IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. 1997/D-141

BETWEEN	D & L H SERVICES LIMITED	1ST CLAIMANT
AND	ISADRA INTERNATIONAL LIMITED	2ND CLAIMANT
AND	DALEY WALKER & LEE HING (A FIRM) by the Estate Clifton Daley Rep. by Executors Louise Daley & Clifton George Daley)	3RD CLAIMANT
AND	CLIFTON DALEY (By Executors Louise Daley & Clifton George Daley)	4TH CLAIMANT
AND	THE ATTORNEY GENERAL	1ST DEFENDANT
AND	THE COMMISSIONER OF THE JAMAICA FIRE BRIGADE	2ND DEFENDANT

Mr. David Batts instructed by Livingston, Alexander and Levy for the claimants.
Mr. Curtis Cochrane instructed by the Director of State Proceedings for the defendants.

HEARD: December 14, 15 and 16, 2009 and October 22, 2010.

EDWARDS, J (Ag.)

Fire Brigade-Breach of statutory duty-Whether a civil right of action is conferred on the claimants-Whether fire brigade enjoys statutory immunity-Meaning of bona fide-Negligence -Whether duty of care owed by the fire brigade- Vicarious liability- Fire Brigade Act ss (5) (10) (11) (15)-Fire Brigade Regulations ss (33) (37).

Introduction

1. In Kingston, Jamaica, at the corner of Temple Lane and Tower Street, there once existed a concrete building, identifiable as 114-120 Tower Street, with the enviable claim of being in close proximity to that great edifice, the Supreme Court of Jamaica.

2. On October 22, 1997, at the end of the work day, the owners and occupiers of this building, locked the doors, windows and grills, brought down the shutters, locked the locks and they and all their staff went home. But by the next day this building was a mere shell of its former self. It had gone up in smoke. However, it did not go up in a puff of smoke; instead, it fell victim to a slow burning fire that started from 8 pm that same evening, until it erupted and blazed well into the early hours of the next morning.

3. The owners say the destruction of the building was the fault of the fire brigade who were summoned to the scene quite early; from as early as 8 pm. The owners say that the fire men, in breach of their statutory duty and or due to their negligence, caused the building to go up in flames when they failed to pour water on the fire as soon as they arrived on the scene. They further say that the fire was early evidenced by smoke spiraling under the shutters and rising through the windows, but the firemen did nothing to quell this smoke until the building became engulfed in flames and it was too late.

4. The witnesses for the defendants say this is not true; they say that everything possible was done to fight this fire but there was nothing more the fire men could do.

The Claim

5. The claimants' claim for damages is framed both in breach of statutory duty and in negligence. The allegations are that the members of the Jamaica Fire Brigade were in breach of their duties under section 5(a), (b) and (e) of the Fire Brigade Act (the Act); and also that they were negligent in the exercise of their duties under sections 10 (e) and 11 of the Act.

6. The claim against the Commissioner of the Jamaica Fire Brigade is that the acts or defaults complained of arose from breaches of the Act for which he

had primary statutory responsibility for its efficient conduct and administration.

7. The Attorney General is sued in a representative capacity pursuant to the provisions of the Crown Proceedings Act. Section 3(1) of the Crown Proceedings Act provides:

> *"Subject to the provisions of this Act, the Crown shall be subject to all those liabilities to tort to which, if it were a private person of full age and capacity, it would be subject (a) in respect of torts committed by its servants or agents, (b)-. (c)....*
>
> *Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate."*

8. The Fire Brigade Commissioner is a servant of the Crown and the acts or defaults complained of arose from the alleged breaches of the Fire Brigade Act, for which he has statutory responsibility.

Background to the Claim

9. The original claim filed by writ of summons dated November 24, 1997 was filed by D&LH Services Limited, Isadra International Limited, Daley Walker and Lee Hing (a Firm) by its partner Clifton Daley and Clifton Daley, against The Attorney General and the Commissioner of the Jamaica Fire brigade. This was in Suit No. C. L. D 141/0f 1997.

10. The 1st claimant was the registered proprietor of premises known as 114-120 Tower Street in the parish of Kingston. The 2nd claimant carried on business at the said premises. The 3rd claimant is a law firm carrying on practice at the said address. The 4th claimant is an attorney in the said law firm.

11. There were three other subsequent claims arising out of the same incident. These were: Suit No. C.L. 1998/H176; Suit No. C.L. 1998/P.199 and Suit No. C.L. 2000/H021.

12. An application was then filed for the suits to be consolidated under CPR 26.1 (2) (b) (White Book Vol. 1/2003), up to and including the determination of liability and for the leading action to be Suit No. 1997/ D141.

13. At the Case Management Conference in suit No C.L. 2000/H021 held on June 18, 2004, the order of Mr. Justice Brooks made by and with the consent of all the parties present, was that;

    1. *Claim No. C.L. 1997/D 141 shall proceed to trial.*
    2. *Claims C.L. 1998/H176, C.L. 2000/H 021 and C.L. 1998/P. 199 are ordered stayed pending the outcome of the trial of claim No. C.L. 1997 /D 141 on the issue of liability and shall be bound by the order of the court on that issue subject to the outcome of any appeal thereon.*

14. The claimant Clifton Daley is now deceased. He died in 2005, prior to the trial. Louise Daley and Clifton George Eustace Daley, Executors of his estate, consented to be substituted as the third and fourth claimant. By order of the court dated December 19, 2006, the court granted an order for the estate to be substituted as third and fourth claimant.

15. Following an application at pre-trial review for the affidavits of the deceased Clifton Daley to be admitted into evidence on the basis that the maker was deceased and could not reasonably be called to give evidence, such an order was granted by the court on October 12, 2009. Two affidavits made by Clifton Daley dated January 21 and 23, 1998 were tendered and admitted into evidence at trial.

16. The issues that fall to be determined by this court in this claim, as I believe them to be, are:

1. *Whether section 5 of the Fire Brigade Act gives rise to a statutory duty, breach of which confers a civil right of action on the claimants.*
2. *Whether the men of the Jamaica Fire Brigade were in breach of their statutory duty to extinguish the fire.*
3. *What, if any, common law duty of care is owed by the Fire Brigade which attends the scene of a fire, to the owner/occupier of premises which is on or in danger of fire.*
4. *Whether the acts or omissions of the Fire Brigade at the scene of the fire amounted to negligence ; if yes*
5. *The question of the measure of damages recoverable by the claimants.*

Overview of The Evidence Relied on By the Parties.

17. In support of their claim, the claimants called 5 witnesses. All were present at the scene on the fatal night and gave their account of what they saw and heard. Mr. Raymond Robinson was an Inspector of Police now retired; Mrs. Louise Daley was the wife of the now deceased Clifton Daley; Mr. Clive Savage worked in a nearby building and was first on the scene; Mr. William Anthony Pearson, an Attorney-at-law and an owner/occupier of the ill-fated premises and Mr. Gordon Langford of the firm, Langford and Brown, Chartered Surveyors, Valuers and Real Estate Dealers, who did a post fire valuation of the premises.

18. The Defendants called four (4) witnesses, all members of the Jamaica Fire Brigade and by implication all trained firefighters. Two of these men are now retired senior officers of the Brigade. These were; District Officer

Dennis Lyons, Sergeant Lawrence Campbell, Retired Assistant Commissioner Denroy Lewis and Retired Assistant Commissioner Herbert Hall.

19. The evidence of the claimants' witnesses was that the fire fighters were on location for approximately two (2) hours during which time they made no attempt to fight the fire. This of course was disputed by the defendants' witnesses.

The Claimants' Evidence

20. I will examine the evidence of Louise Daley (Mrs. Daley) first, for the simple reason that her evidence gives a comprehensive picture of the layout of the building as it stood prior to its destruction.

21. Based on the evidence of Mrs. Daley, the building consisted of a ground floor, a first floor and a partially completed second floor. The ground floor was divided into three strata (I take that to mean three separate lots.) The strata lot to the east was a jewelry establishment. The strata lot in the centre was owned by D&LH Services and leased to the firm of Playfair, Junor, Pearson and Company; the lot to the west was owned by Playfair, Junor and Gayle Nelson and Company.

22. The first floor had a concrete extension forming a piazza and was occupied to the front by Isadra Limited. The back section of that entire floor was occupied by D&LH Services. The second floor was D&LH Services, a company which belonged to Clifton Daley.

23. The main entrance to the building was grilled. There were windows made of glass from east to west which were not grilled. She said the strata lot to Temple Lane occupied by Playfair, Junor, Pearson and Company was grilled because of the air conditioners in that section.

24. The centre of the building had a staircase for entry to the upper floors. This was located at the wall between the east and west shutters. This entrance was located under the piazza formed by the concrete extension. This was the entry to the offices upstairs. Entry was gained by opening a grill door. Behind the grill door was a glass door which was locked. Half-way up the stairs was a broad metal sheet door which was also kept locked. At the top of the stairs was a glass door which was also locked. This formed the entrance to the offices upstairs.

