25 JUL 1995

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

(CIVIL)

Suit No.200 of 1995

Between:

JALOUSIE PLANTATION DEVELOPMENT COMPANY LIMITED, Trading as JALOUSIE **Plaintiff**

vs

ST LUCIA ELECTRICITY SERVICES LIMITED **Defendant**

Mr D Theodore for the Plaintiff

Mr H Deterville for the Defendant

1995 : April 6, 7 & 26

JUDGMENT

d'Auvergne, J.

By a writ of summons indorsed with a statement of claim filed on 16th March, 1995 the Plaintiffs claimed *inter alia* an injunction restraining the Defendants from disconnecting the Plaintiff's supply of electricity to Jalousie for arrears of charges for electricity prior to the execution of the proceedings.

On 17th March, 1995 the Plaintiff filed a summons for an injunction supported by an affidavit of Monty Zullo.

The application by the Plaintiff for the injunction reads as follows:

> The Defendants be restrained and that an injunction be granted restraining the Defendants for disconnecting the Plaintiff's supply of electricity to the Plaintiff's hotel premises at Jalousie, Soufriere for the arrears of electricity prior to the termination of the proceedings

JALOUSIE PLANTATION V ST. LUCIA ELECTRICITY SERVICES

in this action.

The affidavit of Monty Zullo is hereby reproduced in its entirety:

I, Monty Zullo, of Jalousie, Soufriere, Operations Director of Jalousie Hotel do hereby make oath and say as follows:-

1. I am the Operations Director of Jalousie Plantation Resort (hereinafter called JALOUSIE) which carries on business as a resort hotel at Jalousie, Soufriere.

2. JALOUSIE is a four star hotel situate next to the Petit Piton in Soufriere. It receives and accommodates guests on an international scale.

3. I make this affidavit according to my own knowledge derived in the course of my duties as Operations Director of JALOUSIE.

4. The Plaintiffs are customers of the Defendants in relation to the supply of electricity to them consumed at JALOUSIE and the Defendants have a sole statutory right under Section 3 of the Electricity Supply Ordinance (1964) to generate, transmit, distribute and sell electricity in Saint Lucia.

5. At all material times there subsisted between the Defendants and the Plaintiffs, an agreement in writing hereby the Defendants agreed to supply the Plaintiffs with electricity at a voltage of 11,000 volts for use in relation to JALOUSIE.

6. However, between the period of October 1990 and July 1994 and continuing from that date up to this date in breach of the Defendants' said agreement, the electricity voltage supplied by the Defendants to JALOUSIE fluctuated from time to time either below or above the said agreed voltage of 11,000 volts whereby the Plaintiffs suffered

loss and damage as set out in the Statement attached. The damage amounts to approximately $257,775.00 US (or $688,259.25 EC) for equipment damaged plus loss of database. Furthermore the Plaintiffs have also suffered loss of goodwill which is to be assessed by the Court.

7. The Defendant's claim against the Plaintiffs for electricity charges supplied as at 1st March 1995, the sum of approximately $500,000.00. In the Defendants' letter dated 1st March 1995, they notified the Plaintiffs that failing complete settlement of their account by 17th March 1995, the Defendants would permanently discontinue their supply of electricity to the Plaintiffs and seek redress in the courts. A true copy of the said letter is exhibited hereto and marked "A".

8. The Plaintiffs claim to be entitled to set off all the amounts due to them as damages from the Defendants as stipulated in paragraph 7 above.

9. In a suit by the Plaintiffs against the Defendants filed on 16th March 1995 numbered 200 of 1995, the Plaintiffs claim from the Defendants damages for breach of the said contract as at paragraph 7 above and claim also to be entitled to a set off as set out in paragraph 8 above.

10. Nevertheless, the Defendants intend to permanently disconnect the Plaintiffs' supply of electricity at JALOUSIE aforesaid despite the Plaintiffs' losses alleged herein and in the said suit due to the Defendants' breach of contract in consequence whereof the Plaintiffs will lose business and/or will be compelled to close down their operations at JALOUSIE.

