

THE EASTERN CARIBBEAN SUPREME COURT

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SAINT LUCIA

CLAIM NO.: SLUHCV2016/0398

BETWEEN:

VANYA EDWIN-MAGRAS

Claimant

and

ST LUCIA ELECTRICITY SERVICES LIMITED

Defendant

APPEARANCES:

Rowana-Kay Campbell and Sahleem Charles for the Claimant
Mark Maragh, Esther Greene-Ernest and Shervon Pierre for the Defendant

2018: March 13;
March 20.

JUDGMENT

[1] **SMITH J:** Mrs. Vanya Magras is a woman of means who lives in the idyllic, upscale community of Cap Estate, perhaps the most affluent neighborhood in Saint Lucia. On the 16th June 2015, there was an interruption in the supply of electricity to her home. As a result of this electrical fault, her Sony 46" flat screen television, a

number of fluorescent light bulbs, her surge protector and her Viking refrigerator were damaged.

[2] Saint Lucia Electricity Services Limited ("Lucelec") repaired and returned her television and did certain repairs to the refrigerator. The television worked fine, but Mrs. Magras complained that the refrigerator never returned to the normal cooling temperature of between 35–40 degrees Fahrenheit. After calling Lucelec 126 times and having its technician visit her home on 16 occasions in an attempt to fix the cooling problem, Mrs. Magras finally emailed Lucelec on 28th October 2015 seeking compensation for the replacement of her surge protector, bulbs and Viking refrigerator. She also claimed compensation for electrical expenses incurred and spoiled food connected with the electrical fault. Lucelec agreed to compensate her for all items except the replacement of her refrigerator. This Court is therefore called upon to determine whether Lucelec is liable for preventing the refrigerator from cooling properly and, if so, what the compensation for that should be.

[3] At the commencement of this trial, counsel for Lucelec, Mr. Maragh, attempted to strike out certain paragraphs of the witness statement of Mr. Edmund Saint Mark, a refrigeration technician and witness for Mrs. Magras. Her counsel also attempted to strike out a report of Mr. Darryl Clyne, a refrigeration technician, being relied upon by Lucelec. This unleashed a technical, preliminary round of arguments over the rules for admissibility of documents, expert versus lay opinion, the hearsay rules, the **Evidence Act** and the **Civil Procedure Rule (CPR)**. Each side had three attorneys. The Court could not help but wonder how another claimant, in similar circumstances but lacking Mrs. Magras' means, would have fared. The outcome of those preliminary objections was the subject of a separate written decision by this Court. Suffice it to say that the Court did not accede to either party's application.

[4] In summary, Mrs. Magras claims damages in negligence against Lucelec arising from the electrical fault, which she says caused her Viking refrigerator to not cool properly. Lucelec denies that it was negligent and says that the failure of the Viking

to cool properly pre-existed the electrical fault and was caused by a thermostat retrofitted to it that was not part of the manufacturer's design.

Issues

[5] The statement of issues to be determined at trial in Mrs. Magras' pre-trial memorandum included the following at No. 2:

- i. "Whether the Claimant's refrigerator was in good working condition immediately before the electrical fault on 16th June 2015?
- ii. Whether the electrical fault on 16th June 2015 damaged the Claimant's Viking Refrigerator?
- iii. If yes, to what extent was the Viking refrigerator damaged by the electrical fault, and was the said electrical fault responsible for the continued malfunctioning of the Claimant's refrigerator?
- iv. Whether the electrical fault was due to the negligence of the Defendant?
...."

