[2016] JMSC Civ. 81

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010 HCV 4354

BETWEEN	**HARRY MORRELL**	**CLAIMANT**
AND	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. Rudolph Smellie for Claimant

Mrs. Symone Mayhew for Defendant

Heard: **23rd - 25th February 2015, 4th June 2015, 16th November 2015 and 16th May 2016**

CONTRACT - UNDER-REGISTRATION OF ELECTRICITY CONSUMPTION - DISCONNECTION OF ELECTRICITY CLAIMANT COMMENCING ACTION AGAINST DEFENDANT FOR BREACH OF CONTRACT AND DEFAMATION - CLAIMANT SUFFERING LOSS RESULTING FROM REWIRING OF PREMISES - CLAIMANT CONTENDING DEFENDANT'S BREACH OF DUTY CAUSED LOSS - WHETHER DEFENDANT BREACHED DUTY - WHETHER BREACH CAUSED LOSS - WHETHER CLAIMANT ENTITLED TO DAMAGES FOR PHYSICAL INCONVENIENCE AND MENTAL DISTRESS - WHETHER DEFENDANT ENTITLED TO PAYMENT FOR UNDER-REGISTERED CONSUMPTION - ASSESSMENT OF DAMAGES.

CORAM: DUNBAR-GREEN, J

Background

[1] On 27th May 2010, two technicians employed by the Jamaica Public Service Company (JPS/defendant) went to the claimant's premises at Lot 377, Wisco

Avenue, Shrewsbury Housing Scheme in the parish of Westmoreland (the premises), in order to investigate a noticeable and significant reduction in the electricity consumption which was being recorded. They were admitted to the premises by the claimant's mother-in law.

[2] On completion of the inspection, the electricity supply was disconnected based on a determination that the under-registration of the electricity consumption was caused by an illegal bypass which rendered the premises unsafe.

[3] Consequent on the disconnection, the claimant spoke to various employees at JPS and was informed that in order for the electricity to be reconnected, the premises needed to be re-certified and the outstanding bill paid.

[4] The claimant engaged a government electrical engineer to inspect the premises and no bypass was found. However, the inspector found other irregularities which required certain electrical works to be done before there could be re-certification.

[5] On 8th September 2010, the claimant filed an action against the defendant for breach of contract. He also sought a mandatory injunction compelling the defendant to restore his power supply.

[6] In Second Further Amended Particulars of Claim, filed on 1st December 2014, the claimant sought damages for malicious falsehood, aggravated and/or exemplary damages and interest.

[7] Special Damages were claimed as follows:

i.	Government Electrical Inspector's Fee		$1000
ii.	Fee for electrician to assist GEI		$100,000
iii.	Cost of First Engineer's Analysis Report	US$3000	
iv.	Cost of Second Engineer's Report	US$2000	
v.	Cost of drilling wall for re-certification		$30,000
vi.	Cost of removing metre socket from wall for re-certification		$30,000
vii.	Cost of removing cables between pothead and metre		$17,000
viii.	Cost of drilling wall around main breaker panel for re-certification		$50,000
ix.	Cost of removing main breaker panel		$35,000

x.	Cost of removing cables		$25,000
xi.	Cost of new metre poll		$30,000
xii.	Cost of transporting and planting poll		$20,000
xiii.	Cost of installing metre socket on poll with main cables		$50,000
xiv.	Cost of installing new breaker panel		$48,000
xv.	Cost of installing new cables between pothead and draw box		$35,000
xvi.	Total cost of new electrical material (panel, breaker, wires etc.)		$130,000
xvii.	Cost of construction material to rebuild drilled walls		$60,000
xviii.	Cost of labour for rebuilding walls		$40,000
xix.	Cost of licensed electrician for mandatory re-certification		$25,000
xx.	Cost of repairing damaged furniture		$60,000
xxi.	Cost of transportation		$45,000
xxii.	Cost of phone calls		$15,000
xxiii.	Cost of hotel accommodation 19th to 30th	US$9000	
	TOTAL	**US$14,000 + $871,000**	

[8] By way of Amended Defence and Counter-Claim filed 15th March 2011, the defendant denied that the claimant was entitled to the reliefs sought. The defendant counter-claimed for the sum of $2,910,760.75 being the total adjustment to the claimant's account as a result of electricity consumed and not registered for the period 29th November 2004 to 27th May 2010. The defendant also claimed interest and General Consumption Tax.

[9] Electricity was restored to the claimant's premises consequent on a court order dated 27th September 2010.

Agreed Documents

[10] The parties agreed the following documents and they were admitted into evidence as exhibits 1-21:

Exhibit 1: Copy of JPS metre change document dated 27/5/2010.
Exhibit 2: Copy of letter from claimant to Mr. Paul O'connor (Government Electrical Inspector) dated 2/6/10.
Exhibit 3: Copy of Historical record of metered electrical usage.
Exhibit 4: Copy of letter dated 19/7/10 from claimant to JPSCO.
Exhibit 5: Copy of letter dated 15/7/10 from defendant to claimant.
Exhibit 6: Copy of e-mail dated 4/8/10.
Exhibit 7: Copy of e-mail dated 9/8/10.
Exhibit 8: Copy of adjusted bill dated 19/8/10.
Exhibit 9: Copy of report on test metre.
Exhibit 10: Copy of standard terms and conditions.
Exhibit 11: Copy of re-certification dated 7/7/10.

Exhibit 12: Copy of letter from defendant to Claimant dated 29/9/10.
Exhibit 13: Copy of defendants back billing procedures
Exhibit 14: Copy of JPSCO Guidelines
Exhibit 15: Copy of GOJ official receipt.
Exhibit 16: Copy of service manual of Panasonic room air-conditioners.
Exhibit 17: Receipt dated 19th September 2010 from Bourbon Beach Resort for the sum of US$9,000.
Exhibit 18: Invoice dated 30th September 2010 from Bourbon Beach Club in the sum of US$9000.
Exhibit 19: Letter from Mr. Vincent Bailey to Claimant dated 14/7/10.
Exhibits 20A-C Wires taken from the socket of claimant's premises on 9th June, 2010.
Exhibit 21: Expert Report of Mr. R. Dacosta.

The Claimant's Case

Mr. Harry Morrel

[11] The Witness Statements of Harry Morrel filed 11th April 2012 and 28th November 2013, with amplification, were ordered to stand as his evidence in chief. Parts of paragraph 32 of the statement filed 11th April 2012, were redacted as being hearsay, prejudicial and of no probative value.

[12] The claimant's evidence was that he had built a two bedroom house under the supervision of a building officer from the NHT and lived at the premises since February 2002. At the time of moving in he had entered into a contract with the defendant for electricity supply. This supply was uninterrupted until 27th May 2010.

[13] Prior to 27th May 2010 he had never been contacted by the defendant about any problems with his electricity supply. However, he had noticed that the electricity bills for the premises were unusually low in the latter part of 2009 and the early months of 2010. He mentioned this to a metre reader in or around March or April 2010.

[14] In a conversation with Mr. Daley, an agent of the defendant, on 27th May 2010, he was told that the electricity had been disconnected because of an illegal connection. He requested that the electricity be restored and that Mr. Daley await

his arrival in about thirty minutes. The requests were denied and he was told that a card would be left at the house.

[15] At approximately an hour after speaking with Mr. Daley, the claimant said he went to the JPS Paradise Office and spoke with Ms. Sarah Nankoo who informed him that he needed to pay a "big bill" before the electricity could be restored.

[16] The claimant said the bill amounted to two million, eight hundred and ninety six thousand, nine hundred and fifty eight dollars and ninety five cents ($2,896,958.95). He refused to sign a payment agreement and rejected the allegation that an illegal or unsafe connection was found at the premises. He also said he told Ms. Nakoo that he was willing to demolish the entire house in order for the JPS to show him evidence of an illegal connection.

[17] Mr. Daley, who was present, refused to return to the premises with him but said that the illegal connection was in a concrete column.

[18] Ms. Nankoo then told him that a licenced electrician would have to "pass the house" before the electricity could be reconnected.

[19] The claimant said he told Ms. Nankoo that he had noticed a decline in the consumption of electricity at his home and that he had mentioned it to a metre reader.

[20] He returned to the office the following day and was told that no one was available to visit his home. He made a third visit on 2nd of June 2010 and spoke with Mr. Pete Drummond, a supervisor. He renewed the request for a technician to attend the premises but was again told that no one was available. Mr. Drummond told him that it was best to "work out a compromise" since it could not be determined whether anything had changed at the house since the inspection.