11. The Plaintiffs have offered and are ready and willing to continue to pay to the Defendants all current bills.

12. Nevertheless, the Defendants intend unless restrained by

injunction from so doing to cut off the supply of electricity to JALOUSIE as from 17th March 1995.

13. Consequently, the Plaintiffs request this honourable court to issue an injunction restraining the Defendants, their workmen, servants or agents from disconnecting their supply of electricity at JALOUSIE up to the termination of the proceedings herein and the Plaintiffs undertake to give security to the Defendants for such damages, if any, as the Defendants may suffer as a result of such injunction.

On that same day, 17th March 1995, the application for injunctive relief was heard.

I pause here to note that though the application was not drafted in the form of an Ex Parte application it was heard as an Ex Parte application since Learned Counsel for the Plaintiff impressed upon the Court that it was a matter of the greatest urgency that the matter be heard Ex Parte.

The Court noted the Plaintiff's undertaking as to damages and granted the order which reads as follows:

> "It is hereby ordered:
> That the Defendants be restrained from disconnecting the Plaintiffs' supply of electricity to the Plaintiffs' hotel premises at Jalousie, Soufriere for arrears of electricity prior to the termination of the proceedings in this action until after the hearing of the said summons returnable on 29th March 1995 or until further order."

A penal notice was also included.

On 20th March, 1995 the Defendant had an appearance entered on its behalf.

On 29th March 1995 the matter was adjourned to 3rd April, 1995 and on that date to 6th April, 1995.

On the 30th day of March 1995 the Defendant filled an affidavit in answer. This affidavit is hereby reproduced in its entirety.

AFFIDAVIT IN ANSWER

I, BERNARD THEOBALDS, of the Morne in the quarter of Castries in Saint Lucia, make oath and say as follows:

1. I am the Managing Director of the defendant and am authorized to make this affidavit on behalf of the defendant.

2. I have been shown and have read the affidavit of the plaintiff filed herein on the 17th March 1995.

3. Save that the defendant states that the plaintiff has been a consumer of electricity as defined in the Electricity Supply Act No.10 of 1994 (hereinafter referred to as THE ACT), the defendant has no knowledge of the allegations made in paragraphs 1, 2 and 3 of the said affidavit and put the deponent to proof thereof.

4. The defendant denies paragraph 4 of the said affidavit and state as follows:

   (a) The plaintiff has at all material times been a consumer of electricity as defined in THE ACT.

   (b) Section 3 (1) of THE ACT provides as follows:

   "Subject to this Act, the company shall have a sole and exclusive license to generate, transmit, distribute and sell electricity in Saint Lucia for a period of eighty years with effect from 1st July 1965".

   (c) Section 21 (1) of THE ACT provides as follows:

   "Subject to subsection (2), during the continuance of the license no person except the Company shall generate, transmit (save for his own consumption and sue), distribute or sell electricity within Saint Lucia. . ."

5. With respect to paragraph 5 of the said affidavit the defendant states as follows:-

   (a) Section 22 of THE ACT provides as follows:

   (1) The voltage of electricity supplied for domestic or lighting purposes shall be 240 volts and this shall be maintained by the Company within 4% and minus 8% (measured at the consumers' terminals) of such voltage.

   (2) The frequency of electricity supplied for any purpose shall be 50 cycles per second and this shall be maintained within plus and minus 3% of such frequency.

(3) Subject to subsection (4), the system of distribution of electricity shall be 3 phase 4 wire for 415 volts between lines and 240 volts between line and neutral, single phase 3 wire for 480 volts between lines and 240 volts between line and neutral, the neutral in each case being earthed, or single phase 2 wire for 240 volts between lines with one line earth and designated "the neutral", all or any of such systems to be used, the choice in any particular case being by the Company according to load conditions and the most economical method of supply.