25. The stairway was a few feet to the east of the shutters. In paragraph four of her witness statement she indicated that she along with her husband were the last ones to lock up and leave the first floor offices that night. They did so by fastening the security doors at the top, the middle and the bottom of the stairs.

26. The evidence was that the second floor was incomplete having a roof and walls but the windows were not yet installed. The entire building had been insured up to 1996 but not at the time of the fire.

27. Mrs. Daley gave evidence that her husband Clifton Daley died in 2005. She is the executrix of his estate. The building had been owned by her husband and she tendered in evidence a certificate of title which was admitted in evidence as exhibit 3. The title is in the name of D&LH Services Limited and there was no dispute at the time of its tender that it was indeed owned by Mr. Daley.

28. On the date in question she said she had received a call at about 8.05 p.m. and arrived at the premises at around 8.40 p.m. She saw no fire blazing. She said she saw tuffs of smoke emanating from beneath a shutter on the ground floor which was to the north western side of the building. She explained that there were metal shutters to the west and east front as well.

29. She saw firemen on the scene; some were sitting at the front of the building and some were standing around. She said that although the fire brigade was present, no fire fighting was taking place. She said the firemen made no attempts to open the shutters. She described the fire fighters getting access to the upstairs and not finding any fire there. She recalled seeing one fireman go upstairs to break the glass window and another borrowed her torch because they had none of their own. She recalled also seeing three fire trucks at first and then another two, after what she described as the big blaze.

30. In her witness statement she said there were six units on the scene but there was no evidence of them doing any fire fighting. She said that by 10:20 p.m. large flames were seen behind the front projected section of the first floor that had a slab roof.

31. She testified that the first time she saw fire was about 10.40 p.m.; this was on the first floor. She described it as a big blast of fire stretching across the first floor. She said she just saw it come up. It was then she said she saw the firemen use the hose to out the fire. She also saw other firemen using the hose behind the building on Temple Lane as the fire had spread there but it was too late to save the building.

32. In her witness statement she described how the huge flames caused her to rush to her vehicle parked by the Supreme Court. She also claimed that even then, the water was not directed on the fire but was allowed to run freely on the road.

33. Mr. Clive Savage worked in an adjoining building. He was the first of the witnesses on the scene. He claimed to have seen smoke coming from the western side of the building at which time he also saw one fire truck present. He telephoned the wife of attorney Anthony Pearson who occupied offices in the building.

34. Mr. Savage claimed that he suggested to the fire fighters that they should turn the water hose onto the ground floor where the smoke was evident but the firemen responded that they saw no fire so they could not spray water. In his witness statement he said no fire was evident on the ground floor although there was a "glow" above the ground floor. In paragraph 9 of his statement Mr. Savage declared that "no attempt was made to wet the floor area such that should there be bits of fire from above this would likely be smothered".

35. It was Mr. Savage's opinion that there was no organized approach to fighting the fire. It was his view that the firemen ignored the downstairs portion of the building where they could have applied water and seemed fixated on opening the doors to the upstairs portion of the building.

36. The cross-examination of Mr. Savage was confined to establishing that Mr. Savage had no formal training in fire fighting which indeed he did not have, but it is indeed certain that he is not lacking in common sense.

37. Inspector Raymond Robinson's evidence is that he arrived on the scene between 8-9 p.m. He was the officer in command of the police at the scene. He saw one unit on the scene. He summoned others. When he arrived he saw a sizable crowd and a number of attorneys. He saw smoke coming from the ground floor but no visible fire blazing. He, too, said he advised the brigade to pump water into the ground floor but they failed to do so. They did not enter the ground floor but spent the time trying to locate the keys to the front grill. He said no fire fighting took place until 45 minutes after they entered the first floor.

38. In paragraph 6 of his witness statement he said he advised members of the brigade to break a glass along Temple Lane in an attempt to control the fire on the ground from above. He further said he advised them to pump water

into the ground floor to extinguish any fire that might have been there but they did not take his advice. He said they took no steps to control the spread of the fire on the ground floor and that some members were on the ground fiddling around. He, too, also said water was not directed on the fire but was allowed to run along the road.

39. In paragraph 21 of his witness statement he opined that the men of the brigade appeared to be young and inexperienced and he claimed not to have seen any effective control or discipline being exercised by their supervisors. He further said that there were no directions about entering the building and there appeared to be some confusion as to how to tackle the fire fighting.

40. Inspector Robinson in cross-examination stated that he was not a trained fire fighter but had received training from experts at the fire department as part of his police training. He said that if required, he could be called upon to assist in fighting fires. He said he also had experience with 20 large fires. It was his opinion, based on his experience with 20 previous large fires that if the fire fighters had acted professionally, the building could easily have been saved. In his witness statement he said:

> **"I had 20 exposures to dangerous fires and large fires. Moreover in basic training at Port Royal training school the fire brigade sent its experts to guide us as professionals how to strategically deal with fire; what went on was as if they were trainees".**

41. His explanation for describing the fire fighters actions as that of trainees was that they were spraying the water in the opposite direction from where the smoke and fire was coming from.

42. The affidavits of Mr. Clifton Daley, deceased, sworn to on January 21 and 23, 1998, were admitted into evidence. In his affidavits Mr. Daley said that

when he arrived at the premises no blaze was seen anywhere in the building but he saw smoke coming out from underneath the ground floor shutters.

43. He then went on to describe how the firemen made futile efforts to open the grill door leading to the upper floor. He said that the keys had previously been handed to the men and they were advised to break the glass window of the upper floor to gain access to the upper floor. They did so but they found neither smoke nor fire on the first floor. Smoke was still coming from the ground floor but the fire men did nothing to the smoke or to the ground floor to attempt to fight the fire with water or otherwise.

44. He noted that some fire fighting began when the wooden section of the upper floor caught fire and the blaze engulfed the upper floor. He complained that even then the fire fighting efforts were not meaningful as a vast quantity of water was allowed to run from the fire truck into the streets without it being pumped on the fire.

45. Mr. Anthony Pearson gave evidence that he received a call from his wife and arrived on the scene about 8 p.m. In cross-examination he admitted to seeing a single fire engine and some fire fighters on his arrival. In his witness statement he also said he saw no fire fighting and no water was coming from the fire hoses.

46. His offices were located on the ground floor of the building. This was on Tower Street. To get to his offices he said that he would walk from a pathway which was on Tower Street. To get into the building there was a steel roller shutter that had to be pushed up. Behind that steel roller shutter was a glass door in an aluminum frame which had to be opened with a key.

47. He said the ground floor of the building was a separate strata lot from the upper floor. The ground floor was jointly owned by Mrs. Shirley Playfair,

Mr. John Junor, Mr. Gayle Nelson and himself. They had purchased it from Mr. Clifton Daley.

48. He also gave evidence of having his keys with him that night. He used his keys to open the shutters to his offices (located on the north western section of the building facing Tower Street) and went inside the ground floor where he saw smoke and felt heat. He was unable to recall if he had given his keys to any of the firemen that night. He recalled pulling locks, rolling up the shutters, opening the front doors with the keys, saw the smoke and felt the heat and backing off. He was unable to recall if the firemen assisted him in opening the locks but admitted to getting assistance.

49. He told the court that when he arrived on the scene the smoke was coming from the north western section of the building and seemed to be coming from the upper floor. The smoke, he said, was coming from a window of the upper floor at the side of the building bordering against Temple Lane. By upper floor he said he meant that floor immediately above the ground floor, which would be the first floor.

50. He said the fire brigade did not enter the ground floor or seek to apply water there, but were more concerned with gaining entry to the upper floor. He said the smoke was in the ground floor as a whole and he could not identify its presence in any particular section of it. After retreating he called the attention of the fire personnel to the smoke on the ground floor. However, he said they expressed a view to getting to the first floor which was not open. He said they eventually entered the first floor by smashing the glass windows. At that time smoke was visible on the first floor.

51. He said further, that the firemen did not enter the ground floor and made no effort to put out the fire. In his witness statement he said the presence of the firemen was conspicuous as there were six units present but there was no

evidence of fire fighting. He also said that the fire was allowed to spread for sometime without any significant attempt to extinguish it. Mr. Pearson admitted in cross-examination to having no fire fighting training but credits himself with basic intelligence.

52. He said the firemen only began using the hose an hour after he arrived. Then, frantic efforts were made when there was an explosion and a great conflagration spread over the building.

The Defendants' Evidence

53. Assistant Superintendent Dennis Lyons was at the time a District Officer. He gave evidence that the call to the York Park station came in about 7:50 p.m. They arrived on the scene from about 7:58 p.m. He said at the scene of a fire the fire brigade was in charge and no civilian or non-member of the brigade would be allowed to enter the building.

54. His evidence in cross-examination was that on arrival on the scene he saw a little smoke coming from upstairs through a window. He saw no fire. He said that he instructed his men to break a window upstairs and apply water, which they did.

