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ESTOPPEL IN RELATION TO A CLAIM FOR BACKBILLING FOR ELECTRIC SERVICE

By Justice Prem Persaud,
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The Public Utilities Commission of Guyana is a Regulatory body established under the Public Utilities Commission Act, 1999, to perform regulatory, investigatory, enforcement and other functions conferred on it by the Act for public utilities. The Guyana Power and Light (GPL) comes under its jurisdiction. It enjoys a monopoly to generate, transmit and distribute electricity to consumers countrywide.

The charges which consumers are required to pay for the supply of electricity are regulated by the provision of the **Electricity Sector Reform Act 1999 (ESRA),** and the Third Schedule thereto.

Two commercial Banks and a petrol service station are among consumers of the Utility. The Utility Company had been sending out bills for the electricity consumed, but used an incorrect multiplier in the calculation of the rates which the three companies were required to pay. The technical and relevant officer of the Utility explained that when a consumer applies for service, GPL estimates what the likely consumption will be based on the customer's installations.

One of the business firms was served with a bill claiming a fabulous amount as miscellaneous charge. That business enterprise requested of GPL a check on its consumption as a consequence. It was discovered that the multiplier used was 240 whereas it should really be 480, and this the Utility Company claimed was due to a computer error. It appears that the readings on the meter are controlled by current transformers, which seems to have been the accepted position.

A similar situation occurred with respect to the other two business firms. They all refused to pay the additional miscellaneous charges which were in fact back billing for 6 months at the proper rate but based on the multiplier of 480 and the matters engaged the attention of the Commission. The Commission after hearing all the parties found that **Section 7.2** of the Third Schedule of ESRA was relevant in the determination of the issue.

> **Section 7.2** provides that nothing in the Act shall be construed as preventing public suppliers from billing a consumer retroactively for electricity consumption for a maximum period of six months prior to the issuance of such a bill, upon the presentation of reasonable evidence that the consumer was not previously billed for such consumption, and the rates reflected in such a bill should be those in effect at the time the consumption of electricity occurred."

The Commission found that section 7.2 of the Third Schedule gave the Utility company the right to bill a consumer retroactively for six months prior to the issuance of a bill upon reasonable evidence that the **meter** did not accurately register the amount of electricity consumed, but it found no evidence why the proper multiplier was not factored into the billing. It went on to find that the Act (ESRA) does not contemplate non-recording of the actual consumption in such circumstances as a reason for a retroactive claim for six months.

Section 6.3 of the Third Schedule deals with the unauthorised interference of a meter by a consumer and which permits the supplier to estimate the unrecorded consumption for a retrospective period not exceeding twenty four months. The Utility had sought to bill the Companies for 24 months – a charge which is used often by the utility to back bill consumers on allegations of consumer meter tampering.

But at the hearing it conceded that there was no unauthorised interference, and relied instead on Section 7.2 of the Third Schedule.

Section 26 of ESRA stipulates that the rates to be charged by the utilities for the supply of electricity shall be in accordance with the rates fixed by the Commission in accordance with the Act and the PUC Act. The Commission did fix the rates which were published, in due form, in the public daily newspapers. The rates fixed set out the charges per kwh for residential, commercial and industrial consumers.

It is a question of conjecture why the utility company sought to justify the miscellaneous charges on the grounds of tampering, and when realising it cannot so prove, sought justification on the ground of computer error.

The utility appealed the Commissions' order to the Court of Appeal, the final Court, and lost.

I am sure participants will like to hear what I have to say on the issue as it unfolded before the learned Judges of the Court of Appeal. I also have some interesting thoughts on a similar issue which engaged the attention of the Courts in other jurisdictions.

Counsel for the Utility in the Guyana Court of course urged that the Commission's interpretation of Section 7.2 of the Third Schedule was wrong and relied on two Canadian Cases in support of their contention; **Maritime Electricity Co. Ltd –vs- General Dairies Ltd (1937) 1 All ER 748; and Kenora (Town) Hydroelectric Commission and another –vs- Vacationland Dairy Cooperative Ltd (1994) 1 LRC 529.**

The facts in the Maritime Case are as follows: The Maritime Electric Co Ltd is a public utility company of New Brunswick, Canada, which sold and delivered electric services to General Dairies Ltd which the Company is aware, used it in the manufacture

of certain milk products. The Dairy Company paid to the sellers of the products a price depending on the cost of manufacture of its products, of which the cost of electricity consumed was a factor. Because of a mistake on the part of the Electric Company's employees, the amount of electricity supplied was wrongly determined on the meter dial readings, and as a result monthly amounts were rendered by that Company and paid by the Dairy Company for only one tenth of the current actually supplied. As a consequence the Dairy Company, relying on the correctness of the accounts as rendered, paid to the vendors of the cream larger sums of money than it would or could have paid for the cream if the proper accounts for electrical energy supplied had been furnished.

