[2013] JMCA Civ 28

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 66/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**DESMOND BENNETT**	**APPELLANT**
AND	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**1ST RESPONDENT**
AND	**CLARENCE BAILEY**	**2ND RESPONDENT**

Ainsworth Campbell and Andrew Campbell for the appellant

Mrs Daniella Gentles-Silvera instructed by Livingston Alexander & Levy for the 1st respondent

Mrs Jacqueline Samuels-Brown QC for the 2nd respondent

16, 17, 18 October 2012 and 19 July 2013

PANTON P

[1] I have read, in draft, the judgment of Brooks JA. I agree fully with his reasoning and conclusion and have nothing to add.

McINTOSH JA

[2] I too have read the draft judgment of Brooks JA. I also agree and have nothing to add.

BROOKS JA

[3] On 28 April 1995, the appellant Mr Desmond Bennett suffered life-changing injuries when he came in contact with electrically charged wires installed by Jamaica Public Service Company Limited (JPS). JPS is the holder of a licence to supply electricity to the public. Mr Bennett was, at the time, working as a mason on the roof of a two-storied house at number 23 Sherlock Crescent in the parish of Saint Andrew.

[4] In 1999, Mr Bennett instituted a claim against JPS to recover damages for negligence and breach of statutory duty. JPS, in turn, joined the owner of the house, Mr Clarence Bailey, as an ancillary defendant. It sought a contribution and/or indemnity from Mr Bailey, in the event that the court found that it was liable to Mr Bennett. The claim came on for trial before R Anderson J in February 2006. The trial occupied the court's attention for a number of days of hearing, which stretched over the course of five months. Judgment was delivered on 24 April 2009.

[5] The issues before the learned trial judge turned on the pleadings and questions of fact as well as of law. In resolving those issues, he found in favour of JPS, essentially determining that Mr Bennett had not proved that it was liable for the injuries that he had suffered. The learned trial judge, therefore, gave judgment for JPS against

Mr Bennett with costs to JPS. He also ruled that JPS should pay Mr Bailey's costs, but that it could recover those costs from Mr Bennett.

[6] Mr Bennett has appealed against this judgment. Mr Ainsworth Campbell, on his behalf, filed 41 grounds of appeal in seeking to have this court overturn the judgment of the court below. These wide-ranging grounds criticised, among, other things, the findings of fact, the finding in respect of the duty placed on JPS and the application of the law. JPS has also appealed against the learned trial judge's order that it should pay Mr Bailey's costs in respect of the ancillary claim. It argues that Mr Bailey's costs should be paid directly by Mr Bennett. Before addressing the grounds of appeal, it would be of assistance to outline the factual background to the claim.

Factual background

[7] The project that Mr Bennett was engaged in included an extension to the front section of the upper floor of the house. The extension brought the building closer to the JPS wires, which ran in front of it. The event resulting in his injury was not the first occurrence of electrical shock at those premises. Just one day prior to this incident, that is on 27 April 1995, the electrician employed on that construction project suffered electrical burns while working on the same building.

[8] Mr Donald Card, who was the contractor in charge of the work, was very shaken by that previous incident. He testified at the trial that he and Mr Bennett assisted the injured electrician from the roof where the electrician had been working. Because of

that experience, Mr Card resolved that he would not go back to work on the building under those conditions.

[9] According to Mr Card, Mr Bennett was, at the time of assisting the electrician, similarly disinclined to resume work in those circumstances. It seems, however, that Mr Bennett's resolve was not as firm as Mr Card's. On the morning following the incident with the electrician, Mr Bennett approached Mr Card suggesting that they should both go back to work on the building. Mr Card declined the invitation, and sought to dissuade Mr Bennett from returning to the building. Mr Bennett, however, dismissed Mr Card's entreaties. According to Mr Card, Mr Brown's response was that "him have children so him haffi work" (paragraph five of Mr Card's witness statement). Mr Bennett had initially included Mr Card as a defendant to the claim but he discontinued against Mr Card. At the trial, Mr Card gave evidence at the instance of JPS.

[10] Mr Card was not the only person who sought to convince Mr Bennett not to work in those conditions. A maintenance engineer employed to JPS, Mr David Archer, testified that he went to number 23 Sherlock Crescent at about 1:00 pm on 28 April 1995. He said that when he got there, he saw a man working on top of the building. He noticed that the existing structure was being extended. At paragraph four of his witness statement, he described the scene thus:

> "...It appears as if an additional floor was being built on top of the existing building and also a balcony which was extending outwards towards the road. The additional floor and balcony were being constructed very close to JPS' electric lines/conductors which ran along poles erected along the road. On observation it appeared that the distance between the electric lines/conductors and the modifications

> to the existing building was in breach of the clearances stipulated by JPS. The distance appeared to be less than 5 feet both horizontal and vertical. Construction steel was vertically protruding out of concrete blocks which were being placed on top of the existing building which posed even greater danger as metal is a conductor for electricity.

[11] Mr Archer said he noticed a man working on top of the building. The man, Mr Archer said, was "too close to the JPS' electric lines/conductors as he could almost reach out and touch [them] if he raised his arms in the air or to the side". In addition to that situation, the man had a metal object in his hand "which would cause electricity to flow much easier into and through his body resulting in electric burns and possible electrocution, should he touch any of the electric lines/conductors or get caught in the electric field".

[12] Mr Archer said that he warned the man of the danger of injury and death occurring in those circumstances, as those electric lines/conductors were carrying 24,000 volts. He tried to convince the man to stop working there, but the man dismissed his warnings and entreaties, saying that, "he knew what he was doing".

[13] Mr Archer then left the scene intending to report the situation and to have the construction stopped. Within an hour of leaving, he received some information that led him to the burn unit at the University Hospital. At the hospital, he saw a patient suffering from electrical burns. The patient was the same man that he had spoken to at number 23 Sherlock Crescent earlier that day. The patient proved to be Mr Bennett.

[14] Mr Bennett was not able to give any details as to how he came to be injured. In his witness statement, he said that he was working on the roof with others but they had left him working there. He finished working at about 1:30 pm. He took up his tools and was walking toward the ladder to get off the roof. He said that as he was walking under a high-tension wire that was running over the roof and about eight feet above the roof, he heard a loud sound. According to him, "I know nothing more until I found myself in University Hospital of the West Indies about 11:00 p.m.".

