

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 17/03

BEFORE: THE HON. MR. JUSTICE A. SMITH, J.A.
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MRS. JUSTICE H. HARRIS J.A.

BETWEEN THE JAMAICA PUBLIC SERVICE CO. LTD. APPELLANT

A N D WINSOME PATRICIA CRAWFORD RAMSEY RESPONDENT

David Batts instructed by Livingston, Alexander & Levy for the appellant
Miss Jacqueline Cummings instructed by Archer, Cummings & Co. for
the respondent

January 24, 25, 26 and December 18, 2006

SMITH, J.A:

The appellant the Jamaica Public Service Company Ltd. (JPSCo.) is the exclusive supplier of electricity to premises throughout Jamaica. The respondent, Mrs. Winsome Ramsey, a businesswoman, is the owner of premises situate at Dunder Hill, Junction in the parish of St. Elizabeth. On the 12th May, 1999, fire of electrical origin destroyed Mrs. Ramsey's dwelling house on the said premises.

On the 29th October, 1999 Mrs. Ramsey filed a Writ of Summons in the Supreme Court claiming damages against the JPSCo for negligence. In this Writ she averred that her house and the contents thereof were destroyed by fire that commenced as a result of the JPSCo's failure to

maintain their transformer and/or electrical wires located at close proximity to her premises.

The JPSCo, in its defence, denied liability asserting that "at all material times its service wire, transformer and other equipment were in proper working order." Further, the JPSCo claimed that "its servants or agents, its equipment and services had nothing to do with the fire at the plaintiff's (Mrs. Ramsey's) premises and neither did the Defendant (JPSCo), its servants or agents cause or contribute to the creation or the igniting of the said fire."

At the trial of the action Campbell J gave judgment on February 7, 2003 for Mrs. Ramsey in the sum of \$3,850,000.00 with interest thereon at the rate of 6% per annum. The JPSCo has appealed against the order of Campbell, J. It is with this appeal that we are now concerned.

The following are the amended grounds of appeal:

1. The learned trial judge in his written judgment misunderstood, misapplied and misrepresented the evidence given in the Court below.
2. The learned trial judge came to a conclusion of fact as to the cause of the fire and the way it occurred which was unsupported by the evidence.
3. The learned trial judge erred in law in that he came to a conclusion based upon his own theory of the case which was contrary to and/or unsupported by the evidence before him.
4. The learned trial judge erred in law in that he failed or neglected to apply the legal burden of proof appropriately or at all.

The evidence as to what took place just before the fire is as would perhaps be expected, rather imprecise, but is of importance in that it provides in some sort a framework for the evidence of the expert witnesses.

At the relevant time Mrs. Ramsey lived at her house at Dunder Hill with her husband, her children and a nephew. The house was some distance from the main road. Her house was supplied with electricity by way of electric wires strung on poles. There are three poles that took the wires from the main road to her house. The first pole was about 30 meters from the main road. On this pole was her meter. This pole was installed on her instructions. There was another pole close to the first. That other pole had a meter which belonged to someone else. At the point of the main road where the wire left from JPSCo pole to the first pole was a bar.

On the 12th May, 1999 Mrs. Ramsey left her house at about 4:00 p.m. for Junction Market where she operated a little shop. She recalled that she had left the refrigerator plugged in. She was not sure about the other electrical appliances. Mrs. Ingrid Newell, a neighbour of Mrs. Ramsey, testified that at about 7:00 p.m., while she was at one Ms. Johnson's shop in Dunder Hill she saw the lights in the shop "going down and up" (on and off) repeatedly. According to her the shopkeeper unplugged her electrical appliances. She said that "rain was squalling".

This, I think, is her way of describing a drizzle. She stood at the shop's doorway waiting for the rain to stop; others were standing on the piazza. A JPSCo transformer is across the road from Miss Johnson's shop.

Her evidence was that whilst standing at the door of the shop she saw the transformer "spark up" and, according to her, everyone scampered. She described what took place in this way "I saw a ball of fire like my hand (the size of my fist) run up the line and went straight up the road. It went along the line and up the road." The witness walked up the road in the direction that the "ball of fire" had taken. She heard someone say "Ms. Pat's (Mrs. Ramsey's) house is on fire." She proceeded to Mrs. Ramsey's house. According to her the front of the house "where the wire is connected to the front room was engulfed in flames." She said that this was about 8 minutes after she had noticed the spark from the transformer. No member of Mrs. Ramsey's household was at the house at the time. She said that two men disconnected two gas cylinders and placed them out of harm's way. The fire brigade was summoned. By the time the fire truck arrived the entire house was in flames. According to her there was low voltage in the area four days prior to the fire.

It is her evidence that from the shop to Mrs. Ramsey's house is about a 5 minute walk. So also, she said is the distance between Mrs.

Ramsey's house and the transformer. From the shop where she was standing she could not see Mrs. Ramsey's house.

Another of Mrs. Ramsey's neighbour, Ms. Nicola Artwell gave evidence to the following effect. She was at home watching television at about 7 pm on May 12, 1999. The television went off. She went on to the verandah. She saw a "ball of fire on the light post running towards Ms. Pat's house". It was going up the driveway. She went back inside, unplugged her television and turned off the breaker because the light was dimming. She heard "popping" sounds coming from Ms. Pat's house then she saw smoke - the awning was on fire. She ran out of her house and went on the road to get help.

In answer to Mr. Batts she said that no one was at Ms. Pat's house at the time. She had seen them leave before the fire. She could not say whether or not they had left any light on Ms. Pat's house. She said no rain was squalling that day. The fire ball moved quickly and it did not stop. She told the Court that the JPSCo power line left the main road at a point where there was a shop. This power line went to two poles on which there were two meters. One of these meters belonged to Mrs. Ramsey and the other to her. The following morning she saw men presumably on Mrs. Ramsey's premises rolling up the electrical wire which was burnt.

Mr. Fitzmore Coates gave expert evidence on behalf of Mrs. Ramsey. He is a Senior Forensic Officer in the Ministry of National Security and Justice. His duties include the investigation of fires. He has 25 years experience in this area of investigation. He holds a BSc degree (U.W.I) in Chemistry with a minor in Biochemistry and Physics. He did electronics as part of the Physics course at the U.W.I up to the N-3 level.

He testified that on the instruction of the police he examined Mrs. Ramsey's house on the 14th May, 1999. In his opinion the house was destroyed by fire which was electrical in nature and which started in the pothead above the bedroom which is in the north eastern section of the building. The fire spread throughout the roof following the electrical wiring. In his opinion all the electrical equipments except the fridge which was in the eastern section of the building, were unplugged prior to the fire. He came to this conclusion because he saw carbon deposits on wires and plugs of these appliances which would not be the case if they had been plugged in at the socket at the time of the fire. He said that the refrigerator was only slightly burnt from the top - this was due to the falling burning material. There was no evidence of burning at the point where the refrigerator was plugged in. The breakers in the bedroom to the north eastern section had tripped. In his opinion the fire started at the top of the house and the most severely burnt area was the pothead. The pothead he explained is the point at which the external wiring joins the

wiring to the building. He did not observe any short circuit coming from the fridge. If a short circuit was from an appliance there would be fusing and beading of the electrical wiring to the appliance the wire would become brittle and break easily as opposed to an external fire which would burn off the insulation but the wire would still be pliable. He did not see any wire outside the dwelling house, except the remains of some wires coming from the pothead. Mr. Coates opined that the fire at the pothead was external because what was after the pothead appeared different from what was before it.

There was, he said, indication that shorting had occurred in the area of Mrs. Ramsey's house. It is, he claimed, unlikely that a shorting in Mrs. Ramsey's house would affect the entire district. It is his opinion that a fire in Mrs. Ramsey's house could not cause a fireball to run along the wire into the community. He said that a fluctuation in electricity supply can cause short circuit. The fluctuation he explained causes surges which sometimes by-pass protectors and may cause a fire or damage to equipment.

He testified that his expertise did not extend to transformers. In his opinion if the fire had run along the line to the pothead and there was an arc over, it could have started the fire at the pothead. If there was a surge of electricity to the house that could have caused the fire.

Mr. Coates' evidence under cross-examination by Mr. Batts is to the following effect. He did not see the meter. At the pothead the copper wire was connected to the aluminium wire. These wires were joined by means of a clamp. If the clamp was not properly insulated there would be a high probability of "arcing" or "shorting". Such arcing or shorting could occur without a fireball – a surge of electricity could cause it. He agreed that it was the customer's responsibility to ensure that the clamp was properly insulated. He also agreed that an inadequately insulated wire in the house could generate a short circuit.

From his observations what took place was a massive short circuit in the area of the pothead. His observations indicate that this massive generation did not originate in the building – it came from outside the building before the pothead. It could have come from the electricity supply. There were no illegal connections to the buildings. It is not impossible for the power surge to bypass the meter and damage equipment beyond it. The surge can also by-pass the transformer. He did not agree that the fact that there was a power cut would indicate that the transformer was functioning properly. He did not agree that in the event of an undesirable charge or surge the fuse would blow and thereby cut power to the community. He agreed that a fuse is put in place to protect a circuit and would blow if something beyond its capacity happened. He was asked:

"Q. Is what you have said consistent with inadequate insulation at the pothead, being the cause?

A. I would not say so.

Q. What rules out inadequate insulation at the pothead being the problem?

A. I did not observe anything regarding the insulation at the pothead that was out of the ordinary."

After describing a photograph of the house with the pothead and wires he continued: "The status of the wires around the pothead were (sic) fused at the pothead and the insulation on wires entirely away from it for the most part- burnt off. I had not examined the pothead before the fire. I cannot say whether the insulation prior to the fire was adequate or not." He agreed that for the electrons to flow there must be a close circuit. What he saw did not support the theory of a break or defect in the insulation resulting in contact between wires and shorting or closing of the circuit and thereby causing a massive surge. If a break in insulation had caused the wires to come together, then the damage observed at the end of the aluminium wires could not be accounted for. What he observed was more than a simple coming together of the wires.

In cross-examination he said that an open circuit would prevent the surge from reaching other households depending on where it is. The switching off of a breaker would avert damage to a house. A blown fuse could be evidence of a power surge.

