

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. NO60 OF 1978

BETWEEN NATIONAL COMMERCIAL BANK JAMAICA LTD. PLAINTIFF
(EXECUTORS OF ESTATE KEIFFER WILLIAMS
DECEASED)

AND DAN HENRY CHANG DEFENDANT

Mrs. A. Hudson-Phillips instructed by Mr. Bruce Barker of Messrs.
Livingston, Alexander & Levy for Plaintiff.

Mr. C.J. Mitchell instructed by Messrs Miller, Mitchell & Co. for Defendant.

Reasons for Judgment - 13th July 1981

GORDON J.

This action was tried by me on the 2nd and 3rd June 1981. At the conclusion of the addresses I gave judgment for the plaintiff and intimated I would give my reasons at a later date.

The plaintiff sought to recover from the defendant the sum of \$6,865.16 money paid by the plaintiff to the Jamaica Public Service Company Ltd. for and on behalf of the defendant and at his request. The plaintiff National Commercial Bank Jamaica Ltd. (the Bank) are executors of the estate of Mr. Keiffer Williams, deceased, who died on 28th January 1973 in a motor vehicle accident which claimed the lives of his wife and himself. At the time of his death Mr. Williams lived at 18 Trenton Road, May Pen and his orphaned children, all minors, continued to occupy these premises. Probate of Mr. Williams' will executed on the 11th December 1972 was granted to the executors on 11th June 1973.

Mr. Donald Cunningham, Manager of the trustee department of the Bank said prior to the grant of Probate the Bank wrote to all utilities advising them of the Bank's position and asking that all bills due by the estate be sent to his department. In due course he received a bill for \$40.10 from the Jamaica Public Service Company Ltd. which was honoured. After the grant of Probate he advertised

for creditors and dealt with claims. 18 Trenton Road, May Pen was part of the deceased's estate and the Bank received bills for these premises on a regular basis and paid them. Mr. Cunningham said that in October 1975 his department received a letter from the Jamaica Public Service Company (exhibit 2) and he then became aware that the deceased had once had an interest in premises 26 Main Street, May Pen. The letter advised that there was an outstanding bill for \$6,865.16 on premises 26 Main Street, May Pen and this bill had been transferred to premises 18 Trenton Road. He made enquiries at the Titles Office and obtained from the Jamaica Public Service Company a detailed statement exhibit 5. This statement showed the arrears accumulated over the period August 1973 to 24th February 1975 when the service was disconnected.

A copy of the Registered Title for premises 26 Main Street, May Pen was admitted by consent of parties as exhibit 1 at the commencement of the trial. This Title showed that the premises were transferred to the defendant Dan Henry Chang on 12th January 1968 by virtue of a transfer dated 2nd January 1968.

The Bank after receipt of the letter (exhibit 2) contacted the defendant by telephone and by letter (exhibit 6) asking him to settle this bill and defendant failed to respond. The Executors pleaded with the Jamaica Public Service Company asking for time in which to sort out the settlement of the outstanding bills and requesting the supply of electricity to 18 Trenton Road be not disconnected. Their entreaty fell on deaf ears and on 18th March 1976 the supply of electricity to 18 Trenton Road was cut off leaving the orphans in darkness. The Bank exhausted all means of getting the bill paid and was obliged to pay and paid the bill on 24th February 1978, on the advice of their Attorneys-at-Law. A delco lighting plant in the interim supplied light to 18 Trenton Road until the Jamaica Public Service Company restored its facilities after the bill was

settled in February 1978.

The defendant said he rented the supermarket from Mr. Williams in 1967 and subsequently bought the premises and it was transferred to him vide exhibit 1. He saw Mr. Williams pay up the electricity bill prior to his taking over the business, subsequent to that he requested the deceased to have the meter transferred to him, this the deceased promised but failed to do despite numerous requests.

Defendant on 1st October 1972 leased the supermarket to a group - Capital Diversified Ltd. who operated the business as K's Supermarket. Prior to completing the lease he said he asked deceased to deal with the transfer of the light meter and deceased promised so to do. The meter was read up to 5th October 1972 and he paid that bill as he paid all bills from the time of the take over. A condition of the lease was that the lessees pay for electricity they consumed.