55. He told the court that once he saw the smoke he realized it was urgent. He said from the time he saw smoke to the time they got the ladder onto the building was about 3-5 minutes. He claimed that within 10 minutes of their arrival water was being applied to the building. They did not however empty the truck of water at that time and smoke did not stop coming from the building after they applied the water. He said the men sprayed for about 2-3 minutes but he saw that smoke was still coming from the building so he instructed his men to come down from the ladder. He said the men broke the window looked inside but saw no fire. This was about 12-13 minutes after 8 p.m.

56. Having determined that the source of the smoke was not upstairs they began looking elsewhere. Agreeing to a suggestion posed by counsel for the claimant that smoke rises, he said they began looking below the upper floor. They immediately went to the front of the building that was shuttered and locked. There was a little smoke coming from under the shutter. This was at the north western end of the building at the corner of Temple Lane. At this time he said it was about 17 minutes past 8 p.m.

57. In order to tackle the locked shutter he sent for the cutting gear from the fire unit. He claimed his men had a tough time opening the shutter. The locks were down on the ground and it took the men about 10-15 minutes to get it open. By this time the smoke was getting thicker. His evidence was that it was then about 8:30 p.m.

58. Having gotten the shutter open the men broke the glass door behind it. There was a grill behind the glass door. In his witness statement he said after the glass door was broken he could see that fire was on the ground floor. The firemen were instructed to spray water into the building whilst attempting to open the grill door. He said they were fighting the fire in that section using the jet spray whilst the men were cutting their way in.

59. He also realized there was another shutter which they also tried to open. There was thick heavy black smoke coming from shutter number two on the eastern front of the building. Realizing that the smoke was getting thicker and more man power was required he called in a second unit.

60. When the second shutter was opened there was also a glass door behind it. He said the fire in the first section (north western) was controlled but the smoke started coming from the second shutter. Before that they thought they had controlled, if not extinguished, the fire and contained it in the first

section. He said it was after that that the thick heavy blanket of smoke started coming from the second shutter.

61. Knocking off the locks with a sledgehammer, he said, opened the second shutter on the eastern side. Then, he said, the grill behind this glass door proved to be a challenge. It took them thirty minutes to open that grill door. In his statement he said the jets were directed at the 1st and 2nd shutters.

62. He said once he had arrived at the scene of the fire he took control and no one would be allowed in the building. He denied that Mr. Pearson entered the building by opening the shutters with keys. He also advised that a more senior officer later arrived on the scene and took over control from him.

63. He denied any suggestion that water was not applied to the ground floor of the building. He said they fought the fire until it was extinguished. He gave evidence that the building was damaged as a result of the fire but it was not totally destroyed. He said the upstairs was burnt and the wooden floors were destroyed after the explosion.

64. He told the court that there was an explosion which was the result of a back draft. He explained that a back draft could occur when oxygen was suddenly allowed on flames in a contained area, that is, an airtight area, which was starved of oxygen.

65. He denied that air would have gotten into the area of the explosion after the glass doors were broken. He said that there was a solid metal door there and once it was opened there was an explosion. He was unable to recall the location of this door. He denied that the conflagration resulted from the wooden floor falling in. He pointed out that the fire exploded outwards causing persons on the scene to flee. He said the floor on the other hand fell inwards.

66. In his witness statement he described seeing a grilled door beside the 2nd shutter, which was the entrance to the building. He described it as metal sheeting with grilled bars fixed onto it facing the street.

67. He recalled that Mr. Pearson did arrive with a set of keys but it was the wrong set, then a lady went away for some keys and returned with them. He was unable to recall where those keys were to open. However, in his witness statement he noted that they attempted to open the grill with the keys and succeeded after a long time. At that time the fire was still raging in the area of the second shutter. He stated that after the grill door was opened they were unable to enter immediately because the back draft occurred.

68. He said that after the back draft there were thick heavy smoke but the men continued to fight the fire. Other units were on the scene. There was a massive blaze after the back draft. It began spreading to Temple Lane and had to be contained. Units were deployed all around. He was later relieved by other officers.

69. Sergeant Lawrence Campbell, in his evidence, said that in 1997 he had by then, the experience of fighting over 100 fires, having joined the brigade in 1990. At the time of the fire he was a Lance Corporal. He said that when he arrived at the premises one other fire unit was present fighting the fire. He assisted with the fire fighting until he was injured and was taken to hospital. He arrived on the scene about 8:30-9p.m. He was assigned to unit 45. Unit 45 was a water unit and supplied water to other units. When he arrived the other unit on the scene was unit 35.

70. He recalled seeing no fire coming from the building when he arrived. There was however some smoke. He could not recall if there were any shutters opened or any ladder on the building or any water being poured on the upper floor of the building when he arrived. Neither did he recall seeing any one

trying to open any shutters to the building. However, he said fire fighting was in progress on the ground floor.

71. He said he walked around to ascertain where assistance was needed and started fighting the fire. He said he relieved someone from a jet who was already applying water to the fire. That jet he said was focused somewhere on the ground floor. He was unable to say what the other fire men were doing at that time.

72. He said that unit 82 arrived with breathing apparatus. He said that when he entered the building there was a lot of heat and smoke. There was no fire. In his witness statement he said he could not pass a particular part of the ground floor due to the magnitude of heat and smoke. He was wearing the breathing apparatus. He said the water cleared the smoke on the ground floor temporarily. He could not now recall what he saw but he formed the view that they required deeper penetration into the building. His evidence was that they were in the ground floor but not at the seat of the fire.

73. He told the court that he then elected to leave the ground floor and go upstairs. He said he had applied water to the ground floor for about 15 to 30 minutes then decided to go upstairs. Someone remained downstairs still applying water. He said a ladder was already there. He climbed up the ladder. He went through a window though he could not recall if he broke it or if it was already opened. He entered between 8-9 pm. He did not apply water upstairs and no fire was up there. However, the first floor was filled with smoke. He was unable to say whether upstairs was wet or dry at this time.

74. He said that whilst he was upstairs he saw a closed door which he assumed led to a stair way. He opened the door and looked but couldn't see if there was any flooring there. He said immediately he opened it he saw a gush of

smoke and fire coming from that direction. The smoke and fire was coming up the stairs. With it came an explosion. He had to leave quickly. With the thickness of the smoke he could not see anything.

75. He testified that this was what was called a back draft. He said that this occurred when fire was in a building and oxygen was used up. When that building is opened up there is a rush of oxygen, which reignites the fire, and you get smoke and fire. He said he had been standing where the oxygen came through the door he had opened and fed the fire. He claimed that he had not expected a back draft.

76. He said that after the back draft he climbed back down through the window. In his witness statement he said that back downstairs he relieved a firefighter with a large jet who had no breathing apparatus. He was then able to advance into the building to a point where he was surrounded by glass. He said he was unable to see but used the jet to clear the smoke. He was still not able to locate an entry. He then retreated to replenish his breathing apparatus. He recalled ending up in a jewelry store but does not know how. He fought the fire in that area with the jet until he stepped on glass and his firefighting ended. He left for hospital. He was approximately four hours on the scene. He left minutes to 1 a.m.

77. Denroy Lewis was at the time a fire fighter and was at the rank of a senior deputy superintendent. He is now retired. He gave a witness statement in this matter. His evidence was that he arrived on the scene late. It could have been after 10 p.m. He left in the early morning.

78. In his witness statement he outlined the protocol which governed the actions of firemen at the scene of a fire. He stated that when firemen arrived at the scene of a fire an assessment is made to determine the seat of the fire and the methodology to be used in reaching the fire and extinguishing it. He stated

that the assessment and determination of methodology is simultaneous and are then put into operation. This methodology may change as the situation evolved. He said that "firemanship" requires determining where to place the men to work to attack the fire bearing in mind their safety.

79. Retired Assistant Commissioner Herbert Hall, in his witness statement, outlined the protocol with respect to leadership when there was a major fire. The level of leadership at the scene of a fire may change during the course of the fire. The officer responding with the first unit on the scene was in charge. When or if a senior officer in rank arrived that officer would take over command. The officer in charge was responsible for making the decisions in relation to fighting the fire.

80. On October 22, 1997, he went on the scene and declared himself satisfied with the actions of the firemen. He stated that he saw several units at strategic points fighting the fire. He noted that his men had difficulty getting access to the building due to the many padlocked grills. He observed parts of the building burnt and the fire extinguished. He stated that he also observed other areas that were not burnt but were water soaked.

81. On being cross–examined he could not recall what time he arrived on the scene. On his arrival he saw several fire units on the scene; he saw 6 units. He saw pad-locked grills; Denroy Lewis was already on the scene. He saw persons trying to get through the grills. He walked around and observed that the fire fighters were unable to get a good strategy or a good fire-fighting angle to get to the seat of the fire.

82. He said he entered a part of the building that was not padlocked and was accessible. He noted that the building was compartmentalized and some areas were not easily accessible. The shutters were up having been chopped through to make entry for the jet of water. He took command and remained

in command until the fire was controlled to a satisfactory level, at which time he left the scene.

