks servicing their regular routes. The emergency truck had no particular route and roved at large supplying customers out of gas immediately.

Mr. Lee in his evidence stated the arrangements set out in clause 6 of contract, exhibit 1, did not operate (i.e. the preparation and collection of delivery orders). Discussion took place subsequently.

The emergency truck referred to in exhibit 4 paragraph (1) was a system Mr. Lue himself had put into effect. There was an emergency truck provided within a radio unit. This truck was operated by Mr. Lee but the radio system was controlled by Tropical Gas. Plaintiff stated that after awhile the

emergency system increased in number i.e. all the orders being delivered was on an emergency basis and they found they were getting more people calling for this service than normal.

Exhibit 5 dated 19th November, 1970, paragraph 6, effect seems to have been the suspension of emergency deliveries up to mid-day each day. Of course, this no doubt, would affect the number of deliveries that could be made in the afternoon period.

Exhibit 6 dated 25th January, 1971. Plaintiff states that during the previous Christmas, the emergency unit was helping out on the regular routes and after Christmas it was put back to its original use as an emergency truck.

Exhibit 6 also took away from plaintiff all control over the emergency unit and placed it under the plant manager. So effectively, from 25th January, 1971, plaintiff had no responsibility for emergency deliveries except to supply a driver for the unit.

Exhibit 24, dated 8th October, 1971, confirms this arrangement.

Finding:

I, therefore, find as a fact that the emergency service was the responsibility of the company from 25th January, 1971.

Allegation of Breakdown in Delivery Service:

Exhibit 1, the agreement, outline the mutual obligations of the parties.

Exhibit 2 renews the agreement for a further five years from 1st February, 1969.

The obligations of the parties in relation to deliveries may be summarised as follows:

The Company

- (1) The company to provide the necessary transport to be used in the delivery of the cylinders.
- (2) The company will take the orders and have ready at its office at 4:00 p.m. each day a list of the customers to whom delivery of cylinders is to be made on the following day, with the address of each customer and the number of cylinders to be supplied.
- (3) Company will have ready for transportation and delivery by the plaintiff by 8:00 a.m. on the following day the numbers of filled cylinders required to be delivered on such day being not less than 120 in number.

The Contractor:

- (1) Shall maintain in good repairs vehicles hired from the company.

- (2) Transport and deliver on every day to such of the company's customers within Kingston and Saint Andrew including Port Royal such number of cylinders filled with gas as may be required by each customer.
- (3) Disconnect any empty cylinder being replaced, by a filled cylinder and connect such filled cylinder.
- (4) Retake, on behalf of the company, from each customer's possession all empty cylinders and transport and deliver the same to company's plant at Brighton.
- (5) Employ at his expense and on his own account an adequate number of assistants to enable him to carry out the aforesaid services efficiently.
- (6) Account to the company for all moneys collected and cylinders not delivered.

General criticism of the manner in which plaintiff was carrying out the agreement is expressed in the correspondence between the company and the plaintiff.

Exhibit 4 dated 17th November, 1970

Paragraph 1 exhibit 4. Plaintiff in his evidence stated that "working hours on a Saturday at Tropical Gas was - office 8 - 12, but the plant go until 4:00 p.m." That his employee drivers' understanding was that they would quit work as soon as they had completed their routes, but they would try and go up as far as they could in the evenings to get off their orders. That that applied to every day. There were no arrangements with the company for working on Sundays. He stated that all his drivers knew where to contact him as he also had a radio frequency in his original system.

That in relation to paragraph 2. He stated there was a rope on the truck but he figured (it broke) this was after normal use.

Mr. Henry stated he wrote exhibit 4 as they had had a lot of complaints from customers about non-delivery of cylinders ordered and on many occasions it could be traced back to numerous reasons like:

- (a) lost invoices; and
- (b) many cylinders left over on say a Saturday never got delivered until Tuesday or Wednesday of the following week.

Paragraph 3 of exhibit 4 reflects a strong expression of dissatisfaction with plaintiff's performance.

Findings:

The incidents cited in paragraph 1 of exhibit 4, I find hard to accept. It is couched in the **vaguest** terms.

Mr. Lee said he had a radio frequency of his own, and there was a radio unit in the emergency truck. I accept Mr. Lee's evidence in this regard. If Mr. Henry's conclusion is that the driver did not know where to contact Mr. Lee or anyone connected with him on this occasion then I would not assign blame to Mr. Lee as I accept that he made adequate arrangements to be contacted by the emergency truck.

In relation to paragraph 2 of exhibit 4, I accept that better supervision on the part of Mr. Lee could have avoided the incident. I find nothing in these incidents that could be construed as breaches of the contract.

Paragraph 3 of exhibit 4, I find unsupported by any evidence and I assign no weight to it.

It was as a result of exhibit 4 discussions took place between Mr. Henry and plaintiff which resulted in exhibit 5 being written by Mr. Henry to plaintiff.

Exhibit 5 dated 19th November, 1970

Exhibit 5 outlined the arrangements mutually acceptable to both sides for the carrying out of the contract.

Exhibit 7, dated 8th February, 1971, brought to plaintiff's attention the necessity for completion of invoices.

Again, exhibit 7 is not specific as to the number of invoices involved.

It is also curious that when the drivers at the end of the day or on the following day when they are making their returns to the plant superintendent he does not insist on the completion of invoices. I find that nothing turns on this letter and view it more as a reminder rather than a complaint.

Exhibits 8, 10, 13, 19, 28 deal with customers' complaints and have been dealt with above.

Exhibits 11, 12, 14, 20 deal with non-delivery of gas on 28th and 29th May, 1971, and have been dealt with above.