[6] Issues No. 2 ii, iii, and iv of Mrs. Magras' pre-trial memorandum were reproduced, in precisely the same words, in Lucelec's statement of issues to be determined at trial in its pre-trial memorandum, at No. 2 (iii), (iv) and (v), among other issues. Both sides were therefore in agreement as to the issues that lay at the heart of the case. It is necessary to have mentioned this because at the trial, both at the preliminary objection stage and again in its closing submissions, Lucelec raised another issue. At paragraph 10 (a) of Mrs. Magras' statement of claim, the following particular of negligence appears: "failure to ensure that their transformers were in good a and proper working condition, especially since this was not the first fault occurring at the Claimant's house"

The Transformers Issue

[7] Mr. Maragh had attempted to strike out the claim at the start of the trial on the ground that this was the only particular of negligence pleaded and there was absolutely no evidence as to the state of the transformers. Indeed, the witness statements filed in the matter said nothing at all about transformers. Nevertheless, I had ruled that the claim was cognizable because paragraph 4 and 12 of the Defendant's defence stated, respectively:

"Paragraph 4 of the Statement of Claim is vehemently denied. The Defendant contends that the fault which occurred on 16th June, 2015 caused only a burnt fuse to the Claimant's refrigerator which was replaced, putting the refrigerator in the state it would have been in had the electrical fault not occurred."

12.

- (a) any damage caused to the Claimant's refrigerator by the electrical fault occurring on 16th June 2015 was repaired by the Defendant.
- (b) the refrigerator was therefore placed in the state that it would have been had the electrical fault not occurred."

- [8] The Defendant's witness, Allison Marquis, stated at paragraph 7 of his witness statement:

"I immediately contacted the Defendant's 'Trouble Call Unit' who confirmed that there had been an interruption in the supply of electricity to the Claimant's residence on that date.'

- [9] I had therefore concluded in my written decision on this point that Lucelec's pleadings accepted that there was an electrical fault that caused a burnt fuse to the Claimant's refrigerator, which had been replaced, thereby putting the refrigerator in the condition it was in prior to the fault. This, I had ruled, relieved the Claimant of the necessity of establishing that the transformers were not working properly. What remained to be decided was whether the electrical fault caused the refrigerator to not cool properly even after the burnt fuse was replaced or whether, as contended by Lucelec, the cooling problem pre-existed the electrical fault.

- [10] A judicial eyebrow was therefore raised when, in his oral closing submissions, Mr. Maragh revisited the issue of Mrs. Magras not proving that the transformers were malfunctioning as she had alleged in her pleadings. If there was any lingering doubt that the matter of the transformers was put paid to by Lucelec's own defence, then the fact that neither party raised this as an issue in their respective pre-trial memorandum puts the matter to rest once and for all. The issues for the Court's determination are as set out in those pre-trial memoranda. Pre-trial memoranda are not an idle exercise. They serve to establish the agreed facts and isolate the issues

for the court's determination in order to remove last minute surprises and make for an efficient trial.

Was the Viking working properly?

- [11] It seems logical that the starting point in this trial is to determine whether in fact the Viking was working properly before the electrical fault. If it was not, there would be no need to go on to examine the other issues. Mrs. Magras says that it was. I would have thought it safe to assume that any housewife would know whether her refrigerator is working as it should to service the normal needs of a household. To suggest otherwise would be sheer pedantry. Mrs. Magras, by the way, described herself as a Director of NJD Kildonan Limited, a company registered in Canada. The question of whether the refrigerator was working properly prior to the fault is complicated by the fact that shortly after it was bought it had some problems.
- [12] Mrs. Magras purchased the Viking as a brand new refrigerator from La Cuisine Gourmet on 8th February 2011 for US\$5,799.00. It was shipped to Saint Lucia, she paid no duties on it as a returning resident and it was installed at her home on 17th May 2012 by Mr. St. Mark. Shortly thereafter, she noticed that water was constantly dripping on the inside and outside of it and there was an ice buildup. She contacted LCI, the distributors of the Viking in this region. In an email of 6th June 2012, Mr. Rafael Fernandez responded to Mrs. Magras. He described himself as the person *"in charge of technical support for Viking here at LCI Service office"* in Puerto Rico. He explained that when the Viking refrigerator is subjected to extreme humidity like in Puerto Rico or the islands, the cycle of cooling is extended which causes the evaporator to frost up, creating a large amount of defrosting water trying to go through the drain. Since the drain does not have the capacity to withstand that much water, it drips out of the drain through the back wall of the unit. He said that they had developed a kit to deal with the issue which should be installed by a qualified refrigeration technician. Mrs. Magras purchased this kit and had it installed by Mr. St. Mark. Her evidence was that she did not have any further problems until the electrical fault in June 2015.

