JAMAICA

IN THE COURT OF APPEAL

R.M. CIVIL APPEAL No. 105/1969

BEFORE: The Hon. Mr. Justice Luckhoo, Presiding
The Hon. Mr. Justice Fox J.A.
The Hon. Mr. Justice Smith J.A. (Ag.)

BETWEEN	S. G. ROBINSON	PLAINTIFF/RESPONDENT
AND	THE JAMAICA TELEPHONE COMPANY LTD.	DEFENDANT/APPELLANT

Mr. W. McCalla for Respondent

Mr. J. Stephenson for the Appellants.

9th & 31st July, 1970

LUCKHOO J.A.:

On the 7th October, 1968, the respondent S. G. Robinson entered into a subscribers service contract with the appellants the Jamaica Telephone Company Ltd., in the form and on the conditions prescribed at Schedule 'A' of the Kingston and Saint Andrew Telephone Licence 1925 and the Jamaica Island Telephone Licence 1945 in respect of business premises occupied by the respondent at 6 Alton Villa Road, Kingston.

At the 8th of March, 1969, the respondent being in default in the payment of moneys due under the contract to the extent of £4.13/- the appellants caused a notice described therein as a Disconnect Notice bearing that date to be sent reminding the respondent that the unpaid balance at the aforesaid date was £4.13/- and informing him that unless payment was received or suitable arrangements were made for the settlement of that account his telephone service would be discontinued on the 20th March, 1969. On the 19th March, 1969, the respondent paid the amount stated on the Disconnect Notice. In the meanwhile the sum of £1.10/- rental under the contract for the accounting period 13th March - 12th April, 1969 (which under the contract was payable in

advance) had become payable on the 13th March, 1969. On the 21st March, 1969 the appellants caused the respondent's telephone connection to be severed on the ground that the respondent was in default in the payment of the amount stated in the Disconnect Notice. Upon ascertaining that the respondent had in fact paid that amount on the 19th March, 1969, the appellants caused the connection to be restored after a lapse of some 8 hours. The respondent thereafter instituted a claim against the appellants in the Resident Magistrate's Court for the parish of Kingston to recover the sum of £150 as damages for breach of the service contract. The learned Resident Magistrate in finding for the respondent and awarding him the sum of £20 as damages held that the Disconnect Notice was an independent contract and that the appellants in causing the respondent's telephone service to be severed were in breach of that contract.

This appeal against the learned Resident Magistrate raises a point of considerable importance both to the appellants as licensees and to service subscribers as to the true nature of Disconnect Notices and the effect, if any, they might have upon the terms of such service contracts.

The appellants in causing the respondent's telephone connection to be severed purported to act under clause 5 of the service contract. Clause 5 in so far as it is material to this matter provides as follows:-

> " 5. I (the respondent) shall be liable at any time and without notice, to have my telephone connection severed and my telephone removed in any one or more of the following events -
>
> > (i) If there shall be any default in the payment of any money due hereunder;"

It is common ground that at the 8th March, 1969, the respondent was in default in the payment of the amount of £4.13/- under the contract. He was, therefore, at that date under clause 5 liable at any time and without notice, to have his telephone connection severed and his telephone removed. As was their practice in the case of defaulting subscribers the appellants caused a Disconnect Notice to be sent the respondent in the terms already mentioned. In addition there appeared on the face

of the Disconnect Notice the following:-

" Dear Subscriber,

We realise that certain circumstances might prevent you from paying your account on time. If you have questions about the service for which you were billed, or if you wish to make payment arrangements, please call our business office and discuss the matter with your service representative."

Indeed the Disconnect Notice was in the standard printed form of such notices with the amount of the unpaid balance £4.13/- as at the specified date, 8th March, 1969, and the proposed discontinuance date, 20th March, 1969, typed in. It is to be observed that severance of a subscriber's telephone connection and the removal of his telephone under clause 5(i) of the Service Contract does not necessarily bring the contract to an end for clause 6 provides that upon action being taken by the appellants under clause 5(i) the subscriber's telephone service may be reconnected upon payment of a reconnection fee of 10/-6d plus all outstanding charges.

