JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 48/89

BEFORE: The Hon. Mr. Justice Forte, J.A.
The Hon. Mr. Justice Downer, J.A.
The Hon. Miss Justice Morgan, J.A.

BETWEEN	**DAVID RUDD**	**PLAINTIFF/APPELLANT**
AND	**CROWNE FIRE EXTINGUISHER SERVICES LTD**	**1ST DEFENDANT/RESPONDENT**
AND	**EDWARD TAYLOR**	**2ND DEFENDANT/RESPONDENT**
AND	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**3RD DEFENDANT/RESPONDENT**

R.B. Manderson-Jones for Appellant

Allan Wood instructed by Livingston, Alexander & Levy for 3rd Respondent

8th, 13th November &
20th December, 1989

FORTE, J.A.

This is an appeal from part of the order made on the 22nd May, 1989 by Reckord J. that (i) application for interlocutory injunction as against the 3rd defendant/respondent (hereafter referred to as J.P.S. Co. Ltd) be refused and (ii) action brought against the J.P.S. be struck out on the ground that the same fails to disclose a cause of action against the J.P.S.

On the 13th November, 1989, we dismissed the appeal in respect of the refusal of the interlocutory judgment and allowed the appeal in respect of the striking out of the action. We then promised to put our reasons in writing, and this we now do.

These proceedings originated out of the employment of the appellant as its Managing Director by Crowne Fire Extinguisher on the 30th June, 1988. Arising out of that employment, the appellant was allowed to sublet from Crowne Fire Extinguisher, a house at 17 Wickham Avenue at a rental of $1,000.00 per month. As it turned out, the appellant, not having performed to the standard expected, was, on the 11th January, 1989 dismissed from his employment. Crowne Fire Extinguisher, then made unsuccessful attempts to have the appellant vacate the premises and on the 9th May, 1989, the J.P.S. acting on their instructions and in keeping with the terms of the contract between them to supply electricity at 17 Wickham Avenue, disconnected electricity at those premises. The appellant, then through his attorney, wrote to the Legal Department of the J.P.S., giving a history of the matter, and requesting that the electricity be re-connected at the premises either in the name of the old account i.e. Crowne Fire Extinguisher or in a new account in his name. To this end, he enclosed a Bank Manager's cheque for $5,000.00 as a deposit. He received no answer. He has now sought his remedy in these Courts if any be available to him.

As was the procedure adopted during the course of the arguments - dealing firstly with the refusal of the order for interlocutory injunction, and then with the application to strike out the action against the J.P.S. - so will it now be done.

1. **INTERLOCUTORY INJUNCTION**

Mr. Manderson-Jones contended that the learned judge wrongly exercised his discretion as the affidavit evidence disclosed a strong and clear case upon which the appellant would succeed at the trial of the issues.

He maintained that the J.P.S. in refusing to re-connect the electricity, required of the appellant information which it was not permitted to do by virtue of the provisions of its licence.

Reference was made to section 18 of the Licence (The Jamaica Gazette Thursday 31st August, 1978) which reads thus:

> "The rights of any person desiring to obtain electric service will be subject to his entering into an agreement with the Company in such form as may be established by the the Company from time to time with the approval of the Minister.
>
> Existing terms and conditions of supply shall remain in force until modified by the Company with the prior approval of the Minister. Any approved modification of the standard terms and conditions of supply shall have immediate application on publication in the Jamaica Gazette and in one issue of a daily newspaper provided that where the modification is in the opinion of the Minister of minor importance, the Minister may, if he thinks it proper by order waive the requirement above."

The appellant relied on the "Standard Terms and Conditions of Electricity Service" which was exhibited, and which he invited the Court to say did not permit the conditions laid down by the J.P.S. in respect of his application for electricity.

This contention arose out of the request by the Company for a "Letter from Landlord,Agent or Attorney, stating commencement date of your tenancy and whereabouts of previous tenant."

The request was made by standard memeograph form which is handed to all applicants and is headed "Note to Prospective Jamaica Public Service Company Limited Customers Required References for Contracts."

It is this document, which the appellant contends is in breach and therefore ultra vires the Standard terms and conditions. The J.P.S. the appellant says, is not entitled to request such information, and indeed, being a company charged with the responsibility of supplying the island of Jamaica with electricity such an essential commodity, it was compelled to supply electricity to whomsoever applies for same.

The question for determination is of course whether the request for the information is in fact ultra vires the standard terms and conditions.

