IN THE HIGH COURT OF THE COOK ISLANDS

HELD AT RAROTONGA

(CIVIL DIVISION)

PLT NO. 40/2002

BETWEEN **TELECOM COOK ISLANDS LTD**
Plaintiff

AND **MATA COCKBURN** of Rarotonga
Defendant

Ms Short for Plaintiff

Mr Little for Defendant

Date of Hearing: 10 November 2003 and 12 November 2003

Date of Decision: 12 November 2003

DECISION OF WILLIAMS J

[1] This is an action brought by Telecom Cook Islands Limited against Ms Mata Cockburn to recover a total of $3469.95 in respect of telephone services provided to Telecom account 149703 together with interest and costs. The proceedings were issued in November 2002 but adjourned sine die on 13 December 2002 doubtless because the Defendant Ms Cockburn was then overseas. The Court was informed that Ms Cockburn returned to the Cook Islands not long ago and thereafter a writ of arrest was issued in relation to this matter. The matter came before me on Monday the 10th November. The file revealed that a notice of intention to defend dated 7th November had been filed and a notice issued by the Defendant on the same day to produce documents for inspection, namely, the relevant telephone accounts.

[2] When the matter came before me on the 10th November the Notice to Produce had not been served or complied with, nor was there any indication as to the precise nature of the defence. I was concerned to ensure that both parties wished to proceed in spite of this unfinished procedural business. There was an exchange between the Court and counsel where I pursued this issue. I have had the notes of evidence for the first part of the hearing typed and I will annex these notes to my judgment. They are important in demonstrating four points. First that although there was no full pleaded defence the precise nature of the defence was spelled out by counsel for the Defendant in the remarks he made that time. Secondly, that the Plaintiff elected to proceed having heard those remarks by defence counsel. Thirdly, that the Defendant wished to proceed without completing discovery. Fourthly, there was no pressure on the Plaintiff from the Court to proceed. The significance of these opening exchanges with the Court will become apparent later in my judgment.

[3] The preliminary exchanges indicate that it was apparent before any witnesses were called that the essential defence was a denial of the alleged reconnection request said to have been made on 28th December 2000 by the Defendant in respect of her telephone 26701 customer No. 149703.

[4] The parties were agreed that the Defendant had made a valid suspension request on 28.12.2000 duly recorded by Telecom. Since all the charges claimed related to periods after 28.12.2000 it was obvious that Telecom could not succeed unless it proved the reconnection request.

[5] The Defendant had been so for some time a good customer of Telecom when on 18th December 2000 as recorded on page 2 of Exhibit 3, Ms

Cockburn requested a temporary suspension of service. The precise words on the relevant Telecom document headed Disconnect Service contract No. 40698 are "please suspend phone on 28.12.00 at customer's request. Customer willbe out of the country for over a month."

[6] The crux of the case is therefore the allegation that the Defendant telephoned thereafter asking for a re-connection. Exhibit 3, an unsigned Telecom Reconnect Service Contract No. 41679 records under the heading "Service Order Details" the following:

> "Created on 28.12.2000 ... the reason for disconnection, customer request – reconnected on 28.12.2000. Notes – Please reconnect 26701 customer phoned 28.12.00 since her daughter is on the island."

According to these Telecom records the suspension and the request for reconnection were therefore made on the same day.

[7] A passport entry shows that the Defendant departed the Cook Islands on 27 December 2000. No evidence was called from Telecom to prove the reconnection request allegedly made by the Defendant. It became increasing apparent in the course of the hearing that the absence of such evidence would be a major problem for Telecom.

[8] During closing submissions for the Plaintiff the Court was told that there was a Telecom witness who could give evidence that she had a telephone conversation with a customer during which the request for reconnection was made. At that stage there was an application for an adjournment to enable the witness to be called. The Court disallowed the application because it was too late. My reasons for refusing it have been recorded

elsewhere but in essence there were two. First I was satisfied that Mr Little had made very clear his client's defence before the hearing commenced and before me. The exchanges that I have referred to which took place at the beginning of the case underscore the fact that Telecom elected to proceed, knowing the defence, but without the witness. Secondly, an adjournment would have been impracticable because the witness would not be available for some time and I would not in any case be able to conclude this part heard matter until next I sat in Rarotonga which could be well into 2004.