The Defence

The defence relied mainly on the expert evidence of Mr. Kenston Tomlinson. Two other witnesses were called by the defence – Mr. Weyman Scarlett, a maintenance supervisor of the JPSCo, said that from his records there has been no change of transformer from 1st May, 1999 to April, 2002. The other witness, Mr. Donovan Williamson, a linesman employed to the JPSCo was dispatched to the scene of the fire the very night. The gist of his evidence is as follows. On his arrival the area was in darkness. There was no electricity. The house was on fire. Firemen were on spot. He examined the customer's private wire from the house to the meter. The wire was burnt at the point of connection to the house, "the rest of the wire was o.k. The wire was still strung up". There were no wires on the ground. He removed the meter from its socket and disconnected the wire at the pothead – "The wire I disconnected was JPS line at the meter pothead of the customer whose house burnt". Neither the pipe nor the wire entering the meter was burnt. The meter itself was not burnt and no damage was done to it. He then went to the transformer. The tube in the transformer was blown. He reset it and the supply of electricity was restored to the area. He said that he disconnected the meter to avoid another fire and that it was the JPSCo's policy that after a fire the meter for the affected house should be removed. The supply of electricity to that house would be resumed only after recertification.

Mr. Kenston Tomlinson was employed to the JPSCo for 41 years. He started as a trainee in the Engineering Department and was manager of the claims unit when he retired in November, 2000. He holds a BSc degree in Natural Science, Physics and Mathematics (UWI). He has participated in several in-house training courses. He participated in courses at LAPP Industries, New York, the manufacturers of insulators, Georgia Technical and many others. His duties as claims manager involved the investigation of customers' claims against the JPSCo.

On or about the 12th July, 1999 (about 2 months after the fire) he received a report from a serviceman concerning the fire at the Ramsey's dwelling. He also received a letter from the latter's lawyer.

In November, 1999, he visited the location with a view to making a sketch of the distribution system and the layout of the electricity supply to Mrs. Ramsey's house. He said that the layout was, in his view, important to the determination of Mrs. Ramsey's claim. The sketch which he made was received in evidence at the trial as exhibit 9. The sketch reflects the parts of the system which were the JPSCo's responsibility and the parts that were private property that is to say, not JPSCo's property. He observed that the JPSCo's conductors which ran along the road were open wiring running singly about one foot apart. The JPSCo conductors which ran off the road to the pole on which the meter was installed, were triplets – one uninsulated conductor and two separately insulated

conductors. The private conductors, he said, were similar in configuration. He examined the areas owned by JPSCo including its transformer. He saw no sign of repairs or of damage to those areas. He could not examine the wires closely because it was raining.

In January or February, 2000 he returned to the location. He had the assistance of a photographer and maintenance personnel from Black River. The purpose of this visit was to take photographs and to examine joints closely to ascertain whether or not the clamps at the joints were new. He saw no new clamps. The significance of this, he said, is that contrary to what was suggested, no repairs had been carried out in that part of the system. Photos taken were received in evidence. After close examination of the wires and the poles, he concluded that no part of the JP.S.Co system suffered any damage and that nothing happened at the two poles, that is, where the meters were and where the company's system ended. He examined the claimant's meter socket and found no sign of damage on the joints of the meter. All current going to the customer's house must pass through the meter if the customer has a legal supply. Damage to the meter socket, he said, would indicate that there was over voltage imposed on the customer's supply.

It was his opinion that if an electrical disturbance had emanated from the JPSCo's transformer, it would have damaged some part of the system from the transformer to the two poles and also the properties of

the 18 customers in that area of the system who were supplied with electricity. He said that the company had not received any complaints or any claims from any other customer.

He didn't examine the transformer, because it was functioning. He described the design, features and functions of the transformer he saw. It was his opinion that if there were a power cut and he flicked the switch and power was returned it would mean that the disturbance that caused it to have tripped was no longer connected to the system. He said that, if before resetting, one of the meters supplying a customer was disconnected, that would suggest to him that the problem was downstream, that is, the problem was beyond the meter closer to the customer's house.

He testified that a short circuit can occur in the conductors in the house if there had been a breakdown in the insulation in the conductors and the exposed wires touched. Dust and water can also cause a short circuit, he said. It is possible to have what appears to be a ball of fire moving along a line. He explained it thus:

" When you have a short circuit, what happens is that two wires that lead from the transformer now have current flowing in them. Immediately you have a short circuit. It causes a very large current to flow out of the transformer. The effect of this is to cause the wires along the road to sag and come closer together than normal. Because of magnetic forces created by the large current when the wires come close, an observer on the ground would see sparks flying

between the conductors. These sparks would appear to be moving towards the location of the short circuit. All of this happens at a very high speed pretty near the speed of light. From the ground it would appear as if fires were burning in the wire."

According to Mr. Tomlinson when there is a short circuit the voltage output of the transformer drops and the current going to the short circuit goes up and that going to other customers goes down. If the short circuit is intermittent other customers would see their lights dimming intermittently. Mr. Tomlinson testifies that as a matter of absolute principle a surge cannot be initiated on the JPSCo's side. This is so, he said, because the breaker in the transformer would operate to cut off the supply of electricity to customers in the area.

Under cross-examination he said he did not inspect Mrs. Ramsey's house. He said that overload of the transformer can cause low voltage and that if the low voltage is intermittent it can cause short circuits. Sparking in the transformer can be caused by a large amount of current flowing out particularly suddenly. He admitted that he did not know what caused the fire. He agreed that a surge of voltage can cause a fuse to blow but the breaker would chip in before this happens. A surge of current to Mrs. Ramsey's house would cause a low voltage to everyone else. A massive surge of current can cause a short circuit. Arcing, he explained, is an electrical discharge through space. When this occurs there is a pitting on the wire and portions of the metal at the

joint of arcing are gouged out leaving pits. Extremely high voltage, he said, can cause arcing. If arcing had taken place at the meter socket the jaws of the socket would be pitted. If arcing took place within the transformer there would be pits. This he said, would not affect the performance of the transformer.

He agreed that a customer may recover damages for loss of electrical equipment as a result of a surge if negligence is proved. However, he insists that a surge will not occur until the customer does something to "demand" it. He had no clue as to what caused the fire. His opinion and assumptions are based on observations he made after the fire and the report of the linesman. He was cross-examined at length in respect of the malfunctioning of a transformer, arcing, low and over voltage, the cause and effect of a blown fuse, short circuit and the insulation of wires.

The learned judge in his reasons for judgment said:

"I find that the plaintiff's residence was destroyed as a result of a voltage surge emanating from the transformer probably due to an overload. The resultant surge arched the plaintiff's meter and 'short circuit' in the area of the pothead of the plaintiff's house."

The defendant's workmen testify that the switch for the transformer was down and the area was without electricity. The plaintiff had alleged that the defendant had failed to maintain the transformer in a proper condition and workmanlike manner. I find that on a preponderance of evidence that the plaintiff

has demonstrated that the defendant's transformer malfunctioned."

Analysis of Submissions, the Evidence and the Law

Mr. Batts submitted that the conclusions of the learned judge were contrary to or unsupported by the evidence. He submitted that the judge's conclusions resulted from his failure to appreciate that the legal burden at all material times rested on the plaintiff. It is his contention that the learned judge failed to pay any sufficient regard to certain uncontradicted and important aspects of the evidence. The learned judge, he argued, misunderstood and misapplied the evidence and as a result erred in finding that the respondent had proved that the appellant was negligent as alleged or at all.

Miss Cummings for the respondent, submitted that the learned judge was correct in his findings and conclusions. She contended that there was sufficient evidence to support his reasons for judgment. She conceded that the learned judge mis-represented the evidence in two instances but argued that these did not render the judgment flawed. It is her view that in the event that this Court should hold that the judgment cannot stand because of these errors, in the interest of justice, the Court should remit the matter for rehearing. She referred to certain aspects of Mr. Tomlinson's evidence which, she argued, showed his allegiance to JPSCo and that he lacked credibility.

As I understand it the burden of the appellant's complaint is that the learned trial judge erred in finding that the evidence adduced on behalf of the respondent/ plaintiff did establish a prima facie case that the destruction of the latter's house by fire was as a result of the negligence of the appellant. In the course of his submissions, Mr. Batts referred to many aspects of the trial judge's reasons for judgment and contended that the learned judge misrepresented and misapplied the evidence and misdirected himself on the burden of proof. It might be convenient, at this point, to state the Particulars of Negligence averred in the Statement of Claim:

- (a) Failing to ensure that the service wire at close proximity to the plaintiff premises was connected in a manner whereby no damage would result to the Plaintiff's dwelling house.
- (b) Failing to maintain the transformer in a proper condition and workmanlike manner.
- (c) Failing to take steps to ensure that the electrical current flowing through the wires was consistent.
- (d) Failing to take steps to prevent a surge of electricity to the plaintiff's premises.
- (e) Failing to prevent the electrical wire from becoming ignited from power surges.

The respondent/plaintiff had the burden of proving that the fire was caused by the failure of the defendant/appellant to maintain its transformer and/or electrical wires. How did the respondent seek to establish this?

Miss Cummings submitted that the necessary inference could be drawn from the following:

- (a) Rain was squalling
- (b) There were fluctuations in the supply of electricity
- (c) The transformer emitted sparks
- (d) What appeared to be a "a ball of fire" was seen coming from the transformer, and travelling along the wire towards the respondent's house.
- (e) Shortly thereafter the respondent's house was on fire.
- (f) Mr. Coates' opinion evidence that :
 - (i) The fire started in the pothead above the bedroom
 - lii) All appliances in the house except the refrigerator were unplugged prior to fire.
 - (iii) The refrigerator did not cause a short circuit.
 - (iv) The fire did not originate in the building
 - (v) Fluctuations in electricity supply can cause a short circuit.
 - (vi) A surge of electricity to the house could have caused the fire
 - (vii) A massive short out occurred in the area of the pothead
 - (viii) It is not impossible for a power surge to bypass the meter.
 - (ix) A break or defect in the insulation of the pothead could close the circuit and cause a massive surge; however what he observed did not support this theory.