Section 18 requires the Minister to approve modifications of the standard terms and conditions, and any such modifications must be published in the gazette. There was no evidence of any modification disclosed in the transcript.

Mr. Wood, in answer, concedes that section 18 of the Licence does restrict the type of contract that the J.P.S. must enter into with its customers, and indeed sets out through the document,"Standard Terms and Conditions," the terms and conditions of the contract. This, however, does not affect the Company's entitlement to determine through certain criteria laid down and notified to the public through the memeograph form already referred, with whom it will enter into such a contract. With this submission I entirely agree.

Section 3 of the Electric Lighting Act provides for the granting of a licence to supply electricity. The relevant section for the purposes of the arguments in this appeal is section 3 (a) which reads as follows:

> "The Minister may from time to time license any Local Authority as defined by this Act, or any company or person, to supply electricity under this Act for any public or private purposes within any area, subject to the following provisions.

" (a) the licence may make such regulations as to the limits within which, and the conditions under which, a supply of electricity is to be provided, and for enforcing the performance by the licensees of their duties in relation to such supply, and for the revocation of the licence where the licensees fail to perform such duties, and generally may contain such regulations and conditions as the Minister may think expedient."

In my view the section is aimed at regulating by means of a licence the conditions under which the Company should supply electricity to its customers. The condition relates not to the means by which the company determines whom should be its customer, but having agreed to supply the electricity, the condition under which this should be done. The company therefore is not restricted in any way in the administrative function of processing applications, and determining with whom it should do business. It may be however that any unreasonable withholding of its services from potential customers who meet all the criteria, could be in breach of its responsibility to undertake the provision of such an essential service and could possibly be the subject of legal action, or a review of its licence. In the instant case, it is my opinion that a request for evidence of the bona fide occupation of the premises in respect of which the application is made, is merely an administrative act, not in breach of any condition, and in any event a reasonable request in the circumstances.

In the statement of claim, the appellant claimed in paragraph 16:

> "In disregard of the plaintiff's request and in breach of its statutory duty the third Defendant has failed to restore electricity supplies to the premises in an account in the plaintiff's name or at all and continues to refuse or neglect so to do, as a consequence whereof the plaintiff has suffered loss and damage and has been put to considerable inconvenience."

In his affidavit in support of his application for interlocutory injunction the appellant averred in paragraphs 13 & 14 as follows:

> "That my Attorney-at-law also wrote the third Defendant on the 10th and 11th May, 1989 requesting restoration of electricity supplies and forwarding a Manager's Cheque for $5,000.00 by way of security and advance payment. I exhibit herewith as 'DR. 5' and 'DR. 6' respectively the said letters dated 10th and 11th May.
>
> That the Third Defendant has not responded to my Attorney-at-law and has not restored electricity supplies."

Neither in the Statement of Claim nor in his affidavit has the appellant set out in any detail what are the breaches of its statutory duty allegedly committed by the J.P.S. It was the submission by counsel for the appellant which disclosed the detailed complaint to which I have already referred and about which I have stated my opinion.

In the case of Esso Standard Oil S.A. Ltd v. Lloyd Chan C.A. 12/88 dated 14th March, 1988 (unreported), this Court, cited with approval and followed the following dicta of Megarry J. in Shepherd Homes Ltd v. Sandham (1970) 3 All E.R. 402, as to the matters which should be considered in an application for a mandatory injunction:

> "..... it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course, grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think that the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation."

This proposition was approved by the Court of Appeal in England in the case of Locabail INternational Finance Ltd v. Agroexport (1986) 1 All E.R. 900.

In the instant case it is conceded on both sides that the injunction being asked for was in fact a mandatory injunction. The case therefore for the appellant has to be unusually strong and clear for the interlocutory injunction to be granted.

In my view for the reasons already stated the appellant has not shown that the probability of success in his action is unusually strong and clear, and the learned judge was therefore correct in refusing to grant the injunction.

In the event, I agree that the appeal against the order refusing the grant of the injunction should be dismissed.

2. **Striking out of the Action against the Respondent**

The order of the learned judge reads as follows:

> "It is hereby ordered that the plaintiff's action against the Third Defendant be struck out on the ground that same fails to disclose a cause of action and/or is frivolous and vexatious.

