



[2022] JMSC Civ. 07

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CLAIM NO. 2014 HCV 02806**

|                |                                       |   |
|----------------|---------------------------------------|---|
| <b>BETWEEN</b> | <b>SIMCO 2000 LIMITED</b>             | <b>CLAIMANT</b>                                     |
| <b>AND</b>     | <b>JAMAICA PUBLIC SERVICE CO. LTD</b> | <b>1ST DEFENDANT</b>                                |
| <b>AND</b>     | <b>ROBERT SIMPSON</b>                 | <b>2ND DEFENDANT/ANCILLARY CLAIMANT</b>             |
| <b>AND</b>     | <b>JAMAICA PUBLIC SERVICE CO. LTD</b> | <b>1<sup>ST</sup> DEFENDANT/ANCILLARY DEFENDANT</b> |

**OPEN COURT**

**Mr. Jovan Bowes and Mr. Matthew Palmer instructed by Archer, Cummings & Co. for the Claimant**

**Mrs. Symone Mayhew Q.C and Ms. Lesley-Ann Stewart for the 1<sup>st</sup> Defendant/Ancillary Defendant**

**2<sup>ND</sup> Defendant/Ancillary Claimant in person**

**HEARD: February 2, 3, 2021 and January 14, 2022**

**CONTRACT FOR SUPPLY OF ELECTRICITY TO PREMISES OCCUPIED BY CLAIMANT – UNDER –  
REGISTRATION OF ELECTRICITY CONSUMPTION – DISCONNECTION OF ELECTRICITY –  
CLAIMANT’S BUSINESS SUFFERS FINANCIAL LOSS – CLAIMANT COMMENCES ACTION AGAINST  
1ST DEFENDANT FOR BREACH OF CONTRACT AND NEGLIGENCE – PRIVACY OF CONTRACT –  
BREACH OF DUTY-WHETHER 1ST DEFENDANT ENTITLED TO PAYMENT FOR UNDER –  
REGISTRATION – JPS BACK-BILLING FOR SIX YEARS**

**HENRY-MCKENZIE, J**

## INTRODUCTION

- [1] The claimant Simco 2000 Limited, (Simco) whose director is Mr. Christopher Simpson, by way of an oral agreement with the 2<sup>nd</sup> defendant Mr. Robert Simpson leased premises located at No. 3A Central Avenue, St. Andrew for the purpose of conducting business as a manufacturer of metal supplies and furniture at a monthly rental of \$150,000.00 inclusive of the costs for electricity and water. The claimant occupied the premises from about May 2001 at which time it also commenced its business. However, on July 14, 2010 and divers dates thereafter, this business was interrupted when the 1<sup>st</sup> defendant , the Jamaica Public Service Co. Ltd (JPS) disconnected the supply of electricity to the premises. It is averred that this caused the claimant's business to suffer severe losses and incur expenses and to eventually cease operations.
- [2] On June 9, 2014, Mr. Christopher Simpson on behalf of the claimant filed an action against the defendants to recover damages for breach of contract and negligence.
- [3] The allegations of negligence are particularized as follows:
- i. Discontinuing electricity to the claimant's premises without any lawful authority so to do;
  - ii. Discontinuing the electricity to the claimant's premises without ensuring that same would not cause damage to the claimant;
  - iii. Failing to have any or any sufficient and/or proper regard for the business of the claimant.
- [4] The 1st defendant, the JPS, denies liability and asserts that there was no breach of contract nor breach of duty of care. The 1st defendant contends that the contract for the supply of electricity to the premises was entered with Mr. Robert Simpson, and not with Mr. Christopher Simpson. The 1st defendant further contends, that disconnection of the electricity supply to the premises

occupied by the claimant was done in accordance with the agreed terms and conditions for the provision of electricity to its customers and was not in breach of its duty. Further, that the disconnections were made after the discovery of under-registering of electricity from the meter assigned to the premises and the subsequent refusal or failure of the claimant to pay the value of the under-registered electricity, despite adjustments being made to lessen the sum.

### **Case for the 2nd Defendant/Ancillary Claimant**

[5] The 2nd defendant, Robert Simpson filed no defence contesting the claimant's allegations. In addition to this, the 2nd defendant did not comply with the CMC orders of the Hon. Mr. Justice A. Rattray. Having failed to comply with these orders, the 2nd defendant's statement of case was struck out and judgment entered in favour of the claimant against the 2nd defendant.

### **Claimant's Case**

*Christopher Simpson ( also referred to as Mr. Simpson)*

[6] At the trial, the witness statement of Mr. Christopher Simpson dated and filed August 10, 2020 was permitted to stand as his evidence in chief with amplification. He was also cross-examined.

[7] Mr. Simpson was the main witness for the claimant, as the director of the claimant company. He gave evidence that on or about July 14, 2010, JPS representatives entered onto Simco's premises and disconnected the electricity supply and removed the meter for it to be tested for any irregularity. He stated that Simco's operations ceased on that day.

[8] The same day he called Mr. Kendis Nangle, who at the time was manager of Large Account Audit Department at JPS. Mr. Nangle told him to visit the JPS office the following day (July 15, 2010) which he did. He had discussions with Mr. Nangle after which a new meter was installed at the premises and

electricity supply was restored on July 16, 2010. Simco resumed operations on July 19, 2010.

- [9]** However, by a letter dated August 12, 2010, JPS wrote to Mr. Christopher Simpson and Mr. Robert Simpson, the 2nd defendant, informing them that the meter was showing irregularities and was recording only 50% of the energy which passed through it, and asserting therefore, that the meter was not registering the full amount of energy consumed on the premises. As a result, the JPS requested from them the sum of \$1,801,456.39, reflecting the 50% which was claimed to be owed for the under registration of the meter. He further stated that the JPS alleged in the letter that a third party deliberately altered the meter to record a lower supply of electricity than that which was actually consumed. Mr. Simpson said he responded to this letter denying there had been any tampering with the meter or even any knowledge or suspicion of this.
- [10]** Mr. Simpson further stated, that in December 2010, JPS workers returned to the premises and removed the new meter, disconnecting the electricity supply. Following this, he and his attorney met with Mr. Nangle once more to attempt to resolve the issue, however, the electricity supply was not restored and Simco had to yet again cease operation.
- [11]** Further, as a result of the disconnection, Simco was forced to make a number of its staff redundant and lost almost 60% of its customers due to non-production. Simco also lost several orders which were in place at the time.
- [12]** Mr. Simpson said he met again with another JPS representative, Mr. Sangeet Dutta, who was at the time JPS' Vice President for Customer Operations, in February 2011, where it was finally agreed that another meter would be installed at the premises. Around February 28, 2011, the new meter was installed and electricity supply was restored to the premises. However, he stated that a mere month later, the electricity supply was again disconnected, though he had paid all the bills. A week later the meter which was most

recently installed was taken out and a new meter was yet again installed and electricity restored. However, two months later in May 2011, Simco faced the loss of electricity again. It was restored the following day after Mr. Simpson spoke with Mr. Garth McKenzie, manager at JPS, Spanish Town Office.

**[13]** Mr. Simpson explained that this “on and off” disruption of electricity supply and changing of meters occurred every other month thereafter. Overall, he estimated the disruption and changing of meters taking place on approximately twenty occasions between July 2010 and August 2012. Eventually, he said that Mr. Robert Simpson, the landlord, took the decision to have JPS remove the meter from the premises permanently putting an end to the electricity supply to the premises.