[13] Through his cross-examination of Mrs. Magras and Mr. St. Mark, Mr. Maragh suggested, firstly, that the kit was not purchased from the manufacturer but from the distributors in Puerto Rico. Secondly, he suggested that when Mr. Fernandez, in his email to Mrs. Magras, stated that "*Here in PR we have develop [sic] a kit for fixing this issue*" that showed that the kit was not developed by the manufacturer but by the distributor in Puerto Rico. I have no hesitation in rejecting that suggestion. Mr. Fernandez stated in his email that he was in charge of technical support for Viking at the LCI service office in Puerto Rico. A Viking technical support unit would only distribute manufacturer-approved products. There was no evidence that it was not a manufacturer-approved product, only a suggestion that it was not. Mr. St. Mark who installed the kit said that it was from the manufacturer and I had absolutely no reason to disbelieve his frank and straightforward testimony.

[14] In his report, Mr. Clyne made the following findings:

" ...

A thermostat, which is not part of the original design of the refrigerator, was installed in the refrigerator. This thermostat appears to be a retrofit and was connected to the wires which were supposed to have been assigned to the sensors which are supposed to be controlled by the circuit board. In other words, the retrofitted thermostat, and not the original sensors, was found to be connected to the circuit board.

Even after adjusting the temperature setting on the retrofit thermostat, the temperature did not reduce sufficiently.

The fridge was low on Freon – after adding more Freon however, a temperature no lower than 44.2 degrees Fahrenheit was attained....

Conclusion

It was puzzling that after replacing the circuit board, and adding Freon up to the required level, the fridge still was not cooling to a satisfactory temperature.

However, the discovery that a retrofitted thermostat, and not the original sensors, is connected to the circuit board and the fact that the adjustment of its settings proved ineffective, begs the question as to whether this configuration (which is not the origin design) permitted the fridge to attain the optimal temperature before the circuit board was damaged."

[15] Mr. Clyne stated that the retrofit thermostat was not part of the original design, as indeed it was not. He did not say, however, that the retrofit thermostat was not developed by the Viking manufacturers for refrigerators distributed in this region of the world. It is not known whether Mr. Clyne, in running his diagnostics on the Viking, inquired of Mrs. Magras where she got the retrofit thermostat and who installed it. In this regard, it is regrettable that, being such an important figure in this claim, he was not made a witness and could not be cross-examined on those important comments in his report. The Court would have been keenly interested in his response to Mrs. Magras and Mr. St Mark's stated position that the kit was specially developed by the manufacturers of Viking refrigerators exported to this region and that the Viking worked well after it was installed. Would this crucial piece of information, apparently not known to Mr. Clyne, have changed the conclusion in his report? We shall never know now.

[16] In his report, Mr. Clyne also stated that, "*a number of visits have been done at the customer's house to ascertain the cooling capacity of the appliance although I cannot verify as to how the appliance operated before the board got burnt.*" (underlining supplied) Mr. Allison Marquis, electrical engineer and witness for Lucelec, under cross-examination, candidly stated that he could not say how the Viking operated or cooled before the electrical fault.

[17] On the other hand, Mrs. Magras' position was that the Viking cooled just fine after the kit was installed. She appeared to be a frank, calm and honest witness who answered all questions put to her directly without any prevarication. Given her obvious means, she had absolutely no reason or motive to lie about the functioning of the Viking before the electrical fault. Indeed, she wasted no time in purchasing herself a new refrigerator even before Lucelec declined to compensate her for the Viking. In any event, it is conspicuous that it was never seriously put to her in cross-examination that she was lying about how the Viking was cooling prior to the electrical fault or that it was not cooling properly prior to the fault. Mr. St. Mark who installed the kit also stated that, following the installation, the Viking was cooling

properly between 35 and 40 degrees Fahrenheit. This testimony was not altered under cross-examination. I am therefore left to conclude that the Viking was cooling properly at between 35–40 degrees Fahrenheit before the electrical fault and that after the fault, despite best efforts of Mr. Clyne, it would not cool lower than 44.2 degrees Fahrenheit.