The defendant contended that the amount paid by the plaintiff accumulated while the lessees were in possession and he is not liable. He attended at the supermarket every month and collected the rent from the lessees. He described himself as an experienced and successful businessman (with some reservations). The lessees got in financial difficulties "I took back my supermarket. I came out free I got my money from them, they owed me nothing. It did not matter to who they owed. Their finances were haywire" he said. Having terminated the lease he again commenced business on the premises. The business then was operated as J and D Supermarket, he was a "sleeping partner" Before re commencing to operate the supermarket he said he went to Jamaica Public Service Company to get a new meter he told them he had bought the premises, he got the meter.

The defendant is a very positive, if not aggressive, person. He said he had been taught how to operate a business by Mr. Williams who had given him his start in business. He had urged Mr. Williams on numerous occasions to have the meter transferred and in this effort went to the Jamaica Public Service Company's Office and

obtained information as to how the transfer should be affected. He relayed this information to Mr. Williams he said. It does seem very strange that over the years he never mentioned to the Jamaica Public Service Company that he had bought the premises until he decided to operate J and D Supermarket. This latter supermarket he said came into operation in 1977 he then corrected himself and said it was in 1974 or 1975; When this business commenced the light had been disconnected long before.

I find that when the defendant exercised his right of re-entry at 46 Main Street, May Pen the electricity supply to the premises had not been disconnected. He said "When I went there the lights were on. The receivers were there, I allowed them to keep the goods until auction, after that the lights were cut off"

If J and D Supermarket commenced operations in 1974, the electricity was still being supplied to the premises in the name of Keiffer Williams and this supply was not disconnected until 24th February 1975. When the letter exhibit 6, was sent to defendant c/o J and D Supermarket 46 Main Street, May Pen that business was in operation on 6th November 1975. The defendant denied receipt of this letter but asserted "It is logical to assume a letter addressed to me there would reach me". The defendant, positive in his evidence in-chief, was not so positive in cross examination. He was uncertain of the date J and D Supermarket commenced operation.

The supply of electricity to premises 26 Main Street, May Pen was discontinued on 25th February 1975 yet it was not until 7th October 1975 that plaintiff was informed that the account was transferred to the account at 18 Trenton Road. The transfer was effected in January or February 1976 as per exhibit 7. It was suggested to the defendant that he could not get the Jamaica Public Service Company to supply J and D Supermarket with electricity until the bill had been paid or arrangements, satisfactory to the Jamaica Public Service Company for the payment of the bill, had been made. This he denied. It is probable that J and D Supermarket was in operation when exhibit 2 was written on 7th October 1975.

The defendant contended that Capital Diversified is the party responsible for payment of the bill as the electricity was consumed in their operation. He did not regard himself as being in any way responsible. Defendant said the covenant in the lease (exhibit 10) whereby the lessees covenanted with him the lessor to pay for electricity consumed by them was normal in those transactions. The defendant had himself enjoyed the use of the electricity supplied to 46 Main Street, May Pen from sometime in 1967 until 30th September 1972 and he had assumed responsibility for the payment of the bills incurred for such use. He had in fact paid for such use. As owner of the premises he had enjoyed this benefit for approximately five years or more. On the evidence the account with the Jamaica Public Service Company was settled up to about June or July 1973. Thereafter the arrears began to accumulate. His responsibility as he saw it under the lease was to collect his rent and see to it that he lost nothing. If a covenant by the lessee or tenant to pay for services rendered during his tenancy is normal in these commercial transactions, then it can be assumed that at the time the defendant rented the premises 46 Main Street, May Pen from Mr. Williams such a covenant was made by the defendant with Mr. Williams and the defendant admitted he paid his bills. The covenant may have been included in the Agreement for Sale which was subsequently executed. The defendants continued in possession of the premises 46 Main Street, May Pen from he entered thereon in 1967 as a tenant until he became the owner in fee simple in 1968.

The defendant was sued in quasi - contract and the plaintiff had to establish:

- (1) That he has been constrained to pay the money and
- (2) That it is money for which the defendant was legally liable.

