

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 49/89

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	CROWNE FIRE EXTINGUISHER SERVICES LIMITED	1ST DEFENDANT/ APPELLANT
AND	EDWARD TAYLOR	2ND DEFENDANT/ APPELLANT
AND	DAVID RUDD	PLAINTIFF/RESPON- DENT

Hilary Phillips & Denise Kitson
for the appellants instructed by
Perkins, Grant, Stewart, Phillips & Co.

Dr. R.B. Manderson-Jones for respondent

29th & 30th May, &
19th June, 1990

DOWNER, J.A.

The Background

Since one half of the proceedings in this case, has already been disposed of on appeal and the action is yet to be tried, it is necessary to advert briefly to what has gone before to grasp the legal issues raised in this interlocutory appeal. David Rudd, the respondent brought an action against the appellants Crowne Fire Extinguisher Services Limited and Edward Taylor, the Managing Director as the first and second defendants and Jamaica Public Service Company Limited, the third defendant.

It is convenient to set out the endorsement on the writ to get an overview of the way the issues will be raised at the trial. It reads -

"
ENDORSEMENT

The Plaintiff claims an injunction and damages against the First Defendant for breach of contract and breach of statutory duty; an injunction and damages against the Second Defendant for breach of statutory duty and inducement to breach of contract; and damages against the Third Defendant for negligence and breach of statutory duty - all claims arising out of the disconnection of electricity supplies to No. 17 Wickham Avenue, Kingston 8 in the parish of St. Andrew on or about 9th May, 1989, and in relation to a tenancy agreement between the Plaintiff and the First Defendant in respect of the said premises."

Jamaica Public Service (Public Service) brought a summons to strike out the Statement of Claim so far as it related to them. Record J. acceded to their prayer and Rudd appealed. This court set aside the order of the Supreme Court and the action has been restored on the basis that there are serious issues to be tried on the tortious liability of Public Service. See David Rudd v. Crowne Fire Extinguisher Services Ltd. S.C.C.B. 48/89 delivered 20th December, 1989.

This appeal is concerned with that part of the action against the company and Taylor as first and second defendants, as summarised in the endorsement on the writ. These allegations were amplified in the Statement of Claim. As a further step, Rudd sought an interlocutory injunction which was heard at the same time with the summons to strike out the statement of claim instituted by Public Service. Here is the relevant part of that summons -

"1. THAT the First and Second Defendants by themselves or otherwise howsoever be restrained from further

" interference with or interruption of the Plaintiff's quiet enjoyment of premises situated at No. 17 Wickham Avenue, Kingston 8 in the parish of St. Andrew from the date hereof until the trial of this action."

Since the order on this summons is the order appealed from, it will clarify matters if the relevant part is set out. It reads -

- "1. THAT the First and Second Defendants by themselves or by their servants or agents or otherwise howsoever be restrained from further interference with or interruption of the Plaintiff's quiet enjoyment of premises situated at No. 17 Wickham Avenue, Kingston 8 in the parish of St. Andrew from the date hereof until the trial of this action;
2. THAT the First Defendant forthwith apply and in any event by the 26th of May, 1989, to the Third Defendant, JAMAICA PUBLIC SERVICE COMPANY LIMITED, to restore electricity supplies to premises at No. 17 Wickham Avenue, Kingston 8, in the parish of St. Andrew, in the same account in which it had been supplied on the 8th May, 1989;
3.
.....
4. THAT this order is on condition that the Plaintiff:-
 - (i) pay all outstanding amounts due on the account;
 - (ii) pay the reconnection fee;
 - (iii) pay any deposit required by the JAMAICA PUBLIC SERVICE COMPANY LIMITED for reconnection;
 - (iv) indemnifies the First and Second Defendants against all charges by the JAMAICA PUBLIC SERVICE COMPANY LIMITED in respect of electricity supplies while in occupation."

It is against this background that it is now appropriate to consider the issues to be resolved.

Did Record J. grant a mandatory order against the appellants which was 'in vain'

To appreciate the order made below, it is necessary to refer initially to the Statement of Claim. In it Rudd alleged that he was dismissed. This is how that aspect was pleaded -

"5. By letter dated 11th January, 1989, the Second Defendant writing as Chairman of the First Defendant advised the Plaintiff that he had taken the decision that any further association with the First Defendant company by the Plaintiff could only be to discuss the Plaintiff's entitlements, that the Plaintiff's further attendance at the office would not be necessary and that the Plaintiff should return the keys to the First Defendant's office without delay."

