

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. 1976 C. 307

BETWEEN	URVILL CHIN	PLAINTIFF
A N D	THE JAMAICA PUBLIC SERVICE COMPANY LTD.	DEFENDANTS

H. Haughton-Gayle for the Plaintiff

R. Williams, Q.C. & W.K. Chin See for Defendants.

Hearing: January 29, 30, 31, 1979
 June 25, 26, 27, 1979
 November 26, 27, 28, 1979
 March 3, 4, 5, 1980

DELIVERED: 13th November, 1981

J U D G M E N T

WRIGHT J.

In contemplation of the Plaintiff operating a supermarket at premises No. 30 - 32 Manchester Road, Mandeville, he in the month of December, 1968 entered into a contract with the Defendant company for supplying of electricity to those premises. The service was duly installed on 10th December, 1968 and thereafter the defendant on a regular basis submitted bills for electricity supplied as indicated by the meter installed on the plaintiff's premises and payments were made from time to time. However, in November, 1975 the plaintiff received a letter dated November 21 over the signature of H.E. Bennett, Manager, Revenue Accounting which states -

" A recent examination of the above electricity supply revealed that the Meter Seals have been broken, and there was also evidence of tampering with our equipment installed on your premises. Our Technician has resealed the meter and left it working accurately. We have consequently billed your account over the period of this irregularity based on consumption recorded on the meter during an interference-free period and we request immediate settlement of this bill for \$14,806.54 which is enclosed herewith.

Interference with our equipment is a very serious violation of our Terms and Conditions of service and any evidence of a recurrence of this act will leave us no alternative but to remove the meter

" and service from the premises and further, renders you liable to prosecution."

Faced with this demand and the very serious threat to his business the plaintiff sought the services of Mr. O. Crosbie, Attorney-at-Law who by letter dated the 2nd December, 1975 denied the indebtedness and the charge of tampering.

The defendant replied by letter dated December 16, 1975 which reads in part -

" The meter at the above-address was inspected on the 24th October, 1975 and was found to be registering incorrectly due to the fact that the pointers had been misplaced. These were adjusted and left reading 8,265 KWH on 24.10.75. A subsequent reading 24 days later revealed a consumption of 6,370 KWH and on the basis of the consumption for the period your clients bi-monthly consumption was estimated at 15,924 KWH. This estimate, though still short of the recorded bi-monthly consumption up to the meter-reading of 24th March, 1970 was very much more than the highest recorded bi-monthly consumption of 9,000 KWH, subsequent to that date. In view of this the consumption for the bi-monthly periods March 24, 1970 to September 29, 1975 has been estimated on the basis of the known consumption for twenty-four days following the correction of the Meter Pointers and your client's account has been adjusted accordingly.

Unless satisfactory arrangements for the payment of the outstanding amount is made within seven days from the date of this letter we will have no alternative but to discontinue the supply."

The plaintiff was thus confronted with the basis for the defendant's charge of tampering and an unyielding demand for payment. So, on December 19, 1975 Mr. Crosbie was on the telephone to the defendant's Credit Manager and under protest agreed to certain terms which he later incorporated in his letter dated December 22, 1975 the relevant portions of which read as follows:-

" Further to telephone conversation between your Mr. Morris - Credit Control Manager and me of the 19th instant under protest and without any admission of liability by my client, Mr. Urvill Chin, of your demand for payment of Fourteen Thousand Seven Hundred and Fifteen Dollars and Eight Cents (\$14,715.08) as amount due as adjustments I am instructed by Mr. Chin to make the following arrangements.

- a) Immediate payment of the sum of \$3,000 which is enclosed.

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- b) Full payments within twelve months from date.
- c) Payment of interest on any outstanding balance at any rate of interest at which J.P.S. Co. Ltd. pays interest on loans to it in the normal course of its business for working capital or at the rate of interest a commercial bank charges a business such as J.P.S. Ltd. for working capital whichever is less.
- d) Further payments of the balance of amount represented as adjustments by eleven equal monthly instalments and interest thereon when liquidated and notified to Mr. Chin.
- e)
- f)

Be it further expressly stated that all payments and arrangements are made under protest and without any admission of liability."

A further letter from Mr. Crosbie dated 20th January, 1976 requested that the meter be tested and questioned the charge of tampering in the light of an amended bill which reflected a reduction in the amount claimed. Mr. Bennett's letter dated 23rd February, 1976 in reply explained this new amount. Credit had been given for payments made and additional sums debited up to 23rd January, 1976.

The plaintiff not being satisfied with what the defendant hoped would be a resolution of the issue brought his action in which he claims -

- 1) A declaration that he is not liable to pay the amount of \$14,715.08 claimed by the defendant or any part thereof.
- 2) Alternatively, a declaration that if the plaintiff is indebted to the defendant at all it would be for a three (3) month period of service only as aforesaid and that any such indebtedness would amount to a small fraction of the amount claimed.
- 3) Refund of the said amount of \$3,000.00 paid.
- 4) An order that the defendant by their directors, officers, servants, workman or agents or any of them or otherwise howsoever be restrained from doing the following acts or any of them, that is to say, discontinuing or diminishing the electricity supply to the said premises by reason of non-payment of the said sum of \$14,715.08 or any part thereof or for any unreasonable cause whatsoever.

The defence persists in the charge of tampering and alleges that this constituted breaches of conditions and/or fundamental terms of the said contract and/or a deviation by the plaintiff from the terms of the said contract or alternatively was a fundamental breach of contract on the part

of the plaintiff. The defence continues that because of such breaches the plaintiff is precluded from relying on a particular term (Revised Sheet No. 212) of the Standard Terms and Conditions subject to which the contract was made and upon which the plaintiff places great reliance, even if, which is not admitted that ^{were} terms ~~was~~/applicable. Accordingly, the defence denies that the plaintiff is entitled to the relief claimed or any relief at all.

In addition, the defence counter-claims for the amount of \$14,715.08 less \$12,000.00 paid as at 14th December, 1976 - balance \$2,715.08.

It is the case for the defence, and the plaintiff admitted this in cross-examination, that the contract was for the payment by the plaintiff for electricity consumed on the premises. However, the contention runs, until the irregularity was discovered and the adjustment of the pointers made, the defendant was not in a position, for the period in question, to submit normal bills for the true cost of the electricity supplied. Hence the amount claimed.

In his reply the plaintiff denies the tampering as well as breach of any conditions or fundamental terms of the contract or any deviation from the terms of the contract or any fundamental breach of contract. And, whereas the defendant alleges a duty on the part of the plaintiff to take reasonable care not to allow the meter on his premises to be tampered with the plaintiff's reply disclaims any such duty.

Before embarking upon a consideration of the evidence adduced it may be appropriate to set out the provisions of Revised Sheet #212 which bulks so largely in the plaintiff's case. Reference will later on be made to other Revised Sheets prayed in aid by the defence.

The relevant portion of Revised Sheet No. 212 reads:-

" The meter will be the property of the company and will be tested at regular intervals. The company at any time upon the written or verbal request of a consumer will test the meter of such consumer, provided only one such test shall be free of charge within a twelve month period, and the consumer shall pay the cost of any additional tests within this period unless the meter is shown to be inaccurate in excess of 2%.

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the
 " In the event of stoppage or failure of the meter to register, the consumer will be billed for such period on an estimated consumption based upon his use of electrical energy in a similar period of like use.

In event of any registration inaccurate in excess of 2%, bills will be adjusted by an amount to compensate for the excess or deficiency for a period equal to one half of the time elapsed since the previous meter test but not to exceed three months. No part of a minimum charge will be refunded."

A portent of the doggedness with which the proceedings would be conducted was clearly given by Mr. Haughton-Gayle's manouvres to have the defendant begin. It was his contention that the defendant had agreed to so much of what the plaintiff pleaded that the defendant should begin. But what the case is really about is the plaintiff's effort to avoid liabilities arising under a contract from which he is not resiling. And, furthermore he could not rest his case on the admissions made by the defendant. Accordingly, I ruled that the plaintiff should begin.

The plaintiff called no witness but himself but by consent several letters and copies of letters passing between the parties were admitted in evidence as Exhibit 5. viz:

Letter from Mr. H.E. Bennett to Mr. U. Chin dated 21st Nov., 1975.

Copy letter from Mr. O. Crosbie to Mr. H.E. Bennett dated 2nd December, 1975.

Letter f r o m Mr. H.E. Bennett to Mr. O. Crosbie dated 16th December, 1975.

Copy letter from Mr. O. Crosbie to Mr. H.E. Bennett dated 22nd December, 1975.

Copy letter from Mr. O. Crosbie to Mr. H.E. Bennett dated 20th January, 1976.

Letter from Mr. H.E. Bennett to Mr. O. Crosbie dated 23rd February, 1976 (with Statement of Account attached).

Copy letter from Mr. O. Crosbie to Mr. H.E. Bennett dated 10th April, 1976.