[15] The only witness who claimed to have seen what occurred was Mr Jomo Gibbs. Mr Gibbs was only 10 years old at the time of the incident. He was then at home, directly across the road from number 23, at number 16 Sherlock Crescent. He saw the men working on the roof at about 2:00 pm. He described the incident, at paragraph five of his witness statement, in this fashion:

> "...I saw when [Mr Bennett] started to stand up. He was then about 2 feet from the overhead wires. I saw when he was lifted and dangling from the wires. Then I heard a loud explosion like the bursting of a high balloon. Then I saw a little ball of fire from the transformer that was by 23 Sherlock Crescent. I had been sitting on the balcony of my house and saw everything."

At paragraph six, Mr Gibbs described what happened next, and gave a graphic outline of Mr Bennett's initial condition:

> "Bennett fell on the gravel that was on the ground missing some spikes just by a shave. About twenty minutes later a policeman on [a] bicycle and a passerby took Bennett away. His skin had [been] burnt and I could smell the flesh burning. His shoes caught fire and his clothes were burnt unto his body. Bennett asked for water but no one gave him any."

[16] That condition was only to get worse. Mr Bennett described his resultant injuries and disabilities at paragraph 14 of his witness statement:

> "Because of the accident I have lost both legs above the knees, damaged my eyes and sustained serious bodily burn [sic] all over my body. My head and face were burnt, my chest, shoulders, stomach, upper and lower arms were all burnt."

[17] In addition to the evidence as to fact, there was also technical evidence adduced before the learned trial judge. Mr Archer gave that evidence on behalf of JPS and Mr Earl Parker gave evidence on behalf of Mr Bennett. The details of that evidence will be addressed during the course of assessing the ground of appeal against the findings of fact by the learned trial judge.

The grounds of appeal

[18] Mr Bennett's 41 grounds of appeal need not be set out in full, neither will they be considered individually, as they may be conveniently grouped under the following headings:

1. The learned trial judge's identification of the issues (ground 24).

2. The learned trial judge's assessment of the evidence before him (grounds 1-5, 7-12, 20, 25-26, 31 and 37).

3. The learned trial judge's findings on the issue of causation (grounds 13, 15-19, 21, 27-30, 32, 34-36, 38 and 40).

4. The learned trial judge's treatment of the issue of *res ipsa loquitur* (ground 6).

5. The learned trial judge's treatment of the issue of the pleadings concerning vicarious liability (ground 14).

6. The learned trial judge's treatment of the issue of escape of a dangerous thing, as raised by **Rylands v Fletcher** [[1868] 3 LR HL 330; [1861-1873] All ER Rep 1] (ground 23).

7. The learned trial judge's treatment of the witness statement of Clarence Bailey (ground 33).

8. The learned trial judge's treatment of JPS' pleadings (ground 39).

9. The learned trial judge's treatment of the issue of the liability of Mr Bailey (ground 41).

10. The learned trial judge's delay in delivering the judgment (ground 22).

The learned trial judge's identification of the issues

[19] In ground 24 Mr Bennett asserts that the "learned trial judge failed to take a sufficiently comprehensive view of the acts or omissions alleged by the Appellant against the [JPS]". According to this ground, the learned trial judge showed that he had not adverted to or sufficiently to all the other acts or omissions alleged "by Mr Bennett in his pleadings of particulars of JPS' negligence". The ground went on to assert that the very nature of the injuries suffered by Mr Bennett and the manner in which it was alleged that they had been sustained, placed a burden on JPS to "falsify those allegations". The complaint is that the learned trial judge, instead of recognising that JPS had failed to "falsify the allegations", simply ignored the allegations to Mr Bennett's detriment.

[20] In arguing this ground, Mr Ainsworth Campbell, appearing for Mr Bennett, pointed out the particulars of negligence alleged against JPS and asserted that JPS had failed to answer those particulars in its defence. In particular, learned counsel argued that JPS' general pleading of denial was insufficient to answer those particulars of negligence.

[21] In his oral submissions, Mr Campbell pointed to Mr Bennett's evidence that electrical wires ran over the house that Mr Bennett was working on. There was evidence from Mr Bennett that when he first went to work at the house there were wires running from the pole to the house at a height of 8 feet above the house (paragraph seven of his witness statement). Mr Bennett also said in his witness statement that on the day of his incident, there were four wires running over the roof of the house (paragraph 10). According to Mr Campbell, the danger posed by these wires was pervasive and outstanding for a long time. He relied on the opinion of Lord Dunedin, in **Dominion Natural Gas Company Ltd v Collins and Perkins** [1909] AC 640 at page 646 in support of this stance. The point will be addressed further, below.

[22] The pleadings alluded to and the arguments advanced point to the requirement of identifying the issues that were joined between these parties. Mr Bennett, in his pleadings, alleged negligence and breach of statutory duty. JPS in reply, denied any negligence or breach of statutory duty and asserted that Mr Bennett either was the sole author of his misfortune or negligently contributed to the occurence of his injury. For completeness, the relevant portions of the respective statements of case are set out below. It must be borne in mind that these pleadings predated the introduction of the

Civil Procedure Rules (CPR), and thus the statement of defence, which may seem somewhat inadequate for present standards, was not objectionable under the previous regime. Nonetheless, it sufficiently outlined JPS' position on liability.

[23] The relevant portion of the statement of claim is set out at paragraph 9:

> "9. On or about the 28th day of April, 1995 the First Defendant negligently and in breach of Statutory Duty ran electrical conduits, cables and wires and supplied electricity at premises No. 23 Sherlock Crescent in the parish of Saint Andrew in a manner that the Plaintiff sustained bodily injuries and was made to suffer pain, damage and loss and to be put to expense.
>
> **PARTICULARS OF NEGLIGENCE OF FIRST DEFENDANT, ITS SERVANT AND/OR AGENT**
>
> a) Running the electrical cables and wires at distances from the premises (house) that was dangerous to humans including the Plaintiff.
>
> b) Allowing electrical cables and wires carrying electricity to remain installed in a position that was dangerous to humans including the Plaintiff.
>
> c) Failing to examine and or to examine enough and or carefully enough electrical cables and wires that carried electrical currents that were:-
>
> a) by the nature of the cables.
> b) By the location of the cables dangerous to living entities including the Plaintiff.
>
> d) Failure to observe and or to remove and or relocate electrical cables and wires transferring electricity that were dangerous to living entities including the Plaintiff.

e) Failure to warn persons coming within the electrical field created by the electrical cables and electricity running through them of the danger of entering the electrical field including the Plaintiff.

f) Failing to have any or any sufficient regard for [the] safety of persons entering the electrical field created by its servant and or agent including the Plaintiff.

g) Failure to keep and or maintain the electrical cables and wires installed in such good and satisfactory condition that they would not create a danger to persons within the environs of those cables and wires and in the electrical field including the Plaintiff.

h) Failing to anticipate and to act as if anticipated that persons including the Plaintiff would enter the electrical field created by the electrical cables installed and supplied with electricity and or through which electricity was supplied.

i) Res Ipsa Loquitur.