The essence of Rudd's claim against the Company and Taylor was set in paragraph six of the statement of claim. It reads -

"6. In or about the month of May, 1989, the First and Second Defendants in breach of statutory duty under the Rent Restriction Act (Sec. 27) and of the terms of the said tenancy agreement and calculatingly intending to interfere with the quiet enjoyment of the premises by the Plaintiff and to compel the Plaintiff to deliver up possession of the said premises, unlawfully and maliciously directed the Third Defendant to disconnect the electricity supplies to the said premises."

Subsequently, Rudd then sought interim relief and took out a summons against Public Service. In that summons (supra) he also sought relief from the Company and Taylor.

In an unusual intervention, Record J. invited Rudd's counsel to amend his summons which Dr. Manderson-Jones accepted. These were adversary proceedings yet the learned judge failed to invite counsel for the Company and Taylor

to make any submissions on this proposal. It is necessary to see how the judge approached the issue. He said in the course of his judgment -

".....In view of the order I am about to make I am going to invite you Dr. Manderson-Jones to make an application for an amendment to the Summons for the Court to order the First Defendant to make an application to the Jamaica Public Service to restore the electricity. (Dr. Manderson-Jones applies accordingly). The amendment would be that the First Defendant forthwith and in any event by the 26th day of May, 1989 apply to the Jamaica Public Service, the Third Defendant to restore the electricity supply to the premises at No. 17 Wickham Avenue Kingston 8 in the parish of Saint Andrew in the name of the account in which it had been supplied on the 4th day of May, 1989. That would be 1 (a) of the Summons."

Since the order was made in terms of the amendment, the mandatory injunction offended the maxim "equity does not act in vain." It is true that the coercive power of the injunction could have a disastrous effect on Taylor if he disobeyed its terms. He could have been imprisoned. But how would the coercive power reach Public Service so that electricity could be restored? It could never have any effect on Public Service and once that is conceded the amendment ought not to have been proposed or acted on and so the injunction should not have been granted. There is also another cogent reason why a mandatory injunction ought not to have been considered in the circumstances of this case. In Rudd v. Crowne Fire Extinguisher Services Ltd. (supra) there was unanimous acceptance of the principle enunciated by Megarry J Shepperd Homes Ltd. v. Sandham (1970) 3 All E.R. 402 that for an interlocutory mandatory injunction to be granted, the case has to be unusually strong and clear

even if it was sought to enforce a contractual obligation. The principle has been applied in England in Locabail International Finance Ltd. v. Agro export (1986) 1 All E.R. 900 and in Jamaica in Esso Standard Oil S.A. Ltd. v. Lloyd Chan S.C.C.A. 12/88 dated March 14, 1988.

It is against this principle that Rudd's case against the Company and Taylor must be examined. In paragraph six of his Statement of Claim (supra) Rudd alleges that the Company and Taylor are liable to him for breach of statutory duty and he specifies Section 27 of the Rent Restriction Act. That section reads -

"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

(2) Every person who contravenes any of the provisions of subsection (1) shall, upon summary conviction thereof before a Resident Magistrate, be liable to be imprisoned for any term not exceeding twelve months."

The comparable section of the United Kingdom Rent Act was considered in McCall v. Abelesz & another (1976) 1 All E.R. 727 and the head note accurately summarises the relevant principle. It states that Section 30(2) did not therefore give rise to a civil remedy for damages for harassment, in addition to imposing a criminal sanction. If this be the law in Jamaica it is difficult to understand how it could be contended on behalf of Rudd that he has an unusually strong and clear case in tort for a breach of Section 27 of the Rent Restriction Act.

It is therefore instructive to ascertain the reasons which made the learned judge feel impelled to grant the mandatory injunction against the Company and Taylor. In rightly recognising the importance of electricity supply he said at p. 101 of the record -

"..... As far as the mandatory injunction is concerned I find that electricity is an essential commodity in any household in Jamaica."

As for his views on the liability of Public Service, he saw this only in terms of contract for he said at p. 103 of the record -

" As far as the Third Defendant is concerned I find that there was no contract between the Plaintiff and the Third Defendant. When the Third Defendant disconnected the light, this was not a breach between the Plaintiff and the Third Defendant and Jamaica Public Service was merely exercising a right which they had under the contract with the First Defendant. There being no contract I find that the Third Defendant owed the Plaintiff no duty of care."

Had the appropriate authorities been cited to the judge, he would no doubt have grasped the essence of the tortious liability which could be implied from the Electric Lighting Act and the Licence. See David Rudd v. Crowne Fire Extinguisher Services Ltd. et al S.C.C.A. 48/89 dated 20th December, 1989.