Copy letter from Mr. O. Crosbie to Mr. H.E. Bennett dated 8th June, 1976.

Letter from Mr. C.T. Gilbert to Mr. O. Crosbie dated 2nd December, 1976.

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Copy letter from H.H. Casserly to Mr. U. Chin dated 12th May, 1977.

In addition he tendered as Exhibit 1 the copy letter of application to the Jamaica Public Service Co. Ltd. dated 26th August, 1968;

Exhibit 2. The receipt dated 10th December, 1968 for the deposit he paid for the meter.

Exhibit 3. Copy of the Standard Terms and Conditions which governs the Agreement into which he entered with the defendant company;

Exhibit 4. Forty-nine (49) Bills received for electricity supplied.

Exhibit 4A - 5. Bills received for electricity supplied subsequent to period covered by Exhibit 4.

Exhibit 1 discloses the nature of the business the plaintiff proposed to operate and the type of supply he requested. It reads:-

" It is my intention to open a supermarket and store at 30 - 32 Manchester Road. I have bought refrigeration equipped for use on 220 volts 3 phase 50 cycle current. These compressors are one - five horse power and one - three horse power. We will be air-conditioning this building within six months of opening and this unit will be approximately 15 tons or 15 hp. We are thinking of a modern meat department which would entail a cold-room and meat cutting equipment. We are therefore applying for the type of current to facilitate the uniform running of these equipment i.e. 220V 50C 3 ph 30hp.

The opening date is planned for the end of November, so we would appreciate having power available in October to test-run the equipment etc."

It is clear that if everything went as planned the plaintiff's projection was for an increase in the consumption of electricity by his business. However, an examination of the bills tendered in evidence reveals, surprisingly, that even at a time when business was on the increase the consumption of electricity diminished dramatically.

The plaintiff testified that the defendant installed their meter on the outside of the northern wall of the supermarket over 6 ft. from the ground and that a pump from which he sold kerosene oil was also on that side of the building. Much time was spent in an endeavour to locate the meter in relation to the kerosene oil pump to which the members of the public had access - the manifest intention being to demonstrate that he could not reach

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the meter to tamper with it but that the general public had such access. In the process he confused himself and left me unimpressed by that aspect of his case. He also gave evidence that he was born in Jamaica but went to China at the age of two (2) and spent about twenty (20) years there and that as a consequence his knowledge of English is not too good. This latter bit of evidence was introduced after lunch on the first date he testified presumably to account for his demeanour in the witness-box in the pre-lunch session. But, more of this anon.

The plaintiff's evidence in-chief relating to the usage of electricity on the premises may be conveniently set out at this point.

" Supermarket opened in 1968 and at that time we had -

1 meat case - freezer

1 display case for fresh milk etc.

Lights

I live upstairs supermarket with my family. At that time we had -

1 Television set

1 Radio

1 Electric Iron

In 1972 we bought two (2) more freezers - small ones and in 1974 we bought a water heater and a water pump to pump water upstairs.

Since 1975 we use flood lights on the outside in the back yard - none before 1975 (Supermarket was broken in 1975).

Opening hours were 9 a.m. - 8 p.m. for all shopping days. Hours kept changing from 1975. On Wednesdays we close the whole day and on other days we close at 5.00 p.m. instead and should be using less current inside supermarket - lights turned off inside then.

Used Cash Registers from time supermarket opened - started with four. They use electricity. We have one more since about 1970 but sometimes we use only three.

Freezers and Display Cases not always full because of shortages. Sometimes we turn off some freezers - since 1973.

First knew meters were supposed to have been tampered with when I got the letter dated 21st November, 1975 claiming \$14,806.54. Knew nothing of such allegation before that. Since that date I have not looked at the meter nor did I ever inspect the meter before that.

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Amount on bills varied - don't recall getting any bills for identical amounts.

My son draw cheques for bills most of the times. Son does the book work. I may pay a bill now and then. Before receipt of the letter in November 1975 I had no reason to believe anything wrong with bills or meter."

If this evidence is believed the conclusion could be drawn therefore that the plaintiff would be unaware of the extent to which the electricity bills were contributing to his operational expenses and would not on that consideration be induced to employ any unorthodox method to reduce his expenses in that regard. But unless he were a simpleton, a view with which I do not concur, I find it difficult to accept that his acquaintance with this recurrent item of expenditure could be as casual as he would have me believe.

The bills tendered in evidence do not account for all the charges made for electricity supplied - some are said to be missing. Those in evidence will now be set out (Exhibit 4)

Date billed to	Consumption (K.W.H.)	Amount
23.3.69	1890	(£33.15.9) - \$ 67.58
27.5.69	1798	(£29. 7.7) 58.76
24.7.69	1782	(£29. 7.9) 58.78
24.9.69	17620	442.82
25.11.69	25840	612.79
27.1.70	19200	481.03
24.3.70	18200	460.77
(date omitted)	8140	213.47
25.11.70	700	27.13
26.1. 71	9000	234.27
25.3.71	9000 (estimated)	216.02
27.5.71	9000 (estimated)	220.52
26.7.71	9000	217.82
24.9.71	6640	168.70
24.11.71	8210	204.97
26.1.72	5020	145.06

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(3 bills missing)	-	-
24.11.72	5960	\$ 199.22
25.1.73	2200	87.62
27.3.73	2100	84.20
28.5.73	1560	64.87
26.7.73	2400	97.46
24.9.73	2020	86.46
(1 bill missing)		
24.1.74	1740	85.05
25.3.74	600	39.12
25.5.74	940	66.37
24.9.74	2020	Energy charge) 80.20 Fuel) 53.23
26.11.74	1220	Energy charge) 70.05 Fuel) 22.81
24.1.75	820	Energy charge) 51.62 Fuel) 16.61
24.3.75	1020	Energy charge) 61.62 Fuel) 22.64
25.5.75	520	Energy charge) 36.62 Fuel) 11.65
23.7.75	220	Energy charge) 21.62 Fuel) 5.02
29.9.75	1240	Energy charge) 72.62 Fuel) 29.02
29.9.75	15,924	\$14,715.08
21.11.75	29,520	Energy charge) \$1,073.26 Fuel) 643.54
23.1.76	14,940	Energy charge) 850.26 Fuel) 316.73
25.5.76	14,340	Energy charge) 886.23 Fuel) 293.25
24.7.76	14,680	Energy charge) 923.34 Fuel) 305.34
23.9.76	15,270	Energy charge) 977.43 Fuel) 334.41
24.5.77 - 25.7.77	14,700	Energy charge) 1,008.46 Fuel) 411.60

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Exhibit 4A

23.3.78	12,400	Energy charge) \$ 941.13 Fuel 444.54
25.5.78	15,020	Energy charge) 1,165.94 Fuel 544.48
25.7.78	14,620	Energy charge) 1,307.28 Fuel 672.52
25.9.78	2,250	Energy charge) 270.75 Fuel 113.74
22.11.78	24,520	Energy charge) 2,169.56 Fuel 1,266.46

The reason for setting out the details of these bills is to facilitate a ready reference to the pattern of consumption as well as the attendant cost to the plaintiff bearing in mind his evidence that he had very little knowledge of this aspect of the business. It is readily observed for the period of nearly seven (7) years to the 24th October, 1975 when the adjustment was made that the stated amount of consumption exceeded 10,000 KWH only four (4) times with a low of 220 KWH (23.7.75) costing \$26.64 for a two month usage by a supermarket and residence! But the plaintiff was not even required to pay that total because at that time there was a Government subsidy which reduced the consumer's liability. The plaintiff was required to pay only \$23.60. By contrast the bills submitted disclose that since the date of adjustment with the exception of one occasion (bill to 25.9.78) when the consumption was 2,250 the rate of consumption was considerably well in excess of 10,000 KWH. Mammoth though the defendant's enterprise may be it remains an unsolved puzzle that the irregularity alleged by letter dated December 16, 1975 to have set in after the reading for 24th March, 1970 when the consumption nose-dived from a bi-monthly total of 18,200 KWH to 8,140 KWH after which no bill showed an amount in excess of 9000 KWH was not discovered earlier. Indeed until discovery it may well be said that the consumption rate remained constantly submerged below the 10,000 KWH level! So much for the nonce. I shall have more to say about it later on.

The cross-examination of the plaintiff by Mr. Williams was rigorous and unsparing. The stage was set when the plaintiff was made to testify!

" I consider myself an honest man and as such I expected at all times to pay for electricity consumed on the premises in question - normal charges.

Then followed:

Q: As an honest man wouldn't you expect at all times to pay proper charges for electricity consumed on the premises regardless of whether the meter was working properly or not?

A: Yes - I expected J.P.S. to supply electricity to the premises and I would pay the proper charge for such electricity regardless of whether the meter was working properly or not."