Exhibit 16a deals with non-deliveries during period 31st May - 14th June, 1971, and have been dealt with above.

Exhibit 30 deals with delivery re Mrs. Lopez and have been dealt with above.

Exhibits 18 and 18a deal with wrongful delivery to 79 Deanery Road and have been dealt with above.

Exhibits 25, 25a, 25b deal with late delivery and have been dealt with above.

On June 22, 1971, exhibit 16 was sent to Mr. Lee advising him that Mrs. Hazel Wilson would henceforth be responsible for the cylinder delivery section.

Mrs. Wilson in her evidence stated that in 1971, deliveries were getting very bad. That it seemed that all the time they were getting complaints of non-delivery and it was getting worse and worse every day. That the complaints came to her first. Having received the complaints she would get in touch with Mr. Lee.

She stated that the number of complaints varied. Some days they had at least 30 that was the peak of it. Sometimes she was unable to contact Mr. Lee, when she did he would give her an explanation. She kept Mr. Jones and Mr. Henry informed of the situation.

On 24th August, 1971, Mr. Henry again wrote plaintiff in connection with the deliveries (exhibit 20).

Mr. Lee in his evidence stated that prior to receiving exhibit 20, he had had no communication from Mr. Henry that his drivers were selecting where they would or would not go. He stated that Mrs. Wilson sometimes tried to get the first available driver to make a delivery which might be out of that driver's route, her request sometimes would be turned down and she would be asked by the driver to refer the order to the emergency truck. That he communicated this to Mr. Henry on receiving exhibit 20 and Mr. Henry said he was right.

Mrs. Wilson stated she became aware of the position as set out in paragraph 1 of exhibit 20 as the driver told her this - not that she was routing them. She stated if any of the drivers came to the office for the orders and there were emergency deliveries to be made i.e. by emergency, people out of gas, and in desperate need, she would request the driver to take the delivery to such and such a customer and they would absolutely refuse. They said they can't go in that area. She said drivers who spoke to her mostly the emergency truck drivers but she can't remember.

Of course, the whole purpose of the emergency truck was to take care of the emergency deliveries thereby releasing the regular delivery trucks to ply their routes.

Paragraph 2 of exhibit 20 - Plaintiff said he had agreed on that condition with the company and that was partly how the small truck in the

emergency system came into being. This was plaintiff's own truck.

Paragraph 4 of exhibit 20 seems to be a request for information. I find that nothing turns on this letter. It is not evidence of any circumstances which can be construed as a breach by plaintiff of the contract, but is a letter expressing dissatisfaction with Mr. Lee's performance.

Exhibits 22 and 23

On 4th October, 1971, Mr. Henry wrote plaintiff exhibit 23, enclosing exhibit 22, which he had dictated on 16th September, 1971, but had not sent to plaintiff.

Mr. Henry in his evidence stated that in August, 1971, the service had deteriorated. That at the time of writing exhibit 22, the situation was hopeless. It had gotten to a point where it appeared as if the only way to sort the matter out, if reasonable service was to be given was to handle it themselves.

Paragraph 3 exhibit 22:

He stated he personally tried to get in touch with Mr. Lee, as on that week-end he believes a truck had broken down. That prior to this Mr. Lee had promised that if he was going off the island for any reason, he would be advised. Consequently, he felt Lee was somewhere around, eventually he was told that Lee was in Miami. Lee had told him initially, if he was away, Thyghter would function for him but Thyghter had no authority to take any positive action in case of say a breakdown when money is required to be spent. After Thyghter left Lee's employ, he was told Abbot would carry out this function but Abbot was never in a position to do so. He can't recall if around the time he wrote exhibit 22 i.e. 16th September, 1971, Thyghter was employed to Tropical Gas.

Lee came and saw him after he wrote exhibit 22. Lee said he heard that he was trying to get hold of him and apologised for being away without telling him as promised and he gave Lee exhibit 22 to read. Lee asked him to understand his position. That he intended to shelve a lot of his other activities and to concentrate on Tropical Gas affairs. That he agreed to hold off with the letter for a given period to see if Lee's promises would be kept but he explained to him that if no improvement was forthcoming the company could no longer continue on this ad hoc basis.

Paragraph 3 exhibit 22

Lee told him the driver had not made off with the money but had

left it with the plant superintendent. This was later checked out and the plant superintendent, Mr. Edwards, denied receiving any money or helping to write up any form for that particular driver.

He denied that at the discussions Lee pointed out that the facilities were inadequate and further told him he would be in a worse position for Christmas if more cylinders were not provided.

Exhibit 23 dated 4th October, 1971

Paragraph 2 "fiasco" he referred to Henry in his evidence stated so many things happened during this period. It is difficult to recall which of the "fiascos" he is referring to. That the week-end before 4th October, 1971, he can't recall which exactly, which one this is.

The "fiasco" was, he remember a truck took off for Red Hills, never did make it. That he was called and told by the driver, whose name he can't recall, that he needed help to get the truck back on the road. He asked the driver what had happened to Mr. Lee if he had tried to get hold of him and the driver told him Lee was not available i.e. that he could not be found and that is why he was calling. That after Lee's promises of a few weeks before, he could only refer to this situation as a "fiasco."

He stated that at this time in October 1971, Thyghter was then working for Tropical Gas.

He denied there was a breakdown in the filling arrangements at the plant.

He stated that Lee came to see him again and told him he was sorry that something urgent had come up and he had thought his assistant, Abbot, would have been able to handle the situation. Lee allayed his fears and promised that the problem would not arise again. That he would personally, as of that date, collect invoices, route trucks and, if worst come to worst, he would drive a truck himself and he would put the small truck into full time service.

