

IN THE HIGH COURT OF KIRIBATI 2012

CIVIL CASE NO. 208 OF 2010

	[ETUATI CORRIE	PLAINTIFF
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BETWEEN	[AND	
	[
	[CAPTAIN COOK HOTEL LTD	DEFENDANT

Before: Hon Chief Justice Sir John Maria

10 August 2012

Mr Banuera Berina for Plaintiff
Ms Taaira Timeon for Defendant

JUDGMENT

MURIA CJ: By a writ of summons, the plaintiff claims damages in the sum of \$45,000.00 together with interest and costs for breach of contract. The contract is said to be in respect of the connection and supply of electricity by the defendant to the plaintiff.

PLAINTIFF'S CLAIM

The case for the plaintiff is that in or about 2006 the plaintiff and defendant entered into an oral agreement whereby the plaintiff was allowed to access

electricity power supply from the defendant's power box, provided the plaintiff obtained a cable to connect from the defendant's power box to his residence and that he paid for his electricity consumption every month. The plaintiff obtained the required cable and electricity was connected to his residence. The cable was said to have cost the plaintiff about \$8,000.00.

In June 2008, the defendant disconnected supply of electricity to the plaintiff due to increase of guests at the defendant's Captain Cook Hotel, and which would have caused an overload in electricity consumption should the power supply be not disconnected to the plaintiff. After the extra hotel guests left, the plaintiff requested the defendant to reconnect his electricity supply. The defendant refused to do so on the basis that the plaintiff had an outstanding electricity bill. The plaintiff cleared all his outstanding electricity bill by about 28 August 2010 following which he asked to have his electricity reconnected. The defendant did not reconnect electricity supply to the plaintiff because the generator's cable had burnt down.

The plaintiff has claimed that the defendant's continuous failure to reconnect the electricity supply to the plaintiff was a breach of the defendant's contractual obligation to provide electricity to the plaintiff.

DEFENCE CASE

The defence case is that while it admits having a generator, it says that the generator did not have enough capacity to provide electricity supply to the plaintiff's Lodge as well as to its own consumers at the Main Camp. The plaintiff's Lodge is about one (1) kilometer away from the Main Camp.

The defendant's case is also that they had been supplying electricity to the plaintiff's Lodge since 2005 to mid 2008. The supply had stopped due to the breakdown of the defendant's 287.5 KVA Cummins Generator which was used to supply electricity to the plaintiff's premises. The Cummins Generator could not be used any further since it was beyond repair. The defendant was left to rely on its 75 KVA Denyo Generator to supply electricity to its consumers as well as for its own needs. The plaintiff's Lodge was a kilometer away from the Capt Cook Hotel and according to the defendant's General Manager and Deputy General Manager, the capacity of the 75 KVA generator was inadequate to supply electricity to the plaintiff's Lodge. So it had to discontinue the supply of electricity to the plaintiff.

The defendant relies on the defence of frustration of contract. It argues that the defendant could no longer perform its obligation under the contract because the subject matter of the contract had been damaged and destroyed. It further states that it has been discharged from its obligation on the ground that the contract has been frustrated.

I think it is also important to bear in mind that the defendant is a limited company which operates a Hotel, the Captain Cook Hotel, at the Main Camp on Kiritimati Island. It has its own set up together with the supply of its own electricity power to cater for its operations and services. The plaintiff is a businessman who operates a Lodge which is located about one (1) kilometer from the defendant's Hotel at Main Camp.

ISSUE

There is no dispute that an oral agreement was made between the parties in this case that the defendant supplied the plaintiff electricity, provided the plaintiff purchased its own cable to enable the connection to be made from the defendant's power box to the plaintiff's Lodge. It was also agreed that the plaintiff would have to pay for the use of the defendant's electricity supply. Was the defendant in breach of its contract in this case?

CONSIDERATION AND DETERMINATION

As can be seen from the evidence, supply of electricity was made by the defendant to the plaintiff up to mid 2008 when it was discontinued. The reasons given for the disconnection were that, by mid 2008, the defendant's 287.5 KVA Cummins generator broke down and was completely shut down as beyond repair. The defendant was left to use a 75 KVA generator which was not sufficient to meet the needs of the

defendant's operation and services and to supply the plaintiff with electricity.

In the meantime, the plaintiff also had outstanding electricity bill which was not cleared by 2010. However, even if it was cleared, by then, the defendant would still not be in a position to reconnect power supply to the plaintiff.

