

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 66/2011**

**BEFORE: THE HON MRS JUSTICE HARRIS JA  
THE HON MR JUSTICE DUKHARAN JA  
THE HON MRS JUSTICE MCINTOSH JA**

<b>BETWEEN</b>	<b>HUMPHREY LEE MCPHERSON</b>	<b>APPELLANT</b>
<b>A N D</b>	<b>JAMAICA PUBLIC SERVICE CO LTD</b>	<b>RESPONDENT</b>

**Humphrey McPherson appears for himself**

**Mrs Simone Mayhew for the respondent**

**28 November 2011 and 8 June 2012**

**HARRIS JA**

[1] In this appeal the appellant seeks to set aside an order by McDonald Bishop J of 16 May 2011 refusing an application made by him for an injunction. He sought and obtained leave of the learned judge to appeal the order. Curiously, on 26 May 2011, by way of a notice of application for court orders, he sought permission to appeal the learned judge's order. The matter came on for hearing on 28 November 2011, at which time he was advised that he had a pending appeal, and by virtue of section 11(1) (f) of the Judicature (Appellate Jurisdiction) Act, leave to appeal an order relating to an

injunction would not be necessary. On 20 December 2011, we refused the application for the injunction and awarded costs to the respondent to be agreed or taxed.

[2] The appellant is in possession of property known as 18 Farham Road, in the parish of Saint Andrew. The respondent is a public utility company providing electricity service throughout the island of Jamaica. Sometime in June 2000, the respondent entered into a conditional contract with the appellant for the supply of electricity to his property at Farham Road. During the life of the contract, the appellant failed, on several occasions, to make full payment of amounts due and owing on his electricity bills. As a result, on 24 November 2010, an accrued amount of \$171,036.43 was outstanding, following which, the electricity supply to the property was disconnected on 29 November 2010, and the meter removed.

[3] On 30 November 2010, the appellant made payments of \$165,708.22 and \$1,500.00 towards satisfying the outstanding sum, leaving a balance of \$3,730.17. Despite the existing balance, the respondent issued a service order for the restoration of electricity to the appellant's property. However, an attempt made by the respondent to restore the electricity supply was ineffective due to the respondent's inability to gain access to the premises.

[4] On 31 December 2010, the appellant brought an action against the respondent by way of a claim form supported by particulars of claim. His claim against the respondent was stated as follows:

"...pursuant to the Electric Lighting Act, Sections 13 and/or 16 and/or the Regulations there under, and/or Part 17 of the

Civil Procedure Rules 2002, as amended 2006, for a Mandatory Injunction, Declarations, Damages for Breach of Section 13 and/or 16 of the Electric Lighting Act, Damages for Breach of Contract, Trespass, Theft and/or Conversion, Libel and/or Slander, Damages, Interest on the amounts recoverable and Costs WHEREBY on November 29<sup>th</sup>, 2010, the Defendant criminally, wrongfully and illegally disconnected [sic] Claimant's supply of electricity to the premises situated at 18 Farham Road, Kingston 11.

On November 30<sup>th</sup>, 2010, the Claimant paid the outstanding electric bill. [sic] Defendant granted reconnection approval on December 1<sup>st</sup>, 2010, yet Claimant's supply of electricity still have [sic] not been reconnected."

[5] On 6 January 2011, he filed an amended particulars of claim seeking the following orders and declarations:

- "1. That the 1<sup>st</sup> and/or 2<sup>nd</sup> Defendant(s), Marubeni Corporation and/or the Jamaica Public Service Company Limited respectively by themselves their servant or agents, is/are hereby mandated to immediately reconnect the supply of electricity to the premises situated at 18 Farham Road, Kingston 11, in the parish of Saint Andrew, without the electric line traversing a third party [sic] private premises onto [sic] Claimant's premises. This Mandatory Injunction is for a period of TWENTY ONE (21) DAYS or until the trial of this action or until further ordered [sic] on the Claimant giving the usual undertaking as to damages.
2. A Declaration that the Defendants have no legal authority to use Claimant's neighbors' private premises to traverse [sic] Defendant's electrical wire across either of Claimant's said neighbor's premises to reconnect the supply of electricity onto Claimant's premises or to compel the Claimant to agree to said traversing and Defendant's actions constitute an illegal easement amounting to theft, criminality and wrongdoing.
3. A Declaration that the Defendants have no legal authority to trespass on Claimant's neighbor [sic] private

premise [sic] to trespass onto Claimant's premises to remove the electric meter from Claimant's premises.