<u>PARTICULARS OF STATUTORY BREACH</u>

a) Failure to keep the electrical field within a safe distance from the building at No. 23 Sherlock Crescent in the parish of Saint Andrew.

b) Failure to put any or any sufficient warning signs of the presence of an electrically charged field.

c) Failure to use and maintain such electrical cables and wires as were safe with the context of their use and services.

d) Res Ipsa Loquitur."

[24] The relevant portions of the defence are paragraphs 4, 5, 6 and 9:

“4. That the First Defendant denies that it by its servant and/or agent negligently and/or in breach of its statutory duty or at all installed or allowed to be installed cables and wires for the conduct of electricity to premises at No. 23 Sherlock Crescent in the parish of saint [sic] Andrew on or about the 28th day of April, 1995 or at all as a consequence of which the Plaintiff was caught within the electrical field and sustained injuries and suffered loss and/or damage.

5. Paragraph 9 of the Statement of Claim and the particulars set out thereto are expressly denied.

6. The First Defendant says that the said accident was caused and/or contributed to by the negligence of the Plaintiff and/or Second Defendant and/or his servants and/or agents and/or the owner and/or occupier of the said premises.

PARTICULARS OF NEGLIGENCE

a. Erecting buildings to alter the clearance between the First Defendant’s primary distribution line and the site;

b. Erecting buildings too close to the First Defendant’s power lines;

c. Failing to heed the warning of the First Defendant’s servant and/or agent to suspend all work to allow appropriate measures to be implemented.

9. Save as hereinbefore expressly admitted the First Defendant denies each and every allegation contained herein [sic] as if each had been set out and denied seriatim”

[25] The learned trial judge at pages 4-5 of his judgment identified the issues thus:

“(a) Whether the defendants or either of them is liable for injury, loss and damages suffered by reason of the Claimant coming into contact either with the

energized high tension lines or the electrical field associated therewith.

(b) Whether the Claimant was wholly himself wholly responsible for the accident by reason of his own negligence or under the maxim, "*Volenti Non Fit Injuria*"

(c) Whether the Claimant was contributorily negligent and so partly responsible for the accident.

(d) Whether the Claimant was a visitor or trespasser on the premises at the time of the accident.

(e) Whether the Ancillary Defendant was negligent and or contributorily negligent and or breached statutory duty."

[26] At the conclusion of his judgment, the learned trial judge answered the questions that he had posed for himself, as set out above. He said at page 38:

> "Issue (a): The suit having been discontinued against the 2nd defendant, I hold that the 1st defendant is not liable to the claimant either in negligence or for breach of statutory duty.
>
> Issue (b): The claimant voluntarily undertook the risk of injury and loss despite his being aware of the unsafe circumstances caused by the extension of the building bringing him within the risk of danger.
>
> Issue (c): See (b) above.
>
> Issue (d): The claimant was properly a visitor within the meaning of that term in the Occupier's Liability Act.
>
> Issue (e): In light of my holding in relation to the 1st defendant on liability, I make no finding of liability against the ancillary defendant though I have elsewhere opined as to what my view would have been had I found the 1st defendant liable."

[27] The issues identified by the learned trial judge were broadly the issues that the court at first instance was required to resolve. During the course of his judgment, the learned trial judge considered the subsidiary issues of negligence and causation. He assessed the question of the positions of the wires and the onus of proof as to their non-compliance with the statutory or safety requirements. In addressing submissions by Mr Bennett's counsel, he considered the issues of *res ipsa loquitur* and **Rylands v Fletcher** and made findings in respect of each. Those deliberations will be considered below. When the judgment is considered in the context of the pleadings, there is nothing that indicates that the learned trial judge misidentified the relevant issues.

The learned trial judge's assessment of the evidence before him

[28] The grounds addressing the learned trial judge's assessment of the evidence stem from the fact that the learned trial judge:

a. rejected Mr Bennett's evidence concerning certain conflicts between his testimony, on the one hand, and Mr Archer, on the other;

b. rejected Mr Jomo Gibbs as a reliable witness as to fact;

c. rejected Mr Earl Parker as an expert witness, capable of giving reliable technical evidence; and

d. accepted, as reliable, Mr Archer's evidence, and relied on it, in large measure, in finding that Mr Bennett had

failed to establish that JPS was guilty of negligence or any breach of its statutory duty.

[29] Some of these issues turn on the credibility of the witnesses, while others, such as the technical evidence, allow analysis that is more objective. The learned trial judge's findings of fact, especially in respect of conflicting evidence from lay witnesses, will not be lightly disturbed by this court. That is a principle that has been restated repeatedly in the judgments of this court. It has the support of the court of highest jurisdiction in our legal system. The Privy Council, in its decision of **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 35 JLR 303, at page 305, set out the approach of an appellate tribunal in considering the findings of the tribunal of fact that has seen and heard the witnesses. Their Lordships said, in part, at pages 305b – 306a:

> "The principles governing the approach of an appellate court to the review of the decision of the judge of trial on disputed issues of fact are familiar, but it is worth stressing yet again what has been said both by the House of Lords and by this Board.
>
> The matter is summed up in the well-known passage from the speech of Lord Thankerton in **Watt (or Thomas) v Thomas** [1947] AC 484 at pages 487 and 488:
>
> > '(i) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

(ii) The appellate court may take the view that without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence.

