J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL - NO. 109/75.

B E F O R E : The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Robinson, J.A.
The Hon. Mr. Justice Zacca, J.A.

B E T W E E N : DR. LYNDON H. EVELYN — PLAINTIFF/APPELLANT

A N D — JAMAICA PUBLIC SERVICE CO., LTD. — DEFENDANTS/ RESPONDENTS

Mr. V. Dudley Evelyn for the appellant

Mr. N. Hill, Q.C. and Mr. E. DeLisser for the respondent

M A R C H 8 - 1 2 ; A P R I L 7, 1 9 7 6

GRAHAM-PERKINS, J.A.: At about 8.30 a.m. on July 24, 1972, there was an interruption in the supply of electricity to the appellant's offices at 7 Eureka Crescent, Kingston. This interruption lasted some thirty minutes. Sometime after the electricity was restored the appellant noticed that one of his two Carrier airconditioning units (hereinafter referred to as 'the unit') was not working. He summoned his servicemen. They arrived at his offices at about 9.15 a.m. One of these servicemen was a Mr. Lloyd Williams. He examined the unit and discovered that its overload protector and compressor were burnt out. He effected the necessary repairs to the unit at a cost to the appellant of $680.00. Having unsuccessfully sought an amicable settlement of his claim in respect of the cost of repairs to the unit the appellant instituted proceedings in the Resident Magistrate's Court, St. Andrew, seeking to recover damages for negligence and, in the alternative, for breach of contract. The action was heard by Her Honour Mrs. E. Sinclair. In the result she awarded judgment in favour of the respondent holding, in effect, that the appellant had failed to establish his claim in negligence and in contract. It is against that decision that the appellant brings this appeal.

At the hearing before the learned Resident Magistrate Lloyd Williams gave evidence on behalf of the appellant. That evidence was to the following effect. The purpose of the unit's overload protector

was...

was to protect the compressor "in case of low voltage <u>or</u> high voltage". The unit "was supposed to have 220 voltage", and the overload protector "would protect from 208 - 230 volts in this unit. It would not protect at 130." When he arrived at the appellant's offices he checked the voltage and found that the power being supplied to the unit was 130 volts. The cause of the burning out of the compressor, as also the overload protector, was low voltage. The overload protector was the only protective devise fitted to the unit. Air Contrix Ltd., the company for which Williams worked, serviced the appellant's units from time to time. He had serviced those units prior to July 24, 1972. He did not say how many times he had examined and serviced the units. He specialized in mechanical repairs. His knowledge "of the electrical side was about 25% less than the mechanical aspect."

The appellant's evidence was to the effect that both his units were installed in 1967 and were in good working order up to the time of the outage on July 27, 1972. Both units had been regularly serviced and neither had ever needed repairs.

For the respondent Mr. Arthur Dietrich gave evidence. He was their sole witness. He is an engineer in the employ of the respondent. He denied that an overload protector could be damaged by low voltage. He said, however, that a compressor could be damaged by low voltage if the overload protector was so damaged as to allow power - low voltage - to flow to the compressor. Power of 130 volts was low and could damage a compressor. If an air conditioner had a low voltage protector low voltage could not damage it. He had not seen the appellant's unit but he knew that not all Carrier units carried a complete series of protective devices. They were all, however, fitted with a standard protective device which protected them against overloading.

In her reasons for judgment the Resident Magistrate said, <u>inter alia</u>:

> " At best, Mr. Williams is not shown to be a person with any high degree of expertise in electrical repairs to air conditioner units. This witness gave two answers

which...

" which seem to be irreconcilable in relation to the cause of the damage to the protector and the compressor. At one point he says 'the cause of the burning out of the compressor as also the overload protector was low voltage', and at another point he says 'when there is electrical outage, whatever the cause of the outage, electricity comes back with plenty fluctuation, sometimes 220, 240 or 260 - that is the reason for having protective equipment'.

In contrast to the evidence of the plaintiff's witness, defendant called a Mr. Dietrich, an engineer with the defendant company for 6½ years who had prior experience with Reynolds Jamaica Mines where he was in charge of refrigeration, industrial and domestic, including air conditioner units. He categorically states that an overload protector cannot be damaged by low voltage under any circumstances. He gave a variety of reasons which would lead to the burning out of an overload protector none of which related to low voltage or to sudden surge of power. Significantly, his evidence that low voltage can never destroy an overload protector was not challenged in cross-examination.

On this state of the evidence it was impossible for me to conclude even on a balance of probabilities what did cause the burning out of the overload protector and the compressor of the plaintiff's air conditioning unit".