The order was obviously made by virtue of section 238 of the Judicature (Civil Procedure Code) which reads as follows:

> "238. The Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer; and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

In coming to his conclusion Reckord J, as is disclosed in the agreed Notes of Judgment stated thus:

> "There is no contract between the Plaintiff and the 3rd defendant. When the 3rd defendant disconnected the light: there was no breach of any contract. The 3rd defendant was merely exercising a right under the contract it had with the first defendant there being no contract, the 3rd defendant owed the plaintiff no duty of care. The application for an injunction is hereby refused ..... In view of the findings that I have announced regarding the 3rd defendant's position, there will be an order in terms of the Summons to strike out the action."

In my opinion, no tortious liability can accrue to the J.P.S. for failure to provide electricity, as there is no common law right which requires the Company to provide such a service. It is only in relation to their contractual responsibilities, that the Company can become liable for failing to supply their services. In this case no contract existed between the appellant and the company. The company therefore had no obligation to provide the appellant with electricity. Indeed, it is in pursuance of their contractual obligations with the first-named defendant/respondent that the company terminated services at the home of the appellant. In those circumstances, the company owed the appellant no duty of care and in my opinion cannot be liable in negligence to the appellant.

Mr. Manderson-Jones, however, maintains in ground 2 that the action raises six serious issues to be tried. Most if not all of them relate to the question of whether there was in fact a breach of statutory duty committed by the 3rd defendant/respondent. Only one was fully argued before us, and has been dealt with earlier in this judgment. The statement of claim is, as already stated, void of any details in respect of the claim for breach of statutory duty but having regard to the possibility of amendments to right that error, I have, after very careful and anxious deliberation come to the view that there are triable issues which the appellant should be allowed to advance at a hearing in respect of his allegation of breach of statutory duty.

Consequently, I would strike out the action in respect of the claim for negligence and would allow the action for breach of statutory duty to proceed.

In the circumstances, I would allow in part the appeal against the order, and dismiss it in part.

DOWNER, J.A.:

Before Reckord, J., in Chambers, the Jamaica Public Service Company Limited - Public Service - brought a Summons to strike out the Statement of Claim of the appellant David Rudd on the ground that the claim disclosed no cause of action and/or that it was frivolous and vexatious. The learned judge made an order in terms of the summons and as the appellant Rudd was dissatisfied with that order, he has come to this Court with leave from the Court below.

The averments in the Statement of Claim were negligence and breach of statutory duty on the part of the respondent. It is convenient to examine firstly the claim for breach of statutory duty and it is therefore necessary to set out paragraphs 7 and 16 at pages 8 and 10 of the record:

> "7. The Third Defendant is and was at all material times a company established under the Companies Act and subject to the provisions of its licences under the Electric Lighting Law and Regulations thereunder is under a duty to supply electricity to the public as an essential service."
>
> 16. In disregard of the Plaintiff's request and in breach of its statutory duty the Third Defendant has failed to restore electricity supplies to the premises in an account in the Plaintiff's name or at all and continues to refuse or neglect so to do, as a consequence whereof the Plaintiff has suffered loss and damage and has been put to considerable inconvenience."

No particulars were pleaded. This is surprising in view of Clause 17 and 19 of the Licence. Clause 17 reads as follows:

> "17. The Company shall at all times during the term of this Licence or any extension thereof furnish and maintain a supply of electricity for public and private use in accordance with reasonable standards

"of safety and dependability as understood in the electric utility business."

As for "reasonable standards of dependability" Husey's case [1902] Ch. 411 which is treated later may be helpful.

There is no indication of the specific statutory provision or clause in the licence which it is alleged has been breached. If the plaintiff is to have any prospect of getting off the ground on this aspect of the case, then there must be pleading of the particulars for there to be a case of action. Section 13 of the Electric Lighting Act was referred to in argument to suggest that since there was an application for supply for a house which was previously supplied, that section would have been breached as no attempt was made by Public Service to comply with this provision. The section 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, authorising 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."

Be it noted that Section 15 of the Act regulates the power to cut off supplies. Moreover, the definition, in section 47, of the Act " 'consumer' means any person supplied or entitled to be supplied with electricity by the undertaker." It is arguable that implicit in the combined effect of Sections 13 and 47 is that there are consumers who have the right to enter into a contract and if this statutory entitlement is breached and damage results, there could be a cause of action. In this regard, clause 10 of the Licence which reads -

> "13. The rights of any person desiring to obtain electric service will be subject to his entering into an agreement with the Company in such form as may be established by the Company from time to time with the approval of the Minister."

is probably governed by section 13 which gives an entitlement to supply on an application, so it can be argued that there could be consumers who ought to have a contract which can be put into operation by the coercive power of an injunction.