(4) A consumer may be agreement with the Company be supplied with electricity at a voltage in excess of 480 volts and step this down in his own transformers to any voltage for the time being approved by the Chief Electrical Engineer".

(b) The defendant agreed to supply and does supply the plaintiff with an overhead high voltage 11,000 volt 50 Hz line terminating with a high voltage metering unit approximately one (1) mile from the plaintiff's main facilities.

6. With respect to the allegations made in paragraph 6 of the said affidavit, the defendant states as follows:

(a) The defendant supplies the plaintiff with electricity as stated in paragraph 5 (b) above which said supply is maintained within the acceptable and legally permissible levels of fluctuation.

(b) The defendant denies that it has supplied the defendant with electricity above the voltage agreed.

(c) The plaintiff designed, installed and commissioned the distribution system within its facility. The defendant has no role in this. The system as designed is faulty.

(d) The defendant denies that the plaintiff has suffered loss and damage as a result of any act or omission on the part of the defendant which would make the defendant liable for payment of damages to the plaintiff.

(e) If, which is denied, the plaintiff has suffered loss or damage, this loss and damage, is by the plaintiff's own admission unliquidated and is not a sum which is due and liquidated.

7. With respect to the allegations made in paragraph 7 of the said affidavit, the defendant states as follows:-

(a) Section 41 of THE ACT in so far as is relevant provides as follows:

(1) Subject to this section, where a consumer defaults with respect to a payment due the Company for electricity supplied, the Company may disconnect the supply of electricity to such consumer until such time as such payment

and reconnection fee prescribed in Part B of the FIRST SCHEDULE are paid.

(2) The Company may not discontinue the supply of electricity to any consumer unless -

(i) the consumer is given not less than fifteen days previous written notice by the Company of its intention to do so; and

(ii) the consumer has not during the period of notice required under paragraph (a) paid all sums due by him to the Company.

(b) The plaintiff knew or ought to have known that the sum due by the plaintiff to the defendant as of the 2nd March 1995 was $628,613.66. Of that sum, $328,299.00 was due for over 90 days, the sum of $162,254.94 was due for over 30 days, and $138,059.72 was then current.

(c) The defendant has caused a reading to be taken of the plaintiff's consumption of electricity and has discovered that the sum due by the plaintiff to the defendant for electricity consumed as of the 21st March 1995 is $724,361.78.

(d) In pursuance of the provisions of the Electricity Supply Act outlined above, the defendant gave notice to the plaintiff that it would exercise its right to discontinue the supply of electricity to the defendant as of the 17th March 1995.

(e) The defendant states that it is legally entitled to enforce its rights under the law to disconnect the supply of electricity to the plaintiff.

8. With respect to the allegations made in paragraph 8 of the said affidavit, the defendant states as follows:

(a) The defendant states that the plea of set off is not in law available to the plaintiff.

(b) I am advised and verily believe that the issue of set off only arises in cases where there are debts which are due and liquidated. This is not the case here, and therefore the plaintiff is not entitled to claim and set off.

(c) In any event the plaintiffs unliquidated claim is for $688,259.25 and the defendant's liquidated claim is for $724,361.78 and in such circumstances if, which is denied, a claim for set off can be maintained, this is not a case where the defendant ought to be restrained from exercising its lawful right to disconnect the defendant.

9. With respect to the allegations made in paragraph 9 of the said affidavit, the defendant repeats paragraph 8 hereof.

10. With respect to the allegations made in paragraph 10 of the said affidavit, the defendant repeats paragraph 7 hereof, and states that the defendant is prevented by law from permanently disconnecting the plaintiff, as Section

41 (3) of THE ACT provides as follows:

"Where the Company in accordance with subsection (1) of disconnects the supply of electricity to a consumer the Company must reconnect the supply of electricity to the consumer within twenty-four hours after the arrears, and reconnection fee and any required deposit have been paid to the Company; but where the day for such reconnection falls on a Sunday or a public holiday, such reconnection must be effected on the next working day thereafter."