An examination of the evidence given by Williams and Dietrich reveals that the only real point of conflict between them concerned the question whether the overload protector could have been damaged by low voltage. It may be that the magistrate was justified in preferring the expert opinion of Mr. Dietrich to that of Mr. Williamss in her search for the answer to that question. In my

view,

however, the conclusion that the overload protector could not have been damaged by low voltage was not, as the magistrate appears to have thought, an end of the matter. Both Williams and Dietrich were at one in their view that damage to the overload protector – however caused – was a prerequisite to damage to the compressor. Parenthetically, I observe that Dietrich's opinion that the compressor is vulnerable to damage by low voltage if the overload protector is antecedently damaged does not appear to be consistent with his view that the purpose of an overload protector is to protect only against excessive voltage. True it is that Williams and Dietrich differed as to the particular cause of damage to the overload protector. The opinion advanced by Williams was that it was due to low voltage. Dietrich's view was that it could not have been so brought about. Further, there was certainly no conflict between Williams and Dietrich that the damage to the compressor was caused by low voltage. Williams' opinion was that the damage to the compressor was attributable to low voltage. Dietrich confirmed that low voltage could have damaged the compressor. Another unchallenged bit of evidence from Williams was that some time after he arrived at the appellant's office he found 130 volts in the power line supplying the unit. There was no conflict between Williams and Dietrich that this was low voltage in relation to the unit. The appellant observed that the unit was not working "some time after the electricity was restored". Presumably he did not observe whether the unit was operative when the power was restored. Both Williams and Dietrich agree, however, that it would have taken at least 220 volts to restart the units. Since one of the units was observed to be operative when, or immediately after, power was restored it may be inferred that power was restored to the extent of a minimum of 220 volts. But some time after 9.15 a.m. Williams found 130 volts in the line to the unit. It is also shown that the unit's compressor was in proper working order up to 8.30 a.m. on July 24, 1972 when the outage occurred. It must be noted, too, that no evidence was led to show how long it would take for damage to be done to the compressor by low voltage.

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In Dietrich's opinion damage to an overload protector may be caused in several ways. If the opinion of Dietrich is to be preferred to that of Williams on the issue whether low voltage could have caused, and did in fact cause, damage to the overload protector a crucial issue still remained to be resolved, namely, the cause of damage to the compressor. On this issue the evidence was that low voltage was the operative cause. To prefer Dietrich's opinion with respect to the damage to the overload protector does not by any means necessarily involve the rejection of the opinion of Williams, supported as it was by Dietrich's evidence, that the cause of the damage to the compressor was low voltage. As pointed out earlier Williams did find low voltage. In these circumstances it becomes manifest that two possible inferences, _inter alia_ were fairly open on the evidence adduced before the magistrate Firstly, that the overload protector was damaged some time prior to 9.15 a.m. on July 24, 1972. Significantly, Williams was unable to say _when_ this protector could have been damaged. Secondly, that the compressor was probably damaged by the low voltage Williams found _after_ power had been restored to the appellant's offices. Regrettably, however, having formed the view that the opinion of Dietrich as to the impossibility of damage to the overload protector by low voltage was to be preferred to that of Williams the Resident Magistrate concluded that that was an end of the appellant's case. In my respectful view she erred in so concluding. She ought to have proceeded to an examination of the real questions that arose on the evidence before her. Was there low voltage on the line to the appellant's unit as shown by Williams? Were the probabilities in favour of damage to the compressor by that low voltage? With regard to these two questions the evidence, if accepted, and the inferences therefrom, were undoubtedly capable of sustaining answers in the affirmative in favour of the appellant. Was this low voltage a result of the respondent's negligence? During the hearing of this appeal I expressed the view, a view shared by Messrs. Hill and Evelyn, that the appellant's success either in his claim for breach of contract, or in his claim in negligence, depended on the existence of negligence in the respondent. It is in this area, however, that there arises some considerable uncertainty. An Outage

Report...

Report in respect of the outage on July 24, 1972 was prepared by a Mr. Marrett, the respondent's Transmission and Distribution Manager. This report shows the reason for the outage as follows:

"REASON: At approximately 8.31 a.m. surge conditions affected the system wherein the 138 K.V. Tredegar Line No. 50 C.B. at Old Harbour tripped, during which system instability led to further tripping of the Old Harbour No. 3 unit as the voltage stablizing transformer which would normally correct this condition was not in use."

"COMMENTS: ...

N.B.: Installation of the voltage stablising transformer on the Old Harbour No.3 unit was carried out on Thursday, July 27, 1972: This equipment had been previously damaged on July 17 ..."