With respect to Paragraph 16 of the Statement of Claim, the substance of the allegation is that there has been a proper application for reconnection of electricity and that despite a deposit of $5,000.00 (see para. 14 of the Statement of Claim) and a reminder, there has been no reconnection. Again there is a need for particulars to be pleaded. To illustrate how the courts treat inadequately drafted pleadings such as this, it is pertinent to quote from Republic of Peru v. Peruvian Guano Co. (1887) 36 Ch. 489 at p. 496 where Chitty, J., said:

> "If, notwithstanding defects in the pleading, which would have been fatal on a demurrer, the court sees that a substantial case is presented the Court should, I think, decline to strike out that pleading; but when the pleading discloses a case which the Court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation."

This is an apt case where the court should decline to strike out the pleadings. A case which supports the appellant's submission that there is a duty to supply electricity in certain circumstances is Metropolitan Electric Supply Co. Ltd. v. Ginder [1901] 2 Ch. 799 at p. 806 where Buckley, J., said:

> "The company was bound to supply under the statute if asked. The consumer asks. The result is that he thereupon had a right as against the plaintiffs to be supplied."

So in the light of the averments in the Statement of Claim and the authorities, I find that there is an arguable case that Public Service has been in breach of its statutory duty in respect of the appellant.

Secondly, there is an allegation that Public Service was negligent in disconnecting the appellants' electricity supplies. This allegation acknowledges that at the time of disconnection, the appellant had no contract with the Public Service for electricity supplies. To determine whether the learned judge was correct in striking out this claim, on the ground that there was no arguable case of negligence, it is necessary to examine how it was pleaded. Paragraph 9 of the Statement of Claim reads:

> "9. At the time of disconnection of the electricity supplies the Third Defendant knew or ought to have known that the premises were occupied by the Plaintiff as a sub-tenant and that disconnection of the electricity supplies was not directed to be done and was not in fact being done under or by virtue of any order or judgment of a competent court for the recovery of possession of the premises, which are and were at all material times controlled premises under the Rent Restriction Act. Further, the Third Defendant knew or ought to have known that disconnection would interfere with the quiet enjoyment of the premises by the Plaintiff and intended it to so interfere."

The appellant has specified the loss he has suffered and stipulated the particulars alleged are as follows:

> "12. Further and in the alternative the said loss, damage and inconvenience was caused by the negligence of the Third Defendant."
>
> **PARTICULARS**
>
> 1) Failing to take notice that the premises were occupied as a residence by the Plaintiff and his family;
>
> 2) Failing to make proper enquiries of the occupants of the premises before disconnecting electricity supplies;

> "3) Failing to give the Plaintiff the opportunity to have the electricity supplies transferred in his name, before disconnecting the electricity."

The gist of the claim is based on the provisions of the Rent Restriction Act and in particular Section 27, which states that -

> "27.—(1) Except under an order or judgment of a competent court for the recovery of possession of any controlled premises, no person shall forcibly remove the tenant from those premises or do any act, whether in relation to the premises or otherwise, calculated to interfere with the quiet enjoyment of the premises by the tenant or to compel him to deliver up possession of the premises."

The allegation is that this section obliges Public Service to take notice if premises were occupied before disconnecting electricity and that there should be an enquiry so as to give the occupier an opportunity to enter into a contract for elictricity supplies. In stressing that this is a serious issue, it was pointed out that it is impossible to have quiet enjoyment in a modern home without electricity, so a monopoly operating under statutory powers must take into account implications of the Rent Restriction Act and consider the plaintiff a "neighbour" in the terms stated by Lord Atkin in Donoghue v. Stephenson (1932) A.C. 562. There have been a number of modern applications of this principle in relation to statutory powers, since Lord Atkin's dissenting speech in East Suffolk Rivers Catchment Board v. Kent (1940) 4 All E.R. 527; Dorset Yacht Co. Ltd. v. Home Office [1970] A.C. 1004 was another landmark and there was Anns v. Merton London Borough Council (1977) 2 W.L.R. or [1978] A.C. 728. Furthermore, "the categories of negligence are never closed." To my mind, the appellant ought to be given the opportunity to prosecute his claim on the basis of the modern development in the law of

negligence. Breach of the duties pursuant to a statute can give rise to a claim for "statutory negligence". Failure to act when there is a duty so to do or negligent exercise of statutory powers can give rise to a duty of care. This seems to be the basis of the claim in negligence for disconnecting the electricity supplies. These are the issues which the appellant seeks to litigate in a witness action. The learned judge below had a different approach. He stated at page 91 of the record:

> "There being no contract, the 3rd defendant [Public Service] owed the Plaintiff [the appellant] no duty of care."