11. The defendant denies paragraph 11 of the said affidavit and states as follows:-

(a) By letter dated the 17th August 1993, the plaintiff undertook to settle its outstanding debts to the defendant at the rate of $50,000.00 per week. A copy of the said letter is now shown to me and marked "BT 1". The plaintiff failed to honour its promise made in the said letter.

(b) By letter dated the 29th September 1993, the plaintiff undertook to settle its outstanding debt of $160,732.12 to the defendant as soon as possible. A copy of the said letter is now shown to me and marked "BT 2". The plaintiff failed to honour its promise made in the said letter. The defendant was forced to disconnect the supply of electricity to the plaintiff.

(c) By letter dated the 2nd November 1993, the plaintiff undertook to settle its outstanding debts to the defendant as shown to me and marked "BT 3". By letter dated the 5th November 1993, the defendant set out the terms under which it would reconnect the plaintiff. A copy of the said letter is now shown to me and marked "BT 4". On the basis of promises made by the plaintiff, the defendant reconnected the plaintiff. The plaintiff failed to meet its promises and this resulted in the defendant having to write to the plaintiff on the 29th March 1994. A copy of the said letter is now shown to me and marked "BT 5".

(d) The plaintiff met with the defendant on 23rd December 1994 and agreed to pay the outstanding sums owed by it to the defendant. For the first time in its dealings with the defendant, the plaintiff raised an issue concerning damaged equipment. By letter dated the 28th December 1994, the defendant wrote to the plaintiff setting out the terms of the agreement arrived at on 23rd December 1994. A copy of the said letter is now shown to me and marked "BT 6". The plaintiff has filed to honour the terms of its agreement to pay the defendant the sums due by it to the defendant.

(e) By Notice dated 24th September 1993, the defendant notified the plaintiff that the defendant would disconnect the plaintiffs supply of electricity for non payment of monies due for electricity consumed by the plaintiff. A copy of the said Notice is now shown to me and marked "BT 7". The said electricity was in fact disconnected.

(f) It is therefore not true that the plaintiff is ready and willing to pay to the defendant all current bills.

12. With respect to the allegations made in paragraph 12 of the said affidavit, the defendant states as follows:-

    (a) the plaintiff admits owing the defendant for electricity supplied by the defendant to the plaintiff.

    (b) the sum owed by the plaintiff to the defendant as of the 21st March 1995 is $724,361.78.

    (c) The plaintiff's average monthly consumption of electricity is valued at over $130,000.00.

    (d) The defendant is entitled to disconnect the plaintiff for failure to pay sums due to the defendant for electricity supplied, as disconnection is a right conferred on the defendant by Statute.

13. The defendant states that there is no legal basis for restraining it from enforcing its legal right to disconnect the plaintiff for failure to pay sums due to the defendant for electricity supplied. The plaintiff can prevent the defendant from enforcing its right to disconnect the plaintiff, by paying the sums due to the defendant. This is not a case where the plaintiff can validly allege that the defendant will be unable to abide by whatever order the Court may make as to damages that may be found due to the plaintiff. The plaintiff is attempting to abuse the process of the Court, by having an order which in effect allows it to continue to be supplied electricity by the defendant without paying for the said supply.

14. The defendant states that, in any event, the damages claimed by the plaintiff are a sufficient and adequate remedy for the acts complained of in the Statement of Claim, and in its application for interim injunction.

15. In all the premises the Defendant denies that the plaintiff ought to be granted the injunction claimed and prays that the interlocutory injunction granted herein be discharged with costs to the defendant.

The Defendant also filed a list of exhibits - a copy of six (6) different letters and one notice.

The gist of all those letters was the facilitating of the payment of arrears by the Plaintiff to the Defendant and the acceptance of the terms of payment of the arrears by the Plaintiff.

The notice mentioned reads as follows:

> "We would like to inform that as a result of your inability to maintain the payment schedule agreed with us to reduce your indebtedness on Account number 2-05-15680, we have no choice but to disconnect the supply effective immediately until all outstanding amounts ($260,732.12) are paid."