The other basis on which the respondent Rudd relied for the justification for a mandatory injunction was that both in the endorsement and in the Statement of Claim there is an averment for breach of contract which had been breached by appellants, and that an interlocutory mandatory injunction was necessary to restore the status quo. The relevant paragraphs of the Statement of Claim are as

follows -

"(2) By an oral agreement made between the Plaintiff and the Defendant in September, 1988, the First Defendant sub-let to the Plaintiff premises situated at 17 Wickham Avenue, Kingston 3 in the Parish of St. Andrew at a monthly rental of \$1,000.00 commencing from 15th September, 1988, and the Plaintiff entered into occupation of the said premises in November, 1988."

(3) It was a term of the said tenancy agreement referred to in paragraph 2 hereof that during the tenancy electricity would be supplied to the said premises by and at the sole expense of the First Defendant as landlord of the Plaintiff.

(4) It was also a term of the said tenancy agreement that the Plaintiff would have quiet enjoyment of the said premises."

As Miss Phillips for the appellants pointed out the implied term for quiet enjoyment which Rudd enjoyed by virtue of his tenancy with the appellants ceased when by notice the head landlord terminated the tenancy agreement with the appellants. The law of this aspect is set out in paragraph 327 Volume 27 of Halsbury's Laws of England 4th edition and Adams v. Gibney(1830) 6 Bing, 656 was cited to illustrate the doctrine. Support is also to be found in (1981) Landlord And Tenant by Yates & Hawkins p. 98. This notice was given to the appellants on 24th March, 1989 and the request was to give up possession by May 1, 1989. Rudd was dismissed by the appellants in January 1989 and in his Statement of Claim he states that the disconnection of electricity supply was not until May 9, 1989. As was stated previously, equity does not act in vain, so an interlocutory mandatory injunction ought not to have been granted against the appellants when

they had no power to supply electricity. However, the gist of Rudd's claim as against Taylor and the Company was that the direction to disconnect was given when Rudd was a statutory tenant of the head landlord. See Section 28 of the Rent Restriction Act. Since so much turns on this letter, it is appropriate to cite it. It reads -

"May 4, 1969.

Jamaica Public Service Co. Ltd.
Ruthven Road,
KINGSTON.

ATTENTION: MR. NOEL PECK

Dear Mr. Peck,

RE: METER ACCOUNT # 14066176090
17 WICKHAM AVENUE, ST. ANDREW

We are requesting that you disconnect the above referenced meter with immediate effect.

We note that since this meter was connected to the above mentioned premises that we have received no bills.

We are requesting that all bills be sent to 4 GRETNA GREEN AVENUE, KINGSTON 11 at our Company's Office for payment.

Yours respectfully
CROWNE FIRE EXTINGUISHER SERVICES LIMITED

Sgd/.....
E.H. TAYLOR
Managing Director

Surprisingly, Rudd's Statement of Claim does not refer specifically to this letter for its full force and effect. Notwithstanding this omission in his Statement of Claim, in paragraph six of the said claim he does aver that the appellants "unlawfully and maliciously directed the Third Defendant to disconnect the electricity supplies to the said premises." Even if his action for inducement to

breach of contract is a good one against the appellants, a mandatory injunction against them on this basis would be inappropriate as it could not restore electricity supply.

Did the learned judge err in granting the interlocutory prohibitory injunction sought?

The foundation of the learned judge's decision to grant interlocutory relief by way of a prohibitory injunction, was based on his interpretation of Section 27 of the Rent Restriction Act, the breach of which he said created tortious liability. These were his words -

" Dealing with the first paragraph of the Summons as against the First and Second Defendants, I find that there is a serious issue to be tried, in that, the issues are not frivolous or vexatious. I have gone on to consider the balance of convenience, whether to grant or refuse the injunction. I have questioned whether damages will suffice. In considering that aspect I have considered Section 27 of the Rent Restriction Act, and it appears at this stage that the section has been breached by the First and Second Defendants by having the lights disconnected, and this certainly amounts to a tort against the Plaintiff, who is one of the persons who the section was intended to protect in that the injury is of the kind that the section is intended to prevent. I draw comfort from WARDER V COOPER submitted by Dr. Manderson-Jones."

To reiterate, it is highly probable that the courts in this jurisdiction will follow the English Court of Appeal in McCall v. Abelesz (supra). As previously stated however, what could be in issue at a trial would be the averment in paragraph six of his Statement of Claim that the appellants "unlawfully and maliciously directed the third defendant (Public Service) to disconnect the electricity supplies to the said premises." It is an important

allegation and has to be distinguished from the separate issue of lawfully terminating the contract between Jamaica Public Service and the appellants. Furthermore, this allegation has been considered and applied in this jurisdiction. See Minott v. Smart (1974) 22 W.I.R. 319.