The plaintiff disclosed that the business took about two years to pick up so that about early 1971 business was fairly good though not "really good." It became really good about 1972 and kept up for about two years and then decline started. In 1974 the business was good enough to enable him to acquire two extra freezers because he needed space for chicken meat.

Cross-examination disclosed two other pieces of electrically operated equipments viz: 1 floor polisher and 1 refrigerator.

When asked to account for the non-disclosure of the refrigerator which is in the residence upstairs he said he had forgotten it. As for the polisher he at first denied he had any but retracted and admitted he had one from the opening of the supermarket but had forgotten to mention it because it is rarely used.

The plaintiff revealed that in early 1969 the size of his family residing upstairs the supermarket was 7 - the plaintiff, his wife and mother and four children. He maintained however, that cooking was done by gas and that the children were then at school and came home only on holidays.

It is evident that the size of the family is a factor to be considered as relevant to the question of consumption of electricity.

But I cannot say that the size of the family has been settled. His evidence on this aspect of the case runs thus:-

" Family at present - me, my wife, mother and one son. Children were at school and come only at holidays. They are still at school - two more.

Early in 1969 size of family living upstairs was four children me and wife and mother. Some in Canada. I think first went in 1970. All four are now in Canada - one went last year (1978) and two left 2 - 3 years ago."

To my mind it is evident that the plaintiff appreciates fully the significance of the questions relating to the size of his family and in an effort to minimize the effect has rather succeeded in confusing the issue and clouding his credit.

Another aspect of consumption about which the plaintiff has been rather unhelpful is as regards the sale of kerosene oil. He stated that the demand for this item did not increase as the demand for food and he was not certain that with the picking-up of the business the sale of kerosene oil became much more.

The plaintiff was severely tested with reference to certain bills in the low-billing period in contrast to previous bills and he admitted, as reflected by the bills that at a time when he said the business had picked up he was paying less than half the charge on the previous bill but he could not account for the phenomenon. I find as a fact that his testimony relating to expenses for electricity is indeed equivocal. He did not blame it on his sons but he did advance the evidence that from the opening of the supermarket even a thirteen (13) year old son was drawing cheques for the business though he did not sign them. They were signed by the plaintiff and his wife. Then his evidence followed:-

" At first up to 1970-71 wife and I signed all cheques. After that Michael signed too. I did not notice the billing to be surprised at the drop; I was always interested in the expenses of the supermarket. Even if son drew cheque I would not see the related bill. I looked after store-room. Yes I did interest myself in the financial management of the business.

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" Electricity is a significant expense so far as a supermarket is concerned.

I was not surprised about the bill showing reading of 8,140 KWH and for which the charges were \$213.47."

Be it observed that this is the first bill for the period under query and came after a bill showing a consumption of 18,200 KWH.

Pressed further about the drop his evidence ran thus:-

" Not happy about the drop shown on that bill. Not unhappy either. I was not pleased at the amount I had to pay. Yes I am aware of payments for electricity for the supermarket. I kept an eye on the expenses for electricity. I hardly looked on the bills but I knew how much I had to pay. I knew I had to pay \$213.47 for electricity. Not pleased about the amount I had to pay - I know about payment of that bill for \$27.13 (700 KWH)

Q: Were you amazed at this?

A: Didn't bother me at all."

Even making allowance for the heat generated by the cross-examination it must be admitted that the plaintiff displays an intriguing inconsistency in his attitude to the expenses for electricity which he admits contributes significantly to the cost of operating the supermarket. The question that clamours for attention is what lay behind this inconsistency? Is it the plaintiff's unfamiliarity with the language as he claims or is it knowledge of an involvement in the tampering which the defendant pursues so relentlessly? In this regard it is relevant to bear in mind that, after some fencing with Mr. Williams, the plaintiff did admit that he knows the dials on the meter - this after he had stated categorically that he does not know what the dials on the meter look like - having seen them sometimes when he passes. In addition he also testified that he hardly compared the bills, he doesn't understand the reading of the bills and he has no idea what "present" and "previous" meter reading mean. Then under further pressure he seemed to capitulate as he said -

" I now know that 'present' means what the meter showed on the last reading and that 'previous' is what it showed before."

With his credit under constant pressure he testified, with

regard to the all-time low bill for which he paid \$23.60 for a two month period, that he was not surprised at that bill but eventually yielded the response that in the witness-box he was amazed at the drop. Further he admitted that he knew that from May 1970 electricity was costing him far less until the adjustment was made in September 1975. The inevitable suggestion followed that admission:

Suggestion:

" With that knowledge you were not surprised when the Jamaica Public Service said that the apparent drop in the cost of electricity was the result of tampering with the meter."

Answer: " Even now I don't understand."

Upon the suggestion being repeated and sharpened by other questions the plaintiff obliged -

" Yes - 'me frighten' when Jamaica Public Service said meter tampered with. I was frightened because they said they would cut off the light. I did not know of tampering until I got the letter. Then I knew. The amount of money frightened me and they claimed someone had tampered with the meter. I was frightened because we hadn't tampered with it. Letter did not say I or anyone on my behalf had tampered. The meter is on my premises and 'concerned to me.' Chiefly the money frightened me. After receiving the letter I was satisfied that the allegation of tampering was true. I still feel that the meter was tampered with." (underlining is mine.)

It is not inconsistent with this admission to conclude that the plaintiff's obvious discomfiture was due less to any linguistic incompetence on his part than to the fear that what he had admitted, albeit to himself, he might be forced to admit publicly and then face such consequences as may attend upon such admission. And yet, in all fairness to him, it can be ungrudgingly conceded that even an innocent person in the plaintiff's position who may unwittingly have become the beneficiary of tampering confronted not only with the demand for immediate payment of an amount in excess of \$14,000 but with a threat of the removal of the meter from the premises plus a possible criminal prosecution might have found it difficult to resist the temptation to panic. His position is certainly an invidious one. He is not free to call the company's bluff, refuse to pay the amount claimed and dare the company to do it's worse. That would

effectively bring his business to an abrupt end; for he has no alternative source of electricity to which he may turn.

However, having granted that concession, I must hasten to state that the plaintiff had not yet given his last word on the aspect of tampering, final though the admission may seem. That admission was made just shortly before the court took the luncheon adjournment at 1:00 p.m. on the 3rd day of the hearing. Upon the resumption at 2:30 p.m. the cross-examination dealt with the plaintiff's indebtedness to the defendant whereupon he admitted to having paid all but \$2,715 of the amount demanded plus an amount of \$11,000 which has become due since October 1975. After identifying a meter in Court as similar to the one installed on his premises he was being quizzed about the letter of 16th December, 1975 (supra) when the evidence took a rather strange turn. He stated that he objected to the course taken by Jamaica Public Service and was asked why.

Answer:

" I don't think I owe them money because the period back to 1970 was too far. I don't understand."

This answer must be viewed against his evidence that as an honest man he expected to pay for electricity actually consumed on the premises.

Further questioning elicited the following evidence:-

" I don't know that Jamaica Public Service is saying tampering took place about May 1970 that's why adjustment made from March 1970. I don't know the period of adjustment though I saw a paper. Yes, I see date 24th March, 1970 in the letter. I know that in their view the tampering took place about then. I don't know if the tampering took place about that time. I did not mean to say I know somebody tampered with the meter through I don't understand the English.

I want to change my evidence i.e. that I still feel the meter was tampered with. I want to change my evidence that I am satisfied that allegation of tampering is true to say I don't know if anybody tampered with it. I want to change 'I still feel the meter was tampered with' to say 'I don't know anybody who tampered with the meter.' I want to change it because you say I know somebody tampered with the meter. I realised that just after lunch.

I know what dishonest means. I agree with you that I am being dishonest in changing my evidence."

The time was 3:58 p.m. and the adjournment was taken on that rather embarrassing note. When the hearing resumed five months later it was announced that the cross-examination was closed.

The comment I would indulge at this point is that bearing in mind the language difficultly pleaded by the plaintiff he succeeded within a very short span of time to make a volte face that reflects great ingenuity. For such a reconstruction to be possible, if his language deficit were genuine, he would have had to acquire within that lunch period a knowledge of the English which had evaded him all his life! And to achieve this he would have to be far more capable than he would wish the court to believe. But no attorney worthy of the title could have left his client in the plight in which the plaintiff found himself at the close of the cross-examination, so the necessary and inevitable re-examination was undertaken with a view, if possible, to correcting the plaintiff's position. The result was not flattering. The plaintiff responded:

" When in cross-examination I agreed I was being dishonest I said so because my English not too good. Came to Jamaica 21 years of age but I dont understand meaning of dishonest. In this case when I said I was dishonest I meant the same as honest."