[21] The claimant then contacted the Government Electrical Inspectorate Department (GEID) and paid a fee of $1,000.00 at the Tax Office for a special inspection to be done at his house.

[22] He returned to the JPS office on 8th June, where he repeated his denial of the illegal connection. He was told that neither Mr. Daley nor any other technician could visit at that stage. No explanation was given as to why this was so.

[23] On 9th June 2010, Mr. Vincent Bailey, a government electrical inspector (GEI), visited the premises accompanied by his assistant, along with Mr. Ian Beckford, an electrical technician, who had been engaged by the claimant.

[24] The claimant said the costs associated with Mr. Beckford's services amounted to $117,000: $100,000 for his attendance over five (5) days ($60,000 of which was for four aborted days) and $17,000 for helping to remove cables.

[25] On the instruction of Mr. Bailey, the claimant said he pulled out each of the wires which ran between the metre socket and the pothead. These were easily removed without any damage to the walls. The claimant also observed the GEI as he carried out different tests in relation to the breaker panel. The men left the premises with the wires.

[26] The claimant testified that Mr. Beckford co-ordinated the wiring the premises, which began on or about Thursday 10th June, 2010. This was undertaken in order for the premises to be re-certified.

[27] The first phase involved the drilling of the walls inside and outside the living room, a passage way and front wall. Power hammers were used to remove the existing meter socket, breaker panel and electrical wires. A draw box, new breaker panel and electrical wires were installed.

[28] The claimant said that two workmen were constantly in and out of the premises and he and his family suffered from excessive noise and dust. The rubble from the drilling and loose electrical wires affected access to two bedrooms, a passageway and the living room. Furniture had to be re-arranged or covered. The family could only access the premises through a kitchen at the back and one of the bedrooms was accessible only through a back door.

[29] The second phase, which began on 14th June, was carried out by three workmen. It involved removal of electrical wires and restoration of walls. There was mixing of cement in the drive-way, living room and passageway. Damaged areas were splashed with cement and left to dry for three days, followed by roughcast and rendering over a two-week period. This restricted the claimant and family in their access to bedrooms, the living room and drive way.

[30] The next phase involved installation of new wires from the pothead to the draw box and breaker panel. There was also painting of walls, both on the inside and outside of the premises. This lasted for some 6 days, during which paint 'assaulted their senses'. A massive clean-up followed. This required the removal of all furniture to the outside. In the result, there was damage to furniture and a living room settee had to be partially re-wrapped.

[31] The claimant said the entire ordeal lasted from 10th June to 30th June 2010 and caused great physical inconvenience and mental distress. The premises were re-certified by the GEI on 7th July 2010.

[32] He said that his neighbour, Mr. Anderson, assisted him with electricity from 28th May to 19th September 2010.

[33] The claimant also said that he incurred expenses amounting to $738,000 for the works, inclusive of:

i. $25,000 for the licensed electrician;
ii. $60,000 for repairing damaged furniture; and
iii. $45,000 for transportation.

[34] On 8th July 2010 he presented the GEI documents to Mr. Drummond at the JPS Paradise Office but was told that he needed to pay half the bill before the electricity could be restored. He refused to do so.

[35] On 9th July 2010, another proposal was made for him to pay five hundred thousand dollars ($500,000) and enter a payment plan for the balance. He rejected the proposal.

[36] The claimant said he then sent the GEI document, the metre change card and the historical record of his electricity usage to his brother, an electrical engineer. His brother sent him a report which was submitted to Mr. Roger Kennedy, Manager at the JPS Paradise Office, on 19th July 2010.

[37] On 23rd July 2010, a Mr. Campbell met with the claimant, along with his mother-in-law, Mr. Drummond, Ms. Nankoo and Mr. Daley. His mother-in-law related what had transpired when the technicians visited the premises. Mr. Daley also gave his version, which did not include any reference to measurements being taken at both the pothead and metre.

[38] The claimant said that Mr. Campbell told him that the metre would be tested and the result would determine how the bill would be handled.

[39] In a follow-up conversation on 27th July 2010, Mr. Campbell informed him that the metre was 100% functional. He was provided with a copy of the report.

[40] On 29th July 2010, the claimant said he received a letter dated 15th July 2010, which repeated the allegation of an illegal connection and advised that the account for the premises would have to be adjusted. He called a toll free number and spoke to Mr. Tony Ray, to whom he forwarded relevant documentation.

[41] The claimant said that on 19th August 2010, Mr. Garth McKenzie offered to charge a flat 1000 kwh per month for six years. This was refused and the denial of an illegal connection repeated.

[42] He said that his reputation had been tarnished in the eyes of the public as a result of the ordeal. He further asserted that the agents of the JPS had publicized and circulated the allegations within and outside JPSCo's corporate walls. On one such occasion, Ms. Nankoo telephoned a JPS contractor and could be heard

saying that there was an illegal connection at the claimant's premises, which the contractor was being asked to assist in resolving.

[43] In cross-examination, the claimant said that two air-conditioning units had been installed at the time he moved into the premises. The only adjustment in electricity usage was the installation of a water pump. He had no standby generator, solar power or solar water heater. He said he had relied exclusively on JPS for electricity.

[44] The claimant admitted that the rewiring of the premises included the recommendations of the GEI to correct three (3) breaches that had been detected in the GEI inspection. He also admitted that he had noticed low bills since 2009 but did nothing about it. He accepted that he had an obligation to pay for the consumption of electricity at his premises even if the metre was not working.

[45] The claimant also said that for a period during the disconnection of his electricity supply, he had taken an all-inclusive package at the Bourbon Beach Hotel, which was operated by family members. He had done so because the cost was reasonable and there was no time to explore other options. He and his family had occupied three (3) bedrooms and three (3) bathrooms. His house consisted of two (2) bedrooms and two (2) bathrooms.

Mr. Vincent Patrick Bailey

[46] The Witness Statement of Vincent Bailey, filed 11th April 2012, was ordered to stand as his evidence in chief. He also relied on his report of 14th July 2010 (exhibit 19).

[47] He had conducted a special inspection at the premises on 9th June 2010, after two previous aborted attempts. His assistant, Mr. Omar Grant, was present along with the claimant and someone who had been identified as the claimant's electrical technician.

[48] He conducted an insulation resistance test and a visual inspection. The insulation test was to indicate any leakage of electricity between the phase conductors and the neutral conductor as well as any leakage to the earth, in transmission. The visual inspection was to determine whether there had been tampering or replacement of wires.

[49] In carrying out the visual inspection, he had instructed that the wires between the pothead and metre socket be removed by his assistant. The claimant also assisted.

[50] Mr. Bailey testified that the wires were removed quite easily, without damage to the walls, and that this would not have been the case had there been an illegal connection. He had also noted that the wires were worn and appeared to have been installed for some considerable time.

[51] His conclusion was that there had been no indication of any illegal wire, conductor or instrument connected between the pothead and the metre socket.

[52] Mr. Bailey told the Court that it was customary for the inspection to include electrical current readings but this had not been done because the electricity supply was disconnected. Nonetheless, he would not have expected a different conclusion because any illegal bypass connection would have had to be made to the wires between the pothead, which was not the case.

[53] A report was prepared indicating the procedures he followed and his findings, observations and recommendations. The following breaches of standards were observed by him:

I. the electrical lighting system was controlled by 20 Ampere single poll circuit breakers;

II. the water pump circuit was missing an isolating switch and shared a circuit breaker with an a/c circuit; and

III. the panel was too small to accommodate all the circuits needed for the electrical system.

[54] He recommended that the breaches be corrected to bring the electrical installation in conformity with government standards. This required changing the circuit breaker, correcting the water pump circuit and having it controlled by its own circuit breaker and isolation switch, and an upgrade of the panel size.

[55] In cross examination, Mr. Bailey disagreed that if there were no break in the circuit, the measurement of current at the pothead and the metre socket ought to be the same. He said this would be so, only if there was a constant load.

[56] He said that readings had to be taken simultaneously and if the results were different, it could be because of a bypass. However, he suggested that leakage through the insulation of the phase conductor could also cause a difference in readings and depending on the amount of leakage there could be burning. However, a difference of 10 to 12 amps would not necessarily result in burning.

[57] Mr. Bailey also testified that if measurements of 14.2 amps and 12.2 amps were taken at the pothead, simultaneously with measurements of 0 amps and .2 amps at the metre, and there was leakage, a fire would have resulted. If, however, the difference in readings did not result from leakage there would have had to be an irregularity such as a bypass.

[58] He said the exposed section of the pothead was worn and discoloured from the effects of the weather and suggested long life in excess of five years.