Whether electrical fault damaged the Refrigerator?

- [18] This issue can be dealt with shortly. In its defence, Lucelec stated that the fault which occurred on 16th June, 2015 caused only a burnt fuse to the Claimant's refrigerator which was replaced, putting the refrigerator in the state it would have been in had the electrical fault not occurred. Mr. Marquis, again candidly under cross-examination, stated that the damage to the Viking was Lucelec's fault. On re-examination he clarified this to say that the damage was limited to the burnt fuse. I therefore conclude that the electrical fault which occurred on 16th June 2015 damaged Mrs. Magras' Viking refrigerator.

To what extent was the Viking damaged by the electrical fault?

- [19] Mr. Marquis in his witness statement commented on the retrofit thermostat. He stated:

"I was advised by Servitech and do verily believe that this does not conform with the design configuration of the refrigerator and was the cause of the continued malfunctioning...the above clearly suggests that the Claimant's refrigerator was not in good working order before the fluctuation on 16th June, 2015 which resulted in the ill-advised installation of the retrofit thermostat"

- [20] Three important observations must be made regarding this statement from Mr. Marquis. Firstly, Mr. Marquis is an electrical engineer and not a refrigeration expert. He freely admitted this under cross-examination. Secondly, his conclusion is based on the report of Mr. Clyne (on behalf of Servitech) who was not cross-examined. Thirdly, Mr. Clyne's report does not state that the retrofit thermostat was the cause of the continued malfunctioning of the Viking. The report does not support the assertion so positively advanced by Mr. Marquis that the retrofit thermostat "was the

cause of the continued malfunction.” Mr. Marquis reaches this conclusion on his own. Mr. Clyne stated that:

“However, the discovery that a retrofitted thermostat, and not the original sensors, is connected to the circuit board and the fact that the adjustment of its settings proved ineffective, begs the question as to whether this configuration (which is not the origin design) permitted the fridge to attain the optimal temperature before the circuit board was damaged.”

- [21] That statement is hardly conclusive about the cause of the Viking’s failure to adequately cool. In fact, on a strict analysis of that sentence, the use of the phrase “begs the question” means that the statement that follows that phrase contains a conclusion the premise of which lacks support. But all that I think Mr. Clyne meant by that statement was that he was querying whether the failure of the Viking to cool was caused by the retrofit thermostat.
- [22] It is on the assumption – not supported by the conclusion of Mr. Clyne – that the Viking was failing to cool because of the retrofit thermostat, that Lucelec concluded that all that the electrical fault damaged was the Viking’s circuit board and fuse, so that when these were replaced the refrigerator was restored to its pre-June 2015 condition. Mr. Marquis based his conclusion – that the Viking was restored to its condition before the electrical fault – on an assumption for which there was no finding of fact by Mr. Clyne and only a speculation. That assertion that the Viking was restored to its pre-June 2015 condition withers when held against the testimony of Mrs. Magras and Mr. St. Mark that the Viking was in fact working properly before the electrical fault.
- [23] I am satisfied that the greater weight of the evidence, the evidence that has the most convincing force is that the electrical fault caused the Viking to not cool properly. What is this evidence? It is the fact that, as I have found, the Viking was working properly, with the retrofit thermostat, before 16th June 2015; there was an electrical fault which damaged a television, surge protector, bulbs and the electrical circuitry of the Viking at Mrs. Magras’ house; this was not the first electrical fault at her house; there was at least one, and perhaps two, previous instance/s of an electrical fault

resulting in Lucelec having to pay substantial sums in compensation to her. This is sufficient to incline me to the view that the electrical fault caused the Viking to not cool properly afterwards. This is not to say that all doubt is completely removed. But it does not have to be where the standard of proof is on a balance of probabilities. It is certainly superior evidentiary weight to Lucelec's suggestion that the retrofit thermostat caused the malfunction, especially when that suggestion is predicated on the false assumption that the retrofit kit did not come from the manufacturer of the Viking. And especially when both Mrs. Magras and Mr. St. Mark's evidence was that the unit cooled properly with the retrofit thermostat.

