NMLS

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 15 OF 2008

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE MORRISON, J.A.
THE HON. MRS. JUSTICE MCINTOSH, J.A. (Ag.)

BETWEEN	**BARBARA MCNAMEE**	**APPELLANT**
AND	**KASNET ONLINE COMMUNICATIONS**	**RESPONDENT**

Keith N. Bishop instructed by Bishop and Fullerton for the Appellant.

Christopher Dunkley instructed by Phillipson Partners for the Respondent.

May 11, 14, 21 and July 30, 2009.

SMITH, J.A.

I have had the opportunity of reading in draft the judgment of my colleague N. McIntosh, J.A. (Ag). I agree with it and with the reasons she gives for our decision to allow the appeal in part.

MORRISON, J.A.

I too have had the opportunity of reading in draft the judgment prepared by N. McIntosh, J.A. (Ag.). I agree with it and can add nothing to it.

MCINTOSH, J.A. (Ag.)

1. On the 11th and 14th of May, 2009 we heard arguments in this appeal from a decision in the Civil Division of the Resident Magistrate's Court for the Corporate Area, relating to an award on a claim for special damages and, on the 21st of May, 2009, we gave our decision in the following terms:-

> "Appeal allowed in part. The award of US$5,445.00 for damaged equipment is set aside and the award of US$11,656.00 for loss of earnings plus interest at the rate of 3% from judgment to the date of payment is affirmed. Costs to the Appellant set at $15,000.00".

We indicated then that we would reduce our reasons for this decision into writing and we endeavour to do so now.

The Complaint

2. The Appellant was described in the proceedings below as "the Owner of the premises at 7 Trafalgar Road .... and landlord to the Plaintiff." She was sued by the Plaintiff Company, now the Respondent, for damage to the company's equipment occasioned by an episode of heavy rainfall, on August 24, 1998, upon a leaking roof and faulty drainage. There was also a claim for loss of earnings arising from the resulting disruption of the internet services which the company provided to its customers. This disruption of service was referred to as "down time" and a refund became due to the customers for that loss of service.

3. The learned Resident Magistrate, before whom the claim was heard, found that liability for the damage resided in the Defendant inasmuch as she had failed in her duty to the Plaintiff to keep the premises in good repair and awarded to the Plaintiff the sum of seventeen thousand, one hundred and one dollars in United States currency (US $17,101.00), as special damages.

4. The complaint before this court was that in so doing "the learned Resident Magistrate erred in law in accepting the evidence of the Plaintiff/Respondent without strict proof of each item in the special damages claim".

5. There was a further complaint that "the learned Resident Magistrate erred in law in not finding that the Plaintiff/Respondent's agent had contributed to the destruction of the roof after it was fixed by the Defendant/Appellant thus causing the roof to leak and so would be partly responsible for the damage done to its equipment and to the down time caused by the flooding."

Submissions

6. In his written submissions, Mr. Bishop referred to the contention of the Appellant that "the point of contributory negligence raised by her was never even considered by the learned Resident Magistrate" resulting in the Appellant being placed at a disadvantage as the award against her could have been reduced if that point had been considered and applied. He identified as an issue the question of "whether or not the

Respondent contributed or was liable for the disrepair of the roof over the business place which housed the Respondent's business."

7. From the outset of his oral submission on this complaint, however, it was brought to his attention that what the Defendant was contending below was that there was no negligence on her part and that the damage was caused by the negligence of the Plaintiff. As the learned Resident Magistrate had clearly rejected that contention this ground was unsustainable and Mr. Bishop thereafter engaged the court's attention with the first complaint.

The Law and Claims for Special Damages

8. The parties were of like mind as to the legal principles governing claims under this head of damages. Nonetheless it is useful to briefly refer to those principles here. In so doing we refer to a decision of this court in **Attorney General of Jamaica v Tanya Clarke (nee Tyrell),** Supreme Court Civil Appeal No. 109 of 2002, where Cooke, J.A. provided a helpful review of the authorities dealing with the issue of assessment of special damages.

9. He reviewed cases such as:

(a) Lawford Murphy v Luther Mills (1976) 14 JLR 119, (relied on by the Appellant in the instant case), in which this Court accepted the principle enunciated by Lord Goddard, C.J. in **Bonham-Carter v Hyde Park Hotel Ltd.** (1948) 64 TLR 177 at page 178, that:

> "Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it."