**[14]** Mr. Simpson indicated that the prolonged disconnection led to Simco ceasing its operations. Electricity supply was essential to its business as a manufacturer, as the factory, including the machine and equipment could not operate without electricity. As a result of the constant interruptions in the electricity supply, the claimant claims that it suffered severe losses. I will itemize these below:

- i. \$1,000,000.00 in losses for the period January to December 2011
- ii. \$1,500,000.00 in losses for the period January to December 2012
- iii. \$2,250,000.00 in losses for the period January to July 2013
- iv. Loss of sale of chair sets at the rate of \$11000 per chair:
  - a) 380 chair sets to Courts Jamaica Limited, totalling \$4,180,000.00
  - b) 75 chair sets to Chin’s Radio Sales, totalling \$825,000.00
  - c) 70 chair sets to Lucea Furniture, totalling \$770,000.00

d) 60 chair sets to Phidd Furnishing, totalling \$660,000.00

v. Redundancy payments to 14 employees \$4,800,000.00

[15] Mr. Simpson stated that the claimant had met all its obligations to the 2nd defendant as well as to 1<sup>st</sup> defendant. He further stated that at no time did the claimant fail to honour its contractual obligation to the JPS as it relates to payment for the supply of electricity.

[16] In the amplification of his witness statement, Mr. Simpson indicated that electricity was needed for welding metals. He pointed out that after the premises lost electricity in December 2010, he had used the alternative measure of a generator to produce chairs, but that the generator could not manage Simco's operational load. Eventually, the motor in the generator burnt. He also stated that there was no other way to produce the chairs, resulting in the loss of sales. He described Simco's wide customer base, highlighting businesses such as Courts Jamaica Ltd. (Unicomer), Phidd's Furniture and Appliance Co Ltd, Chin's Radio Sales, Shop Smart, Lucea Furniture as well as other, smaller companies.

### **CROSS-EXAMINATION**

[17] When cross-examined at trial as to whether he had considered moving location as a result of the issues, Mr Simpson indicated that he did, but the rent was expensive at other locations.

[18] He pointed out in cross-examination that Simco's sales book sets out the sales allegedly lost. However, when asked what happened to this documentation, he stated that it was once kept at the office but was destroyed after the business was sold in 2013.

[19] Upon being further cross-examined, Mr. Simpson admitted that the contract for electricity was between JPS and Robert Simpson. However, he stated that he paid the electricity bills directly to JPS. He explained that he deducted the

cost of electricity as well as the cost for water and maintenance from the rental sum of \$150,000.00. He also explained that electricity was not on the premises when he first went there, but that sometime after he took possession, Mr. Robert Simpson applied for the service.

**[20]** In relation to what occurred at the initial disconnection, Mr. Simpson agreed that at that particular time he was told by the JPS representatives that they observed some irregularity with the meter. He further agreed, that he was informed of the suspicion of tampering of the meter and that it would be removed to be tested in order to determine if there was any irregularity. He also mentioned that the JPS representative dismantled the meter in three pieces and placed it in a plastic bag. He was however, uncertain whether the bag was sealed. Mr. Simpson also indicated that after this initial disconnection, he informed Mr. Robert Simpson of the issue. He requested Mr. Robert Simpson to deal with it as he was otherwise occupied and was not able to rectify the issue at once.

**[21]** He then explained to the court aspects of Mr. Nangle's demonstration to him on how a meter could be tampered with, as he understood it, stating that Mr. Nangle showed him that parts from the small meter could go in the big meter or the medium-sized one and cause the meter to not register the correct electricity usage.

**[22]** Though admitting being informed of the complexities surrounding the tampering and its effects on measuring the amount of energy consumed at the premises, Mr. Simpson still disagreed with the contents of the August 12, 2010 letter, that the examination revealed that the meter was not accurately registering 50% of the energy. Further, he disagreed that the tampering was not the result of a natural cause, but of third party intervention. When asked if he had been told he could have the meter tested by the Bureau of Standards, in light of his disagreement, he indicated that he was not informed of this and

further, that he did not seek to carry out his own independent testing, as the meter was not in his possession and he did not know where to go.

**[23]** He admitted, however, that in the letter he was informed that as a result of the under-registration there was an outstanding amount that would be charged to Mr. Robert Simpson's account and that it would be subject to the delinquency process, that is, service would be disconnected, if there was no payment. He also admitted that he received another letter from JPS in September 2011 reducing the sum to \$872,391.29. However, he stated that he did not pay anything on that balance as the light bill was consistent since Simco started operating in 2001.

**[24]** He agreed that he paid only the current charges on the account, because he was not in agreement with the adjusted sum. He maintained his disagreement even though admitting to a minimal increase in Simco's business and more production taking place. He also disagreed with the suggestion that JPS had all good reason for the multiple disconnection of service from December 2010 to January 2014.

**[25]** In relation to the losses alleged to have been sustained for the chair sets, he clarified that the sum of \$11,000 was the cost for the finished product, but that he only made a profit of about \$1000 on each chair set.

**[26]** Further, he stated that he made weekly redundancy payments over a long time to the claimant's workers.

**[27]** In re-examination, Mr. Simpson explained that when he stated that the bill was consistent he meant it was within a consistent range, never going above \$20,000.00 and this was between the period of 2001-2010.

*Damian Phidd*

**[28]** Mr. Phidd gave evidence on behalf of the claimant. Mr. Phidd is the director of one of the companies with which the claimant did business that is, Phidd's



Furniture and Appliance Co. Ltd. In his witness statement dated and filed January 20, 2021 which stood as his evidence in chief, Mr. Phidd stated that his company began doing business with Simco from around 2001. He indicated that Simco supplied his company with patio sets, chair sets and other items of furniture. However, following the onset of Simco's troubles with JPS in about 2010, Simco began having difficulties fulfilling his company's orders resulting in his company receiving less and less goods from them until Simco halted in about 2014.

**[29]** He also referred to the company's records of transactions (Exhibits 5 & 6) which show the bills from Simco and the related payments from his company, for the period 2001-2013. He explained that between 2001 and 2009, the payments to Simco increased to \$1,774,916.00, but from 2010 when Simco began having difficulties to 2013, the payments decreased from \$1,481,756.25 to \$870,220.00 before ending completely.

**[30]** Under cross examination, Mr. Phidd was taken through an examination of the business records of his company as exhibited. He accepted that on December 14, 2010 the bill received from Simco was greater than the year before. He also accepted that on December 10, 2012, it was less, and further that on December 20, 2012 the bill was again less than the year before.

### **The 1st Defendant's Case**

**[31]** The 1st defendant presented evidence from Mr. Hopeton Daley and Mr. Kendis Nangle, whose witness statements were filed on January 20, 2021 and October 9, 2020 respectively. Both witness statements stood as their evidence in chief.

#### *Hopeton Daley*

**[32]** At the time of giving evidence, Mr. Daley was employed to JPS in the capacity of Losses Officer but was previously employed as a field technician in the Loss Control Division. As a field technician, his duties included checking customer

premises to ensure that the metering facility was safe, changing defective meters and ensuring there was no tampering with JPS' equipment. He indicated that he consistently received training in policies and procedures relating to metering and identifying forms of tampering with the company's equipment.

**[33]** He gave evidence that on or about July 14, 2010, he along with another technician went to premises located at 3A Central Avenue, Kingston 5, St. Andrew assigned Customer number 330363 and premises number 332881 to conduct routine inspection of JPS meter numbered 254595 installed at the premises. This inspection was conducted in the presence of the occupier at the time, Mr. Christopher Simpson.

**[34]** On examination of the meter, he said he immediately noticed the first reduction gear in the meter had been changed, in particular, that the normal three wire reduction gear within the meter was replaced with a two wire first reduction gear. He stated that this means the gear in the meter did not correspond with the typical characteristics expected of that type of meter. He explained that this was an indication that there was third party human intervention as the change could not be due to normal wear and tear or product defect and this would inevitably cause the meter to under-register.