Whether the electrical fault was due to the negligence of the Defendant?

- [24] Lucelec is the exclusive supplier of electricity to the population of Saint Lucia. It admitted that on 16th June 2015 there was an electrical fault, an interruption of electricity to the home of Mrs. Magras. Under cross-examination Mr. Marquis was referred to his letter dated 12th November 2015 written to Mrs. Magras offering compensation for everything damaged except the Viking refrigerator. He agreed with Ms. Campbell that that offer of compensation was made because Lucelec felt that the damage was its fault. He also admitted that the damage to the refrigerator was Lucelec's fault. Later, on re-examination, he clarified that the damage was limited to the electrical aspects, the burnt fuse and circuit board. Lucelec has plainly accepted responsibility for the electrical fault that damaged items at Mrs. Magras' house, including the Viking. The Court has already found that the electrical fault was also the cause of the failure of the Viking to cool properly after 16th June 2015.

Measure of Damages

- [25] Mrs. Magras seeks compensation for the replacement of her Viking currently stored in the garage of her home. I agree with Mr. Maragh that the measure of damages is to attempt to restore a claimant to her pre-incident position had the tort not occurred. The pre-incident position of Mrs. Magras is that she had a properly functioning Viking refrigerator that was four years old. Lucelec tried but was unsuccessful in restoring her to that position by repairing the refrigerator. When she

requested compensation for the replacement value of a brand new refrigerator, Lucelec refused. It did not offer compensation at the value of a Viking refrigerator that was four years old.

[26] Mrs. Magras seeks compensation in the sum of \$40,369.03 for the replacement of her Viking. That sum includes the cost of the unit plus freight, insurance, duties, brokerage services and transportation. Mr. Maragh submitted in his oral closing submissions that if the Court found for the Claimant then damages should be limited to the replacement cost of a compressor. This was based on Mr. St. Mark's statements in his witness statement that the compressor was not working and if the compressor was not working the Viking could not work properly. But without some conclusive finding that a new compressor would restore the Viking to its pre-incident position, it would be idle and speculative to make an award based on this assumption. In any event, Mr. Clyne, the refrigeration technician relied upon by Lucelec never made any such recommendation. He never mentioned the compressor at all in his report.

[27] No evidence was put before the Court as to what would be the value of the refrigerator after four years of use. I do not think that this should prevent the Court from making an award. Doing the best that I can under these circumstances, I deduct the sum of \$10,000.00 for depreciation from the sum claimed by Mrs. Magras. I arrived at this figuring by taking the original cost of the refrigerator (\$40,369.03) and dividing it by the number of years that it is likely to function adequately (15 years). Lucelec did not dispute the sums claimed for surge protector replacement, bulb replacement, electrical inspection and works paid for by Mrs. Magras as a result of the electrical fault, food spoilage and catering fees. Neither did it dispute the sums claimed for freight insurance duties, brokerage and transportation. Once Mrs. Magras has been paid, Lucelec is entitled to possession of the Viking refrigerator in order to salvage value of that refrigerator.

Disposition

[28] I therefore make the following orders:

- (1) Judgment is entered for the Claimant.
- (2) The Claimant is awarded the sum of \$30,369.03 representing the pre-incident value of her refrigerator.
- (3) The Claimant is awarded the sum of \$2,660.04 representing replacement cost of surge suppressor and bulbs and compensation for electrical inspection and works, catering fees and food spoilage.
- (4) Interest is awarded on the global sum at the rate of 6% from the date of the filing of the claim until payment.
- (5) Prescribed costs are awarded to the Claimant in accordance with CPR Part 65 (5).

GODFREY P. SMITH, SC
HIGH COURT JUDGE

BY THE COURT


REGISTRAR