However, during a lengthy and searching cross-examination, Mr. Coates agreed that it was the customer's responsibility to ensure that the clamp which connects the copper wire to the aluminium wire at the

pothead was properly insulated. He also agreed that if the pothead was not properly insulated there would be a high probability of shorting and that this could occur without there being a surge of electricity.

Mr. Batts complained that the learned judge made no reference to this evidence in his analysis of Mr. Coates' evidence. This is not so. The judge did in fact refer to this aspect of Mr. Coates' evidence see pp 8-23 of the judgment. However, I agree with Mr. Batts that the judge did not demonstrate that he understood this aspect of Mr. Coates' evidence. To be fair to the learned trial judge, I must observe that, in my view, the evidence of the witness in this regard was truncated and imprecise. What was the evidence of Mr. Coates on this important aspect of the case and how did the learned trial judge deal with it?

In his evidence-in-chief Mr. Coates had very little to say concerning the insulation of the plaintiff/respondent's wire. He first referred to "insulation" in the context of comparing a fire of external origin with a fire which originated in the house. He said an external fire, unlike an internal one, would burn off the insulation but the wire would still be pliable instead of becoming brittle.

He next spoke of this presumably in the context of "shorting out" as a consequence of arcing. At p. 24 he seemed to be saying:

"The insulation could burn also within the area where shorting occurs, flammable combustible material could 'catch fire'. With the insulation, the

fire could go along the ducts in which the wires are placed."

The learned judge referred to this part of his evidence at p. 7 but made no comments thereon. During cross-examination Mr. Coates stated that the pothead is the area where the copper and the aluminium wires were joined with clamps. He could not say if they were joined before or after the meter because he did not see the meter. However, he agreed that it was the customer's responsibility to ensure that the clamp was properly insulated. He also agreed, and this is of some importance that, if the insulation was not proper there would be "a high probability of arching" or "shorting" at that point. He went on to say that, an "arching" "or shorting" could be caused by a surge of electricity. His evidence is:

"If no surge of electricity and no proper insulation, anything that causes the wires to touch could cause a short out.

Any inadequately insulated wire in the house could generate a short circuit. The short circuit would have taken place at that weak point and the section (sic) of the fire would have been at that point."

During further cross-examination on this aspect he was asked;

"Q. Is what you have said consistent with inadequate insulation at the pothead being the cause?.

A. I would not say so.

Q. What rules out inadequate insulation at the pothead being the problem?

- A. I did not observe anything regarding the insulation at the pothead that was out of ordinary."

The learned judge observed that this evidence of the insulation of wires at the pothead being in order has not been contradicted by the defendant. Mr. Batts has complained against this judicial observation. And, I think this complaint is justified. When one examines the evidence of Mr. Coates he clearly did not, indeed could not, say that the insulation at the pothead was in order. His evidence indicates that:

- "(i) The wires at the pothead were fused and the insulation on the wires was for the most part burnt off.
- (ii) He had not examined the pothead before the fire and therefore could not say whether the insulation prior to the fire was adequate or inadequate.
- (iii) It is possible for a break or defect in the insulation at the pothead to cause the wires to come together thereby closing the circuit and resulting in a massive surge.
- (iv) He could not recall if the respondent's wires were present. He examined no wires at all.

He discounted (iii) above on the ground that a simple break in insulation and the wires coming together would not account for the damage he observed at the end of the aluminium wires. He said that what he observed was more consistent with arching as a result of a surge. But when he was asked if he would consider a break in the insulation at the joint where aluminium meets copper, "a simple break" he gave this partly unintelligible answer:

"A: I would not consider that a break. I did not agree that it had to be insulated. It should be insulated because if the wires are left unprotected, it makes it possible for a short circuit to occur and particles of dust or rain could cause a closure of the circuit."

The learned judge in his reasons for judgment said (p. 23):

"The entire theory that the defendants espoused as to the probable cause of the fire revolves around the proposition that there was lack of proper insulation at the pothead of the plaintiff's home."

Earlier the learned judge had said:

"There was no evidence from the defendants that there was poor insulation in the area of the plaintiff's pothead. No proper examination of the wires was done by the defendants sufficiently proximate to the date of the fire to allow the Court to rely on the defendant's evidence in this area. "

The learned judge added:

"Neither is there one scintilla of evidence to support the suggestion that the plaintiffs wires at the pothead were poorly insulated."

At p.23, just after the passage quoted above, the judge continued:

"Coates was clear that his examination did not reveal anything regarding the insulation at the pothead that was out of the ordinary. None of the witnesses called by the defendants was able to say that there was any fault in the plaintiff's line or for that matter any fault in any of the places supplied by the defendants. The entire defence is based on the conjecture or on the assumption that there was a fault in the insulation of the plaintiff's wires. There is not one scintilla of evidence adduced to support that proposition."

I agree with the submissions of Mr. Batts that the above passages indicated that the learned trial judge misplaced the burden of proof. It seems to me that there can be no doubt that the burden is on the respondent/ plaintiff to prove on a balance of probabilities that the wires at the pothead and the clamps that join them were adequately insulated. The respondent testified that during the same year as the fire, that is to say in 1999 she had added to her house a bedroom and a car porch. The evidence shows that a certificate of inspection was issued by the Chief Electrical Inspector on the 25th September, 1995. There is no evidence that a certificate of inspection was issued after the 1999 additions were made.

According to Mr. Tomlinson, he made enquiries and searches and found no certificate issued since 1995. He testified that customers are advised that any modifications to their installation must be certified by the government. This, he said, is also a requirement of the JPSCo's contract with customers. It seems to me that in the circumstances of this case it was the responsibility of the respondent/plaintiff to adduce evidence as to the state of the insulation from perhaps the licensed electrician who had made the recent installation. Such a witness would no doubt be able to state whether the installation was inspected and a certificate issued by the Inspector.

In my judgment the respondent/ plaintiff had not established on the balance of probabilities that the wires at the pothead where the fire started was adequately insulated. In my view the learned trial judge erred when he placed the burden on the appellant to show that the insulation at the pothead was inadequate or defective.

It is also my view that the evidence of Mr. Coates is not sufficient to establish that the insulation at the pothead was adequate. Mr. Coates' evidence that he "did not observe anything regarding the insulation at the pothead that was out of the ordinary" must be seen in the light of his evidence as a whole. As I have stated before, he was certainly not in a position to speak to the state of the insulation prior to the fire.

In my judgment had the learned judge properly directed himself as to the burden of proof, he could not reasonably have concluded that it was improbable that the fire which started at the pothead was as a result of faulty or inadequate insulation.

Further, Mr. Coates' evidence that what he observed did not support the appellant's theory of the probability of the fire being caused by defective or inadequate insulation, is of little weight. I say this because he is not a qualified electrician. His evidence in this area should not, in my view, be accepted over and above that of Mr. Tomlinson, who is no doubt an expert in the field of electricity and had undergone training courses with manufacturers of insulators.

Mr. Coates' lack of expertise in this area was demonstrated in his response when he was asked "would you consider a break in insulation at the joint where aluminium meets copper a simple break. We recall that his answer was " I would not consider that a break in insulation. I did not agree that it had to be insulated." And then in the same breath he continued "It should be insulated because if the wires are left unprotected it makes it possible for a short circuit to occur and particles of dust and water could cause a closure of the circuit." It must be remembered that he had earlier agreed that a break or defect in the insulation could eventually result in a massive surge. Also, he had said in cross-examination that "From my observations what took place was a massive short out in the area of the pothead."

In my view, Mr. Coates was venturing upon a discipline beyond his competence. The learned judge erred in relying on Mr. Coates' evidence that his examination did not reveal "anything regarding the insulation at the pothead that was out of the ordinary" and thus concluding that the pothead was in order.

The Transformer

The learned trial judge found that the plaintiff/respondent had demonstrated that the defendant appellant's transformer malfunctioned. Mr. Batts submitted that the learned trial judge's conclusion in this regard was contrary to or unsupported by the evidence. Miss Cummings

disagreed. What is the evidence? On the respondent's case – rain was squalling, there was a fluctuation in electricity and two persons unplugged their electrical appliances; the transformer emitted sparks; what appeared to be a ball of fire was seen to emerge from the transformer and to travel along the defendant's line, towards the respondent's dwelling house, this house was shortly thereafter engulfed in flames. From these the respondent asked the court to infer that the transformer malfunctioned. On the other hand, the appellant claimed that the following pieces of evidence indicate that the transformer was in good working condition:

- (i) The transformer was reset and electricity restored the same night without any replacement of wires or change of transformer.
- (ii) Mr. Tomlinson's unchallenged evidence that :

"If I were told that there was a power cut and flick the switch, etc. it would mean to me, when closed that switch, the disturbance that caused it to have tripped was no longer connected to the system."
- (iii) Mr. Tomlinson's rejection of the possibility of a massive power surge, or a ball of fire moving from the transformer to the respondent's house. The reasons for this rejection being:
 - (a) All other 18 customers would have been affected.
 - (b) If an electrical disturbance emanated from the JPS transformer the JPS poles and lines would have been damaged and there was no such damage and no burn marks on the poles.

- (c) The transformer was reset the same night after removing the respondent's meter and power restored without any incident.
 - (d) The JPSCo received no complaints or claims from any other customer in the area.
 - (e) When a transformer ceases to operate, even if the breaker is reset electricity would not be restored. The transformer would have to be changed.
 - (f) The power outage proved that the safety device on the transformer was effective.
- (iv) Mr. Tomlinson's evidence that the occurrence at Mrs. Ramsey's house could cause the transformer to spark.
 - (v) Tomlinson's explanation of what appeared to be a "ball of fire" moving along the JPSCo wire.

Were the Judge's Findings Consistent With the Evidence?