4. A Declaration that the Defendant have no legal authority to trespass on Claimant's neighbor's private premises to trespass onto Claimant's premises to remove the electric wire traversing Claimant's [sic] through said neighbor's premises from Claimant's premises.
5. A Declaration that the Defendants are liable for the Burglary, Theft and/or Conversion of Claimant's Computer, Proprietary Software, Flat Screen Computer Monitor, computer speakers, Nokia Cell Phone, 1 quart Ketchup, 1 tin Betty Condensed Milk and 1 tin of Tuna.
6. Damages for breach of Section 13 of Electric Lighting Act.
7. Damages for breach of Section 16 of Electric Lighting Act.
8. Damages for Breach of Contract.
9. Damages for Trespass.
10. Damages for Theft and/or Conversion.
11. Damages for Libel and/or Slander.
12. Damages.
13. Exemplary and/or Aggravated Damages
14. Interest on the amounts recovered.
15. Costs."

[6] On the date of the filing of the claim, the appellant filed an application in which he sought the under-mentioned orders:

- "a. That the Defendant the Jamaica Public Service Company Limited by itself, its servants or agents, is

hereby mandated to immediately reconnect the supply of electricity to the premises situated at 18 Farham Road, Kingston 11, in the parish of Saint Andrew. This Mandatory Injunction is for a period of TWENTY ONE (21) DAYS or until the trial of this action or until further ordered [sic] on the Claimant giving the usual undertaking as to damages.

- b. Declaring that the Defendant is in breach of Section 13 of the Electric Lighting Act.
- c. Declaring that the Defendant is in breach of Section 16 of the Electric Lighting Act.
- d. Declaring that the Defendant has no legal authority to use Claimant's neighbors' private premises at 20 or 16 Farham Road, Kingston 11, in the parish of Saint Andrew, to traverse Defendant's electrical line across either of Claimant's said neighbor's premises to reconnect the supply of electricity onto Claimant's premises or to compel the Claimant to agree to said traversing and Defendant's action constitute an illegal easement amounting to theft, criminality and wrongdoing.
- e. Declaring that the Defendant has no legal authority to trespass on Claimant's neighbor's private premises at 20 Farham Road, Kingston 11, in the parish of Saint Andrew, to trespass onto Claimant's premises at 18 Farham Road, Kingston 11, in the parish of Saint Andrew to remove the electric meter from Claimant's premises.
- f. Declaring that the Defendant has no legal authority to trespass on Claimant's neighbor's private premises at 20 Farham Road, Kingston 11, in the parish of Saint Andrew, to trespass onto Claimant's premises at 18 Farham Road, Kingston 11, in the parish of Saint Andrew to remove the electric line traversing Claimant's said neighbor's premises from Claimant's premises.
- g. Declaring that the Defendant is liable for the Burglary, Theft and/or Conversion of Claimant's Computer, Proprietary Software, Flat Screen Computer Monitor,

Computer Speakers, Nokia Cell Phone, 1 quart Ketchup,  
1 tin Betty Condensed Milk and 1 tin of Tuna.”

[7] This court was not furnished with the learned judge’s reasons for the decision. This, however, does not prevent the court from carrying out an examination of the record and the requisite law to determine whether the appellant is deserving of the injunctive relief which he seeks.

[8] Six grounds of appeal were filed. They were couched in the following terms:

- “a. The learned judge was wrong in concluding that there was no legal basis to grant the interim injunction in the face of unchallenged criminal wrongdoing on the part of the Respondent/Defendant breaching Section 16 of the Electric Lighting Act prior to, during and subsequent to the disconnection of the supply of electricity.
- b. The learned judge was wrong in concluding that there was no legal basis to grant the interim injunction in the face of unchallenged discrimination on the part of the Respondent/ Defendant breaching Section 13 of the Electric Lighting Act, by failing to disconnect the supply of electricity from the electric light post on public [sic] sidewalk and refusing to install a light post on public sidewalk at [sic] Respondent/ Defendant's cost for reconnection of supply of electricity to [sic] Appellant/Claimant's premises. Respondent/Defendant knows there is absolutely no way to reconnect without Installing the light post on public sidewalk at Respondent/ Defendant's cost.
- c. The learned judge was wrong to ignore the fact that the Respondent/Defendant did not deny in their [sic] Affidavits that it could have disconnected the supply of electricity from the electric light post on the public sidewalk without trespassing on Appellant/Claimant's premises by trespassing on 20 Farham Road, Kingston 11, then jumping Appellant/Claimant’s fence to remove

the electric meter in breach of Section 16 of the Electric Lighting Act.