The plaintiff relied on three cases -

Moule vs Garrett and others (1872) ALL E.R. (Reprint)

P. 135; (1872) L.R. 7 exch. 101.

Brooks Wharf and Bull Wharf Ltd. vs. Goodman Bros. 1936

ALL E.R. P. 696.

Exall vs. Partridge (1799) Vol. 101 E.R. P. 1405

The head note in Moule vs. Garrett and Others (1872) ALL E.R.

(reprint)- P.135 reads:-

"The plaintiff, lessee of premises under a lease for years containing a covenant to repair, assigned the term to B., who subsequently assigned it to the defendants, the indenture of assignment in each case containing express covenants by the respective assignees with their respective immediate assignors to indemnify them against all subsequent breaches of covenant. The defendants, during the time they were in possession, committed breaches of the covenant to repair, and then assigned over to another person. The plaintiff, having been compelled in an action on his covenant brought against him by the lessor's representatives to pay damages in respect of such breaches, brought an action to recover from the defendants the amount of those damages.

Held: the defendants were liable to reimburse the plaintiff the amount expended by him in satisfying the claim of the lessor's representatives because (i) the defendants had acquired the same estate as that which the plaintiff acquired originally under the lease, and they took that estate subject to all the liabilities which the covenants contained in the lease imposed on the plaintiff; (ii) the plaintiff had been compelled to pay damages by reason of the legal default of the defendants, and so, by implication, he was entitled to recover from them the amount so paid".

Sir Alexander Cockburn, C.J. (P.137i) referred to the general doctrine well stated in Leake on the Law of Contracts at P.41 as follows:-

"This contract is created in law upon an implied request without any request existing in fact, where the plaintiff has been compelled by law to pay or being compellable by law has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability. Under such circumstances the defendant is held indebted to the plaintiff in the amount".

He continued (P.138B)

"Whether the liability is put on the ground of implied contract or on that of a legal obligation arising and imposed by law, is immaterial in either case the duty is such as the law will enforce and in either case a defendant is equally liable".

Mr. Mitchell urged on behalf of the defence that for the plaintiff to succeed in this action it must be established:

- (1) That the defendant was ultimately liable to pay.

(2) There must be no default or negligence in the plaintiff.

He submitted, relying on the authority of Brooks Wharf and Bull Wharf Ltd. vs. Goodman Bros. (supra), that Mr. Keiffer Williams was negligent. The defendant he said had made numerous request of Mr. Williams to transfer the meter to his defendant's name. He sought to tender a copy of a letter he said he wrote to Mr. Williams about the matter. Objection was taken to the admission of this copy letter as it was in part indecipherable, illegible, was not mentioned in the pleadings, and its origin was unknown to the plaintiff. If the letter could be read by the defendant as he asserted, there was no request for the production of the original, and it would be self-serving. I did not admit it. The defendant, it was urged, did not know what is the proper procedure when premises change hands and light is to be supplied. In answer to a question asked in cross examination the defendant said:

"I had a situation in my apartment where a tenant had migrated leaving Jamaica Public Service bill unsettled. I applied for and got a new meter. This was in 1976".

I now turn to a consideration of the Electric Lighting Act (27th May 1890) Section 13 provides:

"Where a supply of electricity is provided in any part of an area for private purposes, then, except in so far as is otherwise provided by the terms of the licence, order or special Statute, authorizing such supply, every company or person within that part of the area shall, on application, be entitled to a supply on the same terms on which any other company or person in such part of the area is entitled, under similar circumstances, to a corresponding supply".

The Jamaica Public Service Company Limited is the company which supplies electricity in Jamaica. It is clear on the evidence that this company supplies electricity to the town of May Pen. The section under review stipulates that a person in May Pen, who requires a supply of electricity, shall on application be entitled to a supply. The inescapable inference to be drawn from this enactment is that on execution of the contract between the person and the company any contract previously existing in relation to that premises or place

for the supply of electricity, is determined. The supply or non-supply of electricity to a person is not left to the determination of the company it is the right of the individual to have it on application made, this right enures to the benefit of any person, a fortiori, an owner in fee simple in possession.

