



[2015] JMSC Civ. 260

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN CIVIL DIVISION**

<b>CLAIM NO. 2015 HCV 05028</b>
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<b>BETWEEN</b>	<b>JENNIFER MAMBY-ALEXANDER</b>	<b>1<sup>ST</sup> APPLICANT</b>
<b>AND</b>	<b>ALFRED THOMAS</b> <b>(on behalf of themselves and 92 other</b> <b>residents in the community of Hope</b> <b>Pastures in the Parish of Saint Andrew)</b>	<b>2<sup>ND</sup> APPLICANT</b>
<b>AND</b>	<b>JAMAICA PUBLIC SERVICE COMPANY</b> <b>LIMITED</b>	<b>RESPONDENT</b>

**Lord Anthony Gifford Q.C., and Mrs. Emily Shields instructed by Gifford, Thompson and Shields for the Applicants.**

**Patrick Foster Q.C., and Mrs. Symone Mayhew instructed by Symone Mayhew for the Respondents.**

**Heard: 17 and 25 November 2015**

**HIBBERT, J.**

[1] The applicants who are claimants in the substantive suit, by way of Notice of Application for Court Orders, filed on 27 October 2015, sought the following order:

“(3) The Defendant is restrained whether by itself or any person duly appointed by the Defendant and acting as its servant or agent, from disconnecting the underground supply of electricity provided to any of the 94 residents represented in this action, without their agreement, until trial of this matter or until further order”

[2] On 25 November, 2015 I delivered an oral judgment and now, with amplification, present it in writing.

[3] Between 1953 and 1962 a community called Hope Pastures was developed in the parish of Saint Andrew and, in at least a part of that development, it was agreed that cables for the supply of electricity and other utilities would be run underground. This option was chosen by purchasers because it eliminated what was described as unsightly poles and wires running from the street to their homes. To obtain this option it is said an additional fee had to be paid. Easements were granted to the respondent to enable it to make the necessary connections. These were endorsed on the titles of the purchasers.

[4] Years later problems developed on the system. This resulted in frequent power outages. The defendant then installed an overhead system to serve the residents who were using the underground system and engaged them in discussions, aimed at having them convert to the overhead system. Some residents, however, refused on the basis of aesthetics and the cost which would be incurred by them to upgrade the wiring to their homes and to obtain the necessary certification in order for connection to be made by the respondent.

[5] In about October 2015 serious power outages occurred affecting customers connected to the underground system. It was discovered that one of three circuits was defective and that it had caused the failure of the entire remaining working portion of the underground system. Once replacement parts were sourced the defective circuit was isolated and electricity supply was restored to those residents who were connected to the two functioning circuits. Some residents contend that the outages were deliberately caused by the defendant in order to coerce them to use the overhead system. This was denied by the respondent.

[6] The applicants assert that the failure of the system is as a result of the neglect of the respondent in its duty to properly maintain it. Further, they say, since they have

already paid to have the underground system installed, costs for transferring to the overhead system should be borne by the respondent.

[7] The respondent agrees that it has a duty to maintain its supply system but contends that because the underground system is old and obsolete it is very costly and difficult to maintain. It further contends that its obligation is to provide electricity and is not obliged to provide it by any particular means. It is ready and able to supply electricity to all the residents of Hope Pastures, albeit from the overhead system.

[8] Attached to the affidavit of Mr. Marvin Campbell, filed on behalf of the respondent is a copy of the Standard Terms and Conditions of Service, issued by the respondent. In this document provision is made for the supply of electricity to consumers by way of an underground service. At sheet No. 214 it states:

“Consumers desiring an underground service from the Company’s overhead system are required to notify the Company accordingly, after which they may arrange for the work to be carried out at the consumer’s expense.”

[9] On behalf of the applicants it was submitted that there is a strong arguable case that the respondent had no right to impose an overhead system nor to require charges to be borne by residents, but rather has a duty to maintain the underground system. It was also submitted that the balance of convenience favours the applicants as the defendant had already erected poles and had installed power lines which would remain and had indicated that it had no intention of disconnecting persons served by the underground system. Further, the grant of the injunction could cause no damage to the defendant hence the question of inadequacy of the undertaking as to damages would not arise.