- d. The learned judge was wrong to ignore the fact that the Respondent/Defendant did not deny in their Affidavits that it trespassed on Appellant/Claimant's premises to disconnect the supply of electricity by trespassing on 20 Farham Road, Kingston 11, then jumping Appellant/Claimant's fence to remove the electric meter in breach of Section 16 of the Electric Lighting Act.
- e. The learned judge was wrong to ignore the fact that the Respondent/Defendant did not deny in their Affidavits that it trespassed on Appellant/Claimant's premises subsequent to disconnecting the supply of electricity by trespassing on 20 Farham Road, Kingston 11, then jumping Appellant/Claimant's fence to remove the electric line in breach of Section 16 of the Electric Lighting Act.
- f. The learned judge was wrong to ignore the fact that the Respondent/Defendant did not deny in their Affidavits that it discriminated against the Appellant/ Claimant by refusing to disconnect the supply of electricity from the light post on the public sidewalk and refusing to install a light post on the public sidewalk at Respondent/Defendant's cost to facilitate reconnecting of the supply of electricity [sic] Appellant/Claimant's premises in breach of Section 13 of the Electric Lighting Act."

[9] Mr McPherson conceded that the respondent had a right to remove the meter but argued that it had an alternative. He sought to advance arguments to show that he had a serious case to be tried, which, in his view, would suggest that in the circumstances of this case, the balance of convenience warrants the grant of an injunction. In his written submissions he stated at paragraphs iv to ix:

"...

- iv. Appellant/Claimant's submission is that the Court below findings of facts are devoid of all reality and appears to aid and abet the criminal and discriminatory private sector garrison policies of Respondent/Defendant [sic] is wrong an abuse of power and a breaking of the law.
- v. Appellant/Claimant's submission is that the Court below findings of law failed to acknowledge or consider the criminal conduct of Respondent/Defendant, specifically in relation to the malicious unlawful trespass arising from the breach of Section 16 of the Electric Lighting Act is wrong an abuse of power and a breaking of the law.
- vi. Appellant/Claimant's submission is that the Court below findings of law failed to acknowledge or consider the discriminatory conduct of Respondent/Defendant, specifically in relation to Section 13 of the said Act in relation to the disconnection of and failure to reconnect said supply of electricity.
- vii. Appellant/Claimant's submission is that Defendant/Respondent had a choice of lawfully disconnecting Appellant/Claimant's supply of electricity from the Defendant/Respondent's source pole situated on the public sidewalk but chose to criminality [sic] and discriminatory [sic] disconnect said supply of electricity in breach of Electric Lighting [sic] by trespassing on Appellant/Claimant's premises.
- viii. Appellant/Claimant's submission is that the learned Judge abandoned the law, specifically, relevant sections of the Civil Procedure Rules, 2002, as amended CPR, and/or Section 16 and/or 13 of the Electric Lighting Act, in dismissing Appellant/Claimant's application for interim injunction among other relief and appears to be encouraging a trespass and an illegal easement on either of Appellant/ Claimant's said neighbors' inner city garrison situated premises.
- ix. Appellant/Claimant's submission is that the learned Judge ought to have ordered a criminal investigation into the conduct of Respondent/Defendant, specifically in relation to the breach of Section 16 and/or 13 of the Electric Lighting



Act, regarding the disconnection of and failure to reconnect Appellant/Claimant's supply of electricity."

[10] The grant of injunctive relief is discretionary. Accordingly, it is not a remedy to which an applicant is entitled as of right. Although the court is clothed with the power to grant injunctive relief, an applicant, seeking a grant in his favour, must show that the circumstances of his case warrant favourable consideration by the court.