Mr. Lee gave evidence in reference to paragraph 2, exhibit 22. He stated that the two drivers discussed were one Stephens and one Cole. These drivers were dismissed as it was alleged that they had sold cylinders belonging to the company and had not made returns. He denied that he employed two drivers who could not read or write. The drivers were Arnold webster and Calvin Gayle, taken on week ending 17th September, 1971. That they had General Driver's Licences. That he took steps to see they were conversant with the route. That the whole thing happened suddenly and the

had very little time to pass them through the usual familiarization of Kingston; but two of the drivers mentioned were taxi drivers and were fairly familiar with the corporate area. That he himself drove the emergency truck during this time. That he was satisfied that they were sufficiently familiar with the corporate area to go on the route. They were also given ^{road} maps to assist them.

Paragraphs 3, 4, 5, 6 - exhibit 22

That he was off the island in Miami over the period ending 14th September, 1971, and Mr. Thyghter was in charge during that period. Usually he would advise Mr. Henry. He can't recall if he did on this occasion.

He stated it is not true that one of the drivers left with the company's money. He stated that the driver's report and money were given to the superintendent of plant, Mr. Edwards, to be written up, although it was not the usual practice, but this was not done until the following day. That this was clarified with Henry. Mr. Edwards denied this.

Mr. Lee stated that he had discussions with Henry on this letter and they agreed on certain things that were wrong i.e. the driver not turning in his cash was explained; and explanation given on the other points raised. That he referred back to the facilities being provided and pointed out they would be in a worse position for Christmas if he was not provided with more cylinders.

Lee said the 'fiasco' referred by Henry was that there was a breakdown at the plant, with the filling operation. That when they tried to put into service the stand-by plant which is operated by gasolene that also proved fruitless, and as a result it was late in the evening when they got the cylinders. There were customers to service in Red Hills that week and the truck that was routed to Red Hills went over an embankment and they were not able to get the truck back on the road until the Sunday afternoon. The cumulative result of late start on the Saturday they were unable to service some of the customers also because of the Red Hills mishap. He had discussion with Henry who agreed on the explanation given.

Plaintiff in cross-examination stated he does not agree that the statement in paragraph 1 exhibit 22 was correct. That was Henry's views. It was not correct. He stated he is not saying that nothing was wrong with delivery of 100 lbs cylinders. He is saying that in his views it had not fallen that badly. It had fallen but not as badly as Henry had said. The service had fallen as during the period mentioned they suffered from lack of cylinders, empty ones, and they had always had the problem of late starts in the morning because of having to wait until they were filled. **This affected the delivery service because of**

having to wait until the cylinders were filled they normally got a late start, which inevitably would affect the delivery for the day. That trucks usually leave plant 9:30 - 10:30 a.m.

Of course, Mr. Edwards, the plant superintendent, described the physical plant. He stated that the filling of cylinders was done by electrical pumps and there was a stand-by plant, operated by gasoline engine in case of electrical breakdown. He stated the normal time for trucks to leave the plant were 8:30 - 9:00 a.m. He denied that trucks were delayed because of power cuts or not enough cylinders. He stated that when Mr. Lee was at the plant, Lee insisted that the trucks be checked before leaving the plant but when he is not there the drivers always complain that the truck is not working right. He stated that Mr. Lee was not at the plant every day. That Lee had one Thyghter employed as his assistant who was to see that the trucks leave on time, see that drivers' reports were submitted and all moneys accounted for after the trucks are gone and check with him if there are any complaints so that the matter can be settled. In 1971, Thyghter tried to perform these duties but there was always disagreement with the truck drivers and he had to wait until he saw Lee. He stated at this time delivery of cylinders was about 50 - 65%.

He recalls the drivers referred to in paragraph 2 of exhibit 22 - Cole and Stephens. They were dismissed as Thyghter caught them stealing cylinders.

He stated there was a driver who could not read or write. This driver was never able to make up a report. He can't recall his name. He believes one was Gayle. The new drivers were not conversant with the route and they always brought back the cylinders. When he spoke to them about it they said they did not know the route.

Paragraph 3 exhibit 22

He knows about that. The driver failed to report on the following morning. He tried to locate Lee but was unsuccessful so he contacted the manager and reported the matter to him.

Findings:

Up to this period, as the plaintiff himself admits, deliveries of cylinders had fallen. How badly is very difficult to ascertain on the evidence. Mr. Edwards gave a figure of 50 - 65%.

Exhibit 16a, the 14 day survey done by Mr. Jones, is revealing but it is for this particular period alone.

The correspondence reveals a great sense of dissatisfaction on the part of the writers, in relation to volume of deliveries, there are, however, no precise figures before the court.

This highlights the court's complaint with regard to the pleadings as one seem to be dealing in generalities when viewing the correspondence by itself.

The consequence was that the trial had to be enlarged to cover these areas by the evidence with only limited success. Precise figures are still not available.

Plaintiff admits a fall in deliveries which he ascribes to breakdown at the plant in filling of cylinders and a shortage of cylinders.

I ^{cannot} accept Mr. Lee's evidence in this regard.

The company's complaints deal with non-delivery of filled cylinders. It follows that these are cylinders filled and available for delivery that are not delivered.

I cannot comprehend how responsible officers of the company such as Mr. Henry and Mr. Edwards could, if Mr. Lee is to be believed, well knowing that power cuts had delayed the filling of cylinders and that there was a shortage of cylinders which caused the trucks to leave late, i.e. that it was by the company's own default that caused the breakdown in the delivery system, and yet Mr. Henry would deliberately write letters complaining almost hysterically about the poor state of deliveries.