**[35]** He added that he was able to spot the alteration with his naked eye due to his specialized training on the job. He indicated as well, that the gear is located to the side of the register and is visible through the transparent glass on the casing for the meter. Furthermore, he indicated, that upon realizing the irregularity with the meter, he advised Mr. Simpson that he would be removing the meter and that the service wire would be disconnected. He also told him to attend the JPS office to speak to a Customer Service Agent. After the meter was removed, it was placed in a tamper proof evidence bag. He then wrote up a Meter Irregularity Card which was left at the premises, consistent with JPS' procedures.

- [36]** In amplifying his evidence at trial, he further explained paragraph 5 of his witness statement as it relates to the characteristics and alterations in the meter. He stated that the meter in question, is a 100amp 240 volts 3 wire meter. This meter has certain specifications where the first reduction gear has two markings on it, unlike a 120 volts 2 wire meter that has one ring on the first reduction gear. He further testified that the markings on the reduction gear did not correspond with the characteristics of a reduction gear for a 3 wire meter, but instead the 120 volts 2 wire meter immediately suggested that the gear was physically tampered with.
- [37]** In cross-examination, Mr. Daley gave evidence that the tampering was visible through the glass for someone with training. When asked whether the average person, without such training would be able to see through the glass the difference between the three wire reduction gear and the two wire reduction gear in a meter, he was of the view that they would not be able to. When further asked if the subject meter was one of the older types requiring physically visiting the premises to get the readings, he indicated that it was an older meter. When asked whether a technician visiting the premises previously would see this alteration, he indicated that a meter reader would not necessarily see the difference in the gear.
- [38]** In relation to JPS' meter inspections, Mr. Daley's evidence was that inspections were done at least once per year on meters. It was also his evidence that it was his first time at the premises, but that had he gone to the premises in 2009 and the tampering was present, he would have spotted it.
- [39]** When cross- examined on the proper procedures for inspecting and handling the meter, Mr. Daley pointed out that he is required to identify himself to the occupant(s), tell them that he is there to conduct inspection of the meter and its facilities and ask the customer to accompany him to the meter to begin the investigations. If an irregularity is discovered, the meter must be placed in a

tamper proof bag, sealed in front of the customer and the irregularity detection letter, form or card given to the customer informing them to visit the office.

- [40]** Mr. Daley also testified that the meters installed at premises possess two seals; one located on the glass and one on the socket to connect the meter to the wall. However, Mr. Daley could not recall if the meter in question had seals on it.

*Kendis Nangle*

- [41]** At the time of giving his statement, Mr. Nangle was employed to JPS as the claims and insurance manager. Previously he occupied the post of manager of the Large Account Audit Department. In this role, he oversaw large accounts and was also tasked with detecting instances of deviation from regular consumption patterns based on the expected load profile of any particular account.

- [42]** Mr. Nangle gave evidence that an examination of the records of JPS showed that in or about October 30, 1992, Robert Simpson entered into a conditional contract with JPS for the supply of electricity to the subject premises. This conditional contract was governed by certain terms and conditions including the Standard Terms and Conditions of Electricity Service.

- [43]** He recounted the events leading up to this matter as seen from the records of JPS. He reiterated what was stated by Mr. Daley in relation to the irregularity detected and the procedure adopted thereafter.

- [44]** He indicated that on the same day the meter was removed, Mr. Christopher Simpson attended the office of the JPS. Mr. Nangle said he explained the irregularity to him, and gave a demonstration of how the gear could be changed and advised him of the requirements for reconnection. However, he explained that in the spirit of good customer relations, a new meter was installed on the premises on July 16, 2010 numbered 1325587, despite the pending lab results from the Centre.

**[45]** He indicated that the lab results subsequently confirmed evidence of unauthorized third party intervention which caused the initial meter to under-register the total energy consumed by 50%. He communicated this to the claimant by a letter dated August 12, 2010, which also set out the assessed value of the under-registered electricity at \$1,801,456.39. He stated that the sum was determined by calculating the difference between what was paid by the customer and what ought to have been paid for electricity actually consumed, had the customer's consumption been accurately measured.

**[46]** In this letter Mr. Nangle said he further explained that the amount assessed was not determined on the basis of fault, but on the principle that regardless of fault, Robert Simpson and/or Christopher Simpson had accrued a benefit from the under-registration. A payment plan was offered on the following terms:

a. The sum of \$900,728.20 to be paid by August 17, 2010.

b. Thereafter, a further sum of 900,728.20 to be paid in six consecutive equal monthly instalments of \$150,121.37 on the 30th of each month beginning September 2010.

**[47]** Mr. Nangle indicated that the payment arrangement was not adhered to. Owing to this delinquency, over the ensuing months there were discussions between the claimant's representative and the 1st defendant about a reduction to the sums assessed as requested by Mr. Christopher Simpson. JPS eventually agreed to the adjustments of the sums. The first adjustment was for the sum of \$1,744,206.13. It was later further adjusted to \$872,391.29 to be paid within 12 months. However, Mr. Nangle's evidence is that to date nothing has been paid on the adjusted balance. He further stated that the balance now owing for outstanding electricity charges is \$973,765.72.

**[48]** He went on to explain that on diverse dates the electricity supply to the premises was disconnected owing to the following:

- i. The adjusted sum remaining unpaid;
- ii. There were instances where the premises displayed an overdue balance being carried forward to subsequent electric bills due to non-payment by the respective due date, making the account liable for disconnection in accordance with Sheet 208 of Standard Terms and Conditions of Electricity Service;
- iii. On at least one occasion, the electricity was disconnected because of a dishonoured cheque.

**[49]** Mr. Nangle also listed in his witness statement the occasions on which the electricity supply to the premises was disconnected and the reasons for same. I will not re-hash this, but Mr. Nangle had recorded approximately 12 disconnections of electricity, and the accompanying reconnection thereafter.

**[50]** In his amplified evidence, Mr. Nangle provided an explanation of the JPS' Standard Terms and Conditions of Electricity Service, indicating that it applies to all customers who contract with JPS for service and to whom the service is provided. He indicated that there are several terms and conditions within this document. One of the terms applicable to this case can be found at Sheet 208 which allows JPS to discontinue service for fraudulent use of services. He also referred to Sheet 209, which allows reconnection of service if all bills due, including those due by reason of fraudulent use or tampering, are paid.

**[51]** He explained that the JPS is demanding payment of the sum specified as there was tampering with the gears in the meter resulting in a 50% under-registration, allowing JPS in accordance with the law, to go back six years to recover the value of the under-registration for the six-year period, and bill for that amount. He was asked if there was any evidence of when the tampering took place, to which he responded that he was experienced in the business and knows the characteristics of the meter and would have knowledge of this type of situation.

- [52]** In amplification, he also provided further details on the Centre and their testing procedure. He indicated that JPS as a provider of electricity in the island is equipped with a lab to test the accuracy of the meters. He also emphasised that the lab is certified by the Bureau of Standards and further that the meters are tested before they are deployed. He also pointed out that after the meter is tested, the Centre issues a certificate which tells by how much the meter is under-registering.
- [53]** He indicated that a certificate was issued as it relates to this matter. In explaining the contents of the certificate and the testing procedure, he pointed out that the testing was in respect of the initial meter numbered 254595 installed at the subject premises. He said further that the meter was tested on July 19, 2010. As it relates to the testing, he said the procedure is that they would have sent two kilowatt of energy to the meter. In this case the meter reading before was 90446. However, the actual outcome was 90447, which would mean that the meter went up by one kilowatt and not two as was applied. This he stated led to the conclusion that the meter was under registering by 50%.
- [54]** In cross-examination, Mr. Nangle indicated that there was no certainty as to the precise starting date the under- registration. He agreed that it is a possibility for the under registration to have been for one day, though the charges went back to six years. He based this back-billing of six years on the Statute of Limitations.
- [55]** Mr. Nangle also disagreed in cross- examination with the evidence of Mr. Daley that the meters were inspected yearly and indicated that the resources wouldn't allow for that. He testified that the Office of Utilities Regulation (OUR) prescribes a percentage of meters to be tested yearly. However, he was unable to say on average how often these routine inspections of meters were carried out. When asked if over a ten year period the inspection would have occurred more than once, he responded that he was not able to say.