[11] In the well-known and often cited case of ***American Cyanamid Co v Ethicon*** [1975] AC 396 Lord Diplock laid down the general principles for the court's consideration in the grant or refusal of an injunction. In order to obtain a grant of an injunction, there must be a serious issue to be tried. However, if there is a serious issue to be tried and damages are an adequate remedy, an injunction should not be granted. This notwithstanding, where there is a serious triable issue and the claimant would be adequately compensated in damages but the balance of convenience favours a grant, an injunction may be ordered.

[12] In ***National Commercial Bank v Olint Corporation*** Privy Council Appeal No 61/2008, delivered on 28 April 2009, the Privy Council, acknowledging the principles laid down in ***American Cyanamid*** enunciated the basic principle to be one in which the court should adopt a course which appears likely to result in the "least irremediable prejudice" to either party. At paragraphs 16, 17, 18 and 19, Lord Hoffmann stated:

"16 ...It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such

restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in ***American Cyanamid Co v Ethicon Ltd*** [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irreparable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irreparable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the ***American Cyanamid*** case [1975] AC 396, 408:

'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.'

18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted

or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.

19 ...What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in ***Shepherd Homes Ltd v Sandham*** [1971] Ch 340, 351, 'high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted.' "

[13] The first question which arises is whether the appellant has a good or arguable appeal. It has been observed from his amended particulars of claim that he has raised certain issues of law, under sections 13 and 16 of the Electric Lighting Act, which are not relevant to his complaint in support of the mandatory injunction which he seeks.

Section 13 reads:

"13. Where a supply of electricity is provided in any part of an area for private purposes, then, except, in so far as is otherwise provided by the terms of the licence, order or special Statute, authorizing such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled, under similar circumstances, to a corresponding supply."

and section 16 provides:

"16. Any person who unlawfully and maliciously cuts or injures any electric line or work with intent to cut off any supply of electricity shall be guilty of felony, and be liable to be imprisoned, with or without hard labour, for a term not exceeding five years; but nothing in this section shall exempt a person from any proceeding for any offence which is punishable under any other provision of this Act, or under any other enactment, or at common law, provided that no person be punished twice for the same offence."

[14] Arguably, the evidence does not disclose that the respondent had committed any act or acts which could be said to have contravened either of those statutory provisions. The gravamen of the appellant's complaint lies in the failure of the respondent to restore his electricity supply. This gives rise to factual issues surrounding the circumstances under which the reconnection of the electricity supply remained outstanding. Where a case turns upon factual circumstances, an appellant is faced with an almost insurmountable task in satisfying the court that he has a good arguable case: see ***Ketchum International plc v Group Public Relations Holdings Ltd and Others*** [1997] 1 WLR 4.

[15] In his affidavit filed on 26 May 2011, it was the appellant's averment that there are serious issues to be tried, damages would not be an adequate remedy and that he was willing to give an undertaking as to damages. It was also his averment that the respondent had not denied that it could have disconnected the electricity from the pole on the sidewalk and that it could have removed the meter without trespassing on the adjoining premises and then entering his premises by jumping over a fence.

[16] It is obvious that the appellant failed to recognize the important features of his case. As disclosed by the evidence, the appellant executed a conditional contract with the respondent under which he was required to pay for his consumption of electricity on due dates and the respondent was at liberty to discontinue electricity supply for non-payment. Under the Standard Terms and Conditions of the contract the respondent had a right to enter the property for the purpose of carrying out, among other things, the

removal of meters and wires. In breach of the contract, the appellant, on several occasions, failed to fully meet his obligations, resulting in the disconnection of electricity supply to his home. The respondent clearly stated, as disclosed in an affidavit of David A. Flemming, the respondent's legal officer, that it did not refuse to restore the electricity but had been unable to do so as the respondent's agent was unable to gain access to the premises by reason of the gate being padlocked. It is remarkable that, despite the appellant's indebtedness not being fully satisfied, an attempt was made, by the respondent, to restore the electricity. It is without doubt that its effort so to do was thwarted by the appellant's own act as he had failed to make his premises accessible.

[17] In all the circumstances, it could be successfully argued that there is no serious issue to be tried as all of the claims raised by the appellant remain unsupported by cogent evidence and are thereof not maintainable. It follows that there is no likelihood of any prejudice being encountered by the appellant by refusing the injunction while it seems that the respondent would have been severely prejudiced if the injunction were to be granted.

[18] The foregoing are our reasons for the dismissal of the appellant's appeal.