[10] On behalf of the defendant Mr. Foster, Q.C., submitted that the injunction ought not to be granted as there was no cause of action. For this he relied on the judgment in **Siskena (Owners of Cargo Lately Laden On Board) and Others v. Distos**

**Compania Naviera S.A.** [1979] AC 210. He also submitted that there is no serious issue to be tried as there is no obligation on the part of the defendant to supply electricity in a particular manner, and there was no allegation of a threatened contractual breach. He further submitted that even if there was a serious question to be tried damages would be an adequate remedy and any undertaking given by the applicants would be illusory. He concluded therefore that the balance of convenience would favour the defendant.

[11] I find that the case of *Siskena* is not applicable to the matter before me. In that case the following was stated:

- (i) the injunction sought in the action, had to be part of the substantive relief to which the plaintiff's cause of action entitled him; and the thing that it was sought to restrain the foreign defendant from doing in England had to amount to an invasion of some legal or equitable right belonging to the plaintiff in this country and enforceable by a final judgment for an injunction; that in the instant case the cargo-owners had no legal or equitable right or interest in the insurance moneys payable to the shipowners in respect of the loss of the vessel, which was enforceable here by a final judgment of the High Court, for all that they had was a claim to monetary compensation arising from a cause of action against the shipowners which was not justiciable in the High Court without the shipowners' consent, which they withheld; and that, accordingly, notice of the writ would be set aside."

In the instant case, however, the application for an injunction does not stand alone as there is also a substantive claim before the court.

[12] Both Lord Gifford Q.C., and Mr. Foster Q.C., on behalf of the parties relied on the decision in **American Cyanamid Co. v. Ethicon Ltd.** [1975] 1 All E.R. 504 for the principles which should guide the granting of an interlocutory injunction. These are to be found at page 510 of the judgment at paragraphs e to i which states:

“It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that ‘it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing’ (*Wakefield v. Duke of Buccleuch*). So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

As to that, the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his rights to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be

in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction."

[13] In the instant case the applicants are seeking to preserve a right which they claim, to be served by the underground system, and not to be forced to be connected to the overhead system thereby incurring substantial costs. Having examined the evidence on affidavit before me I find that there is a serious question to be tried.

[14] During submissions, Mr. Foster Q.C., indicated to the court that the respondent had no intention of deliberately terminating the underground service to the applicants. That being the case, it would suffer no inconvenience as the grant of the injunction would not hinder their provision of service to others by way of the overhead system. On the other hand if the service to the applicants was terminated the applicants would either remain without service or be forced to adopt the overhead service with its attendant costs. I find therefore that *the* balance of convenience lies in favour of granting the interlocutory injunction.

[15] If the applicants were to succeed in obtaining a permanent injunction against the respondent and if prior to that the respondent had terminated their underground service, I do not believe that damages would be an adequate remedy. They would have been without electrical service even if they opted to mitigate by using the overhead service as it would take time for the re-wiring of their homes and to obtain the necessary certification. The loss I believe, would be difficult to quantify. On the other hand, should the respondent succeed at trial, the claimants would be financially able to compensate the respondent which would have, based on the submissions, suffered no loss.

[16] The applicants having given an undertaking as to damages I would therefore grant the interlocutory injunction sought by the applicants. I, however, find that the terms of the injunction sought are too wide and need to be modified. The order therefore is:

The defendant is restrained whether by itself or any person duly appointed by the defendant and acting as its servant or agent from deliberately disconnecting the underground supply of electricity provided to any of the 94 residents represented in this action without their agreement until the trial of this matter or until further order except in accordance with the circumstances stated in paragraphs (a) to (f) of the Jamaica Public Service Standard Terms and Conditions of Service which state:

- (a) For non-payment on due date of bills for electrical service. In this case, if the consumer has a deposit with the Company as a guarantee or payment of bills, the amount of the deposit may be applied to the payment of bills for service then due and the remainder, if any, returned to the consumer. The application of such deposit to the

payment of unpaid bills shall not affect the Company's legal right to collect unpaid balances by available legal methods.

- (b) For refusal or failure to make a deposit or increase a deposit, when requested, to assure payment of bills.
- (c) When the Company has reasonable evidence that the consumer has been previously disconnected for non-payment at his present or any other location and is receiving service for his own use under a different name in order to avoid past payments due to the Company.
- (d) Because of a dangerous condition on the consumer's premises in wiring or energy consuming devices.
- (e) Because of a fraudulent use of the service or tampering with the Company's equipment.
- (f) For any other violation of its Terms and Conditions which the consumer refuses or neglects to correct within 10 days of the date of a notice in writing from the Company specifying such violation and requiring its correction.

Costs of this application to be costs in the claim.