(iii) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because, it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'

...The importance, in these circumstances, of the advantage enjoyed by the judge who heard and saw the witnesses at first hand can, therefore, hardly be over-estimated, and it is appropriate to bear in mind the caution uttered by Lord Shaw in ***Clarke v Edinburgh Tramways Co.*** (1919) SC (HL) 35 at page 36: -

> 'In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.'"

[30] In the instant case, on the questions of fact, the learned trial judge had before him, conflicting testimony on various crucial issues. The major ones were:

a. whether Mr Bennett knew of the danger involved in going on the roof;

b. whether Mr Archer visited the premises and sought to encourage Mr Bennett to come off the roof; and

c. whether the power lines were in breach of the established standards of clearance, prior to the extension of the building.

[31] Because of the way that the learned trial judge treated with these issues, the first and second may be dealt with together. On these issues, the learned trial judge had the testimony of Mr Bennett on the one hand and Messrs Card and Archer on the other. Mr Bennett admitted that he was at the premises on 27 April when the electrician was injured. He however denied that he had anything to do with taking the electrician off the roof and denied knowledge of how the electrician came to be injured. He denied agreeing with Mr Card not to return to the building under those circumstances. He asserted that Mr Card had advocated no such position and that in fact Mr Card was at the premises at some point in time on 28 April. Mr Bennett denied that any employee of JPS spoke to him on 28 April encouraging him to leave the roof.

[32] As was indicated in the background facts, outlined above, Mr Card testified that Mr Bennett had assisted in taking the electrician from the roof and had agreed that the situation at the premises was an unsuitable environment for work. He said that he did not go to the premises on 28 April, before Mr Bennett suffered injury. Mr Archer, for his part, spoke to his entreaties to Mr Bennett to come off the roof.

[33] Whereas the learned trial judge did not record any decision as to the conflict between the evidence of Mr Bennett and that of Mr Card, he did express his preference for Mr Archer's testimony on this dispute as to fact. He said at page 31 of his judgment:

> "I accept the evidence of David Archer for the 1st defendant that when it was brought to his attention, he took steps to convince the Claimant to stop working and leave the site but he kept on working and said that he knew what he was doing."

[34] On the question of the distance of the power lines from the building, the learned trial judge firstly, rejected the evidence of Mr Jomo Gibbs and secondly, he accepted the submissions of JPS' counsel, that Mr Bennett had adduced no evidence that the power lines were erected or maintained, in breach of statutory or safe standards. He found that Mr Gibbs was not reliable. At page 15 of the judgment he said:

> "Having heard and seen this witness [Jomo Gibbs] and observed his demeanour, I accept the submission [of counsel for JPS] that young Gibbs is not a witness on whom great store should be placed. It was also quite clear that he had some difficulty estimating distances and so the evidence that he gave was inconsistent."

The other concern that the learned trial judge had of Mr Gibbs' evidence was that there was no evidence that Mr Gibbs, at the age of 10 years, as he was at the time, "would have known what were "high tension" wires" (page eight of the judgment).

[35] Mr Campbell, in ground nine, complained about the learned trial judge's treatment of Mr Gibbs' knowledge of power lines at age 10. Mr Gibbs did, however,

state in cross-examination that in 1995 he would not have known the difference between high-tension wires and other power lines (page 358 of the record).

[36] There being no compelling evidence that demonstrates Mr Archer's unreliability or Mr Gibbs' reliability, this court is not prepared to disturb the learned trial judge's assessment of the respective witnesses and the evidence as a whole. That reasoning also applies to the learned trial judge's findings concerning the technical evidence given by Mr Earl Parker.

[37] The learned trial judge amply outlined his reasons for rejecting Mr Parker's evidence. Mr Parker had not been approved as an expert witness. His testimony was aimed at outlining JPS' standards and procedures. In addition to being unable to provide proof of his assertion that he was a licensed electrician, Mr Parker also failed to impress the trial judge. The learned trial judge set out, at page seven of his judgment, some of the reasons for his rejection of Mr Parker's testimony:

> "In any event it was clear from [Mr Parker's] answers to the court that:
>
> 1) He had only been to 23 Sherlock Crescent in July 2005, almost ten (10) years after the incident;
>
> 2) He had apparently last worked as an electrician in 2002;
>
> 3) Most of his working experience had been with Cable and Wireless Jamaica Limited and occasionally with JPS and
>
> 4) The only [housing] scheme where he recalled seeing insulated transmission wires was in Westport in Portmore."

At page 26 of the judgment, the learned trial judge addressed the issue of opinion evidence being sought from Mr Parker. He said:

> "It is difficult to see how the opinion evidence of Mr. Parker can be given any weight where there is little before the court that shows that he is qualified to give such opinions."

By contrast, the learned trial judge found that the technical evidence given by Mr Archer was not "challenged in any material particular".

[38] Mr Archer testified that the standards used by JPS for distances from buildings were those "contained in the 1993 U.S. National Electric Safety Code (NESC), published by the Institute of Electrical and Electronics Engineers, Inc. (IEEE)" (page nine of the judgment). Mr Archer also provided technical evidence as to the manner in which the power lines were run. The learned trial judge accepted that evidence. He said, at pages 29-30 of the judgment:

> "I accept the evidence that the power lines in the proximity of the original building ran by way of posts fitted with 8 foot wide cross bars. Further there was no evidence to suggest that the power lines were, on the 28th April 1995, below the minimum standard clearance vertically between roofs or building and electric lines/conductors which are to be at least 2.5 meters [sic] or 8.2 feet….
>
> The evidence that is not contradicted is that the extension of the building had brought it within distances that were less than the tolerances mandated in the appropriate standards and perhaps a distance of less than 5 feet both horizontal and vertical of the building. I accept that in addition, there may well have been construction steel protruding vertically out of concrete blocks…Such was the position of the extension on April 28, 1995, according to the evidence of the Claimant. He said he did casting on that morning. If this was the case, as steel is a conductor of electricity, there was the imminent danger of an electrical accident."

[39] There was evidence from Mr Archer to support those findings. He said at paragraph four of his witness statement that the extension of the building brought it very close to the power lines which ran along the road and the distance was in breach of the clearances stipulated by JPS. He concluded the paragraph with the following:

> "The distance appeared to be less than 5 feet both horizontal and vertical. Construction steel was vertically protruding out of concrete blocks which were being placed on top of the existing building which posed even greater danger as metal is a conductor for electricity."