The learned judge found that "the plaintiff's residence was destroyed as a result of a voltage surge emanating from the transformer probably due to an overload." Mr. Tomlinson's evidence is that all current going to the customer's house must pass through the jaws of the customer's meter socket. He identified the meter socket on Ex. 11 and described the jaws as the four protuberances. He said that he saw no sign of damage to the jaws to suggest that there was over voltage imposed on the customer's supply. Mr. Coates' evidence on this point is that "it is not impossible for a power surge to bypass the meter". It was his opinion that the fire could run along the line, arc the respondent's meter and cause a massive short out in the area of the pothead. The learned

judge seemed to have accepted the plaintiff/respondent's case that the sparking and the fireball originated at the transformer and went along the wire. But the uncontradicted evidence of Mr. Tomlinson is that in such a case the wires leading from the transformer would be burnt.

From statements made at pp. 3,6 and 18 of his judgment the learned judge seemed to have concluded that the appellant's wires coming from the pothead were in fact burnt but that these wires were removed by the appellant's workmen. However, this was a misunderstanding of evidence. Miss Artwell did not say where the wires that she saw the "guys rolling up" came from. The uncontradicted evidence of Mr. Williamson is that "the wire was burnt just at the connection to the house. Rest of the wire was o.k. The wire was still strung up." Further, in accepting the plaintiff/respondent's case the learned judge seemed not to have appreciated the evidence of Mr. Coates that the fire started at the respondent's pothead and that if the pothead was not properly insulated there was the high possibility of shorting. This shorting, Mr. Coates said, could occur without a surge.

There is also the evidence of Mr. Tomlinson that a shorting caused by inadequate insulation could result in a sparking at the transformer. Mr. Tomlinson's explanation as to the "ball of fire" or "fireball" which the respondent's witness spoke of was not examined by the learned judge. In dealing with this aspect of the evidence the learned judge said:

"Sparkling from the transformer (as per evidence of Ingrid Newell) according to Tomlinson would be caused by a large amount of current flowing out particularly suddenly. That the transformer sparked minutes prior to the fire at the plaintiff's house has not been challenged. What precipitated the sparking.? Was it overload?"

The learned judge seemed not to have appreciated the evidence of Mr. Tomlinson that inadequate insulation at the pothead could cause a short circuit which in turn would cause the sparking at the transformer. According to Mr. Tomlinson, a short circuit will cause a large flow of current out of the transformer. The effect of this, he said, is that the wires along the road would sag and come closer together. And because of magnetic forces created by the large current when the wires touch, an observer would see sparks flying between the conductors. These sparks, he said, would appear to be moving towards the location of the short circuit. If Tomlinson's opinion is accepted this would explain the evidence of the plaintiff's witnesses as to the sparking at the transformer and the fireballs moving along the wires. This evidence undoubtedly called for careful analysis. The judge's conclusion that the sparking was caused by an overload is without any evidential basis.

The judge's view that the acceptance of Ingrid Newell's evidence of the sparking and fireball necessarily lead to the conclusion that the transformer was not functioning properly was, in my view, clearly wrong.

The learned judge, in my view, failed to examine Newell's evidence in light of the expert evidence of Tomlinson. The learned trial judge seemed not to have taken into the equation the unchallenged evidence that the transformer was reset and current restored the same night without any replacement of wires or change of transformer. This could not have been done if the JPSCo wires and/or transformer were damaged. I agree with Mr. Batts that the learned judge erred in accepting Mr. Coates' theory about a massive power surge from the transformer. Clearly, Mr. Coates went outside his competence in this regard. Indeed, Mr. Coates conceded that his "expertise would not extend to transformers that supply a community."

In his evaluation of Mr. Tomlinson's evidence that if this electrical disturbance had emanated from the appellant's transformer it would have damaged some part of the defendant's transmission system, the judge said "Tomlinson, however, did not think it necessary to examine the transformer, neither in his November visit or the visit in January 2000". But this is not an accurate appraisal of Mr. Tomlinson's evidence. Mr. Tomlinson testified that his intention when he visited the location was to "examine the section owned by JPS, including JPS transformer to see whether there had been any damage to that portion or if any repairs". He went on to say " I did not examine the transformer because I found it working. It was an old transformer. It was not a recent one."

Thereafter, he went on to describe the design and the safety features of the transformer with particular reference to the switch and the breaker. The burden of his evidence in this regard is that if there is a serious disturbance "the breaker will interrupt the flow of current from the transformer, the switch opens the connector from the coil of the transformer, so that it is no longer electrically connected to the wires running along the street. Immediately the customers will lose supply"

The learned judge seemed to have attributed the operation of these safety features in disconnecting the electricity supply to customers, to the malfunctioning of the transformer. Hence his statement that "the defendant's workmen testify that the switch for the transformer was down and the area was without electricity. The plaintiff had alleged that the defendant had failed to maintain the transformer in a proper condition and workmanlike manner. I find that the plaintiff has demonstrated that the defendant's transformer malfunctioned". The learned judge was clearly in error in holding that a black-out indicates the malfunctioning of the transformer.

There are other aspects of the learned judge's reasons for judgment that, in my view, appear to be flawed. However, those portions which I have already examined form sufficient basis for me to conclude that the learned judge's assessment of the evidence was flawed.

Conclusion

1. The complaint of the appellant that the learned judge wrongly placed the burden on the appellant to prove that the wires at the pothead were not adequately insulated is justified.
2. In my view the respondent failed to prove on a balance of probability that the wires on her side of the system were adequately insulated.
3. The learned judge's assessment of the evidence of the witnesses in particular the appellant's witnesses, was seriously flawed.
4. Consequent on (1) and (2) above the respondent was entitled to succeed and the respondent's claim dismissed.
5. As regards (3) the authorities suggest that this Court may itself consider the evidence and reach its own conclusion. The following cases are instructive.

In ***West Indies Alliance Insurance Co. Ltd. v. Jamaica Flour Mills P.C.***

Appeal No. 24 of 1998 delivered 21st July, 1999 the following passage from the judgment of Rattray P was quoted with approval by their Lordships.

"Whilst the trial judge has an advantage in observing the demeanour of those witnesses who gave evidence before him, it is very less so in the case of an expert witness."

In ***Chin v Chin*** P.C. Appeal No. 61 of 1999 delivered 12th February, 2001 at para. 14 their Lordships said that an appellate court in exercising its function of review, can within well recognized parameters correct factual findings made below. But where the necessary factual findings have not been made below and the material on which to make these findings is absent, an appellate court ought not, except perhaps with the

consent of the parties itself, to embark on the fact finding exercise. It should remit the case for a re-hearing below.

In the instant case both parties relied on the evidence of expert witnesses and on the inferences to be drawn from evidence of other witnesses. In such circumstances any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses would not be great. This Court is therefore in a position to correct the findings made below.

In my judgment the learned trial judge erred in holding that the transformer mal-functioned and that as a consequence the respondent's house was destroyed by fire. I have come to this conclusion because of the following:

- (a) The unchallenged evidence of Mr. Donovan Williamson that after disconnecting the respondent's meter, he reset the transformer and electricity was restored to the area the same night.
- (b) The unchallenged evidence that the JPSCo's wires and poles were not damaged.
- (c) The uncontradicted evidence that none of the other 18 householders served by the transformer sustained damage.
- (d) The uncontradicted evidence that power was restored by a flick of the switch on the transformer.
- (e) The evidence of both expert witnesses that there was a short circuit at the pothead where the fire started.
- (f) The opinion of both expert witnesses that there was a massive short out at the pothead.

- (g) The evidence of Mr. Tomlinson that what happened at the pothead could have caused the transformer to spark.
- (h) Mr. Tomlinson's acceptable explanation of what the respondent's lay witnesses described as fire traveling along the wire.
- (i) The inability of the respondent to say whether prior to the fire the clamps and wires at pothead were adequately insulated.

The respondent, in my view, failed to prove on the balance of probability that the transformer malfunctioned and was the effective cause of the fire.

Accordingly, I am of the opinion that this appeal should be allowed, the judgment below set aside and judgment entered for the appellant. The costs of the appeal should be the appellant's.

K. HARRISON, J.A:**Introduction**

1. This is an appeal against the judgment of Campbell J, awarding the Plaintiff (now the Respondent) damages totalling Three Million Eight Hundred and Fifty Thousand Dollars (\$3,850,000.00) for the loss of her house, loss of personal and household items as a result of an electrical fire that occurred at Junction, St. Elizabeth on the 12th May 1999.

2. That there was a fire on the date and at the place in question is not in issue. The crucial question which fell for determination is how did this fire originate?

The allegations

3. The Respondent, on one hand, has alleged inter alia, that through malfunctioning of the Appellant's transformer, the service wire that was in close proximity to the Respondent's premises became ignited and as a consequence the Respondent's dwelling house was destroyed by fire.

4. The Appellant has contended on the other hand that at all material times, its service wire, transformer and other equipment were in proper working order and that its servants or agents, its equipment and services did not cause the igniting of the power line.

The evidence given in the Court below

5. The Respondent testified that in 1995, prior to the supply of power to her residence by the Appellant she had received the necessary certification with respect to the electrical installation. In 1999, the same year as the fire she had added to the physical

structure of the house but there was no further certification. The Respondent tendered two eyewitnesses with respect to the events of the 12th May 1999. A forensic expert was also called on her behalf.

6. Ingrid Newell said that she was at Miss Johnson's shop at Dunder Hill when she saw the electric light "kept going down and up". She said rain was "squalling" and there was a low voltage which caused the shopkeeper to unplug her equipment. She saw when the transformer "sparked up" and everybody on the piazza jumped up and ran in different directions. The sparks she said, were similar to sparks from a welding gun.

She said:

"I saw a ball of fire like my hand (the size of my fist) run up the line and went straight up the road. It went along the line and up the road".

Shortly thereafter she learnt that the Respondent's house was on fire. She went down to the premises and according to her, "Just the front part of the house to where the wire connected to the front room was engulfed in flame".

7. Newell further testified that there was low voltage in Dunder Hill "all the time" and whenever this occurred they would "unplug and/or switch off" their electrical equipment.

8. Nicola Artwell, the other eyewitness called by the Respondent said she was at home watching television which she said kept going on and off. As she stood on the verandah she saw a ball of fire "on the light post, running towards the house belonging to the Respondent. She went back inside, unplugged her television and said she tried to turn off the breaker. She then looked through her widow. She heard something like a

'proppy' sound coming from the Respondent's house and she next saw smoke. There was fire in the area of the awning.