Further on the same page he continued -

> "In view of the findings that I have announced regarding the 3rd defendant's position, there will be an order in terms of the Summons To Strike Out The Action."

I think that approach was wrong. Even if the case is not a strong one, it merits an examination of the law and facts. The proper test was laid down in the interlocutory proceedings in the great case of Dyson v. Attorney General [1911] 1 K.B. 410, the headnote reads:

> "Order XXV., r. 4, --which enables the Court or a judge to strike out any pleading on the ground that it discloses no reasonable cause of action-- was never intended to apply to any pleading which raises a question of general importance, or serious question of law."

Section 231 of the Judicature (Civil Procedure Code) corresponds to Order XXV., r. 4. In the same case, Fletcher Moulton, L.J., said at p. 418:

> ".....and the Courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, ..."

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I think that the summary method should not have been used to dismiss the appellant's claim so I would allow the appeal against the judge's order which struck out the Statement of Claim. At a trial the respondent will, of course, be able to adduce its defence on law and facts so that nothing said in this judgment is intended to have any effect on the merits of the case at a trial. Perhaps it is necessary to add that I do not agree with Dr. Manderson Jones' submission that clause 20 of the Licence is ultra vires because it offends the constitutional principle of the separation of powers. Clause 20 at p. 43 of the record reads:

> "20. Any dispute between the Company and an applicant for a supply of service, an extension or improvement of service and as to performance by the Company of its obligations under this Licence, shall be determined by the Minister."

All that clause does is to empower the Minister to resolve non-justiciable disputes, a function he shares with the Ombudsman for Public Utilities; save that the Ombudsman investigates and recommends. The Minister decides. See **The Ombudsman Act.**

Was the judge correct in refusing to grant an interlocutory mandatory injunction to the appellant?

The principles which ought to govern the issue of an interlocutory mandatory injunction has recently been considered by this Court in Esso Standard Oil S.A. Ltd. v. Lloyd Chang (Unreported) S.C.C.A. 12/88. The relevant law approved was stated by Megarry, J., in Shepherd Homes Ltd. v. Sandham [1970] 3 All E.R. 402 at 409 and 412. Be it noted that the principle enunciated in this case was approved in Locabail International Finance Ltd v. Agrcexport & Ors. [1986] 1 All

E.R. 901. The first passage, Shepherd Homes, read as follows at p. 409:

> ".....,, it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course, grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think that the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation."

For further emphasis on the high standard at interlocutory stage, Megarry, J., stated at p. 412:

> "Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."

What was the nature of the affidavit evidence relied on by the appellant for injunctive relief? The appellant was employed by Crowne Fire Extinguisher Services Limited on 30th June, 1988 and he was dismissed on 11th June, 1989. Part of the service agreement was that a house at 17 Wickham Avenue, was provided at a monthly rental of $1,000.00 per month. The appellant was a sub-tenant as the house was not owned by his employer. With respect to the electricity, it was contracted for by his employer who gave instructions to disconnect it when the appellant was dismissed. On the same day that the electricity was disconnected there was an application through his Attorney for reconnection and coupled with the application was a deposit of $5,000.00. One of the contested issues in the respondent's affidavit was whether a proper application was

made by the appellant. This is certainly an issue which ought to be decided in a witness action. The respondent contends that as an administrative procedure, they require a reference from consumers which among other requirements stipulated that there should be a letter from the appellant's employer and a letter from his landlord. It was argued on behalf of the appellant that as he was just dismissed from employment there was then no employer and that from the disconnection of electricity at the instigation of his erstwhile employer it was evident that it would be futile for him to expect his employer to write on his behalf as a landlord. In any event, both his employer, Edward Taylor, the Managing Director and principal shareholder of his employer were also before Reckord, J., when these interlocutory proceedings were being heard.

This is a matter that will have to be decided at trial after considering the law and the relevant evidence. Moreover, it was also submitted on behalf of the appellant that the previous application by Crowne Fire Extinguisher Services Limited which was disconnected was not markedly different from his. To my mind, one of the important issues to be decided at a trial is what is the scope and limit of the references Public Service can reasonably request from a consumer against the background of the Electric Lighting Act and the licence in force.