The claim bears examination as it has raised important legal issues on somewhat imprecise pleadings. It seems that the tort contemplated is "procuring a breach of contract" adverted in his endorsement on the writ. There is authority referred to in the previous proceedings David Rudd v. Crowne Fire Extinguisher Services Ltd. (supra) which suggest that the Electric Lighting Act and the licence pursuant thereto imposes a duty not to disconnect without notice or to reconnect if requested of Public Service to any "any person in possession of property" and that includes an occupier. This tort however, is applicable not only when the tortfeasor procures a breach of contractual rights, but to other rights as well. Lord Macnaghten recognised this in his statement about the tort (Lumley v. Gye (1853) 2 E & B 216) 118 E.R. 749 or (1843-60) All E.R. p. 208 in Quinn Leatham (1901) A.C. 495 at 510. He said -

"The decision was right not on the ground of malicious intention - that was not, I think, the gist of the action but on the ground that a violation of a legal right committed knowingly is a cause of action and that it is a violation of a legal right to interfere with contractual relations recognised by law, if there be not sufficient justification for the interference."

James v. The Commonwealth (1939) 62 C.L.R. 339, 370

is an illustration of how the tort applied in Newman v. Zachary (1646) Aleyn 82 E.R. 883 developed in Lumley v. Gye has been expanded to accord with general

principle admitted in Quinn v. Leathem.

There seems to be also a claim by Rudd of conspiracy between the two appellants to disconnect his electricity supply and a claim that Taylor incited the Company to breach its tenancy agreement with Rudd in paragraph 17 of the Statement of Claim. That is another matter which although not expressed with precision, may be decided at trial.

All these claims however, could not be the basis for granting prohibitory injunctive relief. If it is proved that electricity had been disconnected by the inducement of the appellants then damages would be an adequate remedy. Moreover, although the respondent has averred in paragraph 10 of his Statement of Claim that -

" The First and Second Defendants threaten and intend unless restrained by this Honourable Court to continue to interfere with the quiet enjoyment by the Plaintiff of the premises."

he has not sworn in his affidavit that there is a likelihood that his erstwhile employer will seek to discontinue his supply of electricity if it is ever restored. That would be necessary to raise a triable issue and would be the basis to grant prohibitory injunctive relief. See Leader v. Moody (1973) L.R. 20 Eq. 154.

As for the restoration of electricity, this court has already decided on a summons to strike out the respondent's statement of claim that he has a serious issue to be tried in that regard. As for Warder v. Cooper (1970) 1 All E.R. 1112, it does not afford the respondent any assistance as the learned judge found. That was a case under Section 32(1) of the Rent Act (U.K.) not Section 30 which deals with harrassment. The issue under Section 32(1)

was the necessity to recover possession by virtue of a court order where the person in possession is deemed to be a tenant. In these conditions, Stamp J. decided in interlocutory proceedings, that the deemed tenant was entitled to an injunction to permit him to re-occupy when the employer had changed the locks on his residence, after he had been dismissed from his employment. The terms of his service agreement was that he was entitled to a rent free house. In this case, the landlord has not sought to recover possession, or is the appellant seeking to recover possession. What Warder v. Cooper does illustrate was that Stamp J. was bold enough in interlocutory proceedings to declare -

".....whereas here, what the defendant has done is to infringe the terms of an Act and so committed a tort. For although S 32 conferred on the first plaintiff no proprietary interest in the bungalow, the breach of its terms by the defendant was, in my judgment, a tort. The first plaintiff was clearly one of the class of persons whom the section was intended to protect, the injury - the evidence is that the first plaintiff is homeless - is of the kind that the section is intended to prevent and it is the breach of the statutory duty which is causing the damage to the first plaintiff.

Conclusion

The previous litigation on appeal has thrown up difficult points of law on a summons by Public Service to strike out the respondent's Statement of Claim for the restoration of electricity. The order on appeal was that there was a serious issue to be tried and there was an order for a speedy trial. Let it be acknowledged that Record J. recognised at the inception of these proceedings that he was dealing with an important and urgent issue.

He said -

"I draw comfort from WARDER V COOPER submitted by Dr. Manderson-Jones (A portion of the Judgment is read). As far as the mandatory injunction is concerned I find that electricity is an essential commodity in any household in Jamaica."

Where he erred was in granting the injunctive relief against these appellants because to reiterate he thought that, there being no contract between the respondent and Public Service, no liability could be imposed on Public Service.

In this interlocutory appeal which also raised difficult points of law, we allowed it, and set aside the orders granting injunctions in the Supreme Court. We also awarded costs to the appellants both here and below. These are the reasons for that order.

ROWE, P.:

I concur.

GORDON, J.A. (AG.):

I concur.