(b) **Ratcliffe v Evans** (1892) 2 QB 524 where Bowen L.J. said at page 532:

> "As much certainty and particularity must be insisted on both in pleading and proof of damages as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage was done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

(c) **Desmond Walters v Carlene Mitchell** (1992) 29 JLR 173 where Wolfe, J.A. (Acting), as he then was, in delivering the judgment of the court said at page 176 C that:

> "Without attempting to lay down any general principles as to what is strict proof, to expect a side-walk vendor to prove her loss of earnings with the mathematical precision of a well organized corporation may well be what Bowen, L.J. referred to as 'the vainest pedantry' ."

(d-f) **Grant v Motilal Moonan Ltd. and Another** (1988) 43 WIR 372; **Ashcroft v Curtin** (1971) 3 All ER 1208 and **Central Soya of Jamaica Ltd. v Junior Freeman** (1985) 22 JLR 152.

10. Then, at pages 8 - 9 of the judgment, the learned judge of appeal said:

"From the authorities reviewed, I extract the following considerations:-

1. Special damages must be strictly proved: **Murphy v Mills; Bonham-Carter v Hyde Park Hotels Ltd.;** (supra)
2. The court should be very wary to relax this principle: **Ratcliffe v Evans**; (supra);

3. What amounts to strict proof is to be determined by the court in the particular circumstances of each case: **Walters v Mitchell; Grant v Motilal Moonan Ltd. and Another** (supra)

4. In the consideration of 3. supra, there is the concept of reasonableness.

   a. What is reasonable to ask of the plaintiff in strict proof in the particular circumstances **Walters v Mitchell; Grant v Motilal Moonan Ltd. and Another** (supra) and

   b. What is reasonable as an award as determined by the experience of the court: **Central Soya of Jamaica Ltd. v Junior Freeman.** See also **Hepburn Harris v Carlton Walker** SCCA No. 40/90 (Unreported) ...

5. Although not usually specifically stated, the court strives to reach a conclusion which is in harmony with the justice of the situation. See specifically **Ashcroft v Curtin; Bonham-Carter v Hyde Park Hotels Ltd.** (supra)."

These considerations clearly encapsulate the applicable law.

The Debate

11. The debate in the instant case was concerned not with the principles but with the application of the principles. The Plaintiff had claimed in United States dollars the replacement cost of:

One (1) Desk	300.00
One (1) Pentium pro server	2,700.00
One (1) Pentium 200MHz computer	1,950.00
One (1) APC UPC	600.00
Three (3) surge guards @ $65.00	195.00
Two (2) line conditioners @ $200.00	400.00

as well as loss of earnings with respect to 1457 customers, for 4 hours down time, at the rate of US$2.00 per hour. This latter claim was the subject of an amendment granted, unopposed it appears, on the 15th of May, 2006, the day of the hearing.

12. It was the Appellant's contention that no proof was provided for these losses – no receipts or invoices to support the sums claimed - and it was submitted that what transpired before the Resident Magistrate was no more than throwing figures at the court which is not acceptable; that even if the Respondent was unable to provide internet service for four hours, there was no proper proof of the customer base nor was there any proper proof of the rate of US $2.00 per hour used by the Respondent. The Respondent could have produced accounting records, contracts with its customers or some other supporting documents.

We point out here that there was an attempt to introduce some computer generated documents but the Defendant had successfully challenged their admission into evidence on the basis that no proper foundation had been laid.

13. Mr. Bishop referred to the recent decision of the Court of Appeal in **Bevad Limited v Oman Limited** SCCA No. 133/05, delivered July 18, 2008, where at page 32, Harris, JA, with whom the other members of the panel agreed, pointed out that certain items of special damage claimed in that case such as the cost of transfer, the agreement for sale and other miscellaneous costs had not been proved. The learned judge then said:

> "These are special damages and must be specifically proved ... This was not done. The respondent is therefore barred from recovering these sums."

14. On the other hand, Mr. Dunkley argued that the learned Resident Magistrate was entitled to act on the evidence of the Plaintiff's witness, Christopher Elliott, as he was the company's Managing Director and Chief Technical Officer with knowledge of the replacement cost of the damaged equipment, the customer base and the rate for the assessment of the loss of revenue resulting from the disrupted service.

15. Furthermore, the witness had a report to present to the court concerning the customer base and the loss of revenue to which objection was taken but as Mr. Elliott was merely seeking to present a record which he himself had compiled he was able to give viva voce evidence along the same lines as the contents of the report and the

court had accepted his evidence. This, Mr. Dunkley argued, was acceptable proof of those damages.