I find as a fact that if there were power cuts it did not affect the company's capacity to fill cylinders. I also find as a fact that sufficient cylinders were filled by the company and available for delivery.

In 1971, exhibit 11 complains of non-delivery of cylinders. It does not specify the number for 28th and 29th May, 1971. Exhibit 16a is the only precise statement in evidence and is for period 31st May - 14th June, 1971.

Mr. Jones, Marketing Manager, states that exhibit 16a represented one of the worst periods.

I find I can make no findings of fact, up to this period in relation to whether or not the deliveries system had broken down to such a degree to amount to a breach of contract on the part of the plaintiff. Before such a finding could be made, there must be credible evidence before this court, from which the court can evaluate and assess whether or not Mr. Henry's views as expressed in his letters were reasonable or unreasonable, having regard to the evidence.

This evidence is up to this point unavailable to the court: hence this court can make no findings of fact in this regard, at this point.

Mr. Small suggested that Mr. Henry came to the company with preconceived ideas and was determined to find some excuse to terminate the contract, so the company could do the deliveries themselves.

I find that this view of Mr. Small is not justified on the evidence and I reject it.

The essence of the contract is that the plaintiff is obliged to deliver all the filled cylinders ordered. It is the responsibility of the plaintiff to make such arrangements as are necessary to achieve this result even if this entailed late and/or Sunday deliveries.

It is my view, however, that isolated default by plaintiff cannot be said to amount to a breach of contract unless such defaults are of such fundamental a nature to destroy the root of the contract. To assess this, one must examine the overall performance of the contract before one can come to a definitive decision.

Questions to be answered are:

- (1) How many cylinders were filled and available by the company?
- (2) How many of those orders were delivered by plaintiff?
- (3) When were they delivered?

These are some of the matters which, in my view, evidence should be available to the court, alas no such evidence is before the court up to this time, but what I do find and this is admitted by plaintiff, that at times deliveries were not being maintained at a reasonable rate. I find also that no reasonable explanation is forthcoming from plaintiff as to the reason for this default.

Christmas Eve incident - 1971

Plaintiff in his evidence states that Christmas week, 1971, was like any other Christmas. There were a great number of cylinders to be delivered - above average. That they were doing probably 100% in that week that ordinary weeks.

At this time he had the company's four trucks and his two trucks doing deliveries.

Unavailability of Truck

A great deal of controversy developed in the evidence between the parties. Plaintiff alleges that on Christmas Eve one of the company's trucks used in deliveries was withdrawn by the company and sent to the country, where it broke down, thereby depleting the fleet at his disposal and this had an

adverse effect on the deliveries. Plaintiff said he found this out on Christmas Eve morning. Plaintiff said he asked Mr. Hinds for another truck. Hinds promised to do this but he only got this truck at about 4:00 p.m. That it was a much smaller truck than the one sent to the country. Truck sent to the country was a five ton truck and it was replaced by a 1½ ton truck which had a capacity of 15 - 20 cylinders. Five ton truck had a capacity of about 60 cylinders. When he got the 1½ ton truck at 4:00 p.m. they did one trip with it. This has been wholly denied by the company.

Now, which truck was this?

Burke, who gave evidence for plaintiff, stated that on Christmas Eve morning, when he arrived at the plant he did not see his truck in the compound. That he went to Lee's office and enquired of him about the truck and he got no reply. He spoke to plant superintendent, Mr. Edwards, who told him he had got an order from the manager to unload the truck of cylinders that it had on and load it up with goods to go to Montego Bay.

Burke stated that when he had parked his truck mostly empty cylinders and some full cylinders were on it. That he returned to Mr. Lee and reported what Edwards had said. This truck was a five ton and could carry up to 50 cylinders. Its registration number was BV 681.

Being without a truck he remained on the compound until about 3:30 p.m. and in the meantime an unserviceable truck that was there, the company's mechanic was trying to repair it. That he got this small truck at 3:30 p.m. It was loaded and started to make deliveries. He left the plant at 4:00 p.m. He was unable to deliver all cylinders. Truck started to give trouble. It shut off twice and he had to return to the plant.

Mr. Henry gave evidence. He stated he knows about one of the regular delivery trucks being sent to the country just before Christmas. That it was he who sent it to the country to Runaway Bay. It took cylinders. The driver left early morning and got back late as he had had a brake problem with the truck i.e. he did not understand the braking system of the truck. He stated that it is correct that the truck Burke drove had a different braking system from other trucks at Tropical Gas. Driver called the plant that is how he knew the man had a braking problem and Thyghter was sent to help him.

He denied that this truck was sent on Christmas Eve, 1971. He stated he realised that this is an important issue in the case, the date he sent

the truck.

Mr. Hinds gave evidence. He stated he knew about a truck that went to the country sometime in December, 1971. That he first heard about it after it had returned. He remembers about the truck because it developed mechanical defect in the country and was delayed over-night. That this was a truck ordinarily used by Lee. This took place - he does not know the exact date - but it was not near to Christmas. Truck was BV 681. He denied that this truck was unavailable as it had been sent to the country on Christmas Eve. Mr. Edwards gave evidence and stated that one of the trucks used by Lee was sent to the country. That he it was who actually sent the truck. That truck was sent on a week-end, a Sunday. That he is sure of it. There was an emergency in the country which was brought to his attention on the Saturday by Mr. Henry and he sent the truck on the Sunday on Mr. Henry's instructions.

It will be seen that the evidence of the plaintiff and his witness Burke, is in direct conflict with the evidence called by the defendant. If, however, one examines the documentary exhibits it may be helpful. It must be remembered that these documents were prepared at a time when litigation was not contemplated and so ought to be of a reliable nature. Let us examine exhibit 34.