[59] Mr. Bailey was questioned about the breaches he had detected and said that although they did not render the wiring unsafe, there could be no re-certification unless they were corrected.

Roosevelt DaCosta

[60] Mr. DaCosta was certified by the Court as an expert witness for the claimant. He relied on report filed 28th June 2013 (exhibit 21).

[61] He was an electrical engineer with over 42 years' experience in "the design and construction supervision of building, electrical, mechanical, fire, security and

telecommunications systems; standards development and applications; and metrology (measurements) and testing infrastructure as well as quality systems auditing." (Para 1 of report).

[62] He had worked as an engineering consultant and had 36 years' experience in measurement technology and the creation of internationally-recognized measurement infrastructure. He also had 24 years' experience in the testing of electrical and mechanical appliances, equipment and materials for compliance with product standards, assessment of annual energy consumption and compliance with performance requirements.

[63] It was his opinion that the notation on the metre irregularity card 'by pass supplying 12.2/14.2 amperes 2 air conditioning units' suggested that current measurement was made on each of the two lines (phases) at the pothead. Therefore, the two air-conditioning units could not have been in cooling or full load mode stage when the readings were 12.2/14.2 Amps at the pothead, as the two phase current readings were much less than 16.0 Amps. This was so because an air-conditioning unit cycles through full load of 8.0 amperes on each line and light load of 0.2 amperes on each line. It was therefore an erroneous assumption to attribute the 12.2/14.2 current measurements solely to the air-conditioning units. Rather, those measurements could only be attributed to one air-conditioning unit being switched on along with other on-line cycling equipment such as the water pump in its full load state and small appliances such as radios, clocks, and telephone.

[64] He observed that other confirmatory tests were not carried out to validate the JPS' conclusion that the pothead current readings were due exclusively or mainly to the two air conditioning units. For example, there was no attempt to eliminate fault or leakage current to ground that could be taking place between the two measurement points, especially where the technicians were not equipped for simultaneous measurements of all four currents. This could have been done by

using a Meggar to measure the insulation resistance between phase or line conductors and between line conductors and ground conductors.

[65] He noted as well that there had been no determination whether the two air conditioning units had been directly connected to the panel-board bus bars or any circuit breaker in the panel board which was fed from the metre socket. This could have been done by turning the main circuit breaker “on and off” to see whether the air-conditioners were in sequence with the main circuit breaker.

[66] Mr. DaCosta observed that two technicians with two ammeters making a total of 4 simultaneous measurements at the pothead and the metre socket, would need to share the tasks and be in extremely good communication in order to get near simultaneous readings. If the tasks were shared, they could only make one phase measurement each and would not be sure of the current reading on the other phase.

[67] He was of the opinion that in order to determine the likely cause of a declining consumption pattern, it would be reasonable to first establish the consumption profile that was attributable to a metre by-pass. He elaborated by saying that if a by-pass were built with the premises, the profile should be that of a fairly steady consumption pattern for non-bypass loads. If, on the other hand, a by-pass had been introduced sometime after the metre had been installed, the consumption should drop significantly and remain fairly constant thereafter. A by-pass should therefore not manifest itself as a widely declining consumption.

[68] In relation to the metre testing, Mr. Dacosta was of the opinion that the ISO 9000 MTCC should not be accepted because it was a management standard. The acceptable would be the ISQ 17025 which it involves continuous auditing of staff competence, equipment testing and the testing procedure. There would also need to be maintenance of traceability for the MTCC primary, secondary and working standards as well as records to show recalibration dates and calibration history, among other matters.

[69] In summary, the deficiencies he identified were:

I. no evidence was presented on the metre change card to show that the ammeters which were used had been calibrated and traceable to the SI at the time of measurement;

II. the ammeters had not been identified by their serial numbers. It was therefore not possible to positively identify the instruments which were used and their calibration history. The readings were therefore unreliable;

III. the metre card did not state clearly that the alleged irregularity was due to bypass conductors connected between the pothead and metre socket that supplied the air-conditioning units;

IV. the methodology for taking the measurements was flawed as there was a time difference between the measurements taken at the pothead and the metre socket. That time difference was enough for the cyclic equipment which was online to alter the consumption landscape. Accordingly, the technicians should have ensured that all equipment, other than the air-conditioning units, were not in operation;

V. the large disparity between the current measurement at the pothead and at the metre socket was most probably the cyclic snapshot at that time and not the air-conditioning current by-pass which was concluded by the JPS technicians;

VI. the JPS technicians should have conducted a test to rule out the possibility of leakage of current between the pothead and metre socket;

VII. the metre card did not state the serial number of the JPS metre so as to establish that the metre which was tested was the same one at the premises; and

VIII. the reliability of the testing facility had not been established.

[70] Mr. DaCosta said he agreed with the approaches, findings and conclusion of Mr. Vincent P. Bailey, as documented.

[71] He agreed with defence counsel that barring a diversion along the electrical current or some leakage, the readings should be the same, if done simultaneously.

[72] He also explained that physical evidence of leakage was not always present as it depended on the level of leakage, the quality of the wires and levels of insulation. However, he was unsure whether measurements of 14.2 and 12.2 at the pothead and 0 and .2 at the metre would cause burning, but said faults were usually well in excess of those measurements.

[73] He agreed that air conditioning units are large pullers of electricity and that if one a/c unit, other appliances and a water pump were engaged the readings could be 14.2 and 12.2 at the pothead, if the measurements were done simultaneously.

The Defendant's Case

Mr. Basil Daley

[74] Mr. Daley was a field technician employed to JPS since 1992. His duties included checking customer premises to ensure safe metering facilities, changing defective metres and checking for tampering with JPS equipment. He constantly received training in those areas.

[75] His Witness Statement of 23rd April 2010, along with amplification, was ordered to stand as his evidence in chief.

[76] Mr. Daley gave evidence that he, along with another technician, went to the premises on 27th May 2010, to conduct a metre investigation and inspection. This action was consequent on a service order for the premises which indicated that consumption was low.

[77] On arrival at the premises, he spoke with a lady, advised her of the purpose of his visit and she pointed him to the location of the metre. He confirmed the metre

number and took a reading. The lady informed him that the working electrical items at the premises were two a/c units, a refrigerator, clothes iron, television and five light bulbs. He considered that with average use of those appliances, a higher reading should have been reflected.

[78] Mr. Daley said that he requested that an a/c unit be turned on, at which point he conducted an ampere reading at the pothead using an ammeter. The reading was 14.2 amperes and 12.4 amperes on both phases.

[79] He then removed the metre from its socket and did a reading at the pothead. This showed 0 ampere on both phases. A test metre was then inserted and the a/c unit turned on. The readings were then 14.2 amperes and 12.4 amperes at the pothead and 2.4 amperes and 0 ampere at the metre socket. The variation in the readings at the pothead and metre socket aroused his suspicion that there was tampering with the JPS equipment.

[80] He did not consider the observations as indicative of a malfunctioning metre because the readings between the pothead and the metering point were different. Had there been a malfunction, the reading at the pothead and the metering point would have been the same but the metre would not have been accurately recording the total electricity passing through it.

[81] Based on the observations, he concluded that that the a/c unit was connected to a by-pass, which he suspected was buried in the wall.

[82] Mr. Daley said he informed the lady about the irregular and unsafe condition of the electricity supply and offered to show her what had led him to that conclusion but he was told to contact the owner of the premises.

[83] He recalled a brief telephone conversation in which the claimant requested that he should remain at the premises and await his arrival. Mr. Daley told him to visit the JPS office. He left a Metre Irregularity Card at the premises.

[84] In amplification of paragraph 9 of his Witness Statement, pertaining to how the readings had been taken, in relation to himself and the other technician, he told the Court "…the second technician…took that latter reading…and he told me the readings. I was in front of the metre socket."

[85] In amplification of paragraph 10, he said, "These readings were taken after I instructed Ms. Daphnie to turn on the a/c unit. Then I asked to obtain the reading at the pothead. That was done by the second technician… 'Registered the reading' meant I wrote it down… I was told by the second technician what the readings were. I wrote it down on my document… I clamp the test metre and got the reading from that as well… When the second technician said he had 14.2 on one of the lines, I had my test metre testing the lines as well and found 2.4 on one phase and zero on the other phase… After removing the metre from the socket the reading taken from the pothead was zero on both phases/lines. That's what I refer to [in] paragraph 10 of my Witness Statement."

[86] It is here convenient to set out Paragraphs 9 and 10 of the Witness Statement.