On the 5th of April the Plaintiff filed 3 additional affidavits viz, Ali Pascal Mahvi, Managing Director and Shareholder of Jalousie, Damascus Francois, the Refrigeration and Electrical Supervisor and Daniel Beauburn, the Chief Maintenance Engineer all of whom referred to the loss suffered by the Plaintiff due to the fluctuations of the electricity supply.

On the 6th of April Mr Deterville, Learned Counsel for the Defendant made his submissions for the discharge of the injunction granted on 17th March, 1995 in written form.

He commenced his argument by reading out the Order of injunction granted on the 17th day of March 1995, which I have already stated on page 4.

He cited the various provisions which empower the Court to grant injunctions. He quoted **Section 16 of the West Indies Associated States Supreme Court (St Lucia) Act 17 of 1969** which gave the High Court or Judge power to grant an injunction.

He further quoted **Order 29, Rule 1 (20) of the Rules of the Supreme Court** which empowers the Court to grant an injunction Ex Parte where the applicant is the plaintiff and the case is one of urgency otherwise the application must be made by motion or summons.

Articles 843 of the Code of Civil Procedure he said also gave the Court power to grant interim and perpetual injunctions. He urged the Court to note that the date on which the case was being heard was the 6th April, 1995 and therefore the injunction had already been discharged by its terms since no further order had been granted extending it to the 6th April,

1995. He then quoted the oft cited **AMERICAN CYANAMID CO vs ETHICON LTD [1975] 1 ALL ER 504** which will hereafter be referred to as the **Cyanamid Case**.

Page 509 (e) of the said case reads:

> *"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages."*

Learned Counsel contended that based on the above the Plaintiff must show that he is entitled to the right claimed and since he has no right, therefore no right can be violated.

He quoted **SECTION 41 OF THE ELECTRICITY SUPPLY ACT NO.10 OF 1994** which reads:

(1) Subject to this Section, where a consumer defaults with respect to a payment due the company for electricity supplied, the company may disconnect the supply of electricity to such consumer until such time as such payment and reconnection fee prescribed in Part B of the first schedule are paid.

(2) The company may not discontinue the supply of electricity to any consumer unless:

   (i) the consumer is given not less than 15 days previous written notice by the Company of its intention to do so; and

   (ii) the consumer has not during the period of notice required under paragraph (a) paid all sums due by him to the company.

Learned Counsel further contended that the right to disconnect was given to the Defendant by the above quoted Act to disconnect for arrears of electricity after fulfilling the

requirements set down (noted above).

He said the right was that of the Defendant, the Plaintiff was in arrears, the Plaintiff was given notice therefore the Defendant had the legal right to discontinue the supply of electricity to the Plaintiff. He contended that the **Cyanamid's Case** also stated that if at the hearing of the application for the interlocutory injunction the material available to the Court fails to disclose that the Plaintiff has any real prospect of succeeding in its claim for a permanent injunction at the trial, then an interlocutory injunction should be refused.

He argued that the basis of the Plaintiff's claim in his affidavit is that he has the right to a set off.

Learned Counsel submitted that the plea of set off was not available to a plaintiff but a defendant and quoted **Order 18 Rule 17** which reads:

> *"Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the Plaintiff, it may be included in the defence and set off against the plaintiff's claim whether or not it is also added as a counterclaim."*

In **STOOKE vs TAYLOR [1880] 5 QBD 569 AT PAGE 575** Cockburn C.J. said,

> *"By the statutes of set off this plea is available only where the claims on both sides are in respect of liquidated debts, or money demands which can be readily and without difficulty ascertained. The plea can only be used in the way of defence to the Plaintiff's action, as a shield, not as a sword."*

He strenuously argued that the principles in this dictum was the Law of Saint Lucia and quoted **Articles 1118 of the Civil Code of Saint Lucia**,

> *"Set-off takes place by the more operation of law between debts which are due and liquidated and are each in respect of a sum of money or a certain quantity of indeterminate things of the same kin and quality."*

He argued that the Plaintiff wrongly relied on this alleged right to set off and therefore the order of injunction ought to be discharged.