Exhibit 34 is Mr. Lee's bill for deliveries made in December, 1971, and a breakdown on a daily basis of these deliveries. This is plaintiff's document. He prepared and signed it.

Now, the evidence is that the truck, BV 681 is the truck plaintiff alleges was sent to the contry on Christmas Eve. Yet in exhibit 34 BV 681 is shown on the list covering period 1st December - 31st December, 1971, as working for the entire Christmas week and specifically on 24th December, 1971,

Exhibit 35 - Drivers' Reports

These are reports completed by drivers on a daily basis which show the deliveries made. These drivers' reports in respect of BV 681 indicate that it did deliveries on the 20th, 21st, 22nd, 23rd and 24th December, 1971, that these deliveries were made by Mr. Burke. These are Burke's documents. He prepared and signed them. Exhibits 34 and 35 wholly contradict Mr. Lee's and Mr. Burke's contention that BV 681 was unavailable on Christmas Eve for deliveries.

I find as a fact that BV 681 was available and did make deliveries on 24th December, 1971, and I so hold.

Christmas Eve Episode

Mr. Lee's contention supported by Mr. Burke's, is that on Christmas Eve, he was at the plant and that he was without BV 681, and did get a replacement for it i.e. a 1½ ton truck but not until about 4:00 p.m. That one trip was done with this truck. That this truck returned to the plant at about 9:00 p.m. He stated that there were about 50 non-deliveries. That these could not be delivered as they went to the premises but could not make the deliveries as they were C.O.D. and no money was in the house to pay for the cylinders and in some cases it was the wrong address or no one at home. I reject this. I find that Mr. Lee is not speaking the truth. Mr. Burke's reason for the non-delivery was that the truck had shut down twice and so he returned to the plant.

Mr. Edwards stated he went to the plant on Christmas Eve. That Mr. Lee did not come to the plant. The trucks were loaded up and the trucks drove out to make their deliveries. That before the trucks drove out he heard the drivers complaining that they have not seen Mr. Lee and they wanted their money as it was Christmas Eve. That he tried to persuade them to go and deliver the cylinders as Mr. Lee would pay them. Burke was the first one to leave for Harbour View, and while he was gone Abbot brought the pay. The other drivers took their pay and left. When Burke returned from Harbour View he was given his pay but he said it was not right and he would not be going out again. That he parked the truck and left. That at about two o'clock or there-about, two other trucks came in, parked and they also left. That he tried to contact Mr. Lee but failed, so he called the manager, Mr. Henry and told him what was taking place. Later that day he saw Henry and Hinds. Lee never came to the plant that day. That Henry, Hinds and himself had a discussion at the plant, and as a result he returned to the plant Christmas Day. Henry and Hinds came there too. They hired a truck, got a driver, but he did not know the route. They had a Tropical Gas truck driver, Robinson. That they came to the plant because they had cylinders to deliver i.e. the cylinders that were not delivered on Christmas Eve. Three vehicles were used to deliver cylinders on Christmas Day. That Abbot went with ^{the} hired truck driver. Some deliveries were made. Three trucks were used one driven by Thyghter. He denied that on Christmas Eve he drove Mr. Lee's car to buy lunch for Hinds, Lee and himself. He denied that at about 4:00 p.m. Burke was given an old 1½ ton truck which had been repaired to go out on **delivery.**

In cross-examination, he stated that he was not at the plant when the trucks finished their deliveries. He left the plant after 6:00 p.m. On Christmas Day he got to the plant about 7:00 a.m. and left about 3:00 p.m. Henry came to the plant about 8:00 a.m. That they all left together about 3:00 p.m. He stated that he was not present when Henry phoned Mr. Lee, he was told about it. That he was told about this in the morning.

Mr. Hinds stated he went to the plant on Christmas Eve as a result of several telephone calls he received from Edwards. He got there in the afternoon definitely after 2:00 p.m. Can't remember the exact time. He saw Edwards at the plant. Did not see plaintiff there. Edwards spoke to him. He noticed vehicles, noticed almost all the delivery trucks parked in the compound loaded with full cylinders.

This cannot be accurate as Edwards stated when he left the plant at 6:00 p.m. the trucks had not finished their deliveries. Which trucks is he referring to? Six trucks were used on Christmas Eve. Edwards stated that when Burke returned from Harbour View he parked his truck and two other drivers returned and did the same. One of these trucks was driven by Gayle, he does not remember the name of the other driver.

Mr. Hinds stated that he regarded the situation as serious. He tried to get in touch with Lee. He did not succeed. He saw Henry at the plant that afternoon. He denied that Lee and he had lunch at the plant that day. He stated when he left the plant on Christmas Eve the problem had not been resolved.

He returned to the plant on Christmas Day. The trucks were still there. Henry and Edwards were at the plant. Lee did not come to the plant. One driver came at his request.

That he called Lee at his home and spoke to him. That he told Lee of the situation that existed at the plant regarding the non-delivery of cylinders and the unavailability of drivers. That he asked Lee to come down and assist him in resolving the situation. That Lee said that he was getting ready to go out to dinner and could not make it to come down. That Lee gave him the address of Abbot and said he would know where to find the other drivers.

That when he spoke to Lee, at the plant, with him were Edwards and Henry amongst others.

Of course, Edwards said he was told about the phone call. Mr. Hinds said that he told Lee he had his responsibilities and could not tell this to Henry but that Henry was present and if he wished he could speak with him.

He handed the telephone to Henry, who spoke to Lee and told him something. That Henry, Edwards and himself proceeded to try and get the cylinders delivered. That he went for Abbot who accompanied a hired driver. They were not able to deal with the cylinders not delivered.