> *9. With the air-conditioning unit being engaged, I conducted an amper reading at the pothead using an ammeter. The pot head is the point where the service wire leading from the JPS utility pole connects to the customer's premises. The purpose of the ampere reading was to ensure that the meter was recording the electricity that was coming from the pothead through the meter and into the premises. After asking the woman to turn on the air-conditioning unit, I observed that the disk wheel within the meter was moving rather slow. An amperage reading was taken at the pothead and it registered 14.2. amperes and 12.4 amperes on both phases flowing through it. I then asked her to turn off the air conditioning unit.*
>
> *10. I then removed the meter from the meter socket and I did a test at the pothead and got a reading of 0 amperes on both phases. I then inserted the test meter into the meter socket and asked the woman to turn on the air-conditioning unit. I thereafter registered a reading of 14. 2 amperes and 12.4 amperes at the pothead and 2.4 amperes and o amperes at the meter socket. I noticed that there was a variation in the reading taken at the meter socket and that taken at the pothead. The reading at the meter socket was lower than the reading at the pothead as the readings were 12.4 amperes at 14.2*

amperes being supplied to the pothead and 2.4 and 0 amperes flowing through the test meter.

[87] Mr. Daley also said that he did not consider leakage to earth as a possible reason for the difference in readings. He said if there were leakage to earth, he would still get a reading at the pothead on one or both lines.

[88] He disagreed that the disparity in readings was caused by the cyclic phase of the a/c unit and other equipment. He also said other tests had been done which substantiated his findings but these were not recorded in his statement.

[89] He had not taken custody of the cables, having been convinced there was a bypass. However, he agreed that the condition of the wires would show whether there was a bypass.

[90] In re-examination, Mr. Daley said the other tests which he had done involved "an exchange of ampere metre with his assistant and a repeat of the clamping process.

[91] He suspected that the a/c unit was on a bypass because the metre was moving slowly. This should not have been so because an a/c unit is a heavy user of electricity and the disc wheel should therefore have been spinning faster. He also said that readings of 14.2 and 12.4 were normal for an a/c unit and other equipment being operated at the same time.

Mr. Pete Drummond

[92] Mr. Drummond was a Loss Control Officer at the JPS. He had been employed since 1982 and was trained in the policies and procedures for identifying forms of tampering with the company's equipment and other irregularities. He was also a field service manager in Westmoreland.

[93] His Witness Statement filed 23rd April 2012, along with amplification, was ordered to stand as his evidence in chief.

[94] He said it had come to the attention of the Loss Control Division that subsequent to the disconnection of electricity supply at the premises, electricity was still being supplied. This was investigated in June 2010 and it was confirmed that the supply was being provided via a wire to the claimant's neighbour, Mr. Milton Anderson.

[95] In June 2010, Mr. Anderson's consumption rose by approximately 700 kwh, moving to in excess of 1000 kwh from July to September 2010. Prior to June 2010, the consumption averaged 189 to 218 kwh.

[96] Mr. Drummond said he was unable to recall the dates and content of conversations with the claimant. However, he denied telling the claimant that it was best for him to work out a compromise with JPS.

[97] In cross-examination, he said he had become aware of the claimant's situation from the technician's report but the findings were never verified by an expert. He also said the claimant had asked once, on 2nd June 2010, that someone should visit his premises to confirm the bypass but that this was not necessary because too much time had elapsed since the disconnection.

[98] In re-examination, Mr. Drummond said that if there were a bypass associated with particular equipment he would expect a drop in energy consumption but not necessarily a levelling-off because it would be dependent on the frequency of use.

Mr. Garth McKenzie

[99] Mr. McKenzie was the director of commercial process control at the JPS. His duties included overseeing the auditing of residential accounts, specifically related to systems losses.

[100] His Witness Statement, filed 23rd April 2012, along with amplification, was ordered to stand as his evidence in chief.

[101] He had reviewed the claimant's account and noted that between February 2002 and October 2004, the average consumption of electricity was 1000 kwh. The usual average consumption for residential use was 150 to 500 kwh per month. The claimant's consumption had fallen below 1000 kwh in or about November 2004, and was below 100 kwh between April 2009 and May 2010.

[102] Since October 2010, subsequent to re-certification by the GEI, installation of a new metre and reconnection of the electricity supply, the monthly consumption ranged from 587 kwh to 1000 kwh.

[103] Mr. McKenzie said that the ISO certified MTCC had tested the claimant's metre and found no defect. He also explained that where there was a bypass the electrical installation would have had to be re-certified as safe, for there to be a reconnection of electricity supply.

[104] Mr. McKenzie further explained the accounting procedure which was followed. The claimant's bill for November 2004 to May 2010 was calculated based on the amount of electricity which was supplied to the premises but not being registered by the metre. This amount was determined based on measurements which had been taken by the JPS technician. The adjustment was $2,901,760.75 and this was communicated to the claimant by letter dated July 15, 2010.

[105] He said that JPS did not publish its inspection findings to third parties and he was unaware of any such publication in relation to the claimant's case.

[106] In cross-examination, Mr. McKenzie said that it was his responsibility to ensure that a bypass was accurately established and he was satisfied that this was so based on the technicians' measurements.

[107] Mr. McKenzie said he had communicated with the claimant's brother but he did not accept him as an expert.

[108] He was unable to recall how he got involved with the claimant's case, the dates on which they communicated and the specifics of their conversations, including emails. He was specifically asked about an email from Mr. Wray to the claimant, on which he was copied (exhibit 6). He said he could not have received that email because the email address attributed to him was incorrect. He did not recall getting the metre change card (exhibit 1) and a letter from the claimant dated 19th June 2010 (exhibit 4).

Submissions by Counsel for the Claimant

[109] I have sought to do justice to counsel's copious submissions, which are summarised below.

I. It appears from an affidavit by Garth McKenzie and the Amended Defence (para 5.b) that the measurements were done separately by one technician at the pothead and the other at the metre, each with an ammeter. Mr. Daley also told the Court that it was the second technician who had taken readings at the pothead and relayed them to him. However, in response to a question from the Court about the observation he had made about the metre disc, Mr. Daley said, "It was before I took the reading at the pothead that I observed the disc wheel moving rather slow." The defence's position on the measurements, and in particular Mr. Daley's evidence, was therefore questionable and unreliable.

II. The significance of Mr. Daley's evidence that he had done the readings alone was that the difference in results would be explained by the delay between readings and the possibility that by the time of the second reading the a/c unit was in a different cyclical phase.

III. The measurements should be dismissed as unreliable because the instruments had not been certified and the readings were not supported by confirmatory tests.

IV. The alleged finding of an illegal bypass based on one a/c unit being turned on, ran counter to the annotation on the metre change card that there was, "bypass supplying 12.2/14.2 Amp. 2 Air conditioner."

V. The Court should accept Mr. Bailey's evidence that the cables he examined at the premises pre-dated the disconnection and did not show any evidence of a bypass.

VI. In its letters of 15th July 2010 and 29th September 2010, the defendant made statements which imputed that the claimant was responsible for the illegal bypass and was guilty of a felony. There was publication of the defamatory material as the letters were prepared by staff and communicated to others within JPS.

VII. The defendant was vicariously liable for the publication. Authority for that proposition was found in **Winfield & Jolowicz, Tort**, Seventeenth ed, pp.539-549, citing ***Riddick v Thames Board Mills Ltd.*** [1977] Q.B. 88; and the dictum of Hunt J. in ***James v Amalgamated T.V. Services Ltd.*** (1991) 23 N.S.W.L.R 364.

VIII. The principles of qualified privilege and common employment were not appropriate because the imputation against the claimant was false and malicious and the defendant's employees had acted in a quasi-judicial capacity.

IX. Mr. Pete Drummond, who authored the letter of 15th July 2010, had done so without any review or follow-up to the inspection to verify the technicians'. This letter also preceded the testing of the metre.

X. Mr. Garth Mckenzie, who prepared the letter of 29th September 2010, did not take account of the claimant's correspondence and equivocated about receiving same. He was elusive in his responses, such as denying that he had ever seen the metre change card, although he had referenced it in his witness statement (para 21) and an affidavit of 20th September 2010 (para

15). He had been required to act in a 'quasi-judicial' capacity to resolve the issues, but was deceptive about his role and knowledge about matters such as the breach of company guidelines and flawed testing procedure. His actions were evidence of malice or a dishonest mindset (See ***Horrocks*** v ***Lowe*** [1975] AC 135, 150 at para B; **Winfield & Jolowicz, Tort**, Seventeenth ed, pp.570; and ***Fraser*** v ***Mirza***, 1993 SLT 527 HL).

