IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.1985/R286

BETWEEN	CYNTHIA RATTRAY	PLAINTIFF
A N D	JAMAICA TELEPHONE COMPANY LIMITED	DEFENDANTS

Mr. W. B. Frankson, Q.C. and Mrs. M. E. Forte instructed by Gaynair & Fraser for the Plaintiff.

Mr. John Givans instructed by Dunn Cox & Orrett for the Defendants.

JANUARY 31, 1990; FEBRUARY 1, 1990
DECEMBER 20, 1990 AND MARCH 8, 1991

CLARKE, J.

The plaintiff claims against the defendants:

(a) damages for breach of contract,

(b) a declaration that she is entitled to the uninterrupted use of her telephone upon the payment by her of rental and toll charges within a reasonable time after the tender of the customary bill to her and

(c) an injunction restraining the defendant from continuing to disconnect the plaintiff's telephone numbered 9251174.

The defendants deny that they are in breach of contract and contend that the plaintiff is not entitled to any of the reliefs claimed.

The following matters are not in dispute:

1. in 1972 the parties contracted whereby the defendants would furnish the plaintiff with a reasonably efficient telephone service so long as the plaintiff paid the rental and toll charges for the use of telephone numbered 9251141 installed by the defendants at the plaintiff's premises at 17 Stars Way, Kingston 20;

2. Merrick Alexander is the plaintiff's agent and occupies the said premises. He would pay for and use the telephone service at all material times;

3. a condition of the contract or a practice of the defendants' operation required the defendants to furnish to the plaintiff a monthly bill reflecting the monthly rental due and owing by her and the amount of toll charges in respect of toll calls, if any, she made;

4. the plaintiff promptly and regularly paying the rental the defendants were obliged to furnish and continue to furnish to her the services of their plant and equipment;

5. the plaintiff operated the said telephone numbered 9251141 until August 1984 when on her application the defendants allotted in substitution for the said telephone numbered 9251141 a private telephone numbered 9251174. The terms and conditions as to payment of bills and disconnection which were applicable to telephone numbered 9251141 became applicable to telephone numbered 9251174;

6. on or about 26th September, 1985 at a time when the plaintiff's account with the defendants was in credit the defendants disconnected the plaintiff's telephone numbered 9251174 in consequence of which she was deprived of telephone service at the premises aforesaid;

7. on 5th December, 1985 two days after the plaintiff obtained interim injunctive relief the defendants restored the telephone service;

8. on 23rd January, 1986 the defendants again disconnected the plaintiff's telephone numbered 9251174.

As to the disconnection on 23rd January, 1986 the defendants contend that they discontinued the plaintiff's telephone service only partially. According to the defendants' witness, Angella Robinson, although the number was a private number it was a shared line. She asserts that the disconnection was limited to incoming calls and that the plaintiff could and did use the telephone for out-going calls. The plaintiff through the witness, Merrick Merrick Alexander, insists that this second disconnection was total in that the telephone could be used neither for incoming nor for out-going calls. I do not accept the evidence of the defendants' witness as reliable on this issue. Her means of knowledge as to the extent of the disconnection is questionable. She does not say she examined or tested that number and found that the disconnection was partial nor can that be reasonably inferred. I prefer and accept the evidence of the plaintiff's witness who I found to be a truthful witness who deposed to the issue from his own knowledge.

Now, it is to be observed that in the course of the trial learned counsel for the defendants conceded that the disconnection on or about 26th September, 1985 was an error on the defendants' part (contra their pleading) as the new account was then in credit. This important concession

preceded the confirmatory testimony of the defendants' witness, Angella Robinson, supervisor of the Inoperative and Legal Section of the defendant Company. She said this in examination in chief:

> "When the service to Mrs. Cynthia Rattray was disconnected on the first occasion the company made an error because the old number was in credit and it was not applied to the new number. The company did not realise the error and that there was a credit balance on the old account until the Court Order was served. The credit balance was $310.50. After the company got the Court Order it had the number reconnected and arranged for the credit balance to be transferred to the new number. The transfer was done on 17th December, 1985 and was reflected on bill dated 13th February, 1986."

Angella Robinson's admission that the defendants erred in the terms set out above supports unmistakably the unchallenged evidence of the plaintiff's agent, Merrick Alexander, that when in July 1985 he paid the sum of $1,230.76 in respect of the new number he instructed the defendant to apply the credit on the old number to the new number. It is common ground that the defendants failed to do so then. But it is abundantly clear that for some 9 to 10 months after the defendants allotted the new number in substitution for the old number they continued to send to the plaintiff bills for rental in respect of the old number. The plaintiff promptly paid those bills as evidenced by the bills and paid cheques admitted in evidence. This is how, of course, the credit balance on the previous number built up.

Although the defendants contend that they transferred on 17th December, 1985 the credit balance on the old number to the new number they rendered a bill dated 13th February, 1986 reflecting for the first time the transfer of the credit balance on the old number to the new number. By that time the defendants had already disconnected the plaintiff's new number twice.

In my judgment the defendants were plainly in breach of contract when they effected not only the first disconnection but also when they effected the second disconnection. Up to then they rendered no true bill to the plaintiff setting out her indebtedness, if any, up to then, in respect of her use of the new number.

As Mr. Frankson submits, every bill that the defendants issued after the first disconnection was false because every subsequent bill up to 23rd January, 1986 failed to take account of the plaintiff's payments which the defendants wrongfully credited to the account of the old number which was then not in use. If, as Mr. Frankson says, the bills were false as indeed they were, the defendants would have no justification for discontinuing the service.