It is necessary to understand what the terms of the Disconnect Notice sent to the respondent mean in the context of the terms of the service contract. As has already been stated at the 8th March, 1969, the respondent was already in default of payments of moneys due under the contract and the appellants were entitled to, under clause 5(i) to sever his telephone connection. The appellant did not sever the respondent's telephone connection but instead by the terms of the Disconnect Notice they told him that he had until the 19th March, 1969, to pay the amount stated therein or to make satisfactory arrangements for payment of the same failing which his telephone connection would be severed. Payment was duly made by the respondent within the time specified in the Disconnect Notice and despite this the respondent's telephone connection was severed. Counsel for the appellants, Mr. Stephenson, submits that the Disconnect Notice was a mere indulgence granted the respondent and as such was not intended to and did not affect the legal relations between the parties under the service contract. Mr. Stephenson urges that it is not competent for the respondent to

seek to found a claim upon the basis of a mere indulgence. The principle of promissory estoppel could not therefore be invoked by the respondent to prevent the appellants from relying upon the strict terms of clause 5(i) of the service contract.

Mr. Winston McCalla for the respondent on the other hand submits that the Disconnect Notice is in effect a waiver of the strict provisions of clause 5(i) of the service contract and the respondent's claim is upon the service contract with the strict provisions of clause 5(i) waived and is not a claim upon a promise or representation made by the appellants and as such there is no question of the respondent invoking the principle of promissory estoppel.

It will be observed that Mr. McCalla did not seek to support the learned Resident Magistrate's finding that there was an independent contract created by the Disconnect Notice. I think Mr. McCalla was right in so doing. However, I doubt that there was in any true sense a waiver of the strict terms of clause 5(i) of the service contract. The true position I think is that the appellants represented to the respondent that the strict terms of clause 5(i) would be held in abeyance until the 20th March, 1969, and that if the amount stated in the Disconnect Notice were sooner paid or satisfactory arrangements made before that date for payment of that amount these strict terms would not be invoked. Dispite Mr. McCalla's disavowal of the applicability of the principle of promissory estoppel to sustain his contention that in relation to payment of the amount stated in the Disconnect Notice the appellants could not insist on their strict rights under clause 5(i) of the service contract, it would seem that his contention must eventually rest upon that principle.

In dealing with the contentions advanced by counsel it is therefore necessary to examine the nature of the principle of promissory estoppel. The doctrine had its origin in the case of Hughes v. Metropolitan Ry. Co. (1877) 2 App. Cas. 439 where Lord Cairns, L.C., stated it in the following terms at page 448:-

> " .. it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results - certain

" penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be left in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

In the case of Birmingham and District Land Co. v. London and North Western Ry. Co. (1888) 40 Ch. D. 268 the principle was interpreted by Bowen, L.J. at page 286, as follows:-

" .. 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 before."

Denning L.J. in Central London Property Trust Ltd. v. High Trees House Ltd. (1947) K.B. 130 at page 136 stated the principle in the following terms:-

" .. a promise intended to be binding, intended to be acted on, and in fact acted on, is binding so far as its terms properly apply."

It will be observed that in the High Trees case Denning L.J. did not refer to the need for the actor suffering any detriment i.e. altering his position. In Rickards v. Oppenheim (1950) L K.B. 616, where the High Trees doctrine was applied there was in fact detrimental reliance on the representation made by the defendant in that case. In Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd. (1950) 69 R.P.C. 108 at page 112 (first action) Devlin, J. enunciated the principle in the following terms:-

" The rule that protects a party, in circumstances such as these, is a broad rule of equity and justice. It is not

" thought right that a man who had indicated that he is not going to insist upon his strict legal rights, as a result of which the other party has altered his position, should be able to turn around at a minute's notice and insist upon his rights, however inconvenient it may be to the party who thought he was temporarily relieved. Equity requires that he should give reasonable notice that he is going to resume his strict rights."

In the Court of Appeal both Somerwell L.J. and Cohen, L.J. approved this reasoning and were of the opinion that the principle as laid down by Lord Cairns and Bowen L.J. was applicable. In the second action (1955) 2 All E.R. 657, the principle in Hughes' case was not directly in issue but it was discussed by some of the law lords without disapproval. Viscount Simonds expressed some doubt at the omission of the element of detriment from the formulation of the principle by Denning L.J. in the High Trees case and as restated by him in Combe v. Combe (1951) 2 K.B. 215. Lord Tucker on the other hand expressed some doubt concerning the correctness of the Court of Appeal's decision in the first case in respect of the question of proof of detrimental reliance.