At paragraph 15 of that witness statement, Mr Archer said that when he saw the power lines on 28 April 1995, "they were not sagging and did not appear to be in need of any repairs".

[40] Based on that analysis there is no merit in any of the grounds complaining about the assessment of the evidence by the learned trial judge.

The learned trial judge's findings on the issue of causation

[41] The learned trial judge based his decision, in large measure, on Mr Bennett's failure to prove that JPS's placement of the power lines or its failure to maintain them, were the proximate cause of the incident, which caused his injuries. The grounds of appeal concerning the issue of causation, among other things, complain that the learned trial judge dealt with causation in a "pedantic and unrealistic way". They accused him of losing sight of the common sense approach that was required and he "wholly [misled] himself on the question of causation".

[42] In arguing the grounds connected with the issue of causation, Mr Campbell submitted that the learned trial judge was wrong in finding that Mr Bennett had failed to establish the cause of the injury. Mr Campbell said at paragraph nine of his written submissions:

> "Surely the injuries were due to the power lines. Surely the injuries were due to electricity in the power lines that burnt the Claimant/Appellant."

[43] Learned counsel argued that Mr Bennett, being "only a mason employed to a contractor" and "not the owner of the premises", was not responsible for establishing any system of work or for requesting that JPS de-energize the wires. On that basis, he submitted, the learned trial judge was wrong in finding that "the proximate cause of the accident lay in the faulty system of work employed by the Claimant while in close proximity to power lines as well as in the failure to request JPS to de-energize the power lines" (page 30 of the judgment).

[44] In connection with this issue, learned counsel referred to a letter written by JPS dated 3 May 1995. In that letter, it reported the two incidents occurring at 23 Sherlock Crescent. Mr Campbell pointed out that the letter reported, "[Mr Bennett] walked under the high tension line and apparently experienced induction and fell from the roof". He argued that the learned trial judge ignored the impact of that statement in arriving at his decision.

[45] Mr Campbell also placed much store by the fact that electricity is a thing that is inherently dangerous. In arguing that a duty was placed on JPS to deal with the

electricity so as to ensure that persons, who came within proximity of the wires would not be injured, he relied on dictum from Lord Dunedin in **Dominion Natural Gas Company Ltd v Collins and Perkins** at page 646 as follows:

> "It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusdem generis, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter."

[46] These submissions are consistent with those advanced on behalf of Mr Bennett at first instance. It may, at the outset be accepted that Mr Campbell is correct in his submission that electricity is, in itself, a dangerous thing. That principle was recognised in **Dunne and Another v North Western Gas Board and Another** [1964] 2 QB 806 and in **Trinidad and Tobago Electricity Commission v Bridgemohan Sookram and Another** (1999) 57 WIR 473. That situation raises the issue of causation.

[47] In addressing the issue of causation, the learned trial judge first identified the issue that had been joined by the pleadings. In this regard, he said in part, "the case of negligence is not about failing to advise the Claimant how to get out of a danger in which he had placed himself. It is about the placement of poles and wires" (page 24 of the judgment).

[48] The learned trial judge, in addressing the question of liability made a finding of fact, which he was entitled from the evidence to do, that there was no evidence that

the JPS infrastructure was below the minimum standards of safety (page 29 of the judgment). That finding of fact has been quoted above.

[49] The next issue to be determined was the cause of the dangerous situation which faced Mr Bennett. The learned trial judge also dealt with that issue at page 29 of the judgment. He found that it was the extension to the building that had brought it within a distance that was less than the minimum standard and that the protruding steel exacerbated the danger. That finding of fact has also been quoted above.

[50] In that situation, and accepting Mr Archer's evidence that Mr Bennett refused to heed the warnings of the danger and the entreaties to withdraw from it, the learned trial judge was entitled to find, as he did, that the proximate cause of the incident resulting in the injury, did not lay with any act or omission of JPS. In the case of such a finding JPS could not be liable. Lord Dunedin recognised this at page 646 of his judgment in **Dominion Natural Gas**. He said:

> "On the other hand [despite having installed a dangerous thing], if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail."

[51] The facts in **Dominion Natural Gas** are also distinguishable from the instant case. In **Dominion Natural Gas**, the gas company had created a dangerous situation. It installed a system that allowed gas from a safety valve to escape into a chamber where it could have been ignited. It should have, instead, channelled the gas into the open air where it would have safely dissipated. In the instant case, JPS

provided evidence of its system being compliant with the required statutory and safety standards. Mr Bennett did not adduce any evidence to contradict JPS' evidence, nor did he prove that JPS had created a dangerous situation.

[52] The instant case is more in line with that of **Rushton v Turner Brothers Asbestos Co Ltd** [1960] 1 WLR 96, which was brought to our attention by Mrs Gentles-Silvera, appearing for JPS. In **Rushton**, it was held that the proximate cause of the injury suffered by a workman was his deliberate act of trying to clear a clogged machine with his fingers while it was in operation. The owners of the machine, who were his employers, had given clear instructions that the machine should be stopped before that exercise was attempted. It was, therefore, exempted from liability, despite the fact that the machine had a defect at the time of the incident.

[53] There is one other aspect to be considered under this heading. Mr Campbell pointed to the evidence from Mr Archer that the poles along Sherlock Crescent were later replaced with taller ones, in order to prevent a recurrence. Learned counsel argued that that was an indication of admission that the original installation did not comply with the minimum statutory and safety standards. The submission is, however, flawed. The fact that JPS cured a dangerous situation does not necessarily mean that it had created that situation. It was Mr Bennett's duty, as claimant, to prove that JPS had created that situation, and the learned trial judge, quite reasonably, found that he had failed in that duty. The grounds concerning causation also fail.

The learned trial judge's treatment of the issue of *res ipsa loquitur*

[54] The ground complaining of the learned trial judge's treatment of the issue of *res ipsa loquitur* is very closely connected with those concerning the issue of causation. This Latin maxim, roughly translated, means, "the thing speaks for itself". It is applied in cases were there is *prima facie* evidence of negligence, when the precise cause of the incident cannot be shown, but it is more probable than not that a negligent act or omission of the defendant caused it (see Osborn's Concise Law Dictionary 9th Ed).