The Damage

83. Happily there were no personal injuries in this case but the building was gutted. The claimant subjected the court to the evidence of Mr. Gordon Langford, a professional chartered valuation surveyor of the firm of Langford and Brown Jamaica Limited. They handle valuation sales and property consulting. He is a member of the Royal Institute of Chartered Surveyors. He is not a quantity surveyor.

84. A valuation was done of the premises and reduced to writing in the form of a report. The valuation was done of the property in its burnt out state. However, the valuation surveyor proclaimed his ability to comment on the value of the property prior to the fire. He did so and anticipated the building to have been valued at $20 million dollars free hold interest prior to the fire. Rental interest he estimated to be $2.2 million dollars per annum. The value of the building post fire he estimated to be $9.5 million dollars.

The Submissions

Breach of Statutory Duty

85. The functions of the Jamaica Fire Brigade are expressed in section 5 of the Fire Brigade Act (the Act). The section provides:-

5.1. It shall be the duty of the Brigade to protect life and property in the case of a fire or other disaster and, without prejudice to the generality of the foregoing, such duty shall include-

a. extinguishing fires;

b. protecting life and property endangered by fire or other disaster;

c. obtaining information with regard to potential risks from fire or other disaster;

d. *inspecting specified buildings to ensure that reasonable steps are taken for the prevention of fire and for protection against the dangers of fire or other disaster;*

e. *making arrangements for ensuring that reasonable steps are taken to prevent or mitigate loss or injury arising from fire or any other disaster.*

86. The Defendants deny any liability in respect of this fire and the subsequent damage there from. They rely not only on the facts but also on the protection afforded by section 15 (1) of the Fire Brigade Act which provides:

"No member of the Brigade, or member of the Jamaica Defence force on duty pursuant to section 14 (1), or person under the command of the officer in charge, acting bona-fide in carrying out the functions of the Brigade under the Act shall be liable for any damage or for any act done in carrying out such functions under this act." (My emphasis).

87. The Act goes on to state in subsection 2 that:

"Any damage occasioned by any member of the Brigade ....or by any person under the command of the officer in charge in the exercise of the powers conferred under this Act in the case of a fire or other disaster, shall be deemed to be damaged by fire or other disaster within the meaning of policy of insurance against fire or other disaster, as the case may be."

88. The claimants submitted that the protection afforded by section 15 is not absolute. It does not protect the members of the brigade from liability under the Act, if in carrying out their duties they acted other than bona fide. Neither does it protect them from acting negligently in the discharge of their duties, see ***Bullard v Croydon Hospital Group Management Committee & Another*** (1953) 1 Q B 511. They are however not liable for any act or damage resulting from their actions done bona-fide in the discharge of their duties. I take the view from the wording of the section that any claim arising

from any damage done as a result of the bona-fide actions of the brigade in carrying out their functions under the Act must be made against the insurance company of the claimant by virtue of section 5 (2).

89. The claimants pleaded breach of statutory duty and the defendants did indeed submit on this aspect of the law. The issue that arose under this head was whether the claimants had a right to bring a civil action against the fire brigade for breach of statutory duty.

90. The defendants cited *General Engineering Services Limited v K.S.A.C* (1986) 23 J. L. R. 357 and quoted the dictum of White J.A. to wit:

> *"..there is no absolute rule regarding liability for breach of statutory duty, but the existence of statutory duty will depend on the purview of the legislation, which will also determine whether any private individual may sue where he suffers damage beyond what others may have suffered as a result of the breach."*

91. The case of the *Attorney General v St. Ives Regional District Council* (1959) 3 ALL ER 371 is also instructive. The dictum of Lord Justice Smith in *Grouse v Lord Wimbourne* (1898) 2 Q.B. 402 at 407 was cited with approval in the *Attorney General v St. Ives*. It stated:

> *"If a statutory duty is imposed and no remedy by way of penalty or otherwise is prescribed for its breach generally, a right of civil action accrues to the person who is damnified by the breach. For if it were not so, the statute would be but a pious aspiration."*

92. The defendants submitted that where penalties are provided for neglect of duty or failure or (willful) refusal to perform statutory duties there is no right to individuals to maintain a civil claim for such a breach.

93. They pointed to the penalties provided for in the Regulations to the Act. The relevant parts of the Regulations outlining the actions considered to be a

breach of the statutory duty for the fire brigade is to be found in Regulation 33. It provides:-

33(1):- A member commits a disciplinary offence if as respects the brigade he is guilty of –

(a)……

(b)……

(c)……

(d) neglect of duty, that is to say, if he-

(i) neglects or without good and sufficient cause omits, promptly and diligently to attend to or carry out anything which is his duty; or

(ii) idles or gossips while on duty;

94. Regulations 37 (3) sets out the penalties for a breach of statutory duty:

37(3):- If the appropriate superior authority determines that the accused is guilty of a disciplinary act, it shall so find, and may sentence the accused to one of the following punishments, that is to say –

a. deprivation of a good conduct chevron;

b. a fine of a sum not exceeding three (3) days pay;

c. severe reprimand

d. reprimand

95. The defence argued that, there being in existence penalty provisions for statutory breaches of the Act by firemen, and further, there being no provision in either the Act or the Regulations to the Act that specifically granted a civil right to individuals to maintain a claim against the fire brigade for breaches of their statutory duty, the claimants could not maintain such an action.

96. It was submitted that section 5 of the Act imposed a general public duty on firemen that there existed no private legislative arrangement that would allow an aggrieved party a private entitlement to seek a remedy. As such it was submitted that the claimants would not be able to prove an entitlement to such a remedy in the (civil) courts.

97. The claimants, no doubt anticipating an argument from the defendants that no claim for breach of statutory duty arose from a breach of the Fire Brigade Act, cited the case of ***Capital and Counties plc v Hampshire CC and others*** (1997) 2 AER 865 (the ***Hampshire*** case), which is in fact in support of the defendants' contention. That case decided that no action would lie for breach of statutory duty under the Fire Services Act, 1947, UK, because that Act was designed to protect the public at large and not a particular class or section of it. Whilst seeming to concede this point, the claimants also noted that the said case recognized that even where there is no private right to bring an action for breach of statutory duty, an action could however, lie for common law negligence.

Negligence

98. The claimants submitted that section 15 of the Fire Brigade Act was irrelevant to their claim. In their view the section only protected the individual firemen from suit. It was their claim that they had not sued any individual firemen but instead their employers had been sued for vicariously liability.

99. The fallacy in this first argument by the claimant is however, patently and immediately obvious. If the individual employee is not liable then the employer cannot be vicariously responsible for something his employee is not liable for, whether the individual employee is sued or not. If individual

firemen were not in breach of their statutory duty it would be difficult to see how the employers could so vicariously be.

100. The claimants also submitted that section 15 only applied where members of the brigade had acted "bona-fide" in the execution of their duties. It was respectfully submitted that conduct which was negligent and/or malicious was not bona-fide.

101. The claimants further argued that bona-fides did not only refer to honesty in the sense of not having a "guilty" mind, but rather it was to be interpreted in a broader sense of making a real effort to carry out ones duty.

102. They submitted that inaction could not therefore amount to a bona-fide carrying out of one's duty, because in such a case, no effort would have been made to carry out the duty. In that regard counsel for the claimants cited several authorities:

a. *Pendlebury v Colonial Mutual Life Assurance Sty* (1912) 13 C.L.R. 676, a case from Australia wherein Griffiths C.J. decided that a reckless or willful failure to properly exercise the mortgagee's power of sale could amount to bad faith.

b. *Bullard v Croydon Hospital Group Management Committee* (1953) 1 Q B 511, where the court decided that the words "and without negligence" ought to be implied after the words "bona fide" in a statute which in section 265 carried the following words:-

> *"if the matter or thing was done or the contract entered into bona fide for the purpose of executing the Act..."*

c. *Burgoine v Waltham Forest L B C* (1997) BC C 347, where the case of *Bullard* was applied and it was decided that the statutory protection for bona fide acts done could not lead to a

non-suit as the insolvency proceedings involved claims akin to a claim in negligence.

103. The claimants submitted that section 15 could not assist the defendants, as on the true construction of the Act, the firemen were not carrying out their duty to fight the fire.

104. It was also submitted that a breach of common law duty of care could occur where the action of the fire brigade or its members resulted in losses: For example, prematurely turning off the sprinkle system as in the *Hampshire case* (p 880 (a) & (e) to (f)). It was further pointed out that this principle had been applied to other emergency services such as the ambulance service and the police force; citing *Kent v Griffiths* (2000) 2 ALL ER 474, where, by the negligent conduct of members of the emergency service (an ambulance failing to arrive within a reasonable time), their actions resulted in injury or damage.