In his pen-ultimate argument was, Learned Counsel once more referred to the **Cyanamid Case**. He quoted Page 510 (g).

"If damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them no interlocutory injunction should normally be granted, however strong the Plaintiff's claim appeared at that stage."

Learned Counsel argued that since the Plaintiff's claim is that he has suffered monetary loss which has begun to quantify, and that there is also no allegation that the Defendant is not in a position to meet whatever damages found due to the Plaintiff then the injunction should be discharged. Moreover that the disconnection of the Plaintiff's electricity supply by the Defendant for arrears was not novel to the Plaintiff, since the Defendant has had to disconnect the Plaintiff for the same reason in the past and that had not led to the closing down of the Plaintiff.

He argued that on the other hand the disadvantages which would result to the Defendant if the injunction was maintained could not be compensated for, in monetary terms.

He quoted the case of **NORTH ROCK LTD vs JARDINE ET AL, CIVIL APPEAL NO.12 OF 1991** which laid down some factors or circumstances which militate against the grant of an injunction.

At page 8 of the above cited judgment the Learned Chief Justice said, *"Realistically there are at least five (5) factors or circumstances which militate against the grant of the injunction. Firstly, the learned judge might have taken judicial notice of the fact that the operation of a quarry is in the public interest which is always an important factor to be taken into account in the exercise of the judicial discretion to grant or refuse an injunction."*

Learned Counsel submitted that it was not in the public interest that consumers should owe the Defendant for electricity supplied; that to prevent the Defendant from disconnecting the consumer on the basis that the consumer may have a yet undetermined claim against the Defendant, was to place the Defendant at risk of not being able to collect sums due to it, which would finally result that the Defendant would not be in a position to provide the service of supplying electricity to the public which is in the national interest. Learned Counsel concluded that based on the public interest principle the injunction granted should be discharged.

Learned Counsel for the Defendant commenced his argument by stating that set off is available to a Plaintiff and quoted Article 1127A of the Civil Code.

> *"In addition to the cases in which set-off may be pleaded under the foregoing articles set-off may be pleaded in all cases in which it may be pleaded by the law of England."*

He quoted **BANKES vs JARVIS [1903] 1 KB 549 CHANNEL J AT PAGE**

553 which reads as follows:

> *"The case of* ***Agra and Masterman's Bank VS Leighton (1)*** *is clear authority that before the Judicature Act a liquidated amount owing to the Defendant by the Plaintiff's son could have been set-off by the defendant against the claim of the plaintiff serving as trustee for her son. Then the Judicature Act, and more especially the rules distinctly put an unliquidated claim on the same footing as a liquidated claim for the purpose of set-off."*

Therefore he said it was clear that since 1956 set-off was also available to Plaintiff in St. Lucian.

Learned Counsel then argued that under Order 14 where there is no defence to a claim a Plaintiff could be granted a stay of execution pending trial of a counterclaim, therefore analogously the Courts could order the Defendant not to disconnect the supply of electricity to the Plaintiff.

He argued that the word MAY in Section 41 of the Electricity Act No.10 of 1994 was to be construed as permissive and not mandatory and quoted **DE SMITH'S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION** (4th Edition) Pages 346 and 348 respectively.

> *"It has often been asserted in judicial dicta and academic literature that all statutory powers (or at least all statutory powers directly impinging on private rights) must be exercised reasonably; and in as much as powers are conferred subject to an implied requirement that they be exercised reasonably, an authority failing to comply with this obligation acts unlawfully or ultra vires. It may be noted, parenthetically, that the reasonableness of its conduct does not necessarily*

provide a public authority with a conclusive answer to proceedings instituted against it."