16. He referred to the case of **Commissioners for the Executing Office of Lord High Admiral of United Kingdom v Owners of Steamship Susquehanna** (1926) A.C. 655 where Viscount Dunedin stated at page 5 that:

> "If there be any special damage which is attributable to the wrongful act that special damage must be averred and proved and if proved, will be awarded."

It was Mr. Dunkley's submission that the court having found that there was damage in the instant case and that the Defendant was liable for that damage, the award was properly made on the basis of the oral evidence advanced in proof of the claim.

Were the Special Damages Strictly Proved?

17. In making the award for special damages the learned Resident Magistrate disallowed the claim for one desk and 2 line conditioners on the finding that there was no proof of loss in relation to those items. Indeed, a perusal of the Notes of Evidence revealed that Mr. Elliott gave no evidence in support of that part of the claim so that the Resident Magistrate was quite correct to exclude them from her award. But what of the other items?

18. In his evidence in chief Mr. Elliott spoke of the items remaining for the Resident Magistrate's consideration. In relation to the damaged equipment he gave his

recollection of the replacement value for each item. However, when he was cross-examined, he indicated that invoices were available thus making it clear that strict proof was available. This was not a case where he was saying, for instance, that there were invoices but they were no longer available say perhaps because of the flooding in the office. Instead, when he was questioned by Mr. Bishop about the price of US $2,700 for the Pentium pro server he said (at page 59 of the notes of evidence), "I can pull invoices to verify that price".

19. When it was put to him that he was just throwing up figures at the court he disagreed and said he should have secured invoices. Here again was another clear indication that strict proof was available and no explanation was given as to why this was not provided. To have accepted what was before the learned Resident Magistrate concerning the damaged equipment was to have required less than the age old principles required. It amounted to no more than writing down particulars and throwing them at the head of the court saying "This is what I have lost; I ask you to give me these damages" and to overly "relax old and intelligible principles" (See **Bonham-Carter v Hyde Park Hotel Ltd.; Ratcliffe v Evans,** supra). There really was no reason to relax the principles because strict proof was available.

20. We are in agreement with the consideration extracted by Cooke, JA from cases such as **Walters v Mitchell** and **Grant v Montilal Moonan Ltd and Another** to the effect that what amounts to strict proof is to be determined by the court in the particular circumstances of each case. Applying that consideration to the instant case

we have come to the view that the learned Resident Magistrate ought to have disallowed the claim for the damaged equipment as strict proof was available and should have been presented to the court. However, she was entitled to accept the evidence of Mr. Elliott as strictly proving the claim for loss of earnings. Mr. Elliott was the company's technical officer. He gave evidence of his qualifications and spoke of his technical skills. He said he developed and designed the entire network and his was the business plan and pricing structure. This was all unchallenged evidence.

21. Further, it was his evidence that he had "*a record of my customer base for Kasnet from the time I started and for 24th August 1998. I imprint the information and I extracted it. I and my staff under my supervision maintain client records. I constantly maintain the database".* The report which he attempted to introduce was his report consisting of information for which he was responsible – information which he had put into the computer and which he had extracted. The learned Resident Magistrate clearly accepted him as a witness of truth and accepted that he was the source of the information which was being imparted to the court. In this event it was not unreasonable for her to have accepted his evidence in strict proof of the claim for loss of earnings. The court determined as a matter of fact that Mr. Elliott's evidence was a reliable base for her determination as to this loss and having done so her finding of fact ought not lightly to be disturbed. To accept his evidence as proving this claim in our view meets the justice of the case - it is to reach a conclusion which is in harmony with the justice of the situation. **(**See **Attorney General of Jamaica v Tanya Clarke**

(nee Tyrell) referring to **Ashcroft v Curtin; Bonham-Carter v Hyde Park Hotels Ltd.** - supra).

22. Mr. Bishop submitted that the Resident Magistrate referred to "almost" 4 hours of down time so that her assessment would be flawed as it would lack precision. The evidence which she clearly accepted spoke to four hours and more and the figure she awarded was on a calculation of 4 hours so that the word "almost" does no real mischief to her finding.

23. In the event that the court was not in agreement with his submissions that the damages had been proved, Mr. Dunkley expressed the view that the court was empowered by its Rules to remit the matter to the Resident Magistrate's Court for the matter to be properly assessed. Mr. Bishop disagreed with this view and cited a number of authorities to show that such a course was not appropriate. However, it appears to us to be wholly unnecessary for the court to embark upon such considerations as the matter was effectively disposed of on the foregoing considerations.

Accordingly, we made the order as set out on page two herein.