No one could have envied the plaintiff for the sense of relief he must have felt when he left the witness-box without having to say what he meant by 'honest.' For indeed his clarification connotes an understanding of the word 'honest.' But it is short of mind-boggling that a father who had sons of the ages of 26 and 24 did not know the difference between 'dishonest' and 'honest'? I do not say that his clarification really clarified the issue. Rather has it left him exposed to the most damaging suggestions not the least of which is that he could indulge in the most dishonest conduct without compunction in the belief that such conduct was honest. And be it noted that the case bristles with charges of repeated acts of dishonesty either by the plaintiff or on his account.

Before the brief re-examination of the plaintiff Mr. Chinsee applied for certain amendments to Further and Better Particulars which

the defendant had supplied. The amendments sought were merely of a cosmetic nature and though Mr. Haughton-Gayle objected they were granted.

The defendant's case may be condensed thus:

not_/
The plaintiff is bound to the defendant by a contract whereby the defendant agrees to supply and the plaintiff to pay for electricity consumed at the plaintiff's premises. Accordingly, if as a result a tampering which enured solely to the benefit of the plaintiff he had avoided full payment for electricity actually supplied and consumed he cannot escape liability for such electricity as has been paid for otherwise, and this assumes that the tampering was done by the plaintiff himself or by his servant or agent, he would be enabled to profit from his own fraud.

Alternatively under the contract (see Revised Sheet # 211 below) the plaintiff would be in breach of his contractual undertaking to be responsible for the safety of the defendant's equipment on the plaintiff's premises.

Revised Sheet #211 (so far as is relevant) reads:-

" The company shall have the right to install and maintain in convenient and suitable places on the premises of the consumer free of charge all transformers, meters, wires and other equipment necessary for the satisfactory supply of electricity to the consumer. All transformers, meters and other equipment furnished by the company shall remain its property and the consumer shall be liable for all damages to or loss of the company's property located on the consumer's premises, unless such damage or loss is caused by the negligence of the company.....

At a glance it would seem that this provision in the contract was not designed with a claim such as the instant one by the defendant in mind and it may be observed that no serious effort was made to summon it to duty though it was submitted by Mr. Chinsee in opening the case for the defendant that if tampering was found to have been done neither by the plaintiff nor by his servant or agent, then because of the regularity the plaintiff would be in breach of the duty to take care, imposed by this provision, of the defendant's equipment. It is contended by the

defendant that to produce the effect that has led to this litigation tampering had to be done at least once every two months and before the meter reader makes his reading.

In support of the Defence and Counter-Claim several witnesses were called and they were all subjected to very rigorous cross-examination which betrayed both tenacity and industry on the part of Mr. Haughton-Gayle. It was inescapable, therefore, that the case would be extended over many days. Their evidence covered the following areas:-

- a) The meter readings on which the billing was done;
- b) the checking of the meter to ascertain whether there were any defects;
- c) the system used to arrive at the amount counter-claimed;
- d) the checking of the meter to ascertain whether it was registering correctly.

In order of priority I think the question as to whether the meter was defective or not ranks above the other areas of the voluminous evidence presented by the defence. Indeed, the proposition of tampering would disappear into thin air if it were demonstrated that the meter was defective. For the same reason also the counter-claim could not be sustained. Accordingly, although the evidence was not presented in that order I shall deal with that aspect of the evidence first.

The witness called to testify on the condition of the meter was Mr. Aston Daly at the time a supervisor for the Service Irregularity Investigations Department of the defendant company. In 1975 he was employed as a meter technician. On the 24th October, 1975 on receipt of a Meter Inspection Request (Exhibit 7) he visited the plaintiff's premises. The meter he found in the location as stated by the plaintiff. Actually the meter is fitted into a metal panel on the wall. This panel carries a cover which, when in place keeps the meter in position and, to prevent access to any but authorised persons, this panel is sealed. He found no seal on the cover. The meter itself carries a seal at the back but he saw no such seal.

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A meter similar to the one in question was exhibited as Exhibit #6. It is the type ordinarily seen encased in a glass cover. It has four dials and is described as a 3-phased, 4-wire socket type. The meter can be lifted out of the socket once the panel seal is removed. Access would then be gained to the pointers on the dials as well as to the seal at the back of the meter. The meter is so geared that the pointers move in sequence. If there is misplacement of the pointers they would no longer be synchronised.

On observing the pointers of the meter he noted that they were misplaced. The nearest digits indicated were 8265. Reading from right to left (facing the meter) the 5 represents units, the 6 tens, the 2 hundreds and the 8 thousands. He explained that to get a correct reading of 8265 the 'tens' pointers should be half-way between 6 and 7; the next pointer should be between 2 and 3 but nearer to 3. However, when he saw them the pointers were not in a position to read 8265. He adjusted the pointers to read 8265 and sealed the back of the meter and the meter panel.

It is Mr. Daley's view that having regard to the misplacement of the pointers the meter could not be read accurately.

On the Meter Inspection Request (Exhibit 7) he noted the reading 8265 for date 24th October, 1975 and under the heading "Load Data" he recorded the equipments he saw on the premises as follows:-

Lights 5.6 K.W.
Refrigerator 1
Television 1
Radio 1
Iron 1
Water heater 1
Floor polisher 1
Toaster 1
Deep freezers 3
Display cooler 3 (10 H.P. - APP)
1 H.P. motor water pump 1
1/2 H.P. motor (kerosene pump) 1
Cash Register 5

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Also on Exhibit 7 the witness noted

" Meter found with pointers misplaced -
tampering suspected - Pointers adjusted
and left reading 8265."

His opinion, having regard to the number of appliances he saw on the premises is that a bi-monthly consumption should be in the region of 15,600 K.W.H. This view is expressed against a background of twenty-five years with the company - five (5) of which were with Meter Testing Department and eight (8) or nine (9) in his present department.

On 29th October, 1975, i.e., five (5) days later he re-inspected the meter. It was then working properly and showing a reading of 8395. So in five days 1300 units had been consumed. He sealed the meter panel with a #3 seal and left the meter working properly.

It is in relation to this adjustment that the amount claimed by way of Counter-Claim is estimated. Undoubtedly, some mischief of major proportions was afoot. Was it tampering or a defective meter? The enormity of the mischief is suggested by the figures. For the five-day test period the consumption of 1300 units is at the average of 260 units per day. This is in keeping with Mr. Daley's estimate of 15,600 units for a bi-monthly period. The reading just prior to Mr. Daley's check showed 1240 units - an average daily consumption of about 18.5 units! And it is not without interest to note that this check was carried^{out} during the period of decline. Compare the average daily consumption with the good times or, if you please, the high season. The highest billing during that period - 1972 - 1974 - as shown by Exhibit 4 is for 6000 units (27th January, 1972 - 27th March, 1972). That works out at roughly 98 units per day. By contrast during the period before the business picked up, according to the plaintiff, there were bills for 17,620, 25,840, 19,200 and 18,200 for bi-monthly readings. This reflects a daily average which exceeded 400 units per day and, at any rate, in excess of 300 units for the most part. The reading but one before the check showed a consumption of 220 units for two (2) months or less than 4 units per day! These figures reflect the consumption for the supermarket and the residence.

While contemplating the story which these figures appear to

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two factors

reveal it is important to bear in mind. They are these:-

1. The time of the check.
2. The reading 8265.

It is indeed significant that the check was done in the middle of a two month period. The next reading was not done until November 21. If tampering was being done it would have to be done on a regular basis and just before the meter was read since the effect would be to falsify the amount registered as having been consumed. Hence, on 24th October, 1975 the meter, despite the misplacement of the pointers, would not have been attended to in order to affect the reading in November. Under the heading "Present Reading" on the bill for the bi-monthly period ending 29th September, 1975 is the amount 6014 and yet on 24th October, 1975 - twenty-five (25) days later with misplaced pointers the reading nearest to the misplaced pointers was 8265! How is it that the previous reading did not show anything even close to 7000? If tampering was the cause does this indicate that it was done more than once in a billing period?

Mr. Daley inspected the meter again January 1979 and found intact the No. 3 seal he had placed on the panel cover and the meter was registering accurately. He is sure it is the same seal because he alone was assigned sealing tool No. 3 which is kept securely locked away. Every sealing officer is assigned a tool with a different number which is impressed on the seal whenever the tool is used to seal a meter. Also Mr. Daley testified that, to his knowledge, no repairs had been done on that meter from he sealed it on 29th October, 1975 up to the time he inspected it again in January 1979, because no need for repairs was indicated.

This, however, was not to be the last word on this aspect of the case vital as it is to the defence and detrimental to the plaintiff's plea of non-tampering. He was to spend some testing hours under cross-examination against the background of a manual of Watt Power Meters issued by the General Electric Company. The witness was unfamiliar with the publication but after having a look at it he said he considered it an authority on meters. Thereafter Mr. Haughton-Gayle literally threw the

book at him. But before dealing with that aspect of the cross-examination I will first dispose of a question that arose in relation to a note made by the witness. In his effort to refute the charge of tampering Mr. Haughton-Gayle grabbed at anything in sight. He sought to make capital out of an opinion noted by the witness on 29th October, 1975 but inasmuch as it is based on hearsay it must be denied any evidential value. And indeed, apparently on more mature thought the witness retracted the opinion. The note reads:

" 29th October, 1975 - Re-checked Meter found working correctly.
Meter now sealed with seal #3.