XI. The defendant was liable in damages and the claimant did not have to prove actual damage.

XII. Although exemplary damages are confined to tortious conduct, in ***Kuddus (AP)*** v ***Chief Constable of Leicestershire Constabulary*** [2001] UKHL 29, para. 67-69, Lord Nicholls of Birkenhead favoured expanding the entities against whom such an award could be made and the categories of tortious conduct that might attract such sanction.

XIII. The Court should award $500,000 for exemplary damages to punish the malicious and profit-making motive which occasioned the defamatory statements.

XIV. In the Canadian case ***Whiten*** v ***Pilot Insurance Co.*** [2003] SCC 18, the Court made an award of Can$1M for exemplary damages in relation to breach of contract even though the case did not involve an actionable tortious conduct. Using that authority as a guide, the Court should award $1M as exemplary damages, consequent on the breach of contract.

XV. An award of $1.7 M was reasonable for defamation. Reliance was placed on ***Syblis*** v ***Haughton*** Claim No. 2011 HCV 00138, decided December 7, 2012 in which $1M was awarded. The updated sum using a CPI of 230.7 at October 2015 was $1.2M, to which $500,000 should be added for aggravated damages.

XVI. The Court should make an award for the physical inconvenience and mental distress which was suffered by the household of five (5) persons

over the period 27th May 2010 to 10th July 2010. Authority for the claim was ***Watt and another*** v ***Morrow*** [1991] 1 W.L.R. 1421 in which 750 pounds was awarded to a couple who had spent 64 days in a house undergoing repairs. That award, when updated using an exchange rate of 180.26 to 1, CPR of 230.7 at October 2015 and discounted by 30% for the difference in the English and Jamaican economies (per Fraser J. in ***Samuels and another*** v ***Cato*** Claim No. HCV 2488/2009, para 49 citing ***JPS*** v ***Barr et al*** (1988) 25 JLR 326) would amount to $7,181,798.00. A reasonable award in this case would be $3M.

XVII. The Court should not allow back-billing for 6 years, as claimed by the defendant and amounting to $2.9M. Rather, the Court should apply the rule that under-detection by a metre is back-billed for 6 months, amounting to no more than $120,000.

XVIII. The GEI had stated that the breaches detected did not render the premises unsafe and rewiring was not required.

XIX. Although the claimant had admitted that the GEI breaches were rectified at the same time as the re-certification process, there was no indication that the cost of a separate circuit for the water pump had been included in the re-certification exercise.

XX. The claimant gave unchallenged evidence in relation to the following expenses: $117,000 for the licensed electrician's assistance to the GEI inspector; $608,000 for rewiring and re-certification; $25,000 for the licensed electrician who assisted the GEI in the re-certification process; $60,000 for damage to furniture; $15,000 for phone calls; $45,000 for transportation; US$5000 for consultancy service by his brother, Robert Morrel.

[110] I pause to observe that the written submissions were supported with only portions of some of the cases on which Counsel relied. This was unacceptable,

in my view. The Court should have been provided with the full judgments, even if counsel formed the view that the parts excluded did not support his submissions or might be unhelpful to the Court. A judgment constitutes all its parts and there is the risk of overlooking important points of law, facts and context if counsel seeks to assist the Court by providing only selective extracts.

Submissions by Counsel for the Defendant

[111] It was submitted that the Court should reject the claimant's case for the following reasons.

I. The meter had been tested by the JPS's ISO certified laboratory and found to be working properly. Also, the claimant could have requested that the testing be done by an independent party but did not avail himself of the opportunity.

II. The difference in the readings at the pothead and the meter socket could not have been due to leakage to earth. Mr. Daley indicated that if that had been the case he would have expected to see evidence of burning, and there was none. This was supported by the evidence of the GEI and expert witness.

III. The Court should accept Mr. Daley's oral evidence that the readings were done simultaneously, with his assistant.

IV. The conclusions of the GEI, if accepted, should be limited to what he found on June 9, 2010 and not what existed on May 27.

V. The conclusion that an illegal bypass existed was not absurd and patently illogical as has been suggested by the claimant. Kirchoff's law dictates that in measuring a circuit the sum of all currents entering a node should be equal to the sum of all currents exiting the node. The measurements of 2.4 and 0 amps at the metering point suggested that there was an additional circuit between the two points and this would constitute a bypass.

VI. The tests indicated an illegal bypass which created an unsafe situation and that was the reason for the disconnection of the electricity supply. It was Mr. Daley's unchallenged evidence that the unsafe state at the premises had been communicated to the claimant and his mother-in-law. The situation was also confirmed by the GEI inspector, who found non-standard wiring which would not have permitted certification of the premises.

VII. Mr. Daley's explanation of the annotation on the metre change card was reasonable. He had not intended to indicate that the ac units were the only appliances connected to the bypass.

VIII. The information recorded on the metre change card and JPS' letters of 10th and 15th July 2010 did not constitute an accusation of electricity theft. They served only to communicate information pertaining to the finding of a bypass.

IX. Even were the words complained of defamatory, they were published in the ordinary course of business, to persons in the company who had an interest in receiving the information and in communication with the claimant on the matter. The principle of qualified privilege therefore applied and there had been no evidence of malice to establish the tort of malicious falsehood or to defeat the defence of qualified privilege (See **Winfield & Jolowicz on Tort, Seventeenth Edition paras 12-68 – 12-78; Gatley on Libel and Slander, 11th edition para 14.4 -14.15).** Further, it was the claimant himself who published the information to other persons within the JPS.

X. As it relates to malicious falsehood, the claimant must show that he had incurred special damages as a result of the untrue statements. In relation to defamation he should prove that the words complained about had affected his reputation in the estimation of right thinking members of the

society. No evidence was called by the claimant on either count and he had therefore failed to establish damage in relation to either tort.

XI. Notwithstanding dicta on the extension of the categories of exemplary damages, the law remains that exemplary damages may be awarded for torts in three cases : oppressive arbitrary or unconstitutional actions by servants of the government; the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff; and where there is express authorisation by statute (See **Jamaica Observer Limited & Anor v Wright** 2014 JMCA Civ. 18 at paragraphs 47 and 48).

XII. Aggravated damages are usually awarded in cases where there is exceptional or contumelious conduct or motive on the part of the defendant in committing the wrong and where there is mental distress sustained by the plaintiff as a result. The evidence did not establish that those circumstances existed.

XIII. Accordingly, the only damages that the claimant could reasonably hope to recover would be compensatory damages for the loss of electricity and GEI fee of $1000. The other claims for special damages should be disallowed having not been specifically proved.

[112] Counsel submitted that the claimant's account history, the inspection findings and spike in Mr Anderson's consumption established that all the electricity consumed at the premises had not been registered or billed, prior to May 2010.

[113] The method of calculation, in cases of a bypass, was the difference between what had been paid and what ought to have been paid. Applying this method, the defendant was entitled to its counter-claim of $2,901,760.75

Issues

[114] The issues for determination are:

I. whether the disconnection was justified;

II. whether the claimant suffered loss and damage as a result of the disconnection;

III. whether the defendant is liable for any or all of the loss/damage suffered by the claimant;

IV. whether the defendant defamed the claimant and in that regard, whether the defence of qualified privilege was applicable;

V. whether the defendant is entitled to $2,901,760.75 as an adjustment to the claimant's account; and

VI. whether the facts of the case warrant an award for aggravated and/or exemplary damages, mental distress and physical inconvenience.

Analysis

[115] I found the claimant to be a frank and consistent witness throughout the trial. He readily admitted to noticing unusually low electricity bills from the latter part of 2009 into early 2010 and I believe him that this was mentioned to a metre reader. I also believe that he made repeated requests for the defendant to make a technician available to show him evidence of their findings and that those requests were denied.

[116] Mr. Bailey and Mr. DaCosta were also credible witnesses and I found no effective challenge to their evidence.

[117] I found the evidence of Mr. Daley, for the defendant, to be problematic. It would be a most glaring oversight to have conducted tests and not mention them in the Witness Statement, particularly as this was a case in which there had been no physical evidence of a bypass. His testimony about "other tests" was convenient, unbelievable and unpersuasive.

[118] It also appeared convenient for Mr. Daley to have said, in amplification, that readings were taken simultaneously at the pothead and metre. This was an important aspect of the testing procedure and I would have expected it to be clearly established at the initial explanation of how the inspection had been conducted.

[119] I do not accept Mr. Daley's evidence that the reference to two air conditioning units on the change card had not been intended to convey that they were the only equipment on the alleged bypass. I prefer Mr. DaCosta's evidence that two air conditioning units, at full load, would not result in a reading of 12.2 or 14.2 amps but in the region of 16 amps.