[56] Further, Mr. Nangle indicated that discussions he had surrounding the disconnections was with Mr. Christopher Simpson and not with Mr. Robert Simpson. He also stated that he met with Christopher Simpson at least twice. He also indicated that he was aware of the business the claimant operated and how the disconnections would have affected the operation of the business.

[57] Mr. Nangle also disagreed with the suggestion that the meter could have had a product defect. He testified that he has never seen any meter with a product defect in his years at JPS and that the meters are all tested by JPS and the Bureau of Standards.

[58] He also disagreed with the suggestion that the several disconnections were arbitrary. He informed the court that the disconnections were due to past sums owed and highlighted that though there were multiple reconnections, the sum remained owing and continued to be owed up to the date of the trial.

[59] In relation to the adequacy of the protection of the meter from tampering, Mr. Nangle explained that the seal does not give much protection as it can be cut with a knife or a saw.

[60] Further, in relation to the meter testing certificate, he indicated being familiar with the names of the persons on the certificate, each having a distinct role. One person tests, one reviews and another approves.

## **SUBMISSIONS**

[61] At the end of the hearing, the parties were invited to file written closing submissions with authorities in support. The claimant's closing submissions and response to 1st defendant's closing submissions were filed on February 12, 2021 and February 16, 2021, respectively. The 1st defendant's closing



submissions and reply to claimant's closing submissions were filed on February 12, 2021 and February 16, 2021, respectively.

### **Claimant's Submissions**

- [62] In its closing submissions, the claimant indicated that the evidence has shown on a balance of probabilities, that the 1st defendant owed it a duty of care which they had breached, thereby causing it to suffer damage.
- [63] The case of **Jamaica Public Service Company Ltd v Marcia Haughton** SCCA No. 136/2005 (December 20, 2007) was cited in support of the claimant's claim of negligence on the part of the 1st defendant. In that case Harris JA posited at page 31, following the well-known case of **Caparo Industries plc v Dickman** (1990) 1 ALL ER 568, as follows:

*"The question as to whether negligence on the part of the appellant has been established is one of fact. A claimant's success in an action for negligence is dependent on whether there is cogent evidence to establish that the defendant's negligence caused his injury. In discharging the burden of proving the defendant's negligence, the claimant must show the existence of sufficient relationship of 'proximity' or 'neighbourhood' between the defendant and himself, the foreseeability of damage by reason of the defendant's negligent performance of an operation resulting in injury to the claimant. See **Caparo Industries plc v Dickman** (1990) 1 All ER 568."*

- [64] The claimant also relied on the case of **Reverend Dr. Ralph Griffiths v AG of Jamaica and others** [2015] JMISC.34, where Anderson J in considering negligence in circumstances of pure economic loss noted at paragraph 24:

*"The common law though, as regards claims founded on the tort of negligence, has always been reluctant to extend a duty to anyone, to avoid causing, by one's action, nonphysical, or that which is often termed as, 'pure economic loss,' to another... Over time though, the common law evolved and it is now at the point whereby, it is the law, which has been recognized by the Privy Council – Jamaica's highest court, that **in order for pure economic loss to be recoverable**, pursuant to a claim for damages for negligence, in circumstances wherein, no injury to*

*the person or damage to property is being alleged, it must be shown that there also existed, as between the party who/which is pursuing the claim for damage for negligence and the defendant to that claim, a 'special relationship', or in other words, sufficiently close 'proximity' between the parties, whereby the defendant (s) has/had knowledge, or, at least, the means of knowledge that a particular person and not just a member of an unascertained class of persons will rely upon them and would be likely to suffer economic loss as a consequence of their negligence, and possibly; (3) it must be fair, just and reasonable that the law should impose a duty of the scope contended. These points have been clearly set out in the text – Charlesworth and Percy on Negligence (op.cit) at paras 2-121 and are exemplified in the following cases: **Candlewood Navigation Corp. Ltd. v Mitsui O.S.K. Lines Ltd.** – [1985] 2 All E.R. 935 (P.C). and **Muirhead v Industrial Tank Specialities Ltd.** – [1985] 3 All E.R. 705; and **Simaan General Contracting Co. v Pilkington Glass Ltd.** (No. 2) – [1988] 1 All E.R. 791; and **Spartan Steel & Alloys Ltd. v Martin & Co. (Contractors) Ltd.** – [1972] 3 All E.R. 557 and **S.C.M. (United Kingdom) Ltd. v W.J. Whittall & Son Ltd.** – [1970] 2 All E.R. 417.” [Emphasis added]*

[65] The claimant submitted that the evidence has demonstrated that there was sufficient relationship of proximity or neighbourhood between JPS and itself so as to attach a duty of care to JPS. Counsel for the claimant pointed to several things stated and done by the representatives of JPS as well as the interactions with Mr. Simpson on behalf of the claimant, which indicate that, regardless of the [non] existence of a contract between JPS and Simco, a duty of care existed. I will list the relevant evidence below:

- i. Mr. Daley, JPS technician, in seeking to fulfill JPS' proper procedure dealt with Mr. Christopher Simpson as if he were the customer at the premises. He explained JPS' procedure to him and directed him to contact JPS after the removal of the meter. He did not seek to involve Mr. Robert Simpson, but acknowledged Mr. Christopher Simpson as the occupier of the premises.
- ii. Mr. Nangle also spoke with Mr. Christopher Simpson regarding the disconnection. He did not involve Mr. Robert Simpson either. He also

wrote directly to Mr. Christopher Simpson on August 12, 2010 informing him of the results of the test. It was addressed to him personally in the care of Mr. Robert Simpson.

- iii. Mr. Christopher Simpson was also the one who visited JPS' office and discussed the matter on the invitation of Mr. Nangle. He was also the one who spoke with Mr. McKenzie and Mr. Dutta, both representatives of JPS. It was he who had also called JPS on several occasions throughout the ordeal and had the power reconnected at his behest, entirely independent of Mr. Robert Simpson.
- iv. Lastly, Mr. Nangle in his evidence stated that the back-billed amount was owed by both Mr. Christopher Simpson and Mr. Robert Simpson. He stated particularly at paragraph 15 of his witness statement that it was "the claimant's delinquency" and that the adjustments were made "arising from varying discussions with Christopher Simpson."
- v. At no point in time was Mr. Robert Simpson ever directly engaged by JPS, nor did he seek to intervene.

**[66]** On these bases, it was also submitted that JPS' willingness to have the sums it deemed owed settled by Mr. Christopher Simpson, in his capacity as representative of the claimant, and by the claimant itself, does not accord with its defence of privity of contract.

**[67]** Counsel further submitted that the claimant was a specifically known entity to JPS and its representatives and not a face in the crowd or a member of an indeterminate class. He submitted that its needs whether specifically as a manufacturer, or more generally as a commercial entity, were altogether known and as such, it ought to have been within JPS' reasonable contemplation that the claimant's business would be closely and directly affected by its act(s) and/or omission. He highlighted the evidence of Mr. Nangle where he indicated, that at the time of the disconnections he knew and

was aware that a business heavily dependent on electricity was operated on the premises and would be affected if the electricity supply were disconnected. Further, he knew that Mr. Simpson was the representative of the business. He also stated that this knowledge is evidenced by the very fact that JPS bills for the premises bear an "RT20" billing rate, used for small commercial customers.