I understand that the meter was dislodged from socket sometime ago and cover fell off. That could have caused pointers to be misplaced."

It is the opinion expressed as to the possible cause for the misplacement of the pointers that found favour with Mr. Haughton-Gayle. In retracting the opinion the witness gave as his reason the fact that the cover is made of glass and if the meter was dislodged and fell the cover would break. The fact is that no evidence of the meter having been dislodged has been put before the court.

The witness testified that without the proper placing of the pointers a correct reading of the amount of electricity actually supplied would never be ascertained. He further said that although he did not connect the meter he was aware that the pointers were initially properly placed.

Let me now turn to the various factors which were suggested as possible causes for inaccurate registering by a meter -

dust or dirt on the electro-magnet;
defective bearing;
disc shaft bent or out of alignment;
warped disc;
defective coil;
magnetic forces outside the meter such as a powerful magnet applied to the meter while it is in operation;
creeping - the disc revolving without any load being connected to the meter;
short-circuit in the voltage coil producing creeping in the disc;

In cross-examination the witness did not concede the operation of any

of these factors and in re-examination he clarified. For instance a defective coil, a warped disc, a bent shaft and similarly a defective bearing could only be corrected by replacing those parts. To the witness' knowledge no such repair work was ever done to this meter. Such defects are not self-correcting. The pointers are of white metal and he doubts they would respond to a magnet. But even so as soon as the magnet is removed the pointers would function normally again. Creeping, he said may be forward, when the increase would be between 3% and 5% or backwards producing a difference of not more than 5%.

I venture the comment that is it difficult to understand why the use of a powerful magnet should be put forward when that would be a form of tampering!

The witness admitted that dust or dirt or any other foreign matter on the electro-magnet (a permanent magnet inside the meter operated by electricity) can produce a malfunctioning in a meter but that if the foreign body becomes dislodged the meter will resume functioning as it did before.

From the evidence the meter is an enclosed unit which is further sealed into a socket in the wall. The probabilities are against foreign matter invading the meter and behaving in the manner suggested so as to produce misplacement of the pointers - not just a malfunction.

It should be pointed out that this witness did not carry out any test of the meter because once he saw the misplaced pointers he concentrated on correcting them and since the meter functioned satisfactorily thereafter, in his opinion, the need for any further check was not indicated. He did not agree that an alert meter reader who has been dealing with the same meter over a period of time should be able to detect a fall-off in consumption. The reason he gave is that the meter reading sheet supplied the meter reader shows the previous reading but not the consumption. I cannot say that I am altogether happy with that answer because although the sheet does not show the consumption the difference between the previous reading and the present as seen by the meter reader should alert him as to a ridiculously low-reading for those

premises.

Asked to account for the difference in the consumption as at 25th July, 1978 and 25th September, 1978 (see Exhibit 4A supra) the witness said that may be due to under-reading. But the difference would be picked up in the next reading, granted the meter is functioning properly. In this regard it may be observed that the next reading on 22nd November, 1978 shows a consumption which may well be explained on that basis in that it produces an average in keeping with the other consumption figures in Exhibit 4A.

The other witness whose evidence dealt with the working of the meter was Mr. Horace McCormack, though it must be observed that his test was not done until June 26, 1979 nearly four years after the inspection done by Mr. Daly on October 24, 1975. Like Mr. Daly, though junior to him, this witness is a supervisor in the Service Irregularity Investigation Department. He is a graduate of the College of Arts Science and Technology (C.A.S.T.) in Electrical Engineering as well as being a licensed electrician. He has been employed to the defendant company since 1971 during which time he received three (3) years training in the field of metering. Apparently the reason for calling this witness was to demonstrate that even up to four years from the adjusting of the pointers and the sealing of the meter by Mr. Daly the meter had not manifested any malfunctioning.

Having received a meter Inspection Request (Exhibit 13) from his Head Office he proceeded to the plaintiff's supermarket on June 26, 1979 and carried out tests.

On inspection he observed that the panel was sealed by a No. 3 seal. This is the number of the sealing tool used by Mr. Daly. There is no evidence to base a finding other than that this is the very seal put on by Mr. Daly in October, 1975. It is significant to observe that there was no misplacement of the pointers. Mr. Daly had testified that if when the meter was installed the pointers had been misplaced the meter would never correct itself and so would not give a correct reading. Four years after the pointers were adjusted by Mr. Daly they were found to be still functioning properly. What is the inference to be drawn? It is not

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difficult to identify the answer to this question as being at the very core of the case. Accordingly, it must be post-poned until all the relevant factors have been duly considered.

Mr. McCormack proceeded to note the number of the meter, take a reading from a register in the meter, make a stop-watch check of the meter, observe the condition of the meter including a good look at the inside of the meter before breaking the socket seal. Having broken the seal he removed the meter from the socket and observed around the base of the meter and the wiring of the socket. Next, he removed the glass cover of the meter to inspect the inside of the meter. This he found to be in satisfactory condition - the disc floating correctly in its field, the gears meshing correctly and the wiring connections proper. The glass cover was then replaced and the meter re-inserted into the socket.

It may be timely to observe that the visual inspection did not disclose any of the defects which were put to Mr. Daly in cross-examination as capable of producing malfunctioning. The significance of this will be fully appreciated when it is borne in mind that the evidence does not disclose any repairs since Mr. Daly's inspection in October, 1975 and January, 1979.

Having thus far satisfied himself Mr. McCormack proceeded to attach his equipments to test the functioning of the meter. These equipments were -

1. An Ammeter, which he attached to the wire.
2. A Voltage Meter and
3. A Power Factor Meter.

The latter two were attached to the terminals behind the meter.

The Ammeter measures the current, the Voltage Meter the voltage and the Power Factor Meter the Power Factor. These meters would measure the amount of power actually being consumed and this would be compared with what the meter was registering. From the readings on those meters the witness said he was able to calculate the consumption. The readings were -

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Current - 40 amps
Voltage - 218
Power Factor - .086

By applying a formula used by the defendant company he would arrive at the power for any second. The test was run on a 10 - second basis. Here then is the formula together with the result:

Formula: $1.73 \times \text{current (40)} \times \text{Voltage (218)} \times \text{Power Factor (.086)}$

Result: 12.9736 K.W. per second.

But before any dependence can be placed on the result the status of the formula must first be established. The witness' answer in this regard, and it has not been contradicted, is that this is a standard formula in Electrical Engineering.

The revolutions of the disc were checked by a stop-watch and found to be 3 in 10 seconds. Every meter has a watt hour constant which was 12 on this meter.

Another standard formula in metering was employed -

$\frac{\text{Disc revs}}{\text{Time in seconds}} \times \frac{3600}{1000} \times \text{watt hr. constant i.e. } \frac{3}{10} \times \frac{3600}{1000} \times 12$

produced a consumption of 12.960 KW. This is what the meter was registering. Hence, there was slight advantage (0.0136 KW per second) in favour of the consumer. The meter was registering slightly less than the actual load. What he regarded as the actual load he listed on Exhibit 13. These were -

1.	Lights	90
2.	Refrigerators	1
3.	Deep Freeze	3
4.	Display Coolers	3
5.	Cash Registers	6

On the basis of his tests he calculated a bi-monthly consumption of 13050 KWH. His opinion recorded at the appropriate section of Exhibit 13 was

" meter found working correctly no sign of any faults. Registered consumption is quite appropriate for the way connected load is used."

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It may be useful to note that of the listed load items 2, 3 and 4 would consume electricity on a 24 hour basis but items 1 and 5 would not.

By comparison Mr. McCormack listed fewer items than Mr. Daly. Both recorded the same number of appliances requiring electricity on a twenty-four (24) hour basis and Mr. McCormack has six (6) Cash Registers whereas Mr. Daly has five (5.) But having regard to the items listed by Mr. Daly and not appearing on Mr. McCormack's tally it would appear that Mr. McCormack did not check the residence.

His test omits -

- 1 T.V.
- 1 Radio
- 1 Iron
- 1 Water Heater
- 1 Floor Polisher
- 1 Toaster

It is difficult to believe that the use of all the omitted items which seem to relate to the residence had been discontinued. However, even if these were still in use and not noted by him by their very nature their usage would be occasional. He omitted as well the Kerosene Pump and the Water Pump. The bi-monthly consumption as given by Mr. Daly was 15600 KWH. Mr. McCormack's reckoning, it was 13050. There has been no allegation of tampering during the intervening period. So that, if the conclusion is that the meter is not defective and Mr. McCormack has indeed recorded the actual load, then the decline would seem to be attributable to the pattern of usage. Having completed his test the witness again removed the meter from the socket and sealed the base of the meter with a No. 5 seal by his sealing tool bearing that number. He then replaced the meter in the socket and sealed the socket too with a No. 5 seal. His examination had discovered no defects and no foreign body.