Mr. Henry gave evidence. He stated that orders would pick up considerably from November moving into December when it would reach its height; sale sometimes doubling during the December month in contrast to the rest of the year.

He remembered Christmas Eve, 1971. That he went to the plant that day close to mid-day. Hinds had preceeded him to the plant. That when he got there it was complete chaos. That the plant superintendent did not know what to do about the outstanding deliveries. He cannot recall seeing plaintiff at the plant when he got there. He saw some of the trucks there. They had undelivered cylinders on them.

He went to the plant on Christmas Day to help to have cylinders delivered that were not delivered on Christmas Eve because of the breakdown of the delivery service. At the plant were Edwards and Hinds. Three trucks delivered cylinders that day. Cylinders delivered were all orders from the previous day.

One truck was driven by Thyghter. One driven by one Robinson, who normally drove the small (25 lbs) cylinder truck, and one driven by a hired driver. Abbot went with him to show him the route.

That he spoke to plaintiff from the plant. Hinds had spoken to plaintiff in his presence. Hinds gave him a message and he could not believe the message Hinds conveyed to him. He asked plaintiff if he understood correctly what Hinds said i.e. that he understood that Lee intended to spend Christmas Day with his family as customary and would not be coming to the plant. He asked plaintiff if he realised the seriousness of the situation. That there was a pause and no reply. That he hung up and went back to loading cylinders. That there were enough cylinders to take three trucks. That Lee knew this. These cylinders were to be delivered from the day before. That he understood Lee's attitude to be if he (Henry) did not deliver them they would remain at the plant; so Hinds, Edwards, others and himself loaded the cylinders and made the deliveries.

It was as a result of this that he terminated the agreement - exhibit 3.

If one examines Edwards' evidence he seems to be saying that Burke left with deliveries for Harbour View and then returned to the plant, parked the

truck with full cylinders aboard and left. He stated Burke left the plant at about 7:30 - 8:00 a.m.

The evidence shows that Burke's route included Harbour View and extended as far as Havendale. He covered Kingston 17 (Harbour View), Kingston 2, 3, part of Kingston 5, 6, 7, 10.

Edwards admitted after checking the company's file which lists the address of customers, that the names of customers on Drivers' Report of Burke dated 24th December, 1971 (part of exhibit 35) that all these customers are in Havendale. This, of course, shows that Edwards was inaccurate when he said Burke went only to Harbour View on the 24th December, 1971, and returned to the plant and parked the truck. He later said that he believed Burke had gone to Harbour View.

I find the evidence of the defendant's witnesses as to time of day and number of trucks somewhat confusing.

Edwards stated Burke returned first then at about 12 o'clock or so two other trucks returned. This suggests that Burke had returned before 12 o'clock. Edwards said Burke returned after 10:00 a.m. Hinds stated he came to the plant after 2:00 p.m. and saw most of the trucks parked loaded with cylinders. Henry stated that Hinds had preceded him to the plant and he got there about mid-day and saw some of the trucks parked. Edwards, however, stated that when he left at 6:00 p.m., the trucks had not finished their deliveries.

Finding of Fact:

I find as a fact:

- (1) that among the vehicles used for deliveries on 24th December, 1971, was BV 681;
- (2) that it was used by Burke;
- (3) that Burke left the plant at about 7:30 - 8:00 a.m., made some deliveries in the Havendale area and returned to the plant before mid-day;
- (4) that there were undelivered cylinders on the truck;
- (5) that Burke parked the truck and left;
- (6) that two other trucks returned at about mid-day with some undelivered cylinders on them. One driven by Gayle;
- (7) that they were parked

(8) that up to 6:00 p.m. when Edwards left the plant, and I accept his evidence that that was the time he left, the other trucks (3) had not yet returned from making their deliveries.

The question is, how many undelivered cylinders were remaining undelivered that could have been delivered?

In relation to Burke, on 24th December, 1971, he took out 45 cylinders and delivered 10 (see exhibit 35). The Driver's Report states he delivered 10 leaving a balance of 35.

Exhibit 35 shows details of deliveries made by Burke and Gayle for the Christmas week as follows:

<u>BURKE - BV 681</u>			
<u>DATE</u>	<u>LOADED</u>	<u>DELIVERED</u>	<u>UNDELIVERED</u>
20. 12. 71	42	40	2
21. 12. 71	56	55	1
22. 12. 71	60	60	-
23. 12. 71	60	47	13
24. 12. 71	45	10	35
<u>GAYLE - BZ 574 - See Exhibit 40</u>			
20. 12. 71	30	27	3
21. 12. 71	60	56	4
22. 12. 71	55	53	2
23. 12. 71	71	60	11

The records are incomplete. There is no evidence before the Court as to how many filled cylinders remained on Gayle's truck. There is also no evidence as to number of cylinders left on the third truck, Edwards gave evidence about.

The only reliable evidence before this court, therefore, of the number of cylinders of which all or a portion might have been delivered are the 35 left on truck BV 681.

We have no evidence as to the time the other trucks returned from making deliveries, or if they delivered all their cylinders or only a part.

But, let us examine the evidence of what happened on Christmas Day.

Mr. Edwards stated three trucks were used including a hired truck.

Exhibit 36 is payment for delivery of 20 cylinders on Christmas Day.

Edwards stated that on Christmas Day, cylinders were loaded for delivery.

Robinson (Tropical Gas driver) took 20 cylinders

Thyghter took 60

Hired truck took 50 or 60.

That these cylinders should have been delivered on the 24th i.e. a total of approximately 130 cylinders.

Hinds in his evidence stated that on Christmas Eve at the plant he saw BV 681 (Burke) and BX 556 among the other vehicles loaded with full cylinders.