Now by the Public Utilities Act of New Brunswick, a public utility Company is strictly limited as to the charges which it can make, and a public utility company charging or receiving for any service rendered a greater or less compensation than that prescribed by the Act is liable to a penalty. If a penalty is involved it means that a criminal offence has been committed.

Let me ask this: Is that a good law or a bad law? Generally, a Regulatory body tends to be on the side of the consumers. If a utility company collects less than that to which it is entitled shall the Regulator prosecute it? This is an aside and not really a relevant factor in the case we are considering, but if you sit as a juror to determine guilt how would you decide?

There is a legal term – **Estoppel** – and it featured in the case. If you bother with the legalise you would be thoroughly confused. But (simply put, I hope) estoppel is a principle which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person, or by a previous pertinent judicial determination. It is really a rule of evidence in which a defendant or person sued or accused of something can use as a shield to defend such a claim. He must of course establish that he acted or conducted his affairs based on a belief that the representations made by the accuser were true and he acted on that representation to his detriment. In other words the representation relied on as founding the estoppel must be one intended or

calculated to bring about the particular conduct which was the cause of detriment to the party relying on the estoppel. So you may well and truly think that the plea of estoppel has been established, and the Electric utility cannot succeed in its claim.

If you are told, however, that the Courts finally ruled that despite the fact that the Diary company had been paying what the Electricity company was claiming for 29 months, it must now pay the correct amount from the time the error by the utility commenced 29 months ago, how would you react? Would you say, as many others have said before based on rulings by Courts on so many issues, that the law is an ass?

Let me ask, however, that we reserve our judgement and consider why the Courts may have so ordered. If you are persuaded that the Courts felt that that was the law, can we say that they should have found a way out to let justice appear, in your eyes, to be done? Let us consider how the Courts dealt with the matter.

I pointed out earlier that the law prescribed that the utility company cannot charge more or less than that fixed by the Act. The relevant section (16) reads as follows:

> "No public utility shall charge, demand, collect or receive a greater or less compensation for any service that is prescribed in such schedules as are at the time established, or demand, collect or receive and rates, tolls or charges not specified is such schedules."

Section 18 provides that any public utility company charging or receiving for any service rendered a greater or less compensation than that prescribe by the Act is guilty of "**unjust discrimination**" and is made liable to a penalty. and **Section 19** of the Act provides that "no person, firm or corporation shall knowingly solicit, accept or receive any rebate, concession or discrimination in respect to any service in, or affecting or relating to, any public utility whereby any such service is by any device whatsoever, or otherwise, rendered free, or a less rate than that named in the schedules in force, or whereby any

service or advantage is received other than is specified." A penalty is provided for a violation of this section.

The facts as they unfolded before the Court have not established that the Diary Company knowingly was the recipient of any rebate or concession or a rate less than that named or specified in the schedule in force. Indeed, the mistake in rendering the said statements showing incorrect amounts was made by the appellant company. The Dairy company on the other hand believed the statements so rendered to be true and correct and in accordance with the reading of the meter, and had been paying the amounts shown by the statements.

The facts further disclosed that the Electric Company at all material times knew that the Dairy Company was using the electric energy in the manufacture of butter, ice-cream and other milk products and that the cost of such energy entered into the cost of such manufacture and directly affected the price which the company paid to the farmers and others for the cream.

There was also no doubt that the Company paid to the farmers and others larger sums of money – more than it would or could have paid if the amounts claimed by the Electric Company for energy had been rendered to and claimed from the Company at the several times when the said statements were issued.

The long-continued undercharging by the Electric Company was explained as follows. The meter was accurate and confirmed with the statutory requirements, but in order to arrive at the correct amount of electric energy it was necessary to multiply the dial-reading by ten. Through error this was not done and as a result the Dairy Company was charged with only one tenth of the electricity supplied to it.

The Electric Company urged the Court that the plea of estoppel cannot succeed because the representations contained in the statements, claiming payment, were not

intended to induce the Dairy Company to a course of conduct other than the payments of the amounts stated to be due.

What in effect it is saying is that the claim for the amount set out in the statement (that is one tenth) was not intended or calculated to lure the Dairy Company to pay out more than it should if the correct amount was claimed.