9. Fitzmore Coates, a forensic expert at the Forensic Laboratory and who had twenty-five (25) years working experience said he had visited the premises at the request of the Respondent. His duties at the Forensic Laboratory included the investigation of fires.

10. He visited the scene two (2) days after the fire and commenced his investigations. He concluded that the fire had started at the 'pothead' which is above a bedroom at the northeastern section of the building. From his observations, he formed the view that the building had burnt from the area of the pothead and spread throughout the roof, following the electrical wiring. He had formed the opinion that all the electrical equipment, except for a refrigerator in the southeastern section of the building, were unplugged prior to the fire. He said that the wires and plugs of the electrical equipment had deposits of carbon on them and that this would not be present had they been plugged in at the socket at the time of the fire. He also said that the refrigerator was slightly burnt at the top and that this was due to falling burning material.

11. Coates said he did not observe any short circuit coming from the area where the refrigerator was plugged. He said that if there was a short circuit from the appliance itself, there would be "fusing" and "beading" of the wire. This he said would be caused by the electricity "forwarding" through the wires whenever contact is made. Heat, he said would be generated and this would cause the wire to lose tensile strength, become brittle and break easily. He also said that as opposed to an external fire, even where the insulation is burnt off, the wire would still be pliable. There were no wires on the

outside for him to examine however, except for the remains of some wires from the pothead that had been joined to the external wire.

12. Coates said he had formed the view that the building had burnt from the top downwards and that the fire had started from the top of the building. The burning he said was most severe in the area of the pothead.

13. Coates concluded from his examination of the scene that there was a massive "short out" in the area of the pothead which did not originate in the building. From his observation, the fire at the pothead was external. He said:

"You could get arcing. It is electricity jumping a gap and shorting out on the other wire. Consequently, you would get a short out. This could cause the wire in the household to become inflamed. The insulation could burn, also within the area where 'shorting' occurs, flammable/combustible material could 'catch a fire'. With the insulation, the fire could go along the ducts in which the wires are placed. In the area of Mrs. Ramsey's house, there was indication that shorting had occurred in that area. If short out occurred in Mrs. Ramsey's house, it is unlikely that could affect the entire district. It is not possible that a fire in Mrs. Ramsey's house would cause a fire ball to run along the wiring into the community. If there was a feedback, it would not reach the general community. I have never observed fires to feed back and run back.
..."

14. He admitted that he was not an expert on transformers but he said:

"... if fire had run along the lines to the pothead, you had the arc over, as was evident, it could have started the fire. If there was just a surge of electricity to the house, it could have caused the fire. Same as having a sudden surge of water going through a pipe; the pipe would break at the most vulnerable point, the same holes (sic) true for electricity. At the weakest

point it could get a shorting, it could burn through insulation and cause the strands to come together”.

15. Under cross-examination Coates agreed that a lightening strike could possibly cause the damage at the pothead. He said that the damage could also have been caused by the electricity supply. He had not seen any illegal connection to the building and his enquiries revealed that electricity was supplied by the Appellant.

16. Under further cross-examination Coates said he could not say why the Respondent would have suffered more than other persons in the community. From his experience he had seen cases where only one house was affected where there is an electrical fire. He said:

“At the meter, you might or might not see evidence of the shorting in the same way that a surge of electricity will bypass one of these protectors and do damage to the equipment. The same phenomena could occur with the meter in place”.

17. He said it was not impossible for a power surge to bypass the meter.

18. He was asked in cross-examination if inadequate insulation at the pothead could have been the cause of the fire. He said:

“I did not observe anything regarding the insulation at the pothead that was out of the ordinary”.

19. He was unable to say whether the insulation prior to the fire was adequate since he had not examined the pothead prior to the fire.

20. He also said that he had observed that the breaker for the electrical panel was tripped out and this could be an indicator that if there was a short circuit and the circuits are overloaded then the breaker would trip out as a safety precaution.

21. The Appellant called Donovan Williamson on their behalf. He said that he went to the scene of the fire on the night in question. He saw the house on fire and there was no electricity in the area. He observed inter alia, that a private wire that ran from the meter to the Respondent's house was burnt at a point where it connected with the pothead but the "rest of the wire was okay". He had removed the meter from its socket and disconnected the wire at the pothead. He had also disconnected the Appellant's power line at the meter pothead.

22. Williamson observed that a pipe conduit which went into the meter socket as well as a second meter which was located in close proximity with the Respondent's meter was not damaged. He said that after he removed the meter for the Respondent's house he reset the transformer and electricity was restored to the area.

23. Under cross-examination, Williamson said it was the company's policy to remove the meter once property was destroyed by fire. He said that the building was repaired the customer would then need to have the electrical wiring re-certified by JPSCO. in order to have power restored to the property.

24. The Appellant's chief witness was Kenston Tomlinson. He was the company's Claims' Manager at the time of the fire. He had retired in November 2000 after completing forty-one (41) years of service.

25. Mr. Tomlinson holds a BSc degree in Natural Science and specializes in Physics, Mathematics and Chemistry.

26. On 10th November 1999, he received a report in relation to the Respondent's house and visited the location twice. The purpose of his visit was to determine whether the Appellant was responsible for the fire. He made a sketch of the company's distribution system and their layout of electricity supply to the Respondent's premises.

27. Tomlinson said he had also examined the transformer and found no sign of repair or damage to it.

28. He returned to the site in either January or February 2000 and photographs were taken in order to look at joints closely. He concluded that no repairs had been done on the transformer and that the Appellant did not suffer any damage. He was of the opinion that had there been a fire on the company's wires there would be damage to conductors and poles and burn marks would have been evident. In addition, he said that had the transformer malfunctioned, the eighteen (18) customers who were fed from the Appellant's system would have been affected.

29. Tomlinson agreed that a massive surge had occurred and that it was initiated by a short circuit at the pothead on the Respondent's premises. He said that the short circuit caused a big demand for current which had reduced power to other customers in the vicinity. He had ruled out a surge originating from outside the Respondent's property because if this had occurred all customers would have had their electrical equipment damaged and the coils in their meters would also be damaged.

30. Tomlinson was further of the view that tripping of the breaker in the Respondent's house suggested that there was a short circuit at some time within the house and that this could occur where insulation had broken down.

The Grounds of Appeal

31. The following grounds of appeal were argued.

- "1. The learned trial judge in his written judgment misunderstood, misapplied and misrepresented the evidence given in the court below.
- 2. The learned trial judge came to a conclusion of fact as to the cause of the fire and the way it occurred which was unsupported by the evidence.
- 3. The learned trial judge erred in law in that he came to a conclusion based upon his own theory of the case which was contrary to and/or unsupported by the evidence before him.
- 4. The learned trial judge erred in law in that he failed or neglected to apply the legal burden of proof appropriately or at all".

32. These grounds readily disclose that the real issue advanced in this appeal relates to the judge's assessment and conclusions in respect of the two experts who testified, that is one for the Appellant and one for the Respondent.

The findings of the learned trial judge

33. With that background it is convenient now to look at the relevant findings of the learned judge. He found inter alia at the pages listed below of his judgment.

(a) At page 20:

"... There was no evidence from the defendants that there was poor insulation in the area of the Plaintiff's

pothead. No proper examination of the wires were done by the defendants sufficiently proximate to the date of the fire to allow the Court to rely on the defendant's evidence in this area".

(b) At pages 21 - 22:

"... Tomlinson cites two circumstances that can cause a voltage change in the transformer. The first is where there is an overload and secondly, if there is a fault in one of the places supplied by the transformer. I accept this unchallenged evidence of Tomlinson".

"... The Plaintiff only had one appliance plugged in and there is no challenge that it was not the cause of the fire. Neither is there one scintilla of evidence to support the suggestion that the Plaintiff's wires at the pothead were poorly insulated".

"... I accept Coates opinion that a fluctuation in electricity supply can cause a short circuit".

"... Sparking from the transformer (as per the evidence of Ingrid Newell) according to Tomlinson, would be caused by a large amount of current flowing out particularly suddenly. That the transformer sparked minutes prior to the fire at the Plaintiff's home as (sic) not been challenged".

"... The time of the sparking was at the peak demand period".

(c) At page 23:

"... None of the witnesses called by the defendants was able to say that there was any fault in the Plaintiff's line or for that matter any fault in any of the places supplied by the defendants. The entire defence is based on the conjecture or on the assumption that there was a fault in the insulation of the Plaintiff's wires. There is not one scintilla of evidence adduced to support that proposition".

"... Mr. Tomlinson's experience appears to cover all areas of the operation of the defendant. He has not

however claimed any specialist knowledge in the area of investigation of fires”.

(d) At page 24:

“... I must bear in mind Mr. Tomlinson has, for the last forty-one years worked in the employ of the defendant, and that his last employment was that of Claims Manager”.

“... On the other hand, although Mr. Coates lacked the extensive experience in electric transmission, his forensic skills gave more weight to his evidence and caused Tomlinson to defer to him as to the identification of the point of origin of the fire”.

“... Tomlinson was at a disadvantage not having examined the transformer or the remains of the Plaintiff's house. His investigation was not as detailed as that of Coates, or as extensive. His thesis is speculative and devoid of evidentiary support”.

(e) At page 25:

“... No examination was made of the transformer by the defendants or its agents either, and it certainly appears that the report that was examined by Tomlinson was not informed by such an examination either or had the vital input that sparking had taken place at the transformer”.

“... I find that the Plaintiff's residence was destroyed as a result of a voltage surge emanating from the transformer probably due to an overload. The resultant surge arched the Plaintiff's meter and “short circuit” in the area of the pothead of the Plaintiff's house. The defendant's workmen testify that the switch for the transformer was down and the area was without electricity. The Plaintiff had alleged that the defendant had failed to maintain the transformer in a proper condition and workmanlike manner. I find that on a preponderance of evidence that the Plaintiff has demonstrated that the defendant's transformer malfunctioned. ...”

The circumstances in which the Court of Appeal will interfere.