That disconnection was also unjustified because there is no credible evidence that the plaintiff's payments were in arrears. The bills admitted in evidence as exhibit 3 are the only documentary evidence as regards the alleged indebtedness but they do not support the defendants' contention that $215.47 was then owing after the credit balance of $310.50 is taken into account. According to the defendants the sum of $215.47 includes rental at $33.75 a month from 26th September, 1985 to 4th December, 1985. I pause here to say that as the defendants discontinued service throughout that period they are not entitled to charge rental for service which ex hypothesi they opted not to provide.

However, as the defendants restored service from 5th December, 1985 to 23rd January, 1986, rental and any toll calls made during that period are chargeable. I accept the evidence (oral and documentary) that $128.84 was the sum chargeable for rental and for one toll call made during that period. But that sum is deductible from the credit balance of $310.50 which up to the time of the second disconnection the defendants had not reflected in any bill. As no rental was chargeable from 26th September, 1985 to 4th December, 1985, I hold that the plaintiff was still in credit on 23rd January, 1986. I reject the defendants' assertion that the sum of $174.81 (allegedly incurred between 1st September, 1983 and 24th September, 1985 for toll calls) is deductible from the then existing credit balance. I attach no weight to that piece of evidence unsupported as it is by bills or other documentary evidence. In any case, even if that amount is properly chargeable the plaintiff would by January 23, 1986 enjoy a small credit balance of $6.85 arrived at by subtracting $303.65 ($128.84 plus $174.81) from the said credit balance of $310.50.

Nevertheless the defendants allege by way of counterclaim that the plaintiff is indebted to them in the sum of $1,418.66 in respect of rental and use of the said telephone. In calculating that sum the defendants charged about

one half thereof to rental in respect of the period 12th July, 1985 to 8th October, 1986, although the service was disconnected on 23rd September, 1985, reconnected on 5th December, 1985 and finally disconnected on 23rd January, 1986.

There is no evidence as to what the other half of the sum counterclaimed represents or how it is arrived at. He who alleges must prove. The defendants have failed to establish that the plaintiff owes them money. There will accordingly be judgment for the plaintiff on the counterclaim.

The plaintiff's entitlement to damages relates to both disconnections and the period of time over which she has been without the use of telephone service. As a direct consequence of the breach the plaintiff was deprived of service from on or about 26th September, 1985 to 4th December, 1985 and from 24th January, 1986 to now. What then is the appropriate measure of damages in the circumstances of this case? Is it confined to loss of use and physical inconvenience?

In a proper case damages for mental distress can be recovered in an action for breach of contract. Jarvis v. Swans Tours Limited [1973] 1 All. E.R. 71 (cited by Mr. Frankson) was in the judgment of the English Court of Appeal such a case. There the defendants in breach of contract provided the plaintiff with a holiday largely inferior to what he was led to expect by representations in the defendant's brochure. The court comprising Lord Denning M.R., Edmund Davies and Stephenson L.JJ. allowed the plaintiff's appeal against the quantum of damages awarded by the trial judge who had restricted the award of damages to loss of benefit and physical inconvenience. Stephenson L.J. pointed out that in such a contract the parties contemplated that on breach there might be mental inconvenience, such as frustration, annoyance, disappointment, and that damages could be awarded for such inconvenience.

All that is this case. The plaintiff or her agent suffered loss of benefit and physical inconvenience caused by the defendants wrongfully discontinuing their telephone service. In addition the parties must have contemplated that if the defendants breached the contract to provide telephone service the plaintiff or her agent would be disappointed, annoyed or even frustrated by the defendants' breach.

It is difficult to assess damages flowing from such a breach. Yet a trial judge must do the best he can in the circumstances. It was the plaintiff's agent who applied from the old number for the new number. He was the person who paid the bills and he would use the telephone to make local as well as overseas calls to relatives. Indeed, the telephone was his primary means of communicating with his family overseas. He would also use the telephone on his job as Operations Steward to the Jamaica Racing Commission. It seems to me therefore, that an award of damages in the sum of $20,000.00 in respect of the breach resulting in the plaintiff or her agent being deprived of telephone service for approximately 5 years, would meet the justice of the case. Accordingly I make that award.

What of the other reliefs claimed by the plaintiff, to wit, the declaration and injunction in the terms set out respectively at (a) and (b) of the first paragraph of this judgment?

It is well within the declaratory jurisdiction of this court to grant the declaration sought. Such a declaration would be consistent with the evidence and with the state of the pleadings. I accordingly exercise my discretion and make the declaration in the terms sought.

The injunction the plaintiff seeks is one in aid of her contractual rights. It seeks to restrain the defendants from continuing to disconnect the plaintiff's telephone numbered 9251174. Although the injunctive relief claimed is phrased in a negative form it is a positive obligation on the defendants' part that she seeks to enforce, namely, that the plaintiff promptly and regularly paying the rental the defendants are obliged to furnish and continue to furnish to her the services of their plant and equipment. As I have already found, the defendants were in breach not only when they made the first disconnection but also when they made the second disconnection. Because they have not restored their services to the plaintiff since the latter disconnection, the plaintiff seeks not a prohibitory injunction but a mandatory or restorative injunction.

Should I grant such an injunction to the plaintiff? It clearly is not impossible or impracticable for the defendant to restore their services to the plaintiff. Damages are not adequate since they would not put the plaintiff

in as favourable a position in all respects as if she had received equitable relief in specie. Greater hardship and inconvenience would accrue to the plaintiff than to the defendant if I were to refuse the injunction. In all the circumstances, therefore, I hold that the most just course is to grant the injunction and I accordingly do so.

The defendants must pay the plaintiff's costs which are to be taxed if not agreed.