[55] In one of the earlier reported cases addressing the point, **Scott v The London and St Katherine Docks Company** [1861-1873] All ER Rep 246 the court explained the principle thus:

> "But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

[56] In the instant case, JPS has given a credible explanation for the occurrence. It is therefore not sufficient for Mr Bennett to rely on the principle set out in the maxim. The learned trial judge quite appropriately addressed the issue at pages 27-28 of his judgment. After referring to the evidence adduced by JPS, that it complied with local and international standards in its provision of electricity to the location, the learned judge said:

> "It seems to me that this now raises an evidential issue to which the claimant must respond, not with, "Well, I got electrocuted [sic] anyway, so the duty is breached", but rather with some evidence to show why the standards would

> be inadequate, absent the construction which brought the builiding [wires?] lower than the minimum tolerances as set out in those standards. Regrettably, the claimant does not respond to this but says, as is his right, "Res ipsa loquitur".

Later on at page 28 the learned judge stated the principle again:

> "It is not clear to me how res ipsa applies to an undefined breach of duty in an unidentified section of an un-named statute."

There is no basis for criticising the learned judge's comment on this issue. The ground should fail.

The learned trial judge's treatment of the issue of the pleadings concerning vicarious liability

[57] In ground 14, Mr Bennett complained that the learned trial judge was in error when he found that there was no pleading as to vicarious liability for the acts or omissions on 28 April 1995, of any servant or agent of JPS. Mr Campbell addressed Mr Archer's admitted failure to identify a safe route by which Mr Bennett could leave the roof. There were also submissions before the learned trial judge that Mr Archer failed to use a "switch stick" to de-energise the lines and thereby make the lines safe for Mr Bennett to leave the roof.

[58] The evidence given by Mr Archer concerning these issues is set out at page 362 of the record. It is, however, unnecessary to set those answers out in this judgment because, as Mrs Gentles-Silvera quite correctly submitted, that there were no such allegations of negligence pleaded by Mr Bennett. The learned trial judge put the matter quite succinctly at page 24 of his judgment:

> "...the case of negligence is not about failing to advise the Claimant how to get out of a danger in which he had placed himself. It is about the placement of poles and wires."

[59] Mrs Gentles-Silvera, before this court, supported the learned trial judge's approach to the issue. She quite properly pointed out, in her oral submissions, that there was no pleading concerning using a switch stick to turn off the power or concerning recommending a safe route by which Mr Bennett should descend from the roof. It may also be said that had Mr Bennett not been as intractable as Mr Archer's evidence suggested him to be, he may well have been given such a recommendation. This ground also fails.

The learned trial judge's treatment of the issue of escape of a dangerous thing, as raised by Rylands v Fletcher

[60] After referring to the submissions concerning **Rylands v Fletcher**, the learned trial judge said at page 24 of his judgment:

> "I take that [submission] to mean that the foundation upon which the claimant builds the superstructure of his case, is that famous decision. There is all the difference between actions in negligence and actions in nuisance, of which [**Rylands v Fletcher**] is properly considered a part."

[61] He addressed the submissions at page 30:

> "Although the claimant has framed his case in negligence, he has asserted that **<u>Rylands v Fletcher</u>**, which really is about nuisance, is that which undergirds his case....It is not clear to me how that doctrine applies to the instant case where the land over which the lines were run was the Ancillary defendant's."

[62] It may be that the learned trial judge was too restrictive in his interpretation of that well-established decision. It is not difficult to conceive that the harnessing of electricity and conducting it through wires, could fall within the concept established by this head of nuisance (see **Midwood and Co Ltd v Mayor, Aldermen and Citizens of Manchester** [1905] 2 KB 597 and **Collingwood v Home and Colonial Stores Ltd** [1936] 3 All ER 200), but the learned trial judge was correct in distinguishing its applicability to the instant case. As he quite correctly stated, there were no pleadings in this regard.

The learned trial judge's treatment of the witness statement of Clarence Bailey

[63] At page 12 of his judgment, the learned trial judge recorded an application by counsel for Mr Bennett to have a witness statement, made by Mr Clarence Bailey, admitted into evidence as a hearsay document. In his written sumbissions, Mr Campbell argued that the contents of Mr Bailey's statement were relevant to other evidence led at the trial and that the learned trial judge erred in refusing to admit it into evidence.

[64] The learned trial judge, at pages 12-13 of his judgment, explained the objection to the application:

> "An application by Claimant's counsel to have the witness statement of the Ancillary defendant put in as a hearsay document was opposed on the basis that this was a statement which had been provided in relation to the issues between the 1st defendant and, in any event, the claimant had already closed his case."

[65] Rule 29.8(3) and (4) of the CPR are relevant to this discussion. They respectively state:

> (3) Where a party who has served a witness statement does not –
>
> (a) intend to call that witness at the trial; or
>
> (b) put the witness statement in as hearsay evidence,
>
> any other party may put the witness statement in as hearsay evidence.
>
> (4) Where a party –
>
> (a) has served a witness summary; and
>
> (b) does not intend to call that witness at the trial,
>
> that party must give notice to that effect to all other parties not less than 28 days before the trial.

[66] The situation that faced the learned trial judge was that learned counsel appearing for Mr Bailey at the trial, opted to make a no-case submission on his behalf and to rest on those submissions. In those circumstances, there would have been no opportunity to give the notice required by rule 29.8(4). An objection that an application pursuant to rule 29.8(3) had an element of surprise could not have found firm footing in those circumstances.

[67] Although the learned trial judge, despite his ruling to exclude the document, did refer to its contents at page 33 of his judgment, his decision was an exercise of a discretion given to the tribunal of law. In light of the fact that hearsay evidence is not likely to bear much weight where there is direct evidence on the point, there is nothing

to show that the learned trial judge's decision was obviously wrong, and there is no reason to disturb it.

The learned trial judge's treatment of JPS' pleadings

[68] For this ground, Mr Campbell argued that JPS failed to plead to specific averments in the statement of claim and in the absence of evidence addressing, in particular, certain omissions by JPS, the learned trial judge ought to have given judgment for Mr Bennett.

[69] There is, with respect, no merit in this ground. JPS specifically denied all the particulars of negligence alleged against it. In addition, it adduced evidence, which the learned trial judge as the tribunal of fact, accepted, that indicated that liability for the incident lay elsewhere than at its feet. The issues of fact have already been discussed in this judgment. There is no need to retrace that territory.