If it appears that much attention is paid to the evidence of this witness I hasten to state that the reason is clear. He spent the better part of two days in the witness-box the greater portion of which sojourn was in confrontation with a most persistent opponent. And this was necessarily so because he was the only witness put forward whose

evidence has to do with the actual testing of the meter. Indeed, it was under such cross-examination that he gave details of his tests as well as the relative values of other recognised methods of testing a meter. Such cross-examination will either enhance the value of his methods and the conclusions drawn or cheapen them.

Questioned on the advantage, if any, of testing a meter at high and low voltage he parried with Mr. Haughton-Gayle as to the meaning of low voltage contending that as against 1300 low can be 110 but rounded off that there was no advantage in testing at high, normal or low voltage. He did admit that it was a normal occurrence since 1970 for the voltage supply to fluctuate. At the plaintiff's premises there is a 3-phased service carrying a combination of 110 v and 220 v - the normal being anywhere between 215 and 230 volts. Voltage fluctuates according to load with a tolerance being allowed, he explained. His attention was directed to the under-registering of the meter thus:-

Q: Having regard to your findings did you form any opinion as to why the meter was registering below the actual load?

A: Yes. Meters can be calibrated to an accuracy of plus or minus 2% and looking at these values I realise I would fall well within that limit. If meter showing between 100% and 98% accurate I would say it is accurate. The opinion I formed is that the meter would be registering less than 100% of the actual load but not out of 2%.

Having regard to the provisions in Sheet No.212 of Standard Terms and Conditions (supra) relating to an inaccuracy in excess of 2% the witness' answer in relation to a deficit of 2% in the registration obviously excited more than passing interest in his questioner and some time was spent on this aspect of the case. An effort was made to gain the concession from the witness that a meter registering 98% of the actual load is running too slow but he explained that this is not necessarily so because the defendant company (Jamaica Public Service) makes an allowance for a plus or minus 2% tolerance in commercial meters. So that within that tolerance he would say the meter is registering accurately.

In advancing the contention of malfunctioning as opposed to tampering as the defendant contends Mr. Haughton-Gayle questioned the

witness at length on factors that can amount for a meter registering below the actual load and also as to the reliability of his stop-watch test. As regard the method of the test he maintained that, that is a recognised method of testing meters. This was in response to the claim of other methods such as the Portable Standard Watt Meter Test and a Bench Test with the aid of a microscope and, though he conceded that the Portable Standard Watt Meter Test has the facility for eliminating errors which may arise when other methods are employed, he maintained that he has no reason to question the reliability of his method or the ensuing results because he is familiar with the method and his instruments are used normally on a daily basis. He had been supplied his instruments new, though he could not specify the date, along with the manufacturer's manual. And indeed, the test he did included a Watt Meter Test i.e. a combination of the Volt Meter Test and the Ammeter Test.

Taken through the gamut of the possible causes for a meter registering below the actual load apart from the 2% tolerance in the calibration he dealt with each quite competently, in my opinion, supplying the explanations that justify his rejection of any of those factors being accountable for the less than 100% registration.

One cannot fault the plaintiff's attorney for opting for what, in the circumstances, may be regarded as a more sophisticated method of testing meters. But, if in the field of Electrical Engineering, alternative methods are accredited, then the mere fact that one such method is adopted as against another or others is not sufficient reason for denigrating the one used or rejecting its findings in the absence of some defect in the instruments used or incompetence in the person conducting the test. It is obvious that Mr. Haughton-Gayle appreciated this and consequently was unsparing in his efforts to achieve the desired result. From the Electrical Meter Man's Hand-book by Edison with which Mr. McCormack ^{be} claimed to be familiar a barrage of questions was hurled at him, and though he was at times discomfited, in much the same way as a competent batsman may be unsettled by an awkward bouncer, he nonetheless regained his composure sufficiently to deal with the situation with acceptable competence

and honesty. He disclosed that he had gone to the plaintiff's premises prepared to change the meter if any defects were discovered, but no change was necessary. This would meet head-on with any suggestion that he had in advance assumed the accuracy of the meter and that his visit was merely for the purpose of confirming that assumption.

It is appropriate at this stage to come to a determination on the all-important question as to whether the meter was defective, and so malfunctioned, or malfunctioned because of interference other than by way of tampering e.g. because of dust or dirt or any other agent or was in fact deliberately tampered with so as not to register, as it was capable of doing, the amount of electricity consumed, due regard being had to the plus or minus 2% tolerance allowed by the Jamaica Public Service. This is so because, if defect there be that would put paid to the defendant's basis for arriving at the plaintiff's liability and, accordingly, the Counter-Claim would be without a leg on which to stand. And then, of course, the plaintiff's claim would be without any opposition.

I am deeply indebted to Mr. Haughton-Gayle for the purposeful and tenacious presentation of the plaintiff's cause which wore its best appearance in his efforts to blunt the thrust of the defendant. The various matters requiring consideration in dealing with the reliability of the meter were amply ventilated as he contended with a monopolistic giant whose conduct is not always above reproach. The two technical witnesses, Messrs Daly and McCormack, on whose evidence great reliance must be placed to find a solution to the question under consideration had their competence acidly tested.

Worthy of note in this regard is that in the welter of suggestions and the resulting mass of evidence attendant upon the effort to discredit the meter as a competent agent for registering the consumption at the plaintiff's premises the evidence of Mr. Daly that at the time of his check on 24th October, 1975 he found the pointers misplaced and that since he adjusted them and sealed the meter there has been no subsequent misplacement, clamours for an explanation inconsistent with tampering. No such evidence was forthcoming nor does the evidence favour a finding that the meter was either defective or malfunctioning. A conclusion that there was tampering is indicated as the

only rational finding and that is what I find.

The plaintiff's attorney vigorously resisted not only a finding on tampering but what would seem to flow naturally from such a finding, namely, that the customer is liable to pay the company for electricity supplied but for which, because of the tampering, payment could not have been made. And this was so despite the plaintiff's admission that as an honest man he expected to pay for electricity actually consumed regardless of whether the meter was working properly or not. But he may be excused for so thinking if indeed that was not the legal effect of the contract into which he had entered. In this regard it is appropriate to note paragraph 13 of the licence granted the Jamaica Public Service under the Electric Lighting Law and published in the Jamaica Gazette Extraordinary dated 16th June, 1966 (Exhibit 11) which provided (in part):-

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

In keeping with this provision the defendant tendered in evidence as Exhibit 12 the Jamaica Gazette Extraordinary dated 12th September, 1974 exhibiting the order confirming Proposed Tariff with modifications which were issued under the Public Utility Commission Act, 1966. An increase in the rates chargeable by the Company was provided with effect from August 1, 1974. However, such provisions would be irrelevant to the point at issue if in fact the plaintiff is exonerated from paying. But inasmuch as it would be ultra vires the company to contract outside the terms of its licence it must be assumed that the contract signed by the plaintiff conforms with the law, there being no evidence or submissions to the contrary.

The argument for the plaintiff proceeded thus:-

Revised Sheet No. 212 which is incorporated into the contract between the plaintiff and the defendant contemplated the possibility that there might be tampering and made provision for what the company can claim in the event of tampering -

" In the event of any registration inaccurate in excess of 2%, bills will be adjusted by an amount to compensate for the excess or deficiency for a period equal to one half

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" of the time elapsed since the previous meter test, but not to exceed three months"

Accordingly since there is no evidence of any meter test prior to Mr. Daly's visit on 24th October, 1975 there is no period with reference to which an adjustment can be made. Further, to be entitled to recover anything at all from the plaintiff the company would have to prove that the inaccuracy was not in excess of 2%. Support for this contention was sought from Joseph v East Ham Corporation (1936) 1 K.B. 367 at page 379 where Slessor J in his judgment said -

" There was no sum ascertained to be due at all for in the absence of a statutory meter it was not possible to say what payments were in arrear if any."

But I can find no assistance from this decision which having regard to the law and the findings of fact could not be otherwise. Section 49 of the Electric Lighting Act, 1882 (as amended by the Electric Lighting Act 1909) Second Schedule provided:-

" The amount of energy supplied by the undertakers to any ordinary consumer under the special order, or the electrical quantity contained in the supply (according to the method by which the undertakers elect to charge) hereinafter referred to as 'the value of the supply', shall except as otherwise agreed between the consumer and the undertakers be ascertained by means of an appropriate meter duly certified under the provisions of the special order."

The undertakers had not supplied such a meter and arising out of a dispute as to the amount due to the suppliers the customer's supply was disconnected. For the reason stated this was held to be wrong.