The Deputy General Manager's affidavit sets out the circumstances which the defendant says justified non-performance of its contractual obligations.

Paragraphs 7 to 13 of his affidavit state:

"7. It is true that the Defendant owned two Cummins generators, one of them, 287.5 KVA Cummins that was used to supply electricity to the Plaintiff was damaged and beyond repair. The other one was 75 KVA Denyo generator which has limited capacity to supply electricity at a long distance. It is unfortunate that the capacity of this generator cannot supply electricity to the Plaintiff's Lodge which is located about one kilometer away from the CCH powerhouse.

8. At the end of 2007 a fluctuation in voltage on the supply load of the 287.5 KVA Cummins generator was experienced, and in

2008 a fluctuation in voltage became worse resulting in the damage of many of the hotel's freezers, refrigerators and air conditioning units.

- 9. For that reason the 287.5 KVA Cummins generator was shut down completely in order to prevent further damage to other electrical appliances used by the company and its electric consumers.*

- 10. After my inspection on the generator, I found out that the problem was caused from deterioration on the stator and rotor winding by salt crystals formed by the salt water spray as well as the rotating diodes and AVR which leads to the breakdown of that generator.*

- 11. At the same time the 287.5 KVA Cummins generator stopped running due to the damage caused by the accumulation of the saltwater crystals that had been building up over a long period of time on the alternator winding (coil) and the problem remain until today.*

- 12. Within the same period, the Captain Cook Hotel main underground cable (25 mm² cable size) that connects to the*

distribution box, which was used by Etuati and another commercial electricity consumer, was burnt down. To date, the underground cable that was burnt down has not been replaced due to the high cost of replacement. The overloading (over current) of the 25 mm² main underground cable caused the generation of heat on the electric cable which caused the damage on underground cable. The excess usage of electricity or shortage in electric cables by electric consumers are the main cause to degrade the quality of the underground cable insulator. At that point when the quality of the electric cable is degraded the load on the 287.5 KVA Cummins generator had to increase to cover the loss in voltage, this increase in load had impact on the windings of the generator as the windings were already deteriorated by salt crystals. This also led to the rapid breakdown of the generator.

- 13. An option of purchasing and replacing the 287.5 KVA Cummins generator is beyond the Company's financial capacity to purchase one".*

In his evidence in Court, the plaintiff confirmed that his Lodge was located further away from Main Camp. He agreed he had been supplied with electricity until June 2008. He said that he did not know whether the defendant was using an 287.5 KVA generator or 75 KVA generator to supply him with electricity. All that he knew was the defendant agreed to supply

him with electricity which the defendant did until June 2008. It was of no bother to him to know whether the defendant used a 287.5 KVA or 75 KVA generators to supply him with electricity.

The circumstances of the case, in my view, show that the agreement between the parties was a 'gentlemen's agreement' orally made, the performance of which depended on the condition that the defendant would be in a position to perform it. Further in my view, and in the circumstances of this case, the purchase of the cable and payment of the bill for use of the electricity by the plaintiff were not the primary conditions for the performance by the defendant of its obligations under the contract in this case. The extension cable was simply needed to enable the defendant to assist the plaintiff with supply of electricity from its generator. The payment by the plaintiff for the use of electricity, naturally followed on for the use of the power.

I am also of the view that the contract in this case was not an absolute contract to supply electricity power to the plaintiff, come what may. The contract was simply to assist the plaintiff with the supply of power on the implied condition that it had the means to do so. The defendant could not perform its contract to help the plaintiff with the supply of electricity due to the breakdown of its 287.5 KVA generator which was completely shut down. The breakdown of the generator, on the evidence before the Court, occurred through no fault on the part of the defendant. The defendant was simply unable to continue supplying electricity power to the plaintiff due to

the serious mechanical degeneration of its generator which was eventually broken down and inoperable. The principles in *Taylor -v- Caldwell* 31 L.J. (QB) 164, apply in this case, that the contract had become impossible to perform and so the defendant was excused from its performance.

In my judgment the defendant was excused from performing the contract in this case. The plaintiff's claim is therefore dismissed with costs.

- ORDER:** (1) The plaintiff's claim is dismissed;
- (2) Costs to the defendant to be taxed, if not agreed.

Dated the 19th day of April 2013