I am not at all clear whether this report was in evidence before the Resident Magistrate or not. The record discloses: "Photostat copy of Transmission Report on outage - subject to admissibility (Ex. 4)." If the document was "subject to admissibility" I confess no little difficulty in understanding why it was marked as Ex.4. The matter is not rendered any the less uncertain by the following extracts from the magistrate's reasons for judgment:

" By consent the copy contract was admitted .... also a photostat copy of Transmission Report on outage on the 24th July, 1972."

" The outage report, Ex.4, couched in technical language, was not elaborated upon during the course of the trial and the expert called by the defendant was not questioned as to the contents of that report. It might have been interesting to know, for instance, why the installation of the defendant company's voltage stabilizing transformer, damaged on July 17, 1972, was not carried out

until...

> " until July 27, 1972. Had the plaintiff shown that his air conditioner unit was damaged as a result of the electrical outage, then it might have been relevant to consider whether there was any negligence on the part of the company in failing to have in use its voltage stabilizing transformer which could have prevented the outage... and whether the company could rely on the clause exempting from damage flowing from the breakdown of its own machinery."

Mr. Hill maintains that the outage report was not admitted in evidence. Mr. Evelyn insists that it was.

If the document was, indeed, in evidence and there was some point that the Resident Magistrate did not understand there does not appear to be any reason why she did not seek clarification thereon when Dietrich was in the witness box. However technical the language in which the document was couched it was at least clear, from its relevant portions, that the outage was a result of the unexplained abscence from the respondent's No. 3 unit at Old Harbour of a voltage stabilizing transformer.

It is, I think, clear that where there is evidence of circumstances from which it can fairly be inferred that there is a reasonable probability that damage resulted in a given case from the want of some precaution which a defendant ought to have taken the onus is squarely on the defendant to show that the damage complained of was not attributable to his fault. See, e.g., McArthur v. Dominion Cartridge Co. (1905) A.C. 72. The learned Resident Magistrate did not, in this case, reach the point where she would have found it necessary to consider whether on the totality of the evidence, including the outage report, if this document was in evidence, negligence in the respondent was to be reasonably inferred thereby causing an evidential burden to fall on it to show that it was not guilty of any neglect in its duty to the appellant. As I have already shown, once she preferred Dietrich's opinion concerning the damaged overload protector she deemed it unnecessary to proceed further. It may fairly be said that at the end of the day she had not adjudicated on the real issues in this case.

Two...

Two further questions remain. Firstly, assuming a finding of negligence can the respondent rely on a clause in its contract with the appellant which purports to exempt it from liability in the circumstances therein defined? That clause reads:

" LIABILITY

The Company will use reasonable diligence in furnishing as constant a supply of electrical energy as practical but in case such supply shall be interrupted or fail by reason of strike, fire, Act of God, the Public Enemy, accident, legal processes, interference by Government or Local Authority, breakdown or injury to machinery or lines of the Company's system or repairs the Company shall not be liable for damages. The Company shall not be liable to the consumer for any damage to his equipment or for any loss, injury or damage of any nature whatsoever resulting from the Consumer's use of the electrical energy furnished by the Company or from the connection of the Company's line or lines with the Consumer's wiring and appliances."

Mr. Hill argued that the word " whatsoever" must, in effect, be read as if it meant "howsoever caused". I am quite unable to share this view. There cannot, I think, be the least doubt that the word "whatsoever" qualified the word "nature" immediately preceding it and, therefore, as a matter of language, refers directly to the kind of damage suffered by a consumer and not to the cause of that damage. In view of the order that I propose at the end of this judgment I say no more than that in my view the liability clause is not so worded as to exclude the respondent's liability for negligence. See Canada Steamship Lines Ltd. v. The King (1952) A.C. 192.

The second question relates to a term of the contract contained in the Second Revised Sheet N-216. This term reads:

> " (c) It is the responsibility of the consumer to provide the necessary equipment to protect all motors motors and other apparatus or appliances from damage resulting from low voltage, single phasing conditions, etc."

Here again, I will say no more than that in my view this provision as imprecisely worded as it is, is clearly inserted for the benefit of the consumer and cannot be called in aid to protect the Respondent against its own negligence, assuming a finding of negligence, since to permit it to do so would be to convert the provision into a clause excluding liability for negligence when the one clause in the contract dealing with exclusion of the respondent's liability does not, by its terms, exclude such liability.

For the reasons I have given I would allow the appeal and order a new trial before another Resident Magistrate. I would also order that the appellant have the costs of this appeal and that the costs of the first trial abide the result of the new trial

ZACCA, J.A:

I agree.