[120] Mr. McKenzie was unable to recall very important facts which would be expected of someone in his position and who played an important role in the case. I found him to be evasive.

i. The Tests

[121] I agree with Mr. Dacosta that the JPS readings were unreliable on account of there being no evidence that the ammeters were properly calibrated and traceable at the time of measurements.

[122] I accept the GEI's evidence that at the time of his inspection there had been no indication of alterations at the premises. I believe him that the wires between the pothead and metre socket were removed easily, which indicated there was no bypass.

[123] I note Mr. DaCosta's support of Mr. Bailey's evidence about his inspection and findings. Although Mr. Dacosta's opinion had not been based on his own observations, he seemed to have drawn reasonable inferences from what had been reported by Mr. Bailey, whose evidence I found credible, standing on its own.

[124] Mr. Bailey's approach to the inspection was in stark contrast to Mr. Daley's, who said he had not taken charge of the cables between the metre socket and

pothead because he was convinced there was a bypass. Yet, he agreed, in cross-examination, that the wires would have shown whether there was a bypass.

[125] It appears from the evidence that conclusion as to a bypass had already been crystallized in Mr. Daley's mind when he did the inspection. This explains him seeing no necessity to carry out additional eliminatory tests. I am of the view that he should have eliminated the possibility of leakage to earth by carrying out the necessary tests, regardless of the fact that no burning was observed.

[126] Mr. Daley said that he did not consider the circumstances to have been indicative of a malfunctioning metre because in his view, even if the metre malfunctioned, the readings would have been the same. This seems speculative. A malfunctioning metre could only be ruled out by proper testing.

[127] There was disagreement on whether the difference in the readings at the pothead and at the metre socket could have been due to cyclic consumption of energy by the air conditioning units or other equipment. Mr. Daley's position hinged on the readings which he recorded and how they were done. But, as I have already said, it is unacceptable that evidence of such a crucial aspect of the inspection procedure should have emerged only in the amplification of his Witness Statement. Beyond that, the assistant technician gave no evidence. I am therefore unconvinced that the readings were taken simultaneously by Mr. Daley and the assistant technician.

[128] I now turn to the MTCC metre test, with which I found serious fault.

[129] The metre was never positively identified by its serial number and it was not tested until some two months after being removed from the premises. Yet, there was no evidence on the chain of custody or testing procedure. These are important matters in this type of case.

[130] I accept the claimant's argument that in a case where the defendant relies on a facility for scientific or technical findings, it should be established that the facility

was properly accredited, if the Court is to rely on the findings. In the absence of evidence to establish that there was strict adherence to acceptable and required operating procedures, I cannot conclude that the MTCC was operated as a properly accredited test facility.

[131] For these reasons, I do not accept the defendant's conclusion that the metre was functioning normally and did not play a part in the under-registration of electricity usage at the premises.

[132] I need not arrive at any finding in relation to Mr. Dacosta's dismissal of the MTCC ISO 9000 certification vis-à-vis the ISQ 17025 standard.

[133] Much was made of the claimant's right to have the metre tested by a third party but I do not see how that is material given the issues with identification of the metre and the chain of custody.

[134] The evidence established, in totality, that the defendant's procedures needed to have been expansive and technically meticulous. In summary, the ammeters were not identified by serial numbers nor was there evidence about their calibration; further and alternative testing should have been done to rule out other possible explanations for the disparity in readings at the pothead and metre; no evidence was led to establish that the metre which was taken from the premises was the one tested at the MTTC or that the testing procedure accorded with accepted international standards; and the pattern of consumption did not fit that of a bypass.

[135] Accordingly, there is no basis upon which I could find that there was a bypass or to conclusively rule out that there was a defect in the metre at the premises.

[136] Neither did the defendant convince me that the premises were unsafe and justified disconnection of the electricity supply. I note that the GEI found the wires at the premises to be worn and he detected and documented breaches, but he did not say the wiring made the premises unsafe, only that the requirements for GED certification were not satisfied.

ii. Opportunity to be Present at the Inspection

[137] A requirement for the defendant to have either served prior notice or wait on the claimant to arrive at the premises before carrying out its investigation would be unreasonable and unrealistic. On the other hand, it was a reasonable expectation that the claimant would be informed about the procedure which was used to carry out the inspection, particularly when a decision had been made that the premises were unsafe and needed to be re-certified, and there was a paucity of information on the metre change card.

[138] There was no good in that type of information asymmetry, but I do not believe the defendant's failing rises to a level of bad faith, grave abuse of authority or breach of an implied term of the electricity supply agreement.

iii. Defamation

[139] The technician reported his findings and conclusion in the ordinary course of business and it was shared with others within the JPS during the course of investigating the irregular power consumption and in communication with the claimant about the matter.

[140] There was no evidence that information was circulated recklessly within or outside the company or with malicious intent. I view Miss Nankoo's communication, in that context. The claimant himself made contact with personnel within JPS and disclosed information, in the course of complaining about the inspection He also disclosed information to his brother.

[141] I agree with the defendant that even if the words complained of were false or defamatory, they were published on occasions of qualified privilege. It was done in the ordinary course of business, to persons within the JPS who had a common interest in receiving the information. This was in pursuance of the duty to investigate the case of irregular electricity consumption at the claimant's premises and not because of any desire to cause injury to the claimant (see ***Horrocks v Lowe*** [1975] A.C. 135). I have seen no conduct which constituted a misuse of these privileged occasions (see ***Dennis P Chong*** v ***Jamaica***

Observer C.L.C 576 of 1995, paras 38-41, referencing ***Bonnick*** v ***Morris and the Gleaner*** [2002] UKPC 331, ***Jameel and Others*** v ***Wall Street Journal Europe Sprl*** [2005]E.W.C.A. 74, and ***Edward Seaga*** v ***Leslie Harper*** P.C.A. No. 90 of 2006).

[142] The finding of an illegal bypass was based on an inadequate testing and analysis but there was no evidence that the finding was deliberate or occasioned by some improper motive.

[143] Having found no support for the claimant's contention that the defendant's actions were defamatory, improperly motivated and involved malicious falsehood, the claim in defamation fails.

iv. The Rewiring

[144] I make a distinction between the requirement for re-certification and the necessity to do so. The GEI found breaches of government standards but there was no evidence that, but for the JPS' insistence, the claimant would have needed to re-certify the premises or do so immediately, particularly in circumstances where the GEI's report did not say that the breaches posed a safety risk.

[145] Accordingly, the rewiring was causally linked to the JPS' termination of the electricity supply. The expenses were unnecessary, albeit not quite wasted since the breaches were corrected.

The Counter Claim

[146] The Court accepts that the average monthly consumption for residential premises was between 150 and 500 kw/h. The Court also accepts that the claimant's average consumption was 1000 kw/h for the period February 2000 to October 2004.

[147] An analysis of the consumption pattern in Exhibit 3 (Historical Record of Claimant's Consumption) shows a decline since November 2004. This fluctuated between the high 600s and 23 kw/h up to May 2010. There was a noticeable downward trend beginning in August 2008.

[148] In these circumstances, I find that the JPS was very late in its intervention on 27th May 2010. It seems unconscionable that the claimant should be back-billed over such a long period, especially in light of the expert evidence that the consumption pattern did not match the occurrence of a bypass.

[149] Having found the MTTC metre test unreliable, I will adopt the JPS/OUR approach for cases of inaccurate metre registration (Exhibit 10 - Standard Terms and Conditions of Electricity Service). The claimant's account is to be adjusted to allow for the payment of charges for the energy consumed, based on his use of electrical energy during a similar period of like use, not exceeding 6 months prior to the date of adjustment.

[150] The claimant's evidence was that he had not changed his consumption pattern, so I put his normal consumption as that which existed prior to the sharp decline in November, 2004. Using the six month period April 2004 to October 2004, his consumption ranged from 764 to 1,159 kw/h. The average consumption over that period should be a fair basis on which to determine consumption for six months. However, the rate for total consumption is that which would be applicable over six months prior to the disconnection on 27th May 2010. In calculating the amount, account must be taken of the sums which were paid by the claimant, pursuant to the Court Order of 27th September 2010.

[151] I therefore find that the defendant is only entitled to recover the real cost of electricity which the claimant consumed for the six month period prior to 27th May 2010, as outlined above. It is not entitled to $2,901,760.75 being the sum claimed for total adjustment to the claimant's account.