**[68]** Counsel also submitted that on the evidence it was foreseeable that the claimant might have suffered losses if JPS failed to exercise reasonable care. He referred to the evidence of Mr. Nangle where he admitted in cross-examination that he knew if the power were disconnected the claimant would suffer losses and be entirely unable to operate. He submitted that it necessarily followed from that, that the claimant would be unable to produce goods and meet its contractual obligation to its customers and/or staff, satisfy its creditors and would be rendered entirely unviable.

**[69]** In consideration of the fact that the matter is peculiar and that the losses are limited to a single party, in the particular circumstances counsel submitted that it is fair, just and reasonable to impose liability on JPS.

**[70]** It was also submitted that JPS had breached the duty of care owed to the claimant by virtue of its handling of the matter. Counsel submitted that the root of the matter is in the back-billed amounts. He further submitted that given the high degree of reliance that the claimant had on JPS, it was a real risk that disrupting the electricity supply would have harmed it extensively and at the least, the business the claimant was conducting and its ability to pay and keep its workers. It was therefore submitted that care was needed in determining when to disconnect the claimant's electricity. Counsel relied on the following in support of his contention that JPS breached the duty of care owed to the claimant:

- i) JPS failed to adequately inspect and maintain the meter installed at the premises which it has the duty to do as its property. Customers and other

persons cannot do same. By virtue of this failure by JPS they cannot accurately state when, and has no way of ascertaining the exact date the meter was purportedly tampered with. He indicated that it is apparent from the evidence that the subject meter was not inspected by JPS for over nine years between 24th May 2001 and 14th July 2010.

- ii) The meters are also poorly safeguarded.
- iii) JPS unreasonably and arbitrarily used its power in back-billing the claimant to approximately six years. This is a practice of the company where they believe the meter has been tampered with or there has been some impropriety because they are prevented from going further by the Statute of Limitations. He relied on the cases of ***Harry Morrell v Jamaica Public Service Co Ltd*** [2016] JMSC Civ 81 and ***Lisa Gordon v JPS Claim No HCV 4635 of 2011*** for this argument.

[71] The claimant also took issue with the certificate relied on by the 1st defendant. Relying also on the case of ***Harry Morrell*** the claimant submitted that though the certificate contains readings and some information on how the meter was tested, it is still questionable. It was highlighted that it does not specify the instruments used to conduct the tests nor even the conditions of the laboratory in which it was tested. It was also noted that Mr. Carson appears to have signed the certificate for both himself and Mr. McPherson, which he argued, has impugned the reliability of the certificate given the evidence of there being three distinct persons involved in the testing process.

[72] It was also argued that as in ***Harry Morrell***, there was no evidence before the court as to the chain of custody. Counsel went on to state that Mr. Simpson, himself, indicated in cross-examination that he did not see Mr. Daley seal the meter bag which Mr. Daley explained was part of the proper procedure of handling the meter after such discovery.

[73] In the *Harry Morrell Case*, the court in examining the Meter and Calibration Center Meter Test found the test to be unreliable as the meter was never positively identified by its serial number and the test was not done until some two months after the meter was removed from the premises. There was also no evidence of the testing procedure or the chain of custody, nor even evidence to show that the facility was properly accredited as a test facility. In such circumstances, the court ruled that there was no basis upon which it could rely on the test results that there was a bypass and that there was no defect in the meter at the premises, nor even that the premises were unsafe, to justify disconnection.

[74] It was further submitted by the claimant, that based on the communication between Mr. Simpson and JPS as well as the successive reductions in the back-billed amount, the matter was still live and in a state of deliberation and as such a hold should have been placed on the account until determination. Therefore, it was inappropriate for the electricity to have been disconnected on that basis. Further, the claimant had generally paid all its current bills, except during the dispute over the returned cheque.

[75] As it relates to the issue of mitigation, it was pointed out by the claimant that attempts were made to use a generator to operate the business as well as to find an alternative place to do business. However, these attempts were unsuccessful. The claimant therefore did not fail to mitigate its losses.

### **1st Defendant's Submissions**

[76] Queen's Counsel, Mrs Mayhew on behalf of the 1<sup>st</sup> defendant began her submissions by focusing on the allegations of breach of contract. She noted that this cause of action was seemingly abandoned at trial by the claimant, nevertheless, she submitted that the evidence does not support such a claim against the 1st defendant. She asserted that there was no privity of contract between JPS and the claimant so as to enforce the contract against JPS, even though the claimant was the intended beneficiary. She quoted paragraph 14

of the case of ***Jamaica Legend Limited and Percival Hussey v Port Kaiser Oil Terminal S.A. and Rusal Alpart Jamaica*** [2016] JMCC Comm 27 where Batts J indicated the following:

*“ I respectfully depart from any suggestion that there is no doctrine of privity of contract or that it has lost its relevance. To say so is to potentially undermine the established rules of commerce and commercial men. Busy bodies cannot be allowed to seek contractual remedies for agreements to which they are not party, even if they are intended beneficiaries. An agreement becomes binding when there is consideration be it in the way of a promise or of specie. The consideration moves from one party to the other. This case demonstrates precisely why the doctrine of privity is still relevant. It would be so unfair for a court to impose a contractual duty on the 2nd Defendant in favour of the Claimants who are non-parties to the lease and from whom no consideration flowed. The 2nd Defendant would then not be able to terminate its lease, or otherwise bring it to an end, without the concurrence of a non-party. I see no reason why a person, merely because they expected to benefit in some way from its performance, should be afforded such influence.”*

[77] She further asserted that the evidence confirms that, in accordance with the Standard Terms and Conditions, JPS was entitled to disconnect the supply of electricity to the premises occupied by Simco for the non-payment of the outstanding sums charged, further to the irregularity found by Mr. Daley and confirmed by the undisputed results of the Meter Testing Certificate. Additionally, Queen’s Counsel argued that there were attempts to settle the sum that was adjusted with the claimant, but no satisfactory agreement was arrived at. Accordingly, it was submitted that JPS was not negligent in disconnecting the electricity supply to the premises as it was done in accordance with the Standard Terms and Conditions.

[78] It was further submitted, that on the evidence of electricity being supplied to the premises and the full benefit of electricity being consumed and not paid for, JPS was entitled to back-bill the account for Robert Simpson and demand payment of same on the principle of restitution.

[79] In order to obtain restitution of an unjust enrichment Queen's Counsel submitted that four main questions need to be considered:

- i) Has one party benefitted (enriched)?
- ii) Was the enrichment at the other party's expense?
- iii) Was the enrichment unjust?
- iv) Are there any defences?

[80] Regarding the back-billing of the account for electricity not registered but consumed, it was submitted that Mr. Nangle in his evidence indicated that the adjustment was premised on the Statute of Limitations, and that the Statute of Limitations was the starting point for further negotiation with the customer. Further, it was submitted that the sum arrived at was adjusted downwards in September 2011 and there were meetings concerning these sums, so there was the opportunity for Mr. Simpson to indicate why the sums should have been reduced, including disputing with the use of cogent evidence, the meter test results. It was further submitted that the date of tampering is not relevant as there was obviously a defect to the meter thus resulting in the consumption of electricity by the claimant for which the relevant sums were not paid.