In Emmanuel Ayodeji Ajayi v. R. J. Briscoe (Nigeria) Ltd. (1964) 3 All E.R. 556, Lord Hodson in delivering the opinion of the Privy Council said:-

" Their Lordships are of opinion that the principle of law as defined by Bowen L.J. has been confirmed by the House of Lords in the case of the Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd. where the authorities were reviewed, and no encouragement was given to the view that the principle was capable of extension so as to create rights in the promisee for which he had given no consideration. The principle which has been described as quasi estoppel, and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party. This equity is, however, subject to the qualification -

(a) that the other party has altered his position;

(b) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice,

giving the promisee a reasonable opportunity of resuming his position;

(c) the promise only becomes final and irrevocable if the promisee cannot resume his position."

It would seem that there is a strong current of judicial opinion that a necessary element in the operation of the principle is that the other party - the promisee - has altered his position upon the faith of the promise. With that view I am respectfully in agreement.

Can it be said that in the instant case the respondent altered his position in reliance upon the promise contained in the Disconnect Notice not to disconnect before the 20th March, 1969, if the amount stated therein were earlier paid? I am unable to see that he did so. While it is true that he made the payment in consequence of the receipt of the Disconnect Notice he only did after default what he was bound to do in any event. There was not a tittle of evidence that he altered his position by reason of the receipt of the Disconnect Notice. He could not therefore rely upon the principle of promissory estoppel had the appellants sought to enforce the strict terms of the contract and it follows that he can invoke no such principle to bar the appellants from raising a defence which they could otherwise have raised to his claim. Had he been able to rely upon the principle by way of defence he could also have invoked it to bar the appellant from raising a defence which they could otherwise have raised to his claim for his claim was founded upon the service contract and not upon the appellants' promise. Cf. <u>Bruner v. Moore</u> (1904) 1 Ch. 305 at page 314 <u>per</u> Farwell J. and <u>Hartley v. Hymans</u> (1920) 3 K.B. 475, at page 494 <u>per</u> McCardie J., cases decided upon the old common law principle.

There is, however, a good answer to the appellants' contention that they could rely on the terms of clause 5(i) to defeat the respondent's claim. Admittedly there was default on the part of the respondent in the payment of the amount stated in the Disconnect Notice as moneys due under the contract. When this amount was paid on the 19th March, 1969, the default was remedied. The respondent was no longer in default in the payment of that amount and the appellants could not validly on the 21st March, 1969, seek to sever the respondent's telephone connection on the ground of default in the payment of that amount. This is so despite the presence of the

words "shall be liable at any time" in the first line of clause 5. Those words in my view might entitle the appellants to sever a subscriber's telephone connection and to remove his telephone at any time while a default in the payment of any moneys due under the service contract still subsists but cannot entitle him to do so after the default has been remedied.

However, it was urged on behalf of the appellants that in any event the sum of £1.10/- rental payable in advance for the period 13th March - 12th April, 1969, had already become due and remained unpaid at the 21st March, 1969 when the appellants caused the respondent's telephone connection to be severed and it was contended that they are entitled to rely upon that fact in answer to the respondent's claim even though the act complained of by the respondent was not done in reference thereto or in reliance thereon. The question to be answered in this regard as I apprehend it is this - was there default in the payment of the sum of £1.10/- payable in advance under the contract?

By clause 1 of the service contract the respondent undertook to pay on the first day of each accounting period after the first accounting period (in this case it was agreed that the 13th March, 1969 is the material date in this regard) the sum of £1.10/- together with all sums which shall have accrued during the previous accounting period in respect of local toll, trunk or international calls. There was evidence adduced at the hearing before the learned Resident Magistrate that in practice a monthly statement of account would be tendered a subscriber by the appellants which would inform the subscriber of these charges and that upon such an account payment of the amounts payable under clause 1 would be made by the subscriber. See also clause 17. The respondent testified that as at the 21st March, 1969 he had not yet received a statement of account in respect of his liability to pay the amounts payable on the 13th March, 1969 under clause 1, and this was not denied. The total amount payable under clause 1 on the 13th March, 1969 could not be ascertained by the respondent without the provision by the appellants of such a statement of account and it was therefore an implied condition precedent to the respondent being in default of payment of that total amount or any part thereof that the appellants would provide the necessary statement of account. This not

having been done by the appellants the respondents could not be held to be at the 21st March, 1969 in default in the payment of moneys due under the contract.