34. The learned judge's finding at page 24, that is, that although Mr. Coates lacked the extensive experience in electric transmission, his forensic skills gave more weight to his evidence would effectively seem to shut out the Appellant from a reversal of that finding unless the following can be established:

- (i) That any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the learned trial judge's conclusion.
- (ii) That the reasons given by the trial judge are not satisfactory or it is unmistakably so from the evidence.
- (iii) That the learned judge has not taken proper advantage of his having seen and heard the witnesses.

(See **Watt v Thomas** [1947] A.C 484).

35. In the instant case the evidence to a great extent depended on weighing the oral evidence of the two expert witnesses, one against the other. Clearly, in accordance with established principles there would be no justification for us, sitting as an appellate court, to interfere with any primary findings of fact by the trial judge who saw and heard the witnesses give their evidence. Unless it can be shown with absolute clearness that some blunder or error is apparent in the way in which the learned judge below has dealt with the facts, this Court would not reverse the judgment.

36. Mr. Batts for his part sought to accomplish this task by analyzing the physical evidence, and directed an attack on the learned judge's acceptance of the defence expert and an implied rejection of the Respondent's.

37. Miss Cummings on the other hand, admitted that the learned trial judge did make some errors in his judgment but she submitted:

“... if the explanation or conclusion” given by the learned judge was not exactly on point with the evidence, there was sufficient evidence otherwise to say that his judgment was correct although his finding could have been flawed”.

38. Miss Cummings was of the view however, that if this court were minded to set aside the judgment, the case should be remitted for rehearing in the court below in the interest of justice.

39. Given the contentions in this case it may be appropriate to remind ourselves of the words of Lord Reid in ***Benmax v Austin Motor Co. Ltd.*** [1955] 1 All E.R. 326 at 328:

"Apart from cases where appeal is expressly limited to questions of law, an Appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimize the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that. The trial judge may be led to a conclusion about the reliability of a witness' memory or his powers of observation by material not available

to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is, and should be, slow to reverse any finding which appears to be based on any such considerations".

Later (at page 329) Lord Reid said:

"...But in cases where there is no question of credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though, it ought of course, to give weight to his opinion".

The submissions

40. I turn now to the submissions in support of the grounds of appeal.

Grounds Nos. 1, 2 and 3

41. In my view, Grounds 1, 2 and 3 can be conveniently dealt with together. In a nutshell the Appellant is contending that the learned trial judge's findings of fact and his decision are wrong in law and are inconsistent with the evidence and physical observations at the scene of the fire.

42. Mr. Batts in attempting to impugn the learned judge's findings spent some time examining the evidence at the trial in order to demonstrate to this Court that the learned trial judge either erred in making certain findings or made findings that were unsupported by the evidence.

43. I will turn first to the submissions made by Mr. Batts in relation to “sparking” and “fire on the line”. This will necessitate examining the evidence of witnesses who testified about the fire on the electrical line.

44. Both Ingrid Newell and Nicola Artwell spoke of a low voltage in the electric supply in the area. Ingrid Newell said that this low voltage caused the electric lights to “keep going down and up.” She saw when the transformer “sparked up” and then there was a “ball of fire running up the power line”. Shortly thereafter, the Respondent’s house was ablaze. She testified that it was “Just the front part of the house to where the wire connected to the front room engulfed in flame”.

45. Nicola Artwell, testified that after she observed the fluctuation in power she unplugged her appliances. She subsequently heard a “propping” sound coming from the direction of the Respondent’s house and when she looked through her window, she saw fire coming from the house. Prior to hearing this sound, she had also seen a ball of fire on the line “running towards” the Respondent’s house”.

46. Based on what Newell said she saw, the evidence seems to suggest that the fire originated in the region of the transformer. There was this “ball of fire running along the wire” towards the Respondent’s house.

47. Mr. Batts submitted that there was uncontradicted evidence which confirmed that none of the wires leading from the transformer or the transformer itself were burned and that the only burnt wires were those located at the Respondent’s pothead. The trial judge, he said, had ignored evidence that the transformer was reset shortly after the fire

and that current was re-supplied in the community without a replacement of wires or change of transformer. This evidence he said, was confirmed by the two eye witnesses called by the Respondent who said that they did not see the Appellant replace poles or transformer.

48. Furthermore, Mr. Batts argued that if the power lines were damaged, then power could not have been restored in such a short period of time.

49. Mr. Batts also submitted that the learned trial judge failed to appreciate the significance of Coates' evidence when he said that the fire started at the pothead. Coates had also said:

"From my observations what took place was a massive short out in the area of the pothead".

50. Mr. Batts further submitted that the trial judge had failed to mention this crucial bit of evidence in his judgment. He argued that the judge had also ignored Coates' evidence when he said that if the pothead was not properly insulated, there was a high possibility that shorting could take place and that this could have taken place even without a surge of electricity occurring.

51. Mr. Batts also submitted that the learned judge had misquoted the evidence in relation to the insulation of wires at the pothead. In his judgment the learned judge had referred to the following extract taken from the evidence of Coates:

Q: "What rules out inadequate insulation at the pothead being the problem"?

A: I did not observe anything regarding the insulation at the pothead that was out of the ordinary".

52. The judge then proceeded to state at page 9 of the judgment:

"This evidence of the insulation of the wires at the pothead being in order has not been contradicted by the Defendant".

53. Mr. Batts submitted that the trial judge had erred when he said that the insulation was in order because there was no evidence of Coates saying this. What Coates said is this:

"The status of the wires around the pothead were fused at the pothead and the insulation on wires entirely away from it for the most part burnt off". I had not examined that pothead before the fire. I cannot say whether the insulation prior to the fire was adequate or not".

(Emphasis supplied)

54. He had also said under cross-examination:

"I did not observe anything regarding the insulation at the pothead that was out of the ordinary."

55. Mr. Batts submitted that the learned trial judge clearly misunderstood or misrepresented the evidence at p. 9 of his judgment and that there was no evidence for the Appellant to contradict.

56. It was also contended by Mr. Batts that the learned trial judge was clearly in error when he said at page 10 of the judgment that there was no evidence regarding inspection of the Appellant's wire leading to the pothead. He submitted that the learned trial judge had ignored or failed to appreciate the significance of the un-contradicted and unchallenged evidence of Donovan Williamson, a linesman called on behalf of the Appellant who said:

"I began to observe the customers private wire. I observe it down to the meter part. The wire was burnt just at the connection at the house. Rest of the wire was o.k. The wire was still strung up".

57. Mr. Batts further submitted that there was no basis upon which the trial judge could reject Tomlinson's testimony with respect to what he had said about the ball of fire moving from the transformer towards the Respondent's house. Coates he said had in fact testified that he had no personal knowledge about transformers so Tomlinson was the only expert on transformers and public delivery of electricity who had given evidence at the trial. He said that Coates would have been speculating when he spoke about a massive surge coming from the transformer.

58. In the circumstances, Mr. Batts submitted that the evidence of Tomlinson ought to have been accepted because if the ball of fire had originated at the transformer, other customers would have been affected; poles and power lines would have been damaged and the transformer could not have been reset the same night.

59. Mr. Batts also challenged the finding by the learned judge that the Respondent's residence was destroyed because there was a voltage surge emanating from the transformer. He submitted that there was no evidence to support this finding by the learned trial judge and that he had ignored evidence given by Tomlinson that overloads lead to low voltage not to a surge. This is what Tomlinson said at page 52 of the transcript of the Notes of Evidence:

"Low voltage can be caused from overload of the transformer, if the low voltage is persistent. If it is intermittent, can be caused from faults such as short circuits at customer's premises. Don't know if short

circuit took place prior to 12th May 1999. I say fluctuation in voltage cannot be caused on JPS side because a transformer is a static device. Once it is set up, it derives the set voltage or voltages. That voltage or voltages only charge in two circuits:

- (i) when there is an overload of the transformer or;
- (ii) if there is a fault at one of the places supplied by one of the transformer.

If something causes the breaker to operate or the fuse to blow, in either case, no voltage from the transformer. If any of the conditions described short circuit, overloading transformer in order to protect the customer, the fuse can blow or the breaker can chip. Under normal circumstances it is expected that the breaker, on seeing high current flow, would operate before the fuse would have time to operate. Both operate in two different principles. Both operate on the basis of current. An increase in current, the mechanism is to regulate current. Breaker trip in first, if too much, the current would go. Occurs when flow is substantially more".

60. Tomlinson had also testified at pages 39 and 40 of the transcript:

"Internal transformer consist of two sets of coils of wire. One receives high voltage. Receive it from the uppermost conductors on the poles (high voltage) called the LVS in that side of switches. So designed that internally a fuse, when the fuse breaks for any reason, the switch swings out and hangs down, so that it is evident that the transformer is not working. If it falls out it means that the fuse is blown and one has to take down the switch and put in a new fuse.

There is another switch on the transformer on the LVS. That switch is on the inside but one can see the handle sticking out and can be pushed up back, similar to the one in the house. Purpose of that switch is to protect an overload condition.

Overload condition is something that happens on LVS of transformer either on JPS wires or at customers' premises.

If that disturbance is large enough that breaker will interrupt the flow of current from the transformer, the switch opens the connector from the coil of the transformer, so that it is no longer electrically connected to the wires running along the street. Immediately the customer will lose supply, all customers being fed from that transformer will loose supply.

The transformer has this feature for two specific purposes. To protect the customers from persistent low voltage and protect the transformer from damage because of overload".

61. Mr. Batts submitted that on a balance of probabilities, there was no other finding open to the judge because on the evidence before him, the transformer had not malfunctioned.

62. There was also the issue relating to the "rolling up of wires" which Mr. Batts said was incorrectly dealt with in the judgment. He argued that at page 3 of the judgment the learned judge had stated that Nicola Artwell said she saw "guys rolling up wire" and that it was in reference to the Appellant's workmen. He said that no such evidence was given. What the witness actually said was this:

"When I woke the following morning, the guys were there, who were rolling up the electrical wire and that wire was burnt. A wire was on the ground. It seems that it was the one in the middle that the wire was burnt to (the pole)".

63. Mr. Batts submitted that it would be clearly incorrect therefore for the learned judge to have stated that it was the Appellant's workmen who were seen rolling up the wire.

Ground No. 4

64. At page 20 of the judgment the learned judge stated:

"There was no evidence from the defendants that there was poor insulation in the area of the Plaintiff's pothead".