Exhibit 35 shows BX 556, on 24th December, 1971, had loaded 40 cylinders and delivered 30 leaving undelivered 10 cylinders. The driver's report shows 15 but this is obviously incorrect. Having regard to Edwards' evidence as to time for delivery of a cylinder (i.e. 8 - 10 minutes) and taking travel time along the route and return to the plant and driver's rest time, would this be a reasonable number delivered for the day? Of course, we do not know the route taken by BX 556.

Mr. Hinds stated that on Xmas day they were not entirely able to deal with the cylinders not delivered. He does not say how many cylinders were undelivered on Christmas Eve and how many were delivered on Christmas Day.

Mr. Henry stated he went to the plant, Christmas Day to have the cylinders delivered, that were not delivered on Christmas Eve. That three trucks delivered cylinders. One driven by Thyghter one by Robinson and one by a hired driver whom Abbot accompanied to show him the route. He stated that there were enough cylinders to take three trucks. That Hinds, Edwards and himself and others loaded the trucks. That this would normally be handled by Lee's drivers and sidemen. In cross-examination he stated on Christmas Eve he did not check to see how many cylinders were undelivered nor did he check to see if any of the cylinders on the trucks were empties. That on Christmas Eve he had no idea how many cylinders should have been delivered. He was told approximately two-thirds of the cylinders were not delivered. That he cannot dispute that 155 cylinders were delivered on Christmas Eve, 1971. (Ref. Exhibit 34) He agreed that total deliveries for month was 5,087 and 25 delivery dates an average of about 203.48 per day. He cannot say how many cylinders were delivered on Christmas Day there

are no precise figures before the court.

All that can be said positively, on the evidence before the court is that on the basis of exhibit 35 Burke's Driver's Report of BV 681 dated 24th December, 1971, there were undelivered 35 cylinders. Gayle BZ 574 - 26 undelivered. BX 556 driver not named - 10 cylinders undelivered. BY 267 Abbot - 21 cylinders undelivered. On exhibit 40, BZ 646 Simpson, 28 undelivered. Exhibit 34 T. 4928 is listed on 24th December, 1971, as having delivered 25 cylinders. There is, however, no Driver's Report in respect of T. 4928. It seems, however, that Driver's Report designated as Hired Truck - Abbot. Part of exhibit 35 is in respect of T. 4928. If this is correct, it would seem that on Xmas Eve 275 cylinders were loaded on all vehicles used and only 155 were delivered. This figure is arrived at as follows:

Exhibit 34 identifies the vehicles used on Christmas Eve and states the number of deliveries:

24. 12. 71	BY 267	39 Cylinders Delivered	
"	BZ 574	29	"
"	BV 681	10	"
"	BX 556	30	"
"	BZ 646	22	"
"	T.4928	25	"
	TOTAL	<u>155</u>	

Exhibit 35 Drivers' Reports:

		<u>LOADED</u>	<u>DELIVERED</u>	<u>UNDELIVERED</u>
24.12.71	BY 267	60	39	21
	BZ 574	55	29	26
	BV 681	45	10	35
	BX 556	40	30	10
Ex. 40	BZ 646	50	22	28
Ex. 35 (Hired truck)	T.4928	<u>25</u>	<u>25</u>	-
	TOTAL	<u>275</u>	<u>155</u>	<u>120</u>

If one examines Exhibit 34, one can almost see the increasing demand for cylinders by customers and see the earlier efforts being made to supply this demand. There is, however, a very significant drop for the 24th December, 1971, in deliveries. There is no question that the demand for cylinders existed, that the defendant company made every

effort to supply this demand. The figures show that 275 cylinders were loaded on the trucks and taken out and only 155 were delivered leaving 120 undelivered. This shows a remarkable high percentage of non-deliveries.

Here the question of available facilities for filling cylinders do not arise, adequacy of cylinders do not arise. Here the cylinders were loaded on board the trucks and the trucks left on their routes and returned without completing the deliveries. It is significant that BV 681 Burke's truck which had a capacity of 60 cylinders were loaded with only 45 and yet he succeeded in delivering only 10 cylinders.

I find as a fact and I so hold that some of plaintiff's drivers made very little attempt to complete their deliveries on Christmas Eve and instead returned to the plant, well before the usual time. That they returned with undelivered cylinders having made no effort to complete their deliveries. I accept Mr. Edwards' evidence as to what transpired at the plant that morning, Exmas Eve, in connection with plaintiff's drivers and that plaintiff could not be located when it became obvious that a crisis was in the making as a result of undelivered cylinders on Christmas Eve.

I find as a fact that plaintiff failed to carry out his obligations under the contract to transport and deliver the cylinders to the company's customers.

I, therefore find that plaintiff is in breach of a fundamental term of the agreement.

Is this a breach that would justify the defendant summarily terminating the agreement?

The correspondence reveal constant complaints by defendant to plaintiff about deliveries. This culminated in the writing of exhibit 22 and exhibit 23 by defendant to plaintiff.

Exhibit 22 and exhibit 23 contemplate termination of the agreement as provided in clause 9 of the agreement - exhibit 1.

The background of this relationship is of some importance up to this date. One would have expected plaintiff to display a little more concern and sympathy for the company's business but in this "Xmas episode," in my view, plaintiff's conduct showed a complete disregard for the company's responsibilities to its customers and his, plaintiff's responsibility to the company. It was the conduct of plaintiff's employees that had resulted in 120 dissatisfied customers. Plaintiff's attitude on Christmas Eve when

contacted, and I accept defendant's witnesses' version of what happened, left a great deal to be desired. I cannot think of an act more calculated to cause irreparable damage to the company's business than the deliberate non-delivery on Christmas Eve and the plaintiff's complete lack of supervision of his employees on this occasion, and plaintiff's unwillingness to make the slightest attempt to put things right when the situation was brought to his attention on Christmas Day. The breach committed by plaintiff was fundamental and went to the root of the contract. Mr. Henry's remark that it was the last straw is most apt.

