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Powers Cuts are costing me Money – Can I make a Claim Against Gibelec?

Despite hopes that the LNG power plant would assist in meeting the energy demands of a growing local economy, power cuts remain frustratingly common in Gibraltar. Only last month, the Rock was affected by a general blackout said to be the result of a cable interference by a local contractor, which halted trading at crucial time of the working day.

Local business may therefore be keen to understand whether it is possible to bring claims seeking compensation for business interruption caused by power outages.

The position in the United Kingdom

Claims for compensation arising from unplanned power cuts in the UK may be brought in prescribed circumstances. Consumers' rights in the UK are protected by a robust regulatory framework serving as a watchdog for energy companies falling foul of their obligations to customers.

If a power cut is a result of poor or extreme weather conditions, consumers left without power for a period of 24 hours or more may claim compensation totalling £70 with further sums capable of being claimed for every subsequent 12-hour period of outage up to a maximum of £700. Customers may also entitled to compensation where power outages are a consequence of some other fault or reason (for example, mechanical/infrastructural issues). The amount payable by energy companies will generally depend on the severity of the power cut and the number of homes affected.

Can I bring a claim against the Gibraltar Electricity Authority under the Act?

Unfortunately, energy customers in Gibraltar do not enjoy this same protection.

The duties and obligations of Gibraltar's sole provider of electrical power, the Gibraltar Electricity Authority (the "**GEA**"), are reflected in the Gibraltar Electricity Authority Act 2003 (the "**Act**"). Section 9 of the Act sets out the duties owed by the GEA to customers and the obligations it is required to meet in the performance of its functions. Section 9(f) in particular imposes upon the GEA a duty to:

- *"minimise inconvenience and detriment"* to customers as far as possible;
- suitably and reasonably compensate customers for damage sustained *"by reason or in consequence of the exercise by the authority of its duties"*.

Section 9(f) of the Act notionally allows for a claim to be brought against the GEA for damage arising from a negligent act which results in a customer experiencing "inconvenience and detriment". However, this right to compensation under section 9(f) of the Act is stated to be subject Section 7 of the Act which expressly precludes a legal claim being brought against the GEA in respect of:

"….any injury, damage, or economic loss of inconvenience caused by or arising directly or indirectly from any interruption, defect, variation or discontinuance of the supply of electricity of from any break-down of or accident to the authority's machinery or any other apparatus."

The upshot is that a customer will not be able to pursue a successful claim for damages or compensation arising from an interruption to the electrical supply under the Act.

Can I bring a claim against the GEA under common law principles?

The English common law (which applies to Gibraltar) provides guidance and instruction as to the recovery of economic losses suffered by businesses in certain circumstances, including in relation to business interruption arising from power cuts. Economic loss is, as a matter of law, divided into:

- consequential economic Loss: defined as loss arising directly from some physical damage or injury; and
- pure economic loss: defined as financial losses which do not result from any direct physical damage to a person or property. In essence, pure economic loss relates to loss of a potential financial gain or profit, or a wasted cost.



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The approach of the English (and Gibraltar) courts both to "consequential" and "pure" economic losses is exemplified in the case of *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*, a 1973 English Court of Appeal case concerning the recovery of economic losses caused by negligence. In this case, a contractor (Martin & Co) carrying out work digging up a road negligently damaged an electric cable which it knew supplied power to a factory (Spartan Steel). Spartan had to dispose of molten metal out of their furnace to prevent damage to the furnace, which meant that the metal lost value and they suffered a loss of profit it was sold. They also lost profits from further work and production could have been undertaken had the power not been cut. The English Court of Appeal held that Martin & Co:

- was liable for the loss of profit on the damaged metal of which it had needed to dispose (i.e. the consequential economic loss);
- but that it was not liable for loss of profit suffered by Spartan in relation to the work and production which it had been unable to do because of the interruption (i.e. the pure economic loss).

The rationale for limiting the liability of Martin & Co was stated by the English Court of Appeal to be fundamentally one of public policy. The Court reasoned that:

- if the law allowed recovery for all economic loss, the extent of liability in many situations would be enormous. In this case, the contractor who cut the mainline electricity cable would have been liable to a range of businesses whose trade had been interrupted as a result;
- the contractor would have been bankrupted by needing to compensate all business affected by the power interruption arising from this single mistake and would have been forced to carry an excessive part of the risk associated with a socially useful activity which it carried on;
- the effect of imposing such liability upon the contractor would deter the activity from being carried out at all.

Public policy considerations

Civil liability in the law of negligence is based on establishing three principles: duty of care, breach of the said duty, and damage rising from said breach of duty. Compensation may be paid out to a claimant, which aims to put them back into the position they were in before the damage occurred provided all three principles are satisfied.

In respect of duty of care, the Court will determine whether or not this is established using the three-part Caparo Test, which originated from the case of *Caparo Industries PLC vs Dickman.* In his judgement, Lord Bridge explained the parts to the Caparo test: (1) foreseeability of damage, (2) proximity between the defendant and the claimant; and (3) that it is fair, just and reasonable to impose a duty of care in such a situation.

In applying the third stage of the Caparo test, of fair, just and reasonable, the courts take certain policy factors into account. Policy factors which may influence the court include such issues as:

- **Loss allocation:**

  Who can afford to bear the loss?
  Which of the parties have insurance/ is the situation one subject to compulsory insurance?
  Is the defendant a publicly funded body?

- **Opening the floodgates:**

  Will imposing liability lead to a high volume of new claims?
  What effect would this have on cost of insurance or its availability?
  Will the courts be able to cope with the volume of cases?

- **The practical effects of imposing liability:**

  Will the imposition of a duty of care act as a deterrent or raise standards?
  Will imposing a duty have an adverse effect on decision making?
  Will it affect the allocation of resources away from necessities?

The common law has therefore sought to protect defendants from being exposed to an unknowable scope of potential liability. The Court has continued to have regard to these public policy considerations in cases involving public utilities and has limited the right to make claims for damages due to concerns that it may open the floodgates to litigation. This argument may have particular force in Gibraltar given the Rock's vulnerability to power outages.

What about a claim against the contractor/company who due to negligence cause the power cut?

A claim against a private contractor in these circumstances would need to be brought under the common law which, as explained above, provides guidance and instruction as to the recovery of economic losses suffered by businesses in certain circumstances, including in relation to business interruption arising from power cuts.

As a matter of law the same principles would apply to a private contractor. In particular, a claim in respect of what is defined as a 'pure' economic loss will normally fall outside the range of economic loss which a court will be prepared to allow and is also unlikely to be successful (whether against the GEA or a private contractor).





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Summary

Applying the above legal principles to the current issue affecting Members, our view is that:

1. A claim against the GEA under the Act is unlikely to be successful in light of the restriction on the GEA's liability contained in Section 7 of the Act;

2. A claim brought on the basis of a consequential economic loss may potentially be brought under common law rules but is unlikely to be successful given the restriction of liability contained in Section 7 of the Act;

3. A claim in respect of a purely economic loss (i.e. loss of a potential gain or profit or wasted cost) will normally fall outside the ambit of the economic loss which a court will be prepared to allow and is also unlikely to be successful whether as against the GEA or a private contractor.

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