105. In Halsbury's Laws of England 4th edition reissue vol. 18 (2) paragraph 4, the learned editors described the way in which liability for negligence may arise in the case of the fire brigade thus:-

> *"A fire authority is vicariously liable for acts of negligence committed by members of its fire brigade acting in the course of and for the purposes of their duties. A fire Brigade does not owe a duty of care to the owner of a building merely by virtue of attending at the fire ground and fighting the fire, but where the fire brigade, by its own actions, creates or increases the risk of the danger which causes damage, it is liable in negligence in respect of that damage, unless that damage would have occurred in any event."*

106. The defendants submitted that the duty imposed on the firemen at common law was largely operational, citing Lord Wilberforce in the House of Lords in *Anns v London Borough of Merton* (1977) 2 ALL ER 492, at page 500. They noted that the duties under section 5 of the Act are largely general in

nature, the Act not specifying how those duties were to be performed. This, therefore, gave the firemen a discretion as to the manner in which they could carry out their duty. I would add here that this is so, as long as in so doing they acted bona fide.

107. The defendants in their submissions therefore, in my view, accepted that the fire brigade was under a common law duty of care to ensure that their actions did not create or increase the risk of harm.

108. The defendants also referred to Lord Wilberforce in *Anns v Merton* at page 503, where he said:-

> *"for a civil action based on negligence at common law to succeed, there must be acts or omissions taken outside the limits of the delegated discretion."*

109. The defence reiterated that it was within the discretion of the fire fighters to choose how they undertook the challenge of extinguishing the fire. The defendants noted that these firemen, in discharging their duties, did not act outside the discretion granted to them under the Act. They submitted that the fire brigade did not cause the fire; they endeavored to extinguish the fire and in so doing embarked on an execution of their power to fight fires.

110. In support of this contention, they cited the judgment of Viscount Simon L.C. in *East Suffolk Rivers Catchments Board v Kent and Another* (1941) A.C. 74 (HL). In that case the learned Law Lord said:

> *"In order that the respondents should succeed in this action, it is necessary that they should establish, not only that the appellants were wanting in care and skill when exercising their statutory powers, but that they inflicted injury and loss upon the respondents by their negligence....In the present case the damage done by the flooding was not due to the exercise of the appellants statutory powers at all. It was due to the forces of nature which the appellants, albeit unskillfully, were endeavouring to counter act.... These considerations lead to the conclusion that the respondents'*

claim is ill-founded. They have suffered damage by the flooding of their land during four months or more. They seek to recover compensation from the appellants for all of the loss except the first fortnight. But the appellants did not cause the loss: it was caused by the operations of nature which the appellants were endeavouring, not very successfully to counteract."

111. The defendants submitted that the fire brigade, in the execution of their duty to fight the fire, owed only a duty to the claimants and to any member of the public in general, not to add to the damages which that person would have suffered, in any event.

112. The defendants further submitted finally, that the claimants would be "hardpressed" to show that the damage which they suffered was a result of the actions of the fire brigade.

The Cases

113. In *Bullard v Croydon Hospital Group Management Committee and Another* (1953) 1 ALL E R 596, the head note reads:

"An infant died of peritonitis following an operation in a hospital. In an action for negligence the committee contended that an action did not lie against them by reason of the National Health Service Act 1946 s. 72."

It was held that the first defendant was not absolved from liability under s. 72 and s. 265 of the respective Acts.

114. The said case is cited in (1953) 1 QB 511, that head note reads:

"Section 72 of the National Health Service Act, 1946 (which applies section 265 of the Public health Act, 1875, and adds to the number of authorities therein specified, inter alia, a hospital management committee), does not protect such committee or any person acting under its direction, though acting bona fide for the purpose of executing the National Health Service Act, from liability for an act done negligently by or on behalf of the committee which results in loss or injury to any person."

115. Lord Parker in his judgment referred to s. 265 of the Public Health Act which states as far as is relevant that:

> *"No matter or thing done, and no contract entered into by any local authority, or joint board or port sanitary authority....shall, if the matter or thing were done or the contract were entered into bona fide.. subject them or any of them personally to any action liability claim".*

The Judge then said:

> ***"But it does seem to me that the true view may well be that one must read, after "bona fide" the words "and without negligence".***

116. After opining that s. 265 should be read with s. 300 (the compensation section), the learned judge went on to declare that the effect of the two sections was that:

> ***"Where an act is done in pursuance of the statutory powers and is done bona fide and I would add, without negligence then no person whose property, for instance, may be injured or damaged can bring suit but must depend upon the compensation to be awarded under the provisions of the later section."***

117. It would appear therefore, that in order to avail themselves of the immunity afforded by the Act, the members of the fire brigade must also have carried out their duty not only bona fide in good faith, but also without recklessness or negligence. It seems to me therefore, that the members of the fire brigade may be guilty of (a) mala fides, (b) acting ultra vires and (c) acting negligently while carrying out their bona fide functions under the Act.

118. The upshot of it all is that, where the members of the fire brigade carry out there duties under the Act bona fide and without negligence they are not liable to any one who suffers injury, loss or damage as a result. Those who suffer damage must instead seek compensation from their insurers.

119. In *Burgoine v Waltham Forest LBC* (1997) BCC 347, the court dealt with the effect of a contractual indemnity under s. 265 of the Public Health Act 1895. The court found that the contractual indemnity did not extend to Directors' activities that were ultra vires the statute. It also found that the statutory protection under s. 265 of the Public Health Act did not extend to insolvency proceedings which , though they could not be characterized as negligence, were based on allegations sufficiently close to negligence to be and were excluded from the ambit of s. 265.

120. In that case Justice Neuberger stated his opinion thus:

> *"If it be an act wholly beyond the statute, as an injury done mala fide, those persons who did it or ordered it to be done should have been sued individually. If it be within the statute, that is, an act bona fide intended to be properly done under the powers of the statute, but so improperly done as wrongfully to injure the plaintiffs, the only legal remedy of the plaintiffs is to obtain full compensation under (another statutory provision)..For, if such an injury be done as is last described, it is expressly declared by Section 140 that no action shall be maintainable against the local board, or any individual of it, for any act done bona fide for the purpose of executing the act."*

121. To make an employer vicariously liable for the intentional wrongdoing of its employee, a claimant must show that on a balance of probability, there exists a strong connection between what the employer was asking the employee to do and the wrongful act. It is questionable therefore, whether vicarious liability exists for breach of statutory duty, for if the act complained of is ultra vires the statute, the injured party must sue the individual personally and if the act is bona fide, there is statutory immunity.

122. In the *Hampshire case,* the Court of Appeal heard consolidated appeals in claims against the Fire Brigade. The first appeal, involving *Capital and Counties plc. v Hampshire County Council and others and Digital*

Equipment Co. Ltd. v Hampshire County Council and others, was against a judgment in favour of the plaintiff for damages for negligence in respect of the fire authority's decision to switch off the building sprinkler system during a fire.

123. The second case, *John Munroe (Acrylics Ltd v London Fire and Civil Defence Authority and others* (the *London Fire* case), involved an appeal by the plaintiff against a decision in favour of the defendants, which denied damages for negligence and held that the defendants did not owe a duty of care to the plaintiff in respect of its attendance at a fire at the plaintiff's premises.

124. The third case, *Church of Jesus Christ of Latter Day Saints (Great Britain) v West Yorkshire Fire* (*West Yorkshire* case) involved the plaintiff church appealing from a decision of the first instance judge, striking out its claim against the defendant. The claim was one of negligence and breach of statutory duty under s. 13 of the Fire Services Act 1947, in relation to a fire at the plaintiff's church.

125. The issues raised by the consolidated appeals, were:

(a) whether, and if so in what circumstances a fire brigade owes a duty of care to the owner or occupier of premises, which were damaged or destroyed by fire;

(b) whether the fire service was immune from liability for acts of negligence under s. 30 (1) of the 1947 Act; and

(c) whether s. 13 gave rise to a statutory duty, breach of which afforded a personal remedy to a party injured as a result of such breach.

126. The Court of Appeal dismissed the appeals in all three cases. In the first case, the court held that there being a relationship of insufficient proximity, a fire brigade did not owe a duty of care to the owner or occupier of

premises simply by turning up to the scene of a fire and fighting the fire. However, if, by their own actions, the fire brigade increased the risk or danger which caused damage to the plaintiff, they would be liable in negligence in respect of that damage, unless they could show that the damage would have occurred in any event. In the second and third cases the court found that there was insufficient proximity to establish a duty of care, with the result that the defendants were held not liable for negligence with respect to the fire damage.

127. The Court Appeal considered section 30 of the 1947 Act and determined that it did not expressly confer on the fire authority the power or duty to fight fires but that implicit in the wording of s. 30 (1) (2) was the existence of such a power. The relevant statutory provisions of the UK 1947 Act are:

> Provision of Fire Services.-(1) *It shall be the duty of every fire authority in great Britain to make provision for fire-fighting purposes..*

"Fire-fighting purposes" means the purposes of the extinction of fires and the protection of life and property in case of fire; (s 38) (1).