In the result I would dismiss the appeal with costs to the respondent affirming the judgment on grounds different from those relied on by the learned magistrate.

FOX J.A.:

The Telephone Company had the right to disconnect the telephone as soon as the Plaintiff was in default in paying any sum due under the agreement. As at 8th March, 1969, this sum was £4.13/-. The Company did not exercise its rights to disconnect the telephone. Instead it sent out a "disconnect notice" to the Plaintiff who by paying the sum of £4.13/- on the 19th March (one day before expiry of the period of grace given by the Notice in which to make payment) nullified the right of the Company to disconnect the telephone which came into existence with default in the payment of that sum. This default was therefore not available to the Company as a defence to the Plaintiff's action. This is not an end of the matter.

On 13th March, the Plaintiff became liable again for the payment of £1.10/- for rent. On the 21st March when the disconnection was made, the Plaintiff was still so liable. The Company pleads this later default as a defence to the Claim. In reply, the Plaintiff contends that in disconnecting the telephone, the Company had purported to act consequent upon the Plaintiff's default in paying the sum of £4.13/-, and not his later default in paying the £1.10/- due for rent, which was still outstanding when the telephone was re-connected on the afternoon of the 21st March. I cannot agree that because the Company purported to exercise a right which had been nullified, it is thereby debarred from advancing a second valid and existing right as a defence to the claim. The action is for damages for breach of the agreement between the parties. The breach alleged is unlawful disconnection of the Plaintiff's telephone. In accordance with Clause 5 of the agreement, the Company is entitled to disconnect the telephone without notice to the Plaintiff upon default in the payment of any money due under the agreement, and unless the Company is estopped by its conduct from insisting on its strict legal rights under Clause 5, these rights should be available as a defence to the claim. Is the Company so estopped? In my opinion, it is. It is estopped by the system which it has introduced for the collection of amounts due under the agreement. Under this system, a bill is first sent to the subscriber which informs him of the amount which is due and owing for rent and charges up to a certain stated period in the bill. If payment is not forthcoming, a

"disconnect notice" follows in which the subscriber is warned that if the amount of the bill which was previously sent is not paid by a stated date, the telephone will be disconnected. In effect, the Company promised not to insist on its strict legal rights under clause 5, and assured the subscriber that disconnection of his telephone for default in the payment of moneys due under the agreement, would occur as a final step in a series of steps designed to inform him of the amount due, and to give him a reasonable time to make payment. Counsel for the Company contends that this promise is without consideration and therefore unenforceable. It is true that absence of consideration for a promise of this kind created theoretical difficulties over which the common law stumbled for centuries. But within the past century, as a result of increasing recourse to a principle of equity, these difficulties have all been swept away, and the fact that, as in this case, there is no consideration to support a promise to vary the agreement does not necessarily have the effect of nullifying the promise. The Company intended its promise to be acted upon. The Plaintiff acted upon its promise. He waited to be informed by a bill of the amount due and owing under the agreement, and took advantage of the time for making payment which was allowed by the system of sending a "disconnect notice". The Company will not now be allowed to go back on that promise. This is so because of the equitable principle to which I have referred and which has been stated by Denning L.J. in Combe v. Combe (1951) 2 K.B. 215, at 220 as follows:-

> " .... where one party has, by his words or conduct, made to the other a promise or assurance which was intended to effect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word."