An obvious objection to the plaintiff's plea, and this was brought to the attention of his attorney, who readily agreed that it was correct, was that it would be contrary to public policy for the company to have said to the plaintiff that it expected that the plaintiff might act fraudulently by tampering with its equipment so a pecuniary provision was included by means of Revised Sheet No. 212 against such contingency. It was conceded that, that would be defamatory of the plaintiff.

But if that were the intendment of Revised Sheet No. 212 one would expect it to exact a severe pecuniary penalty. On the contrary, the very

argument advanced demonstrates that it did no such thing. Indeed if this provision were interpreted to accommodate the claim for the plaintiff a rather strange result would follow. For, while appearing to discountenance tampering the provision would largely benefit the customer while the Company would be legally ham-strung in its effort to collect what may well be a miniscule portion of the amount of which it has been deprived by tampering. And so, in breach of public policy, a customer could be virtually guaranteed profit by his own fraud.

Revised Sheet No. 212 may well be thought to exact a penalty of the company not with respect to tampering, but for allowing a defective or malfunctioning meter to remain in service for an inordinately long period. It is Revised Sheet No. 208 which deals with tampering. It empowers the company to disconnect for tampering but gives no power to collect a fine.

The question whether the company contracted out of the right to claim payment for electricity supplied but not paid for because the meter registration has been falsified by tampering must be answered in the negative. What good reason could there be to the contrary? Even accepting the strained explanation put upon the plaintiff's evidence by his attorney, viz:

" After receiving the letter I was satisfied that the allegation of tampering was true. I still feel that the meter was tampered with."

to mean that

" The plaintiff not admitting tampering by himself or on his behalf. All he is saying is that he accepted in good faith what the defendant had said about tampering: Man's opinion no better than his information. Plaintiff's state of mind based on the letter received from Mr. Bennett (d/d 16/2/75.) Hence his evidence does not help on the issue of tampering."

I conclude that the liability to pay does not rest on the plaintiff's knowledge of tampering but upon proof of supply for which the company was not able to claim because of tampering. But evenso, could it be seriously maintained that the plaintiff was unaware that at a time when his business had improved he was paying for two months supply such amounts as \$85.05,

\$39.12 and even as low as \$23.60? Why should a stranger, for no disclosed benefits, persistently attend at the plaintiff's premises to tamper with the meter so that the plaintiff (all unknown to him, the plaintiff) might derive benefits which according to the company has aggregated over \$14,000? I am not impressed by any such largess by any phantom benefactor. The plaintiff's nervousness when tampering was mentioned appeared to me to be consistent with neither innocence nor ignorance. And since, on the evidence, the results of the tampering inured solely to the benefit of the plaintiff he must pay such amounts as are shown to be proper adjustment for the period affected by the tampering.

In its endeavour to establish that the amount claimed by way of Counter-Claim is a fair assessment of the amount of which it had been deprived during the period under consideration the defendant called Mr. Oliver Anthony White who for approximately thirty (30) years has been a meter reader employed to the Jamaica Public Service in the Mandeville area and who, for the most part, read the meter at the plaintiff's premises. He was in the witness-box on more than one occasion on each of which he seemed to be affected by the ingestion of some would-be booster and I had the distinct impression that the evidence he gave was less than he knew. But he could not be harshly treated by the party calling him and neither did the opponent treat him very harshly.

He testified that the system in meter reading was changed after September, 1971 when the company changed to computerized accounts. Under the old system the meter reader visited the premises with a meter reading book in which he would record the readings on the meter then affix his signature and the date the reading was done. Under the new system the book issued to the meter reader is really a number of sheets on each of which the date on which the meter is to be read is already printed. In actual practice it was not always possible to comply with the result that a sheet might reflect the printed date as well as the date entered by the reader when the reading was done. A book may contain from 75 up to 150 sheets and in order to try and keep in line with the printed date the reading might be done a day or two days prior to the printed date but not

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later than the printed date in order to return the sheets to the office within the time specified. Not unreasonably the plaintiff's attorney tried to exploit this deviation in an effort to account for the variations in the readings. But the effect of this would be minimal and certainly could not account for persistent low readings over a period when the consumption of electricity was expected to rise.

On the question as to whether he ought to have observed a dramatic diminution in the rate of consumption at the plaintiff's premises he explained that the meter reading sheets showed previous reading but not previous consumption so there was nothing to alert him to any drop in consumption. It is just possible that if his interest did not go beyond reading and recording the meter registration then his answer might well be true provided there are no other factors known to him. Again on the question of the presence or absence of the meter socket seal he answered it was not his duty to check on seals. But in almost the same breath, while testifying under cross-examination he unburdened himself of the information that in the Mandeville area he had seen a not insignificant number of meters without seals - between one-half and three-quarters of the number seen had seals. What was not queried was when in relation to the times at which those meters were installed. He proffered the explanation that the company was short of seals. How he would come by this knowledge was not disclosed. His duties do not embrace that aspect of the company's activities. So that without more I regard such evidence as tenuous and in so doing I bear in mind the lack of embarrassment, I almost said the satisfaction, with which he made the disclosure.

It was hoped to demonstrate from this witness' testimony that the plaintiff had been billed in keeping with the meter reading and so could not have paid for consumption not reflected in such readings. Refreshing his memory from the Meter Reading Book in which he identified his hand-writing he gave meter readings up to 26th November, 1972, after which date he said the computer sheets were introduced, thus:-

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26. 3. 69	1890 K.W.H.
27. 5. 69	3688 "
24. 7. 69	5470 "
24. 9. 69	7232 "
25.11. 69	9860 "
27. 1. 70	1736 "
24. 3. 70	3556 "
26. 5. 70	4370 "
27. 7. 70	5180 "
24. 9. 70	5988 "
25.11. 70	6658 "
26. 1. 71	6958 "
25. 3. 71	8658 "
27. 5. 71	No Reading
24. 9. 71	322 K.W.H.
26. 1. 72	824 "
27. 3. 72	1424 "
26. 5. 72	2034 "
26. 7. 72	2600 "
26. 9. 72	3217 "
26.11. 72	3810 "

Beyond this point the witness, with the consent of Mr. Haughton-Gayle was allowed to refresh his memory from photostat copies of the computer sheets. His evidence flowed freely as he identified his hand-writing on the various sheets before making use of them. However, the sheet following the reading for 25th March, 1976 was stated by the witness not to bear his hand-writing and quite properly Mr. Haughton-Gayle objected to the witness making use of such a document. But he went further and said he was withdrawing his consent to the copies being used because he had been misled. The originals would have to be used.

Indeed, a witness cannot refresh his memory from a document not created by him nor with which he had done nothing. The objection was upheld but it could only properly relate to the impugned copies, though

Mr. Haughton-Gayle would have it to be effective ab initio. What had been used in keeping with the consent given revealed the following readings:

23. 1. 73	4030 K.W.H.
27. 3. 73	4240 "
30. 5. 73	4396 "
26. 7. 73	4634 "
25. 9. 73	6652 "
22.11. 73	4888 "
24. 1. 74	5062 "
25. 3. 74	5122 "
27. 5. 74	526 "
25. 7. 74	538 "
24. 9. 74	5511 "
25.11. 74	5631 "
24. 1. 75	5714 "
21. 3. 75	5816 "
23. 9. 75	6014 "
24.11. 75	8966 "
26. 1. 76	0460 "
25. 3. 76	1812 "

The available originals supplied the following readings:

23. 9. 77	4642 .W.H.
25. 1. 78	7385 "
23. 3. 78	8625 "
25. 7. 78	1589 "
25. 9. 78	1814 "
22.11. 78	4266 "

The readings are cumulative so that to arrive at the consumption for a two (2) month period the reading at the beginning of the period is subtracted from the reading at the end of the period and multiplying the result by 10. Further, the witness explained that where the later reading is less than the previous that is accounted for by the fact that the meter had run its full course and started again on 0.

That explanation may well account from some apparent contradictions but certainly not all.

A look at the reading supplied reveals the absence of readings for May and July, 1975. From the bills (Exhibit 4) these readings were:-

25. 5. 75	5868
23. 7. 75	5890.

The interesting observation can therefore be made that for the period 24. 1. 74 - 23. 7. 75 during which ten (10) readings were done the pointer indicating thousands did not make it beyond the point where a reading of '5' could be recorded. By 23rd September, 1975 it had hurdled the 5 and a reading of 6014 was recorded. It was roughly one month later, on 24th October, 1975, that Mr. Daly saw the misplaced pointers with the nearest reading being 8265. He adjusted them to read 8265 and by sealing the meter as it were gave the meter a free hand to do its work. Five days later - 29th October, 1975 it was recording a consumption of 1300 KWH which exceeded some and more than doubled some of the previous two (2) months consumption! Indeed at the next regular reading on 21st November, 1975 a consumption of 29520 KWH since the reading of 6014 on 23rd September, 1975 was recorded.