At the end of the day the Court finally ruled that the Dairy could not rely on an estoppel which would have the effect of defeating the unconditional statutory obligation imposed by the Public Utilities Act. The duty put upon both parties by the statute could not be avoided or defeated by a mistake.

As a juror would you agree? If you know what you are selling will be used in the pursuit of a business undertaking, would it not be reasonable to conclude that the price charged will be reflected in the cost of the produce? Was the Court right in its interpretation of the Statute and its conclusion?

I have started out by making reference to a matter which engaged the attention of the Guyana Public Utilities Commission. We do not have similar legislation under which Public Utilities operate in Canada whereby a criminal sanction is imposed if there is non compliance with the rates fixed by law.

Our Section 40 of the PUC Act, however, appears to be in a similar vein to Section 16 of the Canadian legislation. Ours provides as follows:

> "No public utility shall directly or indirectly demand or receive for any service provided by it, a greater or lesser rate than the rate specified in the tariffs of such public utility applicable thereto, filed in the manner prescribed by the Act or determined by the Commission."

and Section 34 (1) provides that no public utility shall provide to any person any service at a rate which is unduly preferential or discriminatory, but subsection 2 allows that nothing is subsection (1) shall be deemed to prevent a public utility from demanding and receiving different rates from difficult classes of consumers.

In the Guyana case the question of estoppel was not raised nor discussed, and the Court ruled that for the supplier to avail itself of the retroactivity period it must establish that the consumer had not been previously billed for electricity he had consumed. It went on to say if the consumer had been previously issued with a bill which was paid the supplier cannot retroactively bill him for any reason. The Court further "**did not think it was intended to cover a situation such as the one in which the appellants find themselves, i.e. failure to utilise the correct multiplier on calculating electricity consumed by a consumer and for which a bill was already issued. This may seem as if the respondent companies are receiving an advantage, but it was due to the appellants negligence in not ensuring that the correct multiplier was fed into its computer system."**

Does this not look like a civilised way to approach the problem?

In the **KENORA** case which I mentioned earlier, the sole issue was whether the Ontario utilities legislation **precluded raising estoppel in defence to negligent underbilling by a public utility.** In this case there were two plaintiffs or claimants, one of them, Hydro Electric Commission of the town of Kenora (Kenora Hydro) is responsible for supplying power service to local customers. By an unwritten agreement with Kenora Hydro, the second plaintiff-claimant known as the Corporation of the Town of Kenora ("the town") retains responsibility for billing and collecting the accounts. The defendant Vacationland Dairy Co-operation Ltd (The Co.op) purchased power from Kenora Hydro. **In 1979** Kenora Hydro upgraded power service to the Co op and installed a new meter. This new meter was not designed to measure the actual amount of electricity consumed. It was embossed with a multiplier of two to be used in calculating power consumed for billing purposes. Kenora Hydro advised the Town of the proper

multiplier but through clerical error the multiplier was not transferred to the billing card. As a result the co-op was only billed for half its actual power consumption. In **1986** the co-op requested that Kenora Hydro inspect its plant in preparation for expansion. During this inspection Kenora Hydro discovered that the multiplier was not used in calculating the billing. As a result the co-op had been underbilled by $52,471.36 between 1979 and 1986, and Kenora Hydro and the Town bought an action against the co-op to recover the amount..

This case engaged the attention of three courts. **At the first instance Ontario District Court**, the trial judge held that the Co-op was entitled to raise estoppel in defence. He found that the plaintiffs lacked due diligence amounting to negligence in allowing their mistake to persist for seven years. By sending monthly invoices to the Co-op, Kenora Hydro had represented a certain state of facts on which it intended the Co-op to act. The Co-op factored its power costs shown on the invoices into pricing its products thereby acting to its detriment. **The judge while agreeing with the Maritime case that estoppel cannot be used to avoid an absolute duty imposed by statute held that the statute did not impose such a duty. He dismissed the claim.**

The plaintiffs appealed to the **Ontario Court of Appeal**. Here the Court characterised the issue as a **collection matter resulting from negligent underbilling** and **it went on to say that it allowed the Co-op to raise estoppel on the basis that it would not defeat a positive statutory allegation or lead to results contrary to basic public policy**: **it dismissed the appeal**.

The plaintiffs still wanted to test the waters and they appealed to **the Supreme Court of Canada**. Before this Court the parties agreed that the necessary facts for the application of the equitable doctrine of estoppel had been proven, and the appeal was thereby limited to whether as a matter of law the relief sought could be applied. **The relief was whether legislation precludes raising estoppel in defence to negligent underbilling by a utility company**.