The learned trial judge's treatment of the issue of the liability of Mr Bailey

[70] In this ground, Mr Bennett complains that the learned trial judge was in error when he failed to make any finding of liability against Mr Bailey. The ground ignores the role that pleadings play in the litigation process. All that needs to be said here is that it was JPS that joined Mr Bailey. It sought an indemnity or contribution from him in the event that it was found to be liable to Mr Bennett. It was not found liable to Mr Bennett and therefore the issue of Mr Bailey's liability fell away as one to be resolved. This ground also fails.

The learned trial judge's delay in delivering the judgment

[71] Ground 22 of the grounds dealt with the issue of the learned trial judge's delay in delivering judgment in the instant case. The complaint is not an unreasonable one. The delay covered a period of almost three years. It was clearly excessive but the learned trial judge gave no explanation therefor. It certainly is a regrettable situation. In **Sea Heavens Inc v John Dyrud** [2011] CCJ 13 (AJ), the Caribbean Court of Justice noted the importance to the economy of the timely delivery of judgments. It said at paragraph 7:

> "The expeditious resolution of commercial disputes yields a net benefit not just to the litigants but also to the economy..."

Although the court was addressing the Barbadian economy, there is no doubt that the principle is universally applicable throughout the Caribbean. The court also gave its opinion in **Yolande Reid v Jerome Reid** [2008] CCJ 8 (AJ) as to the time within which a judgment should be delivered. It stated at paragraph 22:

> "What is a reasonable time? In our view, as a general rule no judgment should be outstanding for more than six months and unless a case is one of unusual difficulty or complexity, judgment should normally be delivered within three months at most."

That stipulation is not unreasonable, even in the circumstances of stretched resources in which our courts operate. In making that statement, it is not without recognition that this judgment has taken over six months to be delivered; a result to which the 41 grounds of appeal, in no small measure, contributed.

[72] Excessive delay, by itself is, however, not a basis for overturning the decision of the court below. Their Lordships in **Cobham v Frett** PCA No 41/1999 (delivered 18 December 2000); [2001] 1 WLR 1775, stated that it must be demonstrated that the delay prejudiced the result. They stated at page 1783H of the reported judgment:

> "In their Lordships' opinion, if excessive delay, and they agree that 12 months would normally justify that description, is to be relied on in attacking a judgment, **a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay**. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant." (Emphasis supplied)

[73] In the instant case, the learned trial judge had his notes as well as the witness statements. There is no indication that he would have been hampered in making his findings of fact. Although the delay is clearly excessive, and every effort should be made to remain within the suggested time guidelines, this is not a case in which setting aside the judgment because of the delay, would be warranted. This ground also fails.

The appeal against the award as to costs

[74] The appeal against the learned trial judge's order as to costs was strenuously contested. Mrs Gentles-Silvera relied on a number of facts as the foundation for her submission that the learned trial judge erred in making that order. These facts were:

a. the incident occurred at Mr Bailey's house;

b. the dangerous situation had been created by the extension that he had commissioned;

c. there was no record of any application having been made to the relevant authorities for permission to extend the building;
d. the extension was in breach of a wayleave agreement prescribing a minimum distance between the building and JPS' power lines;
e. the learned trial judge, in his judgment, had opined that he would have been prepared to find Mr Bailey liable to contribute to any damages for which JPS would have been liable.

[75] Learned counsel argued that against those facts, there was no basis for departing from the general principle that costs follow the event. She urged that although the issue of costs is in the discretion of the court, the learned trial judge had erred in principle and therefore this court could and should overturn the exercise of his discretion.

[76] Mrs Samuels-Brown QC sought to support the decision of the learned trial judge. Learned counsel argued that JPS acted prematurely in joining Mr Bailey as an ancillary defendant. She submitted that JPS ought to have properly awaited the result of the litigation between itself and Mr Bennett in order to decide whether or not it was necessary to take action against Mr Bailey. For this reason, she submitted, JPS ought properly to pay Mr Bailey's costs directly and the learned trial judge, in exercising his discretion in a judicial manner, was correct to so order.

[77] In assessing this issue, it must be noted that the question of costs "shall be in the discretion of the Court" (section 47(1) of the Judicature Supreme Court Act). It must also be noted that rule 64.6(1) of the CPR stipulates, in part, that "the general rule is that [the court] must order the unsuccessful party to pay the costs of the successful party". The court may however depart from that rule, and in considering its order as to costs, the court must have regard to a number of factors as set out in rule 64.6(4), including the factor of whether it was reasonable for a party to pursue a particular allegation or raise a particular issue. The decision of the court as to costs is an exercise of its discretion but that decision must be exercised judicially.

[78] This court will not easily disturb an exercise of discretion by a judge of the Supreme Court. A number of authorities, including **Hadmor Productions Ltd & Others v Hamilton & Others** [1982] 1 All ER 1042, have amply demonstrated that it will only do so if the judge at first instance has erred in respect of a relevant principle.

[79] In the instant case, it is undoubted that the learned trial judge was entitled to make an order in either the manner that Mrs Gentles-Silvera has advocated, or in the way Mrs Samuels-Brown QC supports. This is demonstrated in the well-known case of **Sanderson v Blyth Theatre Company** [1903] 2 KB 533. The headnote states in part:

> "In an action in the King's Bench Division, claiming relief against the defendants in the alternative, the Court has jurisdiction in a proper case to order the unsuccessful defendant to pay the costs of the successful defendant, or to order the plaintiff to pay the costs of the successful defendant and then to add those costs to the costs which

> the unsuccessful defendant is ordered to pay to the plaintiff."

[80] The former course is what is conveniently referred to as a **Sanderson** order while the latter course is called a **Bullock** order (after **Bullock v The London General Omnibus Company and Others** [1907] 1 KB 264). These approaches were accepted as being applicable to litigation involving, what were formerly called "third party proceedings" (see **Edginton v Clark and Another** [1963] 3 All ER 468 and **Aiden Shipping Co Ltd v Interbulk Ltd; The Vimeira** [1986] 2 All ER 409).