My reaction to that consumption figure is that it is abnormal being roughly twice what was thereafter regarded as acceptable for a two-month period. The explanation would seem to be that, that figure embraces two periods - one in which there was interference and the other an interference free period. The need for adjustment in the amount charged is thus indicated and unless this figured in the calculations of Mr. Bennett the next witness credit will have to be given the plaintiff for an appropriate amount.

Before parting with this witness I am tempted to ask whether he was over-boosted. It was observed that he misread some of the readings which he had recorded - 4636 the reading he recorded for 25th September, 1973 he corrected to 4634. The bill showed 4636. Most significantly however is his reading of 6652 on 25th September, 1973 though no reading beginning with '6' was recorded until 10 readings later. The reading he

gave following 6652 is 4888 which on the bill is shown as 4838. However, allowance must be made for the fact that the photostat copies might not have been easy to read. Nor can it be glossed over that the reading 6652 does not appear on the relevant bill nor on any other bill for that matter. The figure appearing is 4838 reflecting a consumption of 2020 KWH instead of 20,160 KWH.

Before passing on to deal with the evidence of Mr. Howard Bennett, manager of the Department of Billing and Revenue Accounting, I will just mention one other witness called by the defence. His evidence related to one date only. He was Mr. Clinton White, a meter reader who could recall reading the meter at the premises in question only once, i.e. on the 18th November, 1975 when the reading was 8902. At that time he saw the meter sealed.

The evidence of Mr. Bennett is readily identified as being of critical importance and as a consequence his stay in the witness-box mostly at the instance of Mr. Haughton-Gayle, was of some duration - the better part of four days during June and November, 1979. I will not however set out his evidence exhaustively as that is not necessary for an adequate assessment thereof. He explained the system of meter reading prior to and since May, 1971. At first the meter reader was issued with a Meter Reading Book with which he traversed his route and in which he recorded the readings on the meters along the route. The book would then be returned to the Meter Reading Centre and thence to the Head Office in Kingston where the billing was done. The work then was manually done. During the period May, 1971 - October, 1971 the system was computerized on a phased basis which extended to about November, 1972. Under the new system computer sheets replaced the Meter Reading Book and on these sheets were printed before-hand the dates on which the meters were to be read and for the computer these were the dates used though in fact, as the evidence showed, the reading might have been done a day or two before or after the printed date. It would seem that fluctuations between the printed dates and the dates of actual reading could account for slight, but certainly not substantial, variations in the reflected consumption from one two-month period to another. Further he explained the billing and payment systems

as well as the method of estimating consumption.

Estimates are usually determined by using the average consumption over the previous billing periods based on actual readings. Occasionally an arbitrary figure may be used but this would be adjusted when an actual reading was done. It was essential to have this system of making estimates explained because several of the relevant bills show the consumption to have been estimated and a live issue in the case is the contention by the plaintiff that Revised Sheet No. 212 in so far as it related to estimated consumption is applicable only if the meter stops or fails to register or produces an inaccurate registration for whatever reason. The witness referred to Revised Sheet No. 209 which also refers to estimating bills. Revised Sheet No. 209 which deals with Reconnection of Services states at para (d)

" All bills for service due, including estimated amounts due to the Company by reason of fraudulent use of tampering must be paid etc."

I venture the comment that it is obvious that estimating of bills is a firm plank in the revenue-collecting structure of the Company. And, indeed, it is not open to objection if it is properly done so that the company is not thereby supplied with a tool for unjust gain by charging for services not rendered. There may conceivably be circumstances beyond the company's control which preclude the reading of some meters at the required times and without this facility the company's revenue-collection could be very seriously embarrassed. Estimating is even coded into the system as Code 4.

It was the witness' responsibility to justify the defendant's counter-claim of \$14,715.08 and in the process he was certainly made to earn his keep. The process began with the inspection of the meter by Mr. Aston Daly on 24th October, 1975 the results of which formed the basis for the estimated consumption sought to be recovered from the plaintiff.

The Meter Inspection Request (Exhibit 7) on which Mr. Daly had recorded the results of his inspection on the 24th and 29th October, 1975

and the reading 8902 recorded by Mr. Clinton White on 18th November, 1975 provided data used in calculation of the amount counter-claimed and in making the calculation regard was had to the fact that the Company does its billing on a sixty (60) day basis. The consumption for the period was 6370 KWH for twenty-four (24) days and on that basis an estimate of 15924 was produced for sixty (60) days.

It will be recalled that the bill (part of Exhibit 4) showing the consumption for the period 29th September, 1975 - 21st November, 1975 contains the abnormally high figure of 29520 to which I have already alluded. The witness explains that, that was the result of an error which was subsequently corrected and the account debited by \$1,017.11 as notified to the plaintiff by letter 23rd February, 1976 (part of Exhibit 9)

On the basis of a bi-monthly consumption of 15924 KWH the account was adjusted from 25th May, 1970 to 29th September, 1975 and produced an amount of \$18,787.33. But this figure included charges already made to the tune of \$4,082.25. When this amount was deducted the result is \$14,715.08 - the amount in the counter-claim. By virtue of payments made by the plaintiff the amount had been reduced to \$2,705.08 as at November 12, 1979. Also it was disclosed that the plaintiff had been paying his current bills.

So far as the amount claimed goes the witness did not make the original calculations. These were done by his staff and then submitted to him. On checking them he discovered seven errors which when corrected resulted in the plaintiff's favour to the extent of \$18.53 - there were six errors of over-charging amounting to \$97.35 and one under-charging amounting to \$78.82. Hence a nett difference of \$18.53. (The witness' calculation sheet was put in evidence as Exhibit 10) this was the fruit of a very painstaking and persistent cross-examination which was to yield more.

Implicit in the cross-examination was the view that while the calculation of the amount claimed on the sixty (60) day basis is undoubtedly more convenient to the company it nevertheless worked an injustice to the plaintiff. The base period which the defendant used (October 24 - November

18) is really twenty-five (25) days and the plaintiff contended that, whereas the reading for the period is factual the calculation on a sixty (60) day basis is speculative. The witness admitted that on the basis suggested the bi-monthly consumption would be 15288 KWH instead of 15924 which would yield a difference in the plaintiff's favour of \$742.85. So the plaintiff must receive credit for this amount. The cross-examination, even if taxing, was not fruitless as the results show. It tested all aspects of the defendant's calculation including the Fuel Clause Adjustment Rate and Energy Charge in addition to drawing attention to every bill submitted to the plaintiff up to September, 1975. Further it went into the actual computation of several bills, testing the accuracy.

The plaintiff must therefore be given credit for \$18.53 + \$742.85 - \$761.38. The amount counter-claimed must be accordingly reduced. The result is \$13,953.70.

It should be natural to proceed to enter judgment for the defendant for the amount less payments. But such a step must be shown to have paid due regard to the submissions of Mr. Haughton-Gayle who did his utmost to avert such a conclusion. In the process he submitted exhaustively that there was no evidence to support a finding of tampering even bolstering that submission with another which is, that even if tampering were found Revised Sheet #212 would apply. Accordingly, the company would be obliged to show that any inaccuracy in registration resulting from tampering falls within the 2% margin provided for in Revised Sheet #212 (supra.) Also if that were not enough, he clung tenaciously to another submission:

Does the contract between the parties require the plaintiff to pay for the amount of electricity actually consumed by him as the defendant contends? In considering that issue there must be considered also whether the alleged term of the contract on which the defendant relies is a fundamental term or any breach thereof is a fundamental breach so as to preclude reliance on Revised Sheet #212.

I have already dealt with Revised Sheet #212. It is the plaintiff's evidence that he expected to pay for electricity supplied to and consumed on his premises and I can see no reason why the defendant should contract on any other basis. Indeed this is the contention of the defendant

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all along. The only fetter to the company's right to collect is set out in Revised Sheet #212. The attempt to fit the plaintiff's case into that restricted area despite the most strenuous efforts has produced a result about as comfortable as a size 9 foot in a size 3 shoe.

In order to crystallize the matter Mr. Haughton-Gayle was asked by the court:

" If, contrary to your submissions, tampering was found to have taken place over the period in question what would be the consequence?"

He responded:

" On assumption that the meter has been found to be registering accurately at a point in time to enable the ascertainment of what the amount during tampering was I suppose a claim could properly be made for the due arrears."

But so soon as he had reluctantly made that concession he retreated to his shelter under Revised Sheet #212.

In the light of the facts found the plaintiff is not entitled to any of the reliefs claimed. There will be judgment with costs to the defendant on the claim. As previously stated the true amount of the counter-claim should be \$13,953.70. The defendant will have judgment in this amount with costs. This figure will be adjusted in keeping with the payments made by the plaintiff.

Costs to be agreed or taxed.

Before parting with this case I would like to record my regret at the delay in presenting this judgment which was occasioned by the intense competition among several judgments for the very limited time at my disposal. But I am grateful for the patience of counsel in the meantime.