[81] Queen's Counsel also took issue with the arguments raised by the claimant's attorney regarding the frequency of JPS' inspection of its meter, and submitted that this assertion not being previously pleaded, cannot now be used as a basis to establish negligence against JPS. Reliance was placed on the dictum of Lord Woolf MR in *McPhilemy v Times Newspapers Ltd and others* [1999] 3 All ER 775, 792-793 and rule 8.9A of the Civil Procedure Rules. Lord Woolf had this to say:

*“ The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that*



*party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. **Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader.** This is true both under the old rules and the new rules."*

CPR rule 8.9A states:

*"The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission."*

[82] Accordingly, Queen's Counsel submitted that the failure to inspect having not been pleaded, now cannot be relied on by the claimant to establish negligence against JPS in this claim.

### **Response by the Claimant to 1st Defendant Authorities**

[83] The claimant in response to the case of ***Jamaica Legend Limited*** cited by the 1<sup>st</sup> defendant on the issue of privity of contract, submitted that the same case also noted that though there may not be privity of contract between the parties, the tort of negligence can still be relevant where the "good neighbour" principle applies.

[84] As it relates to the arguments on restitution and the principle of unjust enrichment, counsel for the claimant submitted that on the basis of fairness and the need for enrichment actually obtained, a claim for restitution is concerned with the degree to which a party is in fact enriched. He argued that Mr. Simpson's evidence has shown that it was not a situation where no bills were paid, but that he paid what was owed to JPS. He further argued that in such a situation, it would be unreasonable for JPS to seek to claim restitution

in the form of a benefit for which it cannot truly and accurately determine the date of origin and quantum.

- [85] On the issue of pleadings, counsel referred to the **McPhilemy Case** cited by the 1<sup>st</sup> defendant and highlighted that in the **McPhilemy Case** it was stated:

*“As well as their expense, excessive particulars can achieve directly the opposite result from that which is intended. They can obscure the issues rather than providing clarification. In addition, after disclosure and the exchange of witness statements, pleadings frequently become of only historic interest. Although in this case it would be wrong to interfere with the decision of Eady J, the case is overburdened with particulars and simpler and shorter statements of case would have been sufficient. **Unless there is some obvious purpose to be served by fighting over the precise terms of a pleading, contests over their terms are to be discouraged...**” [Emphasis added]*

- [86] Counsel also drew reference to the case of **Karsales (Harrow) Ltd v Wallis [1956] 1 All ER 866** which considered the issue of pleadings where a lender breached an implied obligation in which Denning LJ stated:

*“The only real difficulty that I have felt in the case is whether this point is put with sufficient clarity in the pleadings. It is not put as clearly as one could wish. Nevertheless, I have always understood in modern times that it is sufficient for a pleader to plead the material facts. He need not plead the legal consequences which flow from them. Even although he has stated the legal consequences inaccurately or incompletely, that does not shut him out from arguing points of law which arise on the facts pleaded.”*

- [87] Counsel also referred to the case of **Claudette White v Cyril Mullings and another [2017] JMSC Civ 111**, which also considered the issue of pleadings at paragraph 15 -16, where it was stated:

*[15] In **Akbar Limited v Citibank NA [2014] JMCA Civ 43**, Phillips J.A. considering the issue of whether the defendant had specifically pleaded and proven his claim for special damages, observed at paragraph 64 that:*

*“The important point is that the defendant must not be taken by surprise..., once the general nature of a claim has been pleaded, if the witness statements are exchanged those statements may supply particulars of a claim. There is thus no longer the need for extensive pleadings. They are not superfluous, they are still required to mark out the parameters of the case of each party and to identify the issues in dispute, but the witness statements and other documents will detail and make obvious the nature of the case that the other party has to meet... “[43] ... therefore, to prevent surprise at the trial, the pleading must contain the particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand pleadings to mean with an extensive amount of particulars, because witness statements are intended to serve the requirement of providing details or particulars of the pleader’s case. [44] It is settled law that witness statements may now be used to supply details or particulars that, under the former practice, were required to be contained in pleadings...”*

*[16] It appears therefore that the concern of the court is to ensure that the defendant knows the case that he has to meet. The pleadings serve to establish the parameters of such a claim and the issues which arise. The witness statements and other documents should thereafter provide the details and particulars in relation to that claim.”*

**[88]** Counsel made the point that though the cross-examination of JPS’ inspection of the meter was only in part, the line of questioning still accords with the claimant’s assertion that JPS repeatedly disconnected its electricity supply without lawfully reason or sufficient/proper regard for its business. The relevance of the inspection was not new material and cannot be separated from the other issues in the case. In fact, this was mentioned in the 1<sup>st</sup> defendant’s own witness statements.

### **Reply by 1st Defendant to Claimant’s Submission**

**[89]** In challenging the applicability of the case of ***Harry Morrell*** relied on by the claimant, the 1st defendant noted that the claimant relied on the case for two points:

- i) JPS’ method of back-billing is arbitrary and unreasonable

ii) The meter testing certificate relied on ought to be impugned.

[90] However, Queen's Counsel submitted that both cases are fundamentally different. She explained that the basis of the disconnection in *Harry Morrell* was due to JPS' finding of under-registration caused by an illegal bypass. At that trial, the claimant presented evidence expressly challenging the presence of an illegal bypass on the premises which was accepted by the court. Accordingly, the court found no basis upon which to rule there was an illegal bypass or to conclusively rule out that there was a defect in the meter at the premises. Flowing from that, the court reasoned that it seemed unconscionable that the claimant should be back-billed for a period of six years and reduced the period to six months. She further argued that there was no general statement that the period of six years for back-billing was arbitrary and only reduced the period in *Harry Morrell* due to the absence of any evidence of meter tampering.

[91] On the contrary she argued that in the present case, the claimant was unable to refute the assertion that there was evidence of tampering and provided no evidence to challenge the finding of JPS technician on his site visit and the meter test results. She further argued that the case still remains one where on the evidence the irregularity is not due to meter defect but third party intervention and as such submitted that there is liberty to back-bill for the period of six years on the principle of restitution.

[92] As to the *Determination Notice* relied on by the claimant, Queen's Counsel contended that there was no breach committed by JPS in disconnecting the service to the premises and there is no obligation on them to put a hold on the account in the circumstances. Further, that the claimant was advised of the results of the investigation and of the adjustment to the account from August 12, 2010. Accordingly, liability for payment arose from that date as the investigation was complete. The claimant failed to settle the sums and therefore the account was liable for disconnection. Despite this, the 1st

defendant exercised its discretion and reconnected the account on different occasions without there being any arrangements for the claimant to pay the sums.

[93] In relation to the case of *Reverend Griffiths* Queen's Counsel indicated that there was no challenge to the principles regarding pure economic loss in negligence cases as outlined in that case, however she argued that the principles do not arise in this case as the claimant has not established negligence on the part of the 1st defendant to warrant an award for pure economic loss.

## ISSUES

[94] The issues for determination are:

- i) Is there a valid claim for breach of contract?
- ii) Whether JPS owed the claimant company a duty to exercise reasonable care in the provision of electricity service to the premises which the claimant occupied and carried on its business.
- iii) Whether there was negligence on the part of JPS in discontinuing the electricity supply to the premises occupied by the claimant.
  - a. Is the Meter Testing and Calibration Center Meter Test Certificate reliable?
  - b. Was the billing of Mr. Robert Simpson's account going back to six years prior to discovery of the alleged tampering reasonable?
  - c. Is the claimant's argument that there was no routine inspection by the JPS to ensure the meter remained in proper working condition to be considered?
  - d. Were the disconnections justified?

- iv) If (d) is answered in the negative, Whether as a result of the disconnection the claimant suffered losses.
- v) Whether the claimant is entitled to recover for any loss incurred as a result of the disruption to the electricity supply.