I was not impressed with the testimony of the defendant that he could not get electricity supplied to his premises in his name for approximately five years. His evidence lacked credibility as he sought to show that the Jamaica Public Service Company would not enter into contract with him over this period - a period during which the current bills for electricity supplied to his premises were paid by him and there were no arrears due. He could have applied for the supply of electricity to be in his name and in accordance with the provisions of Section 13 of the Electricity Act he would have had to have it from the Jamaica Public Service Company. This is what obtained in 1974 or 1975 when J and D Supermarket commenced operations, this facility was also afforded him in 1976 at his apartment. This section of the Electricity Act applied in 1967 as it applies today.

I do not accept the evidence of the defendant that he made several requests of Mr. Williams to effect transfer of the meter. While it is true to say that Mr. Williams could have terminated the contract he had with the Jamaica Public Service Company it is equally true he could have relied on the provisions of Section 13 of the Electricity Act and expect the defendant to act in accordance therewith. Indeed the defendant saw Mr. Williams pay the light bills prior to defendant's take over of the business. This indicates the degree of care Mr. Williams exercised in his business affairs and the confidence he had in the defendant's integrity.

Mr. Williams was a successful businessman of some opulence. He could not have achieved that status by being negligent. The demeanour of the defendant portrayed an aggressive businessman one who was exact in his dealings; he had been taught by Mr. Williams. Had

Mr. Williams terminated the contract with the company, defendant's supply of electricity, vital to the operation of his business, would have been peremptorily discontinued. This would have adversely affected defendant's trade and stock until defendant could have the supply restored. Such was the relationship that existed between these businessmen it is reasonable to infer Mr. Williams expected defendant to exercise his rights under Section 13 of the Electricity Act. The defendant instead of doing this continued to use the electricity supplied in Mr. Williams' name and paid the bills. He was careful to mention in his evidence that he expected Mr. Williams to claim the refund of his deposit and interest thereon, he should have observed the credits on his bills over the 5 years for interest on Mr. Williams' deposit. These credits are given in February - vide exhibit 5. The defendant by subrogation assumed the plaintiff's place vis-a-vis the Jamaica Public Service Company.

In submitting on negligence the defence sought to show that Brooks Wharf and Bull Wharf Ltd. (supra) supported the contention that the Plaintiff must show that there was no negligence or default on his part. The facts and findings are succinctly recorded in the headnote:

"By an agreement between the plaintiffs, bonded warehousemen, and the defendants it was agreed that the defendants should pay to the plaintiffs certain wharf charges and that the plaintiffs should warehouse certain goods which the defendants were importing, undertaking in respect of them the usual obligations of bonded warehousemen. The goods were duly imported, customs duties becoming due. The goods were stolen before the duty had been paid. The plaintiffs paid the duty, pleading obligation to H.M. Customs and alternatively their obligations as bonded warehousemen, and sued for the sum paid. The defendants contended that the duty was paid as a personal liability of the plaintiffs as bonded warehousemen and counter-claimed for the value of the goods stolen, alleging negligence:-

Held: (i) there was no evidence that the theft of the goods was due to negligence of the plaintiffs who had taken such precautions as reasonable and prudent care demanded.
(ii) duty becomes due on importation, though it is not payable whilst the goods remain warehoused, and it only ceases to be due on being actually paid when the goods are taken out for home use or if they are entered for exportation or ships' stores.
(iii) the defendants therefore, as the importers, were and remained liable for duty.
(iv) the plaintiffs were entitled to recover the amount paid in respect of duty as money paid to the use of the defendants".

The plaintiff submitted that this case turned not on a question of negligence but on who was ultimately liable as between plaintiff and defendant for the payment of duties. Negligence was considered and dealt with in Brooks Wharf case, it was a factor taken into contemplation in determination of liability.

In practice a person who desires to have electricity supplied to his holding in any area where such supply is available is required to apply to the Jamaica Public Service Company and his wish must be granted. Section 13 of the Electricity Act provides for it. I hold that Mr. Keiffer Williams was not negligent.

It is convenient here to consider whether the plaintiff was constrained to pay. The facts indicate that the Jamaica Public Service Company invoked the provisions of Section 15 of the Electricity Act and discontinued supply to 46 Main Street, May Pen.