> S.13.-*A fire authority shall take all reasonable measures for ensuring the provision of an adequate supply of water, and for securing that it will be available for use, in case of fire.*

> Powers of firemen and police in extinguishing fires.-s.30(1) *Any member of a fire brigade maintained in pursuance of this Act who is on duty, any member of any other fire brigade who is acting in pursuance of any arrangements made under this Act, or any constable, may enter and if necessary break into any premises or place in which a fire has or is reasonably believed to have broken out, or any premises or place in which it is necessary to enter for the purposes of extinguishing a fire or of protecting the premises or place from acts done for fighting-purposes, without the consent of the owner or occupier thereof, and may do all such things as he may deem necessary for extinguishing the fire or for protecting from fire...*

128. In this case, Stuart-Smith LJ accepted that s. 1 (1) of the 1947 Act imposed no duty on the fire services, the breach of which was actionable in private law. He held it plain that the section laid out target duties, breach of which was not actionable in private law. He then went on to consider whether in the absence of a statutory duty, a statutory power to act (under s. 30) could be converted to a common law duty to exercise that power.

129. In considering also whether there was a common law duty on the fire brigade to answer calls to fires or take reasonable care to do so, Stuart-Smith LJ expressed the view that based on the authority of ***Alexandrou v Oxford*** (1993) 4 All ER 328, the brigade is not under a duty at common law to answer the call for help and are not under a duty to take care to do so. If therefore they fail to turn up or fail to turn up in time, they are not liable.

130. Stuart-Smith LJ went on to consider whether the brigade owed a duty of care to the owners or occupiers of premises once they have arrived at the scene of the fire and started to fight the fire. In assessing the forseeability of damage arising from the negligent performance of the relevant authority Stuart-Smith LJ said:

> *"The peculiarity of fire brigades, together with other rescue services, such as ambulance or coastal rescue and protective services such as the police, is that they do not as a rule create the danger which causes injury to the plaintiff or loss to his property. For the most part they act in the context of a danger already created and damage already caused, whether by the forces of nature, or acts of some third party or even of the plaintiff himself, and whether those acts are criminal, negligent or non-culpable. But where the rescue/protective service itself by negligence creates the danger which caused the plaintiff's injury there is no doubt in our judgment the plaintiff can recover.*

131. He referred to the case of *East Suffolk Rivers Catchment Board v Kent* (1940) 4 ALL ER 527 and approved this statement made by Viscount Simon in the House of Lords:

> *"It would be misapplied if it were supposed to support the proposition that a public body, which owes no duty to render any service, may become liable at the suit of an individual, if once it takes it upon itself to render some service, for failing to render reasonable adequate and efficient service. On the other hand, if the public body by its unskilled intervention created new dangers or traps, it would be liable for its negligence to those who suffered thereby."*

132. In that case the House of Lords held that where a statutory authority embarks upon the execution of the power to do work, the only duty owed to a member of the public is not to add to the damages which that person might have suffered had the authority not interfered.

133. The Court of Appeal in the consolidated appeals also gave due consideration to the question of proximity. Rejecting that a relationship of proximity existed simply from the fire brigade turning up to fight the fire, the Court of Appeal found that a fire brigade does not enter into a sufficiently proximate relationship with the owner or occupier of premises to come under a duty of care merely by attending at the fire ground and fighting the fire; this was so even if the senior officer actually assumes control of the fire fighting operations.

134. It is to be noted that ***Kent v Griffiths***, accepts that the case of the fire brigade services was distinguishable from that of the ambulance services, on the basis that the duty to fight fires remains throughout a duty owed to the public at large. Whereas, once the call to the ambulance service is accepted, the duty is focused on a named individual whom it agrees to take to the

hospital and who in dependence on that agreement, abandons all other alternate forms of transportation to the hospital.

135. The Court of Appeal also considered whether there should be a general immunity as a matter of public policy. The court considered cases where as a matter of policy it was considered undesirable to impose a duty of care. The court held that there were no convincing arguments to apply to fire brigades wholesale immunity from a duty of care. The court instead recognized that there were examples of cases where liability was imposed where in the course of carrying out their duties, the functionaries themselves had created a danger. The ***Hampshire*** case was held to be one such.

136. As for the question of statutory immunity, the submission before the Court of Appeal by the defendants was that s. 30 of the act created a statutory defence against liability for negligence or breach of statutory duty by the fire brigade in extinguishing a fire. It was submitted that liability for activities which caused damage at the scene, was limited to cases of deliberate bad faith. There was however, no question of bad faith in any of the three cases on appeal.

137. The learned judge in dealing with this question said:

> "*Liability of a public authority in tort may be restricted or avoided by appropriate statutory language. Section 30 itself provides a clear example of language which authorizes what would otherwise be a tortuous interference with property.*"

The section takes away a right of action that would otherwise exist. Fire fighters cannot be held liable for trespass as a result of entry onto land for reason of fighting fire. They cannot be held liable for damage to property done by them bona fide reasonably necessary for fighting the fire. There is also no entitlement to compensation.

138. The court however, recognized that a public body is normally expected to use its statutory powers with reasonable care. In looking at s. 30 the Court of Appeal found that there was nothing in it which permitted the brigade's extensive powers to be exercised negligently. In the view of the court express words were required in the statute to exclude liability for negligence. The court of appeal found that there was no implied immunity in the language of s.30 from proceedings in negligence.

139. The final question the Court of Appeal had to wrestle with concerned whether any breach of statutory duty under s. 13 of the Act gave rise to a private right to sue. It was generally accepted that there could be no private right of action where the section provided for a duty for the protection of a general class of persons. The court was guided by the restatement of the principle by Lord Browne-Wilkinson in *X and ors (minors) v Bedfordshire CC* (1995) 3 All E R 353, at 364-365, where he stated:

> "*The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that parliament intended to confer on members of that class a private right of action for breach of the duty.*"

140. In *General Engineering Services Ltd v Kingston and St. Andrew Corporation*, (1986) 23 JLR 357, the plaintiff brought an action against the K.S.A.C (under a statute now repealed and replaced by the current Act) for breach of statutory duty to extinguish fires and protect property and for negligence, on the grounds that the Corporation was vicariously liable for the negligent acts of the firemen. The trial judge found in favour of the

Corporation. The plaintiff appealed. In the judgment of Carey, J.A. he held that:

I. The fire service was an arm of the KSAC and the relationship was that of employer employee.

II. The KSAC had a statutory duty to extinguish fires and protect property but liability was not absolute, they do not guarantee to extinguish fire so that no harm results.

III. The KSAC officials acted promptly and reasonably (in the face of industrial action by fire men) by alerting the army as early as October 12. They were therefore, not in breach of statutory duty. (Per Wright and White, JJ. A.): The scheme and intendment of the Act was not to make the KSAC substantially responsible for the Fire Brigade but to constitute the Fire Brigade as an independent body, independent of any master servant relationship. The statutory duty to extinguish fire was therefore imposed on the Fire Brigade; no such duty was imposed on the KSAC.

IV. Where negligence is alleged against a council then liability might arise even if the council is acting pursuant to statutory power conferred on it and negligence might emanate from a delegated function.

V. For a civil action based on common law negligence involving a discretion to succeed, the acts or omission of the council must be outside the delegated discretion amounting to an abuse of power. In the present case the KSAC had a discretion to call the JDF. The precise time to do so must be left to their discretion.

VI. The firemen were in breach of their contract of employment and were not acting in the course of their employment therefore the KSAC was not vicariously liable for their wrongful acts.

141. His Lordship Mr. Justice Carey, in considering whether a private right exists to sue for breach of statutory duty, looked at the various authorities including *Clegg, Parkinson and Co. v Earby Gas Company* (1896) 1 Q.B. 592; *A.G. v St. Ives R.D.C* (1959) 3 ALL ER 371; *Phillips v Britannia Hygienic Laundry Co.* (1923) 1 KB 832, *Groves v Lord Winbourne* (1898) 2 QB 402 and *Cutler v Wandsworth Stadium Ltd.* (1949) 1 All ER 544.

142. He considered the submission of counsel that no civil action lay for breach of statutory duty because the statute provided sanctions for breaches of duties it imposed, and a regime for disciplining members of the fire service who fail to carry out their duties. He also considered the case of *Clegg, Parkinson and Co*, where Wills J at page 594 said;

> *"In my opinion this is one of these cases in which the principle applies, that, where a duty is created by statute which affects the public as the public, the proper remedy if the duty is not performed is to indict or take proceedings provided by the statute."*

143. His Lordship Mr. Justice Carey pointed out that in the Act under consideration there were no penal sanctions for failure to perform duties, although there were disciplinary procedures for breaches of the regulations. He then opined that the principle did not apply to the Act. He expressed this formulation:

> *"As I understand the principle relied upon by him, the injured party is debarred from instituting proceedings where the statute under which the defendant acts, provides a remedy or a penalty. It follows therefore that if no remedy is provided for the breach of the duty imposed, then a right of action accrues to the injured party."*

144. Considering the question in whose interest the Act was passed, the learned judge concluded that the answer lay in the Act itself, whether any penalty for breach of statutory duty is therein provided. Quoting from Lord Simonds statement in ***Cutler v Wandsworth Stadium*** that a general right of civil action accrues to the person who is "damnified" by the breach where no remedy by way of penalty or otherwise is prescribed in the Act, His Lordship held that the duty to extinguish fires in the corporate area is imposed on an arm of the KSAC and if breach of statutory duty or negligence is shown, the KSAC was liable.