It is against this factual background that it must be decided whether there ought to be a grant of a mandatory injunction at the interlocutory stage. It cannot be said either in the light of the affidavit evidence or the law that this is an unusually strong and clear case. As for the law, this is the nature of a test case. There are difficult points of construction in both the Electric Lighting Act, the Licence and the Rent Restriction Act. Moreover, there is the

equally difficult issue of whether Public Service owes the consumer a duty of care and that they were negligent. The only authority helpfully cited by Mr. Wood in argument was Husey v. London Electric Supply Corporation [1902] 1 Ch. 411. The issues were however different in that case. The plaintiff/ receiver sought a prohibitory injunction to restrain the electric company from disconnecting the electricity supply to him as the new occupier of a hotel where the previous consumer had run up a huge debt. There was no issue that the electric company had refused to enter into a contract with the new occupier nor was there any claim for negligence. In fact, there is a passage in the statement of facts of Husey's case at p. 412 which is instructive, as the utility company did exactly what the appellant suggested. They acted on the basis that they had a duty of care to the consumer not to disconnect forthwith. The passage reads:

> "The corporation then requested him to sign an undertaking that the £4371.2s should be paid within twenty-eight days, and that accounts for the supply of electric energy subsequent to January 18 should be paid weekly during his tenure of the receivership. At this time the receiver had not made any written application for the supply of electric current. He declined to sign the proposed undertaking, and thereupon the corporation threatened to cut off the supply of current at once. The receiver did on January 20 sign an undertaking to pay the corporation for all light supplied since the date of his taking possession on January 17, and for all light which might be consumed during the continuance of the receivership."

It could be that the conduct of the London Electric Supply Corporation in this case is the "reasonable" standard of dependability understood in the electric utility business, seeing that the Electric Lighting Act (1882) U.K. was the model for our Act. Was this then the conduct contemplated by Clause 17 of the Licence? It is certainly open to Rudd

to so contend at a trial, and if the court so finds, then Public Service may well be in breach of its statutory duty in respect of Rudd, or alternatively be liable in negligence.

Be it noted that the receiver as the new occupier of the hotel refused to give the undertaking requested and he had not applied for a contract and it was in those circumstances that Vaughan Williams, L.J., said at page 420:

> "According to my view, whichever may be the right construction of s. 47, it is plain that under the Act of 1882 no one is entitled to demand a supply of electric energy unless and until he has entered into a contract with the undertakers who are empowered to give the supply. In my opinion, the basis of the Act of 1882 is that persons who require a supply of energy shall be entitled to contract with the undertakers for it, provided that the undertakers shall not charge a price exceeding the limits imposed by the provisional order or special Act which authorizes them to supply electric energy, and provided also that the undertakers shall shew no preference. That is provided for in s. 19, the effect of which is that every person within the area shall be entitled to a supply of electric energy on the same terms as those on which any other person under similar circumstances is entitled to a corresponding supply. But that provision assumes that there is already a contract fixing the terms of supply as between the undertakers and some other person who is supplied by them. Then the Act says in effect that any other person within the area who wishes for a supply under similar circumstances is to have a right to insist upon having a similar contract. But that assumes that there will be a contract. And s. 20 is also framed, I think, upon the basis that there is to be a contract between the undertakers and the consumer. The outcome, in my judgment, is this —that the plaintiff is not entitled to any supply of electric current unless and until he has entered into a contract with the defendants for that supply. He has not yet entered into such a contract, and, so long as he has not done so, he is not entitled to have the defendants restrained from cutting off the current. If, as I have already said, the plaintiff is not the 'occupier' of the hotel, if there has been no change of occupation, and the hotel company are still in occupation, a fortiori the defendants ought not to be restrained."

Even in the different circumstances of Husey's case, the learned Lord Justice anticipates circumstances where an applicant 'will be entitled to a contract'. Therefore, if there is a refusal to enter into a contract in the appropriate circumstances, there is room for a mandatory injunction either at the interlocutory or even more so at the final hearing. The appellant has an arguable case, but he does not have so powerful a case as to qualify for an interlocutory mandatory injunction.

C O N C L U S I O N

To my mind, the issues raised in this case are novel and difficult, and it requires to be carefully pleaded, so leave is given to amend the Statement of Claim, as a substantial case has been raised. The appellant should have his day in court as his claim involves points of law of general public importance. It involves the claim of a consumer of electricity to have a supply and this involves the construction of a statute and the scope and limits of the tort of negligence. It is not strong enough to warrant the grant of an interlocutory mandatory injunction, but there should be an order for a speedy trial. It was these considerations which made it appropriate to allow the appeal against the learned judge's order striking out the Statement of Claim and to dismiss the appeal against the order refusing the grant of a mandatory interlocutory injunction on 13th March. An order that there be no order for costs was also made.