Conclusion of Analysis

[152] The evidence has established that there was under-registration of the quantity of electricity which was supplied to the premises. However, it has not been proved on a balance of probabilities that the under-registration was due to a bypass or that the premises were unsafe. It was therefore a breach of the electricity supply agreement for the JPS to have disconnected the supply for the reasons it said.

Quantum of Damages

[153] The claimant is entitled to a sum which will put him in the same position he would have been in, had his contract with the JPS not been breached. The measure, is his financial loss, which he had the burden of proving.

[154] On the morning of trial, counsel for the claimant applied to have documents admitted into evidence without calling the maker. The documents were purported to be invoices for the re-certification works and other expenses. Counsel for the defence objected on the basis that the documents were not receipts and therefore the payments needed to be strictly proved. Counsel had also filed a Notice to Object.

[155] The Court upheld the objection and did not admit the following documents:

I. Invoice from Ian Beckford in the sum of $117,000 for electrical technical services during GEI inspection;

II. Invoice from Ian Beckford in the sum of $738,000 re: provision of electrical installation services;

III. Invoice from Robert Morrell in the sum of US$3000 for electrical engineer's report; and

IV. Invoice from Robert Morrel in the sum of US$2000 for electrical engineer's technical response. services during GEI inspection.

[156] I will now determine the quantum of damages.

i. GED Services

[157] The claimant exhibited a receipt from the Government of Jamaica for payment of $1000.00 for GED fees. He is entitled to recover this sum.

ii. Hotel Accommodation

[158] The claimant's evidence was that he had to move from the premises on 19th September 2010 when his neighbour stopped supplying him with electricity. He produced a receipt for the cost of hotel accommodation at the Bourbon Beach Hotel in the sum of US$9,000. This was an all-inclusive and family owned property. The accommodation was for himself and family for ten days.

[159] There is a duty on a claimant to mitigate his loss. Simply put, the law requires that he takes all reasonable steps to avoid accumulation of his losses (***British Westinghouse Co. v. Underground Ry*** [1912] A.C. 673, 689.

[160] There was no evidence that the claimant had considered any alternative property, with amenities comparable to what he was accustomed to at the premises. It is not good enough for him to say there was no time to search. He would have needed to establish some emergency that required immediate removal and even in those circumstances it would not be a reasonable assumption that there was no option to "walk-in" to a hotel which offered standard accommodation.

[161] There was also no evidence that he considered an alternative power source, such as a generator.

[162] I have considered that the claimant stayed at an all-inclusive property and occupied more rooms than at his home. He would have also had to pay for food at his home and bear the cost of entertainment and other amenities which were enjoyed at the hotel. In the circumstances, I consider one third of the sum claimed to be reasonable. The award is US$3000.000.

iii. Fee for Electrician to assist GEI

[163] It is a general principle that special damages must be specifically pleaded and strictly proven. However, failure to do so is not necessarily fatal to a claim. The Court is expected to look at all the evidence offered to substantiate the claim, however tenuous each aspect may be (***Dalton Wilson v Raymond Reid SC Civ. App*****. no 14/2005** per Smith J.A. at p.12).

[164] The claim under this head is for $100,000, of which $60,000 was for four aborted days. However, the GEI gave evidence that there were two aborted days, which I accept to be the truth. The sum claimed is therefore reduced by $30,000. I will make the award of $70,000, although no receipt was furnished. I have taken into consideration that the GEI had supported the claimant's evidence that Mr. Beckford had assisted him.

iv. First and Second Engineer's Reports

[165] I will make no award in respect to these costs. There is no evidence before me to establish that the author, who is the claimant's brother, had the competence to produce an engineer's report. In any event, the email correspondence from the author to Mr. McKenzie was not, in my view, an "engineer's report'. Further, the necessity for the 'reports' was not established and the author of the 'reports' was not called as a witness so that his *bona fides* could have been verified.

v. Re-certification of Premises

[166] The claimant's evidence was that he paid $738,000 to and through Mr. Beckford for the costs associated with re-certification of the premises. He provided no receipt for payment and Mr. Beckford was not called as a witness.

[167] This is the type of evidence that the Court would have expected the claimant to substantiate with documentary proof. Although he did not avail himself of that approach, I cannot accept counsel's submission that no award should be made. I will make an effort to do what justice and fairness require.

[168] The Court is in no doubt that extensive works were carried out for the re-certification of the premises. I have looked at the break-out of costs and it is not clear to me whether the relocation of the metre was required for re-certification but I note there was no challenge.

[169] I will award two thirds of the costs associated with re-certification, particularised at items 5-20 in the particulars of special damages.

vi. Cost of Repairing Furniture

[170] The claimant said he incurred costs of $60,000 for repairing furniture which was damaged during the electrical and related construction works. Such sums are not recoverable unless they could reasonably have been expected to result from the breach. I find that these costs are remote. They are independent of the defendant's breach and would appear to be related to poor workmanship by the claimant's independent contractors. The claim is disallowed.

vii. Cost of Transportation and Phone Calls

[171] These claims amount to $60,000. The claimant did not establish how he had arrived at those sums. For example, he did not state his method of transportation, for which trips, the purpose of the trips, number of trips and related rates. Similarly, he did not detail the phone calls. However, I have considered that he would have travelled to JPS, the GEID and the hotel. He also gave evidence of telephone conversations. I will award $20,000 in the circumstances.

viii. Physical Inconvenience and Mental Distress

[172] I turn next to the question of whether the evidence established a basis to award damages for mental distress and physical inconvenience. It is contended that the entitlement arose from the noisy and dusty conditions occasioned by the rewiring works. The claimant also had to contend with workmen moving about the premises and was deprived of the use of his living room, furniture and access to rooms.

[173] Counsel relied on ***Watts v Morrow*** [1991] 1 WLR 1421, ***Jackson*** v ***Horizon Holidays*** [1975]1 W.L.R. 1468, and ***Samuels and Anor*** v ***Cato*** Claim No. HCV 2488/2009 delivered 9/8/2011.

[174] In ***Watts***, the plaintiffs purchased a property in reliance on the defendant's building surveyor's report. They had required that the property be reasonably trouble-free without any need for intensive repairs. The report identified some defects which could be dealt with as part of ordinary maintenance. That turned out not to be the case and the plaintiffs had to endure a lot of physical inconvenience and mental distress whilst carrying out extensive repairs to the property. The defendant submitted that general damages were recoverable for the physical discomfort and inconvenience but not mental distress.

[175] Ralph Gibson LJ said:

> *...in the case of the ordinary surveyor's contract, damages are only recoverable for distress caused by physical consequences of the breach of contract [and that]…damages for mental distress resulting from the physical consequence of such a breach of contract should be modest...the proper approach is to fix a modest sum for the amount of physical discomfort endured having regard to the period of time over which it was endured. (pp 1442-1443).*

[176] The trial judge had found that there was physical discomfort caused by the carrying out of work extended over eight months, but limited to the plaintiffs' visits to the premises on weekends. The Court of Appeal awarded seven hundred and fifty pounds.

[177] In ***Romauld James*** v ***The Attorney General of Trinidad and Tobago*** [2010] UKPC 23 Privy Council Appeal No 0112 of 2009, a judgement delivered by Lord Kerr, the Privy Council observed that it can be difficult to assess the amount of compensation for injury which does not possess tangible physical or financial consequences. The Privy Council approved the dictum of Mummery LJ in ***Vento v Chief Constable of West Yorkshire Police*** [2003] ICR 318, at 331:

> *- "50. It is self evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to*

> *be an artificial exercise. As Dickson J said in Andrews v Grand & Toy Alberta Ltd (1978) 83 DLR (3d) 452, 475-476, (cited by this court in Heil v Rankin [2001] QB 272 , 292, para 16) there is no medium of exchange or market for non-pecuniary losses and their monetary evaluation: 'is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.'*
>
> *51. Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury."*

[178] In the instant case, the claimant said that the first phase of works began 10th June 2010 and lasted until 14th June 2010. He said that the drilling of walls occurred over that period. This caused massive rubble to be in the narrow passage between bedrooms and loose electrical wires, among other complaints. He said this prevented him from using the passage for one month.

[179] I cannot see why rubble needed to have remained in the passage for one month, as the claimant also said that the drilling lasted some three days. I also do not see how the wires from the breaker panel prevented the claimant from using the passage. I find that the inconvenience during phase one of the works should reasonably have lasted no more than three days.

[180] The second phase began on 14th June. It involved mixing of concrete in the driveway, living room and passage way. The walls were left to dry until the 17th followed by rough cast and rendering over two weeks. There was no explanation for the necessity to mix concrete in the house and at three separate locations. This has to be examined against the background of the premises being relatively small and inhabited by five persons. It strikes me that the inconvenience was contrived. Even if it did occur, that would have reflected poor workmanship and failure to properly supervise the works.