Section 15:

"If any Local Authority, company or person, neglect to pay any charge for electricity, or any other sum due from them to the undertakers in respect of the supply of electricity to such Local Authority, company or person, the undertakers may cut off such supply, and for that purpose may cut or disconnect any electric line, or other work through which electricity may be supplied, and may, until such charge or other sum together with any expenses incurred by the undertakers in cutting off such supply of electricity as aforesaid are fully paid, but no longer, discontinue the supply of electricity to such Local Authority, company or person".

The section allows for withholding of supply after disconnection until the bill is paid. The supply in respect of 46 Main Street was however restored in 1975 and the bill was not paid until 24th February 1978. There is nothing in the act authorising the merging of accounts. However the Jamaica Public Service Company attached this account to that of Mr. Williams at 18 Trenton Road. The contract with the Jamaica Public Service Company remained over the years in the name of Mr. Williams and had not been terminated by him or under the provisions of Section 13 supra. The Jamaica Public Service Company was therefore entitled in law to proceed to recover from Plaintiff the outstanding amount. The subsequent discontinuance of supply to 18 Trenton Road was pressure for payment applied by Jamaica Public Service Company and eventually

plaintiff was constrained to pay in the interest of the beneficiaries of the estate of Mr. Williams.

There now remains the issue of liability. Mrs. Hudson Phillips submitted:

"There is a duty and an obligation which rests on a defendant purchaser to indemnify the vendor for any charges for services supplied to the premises after sale. Defendant realised this and he made sure Mr. Williams paid for all electricity supplied up to date of change of ownership. Thereafter he paid for electricity supplied to premises".

It was further submitted that he could not exonerate himself by saying he had leased premises to a 3rd party who is responsible. In Moule vs. Garrett (supra) the landlord had recovered from the plaintiff, the lessee under the lease. Plaintiff could not claim against the landlord that the breach had been committed by assignee of the lease. Plaintiff was obliged to satisfy the landlord and recover from the defendant who had benefitted by this payment and the person who as between plaintiff and defendant was ultimately liable for the debt. Ultimate liability is between plaintiff and defendant by virtue of defendant's liability to indemnify the vendor for charges incurred after the change of ownership.

The defence agreed the purchaser's obligation to indemnify the Vendor is well established. It was submitted this obligation was discharged when the Vendor was requested to see to the change of the meter. I do not accept this obligation was discharged. Defendant was obliged to see that covenants in lease were observed. He saw to the fulfilment of covenant to pay rent. He failed in his duty to see that obligation to pay for electricity supplied was discharged. He failed in this duty because he got his money from the lessees they owed him nothing "it did not matter to (him) who they owed". Defendant had bought premises from Mr. Williams, he entered into possession and enjoyed the benefit of the electricity supplied thereto. He leased the premises with the continued flow of electricity.

It was further submitted by the plaintiff that the transfer of the bill from 46 Main Street to 18 Trenton Road conferred a benefit on defendant as he was then able to get electricity vital to the operation

of J and D Supermarket, supplied to 46 Main Street which had previously been saddled with the bill.

Defendant had exercised his right of re-entry under the lease. When he did this he found the receivers of Capital Diversified there. He

"allowed them to keep the goods until auction.
After that the lights were cut off".

Defendant here was an owner in possession and so liable for that portion of the bill which accrued during his possession and up to the time of disconnection. The best evidence defendant could give is that J and D Supermarket commenced operations in 1974 or 1975. If the commencement date was in 1974 some of the charges incurred must have been in respect of electricity supplied to a business operated by defendant and his partners. Plaintiff in paying the bill which includes charges for 1974 had conferred a benefit on the defendant.

I hold that the plaintiff was constrained to pay money for which the defendant was legally liable and is entitled to the judgment of the court;

Per Lord Wright M.R. in Brooks Wharf vs. Goodman supra 1936

ALL E.R. at page 707:

"The obligation is imposed by the court simply under the circumstances of the case and on what the court decides is just and reasonable, having regard to the relationship of the parties.....
The defendant would be unjustly benefitted at the cost of the plaintiff if the latter, who had received no extra consideration and made no express bargain, should be left out of pocket by having to discharge what was the defendant's debt".

U.D. Gordon
Judge