MORGAN, J.A.:

This is an appeal from an interlocutory order on a Statement of Claim in which the plaintiff sought to raise a claim against the third defendant for breach of Statutory duty and Negligence in connection with the termination of electricity supply to premises at No. 17 Wickham Avenue. The third defendant says it discloses no cause of action and is frivolous and vexatious, it is bound to fail and should be struck out. Reckord J. accepted that submission and struck it out. Additionally an injunction was sought to order the third defendant to restore electricity supplies to the said premises. This application was refused. The facts arising from this matter have already been related by my brothers and need not be repeated here.

The Statement of Claim runs thus:

(a) Paras. 1-10 recites the preamble and a claim is made for Breach of Statutory Duty by virtue of Section 27 of the Rent Restriction Law against first, second and third defendants. At para. 11 particulars of damage are given.

(b) Para. 12 is a claim against the third defendant only for negligence. Particulars of the negligent acts are recited.

(c) Paras. 13-16 is a claim against the third defendant only, for Breach of Statutory duty in failing to restore electricity supplies to the premises. Particulars of damage are supplied but the Statute breached is not pleaded.

(d) Paras. 17-18 is a claim against the first and second defendants only and is not part of this application.

As to paras. 1-10, in so far as the third defendant acted on the instructions of the first and second defendants, and can, if it wishes, claim to be indemnified by them for liability incurred as a consequence of carrying out their

from occupiers of premises about their occupation prior to an order for disconnection by a valid customer in these circumstances. Neither could they hesitate while the occupier and themselves go through the routine of such an application. Until the party applies and enters into a contract he has no entitlement under the law. If Mr. Jones' argument is good the question could well be asked, what if the occupier is a trespasser who gives some spurious, untruthful and misleading information? This would enentually involve the third defendant into lengthy and expensive investigative processes. Who is to pay?

There is no contractual dealing between the occupier and third defendant which is a legal entity with a monopoly to enter into valid contracts with applicants. Without this, there can be no duty of care.

It has been expressed that the categories of negligence are not closed but it seems to me that what we are asked to do here, is to create a new dudy of care, one impossible of performance, in order to find negligence on facts and circumstances which are not new and have existed for some long time.

In my view paragraph 12 contains no reasonable cause of action.

As to paras. 13-15: Was there a statutory duty to restore electricity supplies to the premises.

The appellant complains that his Attorney sent a letter of application to the Legal Department in New Kingston of the third defendant on the 10th May, 1989 along with a cheque of $5,000.00 with a paragraph therein requesting restoration of the supply. He got no reply and neither was the supply restored. This letter contained a complaint as to the conduct of the first defendant. The Legal Department

instructions, the facts as outlined by the appellant support a prima facie case of a breach of Section 27 of the Rent Restriction Act. I would not think that any of these paragraphs ought to be struck out.

As to Para. 12, the action in Negligence is an action in tort. It is a general principle of law that actions in negligence cannot stand unless a duty to take care is established, otherwise the action must fail. Whether the duty exists or not is a matter of law and not of fact: per Lord Denning M. R. in Letang vs. Cooper (1965) 1 Q.B. 232.

A valid contract existed between the third defendant and the first and second defendants and it is to these persons that a duty of care is owed. The appellant has no common law right to electricity and in fact has no entitlement until a valid contract is signed (Section 13) His existing supply flowed from a contract to which he was not a party - there is no relationship - no nexus between the appellant and the third defendant who acted in accordance with the terms of the contract. I fail to see how a duty of care can be established.

Mr. Mandersen Jones sought to say that a supplier of essential services owes a duty to the occupiers that they are not injured as a consequence of their contractual dealing and that the third defendant was negligent in not making enquiries of the occupier and giving him an opportunity to have the meter order transferred before disconnecting the electricity.