[181] The third phase involved installation of wires and painting, lasting six days. I accept that residing in small quarters at the same time painting was being done, would be "an annoyance to the senses". However, I am not convinced that the painting lasted for six days.

[182] The last phase was a 'massive clean-up of the entire house.' No period was given for this activity. However, the claimant's evidence is that the dislocation and inconvenience lasted for a month.

[183] On a balance, I find that there was physical inconvenience but with exaggeration.

[184] In ***Watts and Another v Morrow*** 1 WLR 1421, 1446 Bingham L.J. said:

> *A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.*
>
> *But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category.*
>
> *In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort. If those effects are foreseeably suffered during a period when defects are repaired I am prepared to accept that they sound in damages even though the cost of the repairs is not recoverable as such. But I also agree that awards should be restrained…*

[185] I have also considered that in ***Samuels and Anor*** v ***Cato Jackson,*** an uncontested case, the inconvenience and distress were caused by a leaking roof which lasted for two years. A modest award of $700,000 was made.

[186] If an award were appropriate in this case, I would put it no higher than $200,000.

[187] But, should I make the award? In my view, it must have been within the defendant's contemplation that an allegation of a bypass in the wall could bring about a chain of responses including the need for ameliorative works which could cause inconvenience.

[188] But this does not strike me as a proper case, even for a modest award. Not only would the award be unjustified but a windfall of sorts since the works also corrected breaches at the premises. In arriving at this position, I have considered that the re-certification was occasioned by the alleged unsafe conditions attributed to a bypass as well as the correction of breaches detected at the premises, independent of JPS' allegation. The inconvenience suffered would have been occasioned by both sets of circumstances but moreso because of the nature of works that would have been necessary to correct the independent breaches found by the GEI.

[189] There will be no award for physical inconvenience.

[190] This conclusion does not conflict with my earlier decision that the claimant is entitled to recover the proved costs to obtain the re-certification, which would not have arisen other than as a consequence of the defendant's breach of contract and insistence that there would be no re-connection without re-certification.

[191] I now turn to the issue of mental distress, *simpliciter*, to the extent it can be treated as distinct from an award for mental distress which is directly consequent on a physical inconvenience.

[192] In ***Farley v. Skinner***, para 47, the Court affirmed the general principle, which was stated by Bingham LJ in ***Watts v Morrow*** [1991] 1 WLR 1421, 1445, that damages are not awarded for vexation, anxiety, aggravation or similar states of mind which result from a breach of contract.

[193] The authorities establish that it remains good law that there should be no award for mental distress save in exceptional cases. Those are cases in which the very object of the contract is "to provide pleasure, relaxation, peace of mind or

freedom from molestation" and "… the fruit of the contract is not provided or the contrary result is procured instead." (per Bingham LJ in ***Watts v Morrow*** [1991] 1 WLR 1421, 1445).

[194] The provision of electricity does not, in my view, fall within this exception. Pleasure and comfort can be derived from having the benefit of electricity supply but a contract with JPS for the supply of electricity is not for the provision of a 'pleasurable amenity" such as a holiday (see See ***Ruxley Electronics and Construction Ltd v Forsyth*** [1996] AC 344 per Lord Lloyd, 374). In other words, pleasurable amenities are ancilliary to the contract for electricity supply, but not the object of the contract. Electricity is a public utility and not a pleasurable amenity.

[195] I turn next to a further exposition of the exception by Lord Hutton in ***Farley v Skinner***, para 54, where his lordship said:

> *I consider that as a general approach it would be appropriate to treat as cases falling within the exception and calling for an award of damages those where:*
>
> *1. the matter in respect of which the individual claimant seeks damages is of importance to him, and*
>
> *2. the individual claimant has made clear to the other party that the matter is of importance to him, and*
>
> *3. the action to be taken in relation to the matter is made a specific term of the contract.*

[196] These conditions are not satisfied on the facts of this case. The JPS and the claimant had entered into a standard contract for the provision of electricity. As I said, this was a public service and not specific, customised or in any way unique or particularised to the claimant.

[197] In the premises, there will be no award for mental distress.

ix. Aggravated and Exemplary Damages

[198] The traditional rule is that exemplary damages are not awarded, save in the exceptional cases of oppressive arbitrary or unconstitutional actions by servants of the government; conduct by a defendant with a profit motive and where the profit may exceed the compensation payable to the plaintiff; and as allowed by statute. Further, such awards are considered to be confined to the torts of trespass, defamation, false imprisonment and possibly private nuisance (See generally **McGregor on Damages**, 16th ed. pp 291-304).

[199] In parenthesis, I make the observation that this restriction is undergoing revision. In **Kuddus v Chief Constable of Leicestershire Constabulary - [2001] 2 WLR 1789, 1802** Lord Mackay **said:**

[200] *In my opinion there is no basis in* ***Rookes v Barnard*** [1964] AC 1129 fo*r the view that the power to award exemplary damages exists only in torts which had been decided to have that character prior to 1964.*

[201] In the instant case, I found no evidence of defamation or any of the exceptions that allow for an award of exemplary damages.

[202] With respect to aggravated damages, I cannot find a scintilla of evidence which establishes that the defendant's agents were motivated by malice or that they conducted themselves in a contumelious, malevolent, spiteful or like manner with the intention or effect of injuring the claimant's proper feelings of dignity and pride, such that the wrong against the claimant could properly be said to have been aggravated. (See ***Rookes v Bernard*** [1964] AC 1129 at 1221.

Submissions on Costs and Interest

[203] Counsel were given a further opportunity to make submissions on interest and costs.

[204] The claimant's position is that he should have interest at the commercial rate of 12%. Counsel also requested that the Court make an order that the claimant is entitled to recover costs for the fees and expenses of the expert witness appearing in the matter. Reliance was placed on Rule 32.8(4)(b)(ii) of the CPR.

[205] Counsel for the defendant countered by submitting that the claimant was not entitled to interest at the commercial rate because he had failed to specify the claim in his Second Further Amended Particulars of Claim filed 1st December 2014, or the Claim Form.

[206] Counsel also relied on ***Mcleod v Richards*** [2015] JMCA Civ. 44 paragraphs 58 – 64 for the proposition that in order to recover interest at the commercial rate, evidence would need to be led at trial to enable the judge to ascertain and assess an appropriate rate. As this has not been done, interest should be awarded at a rate of 3% per annum from the date of the disconnection of electricity supply, May 27, 2010, being the date when the cause of action arose, until the date of judgment. Likewise, interest on the counter-claim, should be at a rate of 3% per annum from the date of the disconnection, when the irregularity was discovered, to the date of judgment.

[207] Counsel for the defendant submitted further that costs should be limited to only three of the five trial dates on account of counsel for the claimant's inordinately lengthy cross-examination on irrelevant matters and because time was spent on aspects of the claim which failed.

[208] No evidence was led in relation to whether an award of interest at the commercial rate was appropriate or the rate at which an order for commercial interest could be made. Adopting the settled approach, to which the Court of Appeal referred in ***Mcleod v Richards***, I reject the claimant's submission and will apply the normal rate of 3%.

[209] Whilst the Court is keen on timely disposal of matters, in accordance with Rule 64 of the CPR, there is a difference between being uneconomical with words and wasting the Court's time. Counsel for the claimant did not acquit himself with brevity but the issues he pursued were not irrelevant or his conduct of the trial so unreasonable as to justify being penalised in costs.

[210] Counsel for the claimant's request for a specific order in respect of costs for the expert witness is not granted. No application for those costs was made during the trial nor were there any submissions or material put before the Court as to what those costs were and whether they were paid. I also find that Rule 32.8(4)(b)(ii) of the CPR is inapplicable. It also appears that the relevant email, which was further to formal submissions, had not been brought to the attention of counsel for the defendant.

The Order

[211] In the result, I make the following orders:

1. Judgment is entered on the Claim for the claimant against the defendant in the following terms:

   I. damages in the sum of $507,616.00 and US $3000.00;

   II. interest on (i) above at a rate of 3% per annual from the date of disconnection to the date of judgment.

   III. costs to the claimant to be agreed or taxed.

2. Judgment on the Counter-Claim for the defendant in the following terms:

   I. damages in the amount equivalent to six months consumption of electricity calculated in accordance with paragraphs 149-151 above;

   II. interest on (i) above at the rate of 3% per annum from date of disconnection to date of judgment.

   III. costs to the defendant to be agreed or taxed.