65. Mr. Batts submitted that the learned trial judge had wrongly placed the burden of proof on the Appellant. He submitted that the burden rested on the Respondent to prove that the insulation was in order and not for the Appellant to prove otherwise.

Analysis of the submissions and arguments

66. To understand the contention of Mr. Batts for the Appellant, an analysis of the evidence of the experts is necessary. One cannot disregard the fact that Mr. Tomlinson was an ex-employee of the Appellant hence his evidence must be scrutinized carefully. At the same time there was no real challenge taken below regarding his forty-one years of service in the electrical field.

67. The fire was no doubt electrically caused and had occurred when no one was apparently at home. It is clear from the pleadings as well as from the evidence, that neither side felt able to make a specific and positive allegation as to what caused the fire. Evidence as to the possible cause of the fire rested however, to a large extent on suggestions provided by the expert witnesses called on each side.

68. There was also the evidence of Newell and the inference to be drawn when she claimed that she had seen when the transformer "spark up" and a "ball of fire" run along the power line.

69. There seems to be no dispute from the evidence of the experts that the fire had started at the point called the "pothead" that is, the section at which the customer's electrical lines join the wiring to the building.

70. There was a difference of opinion however, between the experts as to whether sparking of the wire could have created a fireball that would have rushed down the line towards the Respondent's premises.

71. The learned trial judge also heard evidence from Tomlinson who said that since a power cut had occurred, the indications were that the transformer was working. There was further evidence led at the trial that power was restored shortly after the Respondent's meter was disconnected and that the transformer was reset.

72. Tomlinson also stated in his evidence that if there was a short circuit at the Respondent's house this could result in a larger flow of current. Wires would sag, come closer together due to magnetic fields and an observer could see sparks flowing between the conductors. These sparks he said, would appear to be moving towards the location of the short circuit.

73. Tomlinson had also testified that a transformer could not cause a change in voltage since it is a static device which delivers a set voltage or voltages. He said that the possibility of a malfunctioning transformer producing more than normal voltage was not likely and was extremely remote. Furthermore, arcing within the transformer he said would cause the transformer to shut down all supply to customers.

74. The learned judge found however, that the transformer had malfunctioned. There was no evidence in the case however showing that a surge from the transformer as the learned trial found, was due to an overload.

75. The learned judge in my view incorrectly drew inferences which were not based upon proved facts.

76. There was evidence on the other hand, that the Respondent had extended her house the same year of the fire and there was no official certification by the Appellant of the wiring done for the extension. Furthermore, the court below did not have the benefit of seeing and hearing the electrician who carried out the additional electrical wiring.

77. The trial judge seemed to have disregarded the evidence of Coates that shorting could lead to fire and also that:

"The insulation could burn, also within the area where shorting occurs (sic) flammable/combustible material could catch a fire".

There was also the evidence of Coates that if the pothead was not properly insulated there was a high possibility of shorting. This of course does not establish either that the wiring in the Respondent's house was defective or that she was overloading her circuits.

78. The trial judge in my view was wrong to place the burden of proof on the Appellant as to whether there was poor insulation in area of the pothead for the Respondent's house. He failed to recognize that in order to succeed, the Respondent had to prove either a specific cause of the fire involving negligence on the Appellant's part or that the

fire had occurred in circumstances in which prima facie it could not have occurred without such negligence.

79. What is most material, however, is that apart from the Respondent's house no other premises in the community was affected by fire. Given the allegations as set out in paragraph 3 of the Statement of Claim, there was no evidence adduced by the Respondent to establish either directly or inferentially that the fire which destroyed the Respondent's house was due to some fault in the power supply system operated by the Appellant.

80. Accordingly, if the burden lay on the Respondent to prove negligence, and not on the Appellant to disprove it, on this state of the evidence the Respondent's claim in negligence should have failed in the Court below, and I so hold.

Conclusion

81. In my judgment, the result is that, however, much one regrets this grave misfortune that had befallen the Respondent and terrible as it had been for her, on the evidence presented, no blame can be attributed to the Appellant and judgment should be entered for the Appellant with costs.

HARRIS, J.A:

This is an appeal against the judgment of Campbell J, delivered on February 7, 2003 in favour of the respondent.

The appellant is a private utility company which distributes electricity throughout the island. The action out of which this appeal originates was brought by the respondent in which she claimed that her house situate at Dunder Hill, Junction in the parish of Saint Elizabeth, and contents were destroyed by an electrical fire due to ignition of the appellant's service wires as a result of their negligence in maintaining their transformer and electrical wires in the vicinity of the house.

On May 12, 1999, sometime after 7:00 p.m., the respondent's three bedroom house was engulfed in flames. At the time, none of the occupants of the house was present. Low voltage of the electrical system was experienced by persons in the Dunder Hill neighbourhood for approximately three days prior to the fire. At about 7:00 p.m. on the date of the fire, it was raining. Power fluctuation was observed. Miss Ingrid Newell, one of the respondent's witnesses, testified that she was standing in front of a shop in the area, saw sparks emitting from a transformer, following which, a ball of fire ran along the electrical wires up the road. Shortly thereafter, she proceeded to the respondent's home and saw it ablaze. Another witness, Miss Nicola Artwell, stated that she observed a ball of fire running along the electrical lines towards the respondent's home which became ignited.

The respondent's expert witness, Mr. Fitzmore Coates, Senior Forensic Officer at the Forensic Laboratory, stated that the fire started in the pothead above the bedroom on the northeastern section of the house, spreading through the roof along the electrical wiring. All the electrical equipment in the house, except the refrigerator were unplugged. He carried out an internal and external inspection of the house. He, however, did not inspect the meter, nor its socket, nor the electrical transmission wires.

His inspection of the internal areas of the home disclosed no evidence of short circuit from the refrigerator, nor did he observe any evidence of illegal connection. He opined that a massive power surge could have caused the fire. It was also his opinion that lightning could have been the source of the fire.

The appellant's evidence, through their first witness Mr. Donovan Williamson, a linesman, was that he visited the scene on the night of the fire and observed that the transmission line at its junction with the house was burnt. However, the rest of the lines, the meter, the pipe leading to the meter socket were intact. He reset the transformer and restored electricity to the area.

The appellant's claims manager, and expert witness, Mr. Kenston Tomlinson visited the location on November 10, 1999 and made certain observations. A number of electrical poles namely, A, B, C, D, as well as others were seen. Poles A, B, and a part of pole C were the appellant's property. The other poles and conductors were owned by other persons. Mr Tomlinson saw no

damage to the appellant's transformer. As it was raining at the time of his visit, he was not afforded the opportunity to conduct a close examination of the electrical wires or the transformer.

In January or February, 2000 he returned to the location, conducted further inspection of the electrical system and concluded that no part of the system controlled by the appellant was damaged. It was his opinion that electrical system on poles, A, B, and C, would have been damaged if an electrical disturbance had its genesis in the transformer. It was his further evidence that no sign of damage was seen on the jaws of the socket of a meter which was housed on one of the poles, suggesting the emission of excessive voltage to the respondent's electricity supply. The transformer, although old, was working. It was not examined. He did not give an opinion as to the cause of the fire.

In accepting the evidence presented by the respondent's witnesses the learned trial judge made the following order:

"Judgment for the plaintiff in the sum of \$3,850,000.00 with interest thereon at the rate of 6% per annum from May 12, 1999 to February 7, 2003."

The following grounds of appeal were filed by the appellant:

- "(a) The learned trial judge failed to pay any or any due regard to the overwhelming evidence that (a) the fire was caused by a short circuit and started at the pothead at the Respondent's house, (b) the fact that the pothead was admitted to be the Respondent's responsibility. (c) the unchallenged evidence that the Appellant's legal responsibility ended at the meter which was located three (3) poles distant from the Respondent's house.

- (b) The learned trial judge erred in his decision in that he has failed to take any or any sufficient account of the overwhelming expert and unchallenged evidence that a power surge could not have by-passed all the other customers along the line between the transformer and the Respondent's house without doing some damage to those other customers also.
- (c) The learned trial judge failed to pay any or any due regard to the unchallenged evidence that there was no defect in the Appellant's transformer which was simply reset after the power outage.
- (d) The learned trial failed to pay any or any sufficient regard to the evidence that the power outage was an indication that the Appellant's protective mechanisms were effective.
- (e) The learned trial judge's decision is against the weight of the evidence and one to which no reasonable tribunal properly directed could have come.
- (f) That the award of Damages is unreasonable having regard to the evidence".

The fundamental contention of the appellant was that the findings of the learned trial judge were inconsistent with the evidence. It was contended that he misconstrued the evidence, drew conclusions which were incongruous with it, ignored important aspects of it and failed to acknowledge a cardinal principle of law regarding the burden of proof in placing the onus of proof on the appellant.

There is no dispute that the respondent's house and contents therein were destroyed by an electrical fire. The question is whether the fire was attributable to the appellant's failure to take reasonable care to maintain their electrical system resulting in damage to the respondent's property. The pivotal issue is whether the appellant owes a duty of care to the respondent, a property owner, to whom they supply electricity.

As a general rule, a party is under a duty to take reasonable care to avoid acts and omissions which can be reasonably foreseen as likely to injure his neighbour. What then is the relevant test in the creation of a duty of care? Over the years there has been diversity in the approaches adopted in the determination of the existence and extent of a duty of care which one party owes to another. As a long established practice, the law recognizes diverse situations which give rise to a duty of care within the scope of negligence.

These situations, however, must be amply perceptible to demand a distinct definition of the requisite ingredients of a duty of care. The modern approach and accepted test in imposing a duty of care are ensconced in three elements. These are (a) foreseeability of damage as a consequence of the negligent performance of an operation; (b) the existence of sufficient relationship of proximity between the parties and (c) whether it is fair and just that a duty be imposed.

The test in imposing a duty was propounded by Lord Bridge in the case of **Caparo Industries plc v Dickman** (1990) 1 All ER 568 at page 572 in this way:

"In determining the existence and scope of the duty of care which one person may owe to another in the infinitely varied circumstances of human relationships there has for long been a tension between two different approaches. Traditionally the law finds the existence of the duty in different specific situations each exhibiting its own particular characteristics. In this way the law has identified a wide variety of duty situations, all falling within the ambit of the tort of

negligence, but sufficiently distinct to require separate definition of the essential ingredients by which the existence of the duty is to be recognized."