[81] The introduction of the CPR has not disturbed that application. In **Arken v Borchard Lines Ltd and Others** [2005] EWCA Civ 655, the English Court of Appeal discussed the issue in the context of the rules of the Civil Procedure Rules of that country that deal, respectively, with the overriding objective, ancillary proceedings and costs. The court made it clear, however, that a court assessing the issue of costs, is entitled to consider the ancillary proceedings separately from the main proceedings. An excerpt from that court's deliberations on the point may assist:

> "**[75] In the usual course of things the court will consider the incidence of costs in the main proceedings quite separately from the incidence of costs in the [ancillary] proceedings, but nobody submitted that this was an inviolable rule**…
>
> **[77]** In the ordinary run of cases under the CPR the same principle will be applied. **A successful [ancillary] defendant should not be deprived of his prima facie right to an order for costs against [an ancillary] claimant merely on the ground of the [main] claimant's impecuniosity**...The issue that has to be determined on the peculiar facts of the present litigation is whether the interests of justice deemed that some different

order should be made…as between the various [parties]..." (Emphasis supplied)

[82] The learned trial judge in the instant case, therefore, clearly had a choice and authorities to support either of the options open to him. The difficulty with his decision on the point is that he did not explain the basis for his choice. At page four of his judgment in respect of costs, he reasoned that an order in the nature of a **Bullock** or **Sanderson** order was appropriate. He said:

> "It is not totally clear to me that in the instant case the real choice is between a Bullock and Sanderson Order, as usually understood, as suggested by the ancillary defendant. Typically that arises where there are two or more defendants and the claimant succeeds against one and fails against another. However, the principles which informed the decisions in the Bullock and Sanderson authorities, are relevant and may be applied here. I am of the view that this was a case where it was reasonable, given the evidence and the pleadings, for the 1st defendant [JPS] to bring the third party/ancillary defendant [Mr Bailey] into the proceedings and "to keep him in the action until judgment". Accordingly it is appropriate to make an order which reflects the thinking behind a Bullock or Sanderson Order.
>
> Having considered whether and if so how the court should exercise its discretion, I have formed the view that the following orders as to costs ought to be made.
>
> Costs of the 1st defendant are to be paid by the claimant [Mr Bennett]. The costs of the ancillary defendant are to be paid by the 1st defendant and are to be recoverable against the claimant. All costs are to be agreed or taxed."

[83] Having decided that JPS acted reasonably in bringing Mr Bailey into the action and keeping him there, one would have expected that the learned trial judge would have gone on to say that Mr Bennett should pay Mr Bailey's costs directly. He,

however, did not do so and did not explain his decision not to do so. In the circumstances, it may be said that the learned trial judge did not exercise his discretion judicially and therefore this court may consider the matter afresh.

[84] The reasoning of the learned trial judge, whereby he stated that he would have been prepared to apportion liability to Mr Bailey, merits significant weight. Not only did it, contrary to Mrs Samuel-Brown's submissions, justify JPS' institution of the ancillary proceedings but it also justified a finding that JPS should not be out of pocket in respect of its costs. The element of JPS being out of pocket, emanated from the evidence that was led at the trial concerning Mr Bennett's financial situation. That evidence signalled that Mr Bennett would not be able to reimburse JPS, were it to pay Mr Bailey his costs of the ancillary claim. In his witness statement Mr Bennett said at paragraph 16:

> "I have not earned anything since the accident. I can't do mason work. I have no other skill. I survive by the assistance of 2 sisters and brother-in-law in whose [sic] I live. They feed and house me."

He also said at paragraph 29:

> "The fact of my impoverishment and my inability to use my skill for my financial independence and advancement weigh heavily upon me. I will always need extra help and future medical care."

In light of that evidence, it seems that the learned trial judge erred when he found that it had not been established that the claimant was "insolvent", as had been submitted in arguments on the issue of costs.

[85] Based on that reasoning, although the costs of the ancillary proceedings are normally considered separately from that involved in the original proceedings, this court

is of the view that the principle of dealing with cases justly allows it to consider Mr Bailey's "culpability", as the learned trial judge was prepared to find. Mr Bennett's impecuniosity, although not determinative, is another of the factors to be considered in deciding the question of costs (see **Mayer v Harte and others** [1960] 2 All ER 840).

[86] When all the circumstances are considered, it is only just that JPS, as the successful defendant should not be alone in the loss, which it will undoubtedly suffer by Mr Bennett's inability to pay. Mr Bailey should share that burden. The appropriate order as to costs, in the circumstances should be:

a. costs of the claim to the defendant JPS;
b. costs of the ancillary claim to the ancillary defendant Mr Bailey;
c. Mr Bailey's costs are to be paid by the claimant Mr Bennett;
d. all costs are to be taxed if not agreed.

Conclusion

[87] The issues, which were joined before the learned trial judge, required him to determine the proximate cause of Mr Bennett's injury. Identifying the proximate cause required him to resolve certain questions of fact. There was ample evidence by which he could properly have come to the conclusion that the proximate cause did not lie with any negligence on JPS' part, but on the extension of the building bringing it closer to JPS' power lines and Mr Bennett's placing himself in a situation of danger despite

warnings from more than one source. Mr Bennett was the author of his own misfortune.

[88] The learned trial judge's notes of the evidence and the statements of the various witnesses provided sufficient material so that the delay by the learned trial judge in delivering his judgment did not prejudice a fair outcome to the trial.

[89] The learned trial judge did, however, err in respect of the matter of costs. He failed to explain the exercise of his discretion to order that Mr Bailey's costs should be paid by JPS first and that, thereafter, JPS should seek to recover those costs from Mr Bennett. In light of that failure, this court is entitled to consider the matter afresh. In doing so, the impact of Mr Bennett's impecuniosity on a just result was considered. It required that Mr Bailey should look to Mr Bennett for his costs.

[90] The appeal should be dismissed and costs, to be taxed if not agreed, awarded to JPS. The counter-notice of appeal should be allowed with costs to JPS against Mr Bailey.

PANTON P

ORDER

1) The appeal is dismissed.
2) The counter-notice of appeal is allowed.
3) The judgment of Anderson J on the claim and the ancillary claim is affirmed on the question of liability.

4) The judgment and order of Anderson J, on the question of costs as between the appellant and the ancillary respondent, is set aside.
5) Costs of the claim, the appeal and the counter-notice of appeal to the respondent Jamaica Public Service Co Ltd;
6) Costs of the ancillary claim to the ancillary respondent Mr Clarence Bailey.
7) Mr Bailey's costs are to be paid by the appellant Mr Desmond Bennett.
8) All costs are to be taxed if not agreed.