Counsel for the Company submitted that the principle cannot be applied in this case, because this would be permitting the Plaintiff to

make use of the doctrine of quasi-estoppel as a cause of action, when as Combe v. Combe shows, it is available only as a defence. In Combe v. Combe, there was no consideration for the husband's promise to pay his wife £100 a year free of tax, and so the wife could not enforce this promise. The equitable principle stood alone. It was thought to give a cause of action in itself. The trial judge was of this view. He applied the principle stated by Denning J. (as he then was) in the High Trees case (1947) K.B. 130 - the same principle stated by Denning L.J. which I have quoted above. In his judgment in Combe v. Combe, Denning L.J. continued by explaining that the principle "can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill-effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge". This statement recognizes the difference between an agreement in which there is no consideration and one in which there is consideration. In the former, the doctrine of quasi-estoppel is available only as a defence to an action on the agreement. In the latter, it may also be used to supply the element of enforceability of a promise to modify or vary the original agreement where the promise is given without consideration moving from the promisee. This situation was discussed in Charles Rickards Ltd. v. Oppenhaim (1950) 1 K.B. 616. There, the defendant, buyer of the body of a motor car, waived the stipulation in the original contract which made time the essence. If the body had been completed within the extended time, the defendant would have been estopped from denying that the contract had been performed. In the course of his judgment, Denning L.J. stated the rights of the plaintiff seller at p. 623 (ibid) -

> " If the defendant, as he did, led the plaintiffs to believe that he would not insist on the sitpulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forebearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By

"his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it."

The Company was not entitled to disconnect the plaintiff's telephone without giving him notice of its intention to resume the strict legal position described in clause 5 of the agreement. Such a notice was not given. The disconnection was therefore a breach of the agreement for which the Plaintiff should be able to maintain an action of damages.

The appeal should be dismissed.

SMITH J.A.:

On 7th October, 1968, the defendant company agreed with the plaintiff for the supply to him of telephone services at No. 6 Alton Villa Road, Kingston, where the plaintiff carried on business. The plaintiff said he was a landlord bailiff, rent collector and private detective. The agreement was in writing.

In March, 1969, the plaintiff received a notice from the defendant company, called a "disconnect notice", which stated that as at 8th March, 1969, there was an unpaid balance of £4.13/- on the plaintiff's account and that unless payment was received or suitable arrangements made for settlement of the account telephone service would be discontinued on 20th March, 1969. On 19th March, 1969, the plaintiff paid £4.13/- into the defendant company's offices and was given a receipt. On 21st March, 1969, the plaintiff's telephone service was disconnected. The plaintiff said he was without this service from 7.00 a.m. until 4.00 p.m. on the same day, when the service was restored.

The plaintiff brought an action against the defendant company in the Resident Magistrate's Court for Kingston, claiming £150.0.0 for breach of the agreement to provide him with telephone services. At the trial the defendant company contended that there was no breach of contract, the act of the company in disconnecting the telephone being within the scope of the written agreement. The learned resident magistrate held, on the authority of DeLassalle v. Guildford (1901) 2 K.B. 215, that the "disconnect notice" was an independent contract between the parties and that the defendant company was in breach thereof. He gave judgment for the plaintiff for $40.00 and costs.

On appeal by the defendant company, it was contended that the learned resident magistrate was wrong in law in holding that the "disconnect notice" was an independent contract as there was no consideration for it moving from the plaintiff. This contention is clearly right and it was not sought, on behalf of the plaintiff, to support the judgment on this ground. Learned counsel for the plaintiff, however, submitted that the "disconnect notice" amounted to a forbearance or waiver by the defendant company of its strict rights under the agreement and, in effect, that the plaintiff was entitled to succeed as there was a breach of the agreement.

as waived or as varied by the waiver.

Clause 5 of the agreement between the parties provides that the plaintiff shall be liable at any time and without notice to have his telephone connection severed and his telephone removed if there shall be any default in the payment of any moneys due under the agreement. The plaintiff does not deny that the sum of £4.13/- became due and payable on 13th February, 1969 (see clause 1(b) of the agreement). Under clause 5 he, therefore, became liable to have his telephone service disconnected without notice from 14th February. But the defendant company's witness, Lloyd Barrett, said that when a subscriber does not pay his bill he is sent a disconnection notice telling him the amount he is to pay. He said the system is that when the amount is paid they do not disconnect.