At pages 573 and 574 he went on to say:

"What emerges, is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers fair just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other".

A court on its inquiry into foreseeability, must consider the nature of the relationship of the parties and must be satisfied that in all the circumstances it is fair and just to assign to a defendant a duty of care. The ingredients of foreseeability, proximity and fairness, are inextricably interwoven in establishing a duty of care. See **Caparo Industries plc v Dickman** (supra). The imposition of a duty is dependent on the particular circumstances of each case and indeed, the law will impose a duty of care if the requirements are satisfied.

In the instant case, the fact that there is a contractual relationship between the appellant and the respondent, does not in itself mean that there is close connection between them to establish proximity of relations within the context of a duty of care. In my view, there would be no difficulty in finding a relationship of proximity or neighbourhood between the parties, the appellant being the supplier of electricity and the respondent, the customer. It must, however, be established that there was sufficient relationship between the parties to create a

duty of care. There should be evidence to show that in the reasonable contemplation of the appellant, the want of care on their part would result in damage to the respondent's property.

The supply of electricity by a defendant to a claimant's house does not as a rule create such danger as would cause loss to the claimant's property. However, where the service which is offered by the defendant, by carelessness on his part, creates a danger causing damage to a claimant, and there is proof that the defendant neglected to exercise due care to prevent the damage, it is without doubt that the defendant would be liable. See **Hill v Chief Constable of West Yorkshire** (1989) 1 AC 53 and **Alcock v Chief Constable of South Yorkshire** [1992] 1 AC 310.

The fact that the respondent's house was destroyed by fire is incontrovertible. There is unchallenged evidence from the respondent's witnesses that it was raining at the time of the fire and that fluctuation in the electricity supply rendered it necessary for persons in the area to unplug their electrical appliances and equipment. There is also evidence on the part of the respondent that a phenomenon in the form of a ball of fire was transported along the electrical transmission wires. Evidence of the emission of sparks from the transformer also exists.

Resolution of the issues essentially rests on the evidence of the parties' expert witnesses. Their evidence is critical in the determination of the questions

The respondent's house was located approximately 30 meters from the main road. Three poles, erected by the respondent, conducted the wires to her house. Her meter was installed on the first pole. The pothead, the external source which unites the wiring to the building, and wires leading from the poles to the respondent's house were installed by her electrician. It was concluded by Mr. Coates, that the fire started at the pothead, as a result of a massive 'short out', by a massive power surge from the transformer and that it did not originate inside the building. He did not examine any of the wires beyond those on the building, nor did he examine the meter nor any of those electrical equipment or wires which were not attached to the house. Mr. Williamson inspected the transmission lines leading from the poles, the meter and the meter socket for the house. There was unchallenged evidence from him which revealed that, upon inspection, none of the wires leading to the house was burnt. It is clear that he was declaring that the fire started at the pothead, as Mr. Coates indicated. In light of Mr. Williamson's evidence was the fire as a result of a defect in the transformer or as a result of a defective pothead?

The learned trial judge accepted Mr. Coates' opinion but failed to acknowledge Mr. Williamson's evidence as to his observation, that, on inspection of the house, the wires leading to the pothead were intact. In light of the fact that Mr. Coates had not examined the wires leading up to the house, it was incumbent on the learned trial judge to have given full consideration to the

probative value of Mr. Williamson's evidence and to have made a specific finding thereto.

Expansion of the house was carried out in 1999, the year of the fire. The respondent was unable to prove that a certificate of electrical inspection was issued in 1999. As it was raining at the time of fire, it could be that some defect in the installation of the pothead might have resulted in a surge of electricity as a result of the rain. Mr. Tomlinson opined that water could cause an electrical surge. Although Mr. Coates was of the view that the fire was caused by a power surge from the transformer, it was also his opinion that in the absence of an electrical surge, a massive 'short out' could have occurred, as dust and water could cause a surge. The question of the sufficiency of insulation of the pothead was therefore of manifest importance.

In treating with the matter of the adequacy of the insulation at the pothead, at page 9 of the judgment, the learned trial judge alluded to the following area of the cross examination of Mr. Coates:

- Q. "Is what you have said consistent with inadequate insulation of the pothead being the cause?
- A. I would not say so.
- Q. What rules out inadequate insulation at the pot head being the problem?
- A. I do not observe anything at the pothead that was out of the ordinary."

There was clearly no evidence from Mr. Coates that the pothead had been properly insulated. The learned trial judge however, erroneously proceeded to find that the insulation of the pothead was in order and that this had not been contradicted. Mr. Coates opined that from his examination of the wires they

appeared to be intact before the fire. He did not examine the pothead before the fire. There was no evidence from him as to the state of the insulation at the time of the fire as he had not inspected it prior to the fire. It was his opinion that there was a 'short out' at the pothead. He said the wires around the pothead were fused, the insulation on the wires were completely away from the pothead and were for the most part burnt. This clearly demonstrates that the Mr. Coates' observation that there was nothing beyond the ordinary at the pothead could not be construed as an assertion that there was adequate insulation prior to the fire.

In the particulars of negligence, the respondent claims, inter alia, that the appellant failed to "ensure that the service wires at close proximity to the plaintiff's premises was (sic) connected in a manner whereby no damage would result to the plaintiff's house ." The learned trial judge in placing the burden of proof on the appellant incorrectly found that the respondent failed to adduce evidence to show that the insulation was poor. It is an elementary principle of law that the evidentiary burden of proof rests on a claimant. He who alleges must prove. It was the respondent's responsibility to have presented proof that the insulation at the pothead was not defective, not the appellant's.

The transformer was old but no evidence was adduced to demonstrate that it was defective or that the appellant failed to maintain it. It was Mr. Tomlinson's evidence that the transformer, was in operation. He stated that when a transformer ceases to operate, it cannot transmit electricity. The

transformer was reset by switching on a safety device and was put back into operation the very night of the fire. Mr. Tomlinson opined that if a massive power surge had originated in the transformer, there would have been damage to the electrical system, the conductors and the poles. No damage to these items was seen. He pointed out that no damage was suffered by any of the other customers of the appellant who receive electricity via poles A, B, and C, and that these person would have been affected had a massive power surge occur via the transformer. Mr. Coates stated that a power surge could have caused the fire to “blow” and if the fire had ran along the lines to the pothead, there could be an arc over which could have started the fire on the respondent’s house.

Mr. Coates admitted that he was unfamiliar with the workings of transformers. The learned trial judge found that although Mr. Coates was without extensive experience in electrical transmission, his forensic skills gave more weight to his evidence than that of Mr. Tomlinson. He rejected Mr. Tomlinson’s evidence for the reason that he had not examined the transformer. In my view, this would not be sufficient ground to reject his evidence. Mr. Tomlinson is an expert who had developed skill in his line of expertise for over 40 years. His expertise would include detailed knowledge of the workings of transformers. He described how a transformer works and advanced the reason for his statement that the one in question was in working order. It is obvious that the evidence given by him, in this regard would not have required his examination of the equipment and ought to have been accepted.

There was also evidence from Mr. Tomlinson that a voltage change in the transformer could occur in the event of an overload or where there is a fault in the union of one of the places supplied by the transformer. He said that sparking by a transformer would arise from a large amount of current flowing from it and sparks would be observed running from one wire to another towards the direction of the source of massive flow of current. In the event of an overload, or should a power surge take place, then the fuse of the transformer blows or the breaker "trips" out. In normal circumstances, in the event of a high current flow, the breaker would trip into operation before the fuse does.

The learned trial judge made reference to these conditions as ones which could precipitate a voltage change, and erroneously concluded that the sparking was as a result of an overload, and that the respondent's property was destroyed by a voltage surge occurring in the transformer possibly due to an overload. However, there was no evidence that the fire would have occurred as a result of an overload.

Mr. Coates stated that it is not impossible for a power surge to bypass the meter. He opined that from his observation a surge would be consistent with arching and that the resultant surge arched the respondent's meter and 'short circuit' in the area of the pothead of the respondent's house." For arching to occur, the voltage must rise to a high volume was Mr. Tomlinson's view. He further opined that a surge could not have passed the meter without damaging it. Mr. Williamson said the meter was not damaged.

It was also a finding of the learned trial judge that on the appellant's case, the sparking of the transformer could only be explained if the surge, caused by a lack of insulation at the pothead, was able to feed back pass the meter without damage to it. There was no evidence to support this finding.

An appellate court is loathe to interfere with the judgment of the facts of a trial judge unless he is plainly wrong in law or on the facts. The court however will intervene where it is shown that the learned trial judge misconstrued the evidence or his judgment as to the facts is affected by material discrepancies or he failed to appreciate the weight of the evidence or otherwise. See *Watt v Thomas* [1947] AC 484. The learned trial judge failed to take certain material aspects of the evidence into account. This rendered much of his findings flawed. I am of the view that a proper assessment of the evidence would have resulted in the award of a judgment in favour of the appellant.

The question of the adequacy of insulation of the respondent's house and the condition of the transformer are germane to the resolution of the issues as to the cause of the fire. The fire started at the pothead due to a massive 'short out' caused by a short circuit. There was no evidence that the pothead was adequately insulated. Nor was there evidence to support the respondent's claim that a defect in the transformer was the source of the fire. The transformer was reset, switched on and continued operation on the very night of the fire. All electrical systems, such as the meter, the jaws of the meter socket, and wires leading from the transformer to the house remained intact. No damage to the

electrical systems, such as the meter, the jaws of the meter socket, and wires leading from the transformer to the house remained intact. No damage to the poles was observed. It had therefore not been established that the appellant was in breach of a duty of care to the respondent.

I would allow the appeal and enter judgment for the appellant with costs to be agreed or taxed.

SMITH, J.A.

ORDER:

The appeal is allowed. The judgment below is hereby set aside and judgment entered for the appellant.

Costs of this appeal to the appellant to be agreed or taxed.