145. He however, agreed that the duty was not an absolute duty and whilst they must do their best to put out the fire, if despite their best efforts damage is caused they could not be held liable. Pointing to the common law duty of care, the learned judge said that the duty is to make efforts to put out the fire, respond to calls with reasonable dispatch and not to dawdle on the way to fires. He found there was a general duty to act efficiently in the discharge of their duties.

146. White, J.A. in examining s. 13 of the Act (now s. 15) recognized that the section exonerated members of the brigade from liability for damages when exercising their powers under the Act. They would not be in breach of their statutory duty whilst acting bona fide under the Act.

147. In considering whether a private law right to remedies exist under the Act, he considered the judgment of Lord Denning in ***Meade v Haringey Council*** (1979) 1 All ER 1016. He noted however, that the particular statute had to be interpreted to determine the right to sue in the event of a breach. He pointed to the provisions in the statute for penalties for breaches of the Act by firemen and determined that it was incumbent on the plaintiff to show on a balance of probabilities that, as a person aggrieved by the alleged breach,

he is entitled to seek a remedy in court, notwithstanding the penalty provisions in the Act.

148. He cited the statement of Lord Cairne L.C in *Atkinson v Newcastle Waterworks Co. 2 Ex. D441 (1874-1880) at p 760*, where he said:

> *"Apart from authority, I should be of the opinion that the scheme of the Act and its true construction was not to create a duty which should be the subject of an action by any individual who might by s. 43, which imposes penalties in the case of neglect or refusal.."*

Lord Cairne continued at p. 761 to note his disagreement with:

> *"the broad general statement that wherever there is a statutory duty imposed, and any person is injured by the non-performance of the duty an action can be maintained. It must depend upon the particular statute and where it is like a private legislative bargain, into which the undertakers of the works have entered, it differs from the case where a general public duty is imposed."*

149. From this White, J.A. concluded that there was no absolute rule regarding liability for breach of statutory duty but the existence of such a liability will depend upon the terms of the particular statute. The purview of the particular statutory provisions will also determine whether any private individual may sue for damages resulting from the statutory breach.

150. Wright, J.A. in his judgment, doubted whether there was a right of action under the Act, even though there was no penal provision, instead pointing to the criminal sanctions under section 9 of the Labour Relations and Industrial disputes Act. He left the question open however, pointing to the fact that the protection under s.13 was not comprehensive but was only in respect of "bona fide" acts.

151. As to the two modes of construing this principle alluded to in the cases, I unequivocally and unqualifiedly acquiesce to the mode of strict construction.

Such a private right of action must be a right granted in the statute in the plainest and most unqualified terms.

152. It must be clearly stated that I respectfully agree with Mr. Carey and do hold that s. 5 of the Fire Brigade Act does confer a duty on the fire brigade to extinguish fires. Although the section does not clearly state how that duty is to be performed, the actual manner of performance being left up to the discretion of the brigade, it nevertheless imposes a duty to act in the case of fires. However, in my judgment, although section 5 imposes a statutory duty on the fire brigade to fight fires, this is a discretionary target duty for which the failure to act does not impose any liability on the brigade. It merely indicates the duties, powers and functions, the reason, so to speak, for the existence of the brigade.

153. In my view, there is no proximate relationship between the brigade and any particular class of persons to whom the brigade would owe a duty of care by virtue of s. 5. It is a general duty owed to the public at large. The section does not provide a guarantee to any particular person or class of persons to extinguish fires.

154. The fire brigade is entrusted with a mixture of functions both involving duties and mere powers. The duties of the brigade are owed to the general public to extinguish fires. This duty may involve a clash of interest between owners or occupiers of premises at any one time. See ***Kent v Griffiths and Others*** (2000) 2 All ER 474. In that case the Court of Appeal in accepting that the primary duty of the police was to the public at large to prevent crime, also accepted that to impose a liability on the police for the benefit of one individual member of the public to prevent a crime could interfere with that primary duty. It recognized that policy decisions may have to be made

involving conflicts between the interest of different members of or sections of the public.

155. It may be necessary to cause damage to one person's property in order to extinguish fire at another's. It may also be necessary to set fire to premises or several premises in order to make a fire break to prevent a spread to adjoining properties or a whole district. In such a circumstance, the question would again arise as to which owner or occupant would a duty be owed.

156. Mr. Justice Carey, in ***General Engineering Services***, stated the statutory duty of the brigade in general terms without reference to forseeability or proximity. He did not express in any definitive sense the nature of the statutory duty. It was expressed as the duty to do their best to put out fires. The learned Judge of appeal did not say that such a duty is owed to the individual owner or occupier of premises in danger of fire or to any particular class of persons.

157. Assuming the nature of the statutory duty is the same as that expressed as the common law duty by his Lordship Mr. Justice Carey, the question arises as to whom such a duty is owed. The answer must be to the public at large and not to any particular class of it. Nothing in the Act, for instance, prevents the owner or occupier of a building from using self-help to extinguish a fire until the brigade arrives on the scene. Borrowing the words of White J.A. p.377 (C), while it is true that the task of extinguishing fires must be performed with due care and efficiency it has not been shown how that expectation could translate into concrete liability.

Principles Applicable to this Case

158. There exists a statutory duty under the Act to extinguish fires. This is not an absolute duty and does not provide a guarantee to extinguish fires so that no

damage results. It is not a duty owed to any particular owner or occupier of premises but to the public at large.

159. Members of the brigade are immune from suit for acts carried out bona fide in exercise of their powers under the Act. Section 15 takes away any right of action which would normally exist for trespass and damage to property as a result of entry upon any land for the purpose of fighting fires. A member of the brigade cannot be held liable for any damage done to property bona fide reasonably necessary to fight the fire.

160. Section 15 of the Act provides immunity for acts done bona fide in pursuance of the statutory duties under the Act. Liability is limited to deliberate acts of bad faith or misfeasance and a claimant has to prove that the fire brigade acted with mala fides or in bad faith.

161. The question whether there is a private right of action under the Act is a matter of interpretation. The Act was created for the benefit of the public at large, granting a mixture of duties and powers to the members and making provisions for disciplinary sanctions for breaches. There being imposed penalties for neglect or refusal to act no private right of action can be maintained.

162. The burden is on a claimant to show that a private right of action exists for breach of statutory duty under the Act.

163. Liability in negligence may occur even where the brigade is bona fide exercising a statutory duty or power.

164. The words of the statute do not clearly provide any statutory immunity for negligence against the members of the brigade. Section 15 does not provide immunity for negligent acts which results in injury or loss to any person.

165. Liability for negligence may still lie against the fire brigade even if its members were acting bona fide.

166. A statutory duty may be converted to a common law duty to act.

167. At common law a fire brigade does not owe a duty of care to the owner or occupier of a building merely by virtue of attending the scene of and fighting the fire; but a duty of care arises in the brigade which attends the scene of the fire, to, while attempting to extinguish the fire, avoid, by its own actions, creating new risks or adding to the existing danger. The brigade will be liable in respect of any such damage unless it would inevitably have occurred.

Conclusion

Was the Fire Brigade in Breach of Statutory Duty?

168. In the circumstances of the case the claimants have failed to show, on a balance of probabilities, that the fire brigade was not acting bona fide in the execution of their duties. There is no evidence in this case of mala fides in the actions of the fire brigade. Neither is their evidence of a failure to act. Despite the submissions on behalf of the claimants in this regard, there is no question of breach of statutory duty or bad faith in this case.

169. In any case, in accordance with the majority view in *General Engineering Services Limited,* the claimants have failed to show on a balance of probability that section 5 of the Act was intended to confer a private right of action on a member of the public.

Did the Fire Brigade act Negligently?

170. In this case, it is clear that once the fire brigade answered the call and entered the premises of the claimant and commenced their operations, they owed a duty to act bona fide in attempting to extinguish the fire and to carry out their operations with reasonable care and avoid, by their own actions, increasing the risk of danger or creating any additional danger.