"The reasonableness of administrative action is often indirectly impugned by contending that an authority has been swayed by extraneous factors and has disregarded relevant factors. So close is the connection between irrelevancy and unreasonableness that it is seldom possible to isolate unreasonableness as an independent ground of challenge. Unreasonable acts and decisions usually take place because an authority has deviated from the path of relevancy in coming to its decision. But it may happen that an authority has considered all relevant factors and closed its mind to the irrelevant, and yet has acted unreasonably through giving undue weight to one relevant factor and too little to another."

Learned Counsel argued that the Defendant acted unreasonably, that it dismissed the Plaintiff's claim for damage suffered as a result of the drops in Voltage and unfairly with total disregard for the amount of monies paid to it for electricity, threatens to disconnect the Plaintiff.

Learned Counsel beseeched the Court to note the language of letter of the 1st March 1995 in particular the pen-ultimate paragraph which states -

"We consequently have no alternative but to reject out of hand this attempt by Jalousie to wiggle out of paying its debts for electricity consumed".

He said that the power to disconnect had to be exercised judicially in all the circumstances and quoted **DE SMITH** at page 351 -

"...A pubic body, although immune from liability for doing that which Parliament has expressly or impliedly

authorised it to do, must as far as reasonably practicable, so exercise its statutory powers as to avoid injury or to minimise the scope of any injury that must inevitable be caused, to the rights of others."

In Judicial Review by Michael Supperstone Q.C. page 136 -

"An appropriate balance must be maintained between the adverse effects which an administrative authority's decision may have on the rights, liberties, or interest of the person concerned and the purpose which the authority is seeking to pursue."

He submitted that the Defendant acted unreasonably in threatening to disconnect the Plaintiff.

Learned Counsel further submitted that the fact that there was no reference in the affidavit of Monty Zullo that the matter was one of urgency was immaterial since the facts deposed to clearly revealed a threat to disconnect the Plaintiff's supply of electricity on the 17th March 1995, the very day on which the application was being made.

He said that the submission that the injunction granted on the 17th March, 1995 made returnable on the 29th March 1995 had been discharged on its terms and should not be entertained since the hearing of the summons was still continuing. He submitted that the Defendant showed a lack of appreciation for the fact that the one of the terms of the injunction reads "until after the hearing of the said summons."

He contended that the Plaintiff does in fact have a right to remain connected with electricity since that on consideration of all the matters discussed above when weighed in the balance the position is, that such a right does exist.

He said that the Cyanamid Case is of limited application to the case in issue because the set off principle was absent and the Court was not concerned with the discretion of a public body.

He stressed that damage would not be an adequate remedy as the Plaintiff would suffer irreparable harm extending even to financial ruin if the Defendant be permitted to exercise its draconian powers of disconnection.

He concluded by stating that it was inaccurate to suggest that to maintain the injunction would open the flood gates since the discretionary power to disconnect must be used judicially and each consumer's case must be considered on its own particular merits.

CONCLUSION

The decision of the House of Lords in **AMERICAN CYANAMID CO. v. ETHICON LTD. 1975 A C 396** is considered the authority as to the approach of the Courts to interlocutory applications between parties for prohibitory injunctions, and the guidelines laid down by Lord Diplock are regarded as the leading source of law on the subject.

In **CAYNE v. GLOBAL NATURAL RESOURCES PLC 1984 1 ALLER** it was established that the guidelines were based on the proposition that there will be a trial on the merits of the Case at a later stage.

In the instant application I have noted that a writ indorsed with statement of claim has been filed and there are other matters to be decided in that statement of claim apart from the injunction.

The guidelines discussed in the Cyanamid Case makes reference

to special cases and it is my view that actions against a public authority is one of the special cases referred to.