I agree with the submission that the "disconnect notice" constituted a waiver of the defendant company's strict rights under clause 5 of the agreement. The equitable principle affecting waiver was stated thus by Bowen L.J. in Birmingham & District Land Co. v. London & North Western Railway Co. (1888), 40 Ch.D. 268 at p. 286:-

> "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."

In commenting on the above statement, thelearned authors of Cheshire & Fifoot's, the Law of Contract (6th edn.) said, at p. 474:

> "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 restored."

Learned counsel for the defendant company submits, however, that: granted the notice amounts to a waiver, this does not give the plaintiff a cause of action. He directed attention to, and relied on, the following passage in Cheshire & Fifoot's, the Law of Contract (op cit)

p. 474:-

> "It may be said, indeed, that consideration is scarcely relevant, since waiver concerns the modification or discharge of a contract, not its formation. In effect, the waiver is always pleaded by way of defence; it is set up, not as the foundation of an action for breach of contract, but as an answer to the contention that the letter of the original contract must be observed."

But the learned authors responsible for this passage, in an article in 63 L.Q.R. 283, said as follows (at p. 300):-

> "The courts, in fact, have carried the doctrine of estoppel to its logical conclusion. If they are satisfied that there has been forbearance with regard to performance and that one of the parties has proceeded on the assumption that the forbearance is to be effective, they will not allow the arrangement to be repudiated. They have drawn no fine distinctions between waiver or forbearance and variation, or, in this connection between a statement of fact and a promise de futuro. They lay no stress on whether it was the plaintiff or defendant who requested the forbearance, or whether the forbearance occurred before or after performance was contractually due, or whether consideration has been given. Further, the forbearance can be used, as Bruner v. Moore ((1904) 1 Ch. 305) shows, as a weapon of offence, at any rate as a means of obtaining the equitable remedy of specific performance."

So, it would appear that there are circumstances in which a plaintiff can rely on waiver.

In my opinion, it is not necessary for the plaintiff in this case to rely on the defendant company's waiver as the foundation of his action for breach of contract. The way I see it is this: The defendant company waived its right to disconnect the plaintiff's telephone for the sum of £4.13/- which was due and payable on 13th February, 1969 on condition that the plaintiff pay the amount due by 19th March, 1969. The plaintiff fulfilled the condition by payment on that date. The defendant company's

right to disconnect the telephone, which was postponed by the terms of the "disconnect notice", was, therefore, extinguished from the moment of payment. The company could not, thereafter, lawfully disconnect for the plaintiff's failure to pay the sum of £4.13/-.

At the trial and before us, it was sought to justify the defendant company's act in disconnecting on 21st March, on the ground that on 13th March, 1969, a further sum of £1.10/- became due and payable under the agreement for rent and was unpaid on 21st March. So, it was said, on this date, there was an existing right under clause 5 to disconnect. The fact is, however, that the telephone clearly was disconnected for the £4.13/- which the company mistakenly thought was still unpaid. This is so because, apart from the fact that the plaintiff does not appear to have received any bill for the £1.10/- due on 13th March, the telephone was reconnected the same day it was disconnected without further payment by the plaintiff. The fact of reconnection without further payment shows that the company was not purporting to exercise any rights in respect of the £1.10/- then due. In any event, in the light of the evidence given by Mr. Barrett, the defendant company's witness, the company's right to disconnect for this sum could not have been lawfully enforced on 21st March. The effect of his evidence is that there was then in operation a general waiver of the company's right under clause 5 to disconnect for unpaid bills until there had been failure to comply with a "disconnect notice". No such notice had been served on the plaintiff for the £1.10/-. The defendant company cannot, therefore, be allowed to rely on this right as an answer to the plaintiff's claim as the right was in abeyance on the 21st March.

In my judgment, in disconnecting the plaintiff's telephone service when its right to do so had ceased, the defendant company committed a breach of the written agreement which it had with the plaintiff. The foundation of the plaintiff's action is, thus, the agreement as it stood originally and not as waived by the company; the waiver was spent by 21st March and was, therefore, irrelevant. The learned resident magistrate found that the plaintiff suffered damage to the extent of $40.00 because of the disconnection. The

company is, therefore, liable to pay this amount to the plaintiff.

I agree that the appeal should be dismissed.

LUCKHOO J.A.:

The appeal is dismissed with costs $30.00 to the respondent.