171. The test for negligence applied at first instance in the *Hampshire* case was that applied in *Bolam v Friern Hospital Management Committee* (1957) 2 All ER 116. The test in that case was stated to the jury thus:

> *"In the ordinary case which does not involve any special skill, negligence in law means this: Some failure to do some act which a reasonable man in the circumstances would do, or doing some act which a reasonable man in the circumstances would not do; and if that failure or doing of that act results in injury, then there is a cause of action.....But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."*

172. Applying the *Bolam* test in this case, the court must ask itself whether the conduct of the fire brigade that night was that of reasonably well-informed and competent firemen or whether their actions amounted to negligence. The subject of the alleged breach seem to me to be directed at the manner in which the fire brigade attempted to exercise their statutory duty to fight the fire. They in fact turned up at the fire. They in fact turned up at the fire on time and in sufficient numbers. The complaint seems to be regarding what was done or not done thereafter. As Lord Browne-Wilkinson said in *X and ors (minors) v Bedfordshire CC:*

> *"It is clear that a common law duty of care may arise in the performance of statutory functions. But a broad distinction has to be drawn between (a) cases in which it is alleged that the authority owes a duty of care in the manner in which it exercises a statutory discretion; and (b) cases in which a duty of care is alleged to arise from the manner in which the statutory duty has been implemented in practice".*

173. In this case it appears to me that we are confronted with the [illegible] Although s. 5 of the Act speaks to the duty to extinguish fires, it is an operational duty which is exercisable, in a discretionary manner. A duty of care will arise in the manner in which the duty is implemented. In exercising its operational discretion the only duty the Fire Brigade owes is a duty to not itself create or cause any further injury or damage; or not to, by its own actions, increase the risk of damage thereby causing additional loss. In such a case the Fire Brigade is liable in negligence in respect of that damage unless it would have occurred in any event.

174. It was alleged that when the Firemen arrived on the scene there was no fire evidenced by flames but there was some smoke emitting from the ground floor and visible through the first floor window. There was evidence of what had been described as a little smoke emerging from the building that witnesses claim could have been easily extinguished by water being sprayed inside the building. The claimants allege that the firemen, instead of immediately eradicating the smoke which could be clearly seen, spent hours doing nothing to actively fight the fire by dousing the smoke.

175. It was further alleged that the firemen took no steps to protect property which was in danger of the fire and actively prevented others from doing so.

176. It is clear to this court, that for the claimants to succeed they must prove the following;

a. That there was a fire;

b. That the fire brigade was called to the fire and that they attended the scene in answer to the call;

c. In attempting to extinguish the fire they acted in so negligent or reckless a manner so as to create a new or increase the existing risk

of damage over and above that which the claimants would have suffered in any event.

d. As a result the claimants suffered loss and or damage.

177. It is not sufficient for the claimants to say the members of the fire brigade did not fight the fire in a manner they would have liked or expected. To succeed the claimants must show that the actions of the fire men were so grossly wanting in the care and skill of ordinary firemen as to call into question their abilities as firemen; that it was this action which created the danger or increased the risk which resulted in their loss. This, the claimants have failed to do.

178. In ***General Engineering Services*** White J.A. at p. 392 (E) phrased it in a way that I respectfully would also wish to adopt. He said:

> ***"The fire brigade is under an obligation created by statute to carry out its duty for the benefit of the public generally. The fact that in carrying out that obligation loss was occasioned to one of the public beyond a degree which would normally have been expected, is not a matter for complaint, unless it can be shown that the manner of performance effectually reduced the usual performance of the duty and so effectively created a breach of duty in the result of that performance. In other words, it is not enough to say that this act was a deviation from the usual manner of performance."***

179. There is no evidence that the operational choices made by the firemen were as a result of a lack of care and skill. The evidence was that there was smoke seen on the ground floor and from the windows of the first floor. No fire was seen. The evidence from both sides indicated that the fire brigade attempted to locate the seat of the fire. There is no evidence that this operational approach was a result of any gross want of care and skill. The claimants' evidence was that the smoke was there for sometime with no evidence of its

origin. Operationally it cannot be said that, in trying to locate its origin, the seat of the fire so to speak, the firemen were acting negligently.

180. The claimants submitted that the seat of the fire was the ground floor, but in my view there is no evidence pointing to this with any degree of certainty. The evidence was that smoke was on the ground floor but there is no evidence pointing unequivocally to the source of the fire being on the ground floor. There was smoke seen coming from the windows of the first floor also but no fire was seen either on the ground or first floor. The blaze which eventually showed itself manifested on the first floor and not on the ground floor.

181. It is also the evidence on both sides that there was a sudden conflagration which ultimately resulted in the quick destruction of the premises. Mrs. Daley saw fire at about 10:40 p.m. She described it as a big blast of fire on the first floor. The fire men described it as a back draft. I accept the description given of the sudden conflagration by the claimants and the description of what occurred given by Mr. Campbell and Mr. Lyon which they termed as a back draft, that it was indeed a sudden unexpected explosion.

182. Certainly the conditions for a back draft would explain the presence of continuous smoke starved of oxygen, without the immediate outward sign of fire. The claimants, though rejecting the explanation of a back draft have provided no other explanation for the sudden explosion which erupted hours after smoke was seen. Their suggestion that it was caused from the floor of the upper floor caving in is not in keeping with the description given by Mrs. Daley which corroborates the description given by Mr. Lyons.

183. The defendants claim that they had sprayed water on the areas from where the smoke was emitting. The claimants denied this. They point to the

inconsistency in the evidence of Mr. Lyons and Mr. Campbell, where both claim a back draft from different areas of the building. Mr. Lyons said there was a back draft when a metal door was opened on the ground floor. He could not recall the location of the metal door. Mr. Campbell said he experienced a back draft when he opened a door in the first floor which he thought led to a staircase below.

184. The claimants also point to the evidence that there could be no back draft from a door leading down the staircase. However, the claimants' view of the evidence failed to take into consideration the evidence of Mrs. Daley herself, in which she described the entrance to the upper floors from the center of the ground floor. There was a locked grill, a locked glass door and a locked metal door which sealed off the stairway from the ground floor and at the top of the stairs there was a glass door.

185. This meant that the stair case from the ground floor to the upper floor was tightly sealed when all these doors were locked. If the origin of the fire was between or near these sealed areas, then a back draft could occur when either the metal door on the ground floor was opened or the glass door at the top of the steps to the first floor was opened or both.

186. However, more importantly to my mind, the claimants have failed to show (a) any other reason for smoke to be smoldering for several hours without any sign of an obvious blaze (b) any other explanation for the tuffs of smoke seen emanating from underneath the shutters of the ground floor and through the windows of the second floor and the heat in the surrounding environment without any early sign of a blaze; and (c) that if water had been sprayed on the ground floor where the smoke was seen, then the later conflagration would not have occurred.

187. In his witness statement, Mr. Pearson alleged that the firemen entered the ground floor but made no visible effort to put out the fire which was allowed to spread for sometime. I believe respectfully, that this statement goes against the weight of the evidence, as it was clear that there was no visible blaze for sometime and the source of the smoke was unknown. Mr. Pearson himself was unable to identify the direction of the smoke in the section of the building in which he claimed to have entered. His description was that it was in the ground floor as a whole and he was unable to locate its presence in any particular section. There was no localized seat of fire seen. The evidence of smoke and heat coming from that section of the ground floor with no visible evidence of a fire simply supports the defendants' theory.

188. The powers under the Act are quite extensive. Since much of their operations are operational, the firemen exercise a great deal of subjective judgment in deciding what is necessary to be done to fight a fire. The Act makes no attempt to subscribe the steps to fighting fires and individual firemen, under the supervision of fire officers, are expected to make the necessary decisions at the scene of the fire.

189. The claim that the fire brigade was in breach of duty in not exercising the right of entry under section 11 and their powers under s. 10 (e) of the Act to secure property is also unsustainable. The evidence is that the brigade made various efforts to enter the building at varying entry points but was defeated by the numerous locked doors and shutters as well as the smoke and heat.

190. The claimants' evidence is that the firemen requested the keys and were given keys but they did not use said keys to open the shutters. However, there is evidence that Mr. Pearson did not give the firemen his keys to the shutters but used his keys himself. There was also evidence that Mrs. Daley brought keys to the firemen, not for the shutters to the ground floor, which

was occupied by the firm of attorneys Playfair, Junor and Nelson and by the Jewelers, but for the entrance to the upper floors.

191. The power under s. 10 (e) is a discretionary power in the Commissioner or the officer in charge. This is a power which creates no duty of care in the fire brigade and is exercisable taking into consideration the protection of life both of the occupants as well as the members of the brigade.

192. In this particular case the brigade were unable to locate the seat of fire and may very well have determined that the protection of life was paramount to the security of property. In any event not much evidence was led by either side in this regard.

193. With regard to the brigade officer exercising his power under the Act and taking over the scene of the fire thus preventing any one from entering the building; it seems to me that the Act imposes on the officer such a power for the benefit of the general public. It provides for order in the face of competing interests. By exercising this control he does not assume any responsibility or duty towards the owner or occupier of premises which are on fire.

Decision

194. Firemen are employees of the Crown. Vicarious liability is a principle of strict liability. It is a liability for a tort committed by an employee not based on any fault of the employer. However, there must be fault found in the employee before the principle can apply. There is also no evidence or allegations that the defendants were themselves otherwise directly liable. I find therefore, that;

a. The defendants were not in breach of their statutory duty; and

b. The defendants were not negligent.

195. Judgment for the 1st and 2nd defendants, with costs to be agreed or taxed.