## **DISCUSSION**

### **i. Breach of Contract Claim**

- [95]** Though it appeared the claimant abandoned the claim for breach of contract against the 1st defendant, I am still required to provide my decision on this issue. This issue can be disposed of summarily.
- [96]** I agree with learned Queen's Counsel Mrs. Mayhew for the 1<sup>st</sup> defendant, that there is no privity of contract between the parties and that the claimant has not provided any evidence to support the claim for breach of contract. I note Mr. Christopher Simpson's evidence coincides with the evidence of Mr. Nangle and with JPS' defence, that the contract for the supply of electricity to the subject premises was with Mr. Robert Simpson and not with Mr. Christopher Simpson himself, as the representative of the claimant. I also accept that Mr. Robert Simpson applied for this service from JPS, so that the claimant could operate its business on the premises.
- [97]** Having considered the general principles pertinent to a contract and the evidence in this case, I find that there was no contract between the claimant and the 1<sup>st</sup> defendant upon which I can find that there has been a breach. Neither can the claimant, whom I find to be a stranger to the contract between JPS and Mr. Robert Simpson, seek to enforce that contract, though he would have benefitted from same. In the circumstances, the claim for breach of contract fails.

## ii. Negligence Claim

[98] In order to establish the claim for damages for negligence, the claimant must prove that the 1st defendant as the supplier of electricity had a duty of care to the claimant company, and that in providing its service, it should exercise the care expected of such a utility company involved in that business activity; that there was a breach of that duty; and that as a consequence of that breach, its business suffered damage or loss. The claimant must therefore establish all three elements, in order to prove that the defendant was negligent.

[99] The test of whether a duty of care exists in a particular case was formulated by Lord Bridge of Harwich in the leading case of **Caparo Industries plc v Dickman** (1990) 1 ALL ER 568. His three-fold test requires:

- i. Foreseeability of loss arising from the defendant's negligent conduct.
- ii. Sufficient degree of proximity or neighbourhood between the parties.
- iii. The situation being one in which the court considers it fair, just and reasonable for the law to impose a duty of care.

[100] This claim in negligence is concerned with seeking to recover for economic losses. There has been no alleged damage to the claimant's property or injury to person.

[101] The claimant noted that in the case of **Reverend Ralph Griffiths**, Anderson J had set out the principles relevant to recovering for pure economic losses brought about by negligence, where there is no injury to person or damage to property. These principles have been recognized by the Privy Council as the law in such circumstances, and as such, I will refer to this passage at this point. Anderson J had this to say:

*“..., in order for pure economic loss to be recoverable, pursuant to a claim for damages for negligence, in circumstances wherein, no injury to the person or damage to property is being*

*alleged, it must be shown that there also existed, as between the party who/which is pursuing the claim for **damaged**<sup>[A1]</sup> for negligence and the defendant to that claim, a ‘special relationship’, or in other words, sufficiently close ‘proximity’ between the parties, whereby the defendant (s) has/had knowledge, or, at least, the means of knowledge that a particular person and not just a member of an unascertained class of persons will rely upon them and would be likely to suffer economic loss as a consequence of their negligence, and possibly; (3) it must be fair, just and reasonable that the law should impose a duty of the scope contended.”[emphasis added]*

[102] The law governing recoverability for pure economic loss has evolved overtime. Liability for financial harm has therefore extended beyond that caused by negligent misstatements as in *Hedley Byrne and Co Ltd v Heller and Partners Ltd* [1946] AC 465 to now cover a broader set of cases of economic losses brought about by negligence in the performance of a service.

[103] An examination of the evidence which the claimant has presented before this court, clearly reveals a special relationship between the claimant and the first defendant that would give rise to a duty of care on the part of JPS. This relationship was created by the nature of the interaction between the parties which exemplified that of a service provider and its customer despite the absence of a contract between the two. The evidence shows that all communication, whether in person or via telephone, regarding the disconnection and arrangements for reconnection was done between JPS and the claimant’s representative Mr. Christopher Simpson. There is no evidence of any occasion where Mr. Robert Simpson, the individual JPS had contracted with, ever contacting JPS or visiting upon their office to have the issue of the disconnections dealt with.



**[104]** Similarly, JPS had also dealt with Mr. Christopher Simpson as if he were the customer with whom they had contracted to provide electricity. They had directed all updates in relation to the disconnection and the results of the meter test to Mr. Christopher Simpson. The JPS also reconnected the service only after discussions with Mr. Christopher Simpson and at his request. In addition to that, all adjustments were made following discussions with Mr. Christopher Simpson. There is no evidence of Mr. Robert Simpson being engaged by JPS in this process, or even seeking to intervene, apart from being notified of the adjustments.

**[105]** In such circumstances, the JPS would have throughout the period of the multiple disconnections and reconnections, either known or at the very least have been in a position to know that if they acted negligently, such negligence could in all reasonable likelihood, have specially affected the claimant company's business and caused it financial loss. Mr. Nangle himself had admitted in cross-examination, that he knew electricity was essential to the claimant's business, and that he also knew that if there were a disconnection during the claimant's business hours, that the claimant's business would be unable to operate and suffer as a result. It is only inevitable that if the claimant cannot operate he will then not be able to produce items for his customers and lose money as a consequence.

**[106]** I agree with the contention that a disruption in electricity supply would affect any customer of the JPS. However, this customer is specifically known to the JPS after numerous direct communications on the issue and is not a face in the crowd, as was stated by counsel for the claimant.

**[107]** When considered carefully, this court has no difficulty in concluding that throughout the period of the disconnections and reconnections, the requisite special relationship existed between the parties, such that a duty of care was owed by the 1st defendant to exercise reasonable care in providing utility service to the premises which the claimant occupied. This court also believes

it to be fair, just and reasonable, based on the 1st defendant's specific assumption of responsibility in providing electricity service to the claimant, to impose such a duty of care on the 1st defendant.

**[108]** I will now turn to the next important question whether the allegations of negligence should succeed.

**[109]** The 1st defendant explained that the disconnection of the electricity supply to the premises occupied by the claimant follows from a discovery by its technician while inspecting the premises that there was meter tampering. The tampering of the meter was later confirmed after testing by their Meter Testing and Calibration Center which issued a certificate with a finding of 50% under-registration of electricity consumed. Relying on the tests by the Center, the 1st defendant in accordance with its accepted practice, back-billed the claimant for six years the 50% of energy that was consumed, but not registered nor paid by the claimant or Mr. Robert Simpson with whom they had contracted.

**[110]** Despite informing the claimant of the irregularity and the payment arrangements available and even after making adjustments, the claimant still did not make any payments towards this sum, but only paid the current charges. On that basis, the 1st defendant disconnected the electricity supply as is allowed under their Standard Terms and Conditions, for the failure to pay the adjusted sum due by reason of the tampering. They explained that in keeping with their Standard Terms and Conditions, they were not obliged to reconnect the electricity until the adjusted sum was paid, but they had still done the reconnections on many occasions to maintain good customer relations.

**[111]** The issue of whether the claimant has established negligence on the part of the 1st defendant in discontinuing the electricity supply is one of fact. The claimant therefore needs to provide evidence to prove on a balance of probabilities, that the 1st defendant was negligent and that its financial loss

resulted from that negligence. In determining this I will consider the following headings:

### **Meter Testing and Calibration Center Meter Test Certificate**

[112] The meter test done by the Meter Testing and Calibration Center being the primary foundation on which the 1st defendant based its measurement of the value of the under-registration so as to bill the claimant, an examination of the certificate issued by the Center is necessary.

[113] Unlike in the case of *Harry Morrell*, in the instant case, the certificate had positively identified the meter by its meter number and the testing was done almost immediately after the discovery of the tampering. The testing was effected on July 19, 2010, only five days after the discovery of the tampering and removal of the meter by Mr. Daley on July 14, 2010.