Many authorities were cited by Counsel for the parties and the Court reviewed them all. Among them was the Maritime case. The Court reviewed the legislation and tended to agree with the Privy Council in the Maritime case that the public utility would be acting in violation of the statute if it does not collect and receive from the respondent company the amount claimed. **The Privy Council held that legislation was a positive law that compelled obeyance; and as such estoppel was not available as it would nullify the statutory provision**.

The Ontario Power Corporation Act under which Kenora Hydro was determined also makes it an offence for a public utility to charge an unauthorised rate.

Section 99 of the Act provides that when a corporation or commission receiving electrical power from a Corporation under a contract made with the Corporation and supplies electric power upon terms and rates other than those that have been approved, or by any means whatsoever directly or indirectly reduces the costs of electrical power to any person so that it is supplied at a lower rate or upon better term than those approved by the Commission, such corporation and or commission is guilty of an offence. The penalty specified is disqualification from sitting and voting as a member of the Council.

It is unlike the Maritime case legislation where the penalty is the imposition of fines. The Supreme Court in the Kenora Hydro case expressed the view that the most defensible interpretation of the Kenora legislation is that it is designed to prevent deliberate, unauthorised discrimination among power consumers. And it added,

"The penalty provision is not directed
against simple negligent mistakes."

Section 19 of the Maritime legislation speaks to no person, firm or corporation knowingly receiving any rebate, concession or discrimination …..

Is it unreasonable to assume that the legislation was not directed against simple, negligent mistakes also.

The Supreme Court of Canada has endorsed the ruling of the Privy Council in the Maritime case. I also agree with the general rule that a public utility would be acting in violation of the law if it does not seek to collect what is due to it, because it will be an offence to charge and collect an unauthorised rate. But in interpreting and in applying that legal doctrine regard must be had to the peculiar circumstances in each case. The facts common to both the Kenora Hydro and the Maritime cases are that the meter recorded the consumption but because of an error or mistake by the employees of the utility the amount was wrongly determined due to the failure to apply the correct or appropriate multipliers.

If this error had been discovered within a month or two of the issue of the bills I will agree that the recipient companies of the electricity will be obliged to pay the difference. But when the error has been allowed to go on and on for years the recipients must be given the benefit that they were paying the correct amounts all along.

Did the legislature intend that purchasers of electricity must be held to ransom, as it were, because of the negligence of the utility. I think the intention behind the legislation was that the suppliers/utility must not discriminate in the price of their product. The intention must have been to prevent the utility from entering into any clandestine arrangement with one or another consumer of electricity. In other words, as the Act provides, it must not **knowingly or deliberately** seek to collect rates not approved by the Competent authority.

. In my judgement the legislation in the Maritime case did not impose any duty to back bill the company in the circumstances of the case.

If I have bored you or thoroughly confused you with all of the forgoing I plead not guilty because this is not my intention. I would however like to end this presentation by quoting MAJOR, J. of the Supreme Court of Canada, in the Kenora case:

"a statute can only affect the operation of the common law principles of restitution and bar the defence of estoppel and change of position where there exists a clear positive duty on the public utility which is incompatible with the operation of those principles. The application of the principle of restitution to the case at bar can be briefly summarised. A benefit in the form of electricity was conferred on the Co-op at the expense of Kenora Hydro. The law of restitution would normally force the Co-op to return the value of the benefit to Kenora Hydro unless the value was no longer in the Co-op possession because of a change of position. In this case, the Co-op successfully proved that it acted to its detriment in reliance on the billing statements for its own billing and budgetary purpose and that therefore the value of the electricity no longer existed for the purpose of restitutory relief. The defence of estoppel is thus an expansion of what the common law has considered to be sufficient justification to release a defendant from liability in the pursuit of fairness, and applying those principles to this case, the Co-op would no longer be liable to Kenora Hydro. Through the appellants error in omitting the multiplier the Co-op has indirectly, but through no fault of its own, receive power for a period of time at a discount: Allowing the respondent to raise estoppel in these circumstances does not relieve Kenora Hydro of its obligation. It does, however, relieve the Co-op from bearing alone the burden of loss resulting from change of position caused by the error of Kenora Hydro. In so doing it underlies Kenora Hydro's obligation by placing the burden of non-compliance on Kenora Hydro and is a means of ensuring accountability. Compelling payment to correct an error in these circumstances introduces costly uncertainty for power consumers and makes them individually bear the burden of the appellant's mistake. Such a harsh public policy should clearly appear in the statute."

Respectfully submitted
Prem Persaud
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