Upon consideration of the affidavit of Bernard Theobalds the Managing Director of the Defendant Company, the former stated and exhibited the various letters sent to the Plaintiff by the Defendant, in which the Defendant urged the Plaintiff to pay outstanding arrears; various arrangements were made for facilitating the payment of the arrears and that it was only at a meeting on the 23rd December, 1994 after the Defendant agreed to pay the outstanding sums owed by it that the issue of damaged equipment was raised; that the letter dated 28th December 1994 confirmed the agreement made on 23rd December and noted the discussion with reference to damaged equipment (these letters were exhibited verifying the facts set out in - paragraph 11 of Theobald's affidavit).

Based on the above, I find it impossible to hold that the Defendant could be said to have acted in an arrogant manner when it wrote to the Plaintiff on the 1st of March 1995 in those words, (bearing in mind earlier correspondence).

> *"We consequently have no alternative but to reject out of hand this attempt by Jalousie to wiggle out of paying its debts for electricity consumed".*

The words of Section 41 of the Electricity Supply Act No. 10 of 1994 are clear, it empowers the Defendant to disconnect. The submission by learned Counsel for the Plaintiff that the Defendant was to act judicially and reasonably taking into consideration the amount of monies paid by the Plaintiff to the Defendant for supply of electricity cannot be entertained, Since it is my view that the Defendant has acted reasonably, setting terms facilitating the Plaintiff in the payment of arrears. The Defendant has acted judicially in that it is the Plaintiff who has requested and was granted the injunction.

The Defendant has only responded by coming to Court to discharge the injunction.

5. In **SMITH AND OTHERS vs. INNER LONDON EDUCATION AUTHORITY 1978 1 ALLER 411**. Lord Denning M.R. said at pages 418 (f) -

> *"I am of opinion that a local authority should not be restrained, even by an interlocutory injunction, from exercising its statutory powers or doing its duty towards the public at large unless the Plaintiff shows that he has a real prospect of succeeding in his claim for a permanent injunction at the trial".*

This case is also authority that the public interest is a legitimate factor to be considered in assessing where the balance of convenience lies and I quote from page 422 (h) "that where the Defendant is a public authority performing duties to the public, one must look at the balance of convenience more widely, and take into account the interests of the public."

In my judgment, it is not in the public's interest to have consumers owe the Defendant for electricity supplied and to prevent the Defendant from disconnecting the consumer, on the basis that, the consumer may have a yet undetermined claim against the Defendant.

I have borne in mind the case of **NORTHROCK LTD. vs. GARDINE CIVIL APPEAL 12 OF 1991** which to my mind is based on the decision in **SMITH'S CASE 1978** quoted earlier.

The submission by Learned Counsel for the Defendant that the injunction has already been discharged by the affluxion of time. I must agree with learned Counsel for the Plaintiff,

that the words of the Order are clear and speaks for itself that the Defendant is not to be disconnected until "the termination of the proceedings in this action. Or until after the hearing of the said summons . . . . . or until further order". The injunction is still in existence until the judgment on the discharge of the injunction is given.

I will not consider the submission of set-off since in my judgment it is a matter to be argued at the trial of the substantive case.

Finally, I will consider the submissions as to whether damages is or is not an adequate remedy. In the **CYANAMID CASE, Page 510 (G),** Lord Diplock said -

> *"If damages in the measure recoverable at Common Law would be adequate remedy and the Defendant would be in a financial position to pay them no interlocutory injunction should normally be granted, however strong the Plaintiff's claim appeared to be at that stage".*

The Plaintiff has in his statement of claim stated that the Defendant breached an agreement' and as a result, he suffered damages. Therefore damages is a matter to be decided at the hearing of the substantive case. Moreover, there is absolutely no doubt in my mind that damage is an adequate remedy and that the Defendant is in the financial position to pay them should the Plaintiff succeed at the trial.

My Order is as follows:-

> That the injunction granted to the Plaintiff on the 17th March, 1995, restraining the Defendant from disconnecting the Plaintiff's supply of electricity to the Plaintiff's hotel premises at Jalousie, Soufriere for arrears of electricity is hereby discharged.

Costs will be costs in the cause.

SUZIE d'AUVERGNE
PUISNE JUDGE