[114] The certificate also contains information on the meter readings and how the testing of it was done. Evidence was also given by Mr. Nangle explaining the contents of the certificate and how the precise testing procedure had taken place to arrive at a 50% under-registration. He stated that the initial reading was 90446 and they would have sent two kilowatt of energy to the meter. However, the actual outcome was 90447 which meant there was an increase of one kilowatt and not two as was applied, leading to the conclusion that the meter was under-registering by 50%.

[115] The claimant disputed the certificate arguing that there was no evidence regarding the instruments used to conduct this test, or even the condition of the laboratory in which the meter was tested. Further, issue was taken with the fact that there were not three distinct signatures on the certificate, as was required. Instead there were two signatures, that of Mr Uton Tobin who did the testing and Mr. Donovan Carson, whose role it was to approve, and who signed on behalf of Mr. Ryan McPherson, who had the role to review. This does not necessarily mean however, that the review process did not take place.

**[116]** It would seem to me that the three signatures are required to attest to the integrity of the testing process. By diverting from this practice, it has opened the gates for questions to be asked in relation to this. It would have been expected therefore, that some explanation would have been proffered by the 1<sup>st</sup> defendant for this departure from its accepted standard and practice.

**[117]** However, though this is not forthcoming, I am satisfied that all else seems to be in order with the certificate. I bear in mind as well, the detailed explanation given by Mr. Nangle of the contents of the certificate and the testing process, which I accept. I am not convinced therefore, that the omission of the signature of Mr. McPherson is a sufficient basis upon which the court should reject this document, especially in light of the fact that there is no evidence before me which impugnes the integrity of the testing process. I agree that an explanation should have been given as to why his signature was not affixed, but this failure is not so detrimental as to affect my acceptance of the contents of the certificate, which has not been challenged by any cogent evidence. Further, the evidence before this court has highlighted that the Meter Testing and Calibration Center is certified by the Bureau of Standards, from which I can reasonably infer that the lab's operation was in conformity with acceptable standards and practices.

**[118]** With that said, I am satisfied that the certificate constitutes reliable evidence upon which I can act. I am even more so convinced as there is no evidence from the claimant to prove that the Center's calculation of a 50% under-registration was inaccurate, though this was an option available to them. According to Mr Nangle, the claimant had the option to have the meter tested by the OUR, if they were not satisfied with the results from the Centre.

## Chain of Custody

[119] As it relates to the chain of custody, I disagree with the claimant's contention that there is no evidence of the chain of custody of the tampered meter. The evidence which I accept, is that after Mr. Daley had placed the meter in the tamper proof evidence bag and secured it, it was sent to the Meter Testing and Calibration Center for further testing. The certificate itself has clearly shown that the contact person for the meter in question was H. Daley. I infer that this refers to Mr. Hopeton Daley. This in itself is adequate proof that this was the meter that was removed by Mr Daley from the claimant's premises. There is sufficient evidence to establish the chain of custody. Not every link in the chain needs to be established. This argument therefore fails.

## Back-billing policy of the JPS

[120] The period in which the claimant was back-billed ran from August 2004 to June 2010. Mr. Nangle indicates that JPS has grounded its right to back-bill for six years in cases of tampering or impropriety, on the Statute of Limitations.

[121] The claimant has argued that this practice is an arbitrary use of power and relies on the case of *Harry Morrell* to support this argument. The 1<sup>st</sup> defendant has however argued in response, that *Harry Morrell* is not an authority for this proposition, because nowhere in the reasoning of the court was this said or even implied.

[122] I agree with the submissions of the 1st defendant. In the circumstances of the *Harry Morrell* case, the court found it would be unconscionable that the claimant should be back-billed to six years in light of there being no evidence that the under-registration was due to an illegal bypass. There was no general ruling in this case on the unreasonableness of JPS' back-billing policy so as to have it applied to the circumstances of this case.<sup>[A2]</sup> In fact it has been proved to be a long standing accepted practice of JPS to back-bill customers to six years in situations such as these. There is no evidence before me to

indicate that this practice is unreasonable. As such, I cannot agree that the back-billing was unreasonable in the absence of compelling arguments on this point.

### **Pleadings and Claimant's Argument of Inspection and Maintenance of Company Equipment**

[123] In cross-examining Mr. Daley and Mr. Nangle, the claimant's counsel appeared to have made a suggestion that if the meters were routinely inspected, the tampering of the meter would have been discovered earlier and there would have been no basis for JPS to back-bill. Queen's Counsel for the 1st defendant challenged this line of questioning on the basis that it was not previously pleaded and as such cannot be used in establishing the claimant's cause of action in negligence.

[124] I do not agree with the argument of the claimant that this line of questioning falls within the ambit of the pleadings.

[125] The cases have long established that the purpose of pleadings is to mark out the parameters of the case the other side ought to meet. Though the claimant's pleading of negligence on the ground of JPS having no lawful authority to disconnect the electricity supply is obviously wide enough to cover numerous areas under the Standard Terms and Condition from which JPS gets its authority, including their failure to do routine or reasonable inspections, it is not reasonable to allow this argument at this juncture, as it would be prejudicial to the 1<sup>st</sup> defendant.

[126] When I examine the pleadings in relation to negligence, it is unreasonable to assume that the 1st defendant would have understood that within this wide coverage, the issue of frequency of inspection may have arisen. It is not for the 1st defendant to speculate what may be included in the pleadings, it is for the claimant to set out its case so that the 1st defendant knows the case it is

required to answer. The 1st defendant ought to be able to discern from the pleadings the general nature of the case the claimant intends to rely on at trial.

[127] This is also not considered extensive pleadings, but the necessary pleadings to allow the 1st defendant to understand the extent of the dispute.

[128] The claimant having not clearly set out its intention to rely on routine inspection to support its claim in negligence, they will not now be allowed to ambush the 1st defendant with this new line of argument. It would not be fair to allow this in all the circumstances.

[129] I am of a similar opinion in respect of the argument that the meter was poorly safeguarded by the seal placed on it, for security purposes.

#### **Were the disconnections justified?**

[130] In considering whether the disconnections were justified, I have made the following findings on the evidence:

- a) I accept the evidence of Mr. Daley, as a trained technician with experience in meter irregularity, that there was in fact tampering with the meter in question by a third party affecting the measurement of the quantity of electricity consumed on the premises occupied by the claimant. I accept as well that consequent upon this discovery of the meter irregularity, he removed the meter and it was taken to the JPS Meter Testing and Calibration Centre for testing. I find that there is sufficient evidence that the chain of custody was intact.
- b) I accept the evidence of the meter testing procedure and the evidence contained in the certificate issued by the Centre which indicates a 50% under-registration of electricity at the claimant's premises.
- c) I find that there is no evidence that the back-billing of the claimant for six years was unreasonable.

- d) I accept that consequent upon the 50% under-registration, the claimant was billed for the under-registered sum which was adjusted downwards and that this sum remained unpaid.
- e) I find that the 1st defendant was therefore, entitled to disconnect the supply of electricity to the premises occupied by the claimant for non-payment of such sums, in accordance with the Standard Terms and Conditions and was not negligent in so doing.
- f) With that being said, it follows that the intermittent disconnections between December 2010 and January 2014 amounting to approximately twelve disconnections, were not done without any lawful authority to do so.
- g) Further, the 1<sup>st</sup> defendant had not failed in its duty to exercise reasonable care in the provision of electricity to the premises which the claimant occupied and carried on its business.

**[131]** In the circumstances, the claimant's cause of action in negligence fails.

## **DISPOSITION**

**[132]** I therefore make the following orders:

- i. Judgment is entered in favour of the 1<sup>st</sup> defendant against the claimant;
- ii. Costs to 1<sup>st</sup> defendant to be taxed if not agreed.

.....  
**G. Henry-McKenzie, J**