[9] In the absence of direct evidence of the reconnection request the question then becomes whether there is other sufficient proof that the Defendant ordered a reconnection or whether some other person acting as her authorized agent made such a request. In considering this aspect of the matter a number of background facts need to be recorded.

[10] First, Ms Cockburn had a good customer record in the period from when she took over the telephone from her ex-husband until the disconnection request on 28th of December. Secondly, in the subsequent year, December 2000 to the end of 2001 when the Defendant was overseas, there were no problems with account although there was no evidence before me as to precisely who had paid the account in this period. (The Defendant was absent from the Cook Islands as from 27 December 2000 till 27th September 2003). Thirdly, the Telecom reconnect form makes provision for signature by the customer. There is no such signature in relation to this reconnect service contract.

[11] To say that this is all creates a rather confusing picture might be an understatement. If the documents are taken at face value we have a disconnect being effected on the 28th of December 2000 having been

requested on 18.12.2000 and it is reconnected the same day as it has been disconnected as a result of a request on that day (28.12.2000) at a time when the Defendant was not in Rarotonga. All of this supports the inference that unless the reconnect request was made by the Defendant from outside the Cook Islands either some other person made the request or the recorded request details are erroneous.

[12] The subsequent history shows that the Defendant was residing in Wellington with one of her daughters for most or all of the time that she was away from the Cook Islands and that there were a large number of telephone calls made to her daughter's residence in Wellington from her phone number in the Cook Islands during 2001 and 2002.

[13] The Defendant's explanation of these is that she had no way of knowing who was making the calls to her from her home number. She says that she had left the Cook Islands on the basis that a friend and relative would be asked to look after her property, that if she wished to stay in the Defendant's home, she could do so. She said she gave no authority to her friend to use her telephone and charge her account.

[14] As to the daughter, the position was that one daughter did return January 2002, at least for a time. She was in Rarotonga during 2002. During that period 62 calls were made on this phone number to the Defendant's place of residence in New Zealand. It is the history of these phone calls to the Defendant in Wellington which the Plaintiff relies upon most strongly to justify the inference that it must have been the Defendant who requested the reconnect. Reliance is also placed on the advice to her friend that she could ring the Defendant at any time in New Zealand.

[15] The Defendant firmly denied making a request for reconnection. She was unable to offer any explanation what had happened. She said that she definitely did not make a request nor did she authorize anyone else to do so on her behalf. The Defendant acknowledged that she told her friend that she could ring her in New Zealand to discuss any problems and she explained that her friend had a number of problems with land matters which probably accounted for the calls.

[16] The onus of proof relies upon Telecom. The standard of proof was the balance of probabilities. Not without some regret the Court finds that that onus of proof of reconnection has not been established on the material placed before the Court. The Court is faced with a denial from the person who has given direct evidence in the witness box, a witness whom Telecom before this problem arose considered to be a reasonable customer who always paid her account.

[17] There are just too many uncertainties here and the Court should not speculate as to precisely what happened. The absence of a witness to speak of the alleged reconnection telephone call by Defendant, the absence of any signed reconnection documents, the strange fact that the disconnect and the request to reconnect occurred on the same day and after the Defendant had left the Cook Islands, the fact that the person who is recorded as making the reconnect request said it was made because the daughter was still on the island, which was not the case with the Defendant's daughter, all of these factors create far too much confusion and uncertainty. The Court is therefore driven to the conclusion that the Plaintiff has not proved its case on liability.

[18] The Court reaches this conclusion with some regret because there are a number of unsatisfactory features about the Defendant's conduct, namely

the rather surprising casualness with for which she appears to have departed from her property in Rarotonga and the loose arrangements for looking after her property, including the phone account. One would have expected that a far greater degree of care would have been taken by someone leaving their property, even if at the time it was thought that the absence would be relatively short. In addition the substantial number of phone calls made to her in Wellington might be thought to have aroused her interest as to exactly what was going on with the telephone account. I say no more. Judgment for the Defendant.

(The Court heard submissions on costs and continued).

In almost all cases a successful Plaintiff is entitled to recover either scale costs or reasonable costs. However in this particular case, the justice of the case is that the parties each pay their own costs. The reason for that is that the Court has formed a strong impression that the Defendant has at least to some extent been responsible for this problem. The large debt built up through long phone calls to her in New Zealand in my view should have put her on notice that something might be amiss. In all the circumstances, it is fair that each party bears its own costs, and that will be the judgment of the Court.

JUDGE