Having regard to all these circumstances outlined above, under the various headings and on the totality of the evidence, I am of the view that the defendant was justified in summarily terminating the agreement and I so hold.

What effect, if any, would the fact that plaintiff was using two of his own trucks to transport the defendant's products, have on the defendant's right to terminate the contract? None in my view. Plaintiff would have been within his rights to have demanded additional transportation to cope with the volume of deliveries. The fact that plaintiff had to be using his own trucks is evidence that transportation which should be supplied by the company was inadequate.

Once, however, plaintiff assumed the responsibility for the delivery of the cylinders, he was obliged to carry out that responsibility or in the alternative bring to the attention of the defendant the impossibility of transporting that number of cylinders with the company's trucks available in order to afford the company reasonable opportunity to:

- (a) supply additional transportation; or
- (b) make its own arrangements to deliver the cylinders.

Plaintiff did neither, instead, he assumed responsibility for the delivery of the cylinders and his employees then proceeded to abort the deliveries deliberately, on Christmas Eve.

Waiver and Estoppel:

The plaintiff in his reply pleaded waiver and estoppel. It is my view that waiver and/or estoppel do not arise in this case. I believe, the application of the principle is best illustrated in the case of:

Birmingham and District Land Company v. L. & B. N. Railway Company
(1888) 40 Ch. D. 268 at p. 286 in which Bowen L. J. stated:

"If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed without at all events placing the parties in the same position as they were in before."

Again:

" In short, a voluntary concession granted by one party, upon the faith of which the other may have shaped his conduct, remains effective until it is made clear by notice or otherwise that it is to be withdrawn and the strict position under the contract resorted (see Cheshire and Fifoot 6th edition p. 474)."

Here the evidence discloses no concession on the part of defendant company, indeed, the correspondence and other evidence disclose the strongest protest on the part of the defendant company to the conduct of plaintiff in the carrying out of plaintiff's obligations under the contract.

There is nothing in the evidence to indicate that at any time the defendant evinced any intention whatsoever, not to insist on plaintiff's carrying out all his obligations under the contract.

I find, therefore, that waiver and/or estoppel do not arise in this case.

Damages:

If I am in error and the plaintiff's contract was terminated without justification, what would be the measure of damages?

Mr. Small submits that the measure of damages would be the unexpired period of the contract i.e. one year and 10 months.

Mr. Lee stated his profits were \$14,000 per annum.

Mr. Hill, on the other hand, stated that clause 9 of exhibit 1, determines the period of notice and damages should be assessed on the basis of clause 9.

Now, clause 9 of exhibit 1 stipulates that company may terminate the agreement by giving written notice to the contractor at least 60 days in advance of its intention to do so.

Mr. Henry said he wrote exhibit 22 paragraphs 4, 5, 6. Exhibit 22 seem to be framed as a notice as required by clause 9 of exhibit 1. Henry did not give it to Lee as they had a discussion about exhibit 22 and according to Henry Lee promised to do better. Henry stated that the promised improvements were not forthcoming and as a consequence he wrote exhibit 23 dated 4th October, 1971, enclosing exhibit 22 which Lee states

It is clear that exhibit 23 is intended to bring into effect paragraphs 4, 5, 6 of exhibit 22 (i.e. termination of contract by notice).

Exhibit 3 dated 5th January, 1972, terminated the contract forthwith. It follows therefore that when the contract was terminated forthwith by exhibit 3, on 5th January, 1972, plaintiff was under notice of intention by the company to terminate the contract at that time - see exhibits 22 and 23.

Plaintiff is entitled to at least 60 days notice. Up to 5th January, 1972, approximately three months had elapsed.

Although exhibits 22 and 23 invited Mr. Lee to come in and finalise arrangements with Henry for the termination of the contract there is no evidence before this court as to what transpired in the interim. It appears that nothing was done about it.

What damage, if any, has plaintiff suffered by the termination of the contract, exhibit 3? Before exhibit 3, plaintiff was under notice that the contract was being terminated and should come in to discuss the arrangements for achieving this. That was the plaintiff's position. Exhibit 3 terminated the agreement forthwith.

Mr. Small submitted that the measure of damage is that unexpired portion of the contract - one year and 10 months. But how can that be? Plaintiff cannot be in any better position as a result of exhibit 3 than he was before exhibit 3. Damages are intended to put plaintiff in the same position he would be in if the agreement had not been wrongly determined and that position was that plaintiff was under notice of the company's intention to terminate the contract.

Consequently, all plaintiff can claim is damages for a reasonable time it would take the company and himself to reach an agreement as regards termination.

It can be well understood why nothing was apparently done by the company until after the Christmas season. This is the company's busiest time, and to change horses in mid-stream so to speak, might be far more catastrophic for the company. I would hold that a reasonable time would be the period of 60 days during which period plaintiff would be in a position to make arrangement, to find alternative use for his trucks and staff.

Plaintiff stated his profits were \$14,000 per annum. This was not contradicted. I would hold plaintiff's damages be assessed at 60 days at \$14,000 per annum calculated as follows:

- 44 -

\$14,000 divided by number of working days
= 365 less Sundays - 52 days
= 313 multiply by 60 days
= \$2,684.00.

For the above reasons, I would enter judgment for defendant with costs to be taxed or agreed.

W. B. Willkie
Puisne Judge
October 22, 1975