The stark fact is that the third defendant entered into a contract with the first defendant to supply electricity to No. 17 Wickham Avenue. The contracting party gave notice to terminate the contract. It can be no duty placed on J. P. S., or a part of their obligations, to make enquiries

to

it is said considered it was a complaint and kept it. In fact that application should have been sent to the Commercial Office of the Company at Ruthven Road. On the 12th May, 1989 his Attorney on enquiring was told of the error, visited the Commercial Office, and received a Note to "customers required reference for Contracts." Three of these references were required of the applicant: (1) Identification, (2) Letter from landlord, agent or Attorney, stating date of occupancy and whereabouts of previous tenant and (3) Proof of Ownership of premises. He complains that this 'Note' was arbitrarily imposed on him as a prospective customer, was not a part of the Standard term and cannot be used as a basis for electricity entitlement. He submitted that the tenant had done all that he was entitled to do i.e. to send a letter of application and that the third defendant having failed to provide electricity had breached a Statutory duty. It appears that at the time of his visit to the Commercial Office and his receipt of the note, that this Writ was already filed; five days before i.e. on May 12. He had, it appears, complained of a breach before it was breached, and Mr. Wood has said that the third defendant has not communicated to the applicant at any time any refusal to supply electricity. No attempt has been made by the appellant to satisfy the criteria. Be that as it may, the appellant argues that there is a valid application and in breach of the Statute he has not been supplied with electricity.

The "Standard Terms and conditions of Electricity Service," Sheet 203 reads inter alia:-

> "An application for service will be required from each consumer. Such application shall contain the information necessary to determine the type

> of service required by the consumer and the condition under which service will be rendered."

Counsel has not named the Statute breached in his Statement of Claim but he pointed to Section 13 in his Grounds of Appeal to indicate his right to a supply. The additional request for information as a condition to receiving a contract is the breach to which he refers in that a demand is made for information and such information is not required by any Statute and in so doing the third defendants have breached the Statute in failing to restore the electricity to the premises.

Section 13 of the Electric Lighting Act 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.

This Section is equivalent to Section 19 of the English Electric Lighting Act 1882. We were referred by Mr. Wood to Husey vs. London Electric Supply Corporation 1 Ch. (1902) C.A. p. 411. In this matter that Section came up for interpretation and was interpreted by Vaughan Williams Lord Justice as follows:

> "That is provided for in s. 19, the effect of which is that every person within the area shall be entitled to a supply of electric energy on the same terms as those on which any other person under similar circumstances is entitled to a corresponding supply. But that provision assumes that there is already a contract fixing the terms of supply as between the undertakers and some other person who is supplied by them. Then the Act says in that effect that any other person within the area who wishes for a supply under similar circumstances is to have a right to insist upon

> having a similar contract. But that assumes that there will be a contract.

In the course of his arguments Counsel referred to Section 19.

What Section 19 says is that as long as a certain named situation exists as to poles in a given area the third defendant must supply energy to the owner or occupier of premises not previously served without any charges for construction.

Indeed this cannot be done without a contract and it is for the third defendant to satisfy themselves at the time of the application as to proper identification of the owner or occupier, proof of ownership of the premises and in case of the occupier, proof of the landlord i.e. or proper tenancy. These are the same particulars or criteria which the third defendant requested, and they are, it seems to me, reasonable requests. It is well to accept that administrative matters are not and cannot be effectively regulated by enactments in parliament and large companies like the third defendant ought to be afforded some limit to deal with problems as they arise, in a reasonable manner, as long as the requests are not onerous and the rights of citizens are not eroded, in which case they should be cut down.

If that is acceptable then in my view it ought to be reasonable for the third defendant to set criteria in the form as set out in the "Note" about which there is a claim.

Notwithstanding these views I remind myself that it has been said that where the application proceeds on the basis of no reasonable cause of action:

> "the practice is clear. So long as the Statement of Claim or the particulars disclose some cause of action, or raise some question fit to be decided

> by a Judge, the mere fact that a case is weak and not likely to succeed is no ground for striking it out.
> Davey v. Bentinck (1893) 1 Q. B. 185
> Moore v. Lawson 31 T. L. R. 418 C. A.

It is also said that a plaintiff should "not be driven from the judgment seat" and should "have his day in Court."

I have read the draft judgment of Downer, J.A. He has said that there is an arguable case if the pleadings are amended before trial. With great respect, I have grave doubts it will succeed but in view of what I have just said and since the action is proceeding on other claims I will not dissent from allowing the claim as it stands to go forward.

The plaintiff also sought a mandatory injunction to compel the third defendant to restore electricity to No. 17 Wickham Avenue, and this was refused.

Mandatory injunctions are granted only where the case is usually strong and clear. In view of what I have already said it is sufficient to say that there is no basis on which it could be granted in this matter. Forte, and Downer, JJ.A. have set out the facts and reasons and conclusion with which I agree, and anything further would be only repetitive. I agree that the judge did not fall into error in refusing the application